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Reining in the Unreasonable Executive

The Supreme Court Should Limit the President's Arbitrary Power as Regulator

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EXECUTIVE SUMMARY

When administrative agencies regulate, courts perform reasonableness review to prevent arbitrary action. But when presidents regulate, courts don't perform reasonableness review because of two misguided Supreme Court decisions from the early 1990s. And because courts don't check for reasonableness, presidents are permitted to be unreasonable when they make policy under statutes passed by Congress. Of course, there can be no meaningful limits on executive power if presidents are allowed unfettered discretion to interpret the extent of their own power. In this context, presidents are effectively above the law, which is antithetical to constitutional government. To achieve their policy agendas, recent presidents have been making ever greater use of their interpretive leeway in exercising their regulatory power. This paper contributes two advances to a small body of scholarship on this disconcerting modern trend in executive authority. First, by providing case studies of presidential power run amok, this analysis lends weight to the case for reform. Second, this analysis proposes a framework to guide judicial oversight of presidential policymaking.

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INTRODUCTION

As the Supreme Court has observed, "the very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails."[1] Despite the intolerance in the Constitution for arbitrary government, an important body of law exists that is marked by conspicuous abuses of discretion—namely, statutes that delegate regulatory authority to the president.

Most of the time, Congress grants regulatory power to subject-specific agencies—the Environmental Protection Agency, Federal Trade Commission, Food and Drug Administration, and so on—in what is known as a "delegation" of legislative authority.[2] For more than a century, these delegations have accumulated into what is known as the "administrative state."[3] These grants of legislative authority occupy thousands of pages in the U.S. Code and, ultimately, have engendered millions of pages of regulatory activity in the *Federal Register*.[4]

Sometimes, however, Congress delegates regulatory authority directly to the president. Although there has been no comprehensive accounting of the president's statutory powers, these delegations often—but not always—occur in areas over which the executive and legislative branches share express or implied constitutional authority, such as foreign policy, immigration, and national defense.

For example, Congress has long empowered the president to act in the realm of international relations.[5] Such delegations are especially prevalent in the regulation of trade.[6] With this authority, President Biden and former president Donald Trump have taxed more than $350 billion of imports, resulting in roughly $51 billion of annual consumer costs, according to a running tally by the American Action Forum.[7]

Professor Amy Stein has identified more than 60 laws that empower the president in the name of "national security," including the statutory basis for an ongoing ban on Huawei technology and an investigation of the web app TikTok.[8] Another example of a "national security" delegation to the president is the Defense Production Act, which authorizes central planning of critical supply chains.[9]

In immigration policy, the president's broad statutory powers include the authority to exclude entire classes of immigrants if the president determines their entry "would be detrimental to the interests of the United States."[10] Trump acted on this provision in issuing a series of discriminatory "travel bans" and a bar on immigrants entering without health insurance.[11] Through a different delegation of authority, Trump "essentially ended" refugee programs.[12]

Under the National Emergencies Act, the president can unlock 136 distinct regulatory powers by declaring a "national emergency."[13] These emergency powers include the authority to suspend federal oil leases, reshuffle billions of dollars of congressional appropriations, and take control of the telecommunications infrastructure.[14]

> "Usually, Congress grants regulatory power to subject-specific agencies as a 'delegation' of legislative authority. Sometimes, however, Congress delegates regulatory authority directly to the president."

In the executive branch, therefore, Congress delegates regulatory authority to agencies *and* the president. In some instances, the powers wielded by these respective delegatees are indistinguishable. For example, the Interior Department and the president have practically identical authority to regulate public lands.[15] And both the president and the Commerce Department possess overlapping tariff-making authority.[16] Despite the functional equivalence of these two categories of delegated authority, they result in two drastically different approaches to judicial review. When agencies execute the law, their actions are subject to thorough oversight under the Administrative Procedure Act (APA).[17] But when the president exercises a congressional delegation of authority, courts don't check for reasonableness.

As a result, the president is effectively immune from meaningful judicial oversight. Because courts don't check for abuses of discretion, presidents can get away with obvious abuses. This unfortunate *status quo* stems from two Supreme Court cases that were decided almost three decades ago—one that exempted the president from the APA and another that has been interpreted by lower courts to close off meaningful review outside of the APA.[18] Since the Court adopted

its hands-off approach, presidents have pushed the envelope of their statutory powers through increasingly expansive—and seemingly arbitrary—interpretations of their own statutory authority.

This paper contributes to a small body of scholarship on the absence of judicial checks for the president's statutory powers. Professor Kevin Stack first drew attention to the problem in a series of influential articles.[19] Building on Stack's work, Professor Kathryn Kovacs has argued that the Supreme Court should reverse its 1992 decision that placed the president's policymaking beyond the APA's reach.[20] This paper complements their work in two ways. First, by providing contemporary case studies of presidential power run amok, this paper lends weight to the need for reform. Second, this paper sets forth a framework for reviewing the president's statutory powers outside the APA. Where before scholars have called for some sort of reasonableness review, this paper proposes a framework to guide such review.

The Modern Bar on Judicial Review of the President's Statutory Powers

Laws that delegate regulatory authority are known as "enabling acts," and they invariably include congressional grants of policymaking discretion to the person being delegated to, that is, the delegatee. Here, "discretion" means "a power to make a choice within a class of actions."[21] The idea is that a congressional delegation of discretionary authority allows for a range of permissible action. Whenever a government official acts outside the gamut of permissible actions authorized by statute, the official has committed an "abuse of discretion."[22] Under the APA's framework for judicial review, the terms "arbitrary," "capricious," and "abuse of discretion" are used interchangeably.[23] As for jurisprudential glosses, the Supreme Court once described arbitrary state action as "an unnecessary and unwarranted interference with individual liberty," while the Ninth Circuit has reasoned that discretion is abused whenever the government's discretionary choices are "fanciful [or] unreasonable."[24]

The sections that follow explain how it came to be that courts don't check the president's actions for arbitrariness, despite the "strong presumption" favoring substantive judicial review of administrative policymaking.

The APA Establishes a Presumption of Reasonableness Review

Only in the late 19th century did Congress start delegating broad discretion to regulate interstate commerce.[25] Judicial oversight of this novel administrative discretion evolved in a haphazard manner in response to the pressures of individual cases.

During the formative years of the administrative state, regulated parties faced two significant difficulties in bringing legal challenges against government action. The first was access to the courts, which is known as the "availability of review." Through the early 20th century, courts presumptively refused to hear legal challenges to administrative decisionmaking unless Congress expressly provided for judicial scrutiny; however, by the 1930s, courts had changed their approach to allow for these kinds of lawsuits, even where Congress was silent.[26] Still, unless Congress established access to the courts, challenges had to proceed through the common law writ system, which imposed procedural and jurisdictional hurdles.[27]

> "When agencies execute the law, their actions are subject to searching judicial review. But when the president exercises a delegation of authority, courts don't check for reasonableness."

