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Bring on the Chicken and Hot Oil: Reviving the Nondelegation Doctrine for Congressional Delegations to the President

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BRING ON THE CHICKEN AND HOT OIL: REVIVING THE NONDELEGATION DOCTRINE FOR CONGRESSIONAL DELEGATIONS TO THE PRESIDENT

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INTRODUCTION

The so-called "nondelegation doctrine" posits that Congress may not transfer its legislative power to another branch of government, and yet Congress delegates its authority routinely not only to the President, but to a whole host of other entities it has created and that are located in the executive branch, including executive branch agencies, independent agencies, commissions, and sometimes even private parties.[1] Recognizing that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives,"[2] the Supreme Court of the United States has essentially created a fiction:[3] when Congress provides as part of the delegation "intelligible principles" that in some way cabin the discretion of the decisionmaker to whom it has delegated,[4] the decisionmaker is no longer "legislating," but merely "executing" the law, as the executive branch may do.[5]

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[1] *See* Mistretta v. United States, 488 U.S. 361, 371–72 (1989); *see* James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 545–48 (2017).

[2] *Mistretta*, 488 U.S. at 372.

[3] Posner and Vermeule call it a "metaphor." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1726–28 (2002).

[4] Gundy v. United States, 139 S. Ct. 2116, 2129, 2140 (2019) ("[D]elegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority.").

[5] *See* U.S. CONST. art. II, § 3 (the President has the duty to "take Care that the Laws be faithfully executed"); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410 (1928) (holding that where a statute contains intelligible principles, the President is "not in any real sense invest[ed] . . . with the power of legislation, because

In the entire history of constitutional law, the Supreme Court has only twice used the "intelligible principle" standard to invalidate congressional delegations to the executive, and both of those decisions came down in 1935.[6] As Cass Sunstein so aptly put it twenty years ago, the conventional nondelegation doctrine has had "one good year, and 211 bad ones (and counting)."[7] Now, of course, it has had 231 bad years, making it practically moribund.[8]

Currently, however, advocates of a more robust nondelegation doctrine have some hope that its rebirth may be imminent.[9] In June 2019, in *Gundy v. United States*—a case involving a congressional delegation to the U.S. Attorney General—four Supreme Court justices indicated their willingness to revisit the nondelegation doctrine, and Justice Gorsuch penned a dissent that set out a more robust version of the "intelligible principle" standard than has prevailed for nