NOTES

OVERLOOKED ORDERS: THE NATIONAL SECURITY COUNCIL AS A TOOL OF PRESIDENTIAL ADMINISTRATION

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Legal scholars have long debated the President's authority over administrative agencies. However, these narratives have ignored that Presidents have assumed directive control for decades—via the National Security Council. This Note fills that void in two ways. First, it provides a historical account. It reviews available national security directives and assesses their role in instigating administrative action. It reveals that, over time, Presidents have increasingly invoked these directives to mold domestic and economic policy. Second, this Note evaluates national security directives under three models of presidential authority: the unitary executive theory, Justice Elena Kagan's notion of implied statutory authorization, and Professor Kevin Stack's requirement of explicit statutory permission. It determines that all three theories sanction the President's deployment of national security directives to control agencies and shape domestic affairs. This Note concludes that by providing a firm constitutional and statutory footing from which a President can dictate administrative action, national security directives are a powerful and expanding presidential tool.

 J.D., 2024, New York University School of Law; B.A., 2021, Boston College. I am deeply grateful to Noah Rosenblum for his support and guidance throughout the development of this Note. I also wish to thank my friends, Cara Day, Kate Evans, and Caleb Hersh for their feedback on my initial drafts; the diligent editors of the *New York University Law Review*, particularly Matthew Grossman, Isabel Paolini, Samuel Orloff, and Michael Gurock, for their hard work and thoughtful suggestions; and Mark Emerton for fostering my interest in history. Finally, I am thankful to my parents and sisters for supporting me as I wrote this Note and throughout law school. I could not have done it without you.

Introduction

It is no secret that the United States has a long, controversial history of using national security to justify the consolidation of government power and drastic interventions in individuals' daily lives. For the most part, legal conversations have surfaced and debated this pattern in the context of criminal procedure,[1] civil procedure,[2] civil rights,[3] and beyond. However, administrative and constitutional law have failed to grapple

[1] *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006) (upholding suspicionless searches of New York City subway passengers' bags "in order to safeguard mass transportation facilities from terrorist attack").

[2] *See, e.g.*, Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 Sup. Ct. Rev. 225, 227 ("Justice Kennedy's majority opinion in *Iqbal* transformed dramatically the basic pleading rule largely by dint of emphasizing the national security context of the case at bar." (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009))).

[3] *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 753 (2018) (Sotomayor, J., dissenting) (explaining that in both *Trump* and Korematsu v. United States, 323 U.S. 214 (1944), the Court "invoked an ill-defined national-security threat" to justify "an odious, gravely injurious racial classification").

with a necessary component of this story: the President's deployment of the National Security Council (NSC) to control domestic affairs. Since Congress adopted the National Security Act of 1947, Presidents have issued national security directives that shape policy, coordinate within the administration, and command agency action. Generally, these directives are presidential notifications to department or agency heads informing them of decisions "in the field of national security affairs" and typically "requiring follow-up action."[4] Yet, the NSC has interpreted this "field of national security affairs" to encompass far more than basic defense. For instance, in May 1986, President Reagan issued a national security directive ordering the Departments of Defense and Commerce to incentivize "the domestic machine tool industry" to "improve its production base."[5] Likewise, in June 2022, President Biden's National Security Memorandum 11 instructed the Secretary of Homeland Security to "investigate fishing vessels and operators suspected to be harvesting seafood with forced labor and issue withhold release orders . . . ."[6] Although their language suggests that national security directives enable Presidents to manage sweeping administrative action, they have yet to be studied in that role.

Specifically, many scholars have advanced theories of presidential control, but none have considered how national security directives play into their narratives. For instance, Justice Elena Kagan asserts that President Clinton inaugurated a governance strategy that exponentially increased the President's use of generic directives to command bureaucratic processes.[7] She supplies a legal justification for this move. Under her vision of the presidency, Congress's statutory delegation of regulatory power to an executive agency official typically implies presidential control; the President may direct the agency in exercising that power unless the law states otherwise.[8] Kagan wrote primarily in response to the rising "unitary executive theory,"[9] which teaches that the

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[4] Bromley K. Smith, Nat'l Sec. Council, Organizational History of the National Security Council During the Kennedy and Johnson Administrations 23 (1988).

[5] National Security Decision Directive No. 226, at 3 (May 21, 1986) [hereinafter NSDD-226], https://www.reaganlibrary.gov/public/archives/reference/scanned-nsdds/nsdd226.pdf [https://perma.cc/KR9U-SRMN].

[6] National Security Memorandum No. 11, 2022 Daily Comp. Pres. Doc. 566 (June 27, 2022) [hereinafter NSM-11].

[7] *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250–51, 2294–95 (2001) (cataloging that President Reagan issued nine directives and President George H.W. Bush issued four, but President Clinton issued 107, drastically expanding their use).

[8] *See id.* at 2251.

[9] *See id.* at 2247 (writing that her assertions "may seem jarring" given "the recent work of constitutional law scholars," specifically the debate concerning "the constitutional basis for a fully 'unitary executive'").

Constitution "allocates the power of law execution and administration to the President alone."[10] Per unitarian principles, the President may control *all* administrative actions. Conversely, Professor Kevin Stack later drafted a reaction to Kagan. His model insists that "the President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name."[11] Amidst this spirited discourse, the presence of *domestic* policy in national security directives presents compelling questions for American administration. Did the proliferation of directive control of agencies occur during the Clinton administration, as Kagan posits? Is this method of presidential control consistent with existing theories of presidential administration? Or does the mere fact of national security implications empower a President with authority over the administration?

This Note seeks to fill this void and answer these queries in two ways. First, as a historical matter, this Note explores how and why the NSC assumed a position of significance in domestic affairs. For the first time, it reviews available national security directives issued since the Carter administration[12] and assesses their role in organizing and ordering administrative action to impact domestic and economic policy. Second, this Note evaluates national security directives according to three influential models of presidential authority: the unitary executive theory, Justice Kagan's implied statutory authorization, and Professor Stack's requirement of explicit statutory authority.[13] It argues that the

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[10] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994).

[11] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 263 (2006).

[12] I chose to begin my review with the Carter administration to avoid duplicating Aaron Friedberg's comprehensive discussion of how Cold War mobilization shaped American state-building, specifically the makeup of the administration and the executive branch, through the Reagan era. *See* AARON L. FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE (2000). Friedberg identifies the Carter administration as a moment of renewed interest in industrial mobilization after a multi-decade lapse, which necessitated NSC action. *Id.* at 238. Accordingly, I utilize Carter's transition point as an opportune starting line.

[13] I utilize these three models in my analysis because scholars of administrative and constitutional law commonly characterize them as the key waypoints in the debate regarding the President's directive power. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637, 657–58 (2021). For instance, in describing the discourse, Cass Sunstein and Adrian Vermeule identify three necessary questions to define the directive power: "(1) [W]hether the President has the directive power as a matter of constitutional right; (2) if, contrary to (1), Congress has the constitutional authority to eliminate the directive power, whether it does so by conferring relevant authority . . . on agency heads . . . ; and (3) whether Congress has the authority suggested by (2)." *Id.* Sunstein and Vermeule associate an affirmative answer to (1) with the unitary executive theory and later explain that there are two competing responses to the question of whether Congress has the constitutional authority to eliminate directive power. *Id.* at 658–59. They identify Elena Kagan as the author of the argument that even when

unitary executive theory and the notion of implied authority firmly support presidential control via national security directives. Meanwhile, Professor Stack's model mandates a more limited use of directives but still concedes that the incidence of national security implications can instigate directive authority without explicit statutory approval.

This Note will proceed in four Parts. Part I offers an overview of scholarship concerning presidential control of administrative agencies, namely the unitary executive theory, Justice Kagan's model, and Professor Stack's approach. This reveals which aspects of presidential authority are contested, creating the lens through which readers should consider Part II's directives. Then, Part II presents the historical evolution of the National Security Council in the context of domestic affairs: It reviews available national security directives, both historical and current, with notable domestic implications and highlights their use to control and coordinate agency action. From there, Part III analyzes NSC actions under the theories considered in Part I. It reveals that when national security intersects with each of the three models, it translates to an expansion of presidential power. Therefore, to varying extents, all three theories allow the President's deployment of national security directives to control agencies and shape domestic policy. Finally, Part IV presents the implications of this analysis for future presidential directives. It argues that, compared to generic presidential directives, national security directives provide firmer constitutional and statutory footing from which a President can control agency action. Therefore, as the modern definition of "national security" expands to include more issues with domestic implications, like climate change, corruption, and public health, national security directives will become an increasingly powerful presidential tool.

I
Three Theories of Presidential Administration

In the modern era, an expansive, federal administrative state exists at the nexus of the executive, legislative, and judicial branches. It adopts regulations, enforces statutes and rules, and adjudicates related claims. It is guided and overseen by the President, Congress, and the

Congress grants power to an executive official, the President may still tell that official what to do. *Id.* For the opposing argument that Congress removes the President's directive authority when it delegates power to agency heads, Sunstein and Vermeule cite Professor Stack, among others. *Id.* at 658 & n.106. Although several scholars take this position, this Note focuses on Stack's version of the argument. For a more thorough explanation of Professor Stack's role in this scholarly conversation, see *infra* text accompanying notes 74–6.

federal courts.[14] Given this reality, legal commentators have sought to reconcile a powerful administration with its perceived absence from the Constitution. This scholarly grappling has produced endless theories, with a prominent strain focusing on the President's authority over administrative agencies. To lay the necessary groundwork to situate the NSC within this conversation, this Part discusses three approaches: the unitary executive theory, implied directive authority, and limited statutory powers. In elucidating how generic presidential directives are debated, Part I guides one's reading of national security directives in Part II.

A. The Unitary Executive Theory

1. Textual Foundations

Developed within President Reagan's Department of Justice to strengthen presidential power,[15] the unitary executive theory posits that the "Constitution gives Presidents the power to control their subordinates by vesting all of the executive power in one, and only one, person: the President of the United States."[16] Thus, "[A]ll of what now counts as administrative activity is controllable by the President."[17] It encompasses many different formulations[18] but generally relies on a textual reading of the Constitution.[19]

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[14] *See generally* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599 (2018) (describing the structure of the administrative state).

[15] *See* Mark J. Rozell & Jeffrey P. Crouch, The Unitary Executive Theory 20–21 (2021) (summarizing the unitary executive theory as well as its origins and influence). The Supreme Court's recent decision, *Trump v. United States*, 144 S. Ct. 2312 (2024), illustrates that the theory has since grown substantially in prominence and acceptance among jurists and legal theorists, particularly conservatives. The *Trump* decision reiterates many of the principles discussed in this Section. *See, e.g.*, *Trump*, 144 S. Ct. at 2327 ("Domestically, [the President] must 'take Care that the Laws be faithfully executed,' § 3, and he bears responsibility for the actions of the many departments and agencies within the Executive Branch." (citing U.S. Const. art. I, § 3)).

[16] Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive 4 (2008).

[17] Kagan, *supra* note 7, at 2247.

[18] *Id.* at 2273 (dividing scholarship into the "weak" unitary executive theory and the "strong" version of the theory); *see, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) (arguing that history does not support unlimited presidential power "over the execution of administrative functions" but concluding that a weaker version of the unitary executive theory is supported by "translat[ing]" the "framers' structure" into the modern context); Calabresi & Prakash, *supra* note 10 (rebutting Lessig and Sunstein and presenting a textual and originalist argument for the "strong" unitarian theory); Calabresi & Yoo, *supra* note 16, at 16 ("We argue that there is thus an unbroken, executive branch practice of construing Article II of the Constitution as giving the President power to control the execution of the laws through removals, directions, or nullifications.").

[19] *See* Rozell & Crouch, *supra* note 15, at 25. For an exhaustive recitation of the unitary executive theory's textual justifications, see Calabresi & Prakash, *supra* note 10.

First, unitarians[20] adopt a broad understanding of the President's executive powers. This was notably articulated in 1988 by Justice Scalia's dissenting opinion in *Morrison v. Olson*.[21] *Morrison* considered whether Congress could establish an independent special counsel capable of investigating the President's administration but not removable by that President; the Attorney General (AG) could only fire the special counsel "for cause."[22] Scalia objected to empowering the special counsel to prosecute, an executive power, outside the bounds of presidential authority.[23] Specifically, he highlighted the discrepancy between Article I's and Article II's Vesting Clauses.[24] Article I states, "All legislative powers *herein granted* shall be vested in a Congress of the United States . . . ."[25] Conversely, Scalia declared that Article II provides: "'The executive Power shall be vested in a President of the United States' . . . this does not mean *some of* the executive power, but *all of* the executive power."[26] Unitarians like Scalia interpret the absence of "herein granted" from Article II to mean that Article II is a *general* grant to the President of the power to execute federal laws, while Congress possesses *only* those powers enumerated in Article I.[27]

Second, unitarians argue that executive power encompasses the administrative power. They find it noteworthy that "the Constitution recognizes the existence of only three kinds of federal government power and creates only three institutions of government."[28] Accordingly, there is no separate but inherent "administrative power"; all power must reside in one of the three branches.[29] For unitarians, the Framers' debates reveal that this branch must be the executive: When listing the

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[20] Following the example of Kagan, Stack, and other scholars, I will use the term "unitarians" to refer to proponents of the unitary executive theory. *See, e.g.*, Kagan, *supra* note 7, at 2247; Stack, *supra* note 11, at 274.

[21] 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[22] *See* Lessig & Sunstein, *supra* note 18, at 14–15 (summarizing *Morrison* and Justice Scalia's dissenting opinion).

[23] *Morrison*, 487 U.S. at 705–06 (Scalia, J., dissenting).

[24] *Id.*; *see also* Calabresi & Prakash, *supra* note 10, at 570–72.

[25] U.S. CONST. art. I, § 1 (emphasis added).

[26] *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting) (citing U.S. CONST. art. II, § 1).

[27] *See* Calabresi & Prakash, *supra* note 10, at 570–72; *see also Morrison*, 487 U.S. at 698–99 (Scalia, J., dissenting) (comparing the first section of Articles I, II, and III).

[28] Calabresi & Prakash, *supra* note 10, at 559; *see also, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (holding that the President's power to remove inferior officers stems from Article II's Vesting Clause).

[29] Calabresi & Prakash, *supra* note 10, at 568–70; *see also* Seila L., LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 247 (2020) (Thomas, J., concurring in part and dissenting in part) (arguing that the Constitution's division of power into three branches does not authorize the administration to invoke "quasi-legislative" or "quasi-judicial" powers, but instead vests all executive power in the President).

"executive department['s]"[30] responsibilities, Alexander Hamilton did not distinguish between "'executive' functions, such as foreign affairs and military matters, and 'administrative' functions, such as spending appropriations."[31] Therefore, if the President is generally granted executive powers, they are also broadly afforded administrative capabilities.

Third, having established that the President is bestowed with expansive executive and administrative powers, unitarians insist that the President's power is *exclusive*. They contend that *Congress* cannot share it by, among other things, contrasting Article II's and Article III's Vesting Clauses. Article III vests the judicial power in the Supreme Court and "in such inferior Courts as the Congress may . . . establish."[32] Thus, Article III envisions a congressional role, while Article II does not similarly empower Congress to manage inferior executive officers or create independent agencies without presidential acquiescence.[33] Unitarians further argue that the Constitution imagines the President as the preeminent power *within* the executive branch.[34] For example, in empowering the President to demand the written opinions of department heads regarding government affairs, the Opinions Clause establishes the President as atop the executive hierarchy[35] and

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30 The Federalist No. 72, at 385 (Alexander Hamilton) (Milton Creek Editorial Services ed., Race Point Publishing 2017).

31 Calabresi & Prakash, *supra* note 10, at 615. *But cf.* Lessig & Sunstein, *supra* note 18, at 41 (arguing that the Framers believed "that some powers fall clearly within the domain of 'the executive' (and these they constitutionalized), but the balance (what we would roughly call administrative) they believed would be assigned pragmatically" by Congress).