The second and more widespread problem involved what is known as the "scope of review," or "the degree of intensity of the judicial inquiry into reviewable action."[28] Even where Congress provided access to the courts to review agency action, lawmakers typically provided no instruction on the scope of review. Absent congressional guidance, courts often denied meaningful review of agency fact-finding and fact-weighing; instead, courts would limit their analysis to "legal" questions. The problem with this sort of restraint is that judicial review of administrative policy invariably involves the application of law to facts. By trying to distinguish between reviewable law and unreviewable facts, courts too often left regulators unchecked. Put differently, "a finding of fact which is based on no more than the will

or desire of the administrator is lawless in substance if not in form."[29] Professor John Dickinson summarized the prevailing concerns in a 1947 article for the American Bar Association, writing that "in recent years, the Supreme Court has tended to treat many issues . . . which would be seen to be issues of law, as lying within the discretion of an administrative agency, and, therefore, non-reviewable."[30]

Congress was aware of the growing dissatisfaction with the lack of judicial checks on administrative governance during the New Deal, leading in 1946 to unanimous passage of the APA.[31] Known as the "constitution of the administrative state," the APA both broadened and standardized judicial review of agency action. Regarding access to courts, "a major premise of the statute [is] that judicial review is not merely available but is plenary [and] no citizen need complain that he is without it if he has been subjected to injury beyond the law," according to Sen. Pat McCarran, one of the primary sponsors of the APA.[32] To this end, the APA created a cause of action—a right to sue in federal court—for any person "suffering a legal wrong because of agency action."[33]

"There is no functional difference between exercises of congressional delegations by the president and administrative agencies. In this context, each is an agent of Congress."

Turning to the scope of judicial review, the APA imposes a clear duty on the courts to probe an agency's discretionary decisionmaking as it pertains to issues of law *and* fact. The statute reaches all agency "action, findings, [or] conclusions."[34] The Court must "hold unlawful" any agency action that is "arbitrary," "capricious," or "an abuse of discretion."[35] As noted earlier, these terms are synonymous.

Before the APA became law, regulated parties faced much uncertainty regarding both the availability and scope of judicial review of agency action. With passage of the APA, Congress clarified the judiciary's role by creating a "strong presumption" in favor of substantive oversight of all administrative action, including legal interpretation, fact-finding, and the reasoning behind agency decisionmaking.[36]

Franklin v. Massachusetts Exempts the President from the APA

As a textual matter, the APA's judicial review provisions seem to reach the president. The APA applies to any "agency action." And an "agency" is defined as "each authority of the Government of the United States."[37] Of course, the president is a governmental authority. Further, the APA specifically excludes Congress and federal courts from the definition of "agency," but the same provision says nothing about the president, which suggests by implication that the president is covered by the law.[38]

Beyond the plain language of the statute, common sense suggests that the president's administrative policymaking would fall within the scope of the APA's provisions for judicial review. After all, there is no functional difference between exercises of congressional delegations by the president and administrative agencies. In this context, each is an agent of Congress.[39] For these reasons, leading administrative scholars of the 1950s and 1960s agreed that the president is subject to reasonableness review under the APA.[40]

Still, the APA's applicability to the president remained an open question. When these sorts of controversies arose, lower courts decided on other grounds and elided the issues of whether and how to perform judicial review of the president's regulatory power.[41]

Only in 1992 did the matter come before the Supreme Court. The case *Franklin v. Massachusetts* involved a challenge to the decennial apportionment of seats in the House of Representatives.[42] Under the scheme set up by Congress, the Commerce Department "tabulates" state populations based on the census and reports these figures to the president, who then has to "transmit" the data to Congress.[43] The controversy centered on the agency's decision to include overseas federal employees in a state's population count.

The challengers in *Franklin* were states with small overseas populations that stood to lose seats in the House of Representatives. The states sued the Commerce Department under the APA in the belief that the agency had been responsible for the decision to include overseas federal employees. Ultimately, however, the Supreme Court held that the president, not the agency, was the final decisionmaker, because apportionment only took effect when the president "transmitted" the data to Congress.[44] Then, in a lone paragraph of analysis, the Court ruled that the president was not an "agency" under the APA.[45]

Although the APA's text seems to include the president by implication, the Court said that it would "require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion . . . under the APA." The court came to this conclusion "out of respect for the separation of powers and the unique constitutional position of the President," which was the only reasoning provided.[46] According to Professor Kovacs, who reviewed the Court's internal papers, there was incomplete briefing on whether the APA reached the president, and the justices' memoranda regarding *Franklin* "were devoid of any deliberation on the question" of how to review a president's regulatory authority.[47] Given the paucity of legal analysis in the *Franklin* opinion, it's fair to question whether the Court gave the matter sufficient deliberation.

Dalton v. Spector Closes Meaningful Non-APA Review

In *Franklin*, the Supreme Court declined to review the president's actions under the APA. Outside of the APA's framework, there is another way to challenge government action, known as *ultra vires* review.[48] However, two years after deciding *Franklin*, the Court cast doubt on meaningful non-APA review in *Dalton v. Specter*.[49]

The case involved a program for closing unneeded military bases in the wake of the Cold War's end. Under the relevant statute, Congress set up a process whereby an independent body (the Defense Base Closure and Realignment Commission) recommended to the president which bases to close, and then the president either approved or disapproved these recommendations. The statute offered no direction to guide the president's decision. If the president approved the commission's recommendation, he had to submit his decision to Congress, which had 45 days to enact a joint resolution of disapproval. If Congress passed such a resolution, the closure plan was scuttled; if the resolution did not pass, the base closures proceeded.[50]

In April 1991, the commission recommended a list of bases to close, including the Philadelphia Naval Shipyard. After the president approved the commission's plan, the House of Representatives rejected a proposed resolution of disapproval by a lopsided vote of 364 to 60.[51] Before Congress voted, the recommended plan was challenged in a federal district court by local interests who would be adversely affected by the closure of the shipyard in Philadelphia.

In *Dalton*, the challengers brought an *ultra vires* claim, alleging that the selection process had deviated from substantive and procedural requirements established by the base-closure statute. After lower courts issued conflicting opinions, the Supreme Court granted *certiorari*.

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In a unanimous decision, the Court refused to consider the challengers' claims in *Dalton*. According to the Court, "how the President chooses to exercise the discretion Congress has granted him is not a matter for our review."[52] Referring to pre-APA case jurisprudence, the Court said that "no question of law is raised when [the president's] exercise of discretion is challenged."[53] Because the case "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given," the Court concluded that the matter was "beyond the reach of judicial power."[54]

Dalton is troubling on at least two fronts. First, there is no such thing as a "mere" governmental abuse of discretion. Instead, "every wanton . . . or unnecessary act of authority . . . over the citizen, is wrong, and unjustifiable, and tyrannical," as explained by Justice James Wilson, a leading Founder.[55] The Court's careless tone in *Dalton* is perhaps attributable to the fact that there were no indications that the president had abused his authority under the base closure statute. After all, Congress had lent its tacit stamp of approval to the president's decision. In any case, the Court's sloppy language seems to invite arbitrary government.

More broadly, the *Dalton* Court was simply wrong to erect an artificial distinction between an "abuse of discretion in exerting a power given" and the "want of presidential power." Congress does not delegate authority to regulate irrationally, so an abuse of discretion—backed by government

force—*always* concerns "a want" of power. The Court's reasoning mirrors the misguided parsing of "fact" from "law" that plagued judicial review before Congress passed the APA. In *Dalton*, the Court denied review for arbitrary decision-making, which requires consideration of (obvious) facts; instead, the Court asked whether there was a "want" of authority, which required only a cursory examination of the statutory text. Read broadly (as it has been by lower courts), the Court seemed to deny any inquiry into how presidents exercise their discretion.

FALLOUT FROM *FRANKLIN* AND *DALTON*

After *Franklin* and *Dalton*, the president's statutory powers became unbound. Because courts don't vet the president's decisionmaking for reasonableness, presidents can get away with unreasonable decisions. If an agency had attempted any of the actions described in this section, it would've been quickly enjoined and, ultimately, defeated by a legal challenge brought under the APA. But because the president is the decisionmaker, courts allow obvious abuses of discretion, as demonstrated by the case studies in this section.

Designating "Monuments"

Under the Antiquities Act of 1906, the president may designate "monuments" on public property and regulate "the smallest area compatible" with their preservation.[56] Congress intended to protect archaeological artifacts from vandalism and looting,[57] but presidents quickly expanded the statute's purpose to include the conservation of vast public spaces.[58] Two years after signing the Antiquities Act, for example, Theodore Roosevelt created the Grand Canyon National Monument, encompassing more than 800,000 acres.[59] Herbert Hoover established a monument twice that size at Death Valley.[60]

Although these presidents (and their successors) pressed their power, they still acted within the bounds of reason. Geologic features like the Grand Canyon and Death Valley are distinct landmarks, and the scope of their regulation comported with their huge size. For the Antiquities Act's first eight decades, presidents created monuments out of discrete objects, which is at least a tenable reading of the law.

In the 1990s, however, President Bill Clinton effectuated a paradigm shift in the Antiquities Act's implementation. During his tenure, the statute's scope broadened from the protection of specific objects to the regulation of nebulous "ecosystems."[61] In 2000, for example, Clinton unilaterally created the 327,000-acre Giant Sequoia National Monument and set forth stringent limits on commercial and recreational access.[62] Yet the monument's titular Giant Sequoia groves made up a mere 6 percent of the regulated area; the rest was an ill-defined "surrounding ecosystem."[63] According to the Clinton administration, these unnamed ecosystems were themselves part and parcel of the "monument."[64]

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The inherent problem with ecosystem monuments is that there's no limiting principle. Because every square inch of the earth contains or is part of an ecosystem, *all* public lands are "monuments" under the Clinton administration's reading of the law.[65] In this manner, ecosystem monuments obviate the Antiquities Act's primary constraint on executive authority—namely, that regulation must be limited to the "smallest area compatible" with the monument's preservation.[66] Such a limitation becomes meaningless when the president is permitted to draw shapes on a map and call everything therein an ecosystem "monument."

Perhaps it's a coincidence, but Clinton's expansive gloss on the Antiquities Act originated only two years after the Supreme Court shielded presidential regulation from meaningful review in *Dalton*. Regardless, there was no judicial scrutiny of the Clinton administration's reasoning, and courts accepted that vague references to ecosystems were sufficient to establish a monument.[67] All told, Clinton established 19 monuments and expanded 3 others, totaling 5.9 million acres.[68]

President George W. Bush expanded on his predecessor's innovation in executive authority by taking ecosystem

monuments to new domains. Under the Antiquities Act, the president's regulatory reach is limited to property that is "controlled" by the federal government, which for the law's first 100 years was understood as meaning only those areas that are subject to U.S. sovereignty, including public lands or territorial seas.[69] In 2006, however, Bush adopted a broader reading in establishing the 89-million-acre Northwestern Hawaiian Islands Marine National Monument in the Pacific Ocean.[70] Under Bush's interpretation of "owned or controlled," the president's power extends to the "exclusive economic zone" (EEZ), an area between the territorial sea and 200 miles from the coast, over which nations exercise authority that falls far short of sovereign dominion.[71] Among the many powers that the federal government lacks in the EEZ is the authority to salvage historic artifacts.[72] Remember, Congress's intent with the Antiquities Act was to protect archaeological artifacts. Bush, therefore, pushed his statutory power to a point at which the government is forbidden from effecting the statute's purpose of protecting antiquities.

Bush established three other vast marine ecosystem monuments. President Barack Obama expanded three of Bush's marine monuments and created another. These two presidents' ocean monuments encompass almost 750 million acres, or almost 10 times as much as the total acreage regulated during the first 100 years of the Antiquities Act.[73]

These new marine monuments gave pause to at least one judge. During oral arguments in a challenge to Obama's Northeast Canyons and Seamounts Marine National Monument, D.C. Circuit Judge David Tatel asked, "What are the limits then? Could the President, say, declare an Atlantic coast monument that would be the whole EEZ? . . . It is clearly an ecosystem." Although the Justice Department answered in the affirmative, thereby confirming the limitless nature of presidential power under the Antiquities Act, the court still sided with the government.[74]

Section 232 "National Security" Tariffs

President Trump took to calling himself "Tariff Man,"[75] but he chose not to pitch his protectionist trade agenda to Congress, which has exclusive constitutional authority over the regulation of imports during peacetime.[76] Instead, the president launched a trade war with an unprecedented interpretation of an old, obscure law.

Specifically, Trump turned to "national security" tariffs authorized by Section 232 of the 1962 Trade Expansion Act.[77] From 1962 to 2016, presidents resorted to Section 232 restrictions sparingly—just five times and only for petroleum imports.[78] Trump, by contrast, tapped this authority twice early in his presidency, setting tariffs on steel and aluminum imports (10 percent and 25 percent, respectively).[79] U.S. trading partners, including NATO allies, responded to Trump's "national security" tariffs in-kind, and a tit-for-tat trade war broke out.[80]

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Although Section 232 doesn't define "national security," presidents historically hewed to a common-sense interpretation that focused on how imports affected the needs of the military. Trump, however, abandoned this customary approach for an expansive reading of Section 232 that includes considerations "*beyond* those necessary to satisfy national defense requirements," such as "the general security and welfare of certain industries."[81] As the *New York Times* reported, Trump "blurr[ed] the line between America's national and economic security, enabling him to harness powerful tools meant to punish the world's worst global actors and redirect them at nearly every trading partner, including Mexico, Japan, China and Europe."[82]

By conflating "national security" with the "general security" of his favored industries, Trump yielded absurd results. To wit, his reading of Section 232 considers Canadian steel and aluminum imports to be a national security threat, even though Canada's industrial base is incorporated into domestic defense planning under legislation passed by Congress.[83] Scholars Clark Packard and Megan Reiss reviewed the Defense Department's annual risk assessments, and they found no discussion of steel and

aluminum imports in the years before the Trump presidency.[84] This silence makes sense, given that U.S. military requirements for steel and aluminum each represent only about 3 percent of domestic production.[85]

Despite the evident unreasonableness of the president's actions, courts wouldn't question his decisionmaking. Because of the Supreme Court's bar on substantive review of the president's statutory powers, "national security" is effectively whatever the president says it is.

In reviewing the president's "national security" tariffs, judges on the Court of International Trade were uncomfortable with blinding themselves to the obvious. During oral argument, for example, Judge Claire Kelly tried to identify some limit on executive power by asking whether the president could regulate peanut butter imports as a national security threat under Section 232, to which the government answered that the president's reasoning would be immune from judicial oversight.[86] Ultimately, the court agreed, as the three-judge panel denied itself "an inquiry for rationality, fact-finding, or abuse of discretion" of the president's decision.[87]

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Despite siding with the government, the panel nonetheless expressed its reservations: Section 232 "seem[s] to invite the President to regulate commerce by way of means reserved for Congress." In addition to the panel's opinion, Judge Gary Katzmann wrote a *dubitante* opinion, which is employed when "a judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent." According to Katzmann, "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers."[88]

Trump's norm-breaking ways paved the path for his successor. President Biden continued the Section 232 aluminum and steel tariffs, albeit for his own nondefense ends.[89] In late 2021, Biden reached an agreement with the European Union that simply replaces steel and aluminum tariffs with a different system of restrictions ("tariff-rate quotas") meant to fight climate change.[90] The administration is trying to expand this climate-based deal with its other trading partners, including South Korea and Great Britain, for whom the Trump-era measures remain in place.[91] Where Trump abused his discretion in imposing national security tariffs for protectionism, Biden is doing so to push his global warming agenda.

"National Emergency" Spending

In early 2019, President Trump declared an immigration "emergency" under the National Emergencies Act (NEA) and thereby unlocked almost $3.8 billion to pay for a wall along the southern border.[92] With some justification, Senate Majority Leader Charles Schumer called the emergency declaration a "lawless act" that demonstrates a "naked contempt for the rule of law."[93] Indeed, it was commonly understood that there was no actual emergency.

