



Supreme Court Nominee Elena Kagan: Presidential Authority and the Separation of Powers

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Summary

In light of Elena Kagan's nomination to serve as an Associate Justice of the United States Supreme Court, this report analyzes then-Professor Kagan's views of executive power and the doctrine of separation of powers as laid most extensively out in her 2001 Harvard Law Review article *Presidential Administration*. This report will proceed as follows. First, it will briefly describe the constitutional and legal basis for presidential authority with respect to domestic policy, focusing on the relevant constitutional text as well as the Supreme Court jurisprudence that forms the foundation for almost all discussions of executive authority. Second, the report will provide a discussion of the well-established and competing theories of executive power, the traditional view as well as the "unitary theory of the executive." Third, the report will discuss Professor Kagan's theory of "presidential administration" and her legal responses to both of the aforementioned theories. Fourth, the report will turn to the application of Professor Kagan's theory to the field of administrative law, with an emphasis on the non-delegation doctrine and the level of deference often afforded to executive branch agencies by the judiciary, often referred to as *Chevron* deference. Finally, the report will provide a discussion of some of the criticism of Professor Kagan's views, especially as they relate to the President's legal authority in the areas of foreign policy and national security, both of which are expected by many to be issues that the Supreme Court will adjudicate in future terms.

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In 2001, the Harvard Law Review published *Presidential Administration* by then-Visiting Professor of Law Elena Kagan.¹ Drawing heavily from her experiences as a member of the White House Counsel's office and as Deputy Assistant to President William J. Clinton for Domestic Policy, Professor Kagan articulates both a political and legal theory of presidential authority over agencies in the executive branch. Professor Kagan's theory of "presidential administration" is seen as a significant departure from the established, competing theories that have been previously developed by the academic and legal literature regarding administrative law and separation of powers. Professor Kagan's article has been quite influential in these fields, cited and discussed by numerous academic and legal experts,² cited by the Supreme Court,³ as well as in two appellate court opinions.⁴

In light of Ms. Kagan's nomination to serve as an Associate Justice of the United States Supreme Court, this report analyzes Kagan's views of executive power and the doctrine of separation of powers as laid out in *Presidential Administration*. This report will proceed as follows: First, it will briefly describe the constitutional and legal basis for presidential authority with respect to domestic policy, focusing on the relevant constitutional text as well as the Supreme Court jurisprudence that forms the foundation for almost all discussions of executive authority. Second, the report will provide a discussion of the well-established and competing theories of executive power, the traditional view as well as the "unitary theory of the executive." Third, the report will discuss Professor Kagan's theory of "presidential administration" and her legal responses to both of the aforementioned theories. Fourth, the report will turn to the application of Professor Kagan's theory to the field of administrative law, with an emphasis on the non-delegation doctrine and the level of deference often afforded to executive branch agencies by the judiciary, often referred to as *Chevron* deference.⁵ Finally, the report will provide a discussion of some of the criticism of Professor Kagan's views, especially as they relate to the President's legal authority in the areas of foreign policy and national security, both of which are expected by many to be issues that the Supreme Court will adjudicate in future terms.

Constitutional and Legal Basis for Executive Authority

Constitutional Text

Article II of the Constitution establishes the office of President of the United States, creates an executive branch of government, and forms the textual basis for much of the President's authority and power. Of specific importance to separation of powers and presidential authority scholars are several clauses in Article II. The first two are found in Article II, § 1, clause 1. The first, commonly referred to as the "Vesting Clause," states that "The executive Power shall be vested in

¹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

² According to a search of the Westlaw "Journals and Law Review" database, Professor Kagan's article has been cited over 300 times by secondary sources.

³ *F.C.C. v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800 (2009).

⁴ See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); see also *Estate of Kanter v. C.I.R.*, 337 F.3d 833 (7th Cir. 2003).

⁵ See *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

a President of the United States of America.”⁶ The second establishes the executive departments, stating that “[the President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”⁷ Additionally, there is the language of the Appointments Clause, under which the President may “nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”⁸ Finally, there is the “Take Care Clause” at Article II, § 3, which states that the President “shall take Care that the Laws be faithfully executed.”⁹

Decisions of the United States Supreme Court

In addition to the Constitution’s text, there have been several influential decisions by the Supreme Court that expound upon the notion of separation of powers and presidential authority. The first is *Youngstown Sheet & Tube v. Sawyer*,¹⁰ which addresses the scope and nature of the President’s implied constitutional authority. Also central to discussions of Presidential authority are three cases dealing with the President’s power of appointment and removal of “Officers of the United States,” *Myers v. United States*,¹¹ *Humphrey’s Executor v. United States*,¹² and *Morrison v. Olson*.¹³

Youngstown Sheet & Tube v. Sawyer

While there is little doubt that the Constitution vests significant legal authority in the President, a central tenet of its structure is the notion that each branch of government is confined to its own sphere of influence. Thus, although the President has plentiful authority with respect to the execution of the laws, he may not exercise his powers in a manner that encroaches upon the powers and duties of the other branches. Similarly, Congress and the Judiciary arguably cannot encroach upon powers that are committed to the President and the executive branch.

This bedrock principle was addressed by the Supreme Court in the seminal case *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Court was faced with an attempt by the executive branch to usurp the legislative power of Congress. In *Youngstown*, the Court dealt with President Truman’s executive order directing the seizure of steel mills, in an effort to avert the effects of a workers’ strike during the Korean War. Invalidating the President’s order, Justice Black writing for the majority held that under the Constitution, “the President’s power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker.”¹⁴ Specifically, Justice Black maintained that presidential authority to issue such an order “must stem either from an act of

⁶ U.S. CONST. Art. II, § 1, cl. 1.

⁷ *Id.*

⁸ U.S. CONST. Art. II, § 1, cl. 2.

⁹ U.S. CONST. Art. II, § 3.

¹⁰ 343 U.S. 579 (1953).

¹¹ 272 U.S. 52 (1926).

¹² 295 U.S. 602 (1935).

¹³ 487 U.S. 654 (1988).

¹⁴ *Youngstown*, 343 U.S. at 587.

Congress or from the Constitution itself.”¹⁵ Applying this reasoning, Justice Black’s majority opinion determined that because no statute or constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act.¹⁶ Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining “the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.”¹⁷

While Justice Black’s majority opinion in *Youngstown* arguably refutes the notion that the President possesses implied constitutional powers, it is perhaps Justice Jackson’s concurrence that has proven to be the most influential opinion from *Youngstown*.¹⁸ In his concurring opinion, Justice Jackson articulates a three-part analytical framework for assessing the validity of presidential actions in relation to constitutional and congressional authority.

