Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies

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Throughout American history, presidents of the United States have sought to direct or otherwise control the numerous agencies of the federal government. Depending upon the nature of the presidential incursion and the political climate of the time, Congress, the Supreme Court, and others have decried these attempts to control the agencies, claiming that the president had overstepped the boundaries of his constitutional power. The most recent controversy arose over Executive Order 12,291,1 and its successor, Executive Order 12,498.2 The impetus for both of these orders was President Reagan's perception that the federal government agencies overregulate. The orders provide for the Office of Management and Budget (OMB) to supervise and direct certain rulemaking efforts of all executive branch agencies.

Some members of Congress and many public interest groups, especially those concerned with environmental protection, have vigorously protested these executive orders and contend, inter alia, that the president's assertion of power is unconstitutional.3 These groups

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argue that the orders disrupt the balance of power between the executive and legislative branches of the federal government by giving the president undue control over agency rulemaking. Therefore, in promulgating the orders, President Reagan has usurped power which properly belongs either to Congress or to the agencies themselves.

This article, after reviewing the historical use of executive orders, will explore the constitutional controversies surrounding Executive Order 12,291 and the promise of similar disputes over Executive Order 12,498. Whatever one's opinion of the policy prescriptions contained in President Reagan's executive orders, the actions taken therein fall squarely within the president's constitutional authority. OMB abuse of this authority should be controlled on a case-by-case basis by the federal courts, as it has been in the past.

I. An Abbreviated History of Presidential Control Over Executive Branch Actions

The actions and opinions of former presidents provide a useful perspective from which to judge Reagan's orders. Some knowledge of the history of presidential control by executive order illuminates the proper understanding of the modern Reagan orders and animates our interpretation of the Constitution. The evidence from our more prominent chief executives demonstrates the extensive scope of presidential powers.

A. The Early Presidents

The history of the executive order begins with our first president, George Washington. Although President Washington issued proclamations which had the effect of today's executive orders, Executive Order 1 was not issued by Washington but by President Lincoln. The orders were not numbered until 1907, when the State Department decided to organize all executive orders numerically, including the old orders which it had on file. See Note, Presidential Power: Use and Enforcement of Executive Orders, 39 Notre Dame L. Rev. 44, 44, 46 n.17 (1963). See also Special Commit-
view of presidential authority, as evidenced by his neutrality proclamation, which enjoined all U.S. citizens from engaging in any "acts and proceedings whatsoever, which may in any manner tend to contravene such disposition . . . [of] conduct friendly and impartial toward the belligerent powers . . ." Given his broad view of presidential power over all citizens, it is not surprising that Washington also felt able to direct the actions of his subordinates in the executive branch. The neutrality proclamation of 1793 also "gave instructions to those officers . . . to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers of war, or any of them."

The neutrality proclamation is not the only example of Washington's assumption of broad presidential powers. Before he issued the proclamation, Washington had declared his power to remove heads of departments. Furthermore, his assumption of control over the members of the government departments is graphically illustrated by his decision to personally review all the correspondence prepared by his cabinet officials prior to its mailing.

Our second president, John Adams, also asserted control over all executive departments. Although there is no evidence that Adams continued Washington's policy of reviewing all cabinet correspondence, it is clear that he thought he was the master of the executive branch. For instance, when he fired Secretaries Pickering and McHenry, Adams "completed the demonstration of his supremacy in
Executive affairs. . . ."11

Prior to his election as our third president, Thomas Jefferson was generally regarded as an opponent of expanded power for the federal executive. Once inaugurated, however, Jefferson showed his willingness to assert broad presidential powers. Seldom has a president unilaterally assumed such power as Jefferson did in the Louisiana Purchase.12 In addition, Jefferson’s willingness to exert executive power led to the foremost case in American constitutional history, *Marbury v. Madison.*13 This case was precipitated when President Jefferson ordered his secretary of state to withhold a judicial commission from William Marbury.14 Still more significant was Jefferson’s explicit approval of President Washington’s practice of reviewing the correspondence of his cabinet officials:

By this means, [Washington] was always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever Department they related; he formed a central point for the different branches; preserved a unity of object and action among them; exercised that participation in the suggestion of affairs which his office made incumbent on him; and met himself the due responsibility for whatever was done.15

Jefferson thus adopted Washington’s practice for his own administration.16

James Madison, our next president, did not exert the degree of

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own political ambitions at the expense of President Adams. See R. Hildreth, *5 The History of the United States of America* 370-375 (2d ed. 1879).

11 M. Hinsdale, *A History of the President’s Cabinet* 35 (1911). In two out of the three controversies involving Adams and his cabinet during his administration, Adams prevailed. The first of these involved the appointment of commissioners to be dispatched to France in 1797. Despite initial disapproval by his cabinet, Adams persevered and succeeded in awarding a position to Elbridge Gerry. Id. at 37. Adams second victory was the resumption of formal diplomatic relations with France over much protestation by his cabinet. Id. at 34.

12 See, e.g., R. Tugwell, supra note 13, at 54 (the famous acquisition was accomplished “through one of the most momentous of all the enlargements of the presidential power, and by a President who had believed it ought not to be done in the way he settled on.”).

13 5 U.S. (1 Cranch) 137 (1803).

14 *The Marbury* Court recognized that the President’s “political powers, in the exercise of which he is to use his own discretion.” Id. at 166.

15 OMB Hearings, supra note 9, at 224 (prepared statement of James Miller, quoting President Jefferson’s Circular to the Heads of Departments, November 6, 1801).

16 See DeMuth & Ginsburg, supra note 9, at 1075. Interestingly, Jefferson’s Secretary of Treasury, Albert Gallatin, complained that Congress was seeking to give him too much power independent of the president. Gallatin preferred to receive “orders” from Jefferson. See M. Hinsdale, supra note 11, at 44-45.
broad control over the executive branch as had his predecessors. Nevertheless, Madison claimed the power to intervene in the decisions of cabinet when he so chose. President Madison appointed an "ornamental" secretary of state and directly discharged the duties of that office while serving as president. Nor was Madison hesitant to use his power of removal. While Madison the writer sometimes appeared to be a foe of executive power, Madison the president exercised dominion over subordinate members of the executive branch.

As this brief historical survey shows, our earliest presidents, whether Federalist or Democratic-Republican, believed that they possessed control over the departments in the executive branch. They were as concerned with effectuating their policy objectives as later presidents have been. As one congressional report acknowledged:

> [f]rom the time of the birth of the Nation, the day-to-day conduct of Government business has, of necessity, required the issuance of presidential orders and policy decisions to carry out the provisions of the Constitution that specify that the President, "shall take Care that the Laws be faithfully executed."

### B. The Latter Nineteenth Century

The expansive view of presidential power over the executive branch did not diminish over time. Andrew Jackson took a strong stand on behalf of the prerogative of his office. President Jackson discharged his treasury secretary as part of his battle against the National Bank and justified his action on the theory that "the entire executive power is vested in the President." According to Jackson, the secretary of the treasury, in the "performance of these [constitutionally assigned] duties . . . is subject to the supervision and control of the President, and in all important measures having relation to

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17 See M. Hinsdale, supra note 11, at 51.
18 See id. at 52. Madison's activities in the State Department extended to "redrafting ordinary correspondence." Id.
19 For example, in 1811 Madison had called for the resignation of Robert Smith, his secretary of state. Id. at 52-53. Madison sought and received the resignation of Secretary of War John Armstrong. Id. at 56-57.
them consults the chief magistrate and obtains his approval and sanction. . . .

Although controversial, Jackson’s view was affirmed at the time by none other than former President James Madison.22

A similar situation arose when President Jackson ordered his attorney general to cease condemnation proceedings over a set of jewels owned by the Princess of Orange. Jackson’s attorney general, future Chief Justice Roger Taney, concluded that the president possessed the power to direct his attorney general to dismiss the prosecution.24 Taney wrote that as a procedural matter the attorney general must himself issue the edict dismissing the case, but that the president had the authority to order this decision, backed up with the threat of removal.25 These episodes were not unique, and it has been said that Jackson treated his cabinet secretaries “more like a General’s orderlies than high civil officials.”26

President James K. Polk followed Jackson’s precedent. Polk “undertook to make reality of the principle sought to be established by Washington, that the executive branch of the government was one whole to be managed by the President alone.”27 To further this end, Polk refused to allow his cabinet members to speak to Congress without his permission and monitored all of their budget requests.28

Our sixteenth president, Abraham Lincoln, continued to interpret presidential powers expansively. President Lincoln used his executive order authority to suspend the writ of habeas corpus, to emancipate slaves, and to provide for the trial of civilians in military courts.29 Lincoln’s assertions of authority over the cabinet were dwarfed by these edicts to the entire citizenry. Of course, these aggrandizing actions occurred in the midst of the Civil War and

22 Id. at 60-61.
25 Id.
26 M. Hinsdale, supra note 11, at 313-14.
27 R. Tugwell, supra note 8, at 134-35.
28 Id. at 135.
29 See generally Comment, supra note 5, at 689-690. When necessary, Lincoln overrode the decisions of his cabinet. See, e.g., M. Hinsdale, supra note 11, at 178 (recounting how Lincoln retracted the decision of his Secretary of War Simon Cameron to arm fugitive slaves for the Union army. Lincoln ultimately dismissed Cameron for insubordination).
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should not be considered representative of presidential authority in less traumatic times. Nevertheless, Lincoln can be counted among the exponents of broad presidential powers.30

Led by Jackson, the latter half of the nineteenth century witnessed the consolidation of executive power in the president’s hands. As described by one respected commentator:

[Presidents] strove vigorously to establish their right to control the heads of departments and, through them, other subordinate officers. The understanding and the cooperation of Congress and the courts were soon forthcoming. By the combined action of the three branches of government the principle of superior control became firmly rooted in the second half of the nineteenth century.81

C. Twentieth Century

Presidential authority over the executive branch of the federal government has not diminished in the current century, although the nature of presidential control has changed. The number of executive agencies has increased dramatically, and it is no longer practical for a president to review all executive correspondence, as did Washington and Jefferson. Instead, presidents have been compelled by circumstances to delegate some supervisory power to trusted individuals or bureaus within the executive office.

Theodore Roosevelt began the century by taking an extremely expansive position of presidential power. Addressing the broader constitutional issues, Roosevelt contended that the president needed no “specific authorization” for his powers but could “do anything that the needs of the nation demanded unless such action was for-

30 In fact, Lincoln ascribed to the “presidential prerogative theory of executive action,” which essentially states that the President has an inherent duty to act at his discretion for the good of the public, even if he has no legal authority to do act. Comment, Presidential Legislation by Executive Order, 37 U. Colo. L. Rev. 105, 108-09. Regarding the president’s control over the executive branch, Lincoln believed that some members of the civil service were disloyal, and he therefore confided some “governmental duties” to private citizens whom he could trust, rather than to government officials. See R. Tugwell, supra note 8, at 179 n.12.

81 Zamir, Administrative Control of Administrative Action, 57 Cal. L. Rev. 867, 873 (1969). Even the less capable presidents of the latter part of the nineteenth century exercised some control over the actions of the heads of executive branch departments. See M. Hinsdale, supra note 11, at 324 (describing actions by Presidents Grant, Cleveland, and others overruling the decisions of the secretary of the interior).
bidden by the Constitution or by the law." This became known as the "stewardship theory" of presidential powers. The first President Roosevelt used this theory to intervene a number of times to resolve industrial disputes and to withdraw land from private control, at times defying express congressional directions. Theodore Roosevelt's use of executive power thus went far beyond the mere control of administrative actions.

In 1921, a development occurred which had enormous practical significance for presidential control over executive agencies. In that year, Congress created the Bureau of the Budget, and gave the newly created bureau the power "to assemble, correlate, revise, reduce, or increase the [budget] estimates of the several departments or establishments." Congress located the new bureau in the Treasury Department. President Harding promptly expanded the mandate of the new bureau to include "central clearance" of legislative proposals that might involve presidential spending. In short, the "[b]ureau began to act as [the president's] eyes and ears in finding out what was taking place and in modifying or changing administrative actions." Since this time, the authority of the bureau over

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32 Gibson, The President's Inherent Emergency Powers, 12 Fed. B.J. 113 (1913) (quoting from Roosevelt, An Autobiography 388-89). Roosevelt reportedly believed "that the Presidency was the paramount Governmental office, not to be subordinated in any way to the other Branches or to be managed in any other interest than that of itself as representative of the whole." R. Tugwell, supra note 8, at 267.

33 See E. Corwin, supra note 8, at 154; Comment, supra note 5, at 690. A third theory of presidential powers, the "constitutional theory", was advocated by President Taft: "[t]he true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to exercise." Comment, supra note 30, at 108 (quoting from W.H. Taft, Our Chief Magistrate and His Powers 16 (1925)). In principle, Taft opposed the stewardship theory as too broad; in practice, however, Taft stepped beyond the limits of the constitutional theory and employed the stewardship theory when he withdrew public oil lands from private acquisition. E. Corwin, supra note 8, at 153.

34 Roosevelt maintained strict control of his cabinet as well. See M. Hinsdale, supra note 11, at 272 (criticizing cabinet secretaries of the time for being mere "echoes and adulators" of Roosevelt).

35 For instance, one commentator describes the creation of the Budget Bureau as "the greatest change in the character of the office of the President since the first organization of the government." R. Tugwell, supra note 8, at 396. For a general overview of the management authority and history of the Bureau of the Budget and Office of Management and Budget, see Benda & Levine, OMB and the Central Management Problem: Is Another Reorganization the Answer?, 46 Pub. Admin. Rev. 379 (1986).

36 42 Stat. 22 (1921).


38 R. Tugwell, supra note 8, at 401.
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other government agencies has grown steadily.

President Franklin Roosevelt wielded great authority, both di-
rectly and indirectly, through the Bureau of the Budget. Having
apparently adopted President Lincoln’s “presidential prerogative”
theory of the presidency, Roosevelt used executive orders to create
whole new agencies with great economic powers. Franklin
Roosevelt was especially active in asserting control over executive
agencies. Not only did Roosevelt give the Bureau of the Budget “ex-
panded authority to review substantive policy proposals from agen-
cies and testimony to congressional committees,” but he also cre-
ated a committee to plan the overhaul of the executive branch.
According to this committee:

The commissions produce confusion, conflict, and incoherence in
the formulation and in the execution of the President's policies.
Not only by constitutional theory, but by the steady and mounting
insistence of public opinion, the President is held responsible for
the wise and efficient management of the Executive Branch of the
Government.48

In response to the conclusions of the committee, Roosevelt trans-
ferred the Budget Bureau from the Treasury Department to the
newly established Executive Office of the President.49 With this act,
the president also expanded the charge of the bureau.44

Roosevelt’s presidency saw the burgeoning of the federal adminis-
trative apparatus as part of the New Deal, and a correlative recog-
nition of the importance of presidential control over agencies. This
era also witnessed a new development in use of this power — exec-
utive orders intended to eradicate discrimination based on race. Be-
beginning with Roosevelt, and continuing with Truman, Eisenhower,
Kennedy, Johnson, and Nixon, American presidents have ordered

30 See Gibson, supra note 32, at 114 (discussing how, in a 1942 message to Congress, FDR
claimed that the president had the power to disregard congressional legislation in times of emergency); Comment, supra note 30, at 108.
40 See S. Rep. No. 1280, supra note 5, at 26. In April 1942, there were 35 federal agencies of
purely presidential creation. E. Corwin, supra note 8, at 242.
41 43 Cong. Q. Weekly Rep., supra note 37, at 1810.
42 E. Corwin, supra note 8, at 96.
44 The Bureau was directed, inter alia, to “keep the President informed of the progress of activities
by agencies” and “to advise the executive departments and agencies of the Government with respect to
improved administrative organization and practice.” Id. at 577.
the departments and agencies of the federal government not to do business with organizations that discriminate against blacks. In so doing, these presidents issued a direct order to members of the executive branch regarding their administration of federal law.

D. Preliminary Conclusions

As the preceding historical sketch indicates, presidents have consistently assumed control over all activities of the executive branch, from giving direct orders to supervising cabinet correspondence. Furthermore, the strongest proponents of such presidential power have been those presidents generally considered to be the greatest in our history — Washington, Jefferson, Jackson, Lincoln, and the Roosevelts. We have also witnessed the creation of a centralized budget clearinghouse in the Office of the President which monitors and controls the activities of the various departments and agencies of the executive branch. The long-standing tradition of such presidential control may itself assume legal significance, confirming the constitutionality of the practice. While past executive actions were not all as comprehensive or systematic as the Reagan orders, this distinction is a relatively small difference of degree.

Importantly, the history of presidential control has not broken down along partisan lines. While liberal Democrats of today may bemoan the exercise of executive branch control by President Reagan, past claimants of such power have included some of our more liberal presidents. Although couched in procedural constitutional terms, it appears that the critics’ true complaint deals with substan-

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* Conversely, those presidents who took a narrower view of their powers “turned out to be the least respected Presidents — Grant, Taft, Harding, Coolidge, and Hoover, for instance.” R. Tugwell, supra note 8, at 139.

* Justice Frankfurter once suggested that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive power’ vested in the President by § 1 of Art. II.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring). See also Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (stating that Congress’ long-standing acquiescence to executive action may be construed as consent to the practice).
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tive policy outcomes.\textsuperscript{48} Such an approach is dangerous, in light of the important executive orders aimed at ending racial discrimination. Critics must take care in dumping out the bathwater of Reagan’s executive orders lest they throw out the civil rights baby as well.

A look at more recent history reveals a continued support for broad presidential powers. With the further growth of federal agencies, presidents have sought to restrain the economic costs of rulemaking. President Reagan’s Executive Order 12,291 largely follows the patterns established by three former presidents, Nixon, Ford, and Carter.

E. Presidents Nixon, Ford & Carter

Presidential control over the executive branch expanded considerably in the 1970s. New procedures were established to give heightened effect to the powers historically claimed by presidents. The first significant step was the transformation of the Bureau of the Budget into the Office of Management and Budget (OMB) in 1970.\textsuperscript{49} This change took account of the increasing non-budgetary role of the bureau in “managing” various agencies.\textsuperscript{50} Although the modification met some opposition in Congress, it was ultimately approved, shifting the bureau’s power further within the president’s sphere of control.\textsuperscript{51}

Nixon quickly employed the newly structured OMB to oversee various agency activities. This process, referred to as “Quality of Life Review,” involved OMB supervision of new agency regulations and focused on the Environmental Protection Agency (EPA).\textsuperscript{52}

\textsuperscript{48} See, e.g., Schuck, The Deregulation Game, Wash. Post, Jan. 8, 1984, Book World, at 4 (reviewing some critics of deregulation who appear to make “a reflexive defense of regulation — almost any regulation, it seems, so long as it sounds humane.”).

\textsuperscript{49} This change was made in 1970 pursuant to President Nixon’s executive reorganization plan. See Congressional Research Service, 99th Cong., 2d Sess., Office of Management and Budget: Evolving Roles and Future Issues 185 (Comm. Print 1986) [hereinafter OMB Print].

\textsuperscript{50} President Johnson made expanded use of the Bureau of the Budget to oversee and influence agency regulations. See Olson, supra note 3, at 9.

\textsuperscript{51} See 43 Cong. Q. Weekly Rep., supra note 37, at 1810. The bureau, originally placed by Congress in the Treasury Department, was moved to the Executive Office of the President by Franklin D. Roosevelt. See supra text accompanying note 43.

\textsuperscript{52} See OMB Print, supra note 49, at 198.
“Quality of Life Review” was implemented to mitigate the economic ill-effects of environmental regulation and to promote compromise among the involved federal agencies. President Ford continued and expanded the review process. During his presidency, the rising inflation rate was of special economic concern, and Ford initiated a requirement that “major” federal rules include an “inflation impact statement.” These statements were to be reviewed by the newly formed Council on Wage and Price Stability. It was OMB’s responsibility to implement the order by establishing the procedures necessary to conduct the inflation analysis. In addition to these formal procedures, President Ford on at least one occasion intervened in an ad hoc manner and directed the Department of Health and Human Services to suspend a recently adopted rule so it could be reexamined.

President Jimmy Carter abolished the Nixon and Ford agency oversight programs and replaced them with one of his own. A goal of his Executive Order 12,044 was to introduce a cost analysis into the rulemaking process by compelling agencies to consider the costs of the proposed rule and of feasible alternatives to regulation. Agencies were directed to employ a substantive criteria and select the “least burdensome of the acceptable alternatives.”

Unlike the prior orders, Carter’s did not rely on OMB for regulatory supervision but created two new interagency organizations: the Regulatory Analysis Review Group (RARG) and the Regula-
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tory Council. Nevertheless, OMB played a significant role in the implementation of President Carter's order: working with the various agencies to improve the methodology of the cost analysis and monitoring the agencies' compliance with the order.

The Carter order was positively received by the regulatory community because it preserved a significant review role for the heads of agencies. Nevertheless, presidential involvement in rulemaking was substantial. The Carter order spawned numerous rulemaking innovations designed to ease the economic burden of regulations. Executive Order 12,044 "achieve[d] results similar to those attained by the OMB 'quality of life review' used in the Nixon and Ford Administrations, but without the same political costs." This is not to imply that President Carter's imposition of a cost analysis on agencies considering new rules was not controversial. For instance, environmental groups challenged the Environmental Protection Agency's use of an econometric model to assess the economic impact of proposed regulations in Sierra Club v. Costle.

Nixon, Ford, and Carter recognized a need for some centralized supervision of agency activities, primarily for alleviating the economic burdens of regulation. Although their programs differed in certain material aspects, all of these presidents asserted a significant degree of control over executive branch agencies, often through the OMB.

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61 See OMB Print, supra note 49, at 199-200 (explaining the roles of the RARG and the Regulatory Council).
63 Although Executive Order 12,044 directed the agencies to consider the economic impact of a newly proposed rule vis-a-vis other alternatives, the agency heads were responsible for deciding what weight to give these economic factors. See OMB Print, supra note 49, at 200.
64 Davis, Presidential Control of Rulemaking, 56 Tul. L. Rev. 849, 851 (1982).
66 Verkuil, supra note 59, at 949 (citation omitted).
67 657 F.2d 298, 332-36 (D.C. Cir. 1981). Also at issue in Costle was the lawfulness of ex parte contacts between the Carter administration and the EPA. See id. at 400-08.
F. The Reagan Orders

President Reagan, in attacking what he considers to be "overregulation," expanded on the oversight programs of Presidents Nixon, Ford, and Carter. However, the Reagan orders go beyond prior presidential interventions and significantly expand the influence of the OMB.

1. Executive Order 12,291

The purposes of Executive Order 12,291 are clear from its preamble: "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations." To accomplish these goals, the order sets forth a new procedure for executive branch agencies engaged in rulemaking and grants supervisory authority for the order to the director of the Office of Management and Budget.

The most significant terms of the order apply to certain "major rules." For newly proposed major rules, agencies must prepare a regulatory impact analysis describing the potential costs and benefits of the rule, as well as alternative approaches with lower costs. This regulatory impact analysis is to be submitted to the OMB director, who may review and comment on the proposed rule prior to its promulgation.

While these provisions are primarily procedural, Executive Order 12,291 also contains a substantive component, directing the criteria to be applied by executive agencies in making decisions. These stan-

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70 See id. at § 6, 3 C.F.R. at 131.
71 Major rules are defined as those with an economic effect of $100 million or more, or those having other significant non-economic effects. Id. at § 1(b), 3 C.F.R. at 127.
72 Id. at § 3(d), 3 C.F.R. at 129.
73 Id. at § 3(e)-(f), 3 C.F.R. at 129-30.
dards apply to agencies “promulgating new regulations, reviewing existing regulations, and developing legislative proposals.” The most significant of these directives states that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.” Agencies also are ordered to select the alternative regulatory approach “involving the least net cost to society,” among other more general requirements.

In sum, Executive Order 12,291 imposes a requirement of something comparable to cost/benefit analysis for federal rulemaking. This requirement is to be effected through a detailed regulatory impact analysis and supervised by OMB. The administration recognized that the terms of the order might conflict with overriding legislative mandates to agencies and therefore restricted its application “to the extent permitted by law.” Therefore, although broad, the terms of the order defer to contrary congressional commands.

2. Executive Order 12,498

Executive Order 12,498 builds on Executive Order 12,291 and attempts to extend its principles to the regulatory planning process. The stated objective of the new order is to establish a process for coordinating the overall federal executive regulatory program in a manner consistent with administration policy. To the extent permitted by law, this new order applies primarily to “significant” rulemaking activities, as defined by the director of the OMB.

As was the case with Executive Order 12,291, the director of the OMB is authorized to ensure agency compliance with the order. In order to accomplish this goal, each agency is directed to submit its proposed regulatory policies to OMB every year, as well as information regarding regulatory actions currently underway or being

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74 Id. at § 2, 3 C.F.R. at 128.
75 Id. at § 2(b), 3 C.F.R. at 128.
76 Id. at § 2(d), 3 C.F.R. at 128.
77 Id. at §§ 2, 3, 3 C.F.R. at 128-29.
79 Id. at § 3(a), 3 C.F.R. at 324.
80 Id. at §4, 3 C.F.R. at 325.
81 Id. at § 2(b), 3 C.F.R. at 324.
82 Id. at § 3, 3 C.F.R. at 324.
planned. In so doing, the agency is to adhere to the substantive requirements set forth in Executive Order 12,291, including cost/benefit balancing. Executive Order 12,498 thus attempts to apply cost/benefit and other principles at an early stage of rulemaking development, when rules may be affected more easily.

The Reagan executive orders rather plainly reflect an ambitious and far-reaching attempt to manage the agencies of the executive branch. The numerous reporting and analysis requirements, combined with the OMB oversight, represent a significant procedural requirement well beyond prior presidential incursions into executive branch agencies. In their attempt to conform agency action to presidential policies, however, the orders are consistent with a long history of presidential actions from Washington's review of cabinet correspondence to Carter's imposition of a cost analysis on the rulemaking process.

II. The Constitutional Basis For Presidential Control Over the Executive Branch

The Reagan Executive Orders 12,291 and 12,498 have stirred up considerable controversy. Opponents of the orders argue that the president has violated the constitutional principle of separation of powers by assuming congressional authority to dictate substantive policy criteria to executive branch agencies. Even assuming, as the critics do, that the orders involve presidential policy directives to executive agencies, presidential assertion of such power is not unconstitutional.

The starting point for an analysis of presidential power to direct agency policies is the text of the Constitution and the government structure it contemplates. Although somewhat vague, the constitutional language offers substantial assistance in resolving this question. Several Supreme Court decisions reviewing the allocation of power between the legislative and executive branches provide a second basis for determining the validity of the Reagan orders. Al-

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83 Id. at § 1(a), 3 C.F.R. at 323.
84 Id. at § 1(d), 3 C.F.R. at 323.
85 This article is limited to the agencies generally considered to be within the executive branch and does not address the organizations usually described as independent regulatory agencies.
though these decisions have wavered somewhat over the years, they are further support for the president's authority over agency decisionmaking.