Objectively speaking, government data belied Trump's proffered basis for an emergency—a supposed onset of "large-scale unlawful migration."[94] According to the Department of Homeland Security, apprehensions at the border were then near historic lows, with fewer than 400,000 in 2018, compared with more than 1.6 million in 2000.[95]

As a matter of statutory interpretation, Trump's "emergency" strained the English language. Although Congress didn't define an "emergency" in the NEA, the term's common usage generally involves some sort of surprise that requires a rapid response. Merriam-Webster, for example, states that an emergency is "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Yet there was nothing sudden about Trump's declaration. He had been mulling the idea in public for months.

During Trump's first two years in office, Congress twice rebuffed his requests to fund a "big, beautiful wall."[96] In late 2018, the president started a third round of discussions with Congress over border wall appropriations; this time, he was determined to get his way. During these negotiations, Trump openly referred to his emergency powers as leverage. For example, on January 10, 2019—more than two months

before his emergency declaration—Trump said that working with Congress was "ridiculous" and that "if we don't make a deal, I would say it would be very surprising to me that I would not declare a national emergency and just fund [the wall]."[97] Three weeks later, he again promised that his administration "will be looking at a national emergency, because I don't think anything is going to happen [in Congress]."[98] Trump described his emergency powers as having no limits, telling reporters that "I have an absolute right to do national emergency if I want."[99]

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On February 15, 2019, he signed an appropriations bill without his preferred wall money—just hours *after* he had freed up a commensurate sum by declaring an emergency.[100] This curious timing, in addition to Trump's earlier statements, made it clear that he was abusing his emergency powers to perform an end-run around Congress's power of the purse.

Even though it was manifest that there was no actual crisis, courts could not "second-guess the motives behind declarations of national emergencies," as federal district court Judge Trevor McFadden reasoned in rejecting the only complaint to allege that the president's reasoning was unreasonable. None of the plaintiffs in other cases bothered to challenge the elephant in the room—namely, the obvious fact that there was no emergency—because they knew that such an argument is a nonstarter under prevailing Supreme Court jurisprudence.

Again, Trump paved the path for future presidents by breaking norms of executive restraint. There are at least 136 statutory grants of power that become available to the president on the declaration of an emergency, according to the Brennan Center for Justice, and "many . . . are far more sweeping and susceptible to abuse than the one President Trump has invoked."[101] Already, prominent members of President Biden's own party are pushing him to use his emergency powers to fight global warming. For example, Senate Majority Leader Chuck Schumer has urged Biden to "call a climate emergency," because "he could do many, many things under the emergency powers of the president that he can do without legislation."[102]

THE GROWING THREAT TO LIBERTY POSED BY PRESIDENTIAL LAWMAKING

It's worth elaborating on the real-world injuries wrought by the president's unchecked statutory authorities. As a result of President Trump's "emergency" declaration, the federal government moved to acquire or has acquired 110 private land tracts along the southwest border, totaling approximately 1,435 acres of private property. The Defense Department prepared takings proceedings for at least eight of these tracts.[103] Although the Biden administration ultimately discontinued these efforts in late 2021, these landowners still had to allow the government to trespass for assessments and, for years, lived under the threat of the government seizing their land.[104]

Turning to the second case study, presidential "national security" tariffs are causing widespread economic harm.[105] Domestic industries that use steel and aluminum faced higher input costs, which led to a combination of lower profits for producers and higher prices for consumers, likely leading to contraction in these sectors, according to a study by analysts at the Federal Reserve Board.[106] On top of these direct costs, retaliatory tariffs led to decreased demand for U.S. exports of a variety of products, including agricultural products, whiskey, and motorcycles.[107] A 2018 study by the Trade Partnership estimated for every job gained in the steel and aluminum industry, Trump's Section 232 tariffs would cost 16 jobs elsewhere in the economy.[108]

The marine ecosystem "monuments" discussed in the first case study are roiling the deep-sea fishing industry. The fishing regulations associated with the Papahānaumokuākea Marine National Monument—created by Bush and tripled in size by Obama—have decreased the revenue per trip for Hawaiian longline fishermen by $3.5 million.[109] As one lobsterman shut out by Obama's Northeast Canyons and Seamounts monument told the Associated Press, "For people who live and work

on the water, this is terrifying. . . . This is the government using eminent domain on your workplace."[110]

For several reasons, the threat to liberty is growing. First, power tends to fill a vacuum. In *Federalist* essay no. 48, James Madison famously observed that "power is of an encroaching nature,"[111] and so it is here. By insulating the president from reasonableness review, the Supreme Court lifted an important check on executive authority. Thus unencumbered, presidents have responded with ambition. They've pressed the advantage. Presidents, moreover, tend to "fortify expansions in their authority over time."[112] Such institutional accretion is evident in the examples mentioned earlier. Clinton created "ecosystem" monuments on land; Bush took them to the oceans. Trump started a trade war that Biden continued.

Finally, presidential exercises of statutory power create their own political momentum. Because the Founders feared an overbearing government, the Constitution makes it hard for Congress to pass laws.[113] Executive lawmaking, by contrast, requires no more than the swipe of the president's pen.[114] The comparative ease of executive action has not been lost on special interests across the political spectrum, who now focus much of their lobbying energies on the president.[115] Recently, for example, the Congressional Progressive Caucus called on President Biden to "declare a National Climate Emergency and invoke authorities under the Defense Production Act and Trade Expansion Act, mobilizing domestic industry to manufacture affordable renewable energy technologies with good paying union jobs for domestic use and international export."[116] The caucus got these ideas from the Trump administration.

These related dynamics create a feedback loop that serves to expand executive power. Presidents break norms to make unilateral law, which engenders political demand for more unilateral action by the lawmaker-in-chief. An unfortunate side effect is the exacerbation of political divisiveness, as the presidency has become the ultimate political prize in the ongoing contest between the two parties.

PROPOSED FRAMEWORK FOR JUDICIAL REVIEW OF THE PRESIDENT'S STATUTORY POWERS

According to the Supreme Court, "arbitrary power and the rule of the Constitution cannot both exist."[117] Now, however, the constitutional system coexists with arbitrary presidential power, as described earlier. Something needs to be done. Assuming the necessity for action, the question then becomes how to act.

Professor Kovacs has argued that the Supreme Court should overturn its decision in *Franklin v. Massachusetts* and thereby subject the president to the APA's framework for judicial review.[118] She is right. Under the Court's *stare decisis* doctrine, there must be a "special justification" for overturning precedent.[119] Such a "special justification" exists, without a doubt, when the president leverages the *Franklin* decision to perpetrate ongoing abuses of discretion, as in recent years.

"It's a feedback loop that serves to expand executive authority. Presidents break norms to make unilateral law, which engenders political demand for more unilateral action by the lawmaker-in-chief."

