ARTICLES

THE PRESIDENT'S SUBJECTIVE AND OBJECTIVE LEGAL OBLIGATIONS

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Congress has granted the President enormous power. This is well known, but how we are to assess the legality of exercises of such power still is not. Put simply, there is no clear framework to understand the legality of presidential exercises of statutory power. Scholars have noticed this and, in response, have largely turned to administrative law for guidance. This turn to administrative law is somewhat intuitive but misguided.

Administrative law is a highly reticulated body of law that has developed over decades to regulate executive branch agencies, *not the* President. *It has focused on legitimizing agency power in the face of agencies' lack of electoral accountability while respecting agency expertise. The President, however, has neither the electoral deficit nor the expertise that has been central to the development of administrative law. For these reasons and others, administrative law is not a good place to start in identifying a legal framework for assessing the President's conduct. We ought to focus on the President specifically. But how?*

This Article suggests looking to an obvious, but largely overlooked, place: the statutory text. It turns out that the text of the statutes delegating power to the President take two basic forms. One is "objective": it provides the President power when a certain condition exists in the world. The other is

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"subjective": it provides the President power when the President "finds" or "determines" that a certain condition exists in the world. This distinction exists throughout the U.S. Code, but no one seems to have noticed it. This Article unearths this distinction and shows how it provides a novel, coherent, and straightforward framework for understanding the legality of the President's conduct.

In brief, subjective conditions require Presidents to fulfill their subjective duties in "finding" or "determining" that a certain condition exists. But the exercise of such power is lawful even when the President is wrong—the power is premised on the "finding" or "determination," not the condition being met in fact. Objective conditions, on the other hand, are only valid if the condition has been met in fact. Understanding this distinction clarifies what is required of the President to exercise statutory power lawfully, provides a straightforward framework for judicial review, and enables Congress to better tailor constraint and discretion when it delegates power to the President going forward.

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INTRODUCTION

The modern President possesses enormous power. Presidents have banned the entry of noncitizens from several Muslim-majority countries,[1] created dozens of national monuments,[2] frozen prices in the national economy to combat inflation,[3] and, more recently, prohibited the importation of oil from Russia in response to its invasion of Ukraine[4] and required employees of government contractors—who make up approximately one-fifth of the entire U.S. workforce[5]—to get vaccinated for COVID-19.[6] This is all aside from launching massive military invasions of Iraq and Afghanistan and ordering continued military operations against various terrorist organizations.[7] Each of these exercises of power rested on power delegated to the President by Congress, not the U.S. Constitution. And they are just the tip of the iceberg. Congress has delegated vast amounts of power to the President over both foreign and domestic affairs.[8]

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1. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017) (using power pursuant to the Immigration and Nationality Act).

2. *See, e.g.*, Cameron v. United States, 252 U.S. 450, 455–56 (1920) (upholding President Theodore Roosevelt's creation of the Grand Canyon national monument pursuant to the Antiquities Act of 1903); Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017) (using power under the Antiquities Act). For a history of national monument designations by Presidents, see CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 15–26 (2022).

3. *See* Exec. Order No. 11615, 36 Fed. Reg. 15727 (Aug. 17, 1971) (using power under the Economic Stabilization Act of 1970).

4. *See* Exec. Order No. 14066, 87 Fed. Reg. 13625 (Mar. 8, 2022) (using power under the International Emergency Economic Powers Act and National Emergencies Act).

5. *History of Executive Order 11246*, DEP'T OF LAB., https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history [https://perma.cc/YFQ6-K485] (last visited Apr. 3, 2023) (noting that "workers employed by federal contractors" make up approximately 20 percent of U.S. labor force).

6. *See* Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021) (using power under the Federal Property and Administrative Services Act of 1949); SAFER FEDERAL WORKFORCE TASK FORCE, COVID-19 WORKPLACE SAFETY: GUIDANCE FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS (2021), https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf [https://perma.cc/9B86-VJ3B]. This order has recently been enjoined by several courts. *See, e.g.*, Georgia v. President of the U.S., 46 F.4th 1283, 1308 (11th Cir. 2022); Kentucky v. Biden, 23 F.4th 585, 612 (6th Cir. 2022); *see also infra* Part IV.B.3 (discussing how this framework can clarify review of such ongoing challenges).

7. The invasion of Afghanistan was launched pursuant to the 2001 Authorization for Use of Military Force, *see* Pub. L. No. 107-40, 115 Stat. 224 (codified as amended at 50 U.S.C. § 1541 note), and the invasion of Iraq pursuant to the Authorization for Use of Military Force Against Iraq Resolution of 2002, *see* Pub. L. No. 107-243, 116 Stat. 1498 (codified as amended at 50 U.S.C. § 1541 note). Military operations against terrorist organizations are ongoing under both authorizations. *See, e.g.*, STEPHANIE SAVELL, WATSON INST. OF INT'L & PUB. AFFS., THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: A COMPREHENSIVE LOOK AT WHERE AND HOW IT HAS BEEN USED (2021), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_2001%20AUMF.pdf [https://perma.cc/EPG2-727C]; STEPHEN P. MULLIGAN & JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10391, UPDATED: RECENT U.S. AIRSTRIKES: LEGAL AUTHORITIES AND QUESTIONS (2020).

8. *See, e.g.*, Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 65 (2020) ("[N]early every volume of the U.S. Statutes contained a statute authorizing the President to take particular actions. Congress has delegated authority to the

Remarkably, despite the breadth of the President's statutory power, there is no accepted framework to assess the legality of the President's exercise of statutory power.[9] Scholars have recognized this as a problem and, in response, have largely turned to administrative law for guidance.[10] This turn makes some intuitive sense. Administrative law is a widely respected body of law that governs executive branch agencies.[11] Although the U.S. Supreme Court has held that the formal source of administrative law, the Administrative Procedure Act[12] (APA), does not apply to the President,[13] given that the President is also part of the executive branch, administrative law can still provide a starting point in constructing a legal framework to govern the President. Or so the conventional thinking goes.[14]

This Article argues that this turn to administrative law is misguided. Rather than trying to shoehorn the President into administrative law, we should treat the President as a statutory actor deserving of their own legal framework. This is for several reasons. Administrative law, as it exists today, is a highly reticulated body of judicially created law that developed over decades with a focus on two fundamental features of administrative agencies—a need to legitimize agencies' lack of electoral accountability and

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President to take action in wartime, in other emergencies, and 'in the name of national security.' The President also acts as Congress's delegate when taking certain actions with respect to immigration, trade, and federally owned lands, among many others." (quoting Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018))); Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1281–90 (2021) (providing examples of statutory power given to the President in various domestic and foreign affairs areas); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018) (discussing the President's statutory power in national security domain).

9. *See, e.g.*, Stack, *supra* note 8, at 541 ("American public law . . . has no answer to the question of how a court should evaluate the president's assertions of statutory authority."); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1747 (2019) ("[J]udicial precedents [do not] provide anything close to a well-developed or coherent legal framework for courts to follow when reviewing presidential orders."); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2037 (2015) (noting "the absence of a well-developed" theory of judicial review of executive orders); Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 2 (1982) ("[T]here exists no generally accepted method for judicial review" of presidential directives).

10. *See, e.g.*, Kovacs, *supra* note 8, at 68 ("This Article . . . . argues . . . that the Statutory President should be subject to the APA's procedural and judicial review provisions."); Manheim & Watts, *supra* note 9, at 1792–93 (advocating for "looking to administrative law principles" in constructing a legal framework for assessing the President's conduct); Stack, *supra* note 8, at 542 ("[T]his Article argues that the same framework of judicial review should apply to assertions of statutory authority by the president and federal agencies."); David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1056–60 (2018) (arguing for applying a modified arbitrary and capricious review to the President); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1013–20 (2007) (calling for the application of administrative law's reason-giving requirement to the President's actions). *See generally infra* Part I (describing the turn to administrative law).

11. *See infra* Part I.

12. 5 U.S.C. §§ 551–559.

13. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").

14. *See infra* Part I (describing the scholarly turn to administrative law).

a need to respect and encourage agency expertise.[15] The President, meanwhile, possesses neither the electoral deficit nor the expertise that has been central to the development of administrative law.[16] Administrative law's myriad highly reticulated doctrines, built for unaccountable, expert agencies, are thus a poor fit for a politically accountable, generalist President. Recognizing this, we might be tempted to apply the spare text of the APA to the President instead of the judicially created doctrine that has developed on top of it, but the President has *never* routinely abided by the APA's textual requirements since its passage in 1946.[17] It is hard to believe that courts would hold that the President has been acting illegally on this front for the past seventy-five years. Moreover, administrative law leaves largely ungoverned some of the most important areas of statutory power that the President possesses—powers relating to foreign affairs, the military, government contracting, and public lands.[18] Given how much agencies do in other domains, this exclusion might make sense in administrative law, but it seems unwise to construct a framework for the President that largely excludes their most important exercises of power.

Administrative law is thus a body of law constructed with different government actors in mind that excludes much of what the President does from its requirements. These are good reasons not to use it as the foundation for a legal framework for assessing the President's conduct. But the most important reason to turn away from administrative law is more fundamental. Administrative law operates under a governance paradigm constructed by routine *judicial* regulation of agency action. Under this paradigm, courts are tasked with identifying legal requirements that agencies must adhere to, and agencies tailor their conduct to survive impending judicial scrutiny.[19] This judicial paradigm has lent itself to the common perception that, when courts do not review agency action—for example, when matters are "committed to agency discretion by law"[20]—there are *no legal requirements imposed on agencies at all*.[21] This view might be understandable in a regime in which courts oversee most of what the government does, but it is essentially nihilistic when applied to the President, whose conduct is almost never judicially reviewed.[22]

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15. *See infra* notes 51–53 and accompanying text.
16. *See infra* notes 54–55 and accompanying text.
17. *See infra* note 63 and accompanying text.
18. *See infra* notes 67–69 and accompanying text (discussing these exceptions).
19. *See infra* notes 70–71 and accompanying text.
20. *See* 5 U.S.C. § 701(a)(2).
21. *See infra* note 73–74 and accompanying text; *see also, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244–45 (2017) (noting and critiquing this common perception). Of course, I do not mean to suggest that all administrative law scholars hold this view, but simply state that it is a prevailing conception of administrative law. *See id.* at 1243–44 ("The reigning model for administrative law doctrine continues to be external constraints on agencies imposed by Congress and the courts."). *But see also id.* at 1244 (collecting a necessarily incomplete list of scholars who have embraced "internal" perspectives on administrative law).
22. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1098 (2013) ("A variety of

This view is also profoundly mistaken. Legal obligations exist even when courts do not enforce them.[23] One only has to look at the text of statutory delegations to the President to be reminded of this. These delegations are not limitless grants of authority. They provide the President power to act only in certain circumstances prescribed by Congress.[24] Just because courts have failed to routinely enforce these legal obligations does not mean that there are no legal obligations in the first place. Indeed, one reason we lack a framework to understand the President's legal obligations is that we have been looking in the wrong place: the courts.

This Article approaches the project of identifying a legal framework for the President's exercise of statutory power in a fundamentally different way than the paradigmatic administrative law approach. Rather than beginning with the question of what doctrines *courts* ought to adopt to enforce the President's legal obligations, it begins with a logically prior—but often unasked—question: *what are the President's legal obligations in the first*

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justiciability limitations . . . are regularly invoked by courts as a basis for declining to resolve issues of presidential power . . . ."); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1173–77 (2009) (explaining that the current doctrine "operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power").

23. *See infra* notes 76–79 and accompanying text; *see also* Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 206 (1976) ("[C]onstitutional directives for what to do and what not to do in making and administering law are addressed to government in the first instance, and to judges only upon a claim that government has disregarded such a directive."); *id.* at 244 ("It is not mere theory to distinguish between constitutional law and judicial review."); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (distinguishing between "constitutional operative propositions," defined as "the judiciary's understanding of the proper meaning of a constitutional . . . provision," and "constitutional decision rules," defined as rules that "direct courts how to decide whether a constitutional operative proposition is satisfied"); Seanna Valentine Shiffrin, *Unfit to Print: Government Speech and the First Amendment*, 69 UCLA L. REV. 986, 993 (2022) ("I deny that constitutional content tracks justiciability or that the nonjusticiable aspects of the U.S. Constitution are merely aspirational. Traditionally, the separation between what the Constitution demands and what can be judicially enforced has always been important for articulating the legal ethical standards to which we should hold officials accountable."); *id.* at 997–98 ("The perimeter of justiciability . . . does not limit the reach of the Constitution, nor should it limit our analysis of the Constitution. Government officials are bound by the Constitution, even if their violations could not be remedied by a court. Implementation of those nether reaches of the Constitution rests upon the good faith of officials, reputational pressures, and other methods of private observance and enforcement."); Metzger & Stack, *supra* note 21, at 1306 (noting that "despite the absence of judicial enforcement, . . . internal [administrative] structures and norms operate as a form of law"); Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) ("There are numerous instances in which the . . . actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution . . . . Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.").

24. *See, e.g.*, Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 845–52 (2019) (discussing presidential statutory power as contingent on certain factual or policy judgment conditions being satisfied).

place?[25] Only once the President's legal obligations are understood does it make sense to ask how such obligations can be enforced.[26]

So, what are the President's first-order legal obligations? To answer this question, this Article looks in an obvious, but largely overlooked, place: *the statutory text*. It turns out that statutes delegating power to the President take two basic forms. Some statutes phrase power "objectively"—they give power to the President when a condition is met in the world.[27] Others phrase power "subjectively"—they give power to the President when the President "finds" or "determines" or "deems" a condition to have been met.[28] This distinction exists throughout the U.S. Code, but no one seems to have noticed it. Taking it seriously provides a coherent and straightforward framework to understand the legality of the President's exercise of statutory power.

In brief, subjective delegations trigger power upon the President's "finding" or "determination" that the relevant condition is met. The President needs to appropriately make such a "finding" or "determination," but the President need not be correct. The power is triggered by the President's subjective determination, not the fulfillment of the condition itself. Objective conditions, on the other hand, are triggered by the condition being met in fact. Presidential exercises of statutory power thus require different things to be lawful, depending on whether the powers are subjectively or objectively conditioned. Subjective delegations require the President to comply with their *subjective legal obligations* in making the relevant "finding" or "determination." These obligations include (1) being properly motivated by the public interest, (2) honestly believing that the condition has been met, and (3) engaging in sufficient deliberation before making the relevant finding.[29] If the President complies with these subjective obligations, the exercise of power is lawful *even if the President turns out to be wrong* about whether the condition was met.

Objective delegations impose different legal requirements. These powers are premised on the condition being met *in fact*, not simply on the President's determination or finding. This has two primary implications. First, for an exercise of objective power to be lawful, it is not sufficient for the President

25. *See infra* Parts II–III.

26. *See infra* Part IV.

27. *See infra* Part II.B (listing examples of objective delegations). For example, the President can remove certain officers "for inefficiency, neglect of duty, or malfeasance in office." 42 U.S.C. § 7171(b)(1). The power is premised on there actually being "inefficiency," "neglect," or "malfeasance," not simply on the President's determination or finding that this is the case. Similarly, the President has statutory power to reserve public land to create national monuments, but the limits of the reserved land "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. Again, the power is premised on the land actually being "confined to the smallest area compatible," not on the President "finding" or "determining" that this is the case.

28. *See infra* Part II.A (listing examples of subjective delegations). For example, the President's travel ban authority gives the President the power to ban the entry of certain noncitizens if the President "*finds* that [their] entry . . . would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphasis added).