Justice Jackson’s first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Justice Jackson, presidential “authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate,” and such action is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”¹⁹ With respect to the second category, Justice Jackson maintained that, in situations where Congress has neither granted nor denied authority to the President, the President acts in reliance only “upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”²⁰ In the third and final category, Justice Jackson stated that in instances where presidential action is “incompatible with the express or implied will of Congress,” the power of the President is at its minimum, and any such action may be supported pursuant to only the President’s “own constitutional powers minus any constitutional powers of Congress over the matter.”²¹ In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure “only by disabling the Congress from acting upon the subject.”²²

Applying this framework to President Truman’s seizure order, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that President Truman’s seizure of the steel mills had not been authorized by Congress, either implicitly or explicitly.²³ Justice Jackson also concluded that the second category was “clearly eliminated,” in that Congress had addressed the issue of seizure, through statutory policies conflicting with the President’s actions.²⁴ Employing the third category, Justice Jackson noted that President Truman’s actions could only be sustained by determining that the seizure was “within his domain and beyond

¹⁵ *Id.* at 585.

¹⁶ *Id.* at 586.

¹⁷ *Id.* at 589; *see also Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996) (striking down an executive order by President Clinton that prohibited federal agencies from contracting with employers that permanently replaced striking employees for being in direct conflict with provisions in the National Labor Relations Act).

¹⁸ *Id.* at 635 (Jackson, J., concurring).

¹⁹ *Id.* at 635-38 (Jackson, J., concurring).

²⁰ *Id.* at 637 (Jackson, J., concurring).

²¹ *Id.* (Jackson, J., concurring).

²² *Id.* at 637-38 (Jackson, J., concurring).

²³ *Id.* at 638 (Jackson, J., concurring).

²⁴ *Id.* at 639 (Jackson, J., concurring).

control by Congress.”²⁵ Justice Jackson established that such matters were not outside the scope of congressional power, reinforcing his declaration that permitting the President to exercise such “conclusive and preclusive” power would endanger “the equilibrium established by our constitutional system.”²⁶

Appointment and Removal Cases

Equally critical to discussions of presidential authority and the separation of powers is the concept of appointment and removal of executive branch officials. As previously noted, the Constitution specifically provides for the presidential appointment of executive branch officials,²⁷ but is silent with respect to their removal from office. The Constitution’s silence regarding removal authority has been the subject of intense debate and disagreement since the creation of the Department of Foreign Affairs (now known as the Department of State) by the first Congress.²⁸ During debate on the bill to create the department, the House of Representatives, relying principally on arguments from James Madison, overcame considerable objection²⁹ and remained silent with respect to the President’s power to remove appointees, thereby implying that removal authority was reserved to the President by the Constitution.³⁰ The Senate, however, much less sanguine about abdicating such power, split evenly on the question. Vice President John Adams cast the tie-breaking vote in favor of allowing the President unfettered removal powers.³¹

Notwithstanding this history, until its 1926 decision in *Myers v. United States*, the Supreme Court had yet to render a decisive pronouncement regarding the removal power, its extent, and location. The question presented by *Myers* was the constitutionality of a Postmaster’s General order, acting by direction of the President, to remove from office a first-class postmaster. The removal order was issued despite the fact that in 1876 Congress enacted the following restriction on the terms of a postmaster’s office: “Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.”³²

²⁵ *Id.* at 640 (Jackson, J., concurring).

²⁶ *Id.* at 638, 640-45 (Jackson, J., concurring).

²⁷ U.S. CONST. Art. II, § 1, cl. 2.

²⁸ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 410, n. 123 (1996).

²⁹ Those Members who objected relied on a statement by Alexander Hamilton in *Federalist* No. 77, in which he argued that consent of the Senate “would be necessary to displace as well as to appoint” federal officials. THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961). During the debate, however, Hamilton, in a note to Representative William Smith of Maryland, indicated that he had changed his mind on the subject and “was now convinced that the President alone should have the power of removal at pleasure.” See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 974 (2002) (citing George C. Rogers, ed., *The Letters from William Laughton Smith to Edward Rutledge, June 6, 1789 to April 28, 1794*, 69 S.C. HIST. MAG. 1, 8 (1968)).

³⁰ See MARGARET C.S. CHRISTMAN, THE FIRST FEDERAL CONGRESS, 1789-1791, at 136 (1989).

³¹ See RAKOVE, *supra* note 28, at 418, n. 15.

³² 19 Stat. 78, 80 (1876).

Chief Justice William H. Taft, formerly the President of the United States, issued the opinion for a divided Court. The opinion upheld the order of removal and declared the statutory provision adopted by Congress unconstitutional.³³ According to the Chief Justice,

Article II grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate’s consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President’s power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate’s power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.³⁴

Thus, *Myers* stands for the proposition that the Constitution endows the President with an unconstrainable power to remove all officers in whose appointment he has participated, the only exception being federal judges, whose tenure is constitutionally prescribed. As a result of this broad holding, the constitutional validity of several “independent agencies” that existed at the time—such as the Interstate Commerce Commission, and the Federal Trade Commission—whose appointees enjoyed statutory protection from at-will removal by the President, was called into question.

A mere seven years after *Myers*, the Court was again faced with a controversy involving the scope of the President’s removal authority. *Humphrey’s Executor v. United States*³⁵ involved the decision of President Franklin D. Roosevelt to remove from office Humphrey, a member of the Federal Trade Commission (FTC), based solely on their differing policy opinions. Humphrey, who enjoyed statutory “for cause” removal protection, sued for salary. The Court, in an opinion by Justice Sutherland, limited the holding of *Myers* to only units of the executive department.³⁶ The Court distinguished, but did not overrule, *Myers*, concluding that the President could not remove Humphrey because the FTC performs both quasi-legislative and quasi-judicial functions.³⁷ According to the Court, there is a legal difference between executive departments and independent agencies which, by congressional design, are intended to exercise functions that are to be free from executive control. Thus, the Court held that the Congress possesses the necessary authority when creating such entities to

³³ *Myers*, 272 U.S. at 164.

³⁴ *Id.* at 163-64.

³⁵ 295 U.S. 602 (1935).

³⁶ *Id.* at 627 (stating that “[t]he actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department, and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is”).

³⁷ *Id.*

fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will³⁸

The tension between the scope of the President's removal power with respect to executive departments as opposed to independent agencies, as well as between the holdings in *Myers* and *Humphrey's Executor*, would eventually come to a head in the 1988 case, *Morrison v. Olson*.³⁹

In *Morrison*, the Court was faced with questions regarding the constitutionality of the Independent Counsel Act.⁴⁰ In adopting the statute, Congress had declared that an independent counsel, who was appointed by a special court upon application by the Attorney General, may be removed by the Attorney General "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."⁴¹

Given the nature of the duties of the independent counsel, the Court was confronted directly with the tension created by its holdings in *Myers* and *Humphrey's Executor*. On one hand, insofar as independent counsels exercised "purely" executive functions, it was argued that the holding in *Myers* governed and, thus, required the invalidation of the statute. Conversely, it remained far from clear that the broad dicta from *Myers*, stating that the President must be able to remove at will officers performing "purely" executive functions, had survived *Humphrey's Executor*. Rather than rely solely on bright-line distinctions between the functions of the officials at issue (i.e., executive versus quasi-legislative or quasi-judicial), the Court shifted the analytical focus to the question of whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty"⁴²

Analyzing the question this way, the Court could discern no compelling reason to find that the Independent Counsel Act's good cause limitation interfered with the President's performance of his constitutional duties.⁴³ Although the independent counsel did exercise executive-type, law-enforcement functions, the jurisdiction and tenure of each counsel was either limited with respect to policymaking authority, or significant administrative power was lacking.⁴⁴ Regardless, according to the Court, the removal authority did afford the President, acting through his Attorney General, with adequate power to ensure the "faithful execution" of the laws, and that the independent counsel is competently performing the statutory duties of the office.⁴⁵

After *Morrison*, it is now affirmed that Congress may not involve itself in the removal of officials performing purely executive functions.⁴⁶ It is also established that, in creating offices both in the

³⁸ *Id.* at 628.

³⁹ 487 U.S. 654 (1988).

⁴⁰ P.L. 95-521, title VI, 92 Stat. 1867 (codified as amended at 28 U.S.C. § 591 *et seq.* (1988)).

⁴¹ 28 U.S.C. § 596(a)(1) (1988).

⁴² *Morrison*, 487 U.S. at 691.

⁴³ *Id.* at 691-92.

⁴⁴ *Id.* at 692.

⁴⁵ *Id.*

⁴⁶ *Id.* at 693 (stating that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other'" (internal citation omitted)).

executive branch and in creating independent agencies, Congress has considerable discretion in statutorily limiting the President's or another appointing authority's power to remove.⁴⁷ Furthermore, it is evident from the opinion that Congress's discretion is not unbounded, as there remain offices which may be essential to the President's performance of his constitutionally assigned powers and duties such that limits on removal would be constitutionally impermissible.⁴⁸ While after *Morrison* there are no longer bright lines demarking one type of office from another, the decision requires close case-by-case analysis.

Theories of Executive Power

Prior to Professor Kagan's 2001 article, separation of powers and presidential authority analysis was largely divided into two camps, the "traditional view," and the "unitary theory of the executive." Both of these camps rely, in various ways, on the constitutional text and Supreme Court opinions discussed above, but reach very different conclusions about the scope of presidential power and Congress's control with respect to the powers and duties of executive departments and agencies.

The "Traditional" View

Adherents to the "traditional" view of separation of powers and presidential authority generally assert that Congress possesses the constitutional authority to vest discretionary decision-making authority directly in the heads of the departments and agencies that it creates.⁴⁹ Thus, while traditionalists accept that the President can supervise and guide agency policymaking, they argue that where Congress has, by statute, specifically vested the decision-making authority in the agency head, the President cannot "go so far as to displace the agency head's discretion to make decisions vested in that officer by law."⁵⁰

The legal basis most often offered for the "traditional" view is based on both the text of the Constitution and in the principles of statutory construction as applied to Congress's delegation of authority to the agency head. Traditionalists will often cite two provisions of the Constitution that directly refer to duties and powers being assigned to officers who are not the President. Initially, there is the "Necessary and Proper Clause," which confers on Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution ... all other Powers vested by this Constitution in the Government of the United States, or in any *Department or Officer*

⁴⁷ *Id.* at 687-88.

⁴⁸ *Id.* at 690.

⁴⁹ See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 25 (1995) ("[T]he President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head."); Thomas O. Sargentich, *The Administrative Process in Crisis: The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN L. J. AM. U. 710, 716 (1993) ("[T]he power to regulate remains where the statute places it: the agency head ultimately is to decide what to do."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM L. REV. 573, 649-50 (1984) (explaining that "the agencies to which rulemaking is assigned," rather than the President, possess "ultimate decisional authority").

⁵⁰ Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN L. REV. 1, 7 (2007).

thereof.”⁵¹ In addition, as mentioned above, Article II, § 1, cl. 1 states that “[the President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”⁵²

With respect to statutory construction, traditionalists will often point to the plain language of statutory delegations employed by Congress. When Congress delegates decision-making authority to the heads of agencies, it typically does so directly and unequivocally. For example, with respect to the regulation of air pollution, Congress has specifically stated that “[t]he Administrator [of the Environmental Protection Agency] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.”⁵³ Thus, by focusing on what Congress actually does—namely, vesting decision-making authority directly with the agency head—it has been argued by traditionalists that had Congress wanted the President to have final authority it would have expressly so provided.⁵⁴ This construction derives further support from examples where Congress has specifically provided the President with the statutory authority to suspend or overturn the agency head’s discretionary decision under certain circumstances, usually ones involving national security or other emergency situations. For instance, a provision in the Clean Air Act allows for the President, and only the President, to determine that a national or regional emergency of such severity exists that portions of the applicable air quality control standards can be suspended.⁵⁵ As a result, according to one commentator, “[i]f the [P]resident has express authority to overturn the legal consequences of agency decisions in some circumstances, but not others, the argument for inferring congressional intent to permit the [P]resident generally to displace agency decisions is somewhat weaker.”⁵⁶

The “Unitary Theory of the Executive”

In contrast to traditionalists, advocates of the “unitary theory of the executive” or “unitarians” generally ascribe to a view of presidential authority that has three prongs: First, unitarians often argue that the President has a constitutionally based duty to provide policy direction to officers of the United States; second, unitarians claim that the President possesses the unfettered power to remove from office any officer who does not comply with the President’s policy directives; and finally, unitarians generally assert that Congress cannot constitutionally assign executive powers to agencies or other entities that are independent or outside the scope of the President’s control.⁵⁷

⁵¹ U.S. CONST. Art. I, § 8, cl. 18 (emphasis added).