32 U.S. Const. art. III, § 1.

33 *See* Calabresi & Prakash, *supra* note 10, at 581. For a summary of the debate regarding independent agencies, see Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 44. Miller ultimately argues that "Congress may not constitutionally deny the President the power to remove a policy-making official who has refused an order of the President to take an action within the officer's statutory authority." *Id.* Generally, "independent agencies" are characterized by statutory limitations on the President's ability to remove the agency head, while Presidents may fire the heads of "executive agencies" at will. Stack, *supra* note 11, at 298. An agency may also be designated "independent" based on other modes of insulation from presidential control, such as assigning the agency head a longer term than the President. *See id.* at 317 (describing measures Congress may adopt to buffer agency heads against presidential authority).

34 *Id.* at 582–85. *See also* Trump v. United States, 144 S. Ct. 2312, 2335 (2024) (discussing the President's "unrestricted power to remove" subordinates in the Executive Branch, namely the President's "exclusive authority over the investigative and prosecutorial function of the Justice Department and its officials").

35 *See* Calabresi & Prakash, *supra* note 10, at 584; *see also* United States v. Arthrex, Inc., 594 U.S. 1, 28–29 (2021) (Gorsuch, J., concurring in part and dissenting in part) (contending that several constitutional provisions "provided for a chain of authority" in the executive branch).

"facilitate[s] presidential control of discretion."[36] This, together with the stipulation that the *President* "shall take Care that the Laws be faithfully executed,"[37] constitutionalizes "the buck stops here."[38] In other words, the Constitution assigns the President ultimate responsibility for and, therefore, control over government administration.[39]

2. *Values Implicated*

Unitarians assert that their approach is particularly compelling because "[a] strongly unitary executive can promote important values of accountability [and] coordination . . . ."[40] Regarding accountability, unitarians consider administrative independence or insulation from the President to be impermissible because they break the political accountability chain. This gap deprives the public of an electoral mechanism to express discontent with agency policies;[41] meanwhile, the public cannot blame the President as a proxy if the President cannot direct or punish the agent.[42] Conversely, under a unitarian theory where the President is the final decisionmaker, policy trade-offs are in the hands of an "electorally accountable" President who is "the only official in government with a national constituency" and is thus "responsive to the interests of the public as a whole."[43]

Concerning organization, unitarians' model responds to the common criticism that "agency decisionmaking tends to be confused and uncoordinated."[44] For instance, at least a dozen regulatory agencies' domains encompass energy policy.[45] With this overlap, agencies' "natural

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36 Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1005 (1993).

37 U.S. CONST. art. II, § 3, cl. 3.

38 *"The Buck Stops Here" Desk Sign*, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign [https://perma.cc/27J6-6WVC] (quoting President Truman's farewell address as asserting, "The President—whoever he is—has to decide. He can't pass the buck to anybody.").

39 Calabresi & Prakash, *supra* note 10, at 582–85.

40 Lessig & Sunstein, *supra* note 18, at 2.

41 *See* Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting) (arguing that if an independent counsel pursued partisan prosecutions or otherwise abused their position, there "would be no one accountable to the public to whom the blame could be assigned" (emphasis omitted)).

42 *See id.* at 730 (contending that because an independent counsel is neither selected nor removable by the President, their "flaws cannot be blamed on the President").

43 Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986); *see also* Seila L., LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020) ("To justify and check [undivided executive] authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government.").

44 Strauss & Sunstein, *supra* note 43, at 187.

45 *Id.* at 189.

devotion to [their] primary purpose[s]"[46] and particularized expertise mean that none are necessarily positioned to decide between competing interests. Conversely, "the President is well-placed to consider the whole scheme of regulation rather than discrete units of it."[47] Consequently, empowering the President, as unitarians desire, to prioritize one mission, override a competing agency, and dictate administrative action enables the President to serve an "indispensable" centralizing and coordinating function.[48] In this way, unitarians conclude that the broad, exclusive presidential power they envision translates to good governance.

B. Implied Directive Authority

Like the unitarians, Justice Kagan envisions sprawling presidential power over administrative officials, but she roots this influence in a different source of authority, which necessitates executive limitations that the unitary executive theory does not contemplate. Specifically, Justice Kagan focuses on the President's *directive* authority. Presidential directives are "formal and published memoranda to executive branch agency heads instructing them to take specified action within the scope of the discretionary power delegated to them by Congress."[49] According to Kagan, Presidents traditionally exercised their power over administrative action via executive orders. However, executive orders have guided "the structure and processes of government" and concerned "federal lands, employees, and operations."[50] Conversely, directives could "direct substantive regulatory policy"[51] by "compel[ling] consideration of an issue" or even "a particular result."[52] Initially proposed by Lloyd Cutler in 1975,[53] President Clinton was the first to regularly wield presidential directives to set a government-wide administrative agenda that reflected

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[46] *Id.* (quoting ABA Comm'n on L. & Econ., Federal Regulation: Roads to Reform 163 (1979)).

[47] *Id.* at 187; *see also Seila L.*, 591 U.S. at 224 (arguing that the Framers gave the President the "'[d]ecision, activity, secrecy, and dispatch' that 'characterise the proceedings of one man'" (alteration in original) (quoting The Federalist No. 70, at 373 (Alexander Hamilton) (Milton Creek Editorial Services ed., Race Point Publishing 2017)).

[48] Strauss & Sunstein, *supra* note 43, at 189.

[49] Kagan, *supra* note 7, at 2290.

[50] *Id.* at 2293.

[51] *Id.*; *cf.* Legal Effectiveness of a Presidential Directive, as Compared to an Exec. Order, 24 Op. O.L.C. (2000) ("[I]t is [the Office's] opinion that there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order.").

[52] Kagan, *supra* note 7, at 2291.

[53] *Id.* at 2290 (citing Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1414–17 (1975)).

his policy preferences.[54] For Clinton, this encompassed guiding informal policymaking, rulemaking, and some enforcement actions.[55] Although this assertive President comports with the unitarian executive theory in the abstract, Kagan looks to statutes and policy, not the Constitution, as the font of directive authority.

1. No Constitutional Foundation

Kagan rejects unitarians' proposition that Congress cannot limit the President's ability to direct administrative officials in exercising their duties.[56] First, she cites *Youngstown Sheet & Tube Co. v. Sawyer*, which invalidated President Truman's executive order directing the Secretary of Commerce to seize the nation's steel mills.[57] In her view, *Youngstown* postulates that a President's policymaking authority to direct the executive branch cannot exceed those powers "expressly or impliedly" delegated to the administration by Congress.[58] However, Kagan notes that *Youngstown* did not answer the following: If Congress *had* delegated policymaking authority over the seizure of property to a specific agency official, could Truman have directed that administrator in exercising their delegated power? For this answer, Kagan looks to *Humphrey's Executor v. United States*, which laid the legal foundation for independent agencies. It upheld a statute that restricted the President's ability to remove a member of the Federal Trade Commission to only instances of "inefficiency, negligence of duty, or malfeasance in office."[59] The President could not fire a commissioner who declined to implement presidentially preferred policies. Together, Kagan takes these cases to dictate that, as a constitutional matter, "Congress may limit the President's capacity to direct administrative officials in the exercise of their substantive discretion."[60]

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[54] *See id.* at 2293–94 (discussing President Clinton's innovations in using directive authority to influence the administrative state towards his own policy preferences, issuing 107 orders throughout his presidency, compared to Reagan's nine and Bush's two).

[55] *Id.* at 2282. For instance, President Clinton used directives to instruct "a wide range of agency heads to undertake a joint effort with state and local government agencies to reduce crime in seaport cities," *id.* at 2295 (citing Memorandum on Establishment of the Interagency Commission on Crime and Security in U.S. Seaports, 1 PUB. PAPERS 649 (Apr. 27, 1999)), and to order the Secretaries of Health and Human Services and the Treasury "to adopt new standards and enforcement policies to enhance the safety of imported foods," *id.* (citing Memorandum on the Safety of Imported Foods, 35 WEEKLY COMP. PRES. DOC. 1277 (July 3, 1999)), among many other things.

[56] Kagan, *supra* note 7, at 2323–26.

[57] 343 U.S. 579 (1952).

[58] Kagan, *supra* note 7, at 2321 (citing *Youngstown Sheet & Tube Co.*, 343 U.S. at 585).

[59] *Id.* at 2322 (citing Humphrey's Executor v. United States, 295 U.S. 602, 632 (1935)).

[60] *Id.* at 2323.

2. *An Alternative Statutory & Policy Basis*

Next, Kagan announces that this analysis does not deprive a President of the authority to direct agency officials; it merely dictates that it is not an inherent constitutional power. Instead, she turns to statutory delegations, declaring that if a statute has stated Congress's intent regarding "presidential involvement, then that is the end of the matter. But if Congress, as it usually does, simply has assigned discretionary authority to an agency official, without in any way commenting on the President's role in the delegation, then an interpretive question arises."[61] For Kagan, both traditional interpretive principles and policy considerations indicate that we must read the latter category of laws "to assume that delegation runs to the agency official specified, rather than to any other agency official, but still subject to the ultimate," and therefore directive, "control of the President."[62] Put differently, a statutory delegation implies presidential directive authority unless it explicitly says otherwise.

First, in interpreting statutes, Kagan examines what the target of the delegation indicates about legislative intentions. In her view, when Congress delegates to an *independent* agency, it is announcing a desire to insulate that policymaking from the President.[63] Conversely, when Congress delegates to the executive branch, it assumes it is delegating to the President in some capacity. Congress knows that executive officials are subordinate to the President, are subject to presidential oversight, and can be removed by the President;[64] it would be nonsensical to read delegations to the executive abstracted from the branch's overall hierarchy.[65] To support her argument that presidential influence is the default rule, Kagan reveals that the Court has traditionally made such an assumption. In *Myers v. United States*, the Court in dicta suggested, "[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty . . . ."[66] According to Kagan, terms like "peculiar" and "specific" suggest "something other than an ordinary delegation," so the *Myers* Court must have assumed a typical delegation implied presidential oversight.[67] Hence, statutory construction generally

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61 *Id.* at 2326.

62 *Id.* at 2326–27.

63 *Id.* at 2327. For the distinction between independent and executive agencies, see *supra* note 33 and accompanying text.

64 Kagan, *supra* note 7, at 2327.

65 *Id.* at 2329.

66 272 U.S. 52, 135 (1926).

67 Kagan, *supra* note 7, at 2328.

denotes that the President has directive authority over agency officials in exercising delegated powers.

Second, Kagan argues that implied directive authority "promotes good administrative lawmaking" by advancing accountability and effectiveness.[68] A presidential directive affirmatively recognizes a policy goal, identifies a responsible agency, and outlines the bureaucratic steps to achieve that end.[69] This leadership "enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power."[70] Meanwhile, when a nationally elected figure initiates or ceases regulation, it "establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."[71] Lastly, a President is a particularly effective actor because he is unitary and all-encompassing. He can make a final judgment and overcome bureaucratic indecision.[72] "And because his 'jurisdiction' extends throughout the administrative state," he can account for an expanse of conflicting interests, "synchronize" segments of the bureaucracy, "and apply general principles to agency action" in a way that individual agencies cannot.[73] Thus, in Kagan's view, the same policy considerations that unitarians tout also provide critical backing to her statutory construction and cement the necessity of a President's directive authority.

C. Limited Statutory Powers

Conversely, multiple scholars have asserted that the President lacks directive authority under statutes that assign power to agency officials.[74] In explaining and analyzing their view, this Note will utilize

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[68] *Id.* at 2331.

[69] *See, e.g.*, *id.* at 2283–84 (describing President Clinton's directive to the Secretary of Labor to "issue a rule to allow States to offer paid leave to new mothers and fathers").

[70] *Id.* at 2331–32.

[71] *Id.* at 2332.

[72] *Id.* at 2339; *see also* THE FEDERALIST NO. 70 (Alexander Hamilton) (arguing in favor of the Constitution's single, robust executive).

[73] Kagan, *supra* note 7, at 2339.

[74] *See, e.g.*, Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) (providing constitutional, historical, and policy arguments that "counsel against giving the President authority to dictate decisions entrusted by statute to executive officers"); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995) (noting a conventional view that if Congress has conferred an authority on an agency head, the President has no authority to make that decision themselves); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (arguing that "primary responsibility, as well as the capacity, for detailed decisionmaking properly lie in the agencies to which rulemaking is assigned"); Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. AM. U.

the arguments advanced by Professor Kevin Stack, as he is frequently cited as a proponent of this position.[75] Moreover, his chronological place in the conversation makes his writings particularly useful: Stack brings together and expands upon preceding opposition to the President's directive authority to directly answer the constitutional and statutory arguments proffered by Kagan's *Presidential Administration*.[76] Given this context, looking to Stack helps this Note facilitate clear comparisons between the three conceptualizations of presidential control.

In his writings, Stack reasons that unless a directive is written according to the President's "independent constitutional authorization," it "may legally bind the discretion of executive officials and the public only if the President acts under a statute granting power to the President in name."[77] He comes to this conclusion through his own reading of the Constitution and congressional statutes.

1. Constitutional Analysis

Like Kagan, Stack relies on *Youngstown* but focuses on Justice Jackson's concurring opinion as "the routine starting point" in assessing executive action.[78] According to Jackson, the Constitution does not assign powers through isolated clauses to a single branch; it seeks to create a "workable" government.[79] Therefore, presidential powers depend on "their disjunction or conjunction with those of Congress."[80] Based on this principle, Jackson outlines a three-part framework to assess presidential authority, which Stack relies upon. First, "[w]hen 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."[81] Justice Jackson deems the second category a "zone of twilight" where the President acts without "a congressional grant or denial of authority" and, therefore, he "can only rely on his own independent powers," but

710 (1993) (contending that the President can urge a particular result of rulemaking or for certain factors to be considered in the process, but "the power to regulate remains where the statute places it: the agency head ultimately is to decide what to do").

75 *See, e.g.*, Sunstein & Vermeule, *supra* note 13, at 659 n.106 (citing Stack, *supra* note 11); 32 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Judicial Review § 8128 (2d ed., 2024 update) (same).

76 Stack, *supra* note 11, at 265–66, 277 n.66 (explaining the scholarship Stack considers himself to be in conversation with).

77 *Id.* at 263.

78 Kevin M. Stack, *The Statutory President*, 90 Iowa L. Rev. 539, 557 (2005).

79 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

80 *Id.*

81 *Id.*

Congress may retain overlapping authorities.[82] Finally, the President's power is at its lowest when he acts against "the expressed or implied will of Congress" because "then he can only rely on his own constitutional powers minus" Congress's authority over the issue.[83] Relying on Justice Jackson's concurrence, rather than invoking the *Youngstown* majority as Kagan does, has a critical consequence: Kagan's approach rules out a constitutional basis for a President's directive authority and allows Congress to facilitate or constrain it via statute.[84] Conversely, in each of Jackson's three zones, the President retains some independent constitutional powers that Congress cannot limit. Accordingly, Stack acknowledges that a President may write binding directives according to their "independent constitutional authorization."[85] In Parts III and IV, this Note will illustrate the significance of this carveout for national security directives.

For now, Stack sets aside *Youngstown* as the framework for *constitutional* review of presidential action.[86] However, he notes that Jackson's opinion does not answer "how to judge whether a presidential act fits within the scope of an expressed or implied statutory authorization";[87] it does not elucidate how to assign a congressional action to one of the three categories. Consequently, like Kagan, Stack resorts to statutory interpretation to answer if and when a President possesses directive authority over agency action.

2. Statutory Interpretation

Stack reviews Congress's statutory delegations to administrative agencies and divides them into two categories: "mixed agency-President delegations," referring to a conditional "grant of authority to either the President or the agency conditional on the approval, direction, control, findings, or involvement of the other," and "simple delegations," or "delegations to executive officials alone."[88] Some statutes condition their delegation to an agency on presidential oversight.[89] For instance, in establishing the Department of Foreign Affairs, the First Congress

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82 *Id.* at 637.

83 *Id.*; *see also* Trump v. United States, 144 S. Ct. 2312, 2327–29 (2024) (discussing and summarizing Justice Jackson's concurrence in *Youngstown*).

84 *See supra* Section I.B.1.

85 Stack, *supra* note 11, at 263.

86 *See* Stack, *supra* note 78, at 559 (asserting that *Youngstown* and Justice Jackson establish a framework for evaluating presidential actions "in view of the President's constitutional status" but "do not themselves articulate a standard of review for his statutory assertions of power").

87 *Id.* at 558.

88 Stack, *supra* note 11, at 276–77.

89 *See id.* at 278–81 (listing and discussing examples).

instructed the Secretary to perform duties as "shall from time to time be enjoined on or instructed to him by the President."[90] Others delegate authority to the President but specify the agency official through which the President must act.[91] For example, modern statutes concerning natural resources provide that "[t]he President, acting through the Under Secretary of Commerce for Oceans and Atmosphere" with the Administrator of the Environmental Protection Agency (EPA) "shall promulgate regulations for the assessment of natural resource damages . . . resulting from a discharge of oil."[92] For Stack, these mixed agency-President delegations have crucial negative implications.

In particular, Stack asserts that mixed agency-presidential delegations refute Kagan's belief that delegations to agency officials typically imply presidential directive authority. He explains that, when there are mixed and simple delegations within the *same* act, principles of statutory interpretation teach, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[93] Thus, if Congress ascribes "the President" a role in assuring adequate supplies of water-treatment chemicals,[94] but elsewhere the statute instructs only the EPA Administrator to bring civil enforcement actions to protect underground sources of drinking water,[95] we must assume the omission of "the President" from the latter was intentional. Hence, Congress denied the President authority to direct the enforcement actions. In addition to these intra-statute distinctions, Stack argues that this negative inference applies to all congressional delegations. The Supreme Court has noted that "courts do not interpret statutes in isolation, but in the context of the corpus juris of which they are part, including later enacted statutes."[96] Because mixed agency-President delegations have been used since the First Congress, we can infer that it is a common "form of statutory usage and congressional practice" distinct from simple delegations, and, therefore, "a reasonable legislator would have used a mixed agency-President delegation if he or she sought to grant

[90] Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28–29 (codified as amended at 22 U.S.C. § 2651); Stack, *supra* note 11, at 278. The Department of Foreign Affairs is now the State Department. *Id.*

[91] Stack, *supra* note 11, at 282.

[92] 33 U.S.C. § 2706(e)(1).

[93] Stack, *supra* note 11, at 284.

[94] 42 U.S.C. § 300j.

[95] 42 U.S.C. § 300h-2.

[96] Stack, *supra* note 11, at 288 (quoting Branch v. Smith, 538 U.S. 254, 281 (2003)).

the President directive control."[97] Consequently, without echoing his opponents' resort to policy, Stack concludes that statutory interpretation eliminates the possibility of implied directive authority and dictates that "presidential directives may bind agency officials only when they follow from an *express* delegation to the President."[98]

Ultimately, Stack's desire for explicit statutory delegations, Kagan's notion of implied directive authority, and the unitary executive theory reflect the expansive spectrum of scholarship examining the President's authority to direct agency action. However, this Note now turns its attention to an alternative history and mechanism of presidential control: the National Security Council. As Parts II and III will reveal, it is necessary to integrate the NSC into this conversation because its use tests the bounds of the President's directive authority over a constitutionally unique subject area.

II
The National Security Council: An Alternative Route?

The National Security Council was originated by the National Security Act of 1947 in the aftermath of World War II.[99] Experts studying possible postwar reform conceived it as "a means of institutionalizing the relationship between those responsible for foreign policy and those responsible for military policy."[100] However, the modern NSC stretches far outside this initial box. This Part explores how the NSC has come to mechanize presidential control of the administration in the *domestic* sphere. Section A establishes the origins of the NSC via the National Security Act. Section B describes the short-lived National Security Resources Board (NSRB), its imagined role in organizing and supervising the American economy, and how it exemplifies a rejection of autonomous agency discretion. Section B then details how Presidents deployed the NSC to assume these responsibilities: It reviews available national security directives issued since the Carter administration and assesses their role in shaping policy, commanding agency action, and organizing the administration to impact domestic and economic affairs. Finally, Section C focuses on President Biden's national security directives as a continuation of a longstanding trend in presidential control of the administration.

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97 *Id.*

98 *Id.* at 311 (emphasis added).

99 *See* Douglas T. Stuart, Creating the National Security State, 7–11 (2008) (discussing the postwar policy debates and the resulting National Security Act of 1947).

100 *Id.* at 121.

A. The National Security Act

The National Security Act of 1947 restructured a massive sector of the American government. It established the Department of Defense, the Central Intelligence Agency, the Joint Chiefs of Staff, the NSC, and the NSRB.[101] The NSC initially consisted of the President and the Secretaries of State, Defense, the Army, Navy, and Air Force, as well as the NSRB Chairman and other officials as the President required.[102] Today, the NSC's statutory members are the President, Vice President, and Secretaries of State, Defense, Energy, and Treasury, as well as the Director of the Office of Pandemic Preparedness and Response Policy and other officers invited by the President.[103] "Consistent with the direction of the President," the NSC's statutory functions include the following:

> (1) advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the Armed Forces and the other departments and agencies of the United States Government to cooperate more effectively in matters involving the national security . . .
>
> (3) make recommendations to the President concerning policies on matters of common interest to the departments and agencies of the United States Government concerned with the national security; and
>
> (4) coordinate, without assuming operational authority, the United States Government response to malign foreign influence operations and campaigns.[104]

This structure and the NSC's location within the Executive Office of the President "afford[] the President maximum latitude to create a security advisory body that suits his unique decisionmaking style."[105] Each time a new President is inaugurated, they issue a national security directive to, among other things, delineate the membership of their NSC and its committees, as well as title and define the national security directives that the President will utilize.[106] Other than appropriating

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101 National Security Act of 1947, 61 Stat. 495 (1947) (current version at 50 U.S.C. § 3001).

102 *Id.* § 101a.

103 50 U.S.C. § 3021(c).

104 *Id.* § 3021b.

105 John W. Rollins, Cong. Rsch. Serv., R44828, The National Security Council: Background and Issues for Congress 9 (2022).

106 *See, e.g.*, National Security Decision Directive No. 1 (Feb. 25, 1981) [hereinafter NSDD-1], https://www.reaganlibrary.gov/public/archives/reference/scanned-nsdds/nsdd1.pdf [https://perma.cc/P5AN-RVEM] (defining the two directive series to be used by the Reagan administration); National Security Decision Directive No. 2 (Jan. 12, 1982), https://www.reaganlibrary.gov/public/archives/reference/scanned-nsdds/nsdd2.pdf [https://perma.

the NSC's budget, Congress has a minimal oversight role.[107] Therefore, despite its congressional genesis, the NSC is an adaptable, malleable body where the President is the ultimate decisionmaker.

Additionally, it is critical to note what the National Security Act omits: a definition of "national security."[108] Instead, the statute leaves open the question of what subjects may be brought under the NSC's umbrella. This echoes a common refrain in American history. Statutes, courts, and policymakers rarely explain what they mean by "national security," and, over time, it has been interpreted to encompass a broadening array of subject areas.[109] In turn, this ambiguity hinders our ability to determine the bounds of presidential power. The remainder of this Note will reveal the changing meaning of "national security" and its implications for the President's directive authority.

B. The National Security Council & Domestic Policy

1. Origins: The National Security Resources Board

Created alongside the NSC, the NSRB's objective was to minimize the time necessary for the U.S. to reach full economic mobilization in the event of another war or crisis. Although it was dissolved during Eisenhower's presidency,[110] the NSRB is relevant to this Note's story of the NSC because of what its elimination represented: a rejection of agency power in favor of presidential control. Per the National Security Act, the NSRB's mandate included to "advise the President" regarding government intervention into the economy, including "industrial and civilian mobilization," "the maintenance and stabilization of the civilian economy in time of war," and the geographic dispersal of population and industry to minimize the impact of an atomic strike.[111] However, Arthur Hill, the NSRB's first chairman, and other leaders of the postwar government feared that another war was imminent and that the U.S. would "not again be given the opportunity to prepare for war

cc/8JUN-UJMB] (outlining the structure of Reagan's National Security Council); Presidential Policy Directive No. 1 (Feb. 13, 2009) [hereinafter PPD-1], https://irp.fas.org/offdocs/ppd/ppd-1.pdf [https://perma.cc/6YF6-WHS8] (establishing Obama's NSC); National Security Memorandum No. 2, 2021 DAILY COMP. PRES. DOC. 121 (Feb. 4, 2021) [hereinafter NSM-2] (outlining Biden's NSC).

107 *See* ROLLINS, *supra* note 105, at 9 (describing how the NSC functions).

108 *See* 50 U.S.C. § 3003 (defining terms).

109 *See infra* Sections III.B.2–IV.

110 FRIEDBERG, *supra* note 12, at 225.

111 National Security Act of 1947 § 103(c); *see also* FRIEDBERG, *supra* note 12, at 212 (describing the NSRB); STUART, *supra* note 99, at 154 (comparing the ambitious vision for the NSRB promoted by some members of the Truman administration with the legislation eventually proposed and adopted in Congress).

after hostilities [had] begun."[112] Thus, they sought to integrate military programs into the civilian economy more aggressively.[113]

Specifically, Hill pressed Truman to grant the NSRB authority over other agencies implicated by mobilization and instigated a report making corresponding recommendations.[114] It presented the NSRB as a civilian-controlled but powerful agency alternative to the rising military-industrial complex.[115] The report "favored giving the NSRB greater access to information from other agencies and the ability to request/compel these agencies to undertake particular studies relating to mobilization issues."[116] Regarding the civilian economy, the study conceded that voluntary public-private cooperation would be ideal but insisted that the government must prepare to mandate action, and in that event, the NSRB "should become the agency not to operate [the mandates] itself, but to coordinate their operation."[117] According to Aaron Friedberg, "[h]ad these recommendations been accepted, the NSRB would have been transformed into an extremely powerful agency, possessed . . . of the authority and ability to intervene actively in the nation's peacetime economy."[118]

Yet, Truman abruptly rejected Hill's proposal in order to protect the presidential prerogative relative to administrative agencies and Congress. In his reply to Hill, Truman wrote, "I do not intend . . . to vest in the National Security Resources Board any responsibilities for coordination of the national security programs of the Government which require the exercise of directive authority over any department or agency, or which imply a final power of decision resting with the Board."[119] Instead, he

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112 Friedberg, *supra* note 12, at 209 (alteration in original) (quoting Arthur M. Hill, A Recommendation to the President by the National Security Resources Board on Steps and Measures Essential to the Fulfillment of the National Security Program (NSRB-R-7) (1948) (on file with the Harry S. Truman Library & Museum).

113 *See* Stuart, *supra* note 99, at 153–54 (discussing the Eberstadt Report, a postwar study that made recommendations regarding industrial mobilization and instigated the creation of the NSRB).

114 *Id.* at 157.

115 *See id.* at 158.

116 *Id.*

117 *Id.* (quoting Michael T. England, U.S. Industrial Mobilization, 1916–1988: An Historical Analysis 22–33 (1989)).

118 Friedberg, *supra* note 12, at 210. Friedberg's argument is supported by the NSRB's self-study of its organizational role and history. *See generally* Harry B. Yoshpe, Exec. Off. of the President, A Case Study in Peacetime Mobilization Planning (1953). For instance, the study contains an organizational chart depicting the NSRB's position in the executive branch. Tellingly, the NSRB portrays itself, not the NSC or national military establishment, as managing the Secretaries of State, Treasury, Defense, Interior, Agriculture, Commerce, and Labor. *Id.* at 7.

119 Friedberg, *supra* note 12, at 210 (quoting Letter from Harry S. Truman to Arthur M. Hill, NSRB Chairman (May 24, 1948)).

instructed Hill to adhere to the NSRB's "statutory duty" of "producing information and advice upon which Presidential action may be taken."[120] Moreover, Truman's stance reflected his administration's political siege mentality. After World War II and the Great Depression necessitated expansive federal programs, by 1946, many Americans were "weary of 'Washington's remote control over their daily lives,'"[121] while Congress resented "the mammoth wartime expansion of executive authority and corresponding erosion of legislative influence"[122] and had already responded by abolishing the National Resources Planning Board and the Office of War Mobilization and Reconversion. The country was clearly wary of powerful agencies, so Truman constrained the NSRB to avoid provoking similar retaliatory legislation.[123]

After Truman suppressed the NSRB, President Eisenhower abolished it altogether.[124] Consequently, by the end of the 1950s, "there was no longer any single institution with the responsibility and power to monitor and modulate the composition of the nation's economy."[125] As Truman expected, this administrative vacuum set the stage for Presidents to claim authority, and they did so via the NSC.

2. *Evolution: The National Security Council from Carter to Trump*

An organizational history prepared by NSC staffers during the Kennedy and Johnson administrations describes how "national security business" came to be carried out.[126] At the beginning of Kennedy's tenure, minutes or memoranda were distributed after NSC meetings.[127] However, the papers were quickly formalized as "National Security Action Memoranda," typically prepared after NSC meetings by the Assistant to the President for National Security Affairs (APNSA),[128] who doubled as the NSC's executive

120 *Id.*

121 *Id.* at 59 (quoting an editorial from the *Washington Daily News* following the 1946 midterm elections); *see also* Alan Brinkley, *The New Deal and the Idea of the State*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980 (Steve Fraser & Gary Gerstle eds., 1989) (describing the sentiments motivating the historical shift from aggressive regulatory policy to less interventionist monetary policy).

122 FRIEDBERG, *supra* note 12, at 45 (quoting RICHARD POLENBERG, WAR AND SOCIETY: THE UNITED STATES, 1941–1945, at 193 (1972)).

123 *See id.* at 210.

124 *Id.* at 225.

125 *Id.* at 226.

126 SMITH, *supra* note 4, at 23.

127 *Id.*

128 *See id.* at 9 (identifying McGeorge Bundy as Kennedy's APNSA and describing how he wrote the first six NSAMs). Today, the APNSA is commonly referred to as the National Security Advisor (NSA). *See* ROLLINS, *supra* note 105, at 14–17 tbl.A-1.

secretary.[129] Although drafted in conjunction with NSC meetings, given the NSC's statutory and practical position as a presidential instrument,[130] the directives were viewed to ultimately "reflect[] presidential decisions."[131] President Johnson defined national security directives as "formal notification[s] to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs and generally requiring follow-up action by the department or agency addressed."[132] Often, Presidents have utilized two types of directives: "review" or "study" directives, which instruct a department or agency to analyze issues,[133] and "decision" or "policy" directives, which "promulgate Presidential decisions."[134] With this context in mind, the remainder of this Part describes the historical and current role of "decision" or "policy" national security directives as presidential instruments for instigating agency action in the domestic sphere. Later, Part III appraises the directives discussed in this Part, principally Carter's Presidential Directive 24,[135] Reagan's National Security Decision Directive 47,[136] and Clinton's Presidential Decision Directive 5,[137] through the prism of Part I.

a. A Cold War Vision of National Security

To begin, this Subsection considers directives issued by Presidents Carter, Reagan, and George H.W. Bush, as they all utilized their authority to direct agency action. Their directives were united by a Cold War vision of national security that defined the Soviet Union and the spread

129 National Security Act of 1947 § 101c.

130 *See supra* Section II.A.

131 Smith, *supra* note 4, at 23.

132 *Id.*

133 *See, e.g.*, Presidential Decision Directive No. 1 (Jan. 20, 1993), at 2, https://clinton.presidentiallibraries.us/items/show/12735 [https://perma.cc/Q849-QV5U] (distinguishing between Clinton's Presidential Review Directives and Presidential Decision Directives); PPD-1, *supra* note 106, at 5 (distinguishing between Obama's Presidential Study Directives and Presidential Policy Directives).

134 NSDD-1, *supra* note 106.

135 Presidential Directive No. 24 (Nov. 16, 1977) [hereinafter PD-24]. The unclassified version of PD-24 is available via the Freedom of Information Act. *See Telecommunications Protection Policy*, CIA (Dec. 10, 2012), https://www.cia.gov/readingroom/document/ciardp10m02313r000703920016-3 [https://perma.cc/7J22-WFDK].

136 National Security Decision Directive No. 47 (July 22, 1982) [hereinafter NSDD-47], https://www.reaganlibrary.gov/public/archives/reference/scanned-nsdds/nsdd47.pdf [https://perma.cc/T8BR-DRAZ].

137 Presidential Decision Directive No. 5 (Apr. 15, 1993) [hereinafter PDD-5], https://clinton.presidentiallibraries.us/items/show/12737 [https://perma.cc/MQ52-GT22].

of communism as the foremost threat.[138] The nature of this menace meant that adequate defense implicated domestic policy but was still constrained to the dangers posed by an identifiable foreign enemy.[139] Specifically, America had to "strengthen the health and vigor of its own society" and economy to guard against communist ideology.[140] It had to prepare its industry and military to withstand the next Pearl Harbor.[141] Therefore, these Presidents' directives predominately pertain to issues like counterintelligence, industrial mobilization, and space policy.

For instance, in Presidential Directive 24, President Carter set out to establish a national policy concerning telecommunications security. Addressed to the Secretaries of State, Defense, and Commerce, as well as the AG, and others, it principally took steps to protect intra-government communications. Yet, it also expressed concern that "private conversations of U.S. citizens" could eventually become "the targets of foreign intercept activity."[142] Consequently, it instructed, "[T]he responsible agencies should work with the FCC and the common carriers to adopt system capabilities which protect the privacy of individual communications and to carry out changes in regulatory policy and draft legislation that may be required."[143] Here, President Carter directed agencies to work with the Federal Communications Commission (FCC), an independent agency, and regulate a significant industry in the American economy based on his counterintelligence policy.

Later, President Carter marked a renewed interest in an old NSRB priority: industrial mobilization. Concerned that sudden Soviet aggression would necessitate rapid and substantial defense production, Carter "announced 'a major effort to establish a coherent and a practical basis for all government mobilization planning'" in his 1980 State of the Union.[144] PD-57 followed.[145] Portions of the directive are still classified, but it is essentially addressed to the entire administration: the Secretaries of State; Treasury; Defense; Interior; Agriculture; Commerce; Labor; Health, Education, and Welfare; Housing and Urban Development; Transportation; and Energy; as well as the Postmaster

138 *See* Laura K. Donohue, *The Limits of National Security*, 48 Am. Crim. L. Rev. 1573, 1576–77 (2011) (detailing how America's understanding of and approach to national security has evolved over time to account for new national interests and threats).

139 *See id.* at 1577.

140 *Id.* at 1671.

141 *See* Stuart, *supra* note 99, at 2 (identifying Pearl Harbor as a "turning point in modern American history" that "*established* the concept of national security").

142 PD-24, *supra* note 135, at 2.

143 *Id.*

144 Friedberg, *supra* note 12, at 238.

145 *Id.*

General and AG.[146] PD-57 directs agencies to develop "implementation plans" based on an "NSC Mobilization Study" to enable the country to "mobilize its national resources," civil and military, in the event of a crisis.[147] It further orders the Federal Emergency Management Agency to "combine the completed individual implementation plans into a Federal Master Mobilization Plan and ensure that necessary standby legislation is drafted and execution procedures promulgated to facilitate use of the plan during crises."[148] This reveals that although Truman denied the NSRB similar powers, security-minded economic planning has not gone away; it has merely become an NSC (and, therefore, a presidential) prerogative. In place of agency power, national security directives enable the President to direct and coordinate federal agencies in areas like industrial mobilization with major domestic and economic implications. Eventually, Carter lost the 1980 election and could not see his directive fully implemented, but President Reagan continued the project that Carter started.[149]

In 1981, Reagan established an "Emergency Mobilization Preparedness Board" (EMPB) within the NSC.[150] Shortly thereafter, he issued National Security Decision Directive 47, which mandated "the necessary industrial mobilization capability to prosecute a major military conflict."[151] It added the EPA Administrator, Chair of the Federal Reserve's Board of Governors, FCC Chairman, and more to PD-57's list of recipients.[152] In its "general principles," NSDD-47 encouraged "responsible government agencies" to create "planning partnerships" with the private sector and promoted "partnership and interdependence between Federal, State, and local governments" as well as coordination across agencies, military and civilian.[153] Consistent with Reagan's perspective on the free market and deregulation,[154] it also directed agencies to develop preparedness programs that typically relied on market forces to meet mobilization needs.[155] However, it also

146 Presidential Directive No. 57, at 1 (Mar. 3, 1980) [hereinafter PD-57], https://irp.fas.org/offdocs/pd/pd57.pdf [https://perma.cc/RTF9-2FYQ].

147 *Id.*

148 *Id.*

149 *See* Friedberg, *supra* note 12, at 238.

150 *Id.* at 241.

151 *Id.* at 239 (quoting Alfred G. Hansen, *General Hansen on Industrial Mobilization*, 72 Nat'l Def., Jan. 1988, at 51).

152 *Compare* NSDD-47, *supra* note 136, at 1, *with* PD-57, *supra* note 146, at 1.

153 NSDD-47, *supra* note 136, at 2.

154 *See generally The Reagan Presidency*, Ronald Reagan Presidential Libr. & Museum, https://www.reaganlibrary.gov/reagans/reagan-administration/reagan-presidency [https://perma.cc/A9GL-7JB6] ("Reagan promised to restore the free market from excessive government regulation and encourage private initiative and enterprise.").

155 *See* NSDD-47, *supra* note 136, at 2–4, 7.

intended to invoke the Defense Production Act to supplement industry and infrastructure "where the free market cannot be reasonably expected to provide the required national security capability in a timely manner."[156] Ultimately, Reagan directed the EMPB to prepare a plan to implement the directive and instructed "all Federal departments and agencies [to] manage their financial and human resources" per the "provisions of this and other directives to assure the development of the required capabilities."[157] Although indicative of the broad spectrum of agencies and policy areas that national security directives implicated, its directions were not realized; implementation costs were prohibitive, and the Reagan administration ultimately preferred to rely on the marketplace to ensure American industrial capabilities.[158]

Nevertheless, other Reagan-era directives demonstrate that the President could still wield authority through the NSC, albeit on a smaller policy scale. For instance, NSDD-226 identified high levels of machine tool imports from Taiwan, Japan, and West Germany as a potential threat to U.S. capabilities.[159] It accordingly ordered the Departments of Defense and Commerce to develop and implement plans to incentivize the "domestic machine tool industry to make needed investments to improve its production base."[160] Meanwhile, another directive identified commercial investment in space exploration and technological development as a priority and accordingly required government agencies to purchase launch services from private companies.[161] Together, these directives further demonstrate how Presidents have initiated economic agency action under the auspices of the NSC.

President George H.W. Bush subsequently continued Reagan's approach to industrial mobilization without modification. A review of declassified and publicly available National Security Directives approved during the Bush administration indicates that his NSC largely left Reagan's NSDDs in force.[162] Also like his predecessor,

156 *Id.* at 6.

157 *Id.* at 12.

158 FRIEDBERG, *supra* note 12, at 239–42.

159 NSDD-226, *supra* note 5, at 1.

160 *Id.* at 3.

161 *See* Press Release, White House Off. of the Press Sec'y, Fact Sheet: Presidential Directive on National Space Policy 2 (Feb. 11, 1988) (describing the civil and commercial space policies approved by President Bush). Although still classified, elsewhere, this directive is identified as NSDD-293. *See* National Security Decision Directive No. 321 (Dec. 2, 1988), https://www.reaganlibrary.gov/public/archives/reference/scanned-nsdds/nsdd321.pdf [https://perma.cc/3MN8-WRC9].

162 *See* National Security Directive No. 2 (Jan. 30, 1989), https://bush41library.tamu.edu/files/nsd/nsd2.pdf [https://perma.cc/JN2F-UENA] ("All extant National Security Decision Directives and other active National Security Council decision memoranda shall remain in force until further notice."). There is one unreleased National Security Review (NSR) titled

Bush initially used his NSC to direct the National Aeronautics and Space Administration as well as "the Departments of Commerce, Defense, and Transportation [to] work cooperatively to develop and implement specific measures to foster the growth of private sector commercial use of space."[163] The directive simultaneously invoked Bush's newly established National Space Council.[164] For the remainder of his administration, further directives to promote a domestic space industry were issued as "National Space Policy Directives" rather than "National Security Directives."[165] However, later Presidents went a different route; space policy reverted to the NSC, while the National Space Council and its directives were not revived until the Trump administration.[166]

Overall, Presidents Carter, Reagan, and Bush used their national security directives to initiate and coordinate agency action concerning certain domestic issues, as well as to dictate what policy factors should be considered when agencies exercised their discretion. However, they did not venture far in testing the boundaries of national security—their directives predominately concerned industrial and economic mobilization. As the Cold War ended and security concerns shifted,[167] their successors' directives came to encompass an even broader array of policy issues.

"National Industrial Security Program" which, based on its title, *could* conceivably touch on industrial mobilization. *See National Security Reviews*, George H.W. Bush Presidential Libr. & Museum, https://bush41library.tamu.edu/archives/nsr [https://perma.cc/R3BY-CXA5]. However, I conclude that this is unlikely to signify a modification to Reagan-era policies for two reasons: First, it is designated as a National Security *Review*, not a National Security *Directive*. Second, in 1993, President Bush enacted Executive Order 12829, which "establish[ed] a *National Industrial Security Program* to safeguard Federal government classified information that is released to contractors, licensees, and grantees of the United States Government." Exec. Order No. 12829, 58 Fed. Reg. 3479 (Jan. 8, 1993) (emphasis added). It seems unlikely that the administration would use the same title to refer to a program for industrial mobilization and a program to secure classified information. Therefore, I conclude that the classified NSR is unlikely to have any impact on the conclusions drawn in this Note.

163 National Security Directive No. 30/National Space Policy Directive No. 1, at 10 (Nov. 2, 1989), https://bush41library.tamu.edu/files/nsd/nsd30.pdf [https://perma.cc/7UQY-X9KH].

164 *Id.*; *see* Exec. Order No. 12675, 54 Fed. Reg. 17691 (Apr. 20, 1989).

165 *See, e.g.*, Press Release, The White House, Fact Sheet: Commercial Space Launch Policy (Sept. 5, 1990) (describing President Bush's approval of the new National Space Policy Directive).

166 Exec. Order No. 13803, 82 Fed. Reg. 31429 (June 30, 2017).

167 *See* Rollins, *supra* note 105, at 2 (describing America's evolving "worldwide responsibilities" and explaining that the end of the Cold War "saw the emergence of new international concerns").

b. National Security in a New Age

The fall of the Soviet Union deprived America of a clear enemy that could "limit American designs."[168] Instead, the U.S. sought a new target for the substantial resources and institutions built to wage the Cold War: It filled this void by broadly engaging with the world on economic, military, and political matters and by redefining national security threats as "*anything that presented a potential harm to the United States*."[169] Against this backdrop, Presidents Clinton, Bush, Obama, and Trump deployed their NSC in new policy realms.

As one example, President Clinton applied Carter's approach to counterintelligence to manage conventional law enforcement. Presidential Decision Directive 5 identified the administration's concern that new encryption technology would "frustrate lawful government electronic surveillance."[170] PDD-5 instructed the AG to request that "manufacturers of communications hardware which incorporates encryption" install "government-developed key-escrow microcircuits in their products" that would be capable of protecting user privacy while allowing law enforcement to unlock the encryption.[171] It specified that the AG would develop storage procedures for the encryption keys and release them to other agencies as legally warranted. Furthermore, it provided that the Commerce Secretary "shall initiate a process to write standards to facilitate the procurement and use of encryption devices fitted with key-escrow microcircuits in federal communications systems that process sensitive but unclassified information."[172] "Sensitive but unclassified" does not necessarily implicate national security; it refers to information not classified for security reasons but still warranting protection, such as trade secrets or federal employees' payroll and medical information.[173] By February 1994, the Commerce Department announced the "Escrow Encryption Standard" that PDD-5 had requested.[174] It approved the technology as "the standard for encoding

168 Donohue, *supra* note 138, at 1706.

169 *Id.*

170 PDD-5, *supra* note 137, at 1; *see also* Presidential Review Directive No. 27 (Apr. 16, 1993), https://irp.fas.org/offdocs/prd/prd-27.pdf [https://perma.cc/5CTF-BVYP] (directing a study of telecommunications and encryption and discussing PDD-5).

171 PDD-5, *supra* note 137, at 2.

172 *Id.*

173 *See* U.S. Dep't of State, Sensitive But Unclassified Information (SBU), 12 Foreign Affairs Manual 540 (2021), https://fam.state.gov/fam/12fam/12fam0540.html [https://perma.cc/2LWR-7P7V].

174 *See* Nat'l Inst. Standards & Tech., Approval of Federal Information Processing Standards Publication 185, Escrowed Encryption Standard (EES) (Feb. 9, 1994), https://www.federalregister.gov/documents/1994/02/09/94-2919/approval-of-federal-information-processing-standards-publication-185-escrowed-encryption-standard [https://perma.cc/DY7T-F3V9].

Federal communications involving sensitive but unclassified material."[175] Like Carter's PD-24, Clinton sought to shape the regulation of America's telecommunications industry via security directive, but his approach went beyond possible foreign surveillance to consider generic law enforcement practices. However, public resistance and rapid technological changes interrupted its commercial application.[176]

Later, Clinton was the first President to utilize national security directives to advance climate policy.[177] Following the United Nations Conference on Environment and Development, his administration issued PDD-7, which proclaimed America's commitment to reduce its greenhouse gas emissions to their 1990 levels by the year 2000 and Clinton's intention to develop a corresponding plan.[178] Thus, PDD-7 instructed the Director of Environmental Policy to coordinate the plan's development with the Departments of Energy, Agriculture, Transportation, Commerce, State, and Treasury, as well as the NSC, Council of Economic Advisors, Office of Science and Technology Policy, "key members of Congress," and "outside interests in the business and environmental communities."[179] Clinton publicly announced the emissions reduction target and declared that he was "instructing [his] administration to produce a cost-effective plan . . . that can continue the trend of reduced emission."[180] This illustrates that, like the generic presidential directives Kagan described, Clinton viewed national security directives as a tool to shape agency policymaking and coordinate multiple agencies within the administration.

Meanwhile, President Clinton continued his predecessor's pattern of using national security directives to guard America's military power and economy against intentional attacks. PDD-63 outlined Clinton's plan to protect critical infrastructure, and its discussion of public-private partnerships was noteworthy. It listed areas of the American economy, including banking and finance, water supply, electric power, and public

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175 Glenn J. McLoughlin, Cong. Rsch. Serv., 95-955, The Clipper Chip: A Fact Sheet Update (1995).

176 *See id.* at 2 (summarizing industry and civil liberty groups' concern that the Clipper Chip would "place individual and corporate privacy at risk" and detailing how that opposition forced the administration to diminish its efforts); Brock N. Meeks, *Clipping Chipper: Matt Blaze*, Wired (Sept. 1, 1994, 12:00 PM), https://www.wired.com/1994/09/clipping-clipper-matt-blaze [https://perma.cc/6KLZ-HYPQ] (detailing the discovery of a design flaw in the Clipper Chip and how the revelation precipitated "the administration's retreat from Clipper").

177 *See* Donohue, *supra* note 138, at 1706 (detailing how General Maxwell Taylor and others wanted national security to encompass climate policy in the 1970s but this shift did not actually occur until the 1990s).

178 Presidential Decision Directive No. 7, at 2 (May 27, 1993) [hereinafter PDD-7], https://clinton.presidentiallibraries.us/items/show/12738 [https://perma.cc/S3QJ-H9C5].

179 *Id.*

180 Remarks on Earth Day, 1 Pub. Papers 468, 470–71 (Apr. 21, 1993).

health, and explained, "For each of the major sectors of our economy that are vulnerable to infrastructure attack, the Federal Government will appoint from a designated Lead Agency a senior officer of that agency as the Sector Liaison Official to work with the private sector."[181] It further identified Lead Agencies and instructed each Sector Liaison Official to identify a private sector counterpart "to represent their sector" and "contribute to a sectoral National Infrastructure Assurance Plan" by, among other things, "assessing the vulnerabilities of the sector to cyber or physical attacks" and "recommending a plan to eliminate significant vulnerabilities."[182] Lastly, the directive explained that normal market incentives would be the first choice to protect critical infrastructure, and agencies should accordingly "identify and assess available alternatives to direct regulation" to achieve their objectives.[183] This shows that, repeatedly, Clinton utilized the NSC to exercise significant authority over agencies' policymaking and interaction with the private sector.

Under George W. Bush's administration, national security directives evolved. In reaction to the September 11th attacks, President Bush established a separate Homeland Security Council (HSC).[184] For a time, the HSC took priority over the NSC in issuing security-minded directives that implicated the domestic economy, which it titled "Homeland Security Presidential Directives" (HSPD).[185] However, this was a nominal distinction, and some directives were cross-listed as both HSPDs and "National Security Policy Directives."[186] To boost operational efficiency by integrating White House staff dealing with security issues,[187] subsequent Presidents folded homeland security matters within NSC proceedings and retitled their directives accordingly.[188] As an example,

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181 Presidential Decision Directive No. 63, at 3 (May 22, 1998), https://clinton.presidentiallibraries.us/items/show/12762 [https://perma.cc/3B9C-FEND].

182 *Id.*

183 *Id.* at 4.

184 Homeland Security Presidential Directive No. 1 (Oct. 29, 2001), *reprinted in* HOUSE COMM. ON HOMELAND SEC., 110TH CONG. COMPILATION OF HOMELAND SECURITY PRESIDENTIAL DIRECTIVES (HSPD), 1–4 (2008) [hereinafter HSPD COMPILATION].

185 *Id.*

186 *See, e.g.*, Homeland Security Presidential Directive No. 23/National Security Presidential Directive No. 54 (Jan. 8, 2008) [hereinafter HSPD-23/NSPD-54], https://irp.fas.org/offdocs/nspd/nspd-54.pdf [https://perma.cc/97SC-4SC7].

187 ROLLINS, *supra* note 105, at 10.

188 *See generally* PPD-1, *supra* note 106, at 1–2 (omitting the HSC and providing that "[w]hen homeland security or counter-terrorism related issues are on the agenda, the NSC's regular attendees will include the Assistant to the President for Homeland Security and Counter-Terrorism"); National Security Presidential Memorandum No. 4, 82 Fed. Reg. 16881 (Apr. 4, 2017) (discussing the HSC and recognizing its existence as a statutory body but ultimately failing to distinguish it from the NSC in membership or operation and assigning the National Security Advisor authority over both entities); NSM-2, *supra* note 106 (omitting the HSC).

Bush's HSPD-9 encompasses the same subjects as Biden's NSM-16.[189] Consequently, this Note includes HSPDs in its analysis.

First, Bush issued HSPD-7, superseding Clinton's NSC-63 regarding critical infrastructure protection.[190] 9/11 shifted America's attention to terrorism, and HSPD-7 correspondingly expanded NSC-63 to encompass unconventional methods of attack. In addition to Clinton's desire to protect America's military power and economy, Bush guarded against mass casualties and health effects, including by adding agriculture and food to Clinton's long list of economic sectors needing protection.[191] HSPD-7 designated an agency responsible for each sector and instructed them to "collaborate with all relevant Federal departments and agencies, State and local governments, and the private sector"; assess the sector's vulnerability; and "encourage risk management strategies" to guard against attacks.[192] Beyond this, it also ordered the Commerce Department to "work with private sector, research, academic, and government organizations" to improve cybersecurity and critical infrastructure protection, "including using its authority under the Defense Production Act to assure the timely availability of industrial products, materials, and services to meet homeland security requirements."[193] Like Clinton, Bush coordinated among the executive branch by assigning particular agencies to economic sectors and instructed those agencies to take action toward the entire American economy. Although ostensibly tied to national security crises, his directive asked agencies to facilitate preemptive action by their respective economic sectors. Undoubtedly, this represents a significant display of presidential authority over agencies.

Second, Bush also issued sector- or threat-specific HSPDs to further prepare for emergencies. Having shifted America's understanding of national security to respond to terrorism, Bush also brought natural disasters and public health emergencies within the presidential threat

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189 *Compare* Homeland Security Presidential Directive No. 9 (Jan. 30, 2004), *reprinted in* HSPD Compilation, *supra* note 184, at 51–56 [hereinafter HSPD-9] ("This directive establishes a national policy to defend the agriculture and food system against terrorist attacks, major disasters, and other emergencies."), *with* National Security Memorandum No. 16 (Nov. 10, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/10/national-security-memorandum-on-on-strengthening-the-security-and-resilience-of-united-states-food-and-agriculture [https://perma.cc/7FD5-UQPL] [hereinafter NSM-16] ("It is the policy of the United States to ensure that our Nation's food and agriculture sector is secure and resilient in response to the possibility of high-consequence and catastrophic incidents.").

190 Homeland Security Presidential Directive No. 7 (Dec. 17, 2003), *reprinted in* HSPD Compilation, *supra* note 184, at 40 [hereinafter HSPD-7].

191 *Id.* at 36.

192 *Id.*

193 *Id.* at 37.

assessment. For instance, HSPD-9 sought to "establish[] a national policy to defend the agriculture and food system."[194] In this vein, it instructed the Departments of Interior, Agriculture, Health and Human Services, and the EPA to develop surveillance and monitoring systems for early detection of disease, pests, or poisonous agents as well as to progress nationwide laboratory networks for food, veterinary, plant health, and water quality.[195] HSPD-9 also compelled the Secretary of Agriculture to work with other agencies, state and local governments, and the private sector to develop a "National Veterinary Stockpile" and a "National Plant Disease Recovery System" sufficient to supply the nation in a crisis.[196] Likewise, Bush issued an HSPD concerning public health. Among other things, HSPD-21 directed Health and Human Services to lead an interagency process "to identify any legal, regulatory, or other barriers to public health and medical preparedness and response" from federal, state, or local government or the private sector "that can be eliminated by appropriate regulatory or legislative action" and submit a corresponding report to the HSC's equivalent of the National Security Advisor.[197] Lastly, Bush's HSPD-23/NSPD-54 perpetuated cybersecurity as a presidential priority. It told the Secretary of Homeland Security and agencies identified in HSPD-7 to compile "a report detailing policy and resource requirements" for protecting "privately owned U.S.-critical infrastructure networks," including how to promote "investment in intrusion protection capabilities."[198] Together, these directives represent the high degree of specificity security directives have reached in instructing agencies to enact the President's policy objectives.

During his tenure in office, President Obama was less innovative than Clinton or Bush in applying national security directives to new policy areas. Nevertheless, he mirrored Bush's actions: He revoked HSPD-7 and instituted his own critical infrastructure directive, PPD-21. It largely replicated HSPD-7 but directed the Secretary of Homeland Security to lead six initiatives.[199] For example, it instructed the Secretary to work with agencies in analyzing "the existing public-private

194 HSPD-9, *supra* note 189, at 51.

195 *Id.* at 52.

196 *Id.* at 54.

197 Homeland Security Presidential Directive No. 21 (Oct. 18, 2007), *reprinted in* HSPD Compilation, *supra* note 184, at 148.

198 HSPD-23/NSPD-54, *supra* note 186, at 12.

199 *See* Tim Starks & David DiMolfetta, *A Presidential Critical Infrastructure Protection Order Is Getting a Badly Needed Update, Officials Say*, Wash. Post (May 11, 2023, 7:05 AM), https://www.washingtonpost.com/politics/2023/05/11/presidential-critical-infrastructure-protection-order-is-getting-badly-needed-update-officials-say [https://perma.cc/ZNE5-W9J9] ("PPD-21 preserved much of the structure of the Bush administration memo.").

partnership model" and recommending improvements.[200] Moreover, it ordered the Secretary to prepare an updated National Infrastructure Protection Plan that would encompass a risk management framework for critical infrastructure, communication protocols, "a metrics and analysis process" to measure risk reduction, as well as "consider sector dependency on energy and communication systems, and identify pre-event and mitigation measures or alternate capabilities."[201] The resulting plan was compiled and released in December 2013.[202] As with HSPD-7, this reinforces that Presidents have continued to use national security directives to instigate agency interaction with the industries they regulate and corresponding policymaking.

In a similar vein, Obama issued PPD-20 to "complement" but "not affect" Bush's NSPD-54/HSPD-23.[203] It attempted "to settle years of debate among government agencies about who is authorized to take what sorts of actions in cyberspace and with what level of permission."[204] Specifically, it defined and distinguished between "defensive" and "offensive cyber effects operations" (OCEO) and mandated that the government refrain from conduct "likely to produce cyber effects within the United States unless approved by the President"[205] and unless other law enforcement techniques had been exhausted.[206] Yet, it provided that an agency may act *defensively* without presidential consent if the agency head approved and it qualified as an "Emergency Cyber Action," which the directive further defined as necessary to "mitigate an imminent threat or ongoing attack" and prevent "imminent loss of life or . . . enduring national impact."[207] After it was leaked by Edward Snowden in 2013, this directive alarmed some commentators, particularly its provision asking to identify "potential targets" for OCEO.[208] Specifically, its contemplation of the offensive use of cyber operations allegedly risked

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200 Presidential Policy Directive No. 21, at 8 (Feb. 12, 2013), https://www.cisa.gov/sites/default/files/2023-01/ppd-21-critical-infrastructure-and-resilience-508_0.pdf [https://perma.cc/C7ST-ATLX].

201 *Id.* at 9–10.

202 *2013 National Infrastructure Plan*, CISA, https://www.cisa.gov/resources-tools/resources/2013-national-infrastructure-protection-plan [https://perma.cc/337D-W3GV].

203 Presidential Policy Directive No. 20, at 1 (Oct. 16, 2012) [hereinafter PPD-20], https://irp.fas.org/offdocs/ppd/ppd-20.pdf [https://perma.cc/MZU3-VSUR].

204 Ellen Nakashima, *Obama Signs Secret Directive to Help Thwart Cyberattacks*, Wash. Post (Nov. 14, 2012, 10:27 AM), https://www.washingtonpost.com/world/national-security/obama-signs-secret-cybersecurity-directive-allowing-more-aggressive-military-role/2012/11/14/7bf51512-2cde-11e2-9ac2-1c61452669c3_story.html [https://perma.cc/D4JW-R9XS].

205 PPD-20, *supra* note 203, at 3, 6.

206 Nakashima, *supra* note 204.

207 PPD-20, *supra* note 203, at 10.

208 *Id.* at 9.

"increasing militarization of the internet" and catching civilian users in the middle.[209] Given that a bill that would have clarified the roles of federal agencies and placed responsibility for cybersecurity with the Department of Homeland Security had only recently collapsed in the Senate,[210] this directive appeared to demonstrate the President's willingness to use national security directives to fill a legislative void. Where Congress failed, the NSC became Obama's mechanism to assign agency responsibilities and ultimate presidential oversight.

Two of President Trump's national security directives warrant exploration based on their nexus with domestic policy. Unfortunately, the first of these papers cannot be fully assessed due to its partial classification: A currently unnumbered and unreleased National Security Presidential Memorandum entitled "Protecting the United States Advantage in Artificial Intelligence and Related Critical Technologies" was signed on February 11, 2019.[211] Trump simultaneously issued Executive Order 13859, "Maintaining American Leadership in Artificial Intelligence" (AI), which elucidates the directive's possible contents. The executive order outlined strategic objectives including promoting investment in AI research and development and ensuring that "technical standards minimize vulnerability to attack."[212] Significantly, it provided that implementing agencies shall "[d]evelop and implement an action plan, in accordance with the [NSPM] of February 11, 2019 . . . to protect the advantage of the United States in AI and technology critical to United States economic and national security interests against strategic competitors and foreign adversaries."[213] Moreover, it stated that "the action plan shall be implemented by agencies who are recipients of the NSPM."[214] Clearly, the NSPM brought an emerging technology within the national security umbrella, and the executive order expected the administration to take action accordingly.

Second, Trump released NSPM-33, which pertained to government-supported research and development (R&D). It provided that "the heads of executive departments and agencies" funding R&D must ensure that participants in projects funded by the government, using

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209 Glenn Greenwald & Ewan MacAskill, *Obama Orders US to Draw Up Overseas Target List for Cyber-Attacks*, GUARDIAN (June 7, 2013, 3:06 PM), https://www.theguardian.com/world/2013/jun/07/obama-china-targets-cyber-overseas [https://perma.cc/C7CP-9LJP].

210 Jennifer Rizzo, *Cybersecurity Bill Fails in Senate*, CNN (Aug. 2, 2012, 4:19 PM), https://www.cnn.com/2012/08/02/politics/cybersecurity-act/index.html [https://perma.cc/XR5N-AYPX].

211 *See* Exec. Order No. 13859, 84 Fed. Reg. 3967, 3968 (Feb. 11, 2019) (referring to the directive).

212 *Id.* at 3967–68.

213 *Id.* at 3968.

214 *Id.* at 3971.

government equipment or facilities, or comprising U.S. employees and contractors meet certain disclosure requirements.[215] Ostensibly, this directive sought to minimize participants' "conflicts of interests" or "conflicts of commitment" and thereby block foreign actors from infiltrating U.S. R&D to "circumvent the costs and risks of conducting research" and "increas[e] their economic and military competitiveness" at America's expense.[216] This was not specific to defense projects. Instead, the directive expanded the NSC's umbrella by pushing generic government R&D through a national security filter. In August 2022, the Office of Science and Technology Policy announced implementation guidance prepared according to NSPM-33. The guidance included standardized disclosure forms and instructions for researchers applying for federal grants or cooperative agreements.[217] Given that Biden's proposed budget for fiscal year 2023 requested $204.9 billion for R&D, a directive controlling the distribution of these funds is impactful for agencies and the economy more broadly.[218] Accordingly, Trump, like Clinton, Bush, and Obama before him, used national security directives as a means to supervise agency action.

C. President Biden's National Security Council

Before taking office, the Biden administration set the stage for a new NSC: "President-elect Joe Biden, facing massive domestic problems and a rapidly changing strategic landscape, has said his goal is to break down barriers between national security and domestic policy, 'especially on crosscutting issues' such as '[COVID], climate, migration and even U.S.-China relations that have touched so many domestic equities.'"[219] In some regard, this is true. President Biden used his directives to expand the definition of "national security." Specifically, he

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[215] National Security Presidential Memorandum No. 33 (Jan. 14, 2021), https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-united-states-government-supported-research-development-national-security-policy [https://perma.cc/Y3W6-Z6VQ].

[216] *Id.* at 2.

[217] Morgan Dwyer, *An Update on Research Security: Streamlining Disclosure Standards to Enhance Clarity, Transparency, and Equity*, White House (Aug. 31, 2022), https://www.whitehouse.gov/ostp/news-updates/2022/08/31/an-update-on-research-securitystreamlining-disclosure-standards-to-enhance-clarity-transparency-and-equity [https://perma.cc/H7EU-VNAR].

[218] Laurie A. Harris, Cong. Rsch. Serv., R47161, Federal Research and Development (R&D) Funding: FY2023, at 3 (2022).

[219] Karen DeYoung, *Biden's NSC to Focus on Global Health, Climate, Cyber, and Human Rights, as well as China and Russia*, Wash. Post (Jan. 8, 2021, 9:30 AM), https://www.washingtonpost.com/national-security/biden-nsc-covid-climate-cyber-china/2021/01/08/85a31cba-5158-11eb-83e3-322644d82356_story.html [https://perma.cc/BZL3-HSRS].

issued National Security Study Memorandum 1 to establish "the [f]ight [a]gainst [c]orruption" as a "core" national security interest.[220] Although NSSM-1 sought to study the problem and did not order other action, it expanded the policy areas subject to national security directives, laying the groundwork for even further presidential control of agencies. In this way, Biden marked a change.