If the Court insists on keeping this flawed precedent, then there is another way forward—one that wouldn't require the Court to overcome *stare decisis*. Outside the APA's framework, parties injured by government action may still seek what is known as *ultra vires* or "nonstatutory" judicial review. As the D.C. Circuit Court recently explained, "review for *ultra vires* acts rests on the longstanding principle that if an agency action is 'unauthorized by the statute under which [the agency] assumes to act,' the agency has 'violated the law' and 'the courts generally have jurisdiction to grant relief,'" as quoted from *American School of Magnetic Healing v. McAnnulty*.[120] Although it is more permissive than review under the APA, *ultra vires* review is nonetheless strong enough to check the arbitrary decisionmaking that characterized the case studies discussed earlier.[121] To win an *ultra vires* claim, the regulated entity must demonstrate a "patent," "obvious," or "apparent" violation of agency authority, or that the government's statutory interpretation is "utterly unreasonable."[122]

To be sure, *Dalton v. Spector* has been read by lower courts to foreclose meaningful review of the president's

regulatory powers under the *ultra vires* framework. But that reading is an overbroad interpretation of *Dalton*. As Professor Stack has persuasively argued, *Dalton*'s reach wanes when one accounts for the case's unique context.[123] In *Dalton*, again, the president faced a binary decision to accept or reject an independent commission's recommendations regarding which domestic military bases to close. The statute, moreover, did "not at all limit the President's discretion in approving or disapproving the Commission's recommendations."[124] And Congress condoned the president's action by overwhelmingly rejecting a resolution that would have checked his decision. Obviously, a yes-or-no decision on an expert recommendation—one that was tacitly approved by Congress—is far removed from the policymaking in the examples discussed earlier, where the president exercised broad discretion, abetted by bad-faith interpretations of his own statutory authority.

"The absence of a viable administrative record limits meaningful review of the president's regulatory power. The obvious remedy is for the Supreme Court to require a reasoned explanation."

With this background in mind, *Dalton* can be readily distinguished: its holding should not reach beyond its idiosyncratic setting. Chief Justice John Roberts recently seemed to lend support for this narrow reading of *Dalton*. In a 2021 statement, Roberts announced his interest in hearing a controversy that "might guide our review of the President's actions" under the Antiquities Act.[125] For all intents and purposes, the chief justice called for ideas on how to conduct substantive review of the president's powers. Such a request wouldn't make sense if *Dalton* precludes meaningful review of the president's authority.

How, then, could courts perform judicial review of the president's statutory powers? According to the D.C. Circuit, "the judicial role [within *ultra vires* review] is to determine the extent of the agency's delegated authority and then determine whether the agency has acted within that authority."[126] To this end, courts may craft "whatever scope of review [is] necessary to ensure that agency action [is] not *ultra vires*."[127] The next sections set forth ideas to inform *ultra vires* review of the president as delegatee.

Demand a Reasoned Explanation

Under the APA, courts must set aside any action that is "arbitrary and capricious." Courts have interpreted this language to require a "hard look" into the reasonableness of the agency's decisionmaking. To survive "hard look" review, agencies develop extensive administrative records to justify their rules. Of course, the APA's judicial review framework doesn't apply to the president, so presidents don't bother creating an administrative record when they regulate. As a result, presidential exercises of regulatory authority are based on the thinnest of justifications. In declaring a "national emergency," for example, President Trump provided one paragraph of explanation in a two-page notice.[128] Alas, such brevity is the norm.

The absence of a viable administrative record limits meaningful review of the president's regulatory power. After all, courts can't review what isn't there. The obvious remedy is for the Supreme Court to require a reasoned explanation. It's not necessary for the president to go to the same lengths as agencies, which commonly compile administrative records that are thousands of pages long. But something more is needed than a handful of conclusory statements, which is what presidents now provide in support of their regulatory initiatives. If the president continues to fail to provide a reasoned basis for the regulations issued, then courts must demand one.

Exhaust the Tools of Construction

Once courts have a reasoned explanation to work with, they can set about performing meaningful judicial review. As always, courts should start with the text of the statute. After exhausting the tools of statutory construction, courts may find that the legislative text speaks to the unreasonableness of the president's decisionmaking.

For example, President Trump's "emergency" permitted the president to reshuffle appropriations to pay for a border wall. In the 2019 spending bill, however, Congress included a specific appropriation for border wall construction.[129] Under traditional canons of statutory construction,

an appropriation for a specific purpose is exclusive of other, more general appropriations that might otherwise be applicable.[130] Congress's specific appropriation in 2019, therefore, served as a strong indication that Trump was being unreasonable when he unlocked spending on a border wall by declaring an "emergency."

The Antiquities Act provides another example. Under that statute, the president's regulatory power does not extend beyond "the smallest area compatible with the proper care and management" of the monument. The idea is that the president designates a "monument" and then regulates the surrounding land to protect the monument. But this distinction has become meaningless. Instead of identifying the "smallest area compatible with the proper care" of a discrete object, presidents today declare everything within a boundary to be part of an ecosystem monument. The result is to obviate the key limitation on presidential power (i.e., that it does not extend beyond the "smallest area compatible" with the monument's safety). Such a reading runs afoul of the long-established "superfluity" rule that courts should avoid interpretations that read text out of the statute. Whenever the president's interpretation violates a textual interpretive canon, courts should be on guard for unreasonable decisionmaking.

"After exhausting the tools of statutory construction, courts may find that the legislative text speaks to the unreasonableness of the president's decisionmaking."

After exhausting the traditional tools of statutory construction, courts might want to use extrinsic interpretive aids like legislative history to inform them as to whether the president is being unreasonable in exercising delegated authority.[131] For example, the legislative history of Section 232 tariffs clearly demonstrates that Congress did not intend for these "national security" actions to be used in place of other tariff-making procedures intended to address concerns not related to national security.[132] Yet President Trump justified Section 232 tariffs by expressly citing the relative difficulty of working through other statutory mechanisms for import relief.[133] Thus, the Trump administration was candid about how its "national security" tariffs contradicted convincing evidence of congressional intent. This is a sign of unreasonable decisionmaking.

Utterly Unprecedented?

Beyond the statutory text, the simplest way to determine whether a president is exercising statutory powers in an unreasonable manner is to look at whether those actions are unprecedented. For each of the case studies previously described, the president had never before advanced such expansive interpretations of the statutes in question. Whenever the president's authority breaks new ground, courts should be on the lookout for abuses of discretion.

In other contexts, courts already consider whether the government's action departs from history or tradition. For example, when the Supreme Court undertakes a "major questions" analysis to determine if a regulatory agency's interpretation of its own power is too expansive, the Court asks whether the action is of an "unprecedented nature."[134] This same inquiry could apply to judicial review of the president's statutory authority.

Patently Pretextual Reasoning?

When reviewing agency action, courts rely exclusively on the administrative record. A court may not reject an agency's "stated reasons for acting simply because the agency might also have had other unstated reasons," nor if "the agency might have been influenced by political considerations."[135] This principle "reflects the recognition that further judicial inquiry into executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided."[136] The Supreme Court, however, recognizes a narrow exception: on a "strong showing of bad faith or improper behavior," courts may inquire into "the mental processes of administrative decisionmakers" to ensure the agency isn't pretextually operating on impermissible grounds.[137]

At present, presidents aren't required to produce an administrative record; earlier, this paper argued that courts should demand (at least) a reasoned justification from presidents

when they exercise a delegation of regulatory authority. In reviewing a president's justification for regulatory actions, courts should maintain their narrow inquiry into whether the president's proffered rationale is undermined by a "strong showing of bad faith or improper behavior."

Concerns about pretextual reasoning are acute with regard to the president's statutory powers. In a famous law review article, then-professor Elena Kagan described the ascendancy of the president over Congress in modern federal government, which she called "presidential administration."[138] Her point is that presidents have become the driving force in domestic policymaking because of how they've managed regulatory policymaking. According to Kagan, presidential administration is fueled by political capital: presidents have taken the initiative on administrative policymaking because they can take credit for achieving policy "wins." It follows that presidents have a political incentive to crow about their unilateral policymaking, such that their true motivations are likely to become a matter of public record. In these circumstances, courts should not blind themselves to the obvious when presidents' public statements contradict their legal presentations.