⁵² U.S. CONST. Art. II, § 1, cl. 1 (emphasis added).

⁵³ 42 U.S.C. § 7601(a)(1) (2006).

⁵⁴ See Sargentich, *supra* note 50, at 10.

⁵⁵ See Clean Air Act, P.L. 95-95 § 107(f), 91 Stat. 691 (1977) (codified as amended at 42 U.S.C. § 7401(f) (2006)).

⁵⁶ Percival, *supra* note 29, at 1008.

⁵⁷ See Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, U. PA. J. CONST. L. 313, 315, 319 (2010) *see also, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L. J. 541 (1994); Martin S. Flaherty, *The Most Dangerous Branch*, 5 YALE L. J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992); Lee S. Liberman, Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong, 38 AM U. L. REV. 313, 314-17 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 35-36 (1986).

As a matter of law, unitary theory supporters look to the plain text of several constitutional provisions, which were discussed above. Supporters of the “unitary theory of the executive” have argued that the “Vesting Clause” of Article II, is best read and most properly understood to be a general grant of power to the President.⁵⁸ Focusing on the language “shall be vested,” unitarians believe that this construction, identical to the construction used to grant judicial power to Article III courts, creates a single and exclusive executive actor, namely, the President. Further bolstering this argument, unitarians argue, is the language of the “Take Care Clause.” According to two prominent unitary executive scholars, the President’s constitutional obligation to “take care that the Laws be faithfully executed” cannot be “fulfilled unless the Article II Vesting Clause was, in fact, already a substantive grant of executive power to the President. Accordingly, the use of the verb ‘take care’ in the Take Care Clause bolsters the power-grant reading of the Vesting Clause of Article II.”⁵⁹ In other words, according to unitarians, the only way that the “Take Care Clause” makes sense is if the “Vesting Clause” is read to grant all executive powers to the President.⁶⁰

The remaining two prongs of the “unitary theory of the executive” are premised on the President’s power to appoint and remove “officers of the United States.” Relying on both the historical actions of the First Congress in creating the Department of Foreign Affairs,⁶¹ President Andrew Jackson’s removal of Treasury Secretary William Duane for his failure to withdraw funds from the Second Bank of the United States,⁶² as well as Chief Justice Taft’s opinion in *Myers v. United States*, supporters of the unitary theory of the executive assert that Presidents should have the power to remove at will all persons exercising executive authority on their behalf.⁶³ Customary arguments advanced to support this theory include an increase in political accountability, as the President is the sole person responsible for the performance of the executive.⁶⁴ In addition, it has been argued that dividing executive authority among multiple governmental entities decreases the general public’s ability to hold executive officials accountable, can increase administrative bargaining costs, and may lead to debilitating collective action problems.⁶⁵

Presidential Administration

According to Professor Kagan, neither the traditional model nor the “unitary theory of the executive” adequately describes the reasons that she believes President Clinton enjoyed success

⁵⁸ See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L. J. 541, 571 (1994).

⁵⁹ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198, n. 221 (1992).

⁶⁰ See Steven G. Calabresi & Saikrishna B. Prakash, *supra* note 58, at 583.

⁶¹ See *supra* notes 28-31 and accompanying text.

⁶² See Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103, 113 (2009).

⁶³ This argument is often made despite the Supreme Court’s holding to the contrary in *Morrison v. Olson*. See *supra* notes 41-48 and accompanying text. Some supporters of the “unitary theory of the executive” have consistently argued that *Morrison* was wrongly decided, and have urged the Supreme Court to utilize the most recent Appointments Clause controversy, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, to overturn the decision. See, e.g., Calabresi & Yoo, *supra* note 62.

⁶⁴ See, e.g., Calabresi & Yoo, *supra* note 62 at 116.

⁶⁵ See *id.*; see also Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN L. REV. 1696, 1705-12, 1717-21, 1730-33 (2009).

in controlling the vast bureaucracy of the executive branch. By adopting and building on the directives and policies of the Reagan Administration and its regulatory review process,⁶⁶ President Clinton was able to dramatically increase the President's level of participation in the administrative decision-making process. Professor Kagan's article posits that it was President Clinton's "articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory product" that led to the development of a new and distinctive form of administrative control.⁶⁷ This new form of administrative control includes two parts. First, the use of "directive authority," which Kagan defines as "commands to executive branch officials to take specified actions within their statutorily delegated discretion."⁶⁸ The second component is what Professor Kagan termed "Presidential ownership," and includes, for example, the public announcement of many regulatory decisions and accomplishments directly by the White House rather than by the responsible agency officials.⁶⁹ The combination of these two concepts as well as the changed relationship between the President and the administrative agencies under Professor Kagan's theory of "presidential administration," raise significant legal questions, as conceptually these notions do not fit into either of the existing models of separation of powers and presidential authority analysis.

Professor Kagan addresses these legal issues by employing the very same analytical framework as both the traditionalists and unitarians. According to Professor Kagan, at the core of the legal framework for "presidential administration" is a re-conceptualization of how congressional delegations are to be interpreted. Specifically, under her theory of "presidential administration," delegations by Congress granting discretion to executive branch officials should be read and interpreted as leaving ultimate decision-making authority with the President.⁷⁰ Similar delegations to independent agencies, however, are not to be interpreted in the same manner, and, thus, Congress can retain oversight and control over the decisions of those entities.⁷¹

The first legal hurdle that such a theory must overcome is that it seems to run directly contrary to Justice Black's majority opinion in *Youngstown Sheet & Tube*, as it would appear that the President, by asserting decision-making authority where Congress has expressly delegated it elsewhere, is acting as a "lawmaker." Professor Kagan, however, distinguishes her concept of presidential administration from President Truman's steel seizure order by noting that in *Youngstown*, Congress had specifically reserved the decision regarding seizures to itself. Conversely, according to Professor Kagan, President Clinton's directives were always issued in situations where Congress had expressly delegated authority to an entity other than itself. Thus, the Court in *Youngstown* never reached the question of the President's authority in these types of contexts, much less rendered a decision. Thus, while *Youngstown* establishes that the President cannot encroach into decisions that Congress has reserved for itself, it says nothing about the President's ability to assume the decision-making function from a subordinate agency official that Congress has specifically authorized to act.⁷²

⁶⁶ See Exec. Order 12291 (Feb. 17, 1981).