However, as the previous Section revealed, Presidents have blurred the boundary between national security and domestic policy for decades. At the end of his administration, it is apparent that Biden's NSC largely continued the trend. For instance, Biden's "National Security Memorandum on Improving Cybersecurity for Critical Infrastructure" sought to protect national and economic security, as well as public health and safety, by boosting the cybersecurity of critical infrastructure sectors identified in his predecessor's national security directives.[221] It instructed the Secretaries of Homeland Security and Commerce to "develop and issue cybersecurity performance goals for critical infrastructure" and further provided that these goals should "serve as clear guidance to owners and operators" what cybersecurity policies Americans "expect for such essential services."[222]

Biden's NSM-10 presented a similarly dramatic intervention into U.S. technology policy. It pertained to quantum computers, machines that utilize quantum mechanics to process supercomplex problems at high speeds.[223] Biden's directive sought to guarantee America's economic and technological advantage in this area while protecting vulnerable systems. Accordingly, it announced that the U.S. will develop technological standards for "the timely and equitable transition of cryptographic systems to quantum-resistant cryptography" and provided comprehensive instructions for that process.[224] In the meantime, it directed the Commerce Secretary to "initiate an open working group with industry, including critical infrastructure owners and operators, and other stakeholders" to advance "adoption of quantum-resistant cryptography."[225] The working group's findings will be incorporated into the planned standards. NSM-10 also asked all "Federal Civilian

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220 National Security Study Memorandum No. 1, 2021 Daily Comp. Pres. Doc. 466, at 1 (June 3, 2021) [hereinafter NSSM-1].

221 National Security Memorandum No. 5, 2021 Daily Comp. Pres. Doc. 622 (July 28, 2021) [hereinafter NSM-5].

222 *Id.*

223 *See generally What Is Quantum Computing?*, IBM, https://www.ibm.com/topics/quantum-computing [https://perma.cc/W3FC-8MGV].

224 National Security Memorandum No. 10, 2022 Daily Comp. Pres. Doc. 355, at 3 (May 4, 2022).

225 *Id.* at 5.

Executive Branch Agencies" to refrain from procuring any "commercial quantum-resistant cryptographic solutions" for certain systems until the first set of standards is released.[226] Ultimately, as Clinton did with PDD-5 and Trump did with his AI NSM, Biden used NSM-10 to prepare the federal government for a massive technological shift.

Biden's other national security directives were similarly sweeping. NSM-11, which concerns illegal fishing and related labor abuse, directed executive departments and agencies to combat these problems. For example, it instructed the Secretary of Homeland Security to "investigate fishing vessels and operators suspected to be harvesting seafood with forced labor and issue withhold release orders, as appropriate."[227] It further stipulated that the Secretaries of State and Treasury shall "consider whether their respective sanctions and visa restriction authorities may be used to address [illegal] fishing and associated labor abuses."[228] Likewise, NSM-16 followed in the footsteps of Bush's HSPD-9 and sought to mitigate physical, climate change, and cyber threats to America's food and agriculture sector. Among other things, it directed the Secretaries of Agriculture and Health and Human Services to conduct a risk assessment and identify vulnerabilities, then prepare corresponding mitigation strategies.[229] It also instructed several agencies to develop "global surveillance and monitoring systems" to warn of potential incidents and track "specific animals, plants, food, and other commodities," as well as to "coordinate[] nationwide laboratory networks for food, animal, and plant health," and maintain necessary veterinary and plant stockpiles.[230] Lastly, NSM-16 told the Secretaries of Agriculture, Health and Human Services, as well as the heads of other agencies, to support the development of degrees and training programs concerned with the protection of food and agriculture and the directive's policy priorities.[231] In this way, Biden's NSC continued the old: Its directives existed at the intersection of domestic and security policy and invoked presidential authority over agency action.

In total, this Part reveals that the National Security Act's enactors recognized a need for security-minded domestic and economic policymaking and interagency coordination and envisioned an agency, the NSRB, as fulfilling that role. However, when the NSRB was eliminated, the President, via the NSC, stepped into the void. Since

226 *Id.* at 7–8.
227 NSM-11, *supra* note 6, at 3–4.
228 *Id.* at 4.
229 National Security Memorandum No. 16, 2022 Daily Comp. Pres. Doc. 1030, at 3, 4 (Nov. 10, 2022).
230 *Id.* at 6.
231 *Id.* at 7.

then, Presidents have, to varying extents, assumed their much-debated authority over administrative agencies under the auspices of national security directives. Such a claim to power flourished before Scalia wrote his *Morrison* dissent or the Clinton administration accelerated the use of directives. Meanwhile, as time passes, Presidents have expanded the subjects that "national security" encompasses and thereby broadened the reach of this power. Having recognized this reality, the next Part considers whether it can be reconciled with the three dominant theories of presidential administration.

III
Considering the National Security Council Under Existing Models of Presidential Authority

This Part contemplates how the theories described in Part I would evaluate the directives identified in Part II. Specifically, it uses Clinton's PDD-5, Carter's PD-24, and Reagan's NSDD-47 to exemplify how Part II's national security directives would be considered.[232]

A. The Unitary Executive Theory

Of the three scholarly approaches, the President's use of national security directives finds its strongest support in the unitary executive theory. As discussed, unitarians believe that the Constitution grants the President broad executive powers which encompass the administrative and does so exclusively.[233] Here, they would examine the Constitution's presentation of national security as a uniquely executive concern and conclude that in this subject area, the President's constitutional authority over agency action is unequivocal. In assessing the Executive's national security domain, unitarians have support in Supreme Court precedent. Specifically, in *United States v. Curtiss-Wright Export Corp.*, the Court noted the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"—because it is rooted in the Constitution.[234] In the

[232] I use PDD-5 to exemplify directives targeting executive agencies because it relies upon a relatively clear delegating statute, 40 U.S.C. § 11331, which simplifies the discussion. Meanwhile, PD-24 and NSDD-47 represent directives affecting independent agencies.

[233] *See supra* Section I.A.

[234] 299 U.S. 304, 320 (1936). *Curtiss-Wright* considered a congressional resolution authorizing the President to prohibit the sale of arms to countries involved in the Chaco Wars. Arms dealers argued that the resolution constituted an unconstitutional grant of legislative authority to the President in violation of the nondelegation doctrine. *Id.* at 314–16. Distinguishing between the President's authority over internal affairs and more expansive,

Court's view, the President's priority over Congress in national security matters is necessitated by the need for secrecy as well as the President's unique access to intelligence and diplomatic agents.[235] In international affairs, "with its important, complicated, delicate and manifold problems," only the President can balance competing information and policy concerns and "has the power to speak or listen as a representative of the nation."[236] Accordingly, the President has greater implied powers in this area; Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[237]

In the unitarian view, this supports national security directives' legality. For instance, in examining PDD-5, Stack might object to Clinton directing the Secretary of Commerce to write procurement standards for telecommunications equipment if the relevant statute, 40 U.S.C. § 11331, empowers the Secretary to regulate, while the President can only disapprove or modify the rules later.[238] Conversely, supporters of the unitary executive theory already argue that the President possesses all executive powers, including quasi-legislative or quasi-judicial administrative authorities, and is entitled to control agency officials.[239] Here, the presence of national security implications, where a *more* expansive presidential prerogative has a recognized precedential[240] and historical foundation,[241] only emphasizes that these directives

inherent power over foreign relations, the Court upheld the prohibition. *Id.* at 220. *Cf.* Zivotofsky v. Kerry, 576 U.S. 1, 20–22 (2015) (arguing that "*Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations" but concluding that the Constitution granted the President exclusive authority to formally recognize foreign nations).

235 *Curtiss-Wright*, 229 U.S. at 319.

236 *Id*.

237 *Id.* at 320.

238 *See infra* Section III.C; *see also* 40 U.S.C. § 11331(a)(1), (c) (empowering the Secretary of Commerce to "prescribe standards and guidelines pertaining to Federal information systems" that did not handle national security information). PDD-5 implicates § 11331(a)(1), relating to generic federal information systems, and not § 11331(a)(2), relating to national security systems, because it applies to systems managing "sensitive but unclassified" information. PDD-5, *supra* note 137, at 2.

239 *See supra* Section I.A; *see also* Lessig & Sunstein, *supra* note 18, at 1–3 (analyzing the original understanding of executive and administrative powers).

240 *See Curtiss-Wright*, 299 U.S. at 320–21; Haig v. Agee, 453 U.S. 280, 293 (1981) (implying the President's ability to *revoke* a passport from statutory authorization "to grant and issue"); Trump v. Hawaii, 585 U.S. 667, 686–87 (2018) ("[W]hen the President adopts 'a preventative measure . . . in the context of international affairs and national security,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'" (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 35 (2010))).

241 *See* Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *in* The Papers of Alexander Hamilton Digital Edition, (Harold C. Syrett ed., 2011), https://founders.archives.gov/documents/Hamilton/01-15-02-0038 [https://perma.cc/5ETQ-EJBN] (arguing that, in

are a power inherent to the executive domain. Meanwhile, *Curtiss-Wright* affirms that unitarians' concern for interagency coordination is particularly relevant in the foreign affairs context. The President, but not the Secretary of Commerce, likely has access to law enforcement and intelligence reports detailing the necessity of encryption keys to public safety and national security. Subsequently, only presidential control can ensure that domestic-facing agencies reflect these interests.[242] Lastly, for a matter as sensitive as balancing personal privacy and security,[243] proponents of the unitary executive theory would contend that it is essential that a democratically accountable decisionmaker bear ultimate responsibility for the policy.[244] In this case, the President can provide that cover to policies or rules advanced by the AG and the Secretary of Commerce. Through this combination of considerations, unitarians would likely conclude that because the President has ultimate authority over the agency head's decisions, Clinton's PDD-5 was proper.

One outstanding issue warrants further analysis under the unitary executive theory: independent agencies. For example, the FCC, referenced in PD-24 and NSDD-47, is designed to be independent from presidential control: Commissioners serve five-year terms, and only three of five commissioners can be from any one political party.[245] In the reviewed directives, the FCC is not the target of any orders. Instead, it is mentioned as one of many agencies that should coordinate in advancing a policy.[246] For unitarians, this creative wording is unnecessary to rescue the legality of a presidential directive to an independent agency. In their view, "[t]he President's duty to take care that the laws be faithfully executed implies the power to 'supervise and guide' the actions of the administrative agencies,"[247] including "to direct the officer to take particular actions within his or her discretion."[248] As that is a

affording the President the entire "executive power" subject to limited exceptions, the Constitution empowers the President, not Congress, to declare America's neutrality).

242 *See Curtiss-Wright*, 299 U.S. at 319–21 (explaining that the President must be afforded a "degree of discretion" based on the President's superior knowledge of "conditions which prevail in foreign countries" stemming from "confidential sources of information" as well as "agents in the form of diplomatic, consular, and other officials"); *see also supra* Section I.A.2 (discussing how presidential action is necessary to properly organize and coordinate agency action).

243 *See* PDD-5, *supra* note 137, at 2 (stating a desire to ensure "both privacy and a secure key-escrow system").

244 *See supra* Section I.A.2.

245 *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/K2TD-CBLN].

246 *See supra* Section II.B.2.a.

247 Miller, *supra* note 33, at 62–63.

248 *Id.* at 44; *cf.* Sunstein & Vermeule, *supra* note 13, at 661 ("The President is entitled to direct independent agencies to follow general policies and principles insofar as their failure to do so would count as neglect of duty.").

constitutional power, it necessarily encompasses *all* agencies; Congress cannot statutorily wall off the FCC or other agencies it wishes to be spared from political pressure.[249] Therefore, just as Clinton could, via national security directive, direct the Secretary of Commerce to write rules for procurement, President Carter could order the FCC to adopt privacy standards for telecommunications carriers. Ultimately, the unitary executive theory embraces Presidents' historical and current deployment of national security directives, including sanctioning their use to control independent agencies.

B. Implied Directive Authority

Similarly, Justice Kagan's discussion of implied directive authority ratifies national security directives' legitimacy as a tool of presidential control. Already, Kagan adopts a broad reading of statutes and contends that congressional delegations to agency officials imply the President's ultimate control unless otherwise stated.[250] In general policy matters, courts have not weighed in on whether this interpretation is correct.[251] Critically, the Supreme Court has done so for national security matters; in addition to reinforcing unitarians' constitutional analysis, *Curtiss-Wright* separately endorses Kagan's statutory interpretation. In *Curtiss-Wright* and its progeny, namely *Haig v. Agee*,[252] the Court has declared that per the Constitution, "[t]he President is the sole organ of the nation in its international relations"[253] and this necessitates that "in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval."[254] *Curtiss-Wright*, like Kagan, implies presidential authority from statutes.

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249 *See* Miller, *supra* note 33, at 44, 81–83 (discussing the argument for protecting certain agencies from political pressures and ultimately concluding that Congress has the power to create and delegate to agency heads, but the President retains directive power over agency officials, and "Congress may not constitutionally restrict the President's power to remove officials who fail to obey these presidential instructions").

250 *See* Kagan, *supra* note 7, at 2251; *see also supra* Section I.B.2.

251 *See* Stack, *supra* note 11, at 270 ("The question of whether the President possesses directive authority when a statute grants power to an executive officer . . . has never been squarely addressed by the Supreme Court.").

252 453 U.S. 280 (1981) (applying *Curtiss-Wright*'s broad reading of national security delegations to imply the President's ability to *revoke* a passport from statutory authorization "to grant and issue"); *see also* Zemel v. Rusk, 381 U.S. 1 (1965) (applying *Curtiss-Wright* and holding that the Secretary of State had statutory authority to refuse to validate passports for travel to Cuba).

253 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

254 *Haig*, 453 U.S. at 291. In *Haig*, an American citizen and former employee of the Central Intelligence Agency (CIA) publicly announced his intent to reveal international CIA operations and published a related book. In response, the Secretary of State revoked

Returning to Clinton's PDD-5, Kagan's model would interpret a delegation to the Secretary of Commerce[255] as also granting the President directive authority over such decisions, even in the domestic context. Although the statute discusses the President's role in disapproving and modifying, but not initiating,[256] guidelines adopted by the Secretary, Kagan would likely argue that this reflects Congress's understanding of the default rule she advocates.[257] The President can typically provoke an agent to utilize their delegated authority but would need enumerated power to unilaterally circumvent the Secretary and revoke or modify a regulation themselves.[258] Therefore, the statute does not reduce the President's authority—it expands it. Once national security is implicated, Kagan's approach is bolstered by Supreme Court precedent declaring statutes must be read broadly to accommodate the President's constitutional primacy in that area:

> [B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly . . . acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas.[259]

Thus, the President's implied directive authority over *national security* matters has not only Kagan's statutory and policy foundation but also a constitutional basis. *Curtiss-Wright* seconds Kagan's conclusion that, in giving the executive branch authority to regulate federal information systems, Congress implies presidential authority over the matter. Against this backdrop, Kagan's theory would deem Clinton's PDD-5 a permissible exercise of presidential authority.

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the citizen's passport pursuant to a regulation that authorized such revocation where "the Secretary determines that an American citizen's activities abroad are causing or likely to cause serious damage to the national security or the foreign policy of the United States." *Id.* at 298. The Court upheld the regulation and revocation as constitutional, reasoning that statutory authority "to grant and issue" passports implied presidential power to revoke them. *Id.* at 294–96.

255 *See, e.g.*, 40 U.S.C. § 11331(a)(1) ("[T]he Secretary of Commerce shall, on the basis of standards and guidelines developed by the National Institute of Science and Technology . . . prescribe standards and guidelines pertaining the Federal information systems.").

256 *See id.* § 11331(a)(1), (c) ("The President may disapprove or modify the standards and guidelines referred to in subsection (a)(1) if the President determines such action to be in the public interest.").

257 *See supra* Section I.B.2.

258 *See* Kagan, *supra* note 7, at 2329 (distinguishing between a delegation of power to an agency head and a delegation of power directly to the President).

259 *Haig*, 453 U.S. at 292 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

Even so, some aspects of this story might give Kagan pause. First, Kagan argues that, beyond statutory construction, policy considerations support presidential control of administrative agencies because it enhances accountability.[260] However, Kagan's discussion of accountability is distinct from the unitary executive theory's approach; while unitarians rely on the President's democratically elected status to provide a necessary check,[261] Kagan focuses on transparency. Citing instances where President Clinton publicly announced an agency would initiate rulemaking,[262] she contends the President's *public* exercise of control enables Americans to comprehend bureaucratic processes.[263] Unlike with generic presidential directives, NSC transparency is typically nonexistent. For instance, directives may be classified for decades: Carter's NSC-24, issued in February 1979, was not fully declassified until December 2012.[264] Furthermore, their frequent stylization as "national security directives" obscures their invocation of presidential power and masks possible domestic implications.[265] Overall, this means that the President's use of national security directives to control administrative agencies undermines, rather than enhances, bureaucratic transparency and public understanding. In this way, its use is inconsistent with one of Kagan's two policy justifications for implied directive authority.