29. *See infra* Part III.A (describing the constitutional basis for these subjective requirements).

to have complied with their subjective legal obligations in finding that the condition was satisfied; the President must also be *correct* about that conclusion. If the President's determination is incorrect, the exercise of power is unlawful—the power has not been triggered. Second, when Congress imposes a duty on the President to act objectively—if it has provided that the President must take action "A" when "X"—the President must act as soon as the condition occurs. Unlike with subjective duties, which phrase the power as requiring the President to take action "A" when the President *finds* "X," the President has no discretion to avoid acting by failing to make the relevant subjective finding. As soon as the condition is met, the duty to act is triggered. We see this, for example, in statutory duties that require the President to respond to certain types of domestic insurrections or to report to Congress whenever U.S. military forces enter into hostilities.[30] Because the President must act as soon as the condition is met in the world, the President has a duty to actively *monitor* such conditions, lest they fail to act as soon as the condition is met. Unlike with subjective delegations, the President thus has no discretion to avoid acting by failing to make the subjective determination, whether deliberately or ignorantly.[31]

With this understanding of the President's subjective and objective legal obligations, we can turn to the question of how to best enforce such obligations. The most impactful way would be for the President to modify the existing, internal executive branch procedures for how presidential exercises of statutory power are executed. This would have the greatest impact on presidential compliance because it would apply to all presidential exercises of power, not just those that result in parties with standing that can convince a court to hear their claims.[32] To better ensure compliance with the President's subjective obligations, the President could (1) formally require a public-interested explanation to improve compliance with the motive requirement, (2) impose pre-set standards of certainty to improve compliance with the honest-belief requirement, and (3) require formal interagency review of relevant conditions to improve compliance with the deliberation requirement.[33] For objective delegations, in addition to the subjective requirements, the President ought to impose a system for monitoring when relevant conditions have been met and ought to apply higher standards of certainty before finding that the conditions are satisfied.[34] Such reforms

30. *See* 10 U.S.C. § 253(1) ("The President . . . shall take such measures . . . to suppress, in a State, any insurrection . . . if it . . . so hinders the execution of the laws of that State . . . ."); 50 U.S.C. § 1543(a)(1) (stating that the President must report to Congress whenever "Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances").

31. *See infra* Part II.D.

32. *See, e.g.*, Bradley & Morrison, *supra* note 22, at 1109–11 (discussing barriers to judicial review of presidential exercises of power).

33. *See infra* Part IV.A.

34. *See infra* Part IV.A.

would not fully ensure that the President abides by these legal obligations, but they would improve the current state of affairs, which is no small feat.[35]

The subjective/objective framework also provides a coherent method of judicial review. Courts have been famously inconsistent in their approach to presidential exercises of statutory power. Sometimes they entirely refuse to evaluate whether the relevant statutory conditions have been satisfied; other times, they appear to evaluate the executive process underlying the relevant presidential findings; and, other times, they examine whether the relevant conditions have been met in fact.[36] But there is no apparent rhyme or reason to when courts take which approach.

The subjective/objective framework provides a coherent way forward. When subjective conditions are at issue, courts ought to ensure that the President has abided by their subjective obligations. This will typically entail straightforward procedural review to ensure that the President has deliberated before making the relevant determination, with a strong but rebuttable presumption that the President is properly motivated and honestly believes that the condition has been met.[37] For objective delegations, courts should engage in a *substantive* evaluation of the relevant condition to determine whether it has been met in fact. This evaluation can be done de novo in some circumstances and somewhat deferentially in others, depending on how amenable the condition is to judicial scrutiny. But the fundamental question in assessing an exercise of an objective delegation is whether the condition has been met in fact. Adopting this framework can resolve the current doctrinal mess and clarify how courts ought to approach ongoing and future reviews of presidential directives, like recent cases challenging President Joe Biden's vaccine mandate for government contractors.[38]

Understanding the subjective/objective distinction also enables Congress to better tailor discretion and constraint for the President going forward. In particular, Congress can phrase delegations objectively when it wishes to impose greater constraints on the President and subjectively when it wishes to grant greater discretion. Along with its decisions to grant power as either duties or authorities and decisions to condition power on factual findings or

35. Some might wonder why Presidents would impose such requirements on themselves, but Presidents frequently impose procedural constraints on themselves, and there are political incentives for them to do so. *See infra* notes 166–67 and accompanying text (discussing such self-imposed constraints and incentives).

36. *See infra* Part IV.B.3 (discussing the current doctrinal incoherence).

37. *See infra* Part IV.B.1 (developing a framework for reviewing subjective delegations). This form of review is essentially what the Supreme Court did in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), with respect to the statutory authority question. *See infra* notes 187–90 and accompanying text.

38. *See, e.g.*, Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022) (enjoining presidential directive); Georgia v. Biden, 574 F. Supp. 3d 1337 (S.D. Ga. 2021) (same), *aff'd in part and vacated in part sub nom.* Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); *see also infra* Part IV.B.3 (discussing how framework can clarify review of such ongoing challenges).

policy judgments, Congress can use the subjective/objective distinction to tailor delegations to the President in nuanced ways going forward.[39]

Presidents have an enormous amount of statutory power. And they know how to use it. Yet to date, we lack even a basic understanding of what makes such exercises of power legal or not. It turns out that the framework we have been looking for has been lying dormant on the very face of Congress's delegations to the President. The subjective/objective distinction gives meaning to the different ways that Congress has chosen to delegate power to the President, explains what is legally required of the President, and lends itself to straightforward reforms that would improve compliance with the President's legal obligations. With this framework in mind, we no longer need to wonder how to assess the legality of the President's exercises of power.

The Article proceeds as follows. Part I explains why administrative law is not the right place to start in constructing a framework to govern the President's exercise of statutory powers. Part II lays out the subjective/objective distinction by providing representative examples of subjective, objective, and mixed delegations, and explains why we should take the distinction seriously. Part III develops the legal framework that follows from understanding the subjective/objective distinction. Part IV explores what the President can do inside the executive branch to ensure compliance with these legal obligations, how courts ought to structure judicial review, and how Congress can use the distinction going forward.

I. AGAINST THE ADMINISTRATIVE LAW TURN

Scholars have recognized that the lack of a coherent legal framework to understand exercises of the President's statutory power is an urgent issue. In response, they have largely turned toward administrative law for guidance. Perhaps the strongest turn in favor of an administrative law approach is an important article by Kathryn E. Kovacs, who argues that the Supreme Court's decision in *Franklin v. Massachusetts*[40]—which held that the President is not subject to the APA's requirements—was wrong, and, therefore, the President should be subject to the same administrative law procedures that agencies are.[41] Other scholars have argued that we ought not apply administrative law wholesale but modify it to better fit the President. For example, David M.

39. *See infra* Part IV.C (discussing how the subjective/objective distinction can be used by Congress to tailor discretion and constraint).

40. 505 U.S. 788 (1992).

41. *See* Kovacs, *supra* note 8, at 68 ("*Franklin* was wrong and . . . the Statutory President should be subject to the APA's procedural and judicial review provisions. A President who acts pursuant to a congressional delegation of authority should be subject to the same constraints as any other statutory delegate.").

Driesen,[42] and Lisa Manheim and Kathryn A. Watts,[43] have called for different versions of a modified form of "arbitrary and capricious" review to be applied to the President's actions.[44] Meanwhile, Kevin M. Stack wrote a series of articles in the mid-2000s calling for the application of administrative law's interpretive deference[45] and reason-giving requirements to the President.[46] These proposals are indicative of the approach in recent scholarly attempts to respond to the incoherence of the legal framework governing the President's statutory power by turning to administrative law.[47]

This turn has not always been explicitly justified but has obvious initial appeal.[48] Administrative law is a well-established form of law that governs

42. *See* Driesen, *supra* note 10, at 1056 ("[C]ourts can soften arbitrary and capricious review of presidential actions to minimize problems associated with arbitrary and capricious review of administrative rulemaking."). Although Driesen grounds his argument for "arbitrary and capricious" review in the Constitution, his explanation of how it should be developed appears to be influenced by administrative law. *See id.* at 1056–60.

43. *See* Manheim & Watts, *supra* note 9, at 1824 ("This Article sketches out what . . . a legal framework [for reviewing presidential orders] might look like. In so doing, it takes note of the relevance of administrative law principles and identifies critical differences between presidential action and agency action. . . . [It] unpack[s] how these differences should inform courts' legal framework for reviewing presidential orders.").

44. I, myself, have also turned to administrative law in identifying methods to enforce the President's legal obligations. *See, e.g.*, Shalev Gad Roisman, *Presidential Motive*, 108 IOWA L. REV. 1, 65–68 (2022).

45. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

46. *See generally* SEC v. Chenery Corp., 332 U.S. 194 (1947). *See, e.g.*, Stack, *supra* note 8, at 542 ("[T]his Article argues that the same framework of judicial review should apply to assertions of statutory authority by the president and federal agencies."); Stack, *supra* note 10, at 1013–20 (calling for application of *Chenery*'s reason-giving requirement to the President).

47. Of course, I do not mean to suggest that all scholarship focusing on the legality of the President's statutory conduct focuses primarily on administrative law. But there has been sufficient movement in this direction recently that I think pushing back now is worthwhile. An important exception to this general turn toward administrative law is Stack's terrific article, *The Reviewability of the President's Statutory Powers*, which argues for a form of ultra vires review of statutory conditions granting the President power. *See* Stack, *supra* note 22, at 1177–78. My approach differs from Stack's in that my framework would apply a different form of review to subjective and objective conditions, while his framework would likely treat them the same. *See id.* at 1174–75. Stack does not engage with the distinction between the two forms of conditions identified in this Article, and thus perhaps would be open to the subjective/objective framework as a friendly amendment to his framework. More broadly, Stack leaves the form of ultra vires review that he proposes as relatively unspecified. *See id.* at 1205 (noting that the availability of ultra vires review "does not imply any particular standard of review"). The framework that I provide in this Article is one way we could fill that gap. Other recent exceptions to the administrative law turn include Tara Leigh Grove, *Presidential Law and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020); Roisman, *supra* note 8; Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231 (2016); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

48. For examples of explicit justification for this turn, see Manheim & Watts, *supra* note 9, at 1793 (suggesting reasons to look to administrative law are that it also governs "executive action" and that doing so would be efficient). Stack makes the case for "parity between the President's claims of statutory powers and those of an agency" because approval of the President's statutory authority requires a supermajority of Congress to overrule, whereas invalidation of an assertion of statutory powers can be overridden by a simple majority, thus

executive branch actors' exercise of statutory power. The President is also, of course, part of the executive branch, and thus, why not ground the framework for assessing the President's actions in administrative law? Although admittedly somewhat intuitive, this turn to administrative law is misguided. We should create a framework built specifically for the President. This is so for several reasons.

First, even if we accept Kovacs's thoughtful argument that the APA was originally meant to apply to the President when it was passed in 1946,[49] that is not a sufficient reason to apply *administrative law* as it exists today to the President. Simply put, the requirements of "administrative law" are not equivalent to the requirements of the text of the APA.[50] To the contrary, courts have built complex and highly reticulated forms of judicial review of agency action that go far beyond the relatively spare words of the APA's text.[51] Importantly, for our purposes, this body of judicially created law has been constructed with a focus on two fundamental features of administrative agencies: First, an attempt to legitimize agency action in the face of agencies' lack of direct electoral accountability.[52] Second, a desire to respect

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bolstering the case for courts sometimes invalidating exercises of presidential power. Stack, *supra* note 22, at 1211. I agree with Stack that this point supports some form of judicial review, but for the reasons discussed below, I do not think that administrative law is necessarily the best way to construct it.

49. *See generally* Kovacs, *supra* note 8.

50. *See, e.g.*, Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 2 (2011); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1212–17 (2015) (describing numerous instances of "administrative common law" in which administrative law's requirements were created by courts rather than required by text of the APA).

51. For example, the APA requires courts to overturn agency action if it is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). These spare words have morphed into a comprehensive form of review requiring detailed, technocratic justification and reason-giving. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (providing standard "hard look review" requirements for arbitrary and capricious review). Similarly, the APA's text governing informal rulemaking requires agencies to provide "general notice of [a] proposed rule making," including "either the terms or substance of the proposed rule or a description of the subjects and issues involved," as well as a "concise general statement of [the] basis and purpose" for the final rule that is adopted. 5 U.S.C. § 553(b)–(c). Through decades of judicially created law, administrative law now requires that the final rule be a "logical outgrowth" of the notice, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (quoting Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986)), and that the concise general statement of basis and purpose include an explanation that enables courts "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did," United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968)). According to one commentator, "appellate courts have . . . [thus] replaced the statutory adjectives 'concise' and 'general' with the judicial adjectives 'encyclopedic' and 'detailed.'" Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 309; *see also* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 353–54 (2019) (making a similar point).

52. *See, e.g.*, Manheim & Watts, *supra* note 9, at 1798 ("[A] motivating force behind the judiciary's creation of many administrative law principles has been political accountability . . . . [A]gency heads, unlike members of Congress, are not elected by the people . . . . Recognizing this, the courts have worked hard to craft administrative law

and encourage the use of subject-matter expertise that agencies are thought to possess.[53] The President, meanwhile, possesses neither the electoral accountability deficit[54] nor apolitical expertise[55] that are seen as central to the governance of agencies. Administrative law's doctrines, which are built for *agencies*, are thus ill-suited to govern the *President*.

We could try to disentangle administrative law's requirements from these core concerns, but it is not clear how we could ever sort out all the ways in which administrative law is infused with concerns about accountability and expertise.[56] More fundamentally, it is not clear how shoehorning the President into an existing framework built for agencies benefits us. Although there might appear to be efficiency reasons to look to administrative law—to avoid "reinventing the wheel," as Manheim and Watts put it[57]—these reasons strike me as ephemeral. We would still need to do the hard work of disentangling administrative law's doctrines from their core concerns of legitimizing agency accountability deficits and respecting agency expertise.[58] And this is unnecessary. As shown below, it turns out that the

principles that will further, rather than undermine, agencies' political accountability."); *id.* ("[M]any of the glosses that the judiciary has placed on top of [the text] of the APA . . . reflect underlying concerns about the fact that Congress has been allowed to transfer legislative-like powers to unelected agencies."); Bagley, *supra* note 51, at 372 ("Agencies are . . . said to labor under an acute democratic deficit: they lack the populist pedigree of either the legislature or the president, yet they wield immense government power.").

53. *See, e.g.*, Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 488–91 (2014) (discussing "expertise model" of administrative law emphasizing "objectivity and apolitical decisionmaking"); Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 564 (2018) (noting "expertise" as a "purpose for and benefit[] of administrative agencies"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001) (noting how expertise has served as a dominant justification for agency power).

54. Some have argued that the President is, in fact, less accountable than agencies. *See, e.g.*, Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Expertise*, 35 YALE J. ON REGUL. 549, 612 (2018) (suggesting that agencies are more accountable than the President because of procedural requirements of administrative law). Without taking sides in this dispute, my point is simply that courts would have structured administrative law procedures differently with the President in mind.

55. *See* Kovacs, *supra* note 53, at 564 ("[T]he President lacks the expertise of agencies."); Kagan, *supra* note 53, at 2352; Seifter, *supra* note 53, at 489 ("[T]he expertise model sometimes conflicts with the presidential model: politically based decisionmaking is anathema to the former but generally palatable to the latter.").

56. For an impressive attempt to do just this, see Manheim & Watts, *supra* note 9, at 1793–99.

57. *See id.* at 1793 ("[R]einventing the wheel—and coming up with an entirely new framework to guide review of presidential orders—would be time consuming and difficult.").

58. For example, we might have to decide whether the inherently more politically inflected nature of review that goes into whether the White House will approve an action, in comparison to whether an agency will approve one, ought to matter as to what procedures we should require. On one hand, the fact that the White House is likely to engage in discussions with the public about a proposed directive might mean that we need to require less procedures than we expect of agencies that do not have such political incentives. For example, courts have suggested that agencies "do not have quite the prerogative of obscurantism reserved to legislatures" but instead must respond to comments of sufficiently "cogent materiality" before issuing regulations. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d

text provides a relatively straightforward framework built specifically for the President.[59] Moreover, it seems unlikely that administrative law has struck the perfect balance even as to its domain, providing even less reason to use it as the foundation for assessing the President's conduct.[60] Given administrative law's focus and known flaws, it is not the proper place to start in constructing such a framework.

One response to these points might be to ignore judicially created "administrative law" and apply the *text* of the APA to the President.[61] But even if the APA were originally meant to be applied to the President,[62] this strikes me as unrealistic. Presidents have never routinely followed the APA's requirements, and I cannot imagine a court requiring the President to do so today.[63] Moreover, creating a new form of review for the President based on the APA's text would require having one body of APA administrative law for the President and another for agencies.[64] But there is no textual basis in the APA for having such disparate treatment. In sum, applying the whole body of "administrative law" or even the spare text of the APA strikes me as unworkable.

There are additional downsides to applying administrative law to the President. First, although scholars have expressed concern about applying administrative law's technocratic and procedural requirements to the President,[65] there is also a concern moving in the opposite direction. If administrative law applied to the President, judicial review of presidential

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Cir. 1977). The President, unlike agencies, is democratically elected, and so does the President have "the prerogative of obscurantism reserved to legislatures," even if agencies do not? The answer does not strike me as obvious. On the other hand, even if we think the President ought to have more leeway given the presidency's political nature, we might still want to put in place procedures to ensure that presidential directives are not *overly* political in their motivations. *See generally* Roisman, *supra* note 44. These are difficult normative questions that lumping the President and agencies together tends to obscure.