⁶⁷ Kagan, *supra* note 1, at 2250.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2251-252.

⁷⁰ *Id.* at 2320.

⁷¹ *Id.*

⁷² *Id.* at 2321-322.

Next, Professor Kagan addresses her theory in correlation with the removal line of cases previously discussed. Accepting the removal cases as “certain to remain the law,”⁷³ Kagan turns to a statutory construction argument to support her claim of broad presidential authority over agency decision making. According to Professor Kagan, delegation statutes can, and should, be read to “assume that the delegation runs to the agency official specified, rather than to any other agency official, but still subject to the ultimate control of the President.”⁷⁴ For example, when Congress delegates decisions related to implementation of the Medicare statute to the Secretary of Health and Human Services (HHS), Professor Kagan not only accepts the proposition that the statute should be read to mean that the Secretary of HHS and not the Secretary of Treasury is legally empowered to make the decision, but also adds the presumption that, unless specifically excluded by Congress, the President is legally entitled to participate in the process by issuing directives to the Secretary of HHS. For Professor Kagan, this additional presumption is expressly based on the reasoning of the removal cases. Relying on the distinction between delegations to independent agencies and delegations to executive branch agencies, she notes that, in the former, Congress has already acted by limiting the President’s appointment and removal authority to insulate the agency’s decision making from presidential control. Thus, according to Professor Kagan, “the agency’s heads are not subordinate to the President in other respects; making the heads subordinate in this single way would subvert the very structure and premises of the agency.”⁷⁵ In the latter, the presumption works the other way. Congress, when delegating to an executive branch agency head, already knows that the official is subordinate to the President, can be terminated at will, and is subject to procedural oversight. Therefore, according to Professor Kagan, “these powers establish a general norm of deference among executive officials to presidential options, such that when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President.”⁷⁶

Responses to Traditionalist Arguments

In articulating her theory of “presidential administration,” Professor Kagan directly addresses several of the arguments and concepts put forward by the two existing separation of power camps. Principally, Professor Kagan’s concept and interpretation of congressional delegations run directly contrary to both the views of the traditionalists as well as the unitarians.

Professor Kagan responds to three arguments that may be advanced by those supportive of the “traditional” perspective. First, she suggests that the traditionalists may attack her concept of congressional delegation on pure statutory interpretation grounds, arguing that Congress’s silence with respect to the President’s role in the process is a denial of any such authority. To make this argument, the traditionalists may rely on the canon of construction “*expressio unius est exclusio alterius*,”⁷⁷ arguing that by specifically delegating to the agency head, Congress has expressly excluded the President from having any role in the process.⁷⁸ Professor Kagan responds by first

⁷³ *Id.* at 2326.

⁷⁴ *Id.* at 2326-327.

⁷⁵ *Id.* at 2327.

⁷⁶ *Id.*

⁷⁷ Commonly translated as “to include one thing is to exclude another.” See BLACK’S LAW DICTIONARY, 602 (7th Ed. 1999).

⁷⁸ See Kagan, *supra* note 1 at 2328.

noting that the canon is unreliable⁷⁹ and, second, that it fails to account for the superior-subordinate relationship between the President and his cabinet officials. Interpreters of statutes, according to Kagan, should read delegation statutes in light of this long-standing relationship that has been left in place by Congress. With that background understanding, delegation statutes that are silent as to the President's role should be read as permitting the use of the President's directive powers.⁸⁰

A second argument that may be advanced by holders of the traditional point of view is that Congress knows how to, and has, delegated decision-making authority directly to the President.⁸¹ Thus, when Congress delegates authority to an administrative official other than the President, it is to be interpreted as meaning that Congress wishes to insulate the official from Presidential control.⁸² In response, Professor Kagan argues that delegations to the President are fundamentally different in nature from delegations to other administrative officials; therefore, the conclusion that Congress intends no presidential involvement when delegating to other officials does not follow.⁸³ Professor Kagan asserts three arguments to support her contention: First, delegations to the President are, by statute, subject to further delegation by the President,⁸⁴ whereas delegations to other officials deprive the President of that authority; second, delegations to the President express a preference by Congress that the President participate in the process; and third, that delegation to the President gives notice that Congress intends to hold him responsible and accountable for any and all decisions made.⁸⁵ For these reasons, Professor Kagan contends that congressional delegations "logically coexist with a presumption that the President has ultimate control over all agency decisions."⁸⁶

Finally, traditionalists argue that Professor Kagan's theory conflicts with congressional intent because permitting such overarching involvement by the President runs contrary to Congress's institutional interests.⁸⁷ Congress, as this argument would contend, generally prefers that decision making be done by administrative agencies which are dependant on and responsible to it as opposed to the President. However, as Professor Kagan points out, if this were actually the case then the independent agencies would greatly outnumber, both in terms of size and authority, their executive branch counterparts.⁸⁸ Rather, and seemingly contrary to its interests, Congress has increasingly delegated authority directly to officials within the executive branch.⁸⁹ Thus, "[t]here seems little reason to presume that as to the single matter of directive authority, Congress self-consciously has adopted such an uncommonly self-protective posture."⁹⁰

⁷⁹ *Id.* at 2329.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (citing 3 U.S.C. § 301 (2006) (permitting the President to delegate to any official, required to be appointed by and with the advice and consent of the Senate, any function vested in the President by law)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2330.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

Response to the “Unitary Theory of the Executive”

At first glance, it would appear that Professor Kagan’s theory of “presidential administration” has much in common with the “unitary theory of the executive”; however, Professor Kagan’s article specifically declines to adopt the “unitary theory of the executive” for two reasons:

First, although I am highly sympathetic to the view that the President should have broad control over administrative activity, I believe, for reasons I can only sketch here, that the unitarians have failed to establish their claim for plenary control as a matter of constitutional mandate. The original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position. And the constitutional values sometimes offered in defense of this claim are too diffuse, too diverse, and for these reasons, too easily manipulable to justify removing from the democratic process all decisions about the relationship between the President and administration especially given that this result would reverse decades’ worth of established law and invalidate the defining features of numerous and entrenched institutions of government. Second and equally important, the cases sustaining restrictions on the President’s removal authority, whether or not justified, are almost certain to remain the law (at least in broad terms, if not in specifics); as a result, any serious attempt to engage the actual practice of presidential-agency relations must incorporate these holdings and their broader implications as part of its framework.⁹¹

Professor Kagan’s rejection of the “unitary theory of the executive” is perhaps best articulated by her consistent differentiation between delegations by Congress to executive branch agencies (that provide the President with broad “directive authority”) and delegations to independent agencies (that provide the President with no “directive authority”).⁹² Supporters of the “unitary theory of the executive” often insist that “the Constitution provides the President with plenary authority over administration, so that Congress can no more interfere with the President’s directive authority than with his removal power.”⁹³ Professor Kagan’s express acceptance of Congress’s power to create agencies that are insulated and separate from Presidential control arguably represents a significant distinction between her concept of “presidential administration” and the “unitary theory of the executive.”