Second, Kagan's theory mandates skepticism toward the President using national security directives to manage independent agencies. The directives analyzed in Part II implicated two such bodies: the FCC and the Federal Reserve.[266] Per Kagan, when Congress delegates to independent agency officials, Congress has "self-consciously" signaled its desire to "insulate agency decisionmaking from the President's influence" by limiting the President's appointment and removal power.[267] Therefore, Congress's delegation to an *independent* agency head does not imply presidential authority to command officials by directive.[268] However, this determination does not bar presidential interaction with independent officials. Kagan notes that, with "the independents," Clinton acted as "a simple petitioner of the administrative state" and "occasionally wrote

260 *See supra* Section I.B.2.

261 *See supra* Section I.A.2.

262 *See* Kagan, *supra* note 7, at 2282–84 ("President Clinton began a press conference by announcing publication of a proposed rule to reduce youth smoking.").

263 *Id.* at 2331–32.

264 *Telecommunications Protection Policy*, *supra* note 135.

265 *Compare* Smith, *supra* note 4, at 23, *with* Memorandum on Carbon Dioxide Emissions Reporting, 1 Pub. Papers 561–62 (Apr. 15, 1999) (exemplifying Clinton's presidential directives issued without a nexus to the National Security Council).

266 *See supra* Section II.B.2.a.

267 Kagan, *supra* note 7, at 2327.

268 *Id.* at 2251.

letters to independent agencies requesting them to investigate or take action on issues within their jurisdictions."[269] Accordingly, Kagan's evaluation of national security directives implicating the FCC and Federal Reserve would likely be swayed by whether the instructions are properly characterized as "commands" or "petitions." Although encompassed in a directive, PD-24 and NSDD-47 simply make requests of independent agencies. In PD-24, Carter's direction to make regulatory changes and protect private communications is aimed toward other agencies, which he asks to work with the FCC.[270] This suggests that law enforcement agencies should surface their concerns so that the FCC could consider them in new policies, but it does not require the FCC to act on the information or adopt a particular regulation. Similarly, Reagan's NSDD-47 does not order the FCC or Federal Reserve to approve a rule or take an action within their unique discretion.[271] Its instruction to manage financial and human resources consistent with the directive's mobilization priorities included independent agencies, but as NSDD-47's "Plans of Action" were never realized,[272] this is, at most, a broad request to deploy assets responsibly such that resources would be available in a crisis. Under Kagan's model, this is well within the President's authority and enables the President to approximate their coordination function[273] without violating the agency's independence. In the national security domain, the President, and not the FCC or Federal Reserve, has complete access to intelligence and big-picture threat assessments; informal methods of presidential control are integral to incorporating the entire bureaucracy in crisis preparation and response. Thus, Kagan's concern for efficiency and organization buoys presidential *requests* to independent agencies. Yet, had NSDD-47 progressed into specific orders, it likely would have crossed the line.[274] In total, despite these concerns, Justice Kagan's notion of implied directive authority supports Presidents' current and historical use of national security directives to control and influence administrative agencies, including indirect management of independent agencies.

C. Limited Statutory Powers

Conversely, Professor Stack may challenge the legality of national security directives seeking to order agencies to regulate domestic

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269 *Id.* at 2308.

270 *See* PD-24, *supra* note 135, at 2; *see also supra* notes 142–43 and accompanying text.

271 *See* NSDD-47, *supra* note 136 (naming the FCC and Federal Reserve as two agencies that must participate in its mobilization preparedness program but not prescribing specific actions that either must take).

272 *See supra* notes 151–57 and accompanying text.

273 Kagan, *supra* note 7, at 2339.

274 *See supra* Section I.B.2.

affairs. From a statutory perspective, the National Security Act places the President in control of the NSC but does not enable the President to act against other agencies by directive.[275] It primarily authorizes the NSC to "advise" and "make recommendations" to the President.[276] Although it does allow the NSC to coordinate interagency responses, this is only in reaction to malign foreign actions and "without assuming operational authority."[277] Inconsistent with these limitations, many of the discussed directives called for preemptive, domestic preparations for undefined future threats[278] or general policies disconnected from an identified enemy.[279] Therefore, since the National Security Act is not a broad source of directive authority, Stack's approach would require a law governing a specific issue or agency to provide presidential authority over that matter.[280]

For independent agencies, Stack would likely consider the answer clear: By delegating to an agency that Congress has insulated from presidential oversight, Congress has communicated that the officials' decisions are not subject to the President's directive authority.[281] Thus, a national security directive ordering an action within an independent agency official's discretion would fall within *Youngstown*'s third category, as the President has acted contrary to congressional will.[282] In this situation, the President could only rely on their constitutional powers to support the directive, and absent that, an independent official would have no legal duty to comply with it.[283] Nevertheless, like Kagan, Stack acknowledges that Presidents may informally guide agency officials[284] and cites empirical evidence that Presidents have "significant influence over policy" in independent agencies, regardless of statutory insulation.[285] Accordingly, Stack's analysis of PD-24 and NSDD-47

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275 *See* 50 U.S.C. § 3021(c).

276 National Security Act of 1947, § 101(a)(1)–(2); *see also supra* Section II.A.

277 National Security Act of 1947, § 101(a)(4).

278 *See, e.g.*, NSDD-47, *supra* note 136; HSPD-7, *supra* note 190.

279 *See, e.g.*, PDD-5, *supra* note 137; PDD-7, *supra* note 178; NSM-11, *supra* note 6.

280 *See supra* Section I.C.

281 *See* Stack, *supra* note 11, at 290 (explaining that "[e]mpirical work confirms Congress's choice of delegate matters and matters to Congress," as during divided government, "Congress delegates relatively more frequently to actors with greater insulation from the President's control").

282 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

283 Stack, *supra* note 11, at 311–12 (discussing examples of when presidential directives would be legally binding on agency officials and when they would not be).

284 *See id.* at 294 (summarizing the President's "wide variety of means to influence executive officials").

285 *See id.* at 298 & n.157. For instance, among a list of studies, Stack cites an article "documenting correspondence between shifts in presidential administration and policy shifts in several independent agencies." *Id.* (citing Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 Am. J. Poli. Sci. 197, 207–18 (1982)).

would likely mirror Kagan's, as they represent permissible presidential *requests* rather than illegal commands.[286]

Similarly, Stack would likely conclude that national security directives to executive agencies, like PDD-5, could not universally bind the officials they implicated. As discussed, 40 U.S.C. § 11331 makes the Secretary of Commerce responsible for prescribing guidelines for federal information systems and only provides presidential authority to *modify* or *disapprove* those general rules or to prescribe separate guidelines for national security systems.[287] Stack would presumably note that there is a mixed agency-President delegation[288] within this statute, and it authorizes the President to prescribe standards strictly for national security systems. Conversely, for generic systems, Congress restricts the President to reviewing guidelines after the Secretary adopts them. For Stack, the negative implication of these provisions is that Congress intended to prevent the President from generally prescribing standards for federal information systems.[289] Thus, Clinton lacked the directive authority he invoked, and his order demanding that the Commerce Secretary author procurement standards was not enforceable.

However, the Supreme Court's broad reading of national security delegations bends Stack's conclusion. Stack insists that "Congress acts intentionally and purposefully in the disparate inclusion or exclusion" of certain language.[290] Conversely, *Curtiss-Wright* and *Haig* concluded that the Constitution grants more expansive national security authority than Presidents are afforded by statute,[291] as "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas."[292] Accordingly, although the statute does not explicitly authorize the President to prescribe standards for generic information systems, *Curtiss-Wright* enables a workaround. The Court might interpret the Commerce Secretary's authority over generic telecommunications systems to denote presidential oversight as needed for national defense. Alternatively, it could read Congress's delegation to the President of regulatory authority over "national security systems" to be broader than the text would imply and encompass PDD-5's "sensitive but

286 *See supra* Section III.B.

287 40 U.S.C. § 11331(a), (c).

288 *See supra* Section I.C.2.

289 *See id.*

290 Stack, *supra* note 11, at 284 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

291 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936); Haig v. Agee, 453 U.S. 280, 292 (1981).

292 *Haig*, 453 U.S. at 292 (emphasis omitted) (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

unclassified systems."[293] Thus, the national security context undermines Stack's desire for explicit statutory authorization and may enable the President to use national security directives to initiate administrative action.

In the same vein, Stack's writings provide a key caveat that further undermines his preferred statutory restrictions. Repeatedly, Stack indicates that an "independent source of constitutional authority" could enable Presidents to issue legally binding directives regardless of the underlying statute.[294] This exception has its roots in *Youngstown*. Jackson's three zones indicate that presidential authority varies based on statutory support, but the President may always rely on their independent, constitutional powers.[295] Stack believes that "[t]he Constitution grants the President relatively few independent powers,"[296] but to what degree does national security implicate those distinct capabilities, and how expansive are they without congressional backing? Given historical and current precedent, national defense is a unique area where the Court has determined that the Constitution requires granting the President substantial deference. Specifically, in *Trump v. Hawaii*, the Court observed that "'[j]udicial inquiry into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs."[297] While this authority is not unlimited,[298] it does create the possibility, as Stack acknowledges, that the President may be constitutionally empowered to direct agencies' response to national security concerns. For instance, in *Chicago & Southern Air Lines v. Waterman Steam Ship Corp.*, the Court considered whether Congress could authorize judicial review of applications to the Civil Aeronautics Board concerning foreign air transportation that had already received presidential approval.[299] The Court held that the President's decisions were unreviewable, as beyond congressional delegations, "[t]he President possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs."[300] Where the

293 *See* PDD-5, *supra* note 137, at 2.

294 Stack, *supra* note 11, at 267.

295 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952).

296 Stack, *supra* note 11, at 264.

297 585 U.S. 667, 704 (2018) (quoting Ziglar v. Abbasi, 582 U.S. 120, 142 (2017)).

298 *See Abbasi*, 582 U.S. at 143 ("There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security.").

299 333 U.S. 103, 104 (1948).

300 *Id.* at 109; *see also* Trump v. United States, 144 S. Ct. 2312, 2327 (2024) ("And the courts have 'no power to control [the President's] discretion' when he acts pursuant to the powers

President utilized those powers, the courts could not nullify his actions.[301] This suggests there are some administrative areas where the President can invoke an "independent source of constitutional authority,"[302] issue a national security directive, and dictate agency action. In this way, even in the absence of statutory permission, Stack's theory may permit a President's use of national security directives to control agencies and implicate domestic policy.

IV
Implications for Future Administrations

As future Presidents continue blurring the line between domestic and national security policy and seek to control administrative agencies, this Note is instructive. Compared to generic presidential directives, national security directives provide firmer constitutional and statutory footing from which a President can control agency action. Therefore, as the modern definition of "national security" expands to include more issues with domestic implications, like climate change, corruption, and public health, national security directives can become an increasingly powerful device.

A. National Security: Firmer Presidential Ground

Until courts answer whether the unitarians, Kagan, or Stack are correct and decisively resolve the President's directive authority, presidential control of agencies is legally dubious.[303] However, this Note elucidates that the President's constitutional powers in the national security sphere can reduce this doubt. First and foremost, a President using national security directives to shape policy, coordinate within the administration, and command agency action has decades of history on their side. While it did not become regular practice for Presidents to issue generic directives until the Clinton administration,[304] Presidents have deployed the NSC to manage the administration and intervene in

invested exclusively in him by the Constitution." (alteration in original) (citing Marbury v. Madison, 5 U.S. 137, 166 (1803))).

301 *See* Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J.L. & Pol. 1, 76 (2000) (discussing *Chi. & S. Air Lines, Inc.*, 333 U.S. 103).

302 Stack, *supra* note 11, at 267.

303 *See id.*, at 270 ("The question of whether the President possesses directive authority when a statute grants power to an executive officer . . . has never been squarely addressed by the Supreme Court.").

304 *See* Kagan, *supra* note 7, at 2294 (remarking that President Reagan issued nine directives and President George H.W. Bush issued four directives, but President Clinton issued 107 such orders, drastically expanding their use).

the economy at least since Carter's era.[305] Although not dispositive, the Court in *Haig v. Agee* considered the known "history of administrative construction" combined with Congress's failure to amend the underlying statute to imply congressional approval of the President's "authority to withhold passports on national security and foreign policy grounds."[306] Once the political branches make such a national security decision, the courts are reluctant to second guess it.[307] Here, Congress has repeatedly amended the National Security Act, including the portion establishing the NSC, and declined to remove the President's directive authority.[308] Against this backdrop, a reviewing court may defer to history and uphold the President's use of national security directives.

Secondly, as explained in Part III, the President's unique national security powers can often overcome constitutional or statutory qualms regarding directive authority. For instance, Stack challenges Kagan's theory by arguing that mixed agency-President delegations prevent simple agency delegations from implying presidential control of that power.[309] However, the Court has explicitly held that in the security context, the President can imply broader powers than the statutory language would otherwise allow.[310] Likewise, Stack's criticisms separately concede that national security may provide an independent constitutional foundation justifying the President's directive authority without a statute explicitly authorizing such oversight.[311] From there, national security directives are insulated from judicial review to a

305 *See supra* Section II.B.2.

306 453 U.S. 280, 292–306 (1981); *see also* Ziglar v. Abbasi, 582 U.S. 120, 143 (2017) ("[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant . . . .").

307 *See Haig*, 453 U.S. at 292 ("[M]atters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952))).

308 *See* 50 U.S.C. § 3021. Previous amendments to the National Security Act of 1947 include: Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3689, 3692 (Dec. 17, 2004); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, § 1841(g), 121 Stat. 500 (Aug. 3, 2007); Energy Independence and Security Act of 2007, Pub. L. 110-140, § 932, 121 Stat. 1740 (Dec. 19, 2007); Intelligence Authorization Act for Fiscal Year 2014, Pub. L. 113-126, § 702, 128 Stat. 1422 (July 7, 2014); National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 1085, 130 Stat. 2422 (Dec. 23, 2016); Countering America's Adversaries Through Sanctions Act, Pub. L. 115-44, § 274(a), 131 Stat. 938 (Aug. 2, 2017); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 1043(a), 132 Stat. 1957 (Aug. 13, 2018); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 1752(d), 134 Stat. 4147 (Jan. 1, 2021); Consolidated Appropriations Act of 2023, Pub. L. 117-328, § 2104(k)(2), 136 Stat. 5720 (Dec. 29, 2022).

309 *See* Stack, *supra* note 11, at 263.

310 *See, e.g.*, *Haig*, 453 U.S. at 291–92.

311 *See supra* notes 290–300 and accompanying text.

degree. Typically, courts do not question whether the President's invocation of national security powers is justified by factual reality and the underlying threat. Specifically, the *Trump v. Hawaii* Court explained, "[W]hen the President adopts a 'preventative measure . . . in the context of international affairs and national security,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'"[312] Together, this precedent and these considerations demonstrate that a President is more secure in their authority when national defense is implicated. Accordingly, if the President seeks legal security in ordering agency action, national security directives are a superior tool.

B. Addressing Possible Limitations

To the extent that the previous Sections elicit concerns about presidential overreach, unresolved issues could provide an offramp. Principal among them is the scope of *Curtiss-Wright*, which was discussed extensively in Part III. *Curtiss-Wright* does not use the term "national security"; it refers to the President's powers within the category of "foreign affairs" and "international relations."[313] Conversely, later cases like *Haig v. Agee* shift to employing phrases like "national security and foreign policy."[314] This gives rise to a significant question: Does *Curtiss-Wright*'s logic apply to the broad, modern understanding of "national security" or only to "national security" via "foreign affairs"? In other words, must a policy issue implicate international relations for the President to invoke the expansive authority that *Curtiss-Wright* affords them? An affirmative answer could mean *Curtiss-Wright* does not provide distinct, constitutional support for national security directives that purely impact domestic industries or issues. Instead, national security directives without a nexus to foreign policy would be subject to the same debate and legal uncertainty as generic presidential directives, which was the focus of Part I. Ultimately, while this interpretation of *Curtiss-Wright* could provide a judicial avenue to reign in national security directives, past and current patterns indicate that it is unlikely to become a significant barrier.