59. *See infra* Parts II, III (laying out subjective/objective distinction and framework that follows from it).

60. *See generally* Bagley, *supra* note 51 (criticizing administrative law's procedural focus); Kovacs, *supra* note 53, at 566 (discussing common critiques of administrative law, including "ossification" of rulemaking, pushing regulatory policy underground, providing incentives for more presidential power, and disincentives for legislative involvement).

61. In the context of administrative law more generally, Kovacs has called for closer adherence to the text of the APA. *See generally* Kovacs, *supra* note 50.

62. *See generally* Kovacs, *supra* note 8.

63. For example, Presidents have not routinely followed even the spare textual requirements of notice-and-comment rulemaking procedures when issuing rules via executive order. *See, e.g.*, Manheim & Watts, *supra* note 9, at 1813–14; Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1704 (1997). There are isolated examples of orders going through some form of notice to the public and receiving comments, *see, e.g.*, Exec. Order No. 12044, 43 Fed. Reg. 12661, 12665–70 (Mar. 23, 1978), but such procedures are rarely used and have never been seen as required. *See* Manheim & Watts, *supra* note 9, at 1794; Siegel, *supra*, at 1704.

64. This assumes that courts do not adopt Kovacs's proposal to adhere more closely to the text of the APA with respect to agencies. *See* Kovacs, *supra* note 50.

65. *See, e.g.*, Manheim & Watts, *supra* note 9, at 1813 ("The[] de facto requirements [of a sufficient record and detailed explanation] could . . . raise serious separation-of-powers concerns" if applied to the President).

power might then create precedents that could then be applied to *agencies*. To the extent that scholars are uncomfortable with the deferential (and incoherent) form of review that has historically characterized judicial review of presidential power,[66] this ought to be cause for concern as such precedents could then broaden their scope to apply to agencies as well.

Second, administrative law excludes from some of its most important requirements military and foreign affairs matters,[67] as well as matters dealing with "agency management or personnel or . . . public property, loans, grants, benefits, or contracts."[68] These categories cover some of the President's most important areas of statutory power.[69] A major problem with adopting administrative law as the starting framework for assessing the President's conduct is that it would exclude from its coverage some of the President's most important statutory powers.

The final reason not to apply administrative law is more abstract, but it is perhaps the most important. Administrative law operates under a fundamentally different governance paradigm than the President's exercise of statutory power. Governance under administrative law is anchored by robust and routine judicial review of agency conduct.[70] Courts develop rules that agencies must follow and, in anticipation of judicial review, agencies modify their conduct to best ensure that their actions can survive such judicial scrutiny.[71] One feature of this paradigm is that, when conduct falls *outside of judicial review*—for example, when conduct is "committed to agency discretion by law"[72]—it is largely seen as falling *outside of legal*

66. *See, e.g.*, Stack, *supra* note 22 (critiquing Supreme Court doctrine exempting some aspects of exercises of presidential power from judicial review).

67. *See, e.g.*, 5 U.S.C. § 553(a)(1) (exempting from rulemaking procedures when "a military or foreign affairs function of the United States" is involved); *see also* Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 514–16 (2014) (noting and critiquing the common view that foreign affairs matters are exempted from the APA).

68. *See* 5 U.S.C. § 553(a)(2).

69. *See* Roisman, *supra* note 8, at 1282–90 (summarizing military and foreign affairs statutory powers, as well as powers over government personnel, contracting, and creation of national monuments); *see also infra* notes 96, 100–01, 221–22 and accompanying text (discussing the President's power over government procurement contracts and monuments, as well as frequent legal challenges to those exercises of power).

70. *See, e.g.*, Metzger & Stack, *supra* note 21, at 1239 ("For years, administrative law has been identified as the external review of agency action, primarily by courts."); *see also* Nicholas R. Parillo, *Introduction: Jerry L. Mashaw's Creative Tension with the Field of Administrative Law*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 1, 2 (Nicholas R. Parillo ed., 2017) ("'[A]dministrative law' has been largely synonymous with external constraints—statutory and especially judicial—on agency action.").

71. This is not how *all* of administrative law operates, *see* Metzger & Stack, *supra* note 21, but it is how most of it operates.

72. *See* 5 U.S.C. § 701(a)(2) (excluding from judicial review "agency action [that] is committed to agency discretion by law").

requirements entirely.[73] To be sure, administrative law scholars have critiqued this dominant paradigm, but it remains dominant nonetheless.[74]

This view, although perhaps understandable in the arena of administrative law, where agency action is routinely judicially reviewed, is essentially nihilistic when applied to the President. Courts rarely review presidential power and, when they do, they tend to be extremely deferential.[75] If we use the conventional thinking in administrative law that actions not reviewed by courts are not subject to any "law," then almost all presidential action will be deemed to fall outside of the law. But this is simply not true. Law imposes legal obligations on government officials even if courts do not enforce them.[76] One only has to read the text of these statutes to see this.[77] They do not give the President unlimited power to act. They give the President power to act *in certain circumstances prescribed by Congress*.[78] Even if courts have avoided ensuring that the President complies with these statutory requirements, that does not mean that no legal obligations exist. Yet given how common it is for observers to conflate a lack of judicial review with a lack of legal requirements,[79] it is imperative that we develop a legal

73. To be clear, this view is mistaken, but, as others have noted, it is widespread. *See, e.g.*, Metzger & Stack, *supra* note 21, at 1244–45 (diagnosing and critiquing this common view).

74. *See, e.g.*, *id.* at 1243–44 (collecting sources of administrative law scholars who reject this paradigm but noting that it remains dominant).

75. *See supra* note 22 (collecting sources); *see also, e.g.*, Stack, *supra* note 22, at 1173–77 (noting current doctrine "operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power"); Manheim & Watts, *supra* note 9, at 1774 ("The historical infrequency of presidential-order challenges has produced an anemic set of judicial precedents . . . ."). Manheim and Watts suggest that the frequency of reviews of presidential power is likely to increase going forward, *see id.* at 1790–91, which is certainly plausible, but I think it is still likely to result in review only rarely.

76. *See supra* note 23 (collecting sources); *see also* Stack, *supra* note 22, at 1199 (differentiating between proposition that every public actor must have legal authorization to act and proposition that the "federal judiciary is available to enforce the limits of legal authorization"); Siegel, *supra* note 63, at 1671 (same); Jeremy Waldron, *Denouncing* Dobbs *and Opposing Judicial Review* 6 (N.Y.U. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 22-39, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4144889 [https://perma.cc/E7RY-WELW] (distinguishing between a "claim about the Constitution" and "a claim about the courts"); Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) ("There are numerous instances in which the . . . actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution.").

77. To be clear, this is true in administrative law when agencies exercise statutory power as well. My point is that this is often overlooked given administrative law's traditional court-centric nature.

78. *See infra* Part II.

79. *See, e.g.*, Waldron, *supra* note 76, at 11 ("[M]atters of constitutionality have become so thoroughly embroiled with judicial review . . . as to [often seem] inseparable from speculation about its likely exercise. . . . [But s]peculating about what the judges will say is not what is required . . . by . . . oaths of office."). For example, this sort of thinking has led to the conventional—but mistaken—view in presidential power circles that the President is under no procedural obligations when issuing executive orders. *See* Roisman, *supra* note 8, at 1271 (noting and critiquing the "conventional wisdom" that the President has *no* procedural obligations); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 17 (1st ed. 2003) ("Beyond the 1937 Federal Register Act's publication

framework for assessing the President's conduct that explicitly rejects this paradigm. Turning to administrative law would only reinforce it.

We need to approach building a framework for assessing the legality of the President's exercise of statutory power in a fundamentally different way. Rather than beginning with the question of how courts ought to enforce the law, we should start with a logically prior, but frequently ignored, question: what does the law require in the first place? Or, what are the President's first-order legal obligations in exercising statutory power? Only once we have identified these first-order obligations can we then understand how institutions, including courts, can help enforce them.

Separating the question of how courts ought to enforce the law from the question of what the law is avoids the mistaken notion that when government power is not judicially policed, it operates outside of the bounds of law. It also has the benefit of providing guidance for those *inside the executive branch* tasked with ensuring the legality of the President's conduct even when courts will not do so. Given the absence of judicial development in this domain, one major function that scholars can serve is to provide a comprehensive and detached form of legal guidance that can be implemented inside the executive branch.[80]

In sum, the benefits of a unique framework for the President are the mirror image of the downsides of looking to administrative law. A specific focus on the President avoids the issue of applying a body of law built for expert, nonaccountable agencies to a generalist, accountable President. It allows us to start fresh, unencumbered by the commonly accepted downsides of administrative law. It permits us to create a framework for assessing legality that applies to all presidential exercises of power, including those in the foreign affairs, military, procurement, and government-employee domains. And it avoids the temptation to conflate the presence of judicial review with the presence of law—providing us with a framework that permits legal evaluation even when courts are absent.

Of course, none of this is to say that we have *nothing* to learn from administrative law,[81] nor that existing scholarship on the topic has failed to

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requirements, presidents need not abide by any fixed requirements when developing, issuing, or circulating an executive order or proclamation.").

80. There are institutions within the executive branch, like the U.S. Department of Justice's Office of Legal Counsel (OLC), that provide legal guidance. *See, e.g.*, Randolph Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000). But such guidance does not cover everything. For example, OLC has never laid out a clear framework for the exercise of the President's statutory powers, and, although committed to a nonadvocate's "best view" of the law, OLC's advice is deliberately infused with the institutional interests of the President. *See, e.g.*, Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., Dep't of Just., to Att'ys of the Off. of Legal Couns. 2 (July 16, 2010) ("Because OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of the Government.").

81. To the contrary, at least some of administrative law appears to have derived from constitutional principles that might be equally applicable to the President. *See, e.g.*, Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV.

contribute to our understanding of the legality of the President's actions—it clearly has. Looking to more developed areas of law is frequently helpful in developing new legal regimes, and it is understandable that scholars have looked to administrative law for guidance in fleshing out frameworks for assessing the legality of presidential conduct—indeed, I, myself, have at times succumbed to this temptation as well.[82] My claim is not that administrative law has nothing to offer, but rather that the paradigm of administrative law ought not be our starting point. It distracts more than it illuminates and, in my view, orients us in the wrong direction. Once we have a basic framework for assessing the President's conduct to start with, administrative law might help fill in its contours. But first, we need to develop that basic framework. We are fortunate that statutory text provides one.

II. THE TEXT: THE SUBJECTIVE/OBJECTIVE DISTINCTION

Close examination of the text of statutory delegations to the President reveals a basic distinction that clarifies the President's legal obligations. Most delegations to the President are conditional—that is, the President has power only when certain conditions are met.[83] The conditions are sometimes stated as factual findings and other times as policy judgments.[84] What has escaped notice is that these conditions are phrased in two distinct ways: One is "subjective"—the power is reliant on the President "finding" or "determining" that the condition has been met. The other is "objective"—the power is reliant on the condition being met simpliciter. Below, I provide relevant examples of both types of conditions, as well as cases of "mixed" delegations that feature both subjective and objective conditions. After providing examples, I then explain why we ought to take this distinction seriously.

A. Subjective Delegations

Congress frequently gives the President power in a manner that is phrased subjectively. For example, as made famous by President Donald J. Trump's so-called "Travel Ban," the President has important immigration powers that are subjectively conditioned. The Travel Ban was premised on an authority that allows the President to ban the entry of certain classes of noncitizens if the President "*finds* that [their] entry . . . would be detrimental to the interests of the United States."[85] That authority is not conditioned on their entry actually being "detrimental to the interests of the United States" but the

479 (2010); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64 (2003); Stack, *supra* note 10.

82. *See, e.g.*, Roisman, *supra* note 44, at 65–68.

83. *See, e.g.*, Roisman, *supra* note 8, at 1279–80; Stack, *supra* note 22, at 1174–75.

84. *See* Roisman, *supra* note 8, at 1279.

85. 8 U.S.C. § 1182(f) (emphasis added) ("Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may . . . suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate.").

President's finding that that is the case. The President also sets the number of refugees permitted to enter the United States by "determin[ing]" the number that "is justified by humanitarian concerns or otherwise in the national interest."[86]

The President has numerous foreign affairs, military, and national security authorities that are subjectively conditioned as well. For example, under the Defense Production Act of 1950,[87] the President can exercise extensive power over the domestic economy by prioritizing the performance of certain contracts over others if the President "*deems* [that doing so is] necessary or appropriate to promote the national defense."[88] The President can sanction foreign states and individuals based on subjective determinations, like the power to sanction individuals if the President "*determines* [that they] knowingly engaged in significant activities undermining cybersecurity . . . [of any] democratic institution" in the United States at the behest of Russia.[89] The President can also impose trade duties or enter into trade agreements, like the Trans-Pacific Partnership, based on subjective conditions.[90]

The President has significant domestic authorities premised on subjective delegations as well. For example, President Richard Nixon froze prices in the national economy to combat inflation based on subjective conditions.[91] And the President's power to impose conditions on government contracting—a sector covering a full fifth of all American employees[92]—is premised subjectively. The Federal Property and Administrative Services Act of 1949[93] (FPASA) provides that the President can "prescribe such policies and directives . . . as he *shall deem necessary* to effectuate the

86. *Id.* § 1157(a)(2).

87. 50 U.S.C. §§ 4501–4568.

88. *Id.* § 4511(a) (emphasis added).

89. *See* 22 U.S.C. § 9524(a)(1)(A) (emphasis added); *see also, e.g.*, *id.* § 8907(a)(1) ("The President shall impose . . . sanctions . . . with respect to—(1) any person . . . that the President *determines* has perpetrated, or is responsible for ordering, controlling, or otherwise directing, significant acts of violence or gross human rights abuses in Ukraine . . . ." (emphasis added)); 50 U.S.C. § 4613(a)(1) ("[T]he President shall impose . . . sanctions . . . if the President *determines* that a foreign person . . . has knowingly and materially contributed . . . to the efforts by any foreign country . . . to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons." (emphasis added)).

90. *See, e.g.*, 19 U.S.C. § 1338(a)(2) (stating that the President can impose duties "when he finds . . . as a fact that such country . . . [d]iscriminates . . . against the commerce of the United States directly or indirectly"); *id.* § 4202(a)(1)(A) (stating that the President has the power to enter into trade agreements if the "President determines that one or more existing duties or other import restriction of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States"); *id.* § 1701(a) (creating "customs-enforcement area" based on a subjective finding by the President).

91. The relevant statutory authority provided that the President could "issue such orders and regulations as *he may deem* appropriate to stabilize prices, rents, wages, and salaries." Economic Stabilization Act of 1970, Pub. L. No. 91-379, tit. II, § 202, 84 Stat. 799, 799 (no longer in force) (emphasis added); R.W. Apple Jr., *Nixon Freezes Prices for Up to 60 Days, Then Will Establish Phase 4 Controls; Farm Prices, Wages, Rents Unaffected*, N.Y. TIMES (June 14, 1973), https://www.nytimes.com/1973/06/14/archives/nixon-freezes-prices-for-up-to-60-da-ys-then-will-establish-phase-4.html [https://perma.cc/N9CK-NEU6].

92. *History of Executive Order 11246*, *supra* note 5.

93. Ch. 288, 63 Stat. 377 (codified as amended in scattered sections of the U.S.C.).

provisions of [FPASA]"[94] by furthering "economy and efficiency" in government contracting.[95] This authority has been used for various initiatives by presidents, including antidiscrimination requirements, as well as President Biden's recent directive requiring federal contractors to impose a COVID-19 vaccine requirement on their workers.[96]

This list is far from exhaustive.[97] Instead, it provides examples to show the commonplace nature of this form of delegation throughout the U.S. Code.

B. Objective Delegations

Unlike subjective delegations, objective delegations trigger power upon the condition being met simpliciter, rather than the finding or determination of it. For example, many restrictions on the removal of executive branch officers are phrased objectively. The statute creating the U.S. Merit Systems Protection Board provides that "[a]ny member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[98] The power is not contingent on the President "determining" or "finding" such inefficiency, neglect, or malfeasance, but on such conduct existing in fact. This stands in contrast to the subjectively phrased removal protection for the head of the Social Security Administration, which provides that "[a]n individual serving in the office of Commissioner may be removed from office

94. 40 U.S.C. § 486(a) (emphasis added).

95. AFL-CIO v. Kahn, 618 F.2d 784, 789 (D.C. Cir. 1979) ("[FPASA's] direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency."); *see also* Auth. to Issue Exec. Ord. on Gov't Procurement, 19 Op. O.L.C. 90, 90 (1995) (stating that Presidents can promulgate regulations if they determine that such regulations "will promote economy and efficiency in government procurement").

96. *See Kahn*, 618 F.2d at 789–92 (noting history of Presidents using such orders to impose "buy American" requirements and prohibit employment discrimination by government contractors); Georgia v. Biden, 574 F. Supp. 3d 1337 (S.D. Ga. 2021) (striking down Biden's vaccine mandate), *aff'd in part and vacated in part sub nom.* Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022).

97. For example, the President can draw down the Strategic Petroleum Reserve if the President "has found drawdown and sale are required by a severe energy supply interruption." 42 U.S.C. § 6241(d)(1). The President also has important environmental powers based on subjective delegations, like the power to "determine . . . those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States," 33 U.S.C. § 1321(b)(4), which forms the basis of a consequential "national contingency plan," 42 U.S.C. § 9605(a). Many statutes give the President the power to exempt federal agencies from environmental regulations if the President "*determines*" that doing so is in the "paramount interest of the United States." 33 U.S.C. § 1323(a) (emphasis added) (pollution control); 42 U.S.C. § 8373(a)(2)(A) (emphasis added) (power plant fuel use regulations) .

98. 5 U.S.C. § 1202(d); *see also, e.g.*, 42 U.S.C. § 7171(b)(1) ("Members [of the Federal Energy Regulatory Commission] shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."); 12 U.S.C. § 242 ("[E]ach member [of the Federal Reserve Board] shall hold office for a term of fourteen years . . . unless sooner removed for cause by the President."); 5 U.S.C. § 7104(b) ("Members of [the U.S. Federal Labor Relations Authority] . . . may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.").

only *pursuant to a finding* by the President of neglect of duty or malfeasance in office."[99]

The President's power to create national monuments is also objectively stated. The Antiquities Act of 1906[100] gives the President the power to declare as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon lands owned" by the United States, and to reserve parcels of federal land, "the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[101] Whether an object is "historic" and whether the reserved parcel is the "smallest area compatible with the proper care and management of the objects to be protected" is not simply up to the President to "determine" or "find"—it is phrased objectively.

Objective delegations also feature in some of the President's most well-known emergency powers. Under the International Emergency Economic Powers Act[102] (IEEPA), the President can declare a national emergency but only with respect to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[103] Whether the threat is "unusual and extraordinary" and whether its "source" is "in whole or substantial part outside the United States" is phrased objectively, not subjectively. Once triggered, IEEPA gives the President power to "nullify [or transfer any interest in] . . . any property *in which any foreign country or a national thereof has any interest*."[104] Again, the core finding that "any foreign country or a national thereof has any interest" is objectively, not subjectively, phrased.

The reporting requirements of the War Powers Resolution[105] are also objectively stated, providing that the President must report to Congress "in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[106]

As above, these examples are by no means exhaustive, but they show the import and commonplace nature of such delegations.[107]

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99. 42 U.S.C. § 902(a)(3) (emphasis added).
100. 16 U.S.C. §§ 431–433.
101. *Id.* § 431.
102. 50 U.S.C. §§ 1701–1706.
103. *Id.* § 1701(a) ("Any authority granted to the President by . . . this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States . . . .").
104. *Id.* § 1702(a)(1)(B) (emphasis added).
105. 50 U.S.C. §§ 1541–1548.
106. *Id.* § 1543(a)(1).
107. *See also, e.g.*, 42 U.S.C. § 9604(a)(1) (providing environmental power to remove hazardous substances "[w]henever . . . any hazardous substance is released or there is a substantial threat of release into the environment"); 19 U.S.C. § 2451(a) (objectively stated trade authority).

C. Mixed Delegations

Parts II.A and II.B provide examples of subjective and objective delegations, but many delegations mix the two types. For example, the Insurrection Act[108] provides that

> [t]he President . . . shall take such measures as he considers necessary to suppress . . . any insurrection . . . if it . . . so hinders the execution of the laws of [a] State . . . [such] that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity . . . .[109]

Whether the President has power here is *objectively* conditioned—there must, in fact, be an insurrection that, inter alia, "so hinders the execution of the laws of the State . . . that any part of . . . its people is deprived of a" relevant right. But the determination of which measures the President can take in response is *subjectively* conditioned—they are whatever measures "he considers necessary to suppress" the insurrection.

The President's travel ban authority is also, in some sense, a mixed delegation. It provides that

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate.[110]

It is up to the President to subjectively find whether the entry of "any class of aliens" would be "detrimental to the interests of the United States" and to "deem" whatever time period is "necessary." But whether the people barred are, in fact, "aliens" is objective. The statute does not provide that the President can ban the entry of any person that they "deem an alien."

Another example is the trade authority at issue in *Motion Systems Corp. v. Bush*,[111] which provided that

> [i]f a product of the People's Republic of China is being imported into the United States in such increased quantities . . . as to cause or threaten to cause market disruption to the domestic producers of a like . . . product, the President shall . . . proclaim increased duties or other import restrictions with respect to such product, to the extent and for such period as the President considers necessary to prevent or remedy the market disruption.[112]

Here, the triggering condition is objective—it requires that a product be imported "in such increased quantities or under such conditions" as to cause

108. 10 U.S.C. §§ 251–255.
109. *Id.* § 253(1).
110. 8 U.S.C. § 1182(f).
111. 437 F.3d 1356 (Fed. Cir. 2006).
112. 19 U.S.C. § 2451(a).

market disruption. Indeed, this condition was to be investigated and found to have been met in the first instance by the U.S. International Trade Commission based on what Congress termed "objective factors," further showing Congress's intent that the condition be objectively, not subjectively, determined.[113] But what action to take is phrased subjectively: the President shall respond via duties or import restrictions "to the extent and for such period as the President *considers* necessary to prevent or remedy the market disruption."[114]

As with the examples preceding them, the examples in this section are illustrative rather than exhaustive, but they show that Congress sometimes uses subjective and objective conditions even within the same statutory provision.

D. Why the Distinction Matters

Above, I have provided examples of subjective, objective, and mixed delegations to ground the reader in the distinction and show that it exists throughout various areas of law. In this section, I explain why this distinction matters.

The initial argument for treating this distinction as meaningful is a plain language claim. Congress sometimes phrases delegations of power as contingent on the President "finding" or "determining" that a condition has been met and, other times, as premised on the condition simpliciter. The difference between the two is straightforward. For subjective conditions, the power is contingent on the "determination" or "finding." Once the President makes the "determination" or "finding," the power is triggered. For objective conditions, on the other hand, the power is contingent on the condition being met, period. The President's "determination" or "finding" that the condition is met is neither sufficient nor necessary for the power to be triggered.

This has two primary implications. First, it means that the President's exercise of subjective delegations is lawful so long as the President appropriately makes the relevant "finding" or "determination." This is true even if the President's finding or determination is *wrong* about whether the condition has been met in fact. The delegation does not require the President to be correct; it only requires them to properly make the "finding" or "determination." For objective delegations, on the other hand, the exercise of power is contingent on the condition being met *in fact*. The legality of an exercise of objectively conditioned power will turn on whether the condition has been met in reality. The President's determination is not sufficient to make the exercise of power lawful.[115]

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113. *See id.* § 2451(b)–(f) (providing a process for an International Trade Commission finding, noting certain "objective factors" to be considered).

114. *Id.* § 2451(a) (emphasis added).

115. This distinction was at the heart of Lord James Richard Atkin's famous dissent in the 1941 British case, *Liversidge v. Anderson* [1941] AC 206 (HL) (appeal taken from Eng.). In *Liversidge*, the secretary of state had detained Liversidge pursuant to an objectively conditioned authority providing the secretary with the power to detain someone "if the

The converse of this is that, for objective delegations, the power is triggered even if the President does not "find" or "determine" that the condition is met. For such delegations, the President's power is triggered whenever the condition is satisfied in fact. If Congress has chosen to phrase a delegation such that the President must do "A" when "X," then if X obtains, the President must do A. To comply with the delegation, the President must act as soon as the condition is satisfied. This imposes a duty to investigate or monitor conditions when objective duties are at stake, lest the President fail to comply with the requirement to act as soon as the condition is satisfied. If the delegation is phrased subjectively, on the other hand, the President has some discretion as to when the power is triggered. If Congress delegates power such that the President must do "A," when the President *finds* "X," even if X has been satisfied, it is still possible to comply with the duty without acting, so long as the President has not "found" X.

This point can be seen more clearly by reference to an everyday example. Imagine I am going out of town for a few weeks. It is the summer, and I live in the desert and, without watering, some of my plants might die. I love my plants and, before I leave, I want to ask my neighbor if she could help water them. I can choose to phrase my request in a couple of different ways:

(A) "Water my plants whenever you think that they need it."
(B) "Water my plants whenever they need it."

We can see that the phrasing of the request in these two ways is different. Statement (B) seems more demanding than statement (A). But how precisely?

In (A), I have given my neighbor more freedom. I have suggested that she need not water my plants, *even if they need water*, so long as she does not *think* that the plants need it. This means two things. First, my neighbor can comply with my request even if she is wrong. That is, she can fail to water my plants even if they need water if she mistakenly believed that they did not. Second, my neighbor can comply with my request if she was unaware

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Secretary of State *has reasonable cause to believe* any person to be of hostile origin or associations . . . and that by reason thereof it is necessary to exercise control over him." *Id.* at 213 (emphasis added) (quoting Defence (General) Regulations 1939, Stat. R & O 1939/927 regul. 18B (UK), *amended by* Order in Council Amending the Defence (General) Regulations 1939, Stat. R & O 1939/1681 (UK)). The majority found that it was sufficient for the secretary to subjectively believe in good faith that the condition had been satisfied. *Id.* at 216–17. In the dissent, Lord Atkin insisted that the secretary needed to *in fact* have reasonable cause to believe that Liversidge ought to be detained and that it was not sufficient to *subjectively* believe he had such cause:

> It is surely incapable of dispute that the words "if A has X" constitute a condition the essence of which is the existence of X and the having of it by A . . . . [T]he words do not mean and cannot mean "if A thinks that he has." "If A has a broken ankle" does not mean and cannot mean "if A thinks that he has a broken ankle." "If A has a right of way" does not mean and cannot mean "if A thinks that he has a right of way."

Id. at 227. My thanks to Jean Galbraith for pointing me in the direction of this case.

that the plants needed water. If my neighbor failed to check, she has not violated my request—the request does not require her to monitor the plants—it only requires her to water the plants when she thinks they need water. If my neighbor gives my plants no thought at all, then she has not disobeyed my request.

In (B), on the other hand, my neighbor is constrained on both dimensions. To comply with my request, she must not only be correct about whether my plants need water whenever she happens to come over to check, but she also *needs to make sure to check my plants in the first place*. This is because, if my plants need water at any point, and my neighbor does not know this, she will fail to abide by my instructions. The instructions require the plants to be watered as soon as they need it—my neighbor's subjective belief that my plants need water is not necessary for the requirement to be triggered.

This applies to the President as well. If a duty is premised on an objective condition, the requirement to act is triggered *as soon as the condition obtains*. The fact that the President might be unaware that the condition has been satisfied is no excuse. If the President does not act, then the President has failed to comply with the duty.

To take a concrete example, consider the Insurrection Act, which provides that the President "shall take such measures as he considers necessary to suppress, in a State, any insurrection . . . if it . . . so hinders the execution of the laws of that State."[116] Here, we have a duty—the President "*shall* take" measures—that is triggered objectively—if an insurrection "so hinders the execution of the laws of [a] State." The President cannot avoid acting by simply avoiding making a finding that such an insurrection exists—if it exists, then the President must take measures to suppress it. Thus, to comply with this duty, the President must make sure that they are made aware of instances in which such an insurrection exists, so that they can act as soon as the duty kicks in. By phrasing the delegation objectively, Congress has triggered the duty automatically, without giving the President any discretion to avoid making the finding. This is also true of other important duties that Congress has phrased objectively rather than subjectively.[117]

There are thus two main differences between subjective and objective delegations. First, subjective delegations trigger power upon the President's subjective determination, not the fulfillment of the condition itself, meaning that the President's exercise of power can be lawful even if the President's determination is, in fact, incorrect. For objective conditions, on the other hand, the President must be *correct* about the condition having been met in fact. Second, objective delegations—particularly when they impose duties—require the President to monitor the relevant conditions. This is because the duty is triggered by the satisfaction of the condition in the world, not by the President's subjective determination.

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116. 10 U.S.C. § 253(1).

117. *See, e.g.*, 50 U.S.C. § 1543(a) (reporting duty under the War Powers Resolution triggered objectively); 22 U.S.C. § 1732 (duty to act under the Anti-Terrorism and Arms Export Amendments Act of 1989 phrased objectively).

Below, I expand on what these differences mean for understanding the legality of presidential exercises of power. Before doing so, it is worth responding to some potential counterarguments to taking the distinction seriously. As a threshold objection, some might argue that the fact that a distinction exists in the text is not sufficient reason to give it legal meaning. There are many distinctions in statutory text that we rightly ignore—for example, whether one statute is in a higher-numbered title of the U.S. Code than another. Giving legal meaning to *this particular textual distinction*, however, is justified for several reasons.

First, use of the distinction is *long-standing* and seems *carefully calibrated*. Every time Congress delegates power to the President contingent on a condition, it has the choice to phrase it subjectively or objectively. By giving the distinction meaning, we respect Congress's choice. Giving such a distinction meaning is also consonant with conventional modes of statutory interpretation, which infer meaning from distinctions like this one that are long-standing and appear carefully calibrated.[118]

Second, using the distinction *makes sense*. Congress might choose to phrase some delegations subjectively and others objectively for compelling reasons. For example, Congress might delegate power subjectively when it thinks that there is good reason to defer to the President's judgment as to whether a condition has been met. This could be because the President is best able to gather and assess information—as is typically thought, for example, in the foreign affairs space[119]—or it could be because the condition requires some mixture of policy and political judgment that the President is best positioned to make.[120] Phrasing such conditions subjectively gives the

118. *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 284 (2006) (noting a "principle of statutory interpretation that '[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'" (quoting Russello v. United States, 464 U.S. 16, 23 (1983))); *id.* at 288 (arguing for the same inference when there are textual differences in different acts). Stack makes an analogous argument that we ought to give meaning to Congress's choice to delegate power to agencies sometimes explicitly subject to the disapproval of the President and sometimes without such language to infer that, when such language is absent, the President lacks such disapproval power. *See id.* at 268 ("From the time of the Founding through today, Congress has expressly conditioned grants of authority to executive officials 'with the approval of the President,' 'with the approbation of the President,' 'under the direction of the President,' or words to similar effect . . . . Once in view, [these statutes] provide strong support for the conclusion that statutory grants of authority to agency officials alone, absent such conditions, do not authorize the President to act or to bind the discretion . . . .").

119. *See, e.g.*, Chi. & S. Air Lines v. Waterman, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

120. *See id.* ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy . . . . They are decisions of a kind for which the Judiciary has neither

President the final word on whether the condition has been satisfied but still requires the President to comply with subjective obligations in making the relevant finding.[121] On the other hand, Congress might choose to phrase a condition objectively because it thinks that the President is not particularly qualified to find that it has been met. Phrasing the condition objectively opens space for an external reviewer to override the President's substantive determination that the condition has been satisfied. Phrasing it objectively rather than subjectively also limits the President's discretion to *avoid* finding that a condition has been met in order to avoid acting. The subjective/objective distinction can thus be used to tailor discretion and constraint in Congress's delegations to the President.

This is not merely hypothetical. Congress has evinced awareness of the distinction in debating how to phrase delegations to the President. For example, in a hearing relating to the Neutrality Act of 1939,[122] members of Congress explicitly discussed the different requirements imposed by phrasing the relevant condition subjectively or objectively.[123] The Neutrality Act required certain neutrality restrictions to kick in based on a subjective condition, i.e., "whenever the President *shall find* that there is a status of war."[124] One witness objected to the subjective phrasing because it gave the President discretion to avoid making the relevant finding, and he argued that the conditions should be phrased objectively instead. This spurred the following exchange:

> MR. SHANLEY. I understand that your objection to the act is that there is a prerequisite there of *a finding by the President*—that is, whenever the President shall find that there is a status of war.
>
> MR. JOHNSON. But as I understand the witness, he wants it automatic so that the President has no discretion, that that will operate automatically when there is a war, as I understand it.
>
> . . . .
>
> As I understand it, we pass the law that says automatically when a certain thing happens, that certain things should be done, and then war happens that is automatically done. . . .
>
> MR. BINGHAM [(the witness)]. As I see the purpose of the legislation, it is to retain our freedom of choice in time of war, and there is no point in retaining freedom of choice as to whether or not war is in existence, if it is to be arbitrarily abused as the President has abused it.

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aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.").

121. *See infra* Part III.A (describing subjective legal obligations).

122. Ch. 2, 54 Stat. 4 (codified as amended in scattered sections of 22 U.S.C.).

123. *See American Neutrality Policy: Hearings on Present Neutrality Law Before the H. Comm. on Foreign Affs.*, 76th Cong. 288 (1939) (statement of Alfred M. Bingham, Editor, Common Sense Magazine).

124. *Id.* (emphasis added).

> By making it mandatory that a state of war be declared to exist, then you are protecting your freedom of choice [to avoid entering the conflict] through these methods that the neutrality law would set up.[125]

Members of Congress thus clearly understood that, because the delegation was phrased subjectively, the power was triggered by the President's subjective determination rather than whether the condition was met in fact.[126] The importance of the subjective/objective distinction was made even more explicit in a later statement by Congressman Luther A. Johnson, who noted that a prior version of the act was phrased objectively:

> MR. JOHNSON. The original act when passed in 1935 . . . is stronger than the act is now. I will read the text. The text is as follows:
>
> "That upon the outbreak or during the progress of war between or among two or more foreign states, the President would proclaim such fact,"
>
> and it does not leave a finding by anyone, it says that upon the outbreak or during the progress of a war between two or three or more states.[127]

These exchanges show that members of Congress were aware of the difference in delegating power subjectively rather than objectively. Although I do not have space to exhaustively catalog every mention of this distinction before Congress,[128] the distinction has also been recognized by

125. *Id.* (emphasis added). The witness was Alfred Bingham, editor of *Common Sense* magazine. *Id.* at 283.

126. *See, e.g.*, *id.* at 325 (statement of Felix Morley, Editor, Washington Post) ("MR. SHANLEY. When we wrote that act and put into the opening sentencing, the opening phrase in section 1, 'that whenever the President shall find . . .' We lodged the ultimate say-so on the finding in the President." (alteration in original)); *id.* at 102 (statement of Rep. Frank B. Keefe) ("MR. FISH. I know of nobody in the world that does not know a state of war exists in China.").

127. *Id.* at 476 (statement of Frederick J. Libby, Executive Secretary, National Council for Prevention of War) (quoting the Neutrality Act of 1935).

128. *See also, e.g.*, *To Amend the Economic Cooperation Act of 1948: Hearing on H.R. 2362 Before the H. Comm. on Foreign Affs.*, 81st Cong. 1134, 1136 (1949) (statement of Rep. Jacob Javits) ("I give the time of the suspension of the aid, and I quote now from my amendment: ' . . . until such time *as the President finds* that such compliance or acceptance has been affected.' So it is up to the President to determine when aid should be restored . . . . This leaves it to the President to determine whether there has been non-compliance, so in that respect he has complete discretion. He can withhold the imposition of this section if he cares to . . . . He has discretion as to his own finding." (first alteration in original)).

the executive branch in testimony[129] and in writing.[130] Of course, this does not prove that Congress has *always* been deliberate or careful about using the distinction. But even if Congress has sometimes used it unthinkingly, one benefit of grounding the legal framework in the statutory text is that it enables Congress to modify its delegations going forward.

Others might object to the textual focus for broader reasons, deeming textualism an inferior mode of statutory interpretation.[131] Without making any claims to the desirability of textualism more broadly, looking to the text *in this context* can be justified for several reasons.

First, as discussed further below, looking to the text in this context happens to create a coherent and straightforward framework to understand the legality of presidential conduct. There is great value in replacing the current incoherent doctrine with a legal framework governing presidential exercises of statutory power that is predictable and provides a baseline that Congress can construct statutes around.[132] When the text provides such coherence, that is good reason to follow it.

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129. For example, recognition of the distinction was evident in a hearing about whether the President complied with the War Powers Resolution's reporting requirements in Lebanon. *See Events in Lebanon: Hearing Before the S. Comm. on Foreign Rels.*, 98th Cong. 20–21 (1983) (statement of Gen. Paul X. Kelley, Commandant, U.S. Marine Corps). The War Powers Resolution requires the President to report to Congress whenever "Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). The U.S. Department of State's deputy legal adviser seemed to acknowledge that the reporting requirement was objectively, not subjectively, stated and thus gave the President no discretion to avoid making the relevant finding to avoid reporting:

> SENATOR DODD. . . . [I]s it . . . your legal determination that [the reporting requirement] is entirely a subjective decision to be made by any President regardless of the circumstances?
>
> . . . .
>
> MR. ROBINSON. No, Senator, I am not saying that at all.
>
> . . . .
>
> . . . I am saying that the President has to report facts.

Events in Lebanon: Hearing Before the S. Comm. on Foreign Rels., *supra*, at 20–21; *id.* at 22 ("He has to report [the facts] . . . . That is his duty. That is the requirement of the law . . . .").

130. *See, e.g.*, *Extension of the Expiration Date of Section 252 of the Energy Policy and Conservation Act: Hearing on S. 1475 Before the S. Comm. on Energy & Nat. Res.*, 97th Cong. 56–57 (1981) (Memorandum from R. Tenney Johnson, General Counsel, U.S. Department of Energy) ("[T]he plain language of the statute provides that the President may require persons in the petroleum industry to 'take such action as *he determines to be necessary*' to enable the United States to meet its obligations . . . . The only limitation . . . on the scope of the President's authority is the requirement that the President determine that the required action is necessary to enable the United States to meet its international obligations."); *see also id.* at 60–61 ("[W]here any one of several different actions may achieve the same end and the statute provides that the President may take such action as *he determines necessary*, the President has the discretion to decide among those alternatives, even where the alternative chosen is not the most 'direct' means of achieving the goal." (emphasis added)).

131. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

132. *See* Stack, *supra* note 8, at 568 ("There are clear costs to the absence of any overarching framework of review. First and most practically, the absence of a framework erodes stability and predictability in review and gives the president no clear guidance on the scope of his own statutory powers . . . . Second, without a general framework, Congress has

Second, looking to the text is relatively easy. This framework will mostly be applied by those inside the executive branch. Grounding it in the text makes it easy for such actors to comply with the relevant legal requirements. They simply need to read the words of the statute, identify whether a condition is subjective or objective, and adjust their conduct accordingly. Alternative approaches might call for evaluation of legislative purpose, but competently evaluating legislative history requires a great deal of time and effort. Executive branch officials often operate on tight timelines with limited resources and will often not have sufficient time to engage in time-consuming research to divine the purpose of whatever statutory provision they are tasked with executing.[133] In constructing a legal framework, we ought to be attuned to the institutions primarily in charge of operationalizing it.[134] Having an *easy-to-apply* framework is particularly important here, given that courts are not developing case law explaining how particular statutes ought to be implemented. The easier we make the framework, the more likely it is to be complied with. Moreover, the framework could also potentially operate as a default position for statutory interpretation that could be overruled by explicit text or, if time permits a deeper dive into legislative history, a showing that Congress did not intend for the distinction to have meaning in that particular instance.

Finally, whatever the ideal normative theory of statutory interpretation is, the dominant mode of statutory interpretation today is *textualism*.[135] When such an approach results in the good outcomes of coherence and ease of use, the fact that it is consistent with how the highest court prefers to interpret statutes is a reason to use it.[136]

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no baseline around which to legislate and specifically to indicate when it seeks to grant broad deference to the president and when it does not.").

133. *See* Shalev Roisman, *The Originalist Presidency in Practice?*, LAWFARE (Jan. 12, 2021, 2:01 PM), https://www.lawfareblog.com/originalist-presidency-practice [https://perma.cc/G5G2-5PVH] (reviewing SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020)) ("[U]nlike the court, which controls its briefing schedule and largely determines when it will issue its opinions, OLC is frequently at the mercy of fast-moving contemporary events requiring quick resolution.").

134. *See id.* ("Even if an interpretive method might work for academics or judges, it might not be a realistic approach for nonjudicial actors, who are also tasked with interpreting the Constitution.").

135. *See, e.g.*, Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&list=PL2q2U2nTrWq1bz6_l-PPEUf9Pw-blX6Pl&index=4 [https://perma.cc/GHW7-7LQ2] ("We are all textualists now.").

136. *Cf.* Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, LAWFARE (May 23, 2022, 11:55 AM), https://www.lawfareblog.com/does-american-law-currently-authorize-president-seize-sovereign-russian-assets [https://perma.cc/29RB-DNEU] ("To be sure, [a] strictly textual approach is one that progressively-minded scholars like me have at times criticized as unduly literal and insufficiently attentive to legislative purposes. But in a world filled with hardball players . . . the case for unilateral methodological disarmament isn't particularly persuasive . . . . And in pragmatic terms, should any case foregrounding this issue come before the current Supreme Court, there is little doubt that all nine Justices . . . would start and finish their analysis with the words of the statute as enacted.").

In short, taking this distinction seriously gives meaning to a straightforward and widely prevalent textual distinction. It does so in a way that allows Congress to tailor discretion and constraint when it delegates power to the President. It provides the basis for a coherent and straightforward legal framework that is easy to access. And, by grounding the framework in the text, it leaves Congress in the driver's seat in determining how it wishes to condition power delegated to the President going forward. There is thus good reason to take this textual distinction seriously.

III. A FRAMEWORK FOR LEGALITY

Above, I have argued that one benefit of taking the subjective/objective distinction seriously is that it provides a coherent framework for assessing the legality of the President's conduct. In this section, I explain what this framework looks like.

In brief, under this framework, the legality of the President's exercise of a statutory power is treated differently if the delegation is subjective or objective. As noted above, subjective delegations trigger power upon the President's subjective determination that the condition is satisfied. But that does not mean that no legal obligations attach to the determination. Presidents have a number of *subjective* legal obligations that attach whenever they must make such subjective determinations. In particular, the President must "find" or "determine" that the relevant condition has been met consistent with the President's obligations to faithfully execute the law under Article II of the Constitution. Objective delegations require even more. Not only is the President required to comply with their subjective legal obligations in exercising such powers, but the President must also be *correct* about the relevant condition being satisfied for the exercise of power to be lawful. Beyond this, particularly when duties are conditioned objectively, the President is under a duty to investigate or monitor whether those conditions have been satisfied to ensure compliance with Congress's delegations. Below, I flesh out what precisely is required for Presidents to comply with their subjective obligations and then explain what is required to comply with their objective obligations.

A. Subjective Obligations

To exercise subjectively delegated power, the President must "find" or "determine" that the triggering condition has been met. To make such a finding or determination properly, the President must comply with Article II's constitutional requirements to "faithfully" execute the law. In particular, Article II requires that the President "shall take Care that the Laws be faithfully executed"[137] and take an oath to "faithfully execute the Office of President of the United States."[138] This faithful-execution duty attaches

137. U.S. CONST. art. II, § 3.
138. *Id.* § 1, cl. 8.

whenever the President must "find" or "determine" that a condition has been satisfied in order to exercise statutory power. The reason for this is straightforward. The "Law[]" in such instances requires a "finding" or "determination" for its execution—as a result, such a "finding" or "determination" must be "faithfully executed."[139] Faithful execution entails several subjective requirements. The President must (1) be *properly motivated* by the public interest rather than the President's private interest,[140] (2) the President must *honestly believe* that the relevant condition has been met,[141] and (3) the President must *deliberate* before making the relevant determination.[142]

While I have identified each of these requirements individually in prior work, this Article is the first time I have put them all together in a ready-made guide to evaluate the legality of the President's subjective conduct. Below, I summarize the basic arguments for where these obligations come from.[143]

1. Motive

Article II's requirement that the President be motivated by the public interest stems from the requirement that the President "faithfully" execute the law. Recent originalist work has concluded that the original public meaning of "faithful" execution in Article II required that "Presidents . . . exercise their power only when *it is motivated in the public interest rather than in their private self-interest*."[144] As I have argued elsewhere, this conclusion is also supported by nonoriginalist methods. In brief, the basic structure that the Constitution sets up is a form of republican democracy[145]

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139. *Id.* § 3; *see, e.g.*, Roisman, *supra* note 24, at 855 ("[W]hen . . . a statute requires the President to find certain facts as a predicate to exercising power, . . . such factfinding is part of the 'execution' of the Law that must be done 'faithfully.'").

140. *See* Roisman, *supra* note 44, at 12–23.

141. *See* Roisman, *supra* note 24, at 852–71.

142. *See* Roisman, *supra* note 8, at 1292–320.

143. The full argument for them can be found in three full-length law review articles. *See generally* Roisman, *supra* note 44; Roisman, *supra* note 24; Roisman, *supra* note 8.

144. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2120 (2019) (emphasis added); *id.* at 2192 ("[O]ur findings here at least suggest that the President . . . must pursue the public interest in good faith republican fashion rather than pursuing his self-interest . . . ."); *id.* at 2141 (concluding that "faithful execution" came to signify a "duty to act . . . impartially in the best interest of the public"). This work has received critique, but, as I have noted in prior work, that critique does not challenge the validity of the claim that the President must be motivated by the public interest; rather, it focuses on Kent, Leib, and Shugerman's focus on fiduciary theory as the basis for such a duty. *See* Roisman, *supra* note 44, at 13–15.

145. *See* Roisman, *supra* note 44, at 14–15; William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1760 (2021) ("The Constitution established our government as a republic of representatives, not as a populist democracy. As Madison expressed it in *Federalist No. 10*, the goal of a representative, deliberative democracy is 'to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial

"consist[ing] of representative officials tasked with acting for the benefit of the public."[146] As Justice Joseph Story stated in his influential treatise on the Constitution, "[i]t should never be forgotten, that in a republican government offices are established . . . not to gratify private interests and private attachments; not as a means of corrupt influence, or individual profit . . . but for purposes of the highest public good."[147] This is also the basic definition of political representation in contemporary political philosophy—that is, representatives act to benefit their constituencies, not themselves.[148] The President is one such official and, thus, to "faithfully" execute their office, the President must act to serve public, not personal, ends.[149]

In short, when the President is tasked with finding a condition in order to exercise statutory power, the President must make that finding "faithfully," which requires being motivated by the public interest rather than personal interest.[150]

2. Honest Belief

In addition to proper motive, "faithful execution" also requires that the President honestly believe that the condition has been met. A basic definition of "faithfully"—both at the Founding and today—is "honestly."[151] Thus, when the President must find that a condition has been satisfied to exercise power, doing so "faithfully" requires doing so "honestly."[152] As I have argued at greater length in prior work, this duty follows straightforwardly from the text of Article II but is also supported by structural considerations and a long history of both Supreme Court precedent and internal executive

considerations.'" (quoting THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009))).

146. Roisman, *supra* note 44, at 17; *see also, e.g.*, Eskridge & Nourse, *supra* note 145, at 1789 ("[W]e have a republican government, one which filters democracy through representation."); Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO L.J. 1, 22 (2019) ("Representative governments rest upon the premise that government power ought to be exercised in order to achieve ends that are valuable to members of the public.").

147. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1524 (Boston, Hilliard, Gray & Co. 1833).

148. *See, e.g.*, HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 164 (1972) ("[I]t will not do for a representative to assert that he did what he did for his own private interest; after all, he is not there for himself."); *id.* at 213 ("[T]he representative must pursue his constituents' interest, in a manner at least potentially responsive to their wishes, and that conflict between them must be justifiable in terms of that interest.").

149. *See* Roisman, *supra* note 44, at 16–17, 20 ("The core of executing 'faithfully' is thus to 'adhere to [the] duty' of execution, to execute 'sincerely,' 'honestly' and 'without fraud.' If we accept that the government and its representatives are meant to further public ends—that they work *on behalf of* the public—then executing the laws and the office of the President 'sincerely' or 'honestly' and 'without fraud' requires doing so for public ends." (alteration in original)).

150. For an explanation of what qualifies as personal rather than public-interested motivations, see *id.* at 38–53.

151. *See generally* Roisman, *supra* note 24, at 855–56 (collecting Founding-era and modern-day definitions of "faithful" as requiring "honesty").

152. *See id.* at 854–57.

branch precedent.[153] In sum, whenever the President must find that a condition has been met to exercise power, to do so "faithfully" requires the President to honestly believe that the condition has been met.

3. Deliberation

Just as the Constitution requires an honest belief that any conditions predicating an exercise of power have been satisfied, it also requires that the President make such determinations deliberately rather than arbitrarily. This duty to deliberate is also grounded in the faithful-execution language of Article II.[154] Textually, "faithfulness" requires not only honesty, but also acting "without failure of performance," or "exactly."[155] Recent originalist work has concluded that the faithful-execution requirement means that the President must act "'diligently' or 'care[fully].'"[156] Such "diligent" or "careful" execution requires the President to deliberate—that is, to "gather relevant information" and "make a considered judgment"—before making the determination.[157] Apart from this textual support, this duty is also supported by a long history of Supreme Court precedent[158] and internal executive branch precedent.[159] In sum, if the President is tasked with finding or determining that a condition is met in order to exercise power, to make such a finding "faithfully," the President must deliberate—that is, "gather

153. *See id.* at 857–71 (providing structural reasons and support from the Supreme Court and executive branch for honest-belief requirement); *see, e.g.*, Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827) ("[The President] is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act *according to his belief of the facts*." (emphasis added)); Sterling v. Constantin, 287 U.S. 378, 399 (1932) (noting that the President's authority to call militia "necessarily implies that there is a permitted range of *honest judgment* as to the measures to be taken" (emphasis added)).

154. *See* Roisman, *supra* note 8, at 1292–317 (providing extensive support for that duty in Article II's text, Supreme Court precedent, and executive branch precedent).

155. *Id.* at 1292–93.

156. *Id.* at 1293 (alteration in original); *see* Kent et al., *supra* note 144, at 2179 ("[T]he President must act diligently and in good faith, taking affirmative steps to pursue what is in the best interest of his national constituency . . . . [T]he command of diligence, care, and good faith contain an affirmative, prescriptive component."); Roisman, *supra* note 24, at 856 ("This requirement of 'performance' or 'exact[itude]' suggests that the President must engage in some sort of reasonable inquiry—some process—to find these facts." (alteration in original)); Kent et al., *supra* note 144, at 2190 ("[F]aithful execution requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of the principal or purpose specified by the authorizing instrument or entity.").

157. Roisman, *supra* note 8, at 1292–93.

158. *See id.* at 1295–310 (providing a long history of Supreme Court cases across a wide array of areas establishing that the Court has assumed that the President must deliberate before finding relevant conditions); *see, e.g.*, Field v. Clark, 143 U.S. 649, 693 (1892) ("The words 'he may deem' [in the statute] . . . of course implied that the president would examine the commercial regulations of other countries . . . and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products."); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405 (1928); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 444 (1935) (Cardozo, J., dissenting) ("The will to act being declared, the law presumes that the declaration was preceded by due inquiry and that it was rooted in sufficient grounds.").

159. *See* Roisman, *supra* note 8, at 1310–17 (providing long history of internal executive branch precedent supporting this duty).

relevant information and make a considered judgment based upon that information."[160]

* * *

In sum, whenever the President's statutory power is premised on finding that a condition has been met, the President has subjective legal obligations to make such findings "faithfully." To comply with this duty, the President must (1) be properly motivated, (2) honestly believe that the condition has been met, and (3) engage in reasonable deliberation. These are the President's core legal obligations in exercising subjective delegations. In Part IV, I flesh out how the President and courts can best ensure compliance with these obligations. Before doing so, I turn to what obligations are imposed by objective delegations.

B. Objective Obligations

Objective conditions also require Presidents to comply with their subjective legal obligations. This is because, even though the condition is objectively stated, the President's determination that it is satisfied will still be subjective. If a statute provides that the President has power to do action "A" if condition "X," then the President will first have to subjectively "find" or "determine" whether condition X has been satisfied. Indeed, internally, the President can *only* find whether the condition is met subjectively. This means that, even when objective delegations are in play, the President must still comply with the subjective legal obligations discussed above—the President must be properly motivated, honestly believe that the condition has been met, and deliberate before making this conclusion.[161]

However, for objective conditions, compliance with these subjective duties is not enough. In some ways, objective conditions speak most intuitively to an external reviewer—be it a judge, member of Congress, scholar, or the general public. For such external reviewers, objective conditions open the door to evaluate legality not only based on the President's compliance with their subjective legal obligations, but also on the substance of the relevant finding—that is, to determine whether the condition has been met in fact. As discussed below, this does not mean that deference to the President will never be justified but simply that the legality of the exercise of power turns on whether the condition is met in fact, not solely on the President's determination that it was.[162]

But objective conditions do not speak only to external reviewers. As discussed in Part II.D, objective conditions also impose a duty on the President to *monitor* or *investigate* whether a relevant condition has obtained. This is particularly true when Congress has objectively delegated a *duty* to the President. If a statute provides that the President *must* take action "A" when "X," if X has occurred, then the President's duty to act is triggered

160. *Id.* at 1292.
161. *See supra* Part III.A.
162. *See infra* Part IV.B.2 (constructing judicial review for objective delegations).

automatically. The President has no discretion to comply with the delegation by avoiding making the relevant subjective finding. This means that, for the President to "faithfully" execute such duties—that is, to execute them "without failure of performance," "exactly," or "diligently"[163]—the President must make sure to know when the relevant conditions have been satisfied. Unlike with subjective delegations, then, the President's legal obligations for objective delegations include a requirement to monitor when objective conditions have been satisfied, lest the President fail to act when the statute requires.[164]

In sum, the legal validity of an exercise of objective power requires both subjective and objective evaluation. To exercise such power lawfully, Presidents must fulfill their subjective obligations, but doing so is not sufficient. Objective power is only triggered by the *fact* of the condition having been satisfied. This requires a different ex post evaluation of legality and imposes a requirement to monitor whether a condition has obtained to ensure that the President acts as soon as the condition is satisfied.

IV. IMPLICATIONS

With the understanding of the President's first-order obligations identified, we can now explore how best to *enforce* the President's first-order legal obligations. Below, I begin with where enforcement would be most impactful—inside the executive branch—before turning to how courts can best enforce these obligations. I then conclude with an explanation of how Congress can better use the subjective/objective distinction going forward.

A. Inside the Executive Branch

The best way to enforce the President's first-order obligations is for Presidents to enforce them *against themselves*. This might seem an unintuitive way to begin, but if the President puts in place systems to enforce these obligations, this can impact *all* exercises of presidential power, not just those that result in an injury that creates standing and the ability to get into court for a party.[165] Of course, for this to work, the President needs to *want* to enforce legal obligations against themselves. But this is not as far-fetched as it might seem. Presidents impose procedural obligations on themselves all

163. *See* Roisman, *supra* note 24, at 855–56 (explaining how "faithfully" was defined to include "without failure of performance" or "exactly" during the Founding era); *id.* at 856 ("This requirement of 'performance' or 'exact[itude]' suggests that the President must engage in some sort of reasonable inquiry—some process—to find these facts." (alteration in original)); Kent et al., *supra* note 144, at 2179 (concluding that "faithful" execution requires "diligence"); *id.* ("[T]he command of diligence, care, and good faith contain an affirmative, prescriptive component.").

164. Such an obligation is more pressing when duties, rather than authorities, are at issue. Objective authorities, like duties, are triggered automatically when the relevant condition is satisfied, but because they are authorities (and not duties), the President is not required to act immediately upon the condition having been satisfied.

165. *See, e.g.*, Bradley & Morrison, *supra* note 22, at 1098 (discussing various barriers to judicial review of presidential power).

the time, and, even apart from a President that has a genuine desire to follow the law, there are self-interested reasons for the President to impose such requirements.[166] For example, Presidents might wish to signal to the public that they take following the law seriously or wish to distance themselves from a predecessor who was seen as flagrantly violating the law.[167]

Below, I explain what the President could do to better ensure compliance with the legal obligations identified above. First, recall that the President's subjective legal obligations require the President to (1) be properly motivated, (2) honestly believe that the relevant condition has been met, and (3) properly deliberate before making the relevant finding. To better ensure that the President abides by these requirements, the President can impose certain reforms to internal executive branch processes for approving presidential exercises of power.

Currently, whenever the President wishes to exercise significant power in a written directive, certain procedural requirements apply. These requirements derive from an executive order first promulgated by President John F. Kennedy and modified by subsequent Presidents in various, relatively minor ways since.[168] This process requires that proposed directives be submitted to the director of the Office of Management and Budget, accompanied by a letter "explaining the nature, purpose, background, and effect of the proposed" directive.[169] If the director approves the proposed directive, they transmit it to the Office of Legal Counsel (OLC) in the U.S. Department of Justice for its "consideration as to both form and legality."[170] Before final approval, such directives typically go through a form of interagency review involving relevant agencies that have subject-matter expertise over the relevant order, but such interagency review is not required by the formal process and it is not always conducted.[171]

This process could be modified to better ensure that the President abides by their subjective obligations. To better ensure proper motive, the President could require a public-interested explanation for all significant exercises of power.[172] Such public-interested explanations are not required by the existing order and are often, but not always, given.[173] Requiring such a public-interested explanation will not fully ensure that the President's

166. *See, e.g.*, Roisman, *supra* note 8, at 1326–27 (describing such incentives); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 433 (2009) ("Presidents frequently support imposition of internal mechanisms that substantially constrain the Executive Branch and even sometimes adopt such measures voluntarily . . . ."); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 801–02 (2011).

167. *See* Roisman, *supra* note 8, at 1326–27.

168. *See* Exec. Order No. 11030, 27 Fed. Reg. 5847 (June 19, 1962); *see also* Roisman, *supra* note 24, at 876 (discussing process required by this order).

169. Exec. Order No. 11030, § 2(a), 27 Fed. Reg. at 5847.

170. *Id.* § 2(b), 27 Fed. Reg. at 5847. This power was originally given to the attorney general, who delegated it to OLC. *See* 28 C.F.R. § 0.25(b) (2018) (assigning task to OLC).

171. *See* Roisman, *supra* note 24, at 876 (collecting examples).

172. *See* Roisman, *supra* note 44, at 59.

173. *See id.* at 59 n.198.

motivation was, in fact, in the public interest, but it will make it harder to act for purely self-interested reasons by focusing the attention of internal executive branch officials on the reason for the conduct and serving as a "fire alarm" for potential whistleblowers inside the executive branch.[174]

Meanwhile, the President's honest-belief requirement could be improved by requiring personal sign-off by the President on the conditions triggering authority. This could be supplemented with the creation of standards of certainty to guide the President—and those working for the President inside the executive branch—as to how confident the President should be about a particular condition or type of condition before concluding that it has been satisfied.[175] Setting forth pre-set levels of certainty or confidence could better ensure that the President is reasonably sure that the condition has been satisfied before making the relevant finding. This suggestion, which mirrors reforms implemented in the intelligence community following the intelligence failures that led to the Iraq War, could help ensure that the President truly, honestly believes the relevant condition has been met.[176]

The President's deliberation requirement can be better enforced by modifying the directive governing executive orders to require interagency review before finding that the relevant conditions have been met. Such review has been a common practice inside the executive branch, but it is not universal and was famously not adhered to in some high-profile presidential directives under the Trump administration.[177] Requiring such interagency

174. *See id.* at 58–60; *cf.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 78 (1985) ("Requiring justifications does not, to be sure, guarantee 'reasoned analysis' on the part of the legislature. Boilerplate, representing not the actual process of decision but instead a necessary bow to the courts, is hardly an unambiguous good and would undoubtedly be increased by the proposed requirements. But requiring justifications does serve an important prophylactic function . . . . [I]dentification of the legitimate public purposes purportedly served by statutory classifications should improve representative politics by ensuring that the deliberative process is focused on those purposes and the extent to which the classifications serve them . . . .").

175. *See* Roisman, *supra* note 24, at 889–92 (suggesting that the President adopt stated levels of certainty or confidence to govern finding of conditions).

176. *See id.* at 892 ("One of the key recommendations made by the Iraq Review Group was that 'in all future major intelligence products, analysts be required to include a thorough assessment and explicit statement regarding their level of confidence in the judgments expressed.'" (quoting MICHAEL MORELL & BILL HARLOW, THE GREAT WAR OF OUR TIME: THE CIA'S FIGHT AGAINST TERRORISM—FROM AL QA'IDA TO ISIS 103–04 (2015))); MICHAEL MORELL & BILL HARLOW, THE GREAT WAR OF OUR TIME: THE CIA'S FIGHT AGAINST TERRORISM—FROM AL QA'IDA TO ISIS 102 (2015) ("[B]y far the biggest mistake made by the analysts . . . was not that they came to the wrong conclusion about Iraq's WMD program, but rather that they did not rigorously ask themselves how confident they were in their judgments.").

177. *See* Roisman, *supra* note 8, at 1328 n.253. For example, the first two versions of President Trump's Travel Ban, and the initial version of his transgender military ban, were reportedly not preceded by any serious internal deliberation before they were implemented. *See, e.g.*, Sophia Brill, *A Modest Proposal for the New Travel Ban: Swear It Under Oath*, LAWFARE (Oct. 5, 2017, 10:30 AM), https://www.lawfareblog.com/modest-proposal-new-travel-ban-swear-it-under-oath [https://perma.cc/96CA-9BQW] ("The first version of this order was issued just seven days after President Trump took office, and it banned travel . . . based on no fact-finding whatsoever . . . . [The] first order was not even reviewed by national security experts within the Department of Justice."); Stone v. Trump, 280 F. Supp. 3d 747,

review would help ensure that the President has gathered relevant information and has made a considered judgment before making any subjective determination that a condition triggering power has been satisfied.

These requirements would help improve compliance with the President's *subjective* obligations. Objective delegations require more. In addition to adhering to the President's subjective obligations, such delegations also require the President to investigate or monitor objective conditions, particularly when duties are at issue.[178] One way to ensure better compliance with this requirement would be for the President to set up a system to identify objectively conditioned duties and require members of the executive branch to monitor such conditions to ensure that the President is made aware when those conditions are satisfied.

Apart from operationalizing their duty to investigate, the President might also consider increasing the level of confidence required for determining whether objective conditions have been met. When Congress phrases conditions objectively, it expresses the notion that the President must be *correct* that the condition has been satisfied. Recognizing this, the President might wish to increase the level of confidence with respect to objective conditions relative to subjective conditions.

To be sure, none of these reforms will *fully enforce* the President's obligations. But there is nothing unusual about legal requirements being underenforced, which is a well-known feature of constitutional law.[179] The fact that something will not perfectly solve a problem is not sufficient reason to avoid making things better. These reforms would do that.

B. Constructing Judicial Review

Above, I have discussed how the President's legal obligations could be enforced inside the executive branch. Here, I explore what courts can do externally to best ensure compliance.[180] As above, the subjective/objective framework lends itself to distinct requirements for subjective and objective delegations.

1. Subjective Delegations

The first-order legal obligations for subjective conditions require the President to be properly motivated, honestly believe that the condition has

768 (D. Md. 2017) ("[T]he Presidential Memorandum [did not] identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.").

178. *See supra* Part III.B.

179. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

180. It is worth being clear that the form of judicial review described below is constructed to ensure the President's compliance with their legal obligations *under Article II* and the statutory text. Claims of individual rights violations, such as those arising under the Due Process Clause, will likely require different forms of review.

been met, and deliberate before making the relevant finding.[181] Some of these obligations are more amenable to judicial enforcement than others are.

The duty to deliberate is most easily subject to judicial review. Recall that the duty to deliberate requires that the President gather relevant information and make a considered judgment based on that information before making a relevant finding.[182] Courts can relatively easily review satisfaction of this obligation through a straightforward form of procedural review. Under this form of review, Presidents would have to show courts that they have deliberated before taking action, which could be accomplished by showing that they engaged in interagency review before making the relevant finding.[183] This is essentially what the Supreme Court did in *Trump v. Hawaii*[184] when it upheld President Trump's compliance with his subjective obligation to "find" that the entry of the classes of noncitizens "would be detrimental to the interests of the United States."[185] The Court concluded that the President's "finding" was sufficient essentially because of the "world-wide multi-agency review" conducted before issuing the third version of the Travel Ban.[186] Conversely, the *lack* of evidence of such deliberation in the prior two versions of the Travel Ban likely contributed to their being enjoined by lower courts.[187] The duty to deliberate thus lends itself to a fairly straightforward form of procedural review.[188]

Whether and how courts ought to review the President's satisfaction of the motive and honest-belief requirements are more complicated issues. Courts, for understandable reasons, have historically been quite wary of reviewing the President's internal beliefs and motivations.[189] Judges are susceptible to

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181. *See supra* Part III.A.

182. *See supra* Part III.A.3.

183. *See* Roisman, *supra* note 8, at 1321–25.

184. 138 S. Ct. 2392 (2018).

185. *Id.* at 2408–10 (quoting 8 U.S.C. § 1182(f)).