To place Professor Kagan’s views in context, if a horizontal line were to be drawn with the traditional view on the far left end and the “unitary theory of the executive” at the far right end, it would seem reasonable to assert that the concept of “presidential administration” articulated falls somewhere in the center, albeit closer to the right end of the line. Exactly where on the right of center Professor Kagan’s article falls has been a matter of academic debate since the publication of the article. Although the paper has generated a significant amount of academic scholarship, and has been cited over 300 times, its views on the nature of congressional delegation and executive control of the administrative process are not likely to generate cases and controversies that will require adjudication by the courts, rather they are most often resolved by negotiations between the political branches of government. As such, it is very difficult to extrapolate a judicial philosophy from the text of *Presidential Administration*.

⁹¹ *Id.* at 2326.

⁹² *See id.* at 2251 & 2237.

⁹³ *Id.* at 2251 (citing Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 599 (1994) (stating that “[T]he President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion ‘assigned’ to them himself”).

The limited instances of judicial review indicate that, at least thus far, courts have been reluctant to address the constitutionality of presidential involvement in the rulemaking process. For example, in *Public Citizen Health Research Group v. Tyson*,⁹⁴ the court addressed the validity of a rule promulgated by the Occupational Safety and Health Agency governing ethylene oxide, including a challenge based on the argument that a critical portion of the proposed rule had been deleted based on a command from the Office of Management and Budget (OMB).⁹⁵ While stating that “OMB’s participation in the rulemaking presents difficult constitutional questions concerning the executive’s proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies,” the court nonetheless found that it had “no occasion to reach the difficult constitutional questions presented by OMB’s participation” given its finding that the agency’s decision to delete the material in question was not supported by the rulemaking record.⁹⁶

The absence of judicial involvement in these types of constitutional issues indicates that they are often settled during the lawmaking process as the President, through his administration, and Congress work to draft delegations in a manner consistent with traditional practice and existing understandings of the Constitution. Thus, it appears unlikely that a case involving the type of administrative structures and presidential activities discussed in *Presidential Administration* will arise and require adjudication by the Supreme Court.

Presidential Administration and Administrative Law

Having laid out her theory of “presidential administration,” Professor Kagan turns to the field of administrative law as fertile ground for developing judicial doctrines that should embrace and support her concept.⁹⁷ Professor Kagan specifically focuses her analysis on two doctrines of administrative law for which the application of “presidential administration” could be judicially recognized; namely, the non-delegation doctrine and judicial review of agency action.

The Non-Delegation Doctrine

The non-delegation doctrine is a separation of powers principle that serves to preserve the “integrity and maintenance of the system of government ordained by the Constitution.”⁹⁸ Pursuant to the concept of non-delegation, Congress cannot delegate general legislative authority to another coordinate branch of government. The Supreme Court, however, has invalidated congressionally delegated grants of authority only twice.⁹⁹ In both instances it was determined

⁹⁴ 796 F.2d 1479 (D.C. Cir. 1986).

⁹⁵ *Id.* at 1505.

⁹⁶ *Id.* at 1507.

⁹⁷ Kagan, *supra* note 1, at 2364 (stating that “recognition of this potential would support a body of doctrine granting preferred status to administrative action infused in the appropriate way with presidential authority, and thereby promoting this kind of presidential involvement”).

⁹⁸ *Field v. Clark*, 143 U.S. 649, 692 (1892); *see also, Mistretta v. United States*, 488 U.S. 361, 371-372 (1988).

⁹⁹ *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

that Congress had improperly delegated its Article I legislative power to the executive branch by imbuing it with the ability to make unfettered law and policy decisions.¹⁰⁰ Since 1935 and despite the concept of non-delegation, the Court has—largely because of the practical requirements of modern government—granted broad power to Congress to delegate legislative authority to the coordinate branches where Congress establishes “by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform
....”¹⁰¹

Because of Congress’s ability to delegate power under broad standards, legal concern over legislative grants of authority does not focus simply on the act of delegation, but rather hinges on congressional abdication of core legislative functions.¹⁰² Thus, the practical effect of the intelligible principle maxim is to require that Congress, not the delegee, render the underlying policy decision and delineate reasonable legal standards for its enforcement, thereby avoiding separation of powers conflicts.¹⁰³

Professor Kagan’s analysis and application of the non-delegation doctrine starts with an observation that the doctrine has been applied only when Congress has delegated power directly to the President.¹⁰⁴ In other words, the only decisions by the Court which have struck down a federal statute for violation of the non-delegation doctrine have occurred when Congress delegated lawmaking authority directly to the President of the United States.¹⁰⁵ Properly understood, Professor Kagan asserts that the non-delegation doctrine is a government accountability principle and, as such, “should welcome active and open presidential involvement in administration, whether pursuant to a direct delegation or superimposed on a delegation to an agency official.”¹⁰⁶ Phrased another way, Professor Kagan posits that courts, when reviewing congressional delegations, should grant maximum protection from non-delegation challenges when the agency action is taken with the full imprimatur and authority of the President.¹⁰⁷ Rather than presuming, as the Supreme Court appears to have done to date, that delegations of congressional authority to the President are violations of the non-delegation doctrine, Professor Kagan asserts the opposite. She argues that her version of “presidential administration” provides for greater accountability, increased transparency, and is more consistent with democratic values than traditional bureaucratic decision-making mechanisms; therefore, the concerns of the non-delegation principle should not apply to delegations to the President, or where the President is actively involved in the decision-making process.¹⁰⁸

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 373; *see also J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁰² *Panama Refining Co.*, 293 U.S. at 415.

¹⁰³ *See Mistretta*, 488 U.S. at 371-375. The Court has recognized the ability of a delegee agency to formulate the necessary intelligible principle, or guiding, confining, standard if Congress has not done so itself in the enabling legislation. *See, e.g., Lichter v. United States*, 334 U.S. 742 (1948).

¹⁰⁴ Kagan, *supra* note 1, at 2364 (stating that the “Supreme Court has applied the doctrine only when Congress has delegated power directly to the President—never when Congress has delegated power to agency officials.”).

¹⁰⁵ *Id.* at 2364-365.

¹⁰⁶ *Id.* at 2365.

¹⁰⁷ *Id.* at 2369.

¹⁰⁸ *See id.*

Judicial Review of Agency Action

Recognizing that non-delegation cases before the courts are rare, Professor Kagan turns her attention to applying her theory of “presidential administration” to an area where the judiciary has been quite active, namely, the judicial review of agency action. Noting that there are two types of judicial review—review of agency legal conclusions under *Chevron U.S.A., Inc. v. Natural Resources Defense Council (Chevron)*¹⁰⁹ and review of agency decision-making processes under the “hard look” doctrine as espoused by *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co. (State Farm)*¹¹⁰—Professor Kagan proposes that a “sounder version of both these doctrines ... would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.”¹¹¹

In *Chevron*, the Supreme Court established a two-part test for judicial review of agency statutory interpretations. First, a reviewing court must first determine “whether Congress has directly spoken to the precise question at issue.”¹¹² If a court finds that there has been an express congressional statement, the inquiry is concluded, as the court “must give effect to the unambiguously expressed intent of Congress.”¹¹³ In the event that Congress has not unequivocally addressed the issue, a reviewing court must respect an agency’s interpretation, so long as it is permissible.¹¹⁴ The Court further stated that

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to that agency to elucidate a specific provision of the statute by regulation ... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.¹¹⁵

The Court went on to note that “[j]udges are not experts in the [technical] field, and are not part of either political branch of the Government,” while agencies, as part of the executive branch, appropriately make “policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”¹¹⁶ Thus, the rationale for this deference is predicated upon the notion that it is not the role of the judiciary to “assess the wisdom” of policy choices and resolve the “struggle between competing views of the public

¹⁰⁹ 467 U.S. 837 (1984). For a more detailed discussion of *Chevron* than is provided here, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by Todd Garvey.

¹¹⁰ 463 U.S. 29 (1983).

¹¹¹ Kagan, *supra* note 1, at 2372.

¹¹² *Chevron*, 467 U.S. at 842.

¹¹³ *Id.* at 843.

¹¹⁴ See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

¹¹⁵ *Chevron*, 467 U.S. at 843-44.

¹¹⁶ *Chevron*, 467 U.S. at 865. In *Cablevision Sys. Dev. v. Motion Picture Ass’n*, 836 F.2d 599, 608-609 (D.C. Cir. 1988), the court noted that, “*Chevron’s* rationale for deference is based on more than agency expertise.” Elaborating, the court stated: “Like the Court in *Chevron*, we are faced with several interpretations of ambiguous language which really involve competing policies among which Congress did not explicitly choose. We see no reason to deny the Copyright Office’s legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation selected is reasonable.” *Id.* at 609.

interest,” as well as an agency’s greater expertise regarding the subject matter of the regulations.¹¹⁷

Professor Kagan notes that courts in applying *Chevron* have completely ignored the role of the President in the administrative process, granting deference to agency regulations “irrespective of whether the President potentially could, or actually did, direct or otherwise participate in their promulgation.”¹¹⁸ In her view, this oversight by the judiciary is inconsistent with *Chevron*’s primary rationale. According to Professor Kagan, *Chevron* deference flows from political accountability, which is greatest when the President is exercising control over the various appendages of the executive branch.¹¹⁹ Thus, Kagan concludes that a proper application of *Chevron* would be one that promotes “actual[,] rather than assumed[,] presidential control over administrative action.”¹²⁰ As Professor Kagan notes, one potential consequence of such an application of *Chevron*, would be a weakening of deference afforded to the independent agencies. This conclusion logically follows because, by their very design, independent agencies are insulated from presidential control and, thus, the President cannot and does not participate in their decision making to the level necessary under Professor Kagan’s theory to justify application of *Chevron* deference. In other words, under Professor Kagan’s formulation “courts could apply *Chevron* when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes.”¹²¹

Review of an agency’s decision-making processes is performed not under *Chevron*, but rather pursuant to the “hard look doctrine.” The doctrine was adopted by the Court in *State Farm*, which reviewed a decision by the Secretary of Transportation to rescind a rule issued by a prior administration requiring new cars to be equipped with automatic seatbelts or airbags. This decision was based on the agency’s determination that the rule would be ineffective due to the ability of customers to simply detach the automatic seatbelts. The Court began its analysis of the agency’s decision by determining that arbitrary and capricious review was appropriate, and that such review is “narrow and a court is not to substitute its judgment for that of the agency.”¹²² The Court then went on to state,

¹¹⁷ *Chevron*, 467 U.S. at 866; *Rust v. Sullivan*, 500 U.S. 173, 187 (1991). It should be mentioned that the Supreme Court revisited *Chevron* in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), declaring that the Food & Drug Administration lacks jurisdictional authority to regulate tobacco products. In reaching this determination, the Court discussed the first prong of *Chevron*, declaring that the proper analysis is to focus not only on the statutory clause, but rather to consider the structure, function, and history of all relevant provisions, interpreting a statute “as a symmetrical and coherent regulatory scheme.” *Id.* at 133. Upon concluding that Congress “squarely rejected proposals to give the FDA jurisdiction over tobacco,” the Court stated that it was “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’[s] consistent judgment to deny the FDA this power.” *Id.* at 160. This reasoning centers on an analysis of the unique regulatory scheme created for tobacco products under the first prong of the *Chevron* test, and, as such, does not appear to impact the traditional inquiry as it applies to the issue at hand. The Supreme Court further clarified the limits of the *Chevron* standard in *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), ruling that deference applies only in instances when Congress has delegated authority to an agency to make rules carrying the force of law, and when the agency interpretation claiming deference was promulgated pursuant to that authority.

¹¹⁸ Kagan, *supra* note 1, at 2375.

¹¹⁹ *Id.* at 2376.

¹²⁰ *Id.*

¹²¹ *Id.* at 2377.

¹²² *State Farm*, 463 U.S. at 43.

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹²³

Applying this standard, the Court rejected the agency's action for two reasons. First, the Court found that the agency had failed to consider the possibility that inertia would have caused a substantial number of people to leave the seatbelts attached.¹²⁴ Additionally, the Court found it significant that the Department of Transportation had failed to explain why it did not consider implementing a mandatory airbag or non-detachable restraint option.¹²⁵ Given these omissions, the Court held that the agency had "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."¹²⁶ Finally, while noting that an "agency's view of what is in the public interest may change, either with or without a change in circumstances," the Court stressed that "an agency changing its course must supply a reasoned analysis" for such a change.¹²⁷ Holding that "the agency has failed to supply the requisite 'reasoned analysis' in this case," the Court remanded the matter to the agency for further consideration.¹²⁸

Like *Chevron*, the "hard look doctrine" developed in *State Farm* arguably ignores presidential involvement in the agency's process. Professor Kagan's proposed revision to the doctrine would "promote an alternative vision centered on the political leadership and accountability provided by the President."¹²⁹ This change would be implemented by reducing the rigors of the "hard look" analysis when evidence is presented to the reviewing court that the President has taken an active role and assumed responsibility for the administrative decision in question.¹³⁰ Professor Kagan does not merely suggest that any evidence will require such a reduction in the level of scrutiny, rather, she posits a standard for evidence of presidential involvement and responsibility. Specifically, if presidential policy is to be sufficient to sustain administrative action, "the relevant actors should have to disclose publicly and in advance the contribution of this policy to the action—in the same way and for the same reasons that they must disclose the other bases for an administrative decision to receive judicial credit."¹³¹

Unlike the issues raised by executive-legislative disputes, which are rarely the subject of judicial review, the changes to administrative law doctrines proposed by Professor Kagan potentially provide some insight as to how a prospective Justice Kagan would approach issues that are likely to come before the Supreme Court. Arguably, should the application of *Chevron* proposed by Professor Kagan be adopted, it may result in fewer administrative actions being entitled to deference from the courts. In addition, such an application could potentially mean that a greater

¹²³ *Id.* at 43.

¹²⁴ *Id.* at 54.

¹²⁵ *Id.* at 55-56.

¹²⁶ *Id.* at 56.

¹²⁷ *Id.* at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

¹²⁸ *Id.* at 57.

¹²⁹ Kagan, *supra* note 1, at 2380.

¹³⁰ *See id.*

¹³¹ *Id.* at 2382.

number of regulatory agencies will look to the President for not only directives and guidance, but also to ensure that their decisions receive deferential treatment from the judiciary when challenged. Similarly, it might be argued that should a future Justice Kagan convince a majority of the Court to adopt her version of the “hard look doctrine,” the result could potentially be a substantial reduction in the number of administrative decisions rejected and remanded by the judiciary.

This combination of reduced judicial review and increased presidential involvement in administrative decision making may be of concern to those who believe that independent, expert-based decision making subject to strong judicial review is what Congress intends when delegating authority to administrative agencies. Conversely, it appears possible to argue that the combination of increased executive influence and reduced scrutiny by the judiciary will greatly reduce administrative ossification, thereby freeing the administrative agencies to act more quickly and more decisively to address pressing regulatory needs.

Presidential Administration, Foreign Affairs, and National Security

Despite its length, Professor Kagan’s *Presidential Administration* is silent with respect to the authority of the President regarding the conduct of foreign affairs and national security. Written prior to September 11, 2001, and focusing largely on the success of the Clinton Administration with regards to domestic policy initiatives, it is difficult to ascertain from the text of the article itself what, if any, views Kagan holds on national security and foreign affairs related issues such as detention, surveillance, interrogation, and rendition. Although there is arguably some overlap between her theory of presidential power and arguments that have been advanced in the areas of foreign affairs and national security, the legal questions involve and implicate clauses in the Constitution and lines of Supreme Court cases that are not addressed or discussed by Professor Kagan in *Presidential Administration*.

That said, Kagan’s views of executive power generally have led some scholars and commentators to speculate on what those views might be. Criticism of Kagan’s views of executive power have come from both the progressive and conservative ends of the political spectrum, and are not always limited to the views and analysis expressed in *Presidential Administration*. From the progressive point of view, it has been suggested that Professor Kagan’s embrace of certain parts of the “unitary theory of the executive,” necessarily leads to a strong view of presidential power and, therefore, could be used to justify positions similar to those taken by the administration of George W. Bush.¹³² Conversely, some conservative writers have criticized Kagan’s article for not accepting in its entirety the precepts of the “unitary theory of the executive.” Specifically, commentators have noted Kagan’s express rejection of the theory that the Constitution mandates a unitary executive by permitting the unfettered removal of officers and officials.¹³³ For strong

¹³² See, e.g., Neal K. Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2343-345 (2006) (stating that “luminaries such as Elena Kagan celebrating presidential administration and unitary executives explaining why such theories are part of our constitutional design. This vision may work in eras of divided government, but it fails to control power the rest of the time”).

¹³³ See *supra*, notes 91-93 and accompanying text.

unitarian supporters, Professor Kagan's failure to fully accept these unitarian principles calls into question her acceptance of all the President's powers.¹³⁴

Conclusion

In sum, *Presidential Administration* presents a complex and multifaceted view of executive-congressional relations focused exclusively on domestic policy. Using the case law, arguments, and structures of both the traditional and "unitary theory of the executive" views, Professor Kagan articulates a view of executive power that envisions strong personal involvement by the President and the White House in the policy decisions and actions of administrative agencies. While arguably, Professor Kagan's theory is favorable to the executive branch, it nevertheless permits Congress to continue to develop and delegate executive functions to independent agencies that remain beyond the scope and control of the President. Furthermore, as recognized by the article, Professor Kagan's theory has some significant real world legal consequences, specifically with respect to administrative law, that may come before the Supreme Court. Whether, and to what extent, the theories and ideas presented in an academic paper like *Presidential Administration* inform her potential decision making as a Supreme Court Justice on issues related to foreign affairs and national security, however, remains to be seen.

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¹³⁴ See, e.g., John Yoo, *An Executive Without Much Privilege*, N.Y. Times, May 26, 2010, at A23 (stating "[i]f Elena Kagan will not even permit presidents this small constitutional right, who can doubt that she will reject executive powers of greater consequence?").