A. Textual and Structural Analysis of Article II

The Constitution defines the scope of presidential power in article II. That article provides, in relevant part:

Section 1. The executive Power shall be vested in a President of the United States of America. . . .

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of Executive Departments, upon any subject relating to the Duties of their respective Offices. . . .

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. . . . [H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States. 86

Commentators have complained that this language is exceedingly ambiguous and therefore precludes clear interpretation. 87 On the contrary, the only reasonable interpretation of this language clearly affords the president substantive power over the entire executive branch.

86 U.S. Const. art. II.
Beginning with section one of article II, the Constitution vests the president with "the executive power" in general and then goes on to provide more specific powers such as the power to appoint officers and to require opinions in writing. Although somewhat vague, this language should properly be deemed to vest all executive power in the president. As a term, "the executive power" reasonably implies all executive power. Had the Constitution's authors meant to limit this power, they presumably would have said "some executive power," or more likely, just "executive power" will be vested in the president. They did not do so, however, and the authorization for executive power does not repose in any other branch of the federal government.

Concededly, reliance on the term "the" is a slim reed for such an important conclusion, and some have argued that the executive power granted in article II is modified and limited by the more specific authorizations found later in section one of the article. This position becomes relatively untenable, however, when article II is compared with article I, which empowers Congress, and with article III, which deals with the judicial branch. All three articles follow a roughly parallel structure, with a general grant of authority followed by more specific enumerations. In article I, however, the Constitution only authorizes Congress to exercise "[a]ll legislative Powers herein granted . . . ." Similarly, article III grants the Supreme Court "the judicial Power," but then circumscribes this power by limiting the situations that the power "shall extend to." In both articles I and III, therefore, express language limits the

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88 This issue was a controversial one in the early days of the republic. Although disputed, there is ample contemporaneous support for the interpretation supported herein. See infra notes 211-26.
90 U.S. Const. art. I, § 1 (emphasis added).
91 U.S. Const. art. III, §§ 1, 2, cl. 1, state, in relevant part:
Section 1. The judicial Power of the United States, shall be vested in one supreme Court . . .
Section 2. [1] The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.
general authorization of power and confines the power to that which is specifically enumerated.

In contrast, article II places no comparable limitation on the presidential executive power. The contrast between the language of articles I and III and that of article II strongly suggests that the president’s executive power is not to be limited by the enumerated clauses. The United States Supreme Court has supported this interpretation of article II, holding that the “difference between the grant of legislative power under article I to Congress, which is limited to powers therein enumerated, and the more general grant of executive power to the President under article II, is significant.”

Thus, all executive power, whatever it consists of, is vested in the president. The definition of executive power is reserved for later, but it is well settled that the activities of modern policymaking agencies are executive in nature. Consequently, section one of article II provides strong support for substantive presidential control over agency policies. This conclusion is bolstered by consideration of the remainder of the article II text.

Section two of article II confirms a broad interpretation of presidential authority over the executive agencies. This section authorizes the president to “require the Opinion, in writing, of the principal officer in each of the executive Departments.” Facially, this authority seems most trivial, but its very triviality suggests that it may carry import beyond its mere words. If we are to presume that all parts of the Constitution have some significant meaning, this clause suggests that the president has control over the principal officers of the departments. Requiring an opinion, with no power to modify that opinion, seems pointless and unworthy of inclusion in our Constitution. This clause may more reasonably be seen as an

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92 The different grammatical construction of the articles was not coincidental. In the original draft of the Constitution, all three articles had wording comparable to that of article II. In the final drafting stages, a style committee was appointed, including Gouverneur Morris, to make wording changes. This committee purposefully revised articles I and III to limit powers to those enumerated but intentionally chose not to place similar restrictions on article II presidential powers. See C. Thach, The Creation of the Presidency 1775-1789, at 138-139 (1923). As a result of this decision, the revised Constitution “admitted an interpretation of executive power which would give to the president a field of action much wider than that outlined by the enumerated powers.” Id. at 139.


94 See infra notes 232-243 and accompanying text.

95 U.S. Const. art II, § 2, cl. 1.
illustration of the general executive power of the president over the agencies. Furthermore, the history of the writing of the Constitution supports the conclusion that the opinions clause is merely an example of presidential executive power, not an enumerated power which, by its inclusion, implies that excluded powers are denied to the president.

Concededly, the opinions clause standing on its own does not establish presidential authority over the entire executive branch. Read in combination with the remainder of article II, however, this clause is supportive of such authority. For instance, a second important source of presidential authority is the appointments power in section two of article II. The Constitution grants the president sole authority to appoint all officers of the United States, with the exception of some “inferior officers.” The Senate, to be sure, must consent in these appointments; yet the president alone may select the individual to administer the laws as an officer of the United States. The legislative role is limited to rejecting a specific individual selected by the president as unqualified. The power to appoint officials obviously gives the president considerable influence in how those officers make policies. The authors of the Constitution could not have failed to realize that the “power to remove generally assures that a subordinate will comply with his superior’s instructions.”

Thus, this section fits neatly within a pattern of presidential authority over the agencies of the executive branch.

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96 Compare Zamir, supra note 31, at 870. A more compelling variation on this position is provided by Professor Strauss. He argues that this clause can be construed as an example of the limits beyond which Congress cannot transgress in restricting executive influence over the agencies. Strauss, supra note 87, at 646-647.

97 See H. Learned, The President’s Cabinet 74-78 (1912). The source of the clause was Gouverneur Morris’s proposal for the creation of a Council of State composed of cabinet secretaries, the Chief Justice, and congressional leaders. This proposal provided that the president “may from time to time submit any matter to the discussion of the council of state, and he may require the written opinion of any one or more of the members. But he shall in all cases exercise his own judgment, and either conform to such opinions, or not, as he may think proper.” Id. at 76-77. The Council of State did not survive the deliberations of the Constitutional Convention, but the written opinions clause remains as a vestige of the Morris proposal. The roots of the clause demonstrate its consistency with expansive presidential authority over policymaking.

98 Zamir, supra note 31, at 877.

99 See Verkuil, Reflections Upon Federal and State Control of Administrative Policymaking, 19 Suffolk U.L. Rev. 577, 584 (1985) (“The President’s express powers in article II [the power faithfully to execute the laws; to appoint officers of the United States; and to demand their opinions in writing] provide enough support for the assertion that policy-making control is also an implied power
Another indication of presidential authority over the actions of executive branch agencies is found in section three of article II. This clause directs the president to "take care that the laws are faithfully executed." Given the plethora of laws enacted by Congress, it is patently obvious that the president cannot personally execute every law, but must rely upon subordinates. Yet it is the president who remains constitutionally responsible for the faithful execution of these laws. As it appears quite unfair for the Constitution to impose a duty on the president, without granting the means to accomplish that duty, article II has been interpreted to grant the president sufficient authority over agencies to ensure that the laws are executed faithfully.

Section three of article II also authorizes the president to "commission" all officers of the United States. Although commonly ignored, this directive is perhaps the clearest indication in the Constitution of an intent to grant the president substantive authority over rulemaking. The ordinary understanding of the word "commission" implies a delegation of authority from one person to another, with the agent exercising that authority for the benefit of the principal. A necessary corollary of this delegation is the authority of

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Opponents of this construction have suggested that the specific power of appointments expressly included in the Constitution denies by implication the existence of additional presidential powers over officers. This argument proves too much, however, as other presidential authority, not expressly enumerated in article II, is now clearly recognized. Removal power over executive officers, for example, has been implied from the more general executive power. See infra notes 145-152 and accompanying text. Also, we have already seen that the enumerated powers in section two of article II are not exclusive and do not limit the general grant of the executive power given in section one of that article. See supra notes 88-94 and accompanying text.

100 "But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court." Myers, 272 U.S. at 117 (citations omitted).

101 Indeed, the president may be impeached for failure to fulfill this duty.

102 During the debates of the Constitutional Convention, one delegate noted that the "Department of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them; but take away his controlling power, and upon what principle do you require his responsibility?" 1 Annals of Congress 532 (J. Gales ed. 1789) (statement of Mr. Vining).

103 "As [the president] is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his discretion in the execution of the laws." Myers, 272 U.S. at 117 (emphasis added).

104 See, e.g., State v. Dews, 1 Ga. (R.M. Charl.) 258, 260 (1835) (defining "commission" as "a term which, whether regarded according to its ordinary meaning, or its legal sense, imports a delegation of authority," revocable at the discretion of the authorizing principal).
the principal to direct the commissioned agent. Although the commis-

sion empowers an agent to exercise authority, it is clear that the au-

thority derives from the principal alone.106 The commissioning

principal ordinarily has great discretion in defining the nature of

the commission, and, unless otherwise proscribed, "may use such

form and language as to [it] may seem proper, so that the purport of

such commission be clearly understood."108 In the context of article

II, the president, as commissioning agent, is the ultimate repository

of the power delegated to officers of the executive branch and has

the implied authority to direct the activities of those officers.

Consideration of all sections of article II indicates that the presi-
dent has substantive policy authority over other executive branch

officials. Admittedly, the scope of this authority is not set forth in

clear terms. However, the structure of the article provides a general

grant of executive power, with very few express restrictions on the

exercise of this power.107 Such a broad authorization, even though

defined vaguely, is a source of considerable presidential power. This

textual format implies that presidential power may expand to fill

the needs of executing the laws of the day.108 In short, the text of

the Constitution supports the exercise of significant presidential

power over executive agencies.

In addition to the constitutional text, consideration of the govern-

ment structure established by the Constitution sheds light on the

constitutionality of Reagan's executive orders.109 Plainly, executive

agencies exercise legal authority. The question becomes: what is the

plain text
Executive Orders 12,291 and 12,498

constitutional source of their authority to regulate? There are three possible sources — the legislative power of Congress, the executive power of the presidency, or some independent power of the agencies themselves. Structural analysis of the Constitution and its objectives clearly rules out Congress and the agencies as sources of rulemaking authority, leaving only the president as the lawful repository of ultimate authority for agency policymaking. As the source of the agencies’ rulemaking power, the president may himself exercise this power.

The role of the legislative branch contemplated by the Constitution eliminates Congress as the source of the agencies’ rulemaking power. Congress undeniably empowers agencies by passing authorizing legislation; however, once such legislation is enacted, Congress has no further power to direct the exercise of discretion delegated to an agency, short of further legislation.\(^1\) Permitting Congress to direct the actions of the various federal agencies would be directly counter to a fundamental constitutional doctrine: separation of powers. This doctrine was perhaps the foremost concern of the Constitutional Convention. As James Madison explained: “[I]f there is a principle in our constitution, indeed in any free constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers.”\(^1\)\(^1\) While this separation need not always be hermetic, its centrality requires that no branch be permitted to infringe upon the fundamental attributes of another.\(^1\)\(^2\)

Therefore, a key objective of Madison and the other delegates to the first Constitutional Convention was to ensure that the legislature would not exercise executive powers. Our Constitution is in large measure a reaction to the legislature-dominated government of the Articles of Confederation, under which the Congress had exercised all executive powers.\(^1\)\(^3\) While much of the backlash against the Articles derived from its ineffectiveness,\(^1\)\(^4\) the framers also were concerned about the potential for majority tyranny under a system

\(^1\)\(^1\) This is clearly confirmed by the recent Supreme Court decision in Bowsher v. Synar, 106 S. Ct. 3181 (1986) (invalidating the legislative veto). See infra notes 184-186 and accompanying text.
\(^1\)\(^1\) Annals of Congress 604 (J. Gales ed. 1789).
\(^1\)\(^2\) See infra notes 244-246 and accompanying text.
\(^1\)\(^3\) See, e.g., The Federalist No. 48 (J. Madison).
\(^1\)\(^4\) See Strauss, supra note 87, at 603.
where the legislature controlled the execution of the laws.\textsuperscript{116} The concern about the possible tyranny of a legislative branch with executive power suggests that Congress may not direct the actions of administrative agencies.\textsuperscript{116}

Nevertheless, the lack of congressional authority over agency actions does not imply the existence of presidential rulemaking authority. The executive agencies may be autonomous and subject to no outside direction in their policymaking activities. Examination of the constitutional structure, however, rules out this theory of independent agency powers.

Nowhere does the Constitution affirmatively grant agencies or departments independent legal power.\textsuperscript{117} On the contrary, the constitutional architects expressly rejected a proposal to provide for various departments in the Constitution with enumerated powers and responsibilities.\textsuperscript{118} After repeatedly debating the advisability of creating a plural executive in the new government,\textsuperscript{119} the delegates at the Constitutional Convention vested all executive power in "a" president, creating a unitary executive.\textsuperscript{120} They based their decision not only on a desire for an executive who would be effective and powerful but also on an expectation that a single executive would be more readily accountable to the people.\textsuperscript{121} Any attempt to find

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\textsuperscript{116} See Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371, 374-75 (1976). According to Levi, "[t]he supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities.... The work of the Constitutional Convention of 1787 was in this respect a reaction to the unchecked power of the legislatures." Id. at 374-75.

\textsuperscript{117} Of course, Congress has historically played a role in agency oversight. This role, though, is incidental to its legislative authority. Congress' response to agency actions of which it disapproves is not to alter those actions directly, but rather to enact new laws that respond to Congress' concern. Theoretically, such congressional oversight may also be incident to the legislature's impeachment power.