186. *Id.* at 2421 ("[I]n each case the determinations were justified by the distinct conditions in each country."); *id.* at 2408, 2412, 2417 (emphasizing the multi-agency review process); *see also* Roisman, *supra* note 24, at 863–64 ("[A]lthough the Court was not willing to substantively review the evidence underlying the finding, the crux of the Court's ruling that the finding requirement was satisfied was that the finding was predicated on facts found through what the Court viewed as robust, executive process.").

187. *See* Kate Shaw, *Statements and Standards in* Trump v. Hawaii, HARV. L. REV. BLOG (June 28, 2018), https://blog.harvardlawreview.org/statements-and-standards-in-trump-v-hawaii [https://perma.cc/CVH7-MNQY] ("It was only after receiving a clear message that the Administration could only act to restrict immigration following a process that involved real inter-agency consultation, and where the order was predicated on some genuine national-security need identified by executive-branch officials, that the Administration produced the policy under review."). A lack of deliberation also contributed to enjoining President Trump's initial transgender military ban. *See* Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017).

188. This, of course, does not preclude normative objections to how relatively modest the deliberation requirement is. *See, e.g.*, Roisman, *supra* note 8, at 1335–42 (questioning normative sufficiency of deliberation requirement).

189. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 756–57 (1982) (noting that "inquiry into the President's motives" could be "highly intrusive" and would "subject the President to trial on virtually every allegation" thus "depriv[ing] absolute immunity of its intended effect"). Indeed, courts are wary of evaluating the motives of agency officials—something they are

being influenced by their political beliefs—whether consciously or subconsciously—and such bias could be particularly pronounced when evaluating the internal beliefs and motivations of the President. This is not to say that there is no situation in which courts ought to evaluate the President's motive or belief, but such review ought to be reserved for only the most egregious cases.[190] In general, courts ought to avoid assessing the President's motives and honest beliefs, but the potential for such judicial review in egregious circumstances is likely helpful in disciplining and constraining the President going forward.[191]

In short, although review of the President's motives and honest beliefs strikes me as possible in extreme situations, the most fruitful mode of judicial review of the President's subjective legal obligations is likely to be procedural review that would ensure that the President has complied with the duty to deliberate, with a strong—but rebuttable in extreme situations—presumption that the President is properly motivated and honestly believes that the relevant conditions were met. Courts would not generally evaluate whether the condition has been met in fact because that is not what the statutory text requires.[192]

2. Objective Delegations

For objective delegations, Presidents need to comply with their subjective obligations in finding that the relevant conditions are met, but they must also be *correct*. This suggests that a different form of judicial review is needed

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likely to be more comfortable doing than evaluating the motives of the President. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) (recognizing that "judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269 n.18 (1977))).

190. *See* Roisman, *supra* note 44, at 65–68 (noting that one option to enforce the motive restriction is to require public-interested explanation and review for pretext in extreme circumstances). For example, if presented with the sort of evidence before the Supreme Court in *Department of Commerce v. New York* regarding the secretary of commerce's reason for adding a citizenship question to the census, then the court might be on safe ground enjoining the President's action. *See* 139 S. Ct. at 2575 ("We are presented . . . with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process . . . . [W]e cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977))). That said, it is less likely such evidence would be in the record in a case involving the President rather than an agency official. Aside from motive, it is conceivable that if a finding of a condition were so plainly inconsistent with the state of the world as to qualify the finding as bizarre or utterly irrational, a court might conclude that the President could not possibly "honestly believe" the condition to have been met and overturn the use of power on that ground. This would also only likely occur in extreme circumstances.

191. *See* Roisman, *supra* note 44, at 55–56.

192. I qualify this statement because one could imagine extreme cases in which a subjective condition was so plainly not satisfied as to call into question the President's compliance with their subjective obligations in finding that it was satisfied. In such situations, a court might evaluate the satisfaction of the condition itself.

when evaluating such exercises of power. Rather than solely reviewing the President's compliance with their subjective obligations, the court should also assess whether the relevant condition has been met *in fact*. In other words, objective delegations require not only procedural but *substantive* review, too.

This will be easier for courts to do in some situations than others. For example, if the President fires an official with for-cause protection for "malfeasance in office"[193]—for example, for sexually harassing a subordinate—whether such malfeasance actually occurred is a factual claim that a court can competently evaluate. Similarly, the satisfaction of a statutory condition requiring the President to ensure that cars leased by the executive branch have a fuel economy of at least eighteen miles per gallon can be easily assessed by a court.[194] In other words, for objective conditions that entail straightforward factual findings, courts can require sufficient evidence to establish that the condition was satisfied in fact and review that evidence de novo.

Other conditions will be harder for courts to competently assess de novo. Sometimes, factual findings will be based on sensitive intelligence information or the like, such that courts might have good reason to defer to the President's assessment as to whether the relevant facts have been found.[195] More broadly, many delegations to the President are premised on broad policy judgments rather than findings of fact.[196] Such policy judgments include powers premised on, for example, actions being in the "national security interest" or "national interest" of the United States.[197] Such findings are not typically amenable to objective verification or falsification—they are, by their nature, judgments, not facts.[198] Courts are not likely to be able to competently assess de novo what is or is not, for example, in the "national security interest" of the United States or what is

193. *See supra* notes 98–99 and accompanying text (collecting examples of for-cause removal restrictions with this language).

194. *See* 49 U.S.C. § 32917(b)(A).

195. *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1366–85 (2009) (discussing various forms of judicial deference to national security factual claims).

196. *See* Roisman, *supra* note 24, at 846–51 (distinguishing between conditions premised on factual findings and policy judgments and providing examples).

197. *See id.* at 847–51 (collecting sources). Examples of objectively stated policy judgments include the President's power to use "all necessary and appropriate force against" those responsible for the 9/11 attacks, 50 U.S.C. § 1541 note, to declare an international emergency only with respect to "any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States," *id.* § 1701(a), and to "prescribe such rules and regulations as may be necessary and proper to carry out . . . the provisions of" a disaster relief statute, 42 U.S.C. § 5201(a).

198. *See, e.g.*, Roisman, *supra* note 44, at 30 (discussing difficulty in objectively assessing such claims); *see also* John Ferejohn, *Power in Public Law: Some Reactions*, 130 HARV. L. REV. F. 9, 22–23 (2016) ("We are a diverse people who disagree deeply about many things. Different communities and interests have their own views of the good, and reconciling these with each other and with some conception of national interests is necessarily difficult and conflictual.").

"necessary and proper" to carry out the provisions of a disaster relief statute.[199]

Although courts will have a hard time assessing the truth or falsity of such policy judgments, this does not mean that they have no role to play when such judgments are phrased objectively. Even though the triggering conditions are ultimately "policy *judgments*," these judgments still must be predicated on actual facts.[200] So, even if the court cannot make a confident judgment as to the validity of the ultimate policy judgment, the court can help enforce the objective requirement by requiring the President to reveal the facts *underlying* such policy judgments. Such a requirement will not fully ensure that the President is "correct" about such judgments, but it will make it *more likely* that the President is correct. To the extent that the facts underlying such a finding needed to be kept secret for national security reasons, courts can use existing doctrines to respect those concerns.[201]

The key for judicial review of objective conditions is that such review be geared at evaluating the *objective validity* of the condition rather than simply evaluating whether the President has abided by their subjective obligations. Although courts might sometimes need to defer to the President, courts can still make it more likely that the exercise of power is lawful by engaging in substantive review.[202]

In short, for objective delegations, the courts' job would be to ensure that Presidents comply with their subjective obligations and to review whether the operative condition has been met in fact. In some instances, this means courts would evaluate such conditions de novo, and, in others, they might defer to the President. But the core inquiry is an objective one into whether the relevant conditions have been met in fact.[203]

3. Fixing the Current Doctrinal Incoherence

Above, I explained how judicial review can be constructed to account for the subjective/objective distinction. In this section, I show how this

199. *See, e.g.*, 50 U.S.C. § 1701(a) (giving the President the power to declare an international emergency only with respect to "any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States"); 42 U.S.C. § 5201(a) (giving the President the power to "prescribe such rules and regulations as may be necessary and proper to carry out . . . the provisions of" a disaster relief statute).

200. *See* Roisman, *supra* note 24, at 847 (noting that, even for policy judgments, "the President must, first, find certain facts and, then, make a judgment about whether *based on those facts* the exercise of power meets the judgmental policy criteria . . . Congress has set forth").

201. *See* Chesney, *supra* note 195, at 1366–85.

202. *Cf.* Stack, *supra* note 22, at 1207 ("[T]he argument for *ultra vires* review [of the President's actions] does not require that the court engage in *de novo* consideration of claims that are reviewable . . . . [T]he President's claims of statutory authority may be entitled to a level of deference . . . ."); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004) (providing an institutional competence approach to judicial review).

203. Courts could also potentially review whether the President has abided by the duty to investigate when objective duties are at issue. That said, I would expect this to be rather rare, given standing and prudential concerns. *See supra* note 22 and accompanying text.

framework would be a marked improvement over the current doctrine that governs judicial review of presidential exercises of statutory power.[204] In brief, sometimes courts refuse to review whether statutory conditions are satisfied at all, sometimes they seem to look to the procedure underlying the finding of the relevant condition, and, other times, they seem to evaluate whether the conditions have been met in fact. But there is no apparent logic as to when courts take one approach rather than another. I first provide a summary of the current incoherence and then explain how the subjective/objective framework would be an improvement over the current state of affairs.

In one line of cases, the Supreme Court has suggested that courts ought never evaluate whether conditions giving the President power have been met. This line of cases dates back—at least—to an 1827 case, *Martin v. Mott*,[205] in which the plaintiff, Jacob Mott, challenged President James Madison's calling forth of a militia pursuant to a statute giving the President such power "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe."[206] Mott refused to join the militia and argued that the President had not shown that any such invasion had, in fact, occurred or been imminent.[207] The Court refused to evaluate the President's determination that the condition was satisfied, concluding that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."[208] The Court followed this decision in *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*,[209] in which President Woodrow Wilson's assumption of control over telephone and telegraph systems pursuant to an authority operative "during the continuance of the present war"[210] was challenged on the ground that the "present war"—World War I—had ended and that the use of authority was therefore invalid.[211] The Court nonetheless refused to review the satisfaction of the condition, stating that the contention that the condition had not been met was merely an assertion "not [of] a want of power, but a mere excess or abuse of discretion in exerting a power given."[212]

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204. *See supra* note 9 (collecting sources on incoherence of existing doctrine); *see, e.g.*, Manheim & Watts, *supra* note 9, at 1775 ("[T]he ad hoc smattering of judicial opinions that do exist in this area fail to provide anything close to a coherent or well-developed legal framework . . . .").

205. 25 U.S. (12 Wheat.) 19 (1827).

206. *Id.* at 29 (quoting the Militia Act of 1795, ch. 36, § 1, 1 Stat. 424, 424 (repealed 1903)).

207. *See id.* at 22–23.

208. *Id.* at 31–32.

209. 250 U.S. 163 (1919).

210. *Id.* at 181 (quoting H.R.J. Res., 65th Cong. (1918) (enacted)).

211. *See id.* at 183–84; *see also* State *ex rel.* Payne v. Dakota Cent. Tel. Co., 171 N.W. 277, 279 (S.D. 1919), *rev'd*, 250 U.S. 163 (1919).

212. *Dakota Cent. Tel. Co.*, 250 U.S. at 184; *see also* Stack, *supra* note 22, at 1173.

This line of cases was continued in *United States v. George S. Bush & Co.*,[213] in which President Franklin D. Roosevelt had invoked a delegation to raise tariffs on the importation of canned clams from Japan, contingent on a statute providing power to issue tariffs whenever, "in [the President's] judgment[,] such rates of duty . . . are shown . . . to be necessary to equalize . . . differences in costs of production" with domestic industry.[214] The challengers argued that the rate imposed was not, in fact, "necessary to equalize" the difference in costs of production, but the Court refused to assess this challenge, concluding that "the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no[t] . . . subject to judicial review."[215]

This line of cases has been used as support for the view that courts cannot review whether the conditions giving the President power have obtained.[216] However, the vitality and scope of this line of cases is unclear. The Supreme Court itself has not applied it consistently. For example, it has reviewed whether the statutory conditions giving the President power to create national monuments have been satisfied.[217] And the latest Supreme Court case to deal with a challenge to the validity of a presidential finding of a condition triggering power, *Trump v. Hawaii*, conspicuously failed to cite to this line of cases at all[218] and seemed to go out of its way to explain that the President's finding of the condition was sufficiently made due to the internal executive branch process that preceded it.[219] Meanwhile, courts of appeals

213. 310 U.S. 371 (1940).

214. *Id.* at 376–77 (quoting Tariff Act of 1930, ch. 497, 46 Stat. 590 (no longer in force)).

215. *Id.* at 379–80.

216. For example, *Dalton v. Specter* invoked this line of cases to avoid review of the President's approval of the Defense Base Closure and Realignment Commission's recommendation to close the Philadelphia Naval Shipyard. 511 U.S. 462, 464, 466 (1994). *Dalton* is distinguishable, however, because the statute at issue there was completely discretionary; it was not conditioned on anything, unlike the statutes at issue in *Mott*, *Dakota Central*, and *George S. Bush & Co.*, which were contingent on certain conditions being satisfied. *See* Stack, *supra* note 22, at 1195–96.

217. For example, the Court rejected a challenge to the creation of the Grand Canyon National Monument, concluding that the Grand Canyon clearly met the statutory criteria of being an "object of historic or scientific interest." *See* Cameron v. United States, 252 U.S. 450, 455–56 (1920) ("The Grand Canyon . . . 'is an object of unusual scientific interest.' It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors." (quoting the President's proclamation)); Cappaert v. United States, 426 U.S. 128, 142 (1976) ("The pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"); United States v. California, 436 U.S. 32, 34 (1978) ("[F]ossils of Pleistocene elephants and ancient trees . . . furnish noteworthy examples of ancient volcanism, deposition, and active sea erosion" and qualify as historic or scientific objects (quoting Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938))).

218. The Court did suggest that the claim that the President had to "explain [their] finding with sufficient detail to enable judicial review" was "questionable." Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018). But the Court relied on *Webster v. Doe*, 486 U.S. 592 (1988), which dealt with whether the CIA director's termination of an employee was "committed to agency discretion by law" under the APA, for the point. *Trump*, 138 S. Ct. at 2409; *Webster*, 486 U.S. at 599–600.

219. *See supra* notes 185–86 and accompanying text.

have affirmatively rejected the notion that they cannot review the satisfaction of conditions giving the President the power to act.[220] This is evidenced by decades of precedent evaluating the statutory conditions underlying presidential directives under FPASA[221] and the Antiquities Act.[222]

The *Mott* line of cases has also been the subject of persuasive scholarly critique.[223] As Kevin Stack has explained, the barrier to judicial review in this line of cases was initially motivated by fear of imposing personal liability on military officials.[224] The concern was that if courts made lower-level officers personally liable for their superiors' violations of statutory conditions, it would create chaos in the chain of command by making subordinates hesitant to follow their superiors' orders.[225] However, as Stack explains, this concern relating to personal liability of government officials is no longer viable because federal employees and military personnel now have official-act immunity.[226]

In short, the Supreme Court has previously held that statutory conditions cannot be reviewed, but the vitality and scope of this line of cases is unclear. Courts of appeals have explicitly rejected a broad application of this doctrine, and the Supreme Court has not consistently applied it. Thus, we are left where we began: an incoherent body of case law governing whether and how courts ought to review whether statutory conditions giving the President power have been met. As Stack succinctly put it, "American public law . . .

220. The U.S. Court of Appeals for the District of Columbia Circuit has explicitly rejected its application in several cases. *See, e.g.*, Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (distinguishing *George S. Bush & Co.* by noting that a "different case is presented . . . where the authorizing statute or another statute places discernible limits on the President's discretion. . . . Courts remain obligated to determine whether statutory restrictions have been violated."); Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996) (rejecting application of *Mott* line of cases in challenge under FPASA because it would be "untenable to conclude that there are no judicially enforceable limitations on presidential actions . . . so long as the President *claims* that he is acting pursuant to" a statutory directive).

221. *See, e.g.*, AFL-CIO v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979) ("Any order based on [the relevant section of FPASA] must accord with the values of 'economy' and 'efficiency.' Because there is a sufficiently close nexus between those criteria and the procurement compliance program established by Executive Order 12092, we find that program to be authorized by the FPASA."); Stack, *supra* note 8, at 563.