President Trump, for example, repeatedly told the media that he'd declare a "national emergency" if Congress failed to meet his demands for spending on a border wall. He was similarly candid about the political calculations behind his "national security" tariffs, announcing at the signing ceremony that "we've been working on [these tariffs] since I came to office, *and long before I came to office*."[139]

There are other instances of plainly pretextual reasoning by presidents who aren't Trump. For example, in a challenge to one of President Clinton's landscape ecosystem monuments in Utah, a federal court acknowledged that "the record appears to support" that the "driving force" for the president's action was to stop a coal-mining operation after Congress's failure to do so.[140]

Wherever presidents demonstrate a "strong showing of bad faith," courts should be wary that they are abusing their discretion.

Lack of Discernible Limits

Arguably, the most important criterion for identifying an abuse of discretion is the absence of any discernible limits on the president's power. Under Section 232, for example, presidents Trump and Biden have reasoned that the nation's economic well-being supports military spending, so economic well-being is a matter of "national security." This syllogism, of course, broadens "national security," which formerly had been considered only in terms of military needs. The limitless nature of the president's purported power became evident during oral arguments in a challenge to President Trump's Section 232 tariffs, when the government insisted courts couldn't review the president's discretion to regulate peanut butter imports in the name of national security.

"Wherever presidents demonstrate a 'strong showing of bad faith,' courts should be wary that they are abusing their discretion."

Ecosystem monuments under the Antiquities Act present the same problem. If ecosystems are "monuments," then monuments are literally everywhere on earth, as there are ecosystems everywhere on earth. During oral arguments for a suit against one of President Obama's marine ecosystem "monuments," D.C. Circuit Court Judge Tatel asked point-blank, "What are the limits?" The government replied, in effect, that there are no limits, because the president's regulatory jurisdiction extended to all ecosystems, and the oceanic EEZ is an ecosystem.

These examples show that, in some cases, courts can use oral hearings to try to get a firm answer from government counsel regarding the limits of presidential authority under the statute. If the government can't provide any such limits, it's a warning sign that the president's discretion is amenable to abuse.

Arbitrary Government: You Know It When You See It

It would be impossible to identify all the possible signs that presidents might abuse their discretion. In addition to the ideas previously stated, courts could look to the factors associated with a "hard look" review of agency action:

- Did the agency rely on factors that Congress has not intended it to consider?

- Did the agency entirely fail to consider an important aspect of the problem?
- Does the agency's explanation for its decision run counter to its evidence?
- Is the agency's decision implausible?
- Did the agency upset reliance interests?[141]

Ultimately, this sort of review is informed by a know-it-when-you-see-it quality. On their face, the case studies discussed in this paper involve outcomes that seem incompatible with the underlying delegation. When an abuse of discretion is conspicuous, courts can rely on common sense.

Here, a ready comparison can be made with the Supreme Court's recent jurisprudence on qualified immunity, which is a doctrine that protects government officers from damages suits, even where their action is unlawful, unless their conduct violates "clearly established . . . constitutional rights."[142] Since the 1960s, this doctrine has erected a huge hurdle for civil rights plaintiffs because it generally requires them to identify a prior case with identical facts, which is as rare as identical snowflakes. During the past two decades, however, the Court has recognized an "obviousness" exception to the otherwise blanket protection afforded by the qualified immunity doctrine.[143] Simply put, the Court has reasoned that some fact patterns are obviously constitutional violations, regardless of whether there was a precedent.

Outside of qualified immunity, the Supreme Court often invokes "common sense" as an interpretive methodology.[144] The Court should make similar recourse to its instincts in reviewing the president's statutory powers.

When Review Should Be Unavailable

Meaningful judicial review should be presumptively available whenever individuals suffer an injury caused by an unreasonable exercise of the president's statutory authority. Still, care must be taken to account for the president's constitutional status, and in certain circumstances, judicial scrutiny might be inappropriate.

Although regulatory agencies possess no authority other than that conferred through statute, the president can draw upon constitutional authority in addition to any delegations of legislative authority. Article II is widely understood to grant implicit authority to the president in certain contexts, such as the conduct of foreign affairs or during an (actual) emergency.[145] The availability of review should depend on the extent the president relies on Article II to act.

Often, there's a straightforward answer to the question of whether the president's decisionmaking is properly before the courts. For example, Article II does not grant the president any authority to regulate public lands, so the Antiquities Act does not implicate the president's constitutional authority. Where powers are more evenly mixed between the political branches of government, it might be more difficult to discern whether the president's implicit Article II authority is present to such a degree that courts should close their doors to legal challengers.

> "If the government can't identify any limits on executive authority, it's a warning sign that the president's discretion is amenable to abuse."

In assessing whether judicial review of the president's statutory authority is appropriate, courts might ask whether the president's action would be impermissible "but for" a grant of legislative authority. For example, in promulgating "national security" tariffs, recent presidents have invoked their implied Article II authority, in addition to the authority granted under Section 232 of the Trade Expansion Act. The Constitution, however, gives Congress the express "Power To lay and collect . . . Duties," and the Supreme Court has described this tariff-making power as being "exclusive and plenary."[146] Indeed, the laying of duties is one of the few broad regulatory tasks that was once performed directly by lawmakers via a long series of detailed and specific tariff acts passed up through the early 20th century.[147] Given Congress's "exclusive and plenary" tariff power, it's highly doubtful that a president could impose peacetime tariffs (on NATO allies) on the basis of implied Article II presidential authority alone. Because the president's action would be unconstitutional "but for" a congressional authorization, these peacetime tariffs should be subject to meaningful judicial review.

It's important to note that judges wouldn't have to reinvent the wheel in deciding when to demur from reviewing presidential regulation. Since the Founding, courts have operated an analogous principle, known as the "political

questions" doctrine, that calls for judicial restraint whenever the Constitution commits decisions to the political branches (i.e., Congress and the president) alone.[148] By building on this well-established methodology, courts can ensure that judicial review respects the president's unique constitutional position.

"When it comes to the president's statutory powers, the Supreme Court is blinding itself to the evident truth of unreasonable presidential decisionmaking."

But before courts can assess whether the president possesses independent Article II authority—which would call for judicial restraint—they must first be able to understand what power the president claims. The problem is that presidents fail to explain their regulatory decisionmaking, as discussed earlier. Other than isolated and vague overtures to Article II, presidents don't discuss the constitutional basis for their regulatory actions.[149] This paper calls on courts to demand a reasoned explanation for regulatory action by presidents; as part of this explanation, presidents should provide a concise discussion of any constitutional bases for their regulatory action.

Sometimes, determining the availability of review will vex the court. Yet it's also true that the easy cases tend to be those that demonstrate egregious abuses of discretion. Getting rid of these worst examples, and nothing else, would go a very long way toward reining in the statutory powers of the president.

CONCLUSION

The courts protect individual liberties from arbitrary restraints. As Justice Neil Gorsuch recently averred, "This Court's duty is to the rule of law and the search for truth."[150] But when it comes to the president's statutory powers, the Court is failing this duty by blinding itself to the evident truth of unreasonable presidential decisionmaking.

Under the Constitution, no person can be above the law, even the president. No individual should be left at the mercy of unreviewable abuses of discretion backed by the state's power. "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied," in the words of Justice Louis D. Brandeis.[151] At present, however, the "supremacy of law" vanishes whenever the president acts as an agent of Congress. Instead, the law becomes whatever the president says it is.

Enough is enough. The Supreme Court must end the president's leeway to be unreasonable.

NOTES

1. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

2. See *Gundy v. United States*, 139 S. Ct. 2116, 2135–37 (Gorsuch, J., dissenting) (explaining historical basis of delegation).

3. For dueling contemporary histories of the administrative state, compare Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107, no. 6 (April 1994): 1231; and Gillian Metzger, "The Supreme Court, 2017 Term—Foreword: 1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131, no. 1 (November 2017).

4. See generally Clyde Wayne Crews, *Ten Thousand Commandments 2021: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, June 30, 2021.

5. See John P. Comer, *Legislative Functions of National Administrative Authorities* (New York: Columbia University Press, 1927), pp. 64–71 (discussing delegating to the president in foreign policy in the 18th and 19th centuries); and *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936) ("Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations."). Congress's practice of delegating to the president in foreign affairs has continued to the present. See, for example, 22 U.S.C. § 3921 (a) (authorizing the secretary of state, "under the direction of the President," to administer and supervise leasing, financing, and cooperative projects with a foreign country); 28 U.S.C. § 1610(f)(3) (allowing the president to issue a waiver of the attachment

of property of foreign states in actions to enforce judgments against them "in the interest of national security"); and 49 U.S.C. § 41304(b) (granting the secretary of transportation the authority "subject to the approval of the President" to suspend the permits of foreign air carriers).

6. See, for example, 19 U.S.C. § 2251 (authorizing the president to impose temporary trade measures if the U.S. International Trade Commission determines a surge in imports is a substantial cause or threat of serious injury to a domestic industry); 19 U.S.C. § 2411 (authorizing the trade representative, subject to a presidential veto, to impose import restrictions if it determines a U.S. trading partner is engaging in discriminatory or unreasonable practices that burden domestic commerce); 19 U.S.C. § 1862 (authorizing the president to impose tariffs if the Commerce Department finds that such imports threaten national security); and Kevin C. Kennedy, "Presidential Authority under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion," *Cornell International Law Journal* 20, no. 1 (1987): 127, 130–38 (explaining president's role in various international trade regimes).

7. Tom Lee and Jacqueline Varas, *The Total Cost of U.S. Tariffs*, American Action Forum, May 10, 2022.

8. Amy L. Stein, "A Statutory National Security President," *Florida Law Review* 70, no. 6 (2018): 1183, 1193; Exec. Order No. 13,873 (May 15, 2019), 84 Fed. Reg. 22689 (May 17, 2019); and Exec. Order No. 14,034 (June 9, 2021), 86 Fed. Reg. 31423 (June 11, 2021).

9. Defense Production Act of 1950, Pub. L. No. 81–774, 64 Stat. 798 codified at 50 U.S.C. Chapter 55; see also Scott Lincicome, "Shining a Much-Needed Light on the Defense Production Act," *Cato at Liberty* (blog), Cato Institute, April 26, 2021.

10. 8 U.S.C. § 1182(f).

11. The travel bans were announced in Proclamation 9645, Fed. Reg. 45161 (September 27, 2017); Proclamation 9723, 83 Fed. Reg. 15937 (April 13, 2018); and Proclamation 9983, 85 Fed. Reg. 6699 (February 5, 2020). See also David Bier, "The Basic Premise of Trump's Travel Ban Is Wrong," *Washington Post*, September 26, 2017; the insurance limitation was announced in Proclamation 9945, Fed. Reg. 53991 (October 9, 2019).

12. 8 U.S.C. § 1157(a)(2) (authorizing the president to establish any bar, limitation, or requirements on the admission of refugees when the president decides such action "is justified by humanitarian concerns or is otherwise in the national interest"); and Alex Nowrasteh and David Bier, "Immigration Policy by Presidential Decree," Pandemics and Policy, Cato Institute, December 2, 2020.

13. Pub. L. No. 94-412, 90 Stat. 1255 codified at 50 U.S.C. Chapter 34.

14. Brennan Center for Justice, *A Guide to Emergency Powers and Their Use*, Research and Reports, December 5, 2018 (tallying emergency powers); see also 43 U.S.C. § 1341 (authority to suspend leases); see also Part III § 1 (discussing authority to reshuffle funds on a declaration of a national emergency); and 47 U.S.C. §§ 606(d), (e) (authority to seize telecommunications infrastructure).

15. 43 U.S.C. § 1714 (authorizing the secretary of the interior, after a lengthy process to incorporate public feedback, to "withdraw" public lands settlement, sale, location, or entry, and regulate them for other values) with 54 U.S.C. § 320301 (authorizing president to designate "monuments" on public lands and to regulate these parcels as he sees fit).

16. 19 U.S.C. § 1671 (empowering the Commerce Department and the International Trade Commission to impose antidumping tariffs) with 19 U.S.C. § 1862 (authorizing president to impose tariffs in interest of "national security").

17. See Pub. L. No. 79-404, 60 Stat. 237, codified at 5 U.S.C. §§ 551, 706(2)(A).

18. *Franklin v. Massachusetts*, 505 U.S. 788 (1992); and *Dalton v. Specter*, 511 U.S. 462 (1994).

19. See Kevin M. Stack, "The Statutory President," *Iowa Law Review* 90 (2005): 539; Kevin M. Stack, "The President's Statutory Powers to Administer the Laws," *Columbia Law Review* 106 (2006): 263; and Kevin M. Stack, "The Reviewability of the President's Statutory Powers," *Vanderbilt Law Review* 62 (2009): 1171.

20. See Kathryn E. Kovacs, "Constraining the Statutory President," *Washington University Law Review* 98 (2020): 63.

21. Louis L. Jaffe, "The Right to Judicial Review II," *Harvard Law Review* 71 (1958): 769, 774.

22. Raoul Berger, "Administrative Arbitrariness: A Synthesis," *Yale Law Journal* 78 (1969): 965, 968–69 (explanations of arbitrary government).

23. See 5 U.S.C. § 706(2)(A) (requiring that a reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law").

24. *Nebbia v. New York*, 291 U.S. 502, 539 (1934); and *Delno v. Market St. Railway*, 124 F.2d 965, 967 (9th Cir. 1942) (using concept in context of appellate review of lower court).

25. "Final Report of Attorney General's Committee on Administrative Procedure," Department of Justice, January 22, 1941, pp. 7–9 (giving a brief history of the onset of the administrative state).

26. Kenneth C. Davis, *Administrative Law Text*, 3rd ed. (Eagan, MN: West Publishing Co., 1972), pp. 508–10.

27. Louis L. Jaffe, "The Right to Judicial Review I," *Harvard Law Review* 71 (1958): 401, 410 (describing the federal workings of the common law system as "something like a one-clawed lobster or an antique and partially dismembered torso"); Clark Byse and Joseph V. Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action," *Harvard Law Review* 81, no. 2 (1967): 308, 310–13 (discussing how, before 1962, the common law remedy of mandamus was available only in the District of Columbia jurisdiction).

28. Davis, *Administrative Law Text*, 509.

29. Louis L. Jaffe, "Judicial Review: Question of Fact," *Harvard Law Review* 69, no. 6 (1956): 1020, 1021.

30. John Dickinson, "Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review," *American Bar Association Journal* 33 (1947): 434, 516.

31. Pub. L. No. 89-554, 60 Stat. 237, codified at 5 U.S.C. §§ 701–706.

32. See, for example, Christopher J. Walker, "The One Time I Agreed with Ian Millhiser (on Constitutional Law, No Less!)," *Notice & Comment* (blog), *Yale Journal on Regulation*, March 6, 2018; Jeremy Rabkin, "The Origins of the APA: Misremembered and Forgotten Views," Center for the Study of the Administrative State Working Paper no. 21-05, at 23; and Pat McCarran, "Improving 'Administrative Justice': Hearings and Evidence; Scope of Judicial Review," *American Bar Association Journal* 32 (1946): 827, 893.

33. 5 U.S.C. § 702.

34. 5 U.S.C. § 706(2); and Dickinson, "Administrative Procedure Act," pp. 434, 516 (1947) (explaining how the APA broadened judicial review).

35. 5 U.S.C. § 706(2)(A).

36. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

37. 5 U.S.C. §§ 701(b)(1) and 702.