\textsuperscript{118} In fact, these organizations are seldom mentioned in the Constitution. What mention does exist suggests that the agencies are subordinate to the president. Thus, article II provides that officers of such agencies shall be appointed and commissioned by the president and shall be bound to provide opinions to the president.

\textsuperscript{119} See C. Thach, supra note 92, at 120-121.

\textsuperscript{120} See, e.g., C. Thach, supra note 92, at 121 (describing the Morris-Pinckney plan for a Council of State "to assist the President in conducting the Public affairs"). This and other proposals were extensively debated and ultimately rejected. See 1 M. Farrand, The Records of the Federal Convention of 1787, at 93-102, 138-140 (1966); 2 id. at 73-80, 537-542 (1966).

\textsuperscript{121} See Strauss, supra note 87, at 599 ("Of the decisions clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President."). This decision is discussed and supported at length in The Federalist No. 70 (A. Hamilton).

\textsuperscript{121} See, e.g., E. Corwin, The President: Office and Powers 14-15 (1957).
independent constitutional authority for agencies qua agencies runs directly afool of the purposeful constitutional choice to create a single, unitary executive.\textsuperscript{122}

Further structural support for presidential control over executive agency policymaking may be found in simple pragmatic concerns. Under the Constitution, the president alone is responsible for the execution of the laws. Obviously, one person cannot execute all the functions of government personally. In order to carry out his constitutional responsibility, the president must delegate his authority to other executive officers. However, the intent of the framers to have a strong executive means that the president must have control over executive agencies.\textsuperscript{123} A single source of executive authority is essential to the effective functioning of the executive branch.\textsuperscript{124} In \textit{Sierra Club v. Costle},\textsuperscript{125} the District of Columbia Circuit Court of Appeals held that "[o]ur form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive."\textsuperscript{126} Social science amply supports this conclusion, as one scholar has explained:

\begin{quote}
[It] is a familiar principle that no administration may properly serve its purpose if it is not governed by the principle of hierarchical control. "An administration," said Professor Wyman, "is a hierarchy." This is not only a statement of fact but also a declaration of policy. There is near unanimity among students of public administration that hierarchical control is essential to both efficiency and democracy.\textsuperscript{127}
\end{quote}

\textsuperscript{122} See, e.g., Strauss & Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Admin. L. Rev. 181, 198 (1986):

The central premise of \textit{Myers} is that the Constitution creates a unitary executive branch. That premise is well supported by the history and background of Article II. To authorize Congress to insulate subordinate officials from executive control would be inconsistent with the premise; it would enable Congress to create a set of agents for which there is no constitutional authorization.

\textsuperscript{123} This point is reflected in a recent resolution of American Bar Association delegates, which emphasizes that the "Constitution's choice of a unitary executive justifies presidential involvement in rulemaking activities of federal agencies." Section of Administrative Law, ABA, Report to the House of Delegates (Resolution 100, passed Feb. 10, 1986).

\textsuperscript{124} This efficiency concern motivated the authors of the Constitution, who created a broad and flexible grant of executive power. See Chemerinsky, supra note 89, at 882. Madison went so far as to suggest that "[f]rom a bad administration of the government, more detriment will arise than from any other source." J. Rohr, To Run a Constitution 23 (1986).

\textsuperscript{125} 657 F. 2d 298 (D.C. Cir. 1981).

\textsuperscript{126} Id. at 406.

\textsuperscript{127} Zamir, supra note 31, at 867 (citations omitted). The necessity of coordination for efficiency is
In order to give effect to the plan for an effective executive establishment and to the checks and balances contemplated by the Constitution, the president must possess ultimate supervisory control over actions taken by the executive branch.  

Both textual and structural analyses of the Constitution support President Reagan's assumption of authority over executive agency actions. Permitting congressional control over such actions, or permitting agencies to act independently of any presidential control would be fundamentally inconsistent with the three-branch separation of powers structure established in the Constitution. Presidential control, by contrast, is consistent with the constitutional plan and also may be implied from the need for an effective executive.

B. Court Interpretation of Article II Presidential Executive Authority

Analysis of the constitutional basis for presidential authority over executive agency actions is incomplete without reference to significant court decisions interpreting the terms of the Constitution. On several occasions, the Supreme Court has been called upon to define the scope of presidential authority over the executive branch of the United States federal government. These decisions elaborate on the constitutional text and offer clear guidance in resolving the dispute over the extent of presidential power. Although the salient precedents are used by both sides of the dispute, these decisions can be coherently integrated only in support of presidential control over executive agency policymaking decisions.

The controversy surrounding presidential authority over executive agencies was first comprehensively addressed in *Myers v. United States*. 128 In *Myers*, the Court took a broad view of presidential power and held that the Constitution granted the president removal authority over executive officers. 129 This single decision did not settle the controversy, however, because it was followed by sev-

128 See Strauss & Sunstein, supra note 122, at 189-190 (quoting Judge Friendly on the necessity of presidential coordinating authority).
129 272 U.S. 52 (1926).
130 See infra notes 134-146 and accompanying text.
eral decisions that seemingly restricted *Myers'* expansive interpretation. While these holdings did not directly contradict *Myers*, they arguably limited its significance.\textsuperscript{131} Very significant recent decisions of the Supreme Court, however, in conjunction with critical lower court judgments, now have restored *Myers'* view of broad presidential authority over executive agencies.\textsuperscript{132}

1. The *Myers* Decision

*Myers v. United States* was unquestionably a watershed decision in the constitutional law of separation of powers. *Myers* considered and approved a presidential claim of inherent power to remove executive officers. In so doing, *Myers* engaged in substantial constitutional analysis supportive of very extensive presidential control over executive agency actions.

*Myers* was a postmaster in Oregon, appointed for four years under an 1876 statute specifying that he could be removed only for cause and with senatorial acquiescence.\textsuperscript{133} The president sought unilaterally to dismiss *Myers*, for unknown reasons, in contravention of the statute.\textsuperscript{134} The postmaster general, complying with the president's request, then dismissed *Myers*.\textsuperscript{135} *Myers'* claim ultimately reached the Supreme Court.

In an opinion of unusual length for the time, the Court ruled for the president. To reach its decision, the Court relied heavily on the intent of the Framers, as reflected in debates during the Constitutional Convention and in the actions of the first Congress of the republic.\textsuperscript{136} The decision reached in *Myers* provides almost conclusive support for the president's asserted power over other executive branch officials.

The Court based its holding primarily on the constitutional grant of "the executive Power" to the president,\textsuperscript{137} holding that this provision authorized broad presidential control over the actions of execu-

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\textsuperscript{131} See infra notes 155-177 and accompanying text.
\textsuperscript{132} See infra notes 178-206 and accompanying text.
\textsuperscript{133} 272 U.S. at 106-07.
\textsuperscript{134} Id. at 106.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 136, 174-76.
\textsuperscript{137} U.S. Const. art. II, § 1.
tive subordinates, including removal. The Court commenced this analysis by clearly holding that the general constitutional grant vested all executive power in the president. Quoting Hamilton among others, the decision emphasized that the generality of the grant of executive power was significant: the specific enumerations merely emphasized the president's power but did not limit it. Other presidential authority, although not specifically mentioned, would "flow from the general grant of the [executive] power." Therefore, except where his power is expressly limited by the Constitution, the president enjoys all of the executive power.

Having concluded that the president possessed all executive power, the Court logically was led to the conclusion that the president had substantive control over his subordinates in their exercise of governmental executive power. The Court suggested that the president was "in charge of and responsible for" the actions of subordinates, who were "under his direction." In summary:

The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. Each head of a department is and must be the President's alter ego in the matters of the department where the President is required by law to exercise authority.

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138 272 U.S. at 119. The Myers Court also found that removal was incidental to the appointment power of the president. Id. at 119, 122. Nevertheless, the central theme of Myers was "that the President executes the laws; that because the President executes the laws, executive officers act for the President as aids to him in execution; therefore, an absolute removal power is necessary to ensure the constitutionally mandated presidential policy control over the decisions of lower officers." Ledewitz, The Uncertain Power of the President to Execute the Laws, 46 Tenn. L. Rev. 757, 763-64 (1979) (citations omitted).

139 Thus, the Court found that the Constitutional Convention had granted the president "all the executive powers of the Congress under the Confederation," vesting these powers in "a single person to be styled the President of the United States." 272 U.S. at 110.

140 Id. at 138 (quoting A. Hamilton, 7 Works of Hamilton 80-81 (J.C. Hamilton ed. 1831)). See also id. at 128.

141 Id. at 118. The express limitation at question in this passage was the Senate's role in advising and consenting to nominees to office. The Court stressed that such exceptions were to be "strictly construed" and "should not be enlarged beyond the words used." Id. The decision continued: the "fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended." Id.

142 Id. at 119.

143 Id. at 117.
The discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will.\textsuperscript{144}

Seldom has the Court been clearer in settling an issue. By creating a unitary, politically accountable executive, the Constitution thus granted the president broad authority over his subordinates’ action.\textsuperscript{145}

The Court did place one restriction on the president, a limitation which some commentators have emphasized. Myers recognized that executive duties which are “so peculiarly and specifically committed to the discretion of a particular officer” or which are “of a quasi-judicial character” may be outside absolute presidential direction.\textsuperscript{146}

It is clear from the decision, however, that ordinary rulemaking does not fall within this limited exception to presidential authority.\textsuperscript{147} At face value, therefore, Myers appears to authorize Reagan’s Executive Orders 12,291 and 12,498, which require agencies to consider various issues of public concern and tailor their rulemakings accordingly. The apparently unambiguous language of Myers, however, must be read in the context of subsequent Court decisions, some of which arguably restrain the president’s power to control

\textsuperscript{144} Id. at 132-34 (emphasis added and citations omitted).

\textsuperscript{145} Other, earlier decisions also support this conclusion. For example, In re Neagle, 135 U.S. 1 (1880) held that the president had inherent constitutional authority to direct a subordinate to enforce the rights, duties and obligations arising out of the Constitution, even in the absence of direct legislative empowerment. Id. at 63-64. See also Wolsey v. Chapman, 101 U.S. 755, 769 (1879) (“[T]he acts of the heads of departments, within the scope of their powers, are in law the acts of the President.”). \textsuperscript{146} 272 U.S. at 135. \textsuperscript{147} The court also specified that “[l]aws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.” 272 U.S. at 135. Where the public interest is at stake, i.e., where general competing interests must be weighed against one another and a decision reached, the president maintains control. This includes, \textit{inter alia}, foreign policy matters, protection of the mails, and regulation of the public domain. Id. at 133-34.

One wonders what issues are beyond the president’s authority to control. Quasi-judicial actions of subordinates, which invoke due process concerns, are one generally recognized exception. Nor can the president countermand clear statutory requirements and attempt to control purely ministerial actions, where no administrative judgment is even permitted. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See infra note 177 (discussion of United States v. Kendall). With the exception of these two discrete areas, Myers appears to grant the president total control over the decisions of the executive branch.
agency actions.

2. Myers Retracted?

Not long after the decision in Myers, the Supreme Court issued several decisions which arguably restricted the presidential authority recognized in Myers. Within a decade of Myers, the Court limited the president's power to remove "independent" executive officials in Humphrey's Executor v. United States. Somewhat later, the Court once again limited presidential removal power in Weiner v. United States. Critics of presidential assertions of power over the executive branch have made much of these decisions.

Humphrey's Executor arose out of President Franklin Roosevelt's attempt to remove a commissioner of the Federal Trade Commission (FTC). When it had created the Commission, Congress had only authorized removal for "cause." President Roosevelt, however, offered no cause for Humphrey's removal other than political incompatibility, which was insufficient under the statute. The Court overruled this presidential action, finding the congressional restriction on removal to be constitutional.

To distinguish the Myers holding, the Court characterized the Federal Trade Commission as non-executive. Humphrey's Executor confirmed Myers by recognizing that a member of the executive branch is to be a "subordinate and aid" of the president. Nevertheless, by concluding that the FTC exercised judicial and legislative, not executive, powers, the Court held that the Commission was outside presidential control.

Unfortunately, the Court was somewhat vague about what characteristics of the FTC made it non-executive in nature. The Court described the FTC duties in question as "quasi-judicial" or

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150 See, e.g., Rosenberg, supra note 3, at 208-09.
151 295 U.S. at 619. The statute permits removal only in cases where "inefficiency, neglect of duty, or malfeasance in office" can be demonstrated. 15 U.S.C. § 41 (1982).
152 Humphrey's Executor, 295 U.S. at 631-32.
154 Id. at 128.
155 The decision has been criticized on this ground, and subsequent cases have found the distinction difficult to apply. See Bruff, supra note 57, at 479-80 and nn.135-36.
“quasi-legislative.” Seizing upon this language, some commentators have claimed that the rulemaking typical of modern federal agencies is quasi-legislative and is therefore beyond the reach of presidential control. However, close consideration of *Humphrey’s Executor*, especially in the context of other court decisions, renders this position untenable.

First, *Humphrey’s Executor* expressly affirmed *Myers*, which cast rulemaking among the executive activities conducted under the president’s authority. Second, the quasi-judicial and quasi-legislative duties referenced in *Humphrey’s Executor* were something far different from modern-day rulemaking. At the time of the decision, the FTC exercised no substantive rulemaking power but rather conducted adjudications and investigations in order to better report to Congress. Given these duties, Congress demanded strict apolitical impartiality from the FTC. Indeed, the Supreme Court placed great importance on the absence of substantive policy discretion afforded the FTC, writing that the agency was “neither political nor executive” and was “charged with the enforcement of no policy except the policy of the law.” In short, *Humphrey’s Executor* did not involve the rulemaking authority which is the subject of controversy today. Given its facts, the outcome in *Humphrey’s Executor* is neither surprising nor terribly significant. At the time, the FTC was not a policymaking organ of government. Obvious due process concerns amply justify the restriction of presidential control over FTC adjudications.

Due process considerations also explain the outcome in *Weiner v. United States*. Weiner was a member of the War Claims Commission, an adjudicatory body created to hear claims for personal

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156 295 U.S. at 628.
157 See, e.g., Rosenberg, supra note 3, at 209-12.
158 See supra note 148.
159 See Verkuil, supra note 59, at 954 n.70, pointing out that Congress did not grant the FTC such powers until 1975. The term “quasi-legislative” “referred not to policy formation, but to the exercise of investigatory authority in support of reports to the Congress.” Strauss, supra note 87, at 615.
160 See 295 U.S. at 628 (describing the role of the FTC).
161 See id. at 624 (“The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality.”).
162 Id.
163 See, e.g., Bruff, supra note 57, at 481-82; Strauss, supra note 87, at 622-25.
injury and property damage suffered during World War II.\textsuperscript{165} Weiner had been appointed by President Truman and confirmed by the Senate but was removed from office by President Eisenhower, who wanted the Commission to be filled with “personnel of [his] own selection.”\textsuperscript{166} The Supreme Court held that the president had no authority to remove members of the Commission since the Commission was essentially a judicial body that needed to be “entirely free from the control or coercive influence, direct or indirect” of either the Executive or the Congress.\textsuperscript{167} The linchpin of the holdings in \textit{Humphrey's Executor} and in \textit{Weiner} was the fact that neither case involved policymaking by an executive agency. Consequently, these decisions should not be employed to deny presidential control over the public policy decisions of federal executive agencies.

Critics of the Reagan executive orders have also relied on one of the more famous separation of powers decisions, \textit{Youngstown Sheet & Tube Co. v. Sawyer}.\textsuperscript{168} In this historic decision, the Court invalidated President Truman’s decision to seize struck steel mills during the Korean War.\textsuperscript{169} Truman had argued that he had the inherent constitutional power to take such actions, by virtue of his powers to execute the laws as commander-in-chief. Although the various members of the Court could not agree upon a single majority opinion, Justice Black stated that the executive order was unconstitutional because it was not authorized by a constitutional provision and was, therefore, purely congressional lawmaking.\textsuperscript{170} Justice Jackson, however, reasoned that the seizure was unconstitutional because Congress had considered granting such power and had expressly rejected such a course.\textsuperscript{171} The express congressional rejection

\textsuperscript{165} See id. at 349-50.
\textsuperscript{166} Id. at 350.
\textsuperscript{167} Id. at 355-56 (quoting \textit{Humphrey's Executor}, 295 U.S. at 629). See, e.g., Bruff, supra note 57, at 482-83 (“Congress intended the Commission to be protected from presidential review because it was an adjudicating body charged with deciding claims on the merits, entirely free of influence from any other branch of government.”) (citations omitted). \textit{Weiner} emphasized that presidential removal power depended upon the “nature of the function,” (i.e., adjudication) assigned the War Claims Commission, explicitly relying on the reasoning in \textit{Humphrey's Executor}. See 357 U.S. at 353. The decision in \textit{Myers} also recognizes this point. See 272 U.S. at 135 (“quasi-judicial” duties beyond presidential control).
\textsuperscript{168} 343 U.S. 579 (1952).
\textsuperscript{169} See id. at 587-89.
\textsuperscript{170} See id. at 587-88 (Black, J., joined by Jackson and Burton, JJ.)
\textsuperscript{171} Justice Jackson described three types of executive actions: those authorized by the Constitution
of the president's authority to seize the mills limits the applicability of *Youngstown* in other circumstances. Nevertheless, under one view, *Youngstown* stands for the proposition that policymaking is a legislative activity and that, as policymaking, rulemaking is beyond the direction of the president.

This interpretation, however, goes far beyond the holding in any of the *Youngstown* opinions and would largely obliterate the traditional constitutional executive power of the president. In *Youngstown*, the president acted entirely on his own, without any law to "execute." Thus, the act was deemed legislative. The Reagan executive orders present an entirely different situation. In promulgating the orders, Reagan has merely used his political discretion in the course of carrying out congressionally delegated authority. Had Congress granted President Truman the power to seize companies at his discretion during national emergencies, the presidential action in *Youngstown* would clearly have been a constitutional exercise of executive power. Hence, *Youngstown* is not inconsistent with presidential control over rulemakings conducted pursuant to congressional authorization. Indeed, it is noteworthy that all the justices in *Youngstown* assumed that if steel mills could lawfully be seized, the president would be the one to take such action.

or by Congress, those incompatible with the intent of Congress, and those in an in-between "twilight zone," neither authorized nor proscribed by Congress. Jackson argued that the president may act in all three areas although "his power is at its lowest ebb" when the president acts contrary to congressional intent and, therefore, the exercise of such power will rarely be sustained. Id. at 635-38 (Jackson, J. concurring).

See Comment, supra note 5, at 700 ("[T]he value of the case as a polestar in determining the extent of independent presidential power is seriously hampered by the fact that Congress had already expressed a negative attitude toward such seizures.").

See Rosenberg, supra note 3, at 198.

Justice Jackson wrote:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

343 U.S. at 635-36. Justice Burton took a similar position. See id. at 659-60. Justice Clark likewise emphasized that the president's attempted seizure would have been upheld if it were not for the contrary congressional intent. Id. at 662. For Justice Frankfurter, the congressional determination to withhold this power was likewise dispositive. Id. at 602-03. Justice Douglas also suggested that the president's action could have been validated by congressional delegation. Id. at 630-32.

See Bruff, supra note 57, at 475.

See Ledewitz, supra note 138, at 767.
The decisions in *Humphrey's Executor*, *Weiner*, *Youngstown*, and other mid-century holdings place some significant constraints on presidential power. They do not, however, modify *Myers'* unambiguous holding that the president is the master of decisions lawfully committed to the executive branch. Any doubt about this conclusion has been laid to rest in several recent decisions.

3. Presidential Executive Power Reaffirmed

Recent times have witnessed congressional attempts to usurp some control over decisions traditionally considered executive in nature, much as the constitutional framers presaged. Court decisions reviewing the actions by Congress have aggressively defended the president's executive power. Consideration of these rulings confirms the president's control over such executive actions.

The first, and perhaps most important, modern ruling on presidential executive powers came in *Buckley v. Valeo*. Numerous constitutional issues were at stake in *Buckley*, but the one of immediate concern involved Congress' retention of the power of appointment over officers of the newly-created and independent Federal Election Commission (FEC), whose duties included investigations, rulemaking, and law enforcement. While rejecting a mechanistic, hermetic view of separation of powers, the Court nonetheless reaffirmed the importance of this constitutional principle and acknowledged the fear of the framers "that the Legislative Branch of the National Government [would] aggrandize itself at the expense of the other two branches." For this reason, the Court struck down Congress' FEC appointment power as an unconstitutional en-

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177 Critics of the Reagan executive orders have also relied upon a pre-*Myers* decision which limited presidential powers, *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). In *Kendall*, the president directed the postmaster general not to make a disputed payment to mail carriers, and the Court ruled that the president had no such power. Id. at 610-13. *Kendall*, however, involved a writ of mandamus compelling the executive to perform a non-discretionary duty. See Strauss, supra note 87, at 606-07; Comment, supra note 68, at 627-28. Nothing in the holding denies the president authority over discretionary duties of the executive and any such implication would be overridden by the subsequent decision in *Myers*.

178 See supra text accompanying notes 113-16.


180 Id. at 137.

181 Id. at 129 (citations omitted).
croachment upon the executive power granted the president by the
Constitution.

Buckley also defined what activities are executive in nature and
therefore committed to the president under article II. Referring to
the Commission's authority to formulate rules, give advisory opin-
ions, and make eligibility determinations, the Court conceded that
the functions were analogous to some legislative activities but held
that "each of these functions also represents the performance of a
significant governmental duty exercised pursuant to a public
law." Because these activities were part of the "administration
and enforcement of public law," they may be "exercised only by
persons who are 'Officers of the United States.'" Although the
Buckley court stopped short of declaring that these rulemaking ac-
tivities are subject to presidential control, seven justices made it
clear that agency rulemaking was an executive power, not a legisla-
tive one.

The significance of Buckley is heightened by the Court's decision
striking down the legislative veto in Immigration and Naturaliza-
tion Service v. Chadha. Congress had attempted to justify the
veto on the grounds that the regulations subject to veto were quasi-
legislative in nature and subject to Congress' article I power. While
acknowledging that these rules may "resemble" lawmaking, the
Court reaffirmed Buckley by stating that agency rules were execu-
tive in nature. Declaring that the legislative veto was beyond con-
gressional article I power, the Court ruled that the legislature could
not "control administration of the laws." Together, Buckley and
Chadha establish that rulemaking is executive in nature, that it
must be carried out by officers of the United States under article II
of the Constitution, and that Congress may not encroach upon the

182 Id. at 141.
183 Id. (quoting U.S. Const., art. II, § 2, cl. 23) (citation omitted).
184 The Court discussed the nature of the FEC's power in Part IV-B-3 of its opinion, in which
Justices Brennan, Stewart, Powell, Marshall, Blackmun, Rehnquist, and Burger joined. Justice
White did not join Part IV-B-3, and Justice Stevens took no part in the consideration of the case. See
id. at 5.
185 462 U.S. 919 (1983). The legislative veto was the analog to the veto of the executive branch: it
allowed one house of Congress to overrule a decision which was made by the executive branch pursu-
ant to authority delegated by Congress.
186 Id. at 953 n.16.
187 Id.
exercise of this power.

The thrust of this proposition was confirmed once again in *Bowsher v. Synar*.\(^8\) *Bowsher* invalidated part of the Gramm-Rudman-Hollings Act, because that legislation authorized the comptroller general, an agent of the Congress, to execute the laws.\(^9\) First, the Court elaborated on its prior definition of "executive" power. *Bowsher* holds that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law," as is "exercis[ing] judgment concerning facts that affect the application of the Act."\(^10\) Having found the comptroller general's activities to be executive in nature, the Court considered the constitutionality of the delegation of executive authority to an agent of Congress. Of critical significance was Congress' power of removal over the comptroller general.\(^11\) Harkening back to the decisions in *Myers* and *Humphrey's Executor*, the majority opinion recognized that the removal power would give Congress significant control over the decisions of the comptroller general,\(^12\) a degree of control that was "constitutionally impermissible."\(^13\) If any doubt had been left by the earlier cases, *Bowsher* makes clear that Congress may not control administrative rulemaking. Moreover, by reaffirming *Myers* and the coincidence of removal authority and power to control, *Bowsher* implicitly recognizes presidential control authority over the officers of the United States who execute the laws.

Together, *Buckley*, *Chadha*, and *Bowsher* define executive authority to include rulemaking and unambiguously place such rulemaking under the president's authority. Other recent Supreme Court cases, although decided against the president, are consistent with this position.\(^14\)

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\(^8\) 106 S. Ct. 3181 (1986).
\(^9\) Id. at 3186.
\(^10\) Id. at 3192.
\(^11\) Id. at 3188.
\(^12\) Id. at 3188-89.
\(^13\) Id. at 3189.
\(^14\) For instance, the president was denied the power to remove lower level public officials for their exercise of first amendment speech in *Elrod v. Burns*, 427 U.S. 347 (1976). However, the Court emphasized that these officials were performing ministerial acts which involved no policymaking discretion. The Court explicitly stated that a different rule would apply to policymaking officials, who had power "to thwart the goals of the in-party." Id. at 367. Thus, *Elrod* recognizes the president's right to an executive branch that will implement his policy goals.
Several circuit court opinions directly address the issue of presidential power over agency rulemaking. *Sierra Club v. Costle* challenged alleged interference by the Office of the President with informal rulemaking by the Environmental Protection Agency (EPA) during the Carter administration. In its decision for the president, the United States Court of Appeals for the District of Columbia could not have been much clearer about the extent of presidential authority:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared — it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention. . . . To ensure the President’s control and supervision over the Executive Branch, the Constitution — and its judicial gloss — vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an “independent agency,” but always part of the Executive Branch.

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of adminis- 

Presidential power controversies also arose out of Watergate. An absolute presidential executive privilege of confidentiality in communications with other executive officials was rejected in United States v. Nixon, 418 U.S. 683 (1974). Yet it is significant that this case recognized an inherent presidential executive privilege, implied from article II’s enumerated powers. The president lost this case because the claim of privilege in question “would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.” Id. at 712. In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court permitted Congress to require the preservation of certain presidential executive branch communications. This was allowed, however, under Congress’ express article I legislative powers and was explicitly limited to cases that were not “unduly disruptive of the Executive Branch.” Id. at 445.

Both *United States v. Nixon* and *Nixon v. General Services* employed something of a balancing test when the president's article II powers conflicted directly with the constitutional powers and roles of the other coordinate branches of the federal government. In the case of Executive Orders 12,291 and 12,498, however, neither Congress nor the judiciary has a constitutional claim to control executive branch rulemaking. Hence, the *Nixon* cases, which acknowledge presidential influence over the executive branch, are in no way inconsistent with the orders.