To begin, courts have already tested the bounds of *Curtiss-Wright* and eschewed a strict reading. As Harold Koh explains, the majority

312 585 U.S. 667, 686–87 (2018) (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 35 (2010)); *see also* Ziglar v. Abbasi, 582 U.S. 120, 142 (2017) ("For these and other reasons, courts have shown deference to what the Executive Branch 'has determined . . . is "essential to national security."'" (quoting Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 26 (2008))).

313 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315, 318 (1936).

314 *Haig*, 453 U.S. at 294.

opinion contained a caveat: "By saying that 'the President alone has the power to *speak or listen* as a representative of the nation,' Justice Sutherland could be recognizing only the well-established exclusive presidential power to negotiate, and not a novel executive power to conclude agreements, on behalf of the United States."[315] However, courts have not confined *Curtiss-Wright* as Koh suggests; instead, they have permitted the President to exercise authority over issues only tenuously connected to international negotiations.[316] In *Haig*, the Supreme Court cited *Curtiss-Wright* and implied the President's ability to *revoke* a passport from statutory authorization "to grant and issue."[317] Although passports are perhaps not obvious elements of presidential diplomacy, the Court made a modest logical leap: Passports are documents "addressed to foreign powers," and Congress had historically expected that the Executive would limit citizens' travel if contrary to national security, so they must fall within the President's wheelhouse.[318] Meanwhile, the Court's immigration cases demonstrate that a *possible* connection to diplomacy can be a basis for judicial deference to other branches.[319] For instance, in *Mathews v. Diaz*, the Court applied a narrow standard of review when considering immigrants' eligibility for Medicare, as it might "implicate our relations with foreign powers."[320] Together, these cases reveal that even when an issue's relationship to diplomacy is as remote as medical insurance, the Court may construe the President's authority to reach it rather than "'inhibit the flexibility' of the President 'to respond to changing world conditions.'"[321]

Still, other decisions moved further away from international relations to more broadly sanction presidential power over foreign policy and national security. As discussed, in *Chicago & Southern*

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315 Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair, 94 (1990).

316 *See, e.g.*, Am. Inst. for Int'l Steel, Inc. v. United States, 806 Fed. App'x 982, 990, 985 (Fed. Cir. 2020) (suggesting, but not deciding, that *Curtiss-Wright* and other decisions "recogniz[ing] that the President has some independent constitutional authority over national security and dealings with foreign nations" could provide support for the President's authority to set a twenty-five percent tariff on imported steel products in light of the "domestic production needed for projected national defense requirements").

317 *Haig*, 453 U.S. at 294.

318 *Id.* at 292, 297.

319 *See* Ziglar v. Abbasi, 582 U.S. 120 (2017) (denying an implied damages remedy for detainees held on immigration violations and subjected to abuse in the wake of the September 11, 2001 attacks); *see also* Trump v. Hawaii, 585 U.S. 667, 704 (2018) ("'[J]udicial inquiry into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs." (citing *Ziglar*, 582 U.S. at 142)).

320 426 U.S. 67, 81 (1976).

321 *Trump v. Hawaii*, 585 U.S. at 704 (citing *Mathews*, 426 U.S. at 81).

Air Lines, the Court invoked *Curtiss-Wright* when concluding that the President's grant or denial of "applications by citizen carriers to engage in overseas and foreign air transportation" was not subject to judicial review.[322] Similarly, in *Webster v. Doe*, the Court considered whether the CIA Director's decision to fire a clerk-typist because of his homosexuality was subject to judicial review.[323] In her opinion concurring with the Court's ruling that the employee's claims were not reviewable, Justice O'Connor quoted *Curtiss-Wright*'s description of the President as the government's "sole organ" in international relations and explained that the Director's authority "to control access to sensitive information by discharging employees deemed untrustworthy flows primarily from this constitutional power of the President . . . ."[324] While air travel and intelligence are relevant to foreign policymaking, these examples show that the Court has drifted far afield from the President's role in "speaking" or "listening" on behalf of the nation.[325] Recently, the Court further illustrated this trend in *Trump v. United States* when it provided a broad list of the President's "foreign relations responsibilities" under the Constitution.[326] Under this umbrella, it included the classic powers Koh referenced like "meeting foreign leaders" and "overseeing international diplomacy," as well as more modern needs like "intelligence gathering . . . [and] managing matters related to terrorism, trade, and immigration."[327] At the same time as it has broadened "foreign affairs" in this way, the Court has increasingly injected the phrase "national security" into its discussion of presidential power without addressing whether it considered the concept distinct from or coterminous with "foreign affairs."[328] Subsequently, Presidents have exploited this ambiguity, and the courts have failed to check them.

Trends within the presidency and the judiciary reveal that an expansive reading of *Curtiss-Wright* has continued to develop and will likely endure. Although the Court has not resolved enduring questions, per Harold Koh, Presidents have used Justice Sutherland's opinion and the lingering ambiguity to justify massively expanding presidential authority over national security at the expense of the legislative

322 Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 104 (1948).

323 486 U.S. 592 (1988).

324 *Id.* at 606 (O'Connor, J., concurring).

325 *See* Koh, *supra* note 315.

326 144 S. Ct. 2312, 2327 (2024).

327 *Id.*

328 *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 704 (2018) (using the terms "national security" and "foreign affairs" when discussing presidential power); Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) ("The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations.").

and judicial branches.[329] The case is "so often quoted" by executive-branch attorneys defending presidential actions "that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite."[330] Administrations have internalized a belief in expansive executive power at all levels, as dramatically exemplified during the Nixon and Reagan eras. For example, in his interview with David Frost, President Nixon's infamous proclamation that "when the President does it, that means that it is not illegal" came amidst a discussion about the President's wide-ranging "national security" power.[331] Nixon insisted that the Constitution empowered him to approve a domestic national security plan that utilized wiretappings, burglaries, mail openings, and other questionable tactics.[332] Additionally, several scholars have argued that "much of the wrongdoing in the Iran-Contra episode flowed directly from the constitutionally impermissible conceptions of presidential power held by administrative officials such as Admiral John Poindexter and Colonel Oliver North,"[333] which the two expressly based on *Curtiss-Wright*.[334] Later, executive officials further exacerbated this pattern when terrorism emerged as the preement threat. For example, Koh draws a direct historical line between the Reagan administration's abuse of *Curtiss-Wright* and the legal opinions authored by the George W. Bush administration to justify torture.[335] Once again envisioning the President as the "sole organ of the federal government in the field of international relations,"[336] Bush's Office of Legal Counsel concluded that statutory prohibitions against torture were inapplicable to interrogations conducted under the President's authority because such restrictions "would violate the Constitution's sole vesting of the Commander-in-Chief power in the President."[337] Critically, Koh argues that regardless

329 *See* Koh, *supra* note 315 at 72; *see also* Harold Hogju Koh, The National Security Constitution in the Twenty-First Century 113 (2024) ("Even when Congress has enacted statutes designed to limit executive power in foreign affairs, executive-branch attorneys have liberally construed statutory loopholes to permit or authorize executive initiatives that Congress never anticipated.").

330 *Id.* at 94.

331 *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. Times (May 20, 1977); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 7 (1993) (discussing Nixon's interview).

332 *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, *supra* note 331; Monaghan, *supra* note 331, at 6.

333 Monaghan, *supra* note 331, at 6; *see also* Koh, *supra* note 315, at 101–16 (discussing the constitutional significance of the Iran-Contra Affair).

334 *See* Koh, *supra* note 315, at 134–49.

335 *See* Koh, *supra* note 315, at 219–27.

336 *Id.* at 211 (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

337 *Id.* at 221 (quoting Memorandum from Jay S. Bybe, Assistant Att'y Gen., Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President 39 (Aug. 1, 2002)).

of whether this presidential trend reflects an accurate interpretation of the Constitution or a gross abuse of power, it has become the status quo because the Supreme Court has consistently acquiesced.[338]

According to Koh, the Supreme Court has repeatedly "condoned executive initiatives" by relying on justiciability doctrines to "refus[e] to hear challenges to the President's authority."[339] The political question doctrine is one such tool. In the foreign affairs and national security context, the Court has defined the concept as follows: If the claim asks the federal courts to "supplant a foreign policy decision of the political branches with the courts' own," then the issue is a nonjusticiable political question that the courts have no power to decide.[340] Conversely, if the question implicates the "familiar judicial exercise" of "enforc[ing] a specific statutory right," interpreting a statute, or deciding whether something is constitutional, then it is justiciable, and the courts may weigh in.[341] Ultimately, the Supreme Court is unlikely to backtrack and limit *Curtiss-Wright* and presidential authority to foreign policy because it would set the Court on a collision course with the political question doctrine. Certainly, determining that the President only has unique powers over national security in the context of foreign policy is a justiciable issue of constitutional interpretation. However, if it sets that boundary, the Court will struggle to police it without running up against political questions.

For instance, many national security directives are crafted in response to multiple threats; Biden's NSM-16 cites both disease and chemical weapons as dangers necessitating more resistant food and agriculture systems.[342] Likewise, seemingly domestic policies often have possible international consequences: Could the healthcare available to immigrants concern a foreign leader?[343] Alternatively, Congress has recognized via statute the interconnectivity between domestic

338 *See* Koh, *supra* note 315, at 134–49.

339 *Id.* at 146.

340 Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012). *Zivotofsky* is often cited by commentators as evidence that the political question doctrine is not an insurmountable bar, as the *Zivotofsky* Court declined to apply it and accordingly decided the case on the merits. However, Koh explains that this is a mirage: "[C]ourts of appeals have generally continued to rely on expansive understandings of justiciability doctrines, procedural obstacles, or immunity defenses to avoid reaching the merits of any civil dispute that arguably touches on national security." Koh, *supra* note 329, at 255.

341 *Id.*; *see also* Bin Ali Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (applying the political question doctrine and deciding that "the foreign target of a military strike cannot challenge in court the wisdom of [that] military action").

342 NSM-16, *supra* note 189.

343 *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (assessing whether Congress may condition a non-citizen's medical insurance eligibility on their admission for permanent residence and residence in the U.S. for at least five years).

industries, national defense, tariff policy, and diplomacy.[344] If boosting production could increase a President's leverage at the negotiating table, is it a "foreign policy" issue? Is it more or less so than the insurance matter? Parsing whether these policy issues are adequately "foreign" in nature is a political question that requires collecting evidence, drawing inferences, and assessing threats—all competencies the Court has repeatedly recognized it lacks.[345] Therefore, although *Curtiss-Wright* could be read to distinguish "foreign affairs" from the broader concept of "national security," the Court will likely balk at the more complex questions that approach would trigger. Regardless, if it did set such limits, the Court would struggle to enforce them, and instead continue its comfortable pattern of invoking justiciability doctrines, refusing to define critical terms, and leaving the President with largely unchecked "national security" powers.

C. An Ever-Expanding Definition

The repercussions of this Note's conclusions could expand further if our definition of "national security" continues to evolve. As discussed, national security directives reflect this shift; over the decades, they have grown to implicate climate change,[346] agriculture,[347] fishing,[348] and corruption.[349] This trend is not exclusive to directives. Laura Donohue explains that, early in American history, "national security" referred to "the goals of establishing international independence and building the country's economic strength."[350] However, this changed as America's international position shifted and new geopolitical threats arose. Between 1930 and 1989, "national security" was defined by the threat of totalitarianism, which had ideological and military dimensions.[351] This necessitated more than military preparation; *society* had to be bolstered against communism's spread and corresponding internal

344 *See* Am. Inst. for Int'l Steel, Inc. v. United States, 806 Fed. App'x 982 (Fed. Cir. 2020) (discussing the Trade Expansion Act of 1962, which "grant[s] the President certain discretionary authority regarding tariffs on goods from foreign nations with which the President might enter into executive agreements" (citing 19 U.S.C. §§ 1351, 1821, 1862)).

345 *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010) ("But when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked . . . .'" (citing Rostker v. Goldberg, 453 U.S. 57, 65 (1981))).

346 *See, e.g.*, PDD-7, *supra* note 178.

347 *See, e.g.*, HSPD-9, *supra* note 189.

348 *See, e.g.*, NSM-11, *supra* note 6.

349 *See, e.g.*, NSSM-1, *supra* note 220.

350 Donohue, *supra* note 138, at 1576.

351 *Id.* at 1657.

threats.[352] Accordingly, issues like civil rights[353] and the economy[354] came under the security umbrella. Since the end of the Cold War diminished communism's threat, "the security interests of other countries and regions . . . have become intertwined with U.S. national security" and new risks "have become folded into the national security framework" based on the "*effects* that may result," rather than an enemy's malevolent intent.[355] This means that "national security" now embraces "climate change, pandemic disease, drugs, and organized crime" alongside "economic vitality, energy, nuclear proliferation, biological weapons, and terrorism."[356] Where security is defined by the extent of the risk rather than the nature of the enemy, it is difficult to identify clear boundaries between defense and domestic policy. Consequently, many issues have plausible "national security" implications, and the President may aggrandize the power discussed in Section A by simply tweaking a definition.

Once started, this phenomenon will be difficult to stop. As mentioned, the Court has been unwilling to define national security or second-guess this presidential threat assessment. Rather, when plaintiffs argued that certain travel restrictions did "little to serve national security interests," the Court rebutted that it "cannot substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which are 'delicate, complex, and involve large elements of prophecy.'"[357] This reticence to intervene reveals that two simultaneous trends have created a foundation for substantial presidential authority via national security directives. The Court will likely not question whether a new issue is properly delineated as a national security threat, and once it is, it opens the door to broad presidential authority unavailable (or at least up for debate) in domestic affairs. Part II's historical and current examples demonstrate how Presidents have translated this control into real-world policy change. Hence, they represent future Presidents' ability to prioritize the development of certain industries, adapt law enforcement procedures to reflect current technology, prepare American agriculture for global warming, and

352 *Id.*

353 *See id.* at 1695–98 (summarizing how much of America's ability to fight totalitarianism "appeared to turn on the United States' ability to portray itself as a democratic country distinguished by liberty and equality").

354 *See id.* at 1688 (explaining that Truman "justified the establishment of a national health care system in terms of national security").

355 *Id.* at 1577.

356 *Id.* at 1589.

357 Trump v. Hawaii, 585 U.S. 667, 707 (2018) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

instigate other significant regulations through the NSC. In this way, national security directives are understudied but immensely powerful tools of presidential administration.

Conclusion

Ultimately, as is common in American history, we have overlooked an exercise of power that would otherwise be scrutinized because it is ostensibly justified by national security. While legal scholars debate the President's authority over administrative agencies in the domestic sphere, for decades, Presidents have wielded national security directives to assume that control. Through their directives, Presidents Carter, Reagan, and Bush pushed agencies to manipulate the economy in ways that would maintain America's competitive position against its enemies and prepare for crisis or attack. Building off this trend, Presidents Clinton, Bush, Obama, and Trump initiated technology regulation, managed agency-industry interactions, and organized specific economic sectors. President Biden continued to invoke this power; his directives regulated cybersecurity and quantum computing, as well as the fishing, food, and agriculture industries. This Note properly brings this exercise of authority into the ongoing discussion about the President's role in the administrative state by recognizing that national security provides a firmer basis for presidential authority.

Specifically, this Note establishes two reasons why this pattern is unlikely to cease. First, history reveals that the definition of national security is malleable and not questioned by courts. Accordingly, Presidents can plausibly sweep climate policy, anticorruption efforts, rules for emerging technologies, and public health into the umbrella of national security directives. Second, Supreme Court precedent dictates that once national security is implicated, the President possesses independent constitutional powers and expanded statutory capabilities, which translate to firmer control of agency discretion. Perhaps this is an inevitable consequence of a changing world and evolving threats. Yet, it is nevertheless critical that this historical and current condition is at least a recognized reality. To properly question and decide the President's administrative role, we must evaluate *all of it*—even the classified commands.