222. *See, e.g.*, Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 540 (D.C. Cir. 2019) (noting that claims challenging the size of monuments under the Antiquities Act "requir[e] factual development" and are not simply unreviewable); *Mountain States Legal Found.*, 306 F.3d at 1136 (suggesting that ultra vires review of President's national monuments declarations is available); Tulare County v. Bush, 306 F.3d 1138, 1140–42 (D.C. Cir. 2002) (evaluating plaintiffs' allegations that reserved parcels were not confined "to the smallest area compatible with proper care and management of the objects to be protected" (quoting 16 U.S.C. § 431)), *reh'g en banc denied*, 317 F.3d 227 (D.C. Cir. 2003) (per curiam).

223. *See* Stack, *supra* note 22, at 1183–98.

224. *See id.* at 1178, 1180 ("In the military setting, there was an evident need for lower-ranking officers or soldiers to comply with the orders of higher-ranking officers. But without a form of official or good faith immunity for following orders, lower-ranking officers and soldiers were subject to tort and conversion claims in their individual capacities.").

225. *See id.* at 1180–81.

226. *See id.* at 1191 ("These broad doctrines of official immunity help to alleviate the prospect of a cascade of noncompliance that had so troubled Justice Story in *Martin v. Mott*.").

[still] has no answer to the question of how a court should evaluate the president's assertions of statutory authority."[227]

This is where the subjective/objective framework comes in. This framework makes these cases much more straightforward. Courts can simply first evaluate whether conditions are subjective or objective and then tailor judicial review appropriately. For subjective conditions, courts can limit themselves to procedural review, and, for objective conditions, they can evaluate underlying evidence of the relevant conditions while applying deference where appropriate.

So, for example, if a delegation of power is premised objectively on the "continuance of the present war," as it was in *Dakota Central*, rather than absurdly holding that a claim that the "present war" is over is a mere allegation of an "abuse of discretion" rather than a "want of power,"[228] the Court could evaluate whether the objective condition had, in fact, been satisfied—i.e., was the "present war" over? If the Court wishes to defer under the political question doctrine or for national security reasons, that is a different matter.[229] Absent such concerns, the court ought to evaluate the objective validity of objective conditions, using appropriate deference when merited. If, on the other hand, the condition is subjectively stated, as was the case in *George S. Bush & Co.*, then the Court could ensure that the President has deliberated before making the relevant finding. This, incidentally, is precisely what the Court said in that case: "[T]he judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."[230]

The subjective/objective framework can also help clarify various ongoing challenges in the courts of appeals. The courts of appeals have developed a doctrine to govern the President's exercise of power under FPASA, which gives the President power to impose conditions on government contracts.[231] FPASA provides that "[t]he President may prescribe policies and directives that the President considers necessary to"[232] further the goals of "economy and efficiency" in government contracting.[233] To evaluate whether a given directive satisfies this condition, courts of appeals have asked whether the directive has a "'sufficiently close nexus' to the values of providing the government an 'economical and efficient system for . . . procurement and

227. Stack, *supra* note 8, at 541.

228. *See* Dakota Cent. Tel. Co. v. South Dakota *ex rel.* Payne, 250 U.S. 163, 181–83 (1919).

229. *See, e.g.*, *supra* note 195 and accompanying text (discussing fact deference in national security context).

230. United States v. George S. Bush & Co., 310 U.S. 371, 379–80 (1940).

231. *See* Georgia v. Biden, 574 F. Supp. 3d 1337 (S.D. Ga. 2021), *aff'd in part and vacated in part sub nom.* Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022).

232. 40 U.S.C. § 121(a).

233. *See, e.g.*, AFL-CIO v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979) ("Any order based on [the relevant section of FPASA] must accord with the values of 'economy' and 'efficiency.'").

supply.'"[234] This test is deferential but essentially *objective* in nature, geared at reviewing whether the order in question would in fact promote economy and efficiency.[235]

Under the framework above, this objective nexus test is misguided. FPASA is a subjective delegation—premised on what the "President *considers necessary*" to further "economy and efficiency."[236] Thus, in reviewing orders under FPASA, courts should ensure that Presidents have met their subjective obligations in making the relevant finding, but they should avoid objective inquiry into what would in fact promote economy and efficiency in government contracting. This would mean, among other things, that courts would no longer be in charge of determining whether requiring employees of government contractors to get vaccinated for COVID-19 has a sufficient nexus to "furthering economy and efficiency" in government contracting.[237]

The subjective/objective framework could also help clarify ongoing challenges under the Antiquities Act. Under the Antiquities Act, the President has objectively stated power to create national monuments with respect to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated on federal land and to reserve parcels of land that "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[238] There have been numerous challenges to presidential declarations of national monuments over the years, but the precise form of judicial review has remained unclear.[239] Recently, the U.S. Court of Appeals for the District of

234. UAW-Lab. Emp. & Training Corp. v. Chao, 325 F.3d 360, 366 (D.C. Cir. 2003) (alteration in original) (quoting AFL-CIO v. Kahn, 618 F.2d 784, 788, 792 (D.C. Cir. 1979)); *see also Kahn*, 618 F.2d at 792 (applying nexus test).

235. This test originated in *Kahn*, which dealt with an order terminating government contracts for contractors who did not abide by wage and price controls deemed necessary to combat inflation. 618 F.2d at 785–86. Challengers argued that the order would not promote economy and efficiency because it might force rejection of contracts by lower bidders. *Id.* at 792. The D.C. Circuit, however, suggested that in the "real-world setting" of government procurement, negotiations could be affected by the order in a way that would ultimately promote economy and efficiency. *See id.* at 792–93. This seemed to be an analysis of whether the order would *in fact* promote economy and efficiency. *See id.* at 793 ("[W]e find no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the advantages gained in negotiated contracts . . . ."); *see also Chao*, 325 F.3d at 366–67 (engaging in objective nexus review).

236. *See supra* notes 232–33 and accompanying text.

237. *Cf.* Georgia v. Biden, 574 F. Supp. 3d 1337, 1354 (S.D. Ga. 2021) (concluding that the vaccine mandate "does not have a sufficient nexus to the purposes of the Procurement Act and thus does not fall within the authority actually granted to the President in that Act"), *aff'd in part and vacated in part sub nom.* Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022).

238. 16 U.S.C § 431.

239. *See, e.g.*, Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 540 (D.C. Cir. 2019) (noting that "the precise 'scope of judicial review' [of national monuments declarations] remains an open question" (quoting Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1133 (D.C. Cir. 2002))); Anaconda Copper Co. v. Andrus, No. A79-161 Civil, 1980 U.S. Dist. LEXIS 17861, at *7 (D. Ala. June 26, 1980) ("[T]here are limitations on the exercise of presidential authority on the Antiquities Act. The outer parameters have not yet been drawn

Columbia Circuit has suggested an openness to reviewing claims that a reserved parcel of land is not "the smallest area compatible with the proper care and management of the objectives to be protected" for objective validity.[240] The D.C. Circuit has yet to engage in any detailed review of such factual claims,[241] but the subjective/objective framework should give the court comfort that such a task is precisely the one that the statutory text sets out for it. Because the Antiquities Act is objectively phrased, the court has a role to play in ensuring that the conditions triggering power have been met in fact. This does not mean that courts should never defer to the government as to what precise area is "compatible with the proper care and management" of the relevant objects to be protected, but the court should feel comfortable requiring the President to provide actual evidence underlying his determination. In addition, the subjective/objective framework also requires courts to ensure that Presidents have complied with their subjective obligations in making these findings, something courts have avoided in the past.[242]

In short, the current landscape of judicial review of the statutory conditions triggering presidential power is a mess. Sometimes courts have suggested that the President's finding of operative conditions is unreviewable, sometimes they have looked at the process underlying such findings, and sometimes they have evaluated the objective validity of the findings. But there has been no apparent rhyme or reason to when courts apply each approach. The subjective/objective distinction provides a clear and coherent framework going forward. It explains what courts should review and when.

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by judicial decision."). For example, in a well-known district court opinion assessing the creation of the Jackson Hole National Monument, the court displayed clear confusion about how to review the President's findings—first taking detailed evidence from both sides on the question of whether there were, in fact, "historic or scientific" objects being preserved, then seeming to uphold the President's finding because there was "substantial evidence" for it, but then claiming that it shouldn't review such a finding at all based on the *Mott* line of cases. *See* Wyoming v. Franke, 58 F. Supp. 890, 895–96 (D. Wyo. 1945).

240. *See, e.g.*, *Mass. Lobstermen's Ass'n*, 945 F.3d at 540 (noting that claims challenging size of monument under Antiquities Act can "requir[e] factual development"); Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (suggesting that such factual review is available); Tulare County v. Bush, 317 F.3d 227, 227 (D.C. Cir. 2003) (per curiam) ("[Plaintiffs'] allegation that Sequoia groves comprise only six percent of the Monument might well have been sufficient if the President had identified only Sequoia groves for protection, but he did not.").

241. *See, e.g.*, *Mass. Lobstermen's Ass'n*, 945 F.3d at 540–44 (finding appellants' pleadings insufficient); *Tulare County*, 317 F.3d at 227 (same).

242. In *Tulare County v. Bush*, plaintiffs appeared to challenge the President's alleged failure to deliberate and claimed that he was improperly motivated. *See* 306 F.3d 1138, 1142 (D.C. Cir. 2002) ("[N]o one in the Clinton administration 'made any meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest. . . . President Clinton 'bowed to political pressure . . . in designating a grossly oversized Monument . . . .'" (third alteration in original) (quoting the complaint)). The court dismissed these arguments, concluding that "the Antiquities Act does not impose upon the President an obligation to make any particular investigation." *Id.* at 1142. Under the subjective/objective framework, such claims can be reviewed by the courts to ensure, for example, proper deliberation. *See supra* Part IV.B.1.

4. Downsides

To be sure, there are downsides to the approach I have laid out above. Some might argue that the proposed judicial approach to reviewing subjective delegations is too lenient. After all, for subjective conditions, the framework only calls for courts to review the President's satisfaction of certain procedural requirements rather than substantively reviewing the relevant condition.[243] Others might argue that the judicial approach to reviewing objective delegations is too intrusive, putting the courts in the place of trying to substantively evaluate conditions that they are ill-equipped to evaluate. More broadly, adopting the subjective/objective framework writ large might seem arbitrary or ill-considered in instances in which Congress has not used the distinction deliberately.

These are fair critiques, and the framework and mode of judicial review proposed here are far from perfect. But perfect is not the prevailing comparator. Although it is true that the form of review of subjective delegations is quite deferential, judicial review of presidential exercises of power has tended to be quite deferential even without the framework posited in this Article.[244] One of the main benefits of the framework set forth above is that it would lend coherence to an area of law where such coherence has been sorely lacking and does so in a way that Congress and the President can bargain around or modify. To be sure, Congress is gridlocked and has not been very responsive to the realities of modern expansive presidential power, but that is not, in my view, sufficient reason for courts to step in without congressional guidance. The truth is that courts have historically been largely deferential to the President, and adopting the framework above would at least make judicial review of presidential exercises of statutory power more predictable and coherent and, in the process, would give Congress a clear way to reduce excessive judicial deference by, for example, delegating more powers objectively rather than subjectively.[245] Finally, to the extent that the framework would prove to be arbitrary or ill-considered as applied to specific delegations issued in the past, Congress could always modify those delegations or, at the least, consider adopting the subjective/objective framework in a statute that would govern *future* delegations to the President.

At bottom, even accepting the downsides to the approach noted above, the coherence of the framework, coupled with the ability of Congress to modify it, render the framework better than the current, incoherent doctrine or its prevailing alternatives. Even if others disagree, the hope is to spur further conversation about how to construct a coherent framework for presidential

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243. One potential modification to address this concern would be to require rational basis review of a sort for subjective delegations on the view that, if a finding does not have at least a conceivable rational basis, it cannot be that the President has found it consistent with their obligations to "faithfully" execute the law.

244. *See supra* note 75 and accompanying text.

245. *See infra* Part IV.C (discussing how Congress could better utilize the subjective/objective distinction going forward).

exercises of statutory power that has the President, rather than agencies, as its primary focus.

C. Congress: Using the Subjective/Objective Distinction

In addition to its implications for internal executive branch processes and judicial review, the subjective/objective legal framework also has implications for Congress. Congress has exhibited awareness of the distinction in the past,[246] but it may not have always used the distinction deliberately. With an understanding of the framework, Congress can put it to even better use going forward.

Every time Congress chooses to delegate power to the President, it has multiple choices in how it constructs such delegations. One important axis along which it can tailor discretion and constraint is the subjective/objective distinction. As explained above, delegating power subjectively gives the President more discretion in at least two ways. First, it makes the power contingent on the finding of the relevant condition rather than the fulfillment of the condition itself. This means that the President has power to act, even if the President is wrong about the condition having been satisfied, so long as they have abided by their subjective legal obligations. Second, subjective delegations implicitly provide the President with discretion to *avoid* exercising power even when the condition is in fact met, by avoiding making the determination or finding.[247] Conversely, objective conditions are more constraining. First, because they are contingent on the fulfillment of the condition in fact, not the finding, this enables external reviewers to override the President's determination if the determination is incorrect. Moreover, because objectively stated duties are automatically triggered as soon as the relevant condition is satisfied, the President cannot avoid exercising such power by avoiding making the finding or determination.

The subjective/objective distinction can be combined with two other axes along with which such delegations can be constructed. On one axis, we can divide delegated powers into authorities and duties. Authorities give the President power to act when the condition is met but do not require the President to act.[248] Duties *require* the President to act when the condition is met.[249] On another axis, the relevant conditions can be put on a spectrum between factual findings and policy judgments.[250] On balance, duties will

246. *See supra* notes 123–28 and accompanying text.

247. I am not contending here that the President has *full discretion* to avoid making the finding when the power is subjectively stated. Rather, the point here is that there is some amount of discretion on this front, in contrast to objective delegations.

248. *See, e.g.*, 8 U.S.C. § 1182(f) (providing the President with the authority to ban the entry of certain classes of noncitizens if the President determines that their entry would be "detrimental to the interest of the United States").

249. *See, e.g.*, 50 U.S.C. § 2410c(a)(1); Presidential Discretion to Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306, 309 (1995) ("The language and purpose of [this] Act demonstrate that the President has a *duty* to make determinations, not merely the *discretion* to do so.").

250. *See* Roisman, *supra* note 24, at 846–50 (making this distinction and providing examples).

be more constraining than authorities because the President does not have discretion to decide whether to act or not. And factual finding conditions will be more constraining than policy judgment conditions because they provide less room for judgment as to whether the condition has been satisfied.[251]

Once we combine the subjective/objective distinction with the axes of duties/authorities and factual findings/policy judgment conditions, we can see the possibilities available to Congress to toggle discretion and constraint when it constructs delegations of power to the President. In brief, if Congress wishes to maximize discretion, it can grant power structured as (1) an authority that is (2) premised on a policy judgment and (3) subjectively stated. On the other hand, if Congress wishes to maximize constraint, it can structure a power as (1) a duty that is (2) premised on a factual finding and (3) objectively stated. Between these two polar types, it can choose to combine the different axes in different ways to precisely tailor power delegated to the President, depending on the subject area, likely external enforcement mechanisms, expertise of the executive branch, and so on.

In short, the subjective/objective distinction not only provides a coherent way to assess the legality of the President's exercises of power, but it also provides an important dimension along which Congress can choose to tailor its delegations to the President going forward.

CONCLUSION

This Article makes two primary contributions. First, it argues that we ought to avoid the temptation to turn toward administrative law in constructing a legal framework for assessing the President's exercise of statutory power. We should construct a framework specifically built for the President. Second, it provides such a framework by looking in an obvious, but often overlooked, place: the statutory text. This focus reveals a coherent legal framework that follows straightforwardly from how Congress has chosen to structure its delegations to the President—sometimes subjectively and sometimes objectively.

Some might disagree with the particulars of the framework provided above, and others might find the basic case for the subjective/objective distinction unpersuasive. Regardless, the hope is to orient scholarship about the President's legal obligations away from courts. The President is under legal obligations even if courts are not the institutions that enforce them. Indeed, given how rarely courts review presidential conduct, if law only existed when courts regularly enforce it, the President *would* be essentially unconstrained by law. That is simply not the case. One only needs to read the text of the statutes giving the President power to understand this. Once we turn away from a judicial focus, we can construct a legal framework that gives guidance not only to judges, but to Presidents, those who work for them inside the executive branch, members of Congress, and the general public.

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251. *See id.*

Courts are not the only word on what the law requires. There remains much to discover in the statutory text. We just need to remember to look.