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trative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations.\footnote{Id. at 405-06 (footnotes omitted).}

The Sierra Club decision thereby recognizes an article II presidential power to coordinate, supervise, and direct executive agency rulemaking, in a context almost identical to that of the Reagan executive orders.

On various other occasions, presidents have directed agencies by executive order to pursue certain policies, and courts have upheld these assertions of presidential authority. The civil rights executive orders were upheld in a series of court decisions, the most significant being Contractor's Association of Eastern Pennsylvania v. Secretary of Labor.\footnote{442 F.2d 159 (3rd Cir.), cert. denied, 404 U.S. 851 (1971). While other cases upheld presidential authority for the civil rights order on statutory grounds, see Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 1964), Contractor's Association presented the issue of inherent constitutional authority for the orders.} In Contractor's Association, the court decided that promulgation of an affirmative action program was an appropriate exercise of presidential executive authority over government contracts, noting that “in the absence of specific statutory regulations, [Congress] must be deemed to have granted to the President a general authority to act for the protection of federal interests.”\footnote{442 F.2d at 171.}

On another occasion, the United States Court of Appeals for the District of Columbia held that “[w]ithin the range of choice allowed by statute, the President may direct his subordinates' choices.”\footnote{Nat'l Fed'n of Fed. Employees, Local 1622 v. Brown, 645 F.2d 1017, 1022 (D.C. Cir. 1981) (citation omitted) (president may order decision on federal employee pay raises).} The few decisions involving Executive Order 12,291 have affirmed this position.\footnote{See Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (1986) (“A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking.”) (citations omitted); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216 (D.C. Cir. 1983) (affirming application of cost/benefit requirement of Executive Order 12,291).}

The preceding review of cases, from Myers to Contractor's Association, reveals a consistent recognition of presidential authority over executive actions. Even Humphrey's Executor and Youngstown, which limited presidential power, are not inconsistent with
Executive Orders 12,291 and 12,498

Reagan’s assumption of power to control agency rulemaking. These cases can be distinguished because they involved presidential action which was non-executive in nature. As most agency actions, including rulemaking, are now clearly recognized as executive, they are within the president’s purview.

In light of the lengthy history of presidential authority exercised over executive branch agencies, the text of the Constitution’s grant of all executive power to the president, and the consistent judicial recognition of this presidential authority, the facial legality of the Reagan executive orders seems clear. The legitimacy of Reagan’s actions can be made even more apparent by examining some specific arguments advanced against the constitutionality of the orders.

III. Evaluation of Specific Arguments Against The Orders

The arguments advanced by critics of the Reagan executive orders for regulatory reform have not been completely answered by the above discussion. The four most prominent arguments are: (i) that the presidential power contemplated by the orders is contrary to the intent of the framers of our Constitution; (ii) that the orders encroach upon the constitutional position of Congress; (iii) that the orders unlawfully encroach upon the powers of the government agencies; and (iv) that OMB is an inappropriate vehicle for the exercise of control over other federal agencies.

A. Presidential Authority Over Agencies and the Intent of the Framers

Central to the arguments against presidential control over federal executive agencies is the idea that, regardless of the Constitution’s language, the framers of our republic intended to create a very limited presidency. While acknowledging the powerful influence of the presidency today, these authors seek to restrain the office whenever possible in the name of “original intent.”

This interpretivist argument focuses on American political and constitutional history and concludes that “it was intended that [the president] should not . . . be the administrative head of the Govern-
According to this position, the framers, "having just escaped from the oppressive authority of King George," were fearful of expansive executive authority in one man. Relying on early statutes and opinions, these commentators conclude that the framers "believed that the President would be a managerial agent for the legislature rather than an independent source of domestic policy."

While there is unquestionably some validity to this position, it is a weak basis upon which to oppose presidential control over the agencies. The decision to base twentieth century constitutional interpretation upon the framers' intention is highly questionable. The value of original intent is especially doubtful in the instant controversy, in view of the tremendous expansion of the executive branch. Even conclusive evidence of the framers' intent "would have only limited persuasiveness in resolving contemporary problems within an executive establishment with dimensions and activities that were not then foreseen." Indeed, literal reliance on interpretivism in this context proves too much — even for its advocates. While it may be true that the framers did not intend for the president to govern the actions of the EPA, neither did the framers intend for the creation of an EPA. Yet those who would use an original intent argument to invalidate the president's control of the

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Olson, supra note 3, at 15.

Rosenberg, supra note 3, at 202-03.

The limitations of interpretivism are discussed throughout the literature on constitutional interpretation. See, e.g., Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980); Chemerinsky, supra note 89, at 883-85; and Sandlow, Constitutional Interpretation, 79 Mich L. Rev. 1033 (1981). Perhaps the most persuasive critique of interpretivism is the evidence that the framers themselves did not intend for their views to rule subsequent interpretations of the Constitution. See Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985).

See Comment, supra note 5, at 711 ("It is clear that the conception of the office of the President held by the framers of the Constitution would not even approximate its current status."); Karl, Executive Reorganization and Presidential Power, 1977 Sup. Ct. Rev. 1, 11 (1977) ("[n]or did the framers forecast the development of extensive managerial bureaucracies to tend to social policies and related problems.").

Bruff, supra note 57, at 468. See also L. Tribe, American Constitutional Law 157 (1978) (Framers did not contemplate the nature of modern government, thus their conception of a "modest chief magistrate" is of limited value today.).

See Karl, supra note 205, at 11, 20 (Framers did not foresee development of executive bureaucracy).
EPA certainly would not contend that the EPA was itself unconstitutional.

Despite its limitations, interpretivism should not be wholly dismissed. The Supreme Court in *Myers* admonished that "[w]e ought always to consider the Constitution with an eye to the principles upon which it was founded." A strong argument can be made that interpreters should strive to avoid constitutional conclusions that contradict the express intentions of the framers. Hence, if the critics could prove conclusively that the constitutional framers meant to preclude presidential management of executive branch agencies, that might provide reason to question the legality of Reagan's executive orders. As shown below, however, the framers' intent to limit the president is by no means clear.

The constitutional text itself is grounds for questioning an interpretivist argument against presidential authority in the area of executive rulemaking. If the president was to have only ministerial tasks, why was this limit not more explicit in the Constitution? The broad grant of executive power to the president in article II is not consistent with a constricted presidency.

Historical events are also a reason to question an interpretivist view of presidential power. President Washington's Neutrality Proclamation and President Jefferson's Louisiana Purchase were not the acts of officials without policymaking authority. As we have seen, the early presidents quickly asserted control of the actions of their executive branch subordinates. Constitutional text and historical episodes are among the most convincing indicia of the framers' intent, and both reflect a president with substantial constitutional powers.

Other evidence of original intent, such as contemporaneous statements of key constitutional architects, provides further support for

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208 272 U.S. at 128-29.

209 For instance, one author has stated that he discusses the framers not to show that his views are supported by original intent but "to show that my proposals are not at war with original intent." J. Choper, Judicial Review and the National Political Process xvii-xviii (1980). This suggests an awareness of the importance of demonstrating that one's views are at least consistent with a rational interpretation of what the framers may have intended.

210 See supra notes 86-108 and accompanying text (textual analysis of article II of the Constitution).

211 See supra notes 5-20 and accompanying text.
recognizing presidential control over executive agencies. Indeed, there is strong evidence that the framers planned to create a very strong and powerful president as a counterweight to the legislature. Those who view the framers' intent in the context of a rebellion against an English king overlook the fact that the Constitution was in large part a reaction against the futility of the government of the Articles of Confederation, due to the lack of a strong and independent executive authority. The Supreme Court has noted that "[t]he debates in the Constitutional Convention indicated an intention to create a strong Executive . . . so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation."\(^{213}\) As a prominent historian has observed, "[t]he delegates chief concern was thus to secure an executive strong enough, not one weak enough."\(^{213}\) Because of the failure of the government established by the Articles of Confederation, the Constitutional Convention chose to grant the president "at least some discretion to define the law with greater particularity — and thus to 'make law' — through its execution."\(^{214}\) One tangible manifestation of this intent is the provision that Congress need not be convened until December of each year,\(^{215}\) a provision which plainly evinces an intent to have the executive assume a substantial role in the operation of the federal government.\(^{216}\)

Statements by key individuals support the conclusion that the framers foresaw a considerable role for the president in the new republic. James Madison, perhaps the foremost author of the Constitution, deemed that "the constitution has invested all executive power in the President."\(^{217}\) Madison also directly addressed the president's authority to control inferior officers. In his view, execu-

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\(^{211}\) Myers, 272 U.S. at 116-17 (citations omitted). See also Rohr, supra note 124, at 21-22, and Strauss, supra note 87, at 603.

\(^{213}\) C. Thach, supra note 92, at 77. See also Bruff, supra note 57, at 467 ("[T]here is consensus that the framers' purpose in drafting article II was to strengthen the executive and provide a more effective check on the legislature than the checks that had been available under the Articles of Confederation.").

\(^{214}\) Bruff, Judicial Review and the President's Statutory Powers, 68 Va. L. Rev. 1, 6 (1982).

\(^{215}\) The constitutional text states that "[t]he Congress shall assemble at least once in every year, and such Meeting shall be on the first Monday in December, unless they shall by law appoint a different Day." U.S. Const. art. I, § 4.

\(^{216}\) Strauss, supra note 87, at 602.

\(^{217}\) 1 Annals of Congress 481 (J. Gales ed. 1789).
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tive officers must be accountable to the president as well as to the Congress, because it was the president who was ultimately accountable to the American people. Madison therefore stated that the president was to "superintend" executive officers in order to ensure "good behavior" on their part. Later on, Madison reiterated his position: "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." Madison's view summarizes the classic formulation that the president is a unitary executive, controlling all executive functions in order to be democratically accountable to the American citizenry.

Other leaders of the Constitutional Convention subscribed to Madison's views. Fisher Ames of Massachusetts was especially clear: "The constitution places all executive power in the hands of the President . . . in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them . . . ." The individuals central in drafting article II had an especially expansive view of presidential power, including Edmund Randolph and William Morris. Similar views were shared by old adversaries Thomas Jefferson and Alexander Hamilton. One respected legal historian concluded that "the general executive power of administrative control" by the president "has not been an extra-constitutional growth. It was the conscious creation of the men who made the Constitution."

Ultimately, interpretivism supports presidential executive control

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518 See id. at 394 (asserting that the president as well as the Senate should have the authority to remove an administrative official).
519 Id. at 387.
520 Id. at 379.
521 Id. at 518.
522 Id. at 492.
523 See Myers, 272 U.S. at 110 (summarizing Randolph's Virginia Plan which provided for a "national executive of one person.").
524 See C. Thach, supra note 93, at 99.
525 See id. at 162.
526 Hamilton has been cited as an opponent of this view of presidential power, see Olson, supra note 3, at 16 ("Even as strong a proponent of centralized executive authority as Alexander Hamilton took pains to point out the President's limited authority over government."). Nevertheless, Hamilton ultimately concluded that the president possessed all executive power and had authority over subordinates in the executive branch. See Myers, 272 U.S. at 137-38 (quoting Hamilton, Letter from Pacifus No. 1, June 29, 1793, reprinted in 7 Works of Hamilton 80-81 (J. C. Hamilton ed. 1851)).
527 C. Thach, supra note 92, at 159.
more than it defeats it. There is no doubt that the framers did not anticipate an executive branch as significant and far-reaching as that at present. Had the framers foreseen such a development, however, it seems they would have approved of presidential power over these executive actions.

B. The Executive Orders and Congressional Authority

A key argument of those opposing the constitutionality of the Reagan executive orders is the allegation that the president has encroached upon the powers of Congress. In its most extreme version, this position contends that "[h]istory, precedent, and policy all favor viewing rulemaking as an exclusive legislative function properly controlled by Congress." This argument is central to Morton Rosenberg's thesis on the unconstitutionality of the order. Rosenberg contends that rulemaking, because it may encompass the same subject as legislation and has much the same legal effect as legislation, is a legislative power delegated to the agencies by Congress. Under this view, "the legislative mandate of the agencies is often a skeleton; consequently, [the agencies] must author the broad regulatory policies characteristic of statutory law." Rosenberg concludes that there should be severe limits on the president's ability to interfere with an agency's "legislative" decisions. This argument is a rather traditional separation of powers contention.

Rosenberg also advances a more moderate version of the separation of powers thesis. He contends that the indirect effect of the Reagan orders is to transfer governmental decisionmaking authority from Congress to the chief executive, thereby disrupting the intended roles of the legislative and executive branches of government. If the effect of the orders was to deprive Congress of its

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Rosenberg, supra note 3, at 212. Rosenberg does admit that "presidential action in [the legislative] sphere is not necessarily objectionable." However, by this he merely means that presidential actions which are "facilitative" (e.g., actions taken to improve communication within an agency) are legitimate. Any actions which substantively affect agency rules violate the legislative sphere. Id. at 212-13.

See id. at 209-12.

Id. at 209.

See id. at 210-11. See also Note, supra note 3, at 81, 88. For an explanation of this "effects" standard, see Chemerinsky, supra note 89, at 906-08 (an executive action is evaluated by looking at its effect on the judicial and legislative branches' ability to perform their central functions).
authority to limit executive powers, the orders would be unconstitutional. This second formulation of Rosenberg's separation of powers thesis argues from the necessity of having "checks and balances" in the federal system.