38. 5 U.S.C. §§ 701(b)(1)(A), (B) (excluding "the Congress" and "the courts of the United States" from the definition of an "agency").

39. See Kovacs, "Constraining the Statutory President" ("A President who acts pursuant to a congressional delegation of authority should be subject to the same constraints as any other statutory delegate.").

40. See, for example, Berger, "Administrative Arbitrariness"; and Kenneth C. Davis, "Administrative Arbitrariness – A Postscript," *University of Pennsylvania Law Review* 114 (1966): 823, 832.

41. See *DeRieux v. Five Smiths Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974) (expressing a "reluctance to decide the question"). Some courts suggested that the president was subject to the Administrative Procedure Act, while others suggested otherwise. Compare *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (three-judge panel) (suggesting in dicta that the president is an agency under the APA) with *Senate Select Com. on Pres. Campaign Activities v. Nixon*, 366 F. Supp. 51, 58 (D.D.C. 1973) (suggesting opposite).

42. *Franklin*, 505 U.S. 788.

43. *Franklin*, 505 U.S. at 791–96 (explaining 13 U.S.C. § 141(a)).

44. Judicial review under the Administrative Procedure Act is limited to "final agency action." See 5 U.S.C. § 704.

45. *Franklin*, 505 U.S. at 800–801.

46. *Franklin*, 505 U.S. at 801.

47. See Kathryn Kovacs, "A Day in the Life of an Administrative Law Nerd," *Notice & Comment* (blog), *Yale Journal on Regulation*, October 29, 2018; see also Kovacs, "Constraining the Statutory President."

48. *Ultra vires* review is discussed in greater detail in a later section.

49. *Dalton v. Specter*, 511 U.S. 462 (1994); see generally Larry Alexander and Evan Tsen Lee, "Is There Such a Thing as Extraconstitutionality?: The Puzzling Case of *Dalton v. Specter*," *Arizona State Law Journal* 27 (1995): 845 (criticizing the decision).

50. Defense Base Closure and Realignment Act of 1990 (1990 Act or Act), 104 Stat. 1808, codified at 10 U.S.C. § 2687 (since repealed) at § 2903.

51. *Dalton*, 511 U.S. at 466.

52. *Dalton*, 511 U.S. at 476.

53. *Dalton*, 511 U.S. at 476 (quoting *United States v. George S. Bush & Co.*, 310 U. S. 371, 380 (1940).

54. *Dalton*, 511 U.S. at 474 (quoting *Dakota Central Telephone Co. v. South Dakota* ex rel. Payne, 250 U.S. 163, 184 (1919)).

55. 2 James Wilson, Works 393 (Andrews ed. 1896).

56. Pub. L. No. 59–209, 34 Stat. 225, codified at 54 U.S.C. §§ 320301–320303.

57. See Richard H. Seamon, "Dismantling Monuments," *Florida Law Review* 70 (2019): 553, 561–67 (discussing legislative purpose); and 40 Cong. Rec. S7888 (daily ed. June 5, 1906) (statement by Rep. John Lacey, the Antiquities Act's sponsor, that statute would affect "not very much" land).

58. Seamon, "Dismantling Monuments." ("Although the text and history of the Antiquities Act evince an intent to allow the President to set apart fairly small parcels of land to protect discrete antiquities, from the very beginning presidents have sometimes used it to create massive monuments.")

59. Proclamation 794, 31 Stat. 2175 (January 11, 1908).

60. Proclamation 1733, 43 Stat. 1988 (February 26, 1925).

61. Bruce Babbitt (Secretary of the Department of the Interior), "Is There a Monumental Future for the BLM?" (address at the Sturm College of Law of the University of Denver, Denver, CO, February 17, 2000) (describing an evolution of presidential regulation under the Antiquities Act, starting with the designation of "curiosit[ies]" and, during the Clinton administration, expanding to the protection of entire ecosystem).

62. Proclamation 7295, 65 Fed. Reg. 24095 (April 25, 2000).

63. *Tulare County v. Bush*, 185 F. Supp. 2d 18, 23 (D.D.C. 2001); and Proclamation 7295, 65 Fed. Reg. 24095 (April 25, 2000).

64. *Tulare County v. Bush*, 306 F. 3d 1138, 1142 (D.C. Cir. 2002) (explaining the president's reasoning).

65. See *National Geographic*, Resource Library: Encyclopedia ("The whole surface of Earth is a series of connected ecosystems.").

66. 54 U.S.C. § 320301(b).

67. See, for example, *Tulare County v. Bush*, 317 F. 3d 227 (D.C. Cir. 2003) (denying petition for en banc review) ("The allegation that Sequoia groves comprise only six percent of the Monument might well have been sufficient if the President had identified only Sequoia groves for protection, but he did not; the Proclamation covered natural resources present throughout the Monument area.").

68. "National Monuments and the Antiquities Act: President Clinton's Designations and Related Issues," Congressional Research Service RL30528: CRS-4, June 28, 2001.

69. See *United States v. California*, 436 U.S. 32, 35–36 (1978) (recognizing that presidents only designated monuments in areas where the federal government exercised "full dominion and power").

70. Proclamation 8031, 71 Fed. Reg. 36443 (June 15, 2006).

71. See Proclamation 5030, 48 Fed. Reg. 10605 (March 14, 1983) (establishing the EEZ).

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129. 2019 Consolidated Appropriations Act, Pub. L. No. 116-6 (2019), 133 Stat. 13 at § 230(a)(1) (providing $1,375 billion for the construction of primary pedestrian fencing and stating that none of the funds can be used "for the construction of pedestrian fencing" in any other areas of the border) and Division D, § 739 ("None of the funds made available in this

or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.").

130. *Nevada v. Department of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) ("An appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation.").

131. To be sure, these sorts of purposive inquiries can obfuscate textual clarity, which is why they should be employed gingerly and only after exhausting the tools of statutory construction.

132. See H.R. Rep. 1761, 85th Cong., 2d Sess. 13 (1958) ("The national security amendment is not an alternative to the means afforded by [statute] for providing industries which believe themselves injured a second court in which to seek relief.").

133. See Department of Commerce, "The Effect of Imports of Steel," p. 28 ("Given the large number of countries and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel, or attempts to transship or evade remedial duties.").

134. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (citations and quotations omitted).

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136. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268, n. 18 (1977).

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144. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (using common sense approach in upholding broad standards as "a reflection of the necessities of modem [securities] legislation dealing with complex economic and social problems");and *J.W. Hampton, Jr. v. United States*, 276 U.S. 394, 407–8 (1928) (upholding, as a matter of "common sense," legislation that gave a presidential commission the power to fix rates in accord with general objectives); compare with *United States v. Midwest Oil Co.*, 236 U.S. 459, 472 (1915) (implying congressional acquiescence to the president's power to withdraw public lands, and remarking that "government is a practical affair intended for practical men").

145. Ilya Wurman, "The Removal Power: A Critical Guide," *Cato Supreme Court Review*, 159–67 (2019–2020) (canvassing various theories of Article II authority).

146. U.S. Const. art. I, § 8; see *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933).

147. See George Bronz, "The Tariff Commission as a Regulatory Agency," *Columbia Law Review* 61 (1961): 463, 464 (listing tariff acts).

148. See *Nixon v. United States*, 506 U.S. 224, 228 (1993) ("A controversy is nonjusticiable—i.e., involves a political question—where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.).

149. See, for example, Proclamation 9705, 83 Fed. Reg. 11625 (March 15, 2018) (steel tariffs) (citing as a basis only "the authority vested in me by the Constitution and the laws of the United States of America").

150. *United States v. Zubaydah*, No. 20-827 (decided on March 3, 2022), slip op. at 30 (Gorsuch, J., dissenting).

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