The first argument, that rulemaking is a legislative function, fails in two respects: it contains a logical fallacy and is contrary to Supreme Court precedent. When Rosenberg simply asserts that "broad regulatory policies" are characteristic of legislative, but not executive, decisions, he begs the question. He has already conceded that these regulatory rulemaking decisions are now beyond the "capacity" of Congress, due to the "complexity of modern society." Nevertheless, Rosenberg harkens back to the early days of the republic to guide contemporary construction. Even in the early days, however, broad policies could be executive in nature, as illustrated by President Washington's Neutrality Proclamation and President Jefferson's Louisiana Purchase. It is far too late in the day to maintain that the president, as chief executive, cannot initiate "broad regulatory policies."

The problem with Rosenberg's criticism is its assumption of a clear substantive distinction between what is legislative and what is executive. In reality, the distinction is, in part, merely a matter of procedure. It should be plain that substantively identical results may be created by both legislative and executive processes. Legislative action is that authorized under article I and enacted as influenced by various constituency groups pursuant to specific legislative processes. Executive action is authorized by the Constitution or, more frequently, by legislation and is promulgated pursuant to a

32 Rosenberg, supra note 3, at 209.
33 This procedural significance is clear from Chadha's invalidation of the legislative veto: "Disagreement with the Attorney General's decision on Chadha's deportation . . . no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President." 462 U.S. at 954-55.
34 For example, President Washington's Neutrality Proclamation could have instead been adopted by Congress. Executive and legislative powers are congruent in many respects. Although some substantive actions, such as impeachment, are purely legislative, and others, such as some forms of law enforcement, are purely executive, the executive and legislative powers overlap in some substantive policy areas. See Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F. Supp. 737, 745 (D.D.C. 1971) ("There is no analytical difference, no difference in kind, between the legislative function — of prescribing rules for the future — that is exercised by the legislature or by the agency implementing the authority conferred by the legislature.").
different set of procedures and influences. When the legislature de-
egates rulemaking power to the executive branch by statute, this
power is transformed into "executive" power by the act of delega-
tion, assuming the delegation is constitutional. Indeed, were such a
power purely or exclusively legislative, it could not be constitution-
ally delegated to an agency. Consequently, delegated rulemaking
authority is definitionally executive, and not legislative, power.

James Madison set forth this distinction, in the context of ap-
pointments, when he wrote: "The powers relative to offices are
partly legislative and partly executive. The legislature creates the
office, defines the powers, limits its duration and annexes a compen-
sation. This done, the legislative power ceases." Although the
legislature always retains the choice to delegate the power to make
broad policy regulations or to keep the power, once it chooses to
delegate, the regulations fall within the executive power, until with-
drawn by subsequent statute. The Court in INS v. Chadha thus
observed that "Congress must abide by its delegation of authority
until that delegation is legislatively altered or revoked." The dele-
gated authority shifts to the president's sphere, and, according to
Bowsher v. Synar, "[t]he Constitution does not contemplate an ac-
tive role for Congress in the supervision of officers charged with the
execution of the laws it enacts." As we have seen, rulemaking has
been characterized as executive, not legislative, in Myers v. United
States, Buckley v. Valeo, Chadha, and Bowsher. Supreme
Court decisions consistently reject the concept that rulemaking is
legislative power beyond presidential control. Consequently, the ex-
cutive orders are not a direct encroachment into the legislative
sphere of power.

The related argument, that the orders indirectly subordinate
Congress to the president to the extent that Congress loses much of its constitutional checking function, would be a more serious objection if it were true. Since it is now widely recognized that the original doctrine of separation of powers should not be interpreted mechanistically or rigidly, any government action which is accused of being in violation of this doctrine must be considered in terms of its effect on the proper functioning of each branch. If a facially constitutional action seriously altered the balance between the branches, that action might be considered improper. Before this "effects" standard assumes constitutional import, however, the disruption of checks and balances should be substantial; we should not tinker with the Constitution over every slight shift of power. The scope of presidential power historically has risen and fallen in waves, as the office has shifted from a Hoover to a Roosevelt and then on to a Truman and an Eisenhower. Only fundamental alterations merit judicial intervention into the constitutional scheme of separation of powers.

The Reagan executive orders do not represent such a fundamental alteration of the power structure; instead, they are consistent with the traditional practices of many presidents. Nor is it clear what aspect of the orders interferes with Congress' intended functions. One commentator objects primarily to Executive Order 12,498, arguing that the order impairs Congress' authority to vest discretion in agency heads: "[Agency decisionmakers will conform to the mandate of the order [and] may decline to regulate at all if they cannot develop 'consistent rules']." Once again, this begs the question somewhat by assuming that only Congress, and not the president, has the constitutional authority to delegate executive au-

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See, e.g., Strauss, supra note 87, at 616-21.

See Levitan, Congress v. President: The Myth and the Pendulum, in The Presidency and Congress 182 (W. Livingston, L. Dodd & R. Schott eds. 1979) (discussing the shifting nature of the balance of power between the president and Congress and the various forces that influence this shift — the judiciary, pressure groups, public opinion, and bureaucracies); Karl, supra note 205, at 3-7 (summarizing presidential actions in executive branch organization from Hoover to Carter).

Chemerinsky, an opponent of broad presidential powers in general, would go even further and permit the president to "act without statutory or constitutional authority so long as he does not usurp the powers of another branch of government." Chemerinsky, supra note 89, at 904. Thus, so long as the president's action is confined to the executive branch, it would be constitutional.

See supra notes 5-67 and accompanying text.

Note, supra note 3, at 88.
thority to agency heads. Moreover, the aspect of the order which this commentator finds objectionable — its requirement of "consistent rules" — was explicitly approved of by the Supreme Court in *Myers*. Because the orders specifically direct that congressional mandates will override the orders' dictates, there is no unconstitutional shift of power.

The note writer also argues that the introduction of presidential authority at an early stage of rulemaking, under Executive Order 12,498, "operates before the agency has developed a record" and therefore "Congress will be unable to ascertain whether its statutory mandate has been undone." Congressional oversight is undeniably an important check on the president which must be preserved. Oversight power is much broader than the note contemplates, however. Unlike some forms of judicial review, oversight never has required a rulemaking record to operate effectively. Even an informal word from a congressman to an agency head can have substantial influence. Indeed, Congress has proved itself to be most effective in conducting oversight into actions taken by OMB pursuant to the executive orders. There is no evidence that the exec-

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248 See infra notes 260-279 and accompanying text for a discussion of congressional delegation of rulemaking power.
249 *Myers* upheld presidential authority "to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 272 U.S. at 135.
251 Note, supra note 3, at 81.
252 The breadth of Congress' oversight powers is widely acknowledged. See, e.g., Barenblatt v. United States, 360 U.S. 109, 111 (1959) (wide range of oversight authority, although Congress cannot supplant the executive within its exclusive realm).
253 The Supreme Court recently has observed that "[t]he Constitution provides Congress with abundant means to oversee and control its administrative creatures." *Chadha*, 462 U.S. 955 n.19. See also Verkuil, supra note 100, at 591 ("Congress may have fewer weapons available to control agency policy making than does the executive, but it is not defenseless. Congress can put up a tough political fight if the President presses his policy-making advantages too far. A case in point is the furor in 1983 over the United States Civil Rights Commission.").
254 See, e.g., Proceedings of the National Conference on Federal Regulation: Roads to Reform, reprinted in 32 Admin. L. Rev. 239, 257 (1980) (remark of Douglas Costle, former head of the EPA: "I can assure you that if several members of Congress express reservations about a proposal, that fact is not going to escape the attention of the Administrator of EPA."). See also Note, Delegation and Regulatory Reform: Letting the President Change the Rules, 89 Yale L.J. 561, 563 (1980).
Executive Orders 12,291 and 12,498

tive orders have materially undermined Congress’s oversight powers, and the orders may well have the opposite effect of opening up more of the administrative process to outside review.256

Even if the orders did limit congressional influence, the House and the Senate are by no means helpless in the face of the orders. Congress possesses the ultimate legislative authority to control rulemaking powers with restrictions on presidential discretion or to withdraw these powers completely.257 Beyond this power over the enabling acts, Congress can take a wide range of statutory or non-statutory actions to overturn or modify executive decisions.258 It is unlikely that presidential control over executive agency rulemaking will undermine Congress’ power since the legislature retains more than ample power to limit presidential action.259

So long as the president stays within the defined sphere of executive power, the executive orders comport with the Constitution. Rulemaking, as an executive action, should remain under the ultimate control of the president. Congress retains considerable constitutional authority to restrain presidential aggrandizement of power, and the orders therefore do not encroach upon the legitimate power of the legislature.

C. The Executive Orders and Autonomous Authority of Executive Agencies

Perhaps the most frequent criticism of Executive Orders 12,291 and 12,498 is the claim that they encroach upon the independent authority delegated to the agencies by Congress. Olson objects to the

256 See infra 294-310 and accompanying text.
257 See Bernstein, The Presidential Role in Administrative Rulemaking: One Vote for Not Tying the President’s Hands, 56 Tul. L. Rev. 818, 826 (1982) (remarking that when Congress wants to control a regulatory program, it merely states its intent in the legislation).
258 Many such alternatives are catalogued in Kaiser, Congressional Action to Overturn Agency Rules: Alternatives to the “Legislative Veto,” 32 Admin. L. Rev. 667 (1980).
259 Indeed, Congress could functionally end the president’s specific program through its appropriations authority. See Current Developments, OMB’s Regulatory Review Office Survives Attempt in House to Eliminate Appropriations, 17 Env’t Rep. (BNA) 1150 (1986) (describing an unsuccessful attempt by Congress to deny funds for the OMB Office of Information and Regulatory Affairs because of concerns that OMB was “abusing” its regulatory review authority). For a summary of congressional efforts to modify the effects of Executive Order 12,291, see Steinberg, OMB Review of Environmental Regulations: Limitations on the Courts and Congress, 4 Yale L. & Pol’y Rev. 404, 420-21 (1986).
orders because they transfer discretionary power vested in specific agencies to the Office of Management and Budget. Therefore, a non-expert decisionmaker has supplanted the agencies, upon whose expertise Congress had relied when it enacted the legislation. Rosenberg likewise complains that “the Order substantially interferes with agencies’ discretion and directly affects the substance of administrative policy-making.” He considers Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, which held that courts could not impose additional procedures on agencies, support for the argument that the president may not do so either. Thus, this argument holds that the executive orders effectively displace authority granted specifically to the administrators of certain agencies.

The arguments advanced by Olson and Rosenberg do not persuasively demonstrate the orders’ unconstitutionality. Rosenberg’s Vermont Yankee analogy makes a large and unwarranted leap of logic. The argument that the chief executive may not impose additional procedures on his own branch does not necessarily follow from a decision which restrains the judiciary’s imposition of additional procedures on the agencies of a different branch. Indeed, the entire argument essentially assumes, rather than proves, its conclusion. When Congress grants power to the head of an administrative agency such as the EPA, Congress may be assuming that the agency head will act entirely independently of presidential authority. However, it is equally plausible that Congress makes this grant knowing that the president will exercise supervisory control over the agency. Olson and Rosenberg merely assume the former interpretation.

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260 See Olson, supra note 3, at 22.
261 Id. at 20-22.
262 Rosenberg, supra note 3, at 216.
264 Rosenberg, supra note 3, at 232.
265 See Bruff, supra note 57, at 488 n.184:
A broad argument can be made that whenever Congress delegates power to an official other than the president, it intends that power to be exercised free of presidential supervision. There is a similarly broad rejoinder that Congress is presumably aware that Myers supports presidential authority over officers within the executive branch, so that whenever Congress places a rulemaking program there, it contemplates presidential direction.
In truth, the Supreme Court has explicitly condoned presidential influence over decisions expressly granted to subordinate administrators. In *Myers*, the Court observed that “[l]aws are often passed with specific provision for the adoption of regulations by a department or bureau head,” but held that the “ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the president must consider and supervise in his administrative control.” Lloyd Cutler explained this point well when he wrote:

There is no statute delegating rulemaking power to a department or agency within the executive branch in which Congress has expressly said that the President may not exercise his normal supervisory power over the acts of his executive branch subordinates. The specification of a particular department or agency may fairly be deemed to imply the exclusion of some other department or agency created by Congress, but it does not necessarily or even presumptively imply an attempt to exclude the President and his immediate staff.

A congressional grant of decisional authority to a specific agency does not, therefore, carry any necessary implication that the president may not influence the decision.

Indeed, there is a substantial debate about whether Congress can constitutionally deny the president’s control over executive agencies. Both the text and structure of the Constitution provide for a unitary, politically accountable executive authority, not one dispersed among various unelected agencies. A key consideration when...
drafting the Constitution was how to "enhance the accountability — and thus the power — of the President by denying him the chance to hide behind a council's approval of his acts." Permitting Congress to circumvent this system by granting authority to agencies without presidential supervision "would . . . leave it open to Congress so to divide and transfer 'the executive power' by statute as to change the government 'into a parliamentary despotism like that of Venezuela or Great Britain, with a nominal executive chief or president, who, however, would remain without a shred of actual power.' Although this extreme outcome may be unlikely, it does illustrate the inconsistency between the Olson/Rosenberg view and the structure of our Constitution.

One might object that this interpretation of presidential authority renders meaningless any congressional delegation of power to agency heads themselves. Such is not the case, however. Quasi-adjudicatory actions may be exempted from presidential supervision, even under *Myers*. More importantly, congressional delegation means that the agency head personally retains formal decision-making authority and that the president, while able to influence the decision, may not supplant the agent's final choice. Only the agent may authorize the official promulgation of a regulation. Under the orders, the agency head retains this ultimate power. The threat of removal for disobeying the president does not render meaningless an administrator's authority to promulgate a regulation. In addition, resource limits on presidential oversight mean that considerable discretion is left to the agencies. The executive orders do not em-

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269 Strauss, supra note 87, at 601.
270 E. Corwin, supra note 8, at 80-81 (quoting former Attorney General Cushing).
272 Executive Order 12,291 § 3(0)(3) provides: "[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law". 3 C.F.R. 127, 130 (1982). A Justice Department Memorandum, reprinted in Committee Print, supra note 255, at 80-83, discusses the effect that Executive Order 12,291 has on agency rulemaking and concludes that "[t]he Order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency." Id. at 82. See also Shane, supra note 267, at 1251 (the president's goals in Executive Order 12,291 "dictate no fundamental policy choice to any agency . . . [and] predetermine no regulatory decision. They are only interstitial in character."); Steinberg, supra note 259, at 408.
273 See Rosenberg, supra note 3, at 208.
274 See Strauss, supra note 87, at 595 ("because the White House often lacks the personnel and knowledge to make detailed judgments about policy content, actual as well as legal placement of final decisions generally remains with the agencies"). See also Bruff, supra note 57, at 469 ("a serious
power the president to override a final agency decision and are therefore consistent with congressional delegations of authority. In practice, the executive orders may effectively increase the authority of the agency heads. Critics have simply assumed that the orders transfer discretion from the head of the agency to OMB or the president. In reality, the orders may transfer discretion from lower-level bureaucrats to OMB and leave the agency head with more meaningful control over the agency's regulations. In defense of the executive orders, representatives of the Reagan administration have testified that "[t]he bureaucracy often presented agency heads with faits accomplis [sic]— finished and sealed with little or no input from them. In many cases, agency heads sometimes learned about the proposals only just before they were submitted for our E.O. 12,291 review." Frustration was expressed that some proposals "germinating in a prior Administration and percolating through several administrations, became creatures seemingly immune to political or policy influence, gaining and retaining a life of their own." The Administrative Law Section of the American Bar Association has agreed. According to Peter Stauss and Cass Sunstein, two members of an ABA committee which studied the impact of both Reagan orders, "a significant element of [the orders'] attractiveness lies in their potential to expand the effective authority, accountability, and oversight capacity of the agency head." According to Strauss and Sunstein, the ABA committee concluded that the "requirement of early disclosure of plans — through ventilation of alternatives (in the case of Executive Order 12,291) and annual statement of the regulatory plan (in the case of Executive

attempt to control the vast regulatory bureaucracy, even excluding the independent agencies, would be a staggering task"). In the history of Executive Order 12,291 review, the vast majority of rules which the agencies have made have not been changed by OMB. See DeMuth & Ginsburg, supra note 9, at 1076 n.7.

See Strauss & Sunstein, supra note 122, at 192.

OMB Hearings, supra note 9, at 228 (prepared written statement of James C. Miller, III, director of OMB). Miller also noted that "disgruntled bureaucrats openly questioned the authority of the agency head to make a decision that they disagreed with, even though all of the statutory authority to make the decision was vested in that agency head." Id. (emphasis in original).

Id. See also Strauss & Sunstein, supra note 122, at 187 (there is the "perception that agency heads are, to an undesirable degree, the captives of their own staffs.").

Strauss & Sunstein, supra note 122, at 187. (The Strauss and Sunstein article is a slightly revised version of the report of the Separation of Powers Committee of the Administrative Law Section of the American Bar Association.)
Order 12,498) is thus a means of ensuring that regulatory policy is set by agency heads rather than staffs.\textsuperscript{279}

In sum, when Congress delegates authority to execute legislation to specific agency heads, both the Constitution and Congress itself contemplate that the president will supervise and guide the administrator in the exercise of his or her duties. While Congress may intend for the agency head to exercise a measure of his or her own expertise, the executive orders do not disturb this ultimate authority. To the contrary, the orders actually enhance the effective control of the agency head in developing and promulgating regulations.

D. OMB As Agent of Presidential Supervisory Authority

Among the most vociferous objections to the executive order is the complaint that the Office of Management and Budget is incapable of proper supervision of agencies.\textsuperscript{280} Among the many criticisms are that OMB has a bias against regulation,\textsuperscript{281} that it politicizes technical regulatory issues,\textsuperscript{282} and that OMB employees lack the institutional competence to review the often complex scientific issues involved in regulation.\textsuperscript{283} In light of these arguments, critics contend that OMB is an inappropriate vehicle for presidential review of agency decisionmaking.

There may well be truth in some of these criticisms, especially in instances where OMB may have violated the terms of enabling statutes or the orders themselves. Despite these criticisms, however, there are legitimate reasons for OMB review, and the OMB’s role in implementing regulatory reform has been justified by its expertise in “the field of regulation itself,”\textsuperscript{284} and by its “institutional position close to the President.”\textsuperscript{285} For every instance of OMB misfeasance listed by opponents of the orders, there is an example of

\textsuperscript{279} Id. Also, DeMuth and Ginsburg note that Executive Order 12,498 “ensured for the first time that those matters [regulations being planned by agency staff] were presented to agency policymaking officials while there was still time to make policy.” DeMuth & Ginsburg, supra note 9, at 1085.
\textsuperscript{281} Note, supra note 3, at 94. See also Olson, supra note 3, at 40-43.
\textsuperscript{282} See Note, supra note 3, at 93.
\textsuperscript{283} See Morrison, supra note 280, at 1066.
\textsuperscript{284} DeMuth & Ginsburg, supra note 9, at 1084.
\textsuperscript{285} Strauss & Sunstein, supra note 122, at 191.
the benefits of review cited by proponents. As a constitutional matter, however, the issue is largely irrelevant.

The president possesses sufficient constitutional authority to review and supervise agency actions. Personal exercise of this power is impossible — in recent years, the federal executive branch has issued, on average, over 2500 proposed and final rules annually. Given this situation, the president must delegate his oversight authority to an agent of his choice. President Reagan has chosen to delegate his supervisory authority to OMB. The wisdom of his delegation does not affect the constitutionality of his choice. As Myers recognized, an assertion that "the President grossly abuses the power of removal" was irrelevant to the existence of that power.

In addition, OMB is probably the best-suited review agency for the purpose of fulfilling the objectives of a politically accountable chief executive. The Office of Management and Budget is intended "to advance generally the set of policies (or just 'attitudes') that brought the president to the head of the government." So long as OMB fulfills this role, its other inadequacies may be criticized on policy grounds but are in no way contrary to the system of government established in the United States Constitution.

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Compare Morrison, supra note 280, at 1064 (OMB review places rulemaking authority "in the hands of OMB personnel who are neither competent in the substantive areas of regulation, nor accountable to Congress or the electorate," is conducted in "an atmosphere of secrecy and insulation from public debate," and entails "costly delays."); with DeMuth & Ginsburg, supra note 9, at 1084-86, 1088 (OMB personnel are experts in "the field of regulation itself," the privacy of the review process has allowed for more straightforward administrative deliberation, and any delay caused by OMB review is minor and "a small price to pay for avoiding the huge costs of issuing ill-considered regulations.").


See, e.g., McElrath v. United States, 102 U.S. 426, 436 (1880) ("[A]s to the vast multiplicity of matters involved in the administration of the executive business of the Government, it is physically impossible for the President to give them his personal supervision. Of necessity he must, as to such matters, discharge his duty through the instrumentality, or by the agency, of others.").

272 U.S. at 149 (quoting Chancellor Kent).

DeMuth & Ginsburg, supra note 9, at 1083.
IV. Administrative Reality and the Real Benefits of the Reagan Executive Orders

To some extent, the opponents of the Reagan executive orders are addressing the wrong question. Presidents have always exercised control, in varying degrees, over the actions of subordinate officials of the executive branch. In recent decades, this control has been exercised predominately by OMB. The most pressing concern, in light of this administrative reality, is to ensure that the president’s delegation of oversight authority to OMB does not interfere with his responsibility to be ultimately accountable for executive branch actions.

Even without the Reagan executive orders, the president has numerous sources of centralized control over the remainder of the executive branch. Some of the president’s most powerful authority is informal, as “political loyalty, hope of advancement or other reward, identification with the goals of the superior and inclination to avoid responsibility may secure obedience more effectively than statutory provisions or even the threat of removal.”291 For these reasons, the independent regulatory commissions, which were exempt from the terms of the Reagan executive orders, have generally voluntarily complied with the orders.292

The president also possesses a wide range of formal legal controls over executive branch officials. Agencies rely significantly upon the Justice Department to represent them in court.293 The president’s Office of Personnel Management exercises considerable control over agency employment decisions.294 OMB’s authority is even more pervasive. No less than ninety-four statutes assign management responsibility to OMB.295 According to the Congressional Research Service report on the nature and source of OMB authority:

From its beginning [OMB] had the responsibility for assembling,
publishing, and executing the Federal government's annual budget . . . [and] was also concerned with the coordination and clearance of proposed legislation and agency comments. Since the late 1930s, it has been variously involved in questions of management and organization of the executive branch. The nature and extent of such involvement have fluctuated over time, the last decade having seen a significant upswing, particularly in the area of regulatory management.\(^{296}\)

Even critics of the Reagan executive orders acknowledge that OMB possesses considerable lawful authority over other agencies of the federal government.\(^{297}\)

Significantly, OMB may employ these statutory controls to influence virtually any agency decision. Informal negotiations over regulations take place frequently. The control of agency budgets "is perhaps its best known tool for influencing agency policy."\(^{298}\) Because "OMB and OIRA possess a formidable array of substantive powers over administrative agencies, they can coerce critical policy responses."\(^{299}\) During the Carter administration, OMB did not administer the regulatory review executive order, but the powers granted to OMB in the Paperwork Reduction Act\(^{300}\) enabled "OMB to get at a lot of rules."\(^{301}\) It has been stated cynically, but no doubt accurately, that "[t]he Government works using three things: money, people and regulations; the agency must get all three through OMB."\(^{302}\) Thus, even absent the Reagan executive orders, the president and OMB can exercise substantial control over agency policymaking discretion.

In view of this situation, Kenneth Culp Davis has made the compelling point:

The vital issue concerning Executive Order 12,291 is not

\[^{296}\] Id. at 404.
\[^{297}\] See Olson, supra note 3, at 6-8; Note, supra note 3, at 94-96.
\[^{298}\] Olson supra note 3, at 6. Not only may budgetary control be used to deny resources to particular regulatory programs, but also "[a]dmisitators of programs that OMB dislikes must fight vigorously to survive OMB budget review." Id.
\[^{299}\] Note, supra note 3, at 95.
\[^{301}\] Olson, supra note 3, at 6 (quoting Jim Tozzi, former OMB deputy administrator).
\[^{302}\] Id.
whether the President may intervene in rulemaking by executive agencies. Of course he may. Presidents have always been in control of policies developed by executive agencies. The vital issue is how the President should intervene, and the main problem of how relates to the preservation of the special values of rulemaking procedure.803

The key question therefore, is the effect of the executive orders on the manner of presidential intervention into agency decisionmaking. The answer is that the effect has been beneficial. With the new regulatory structure imposed by the executive orders, "executive regulatory oversight has become more systematic and more formal, and therefore more public and more visible."804 Insofar as the "President's informal influence over the daily operation of the government is already pervasive," formalizing the process may "restrain rather than confer executive authority."805 While some procedural problems remain in the wake of the orders,806 the net effect of the systematization included in the president's program is certainly positive. The objectives of central management control are carefully spelled out, as are a number of procedures. Critical attention to the operation of OMB control has led to a series of voluntary limits on its regulatory review procedures.807 Perhaps further reforms should be made, but the overall significance of the Reagan executive orders promotes more responsible and accountable presidential supervision over the vast activities of the executive branch of the federal government.

804 EPA Regulations Hearing, supra note 287, at 19 (prepared statement of Wendy L. Gramm, director of the OIRA).
805 Strauss, supra note 87, at 666.
806 See Morrison, supra note 280, at 1069-70; See also Strauss & Sunstein, supra note 122, at 188-89. On occasion, courts have overturned agency actions and been critical of OMB influence. See, e.g., Natural Resources Defense Council v. EPA, 683 F.2d 752 (3rd Cir. 1982); Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986).
807 See Strauss & Sunstein, supra note 122, at 188 ("OMB has cooperated with a continuing (and desirable) process of aggressive congressional oversight. No major scandals have emerged. In addition, OMB has taken steps to protect against contacts with private groups."). See also Steinberg, supra note 259, at 424 (describing new OMB procedures which will increase public access to information about OMB's role in the creation of any particular regulation).
V. Conclusion

Notwithstanding the long-standing tradition of presidential control of executive branch actions and the Supreme Court cases which have validated these assertions of presidential authority, the role of the president in overseeing and directing the actions of executive agencies is still hotly disputed. President Reagan's executive orders are the source of the latest, but almost certainly not the last, episode of controversy over asserted presidential powers.

Today's controversy, like many of the past disputes, is centered more in politics than in constitutional law. Throughout history, presidential administrative control has been sought by both liberals and conservatives, with political opponents fighting the president's actions. In truth, many past presidential actions have been politically questionable and subject to legitimate challenge on policy grounds. Constitutionally, however, presidential executive control is well-founded.

Our Constitution, past practice, and Supreme Court jurisprudence all affirm the president's primacy over the executive agencies. President Reagan's executive orders fit squarely within this authority. Congress, as an equal branch, may legislate to restrict the president's discretion in executing the laws, but, until Congress does so, the president is authorized to direct the actions of agencies involved in rulemaking to implement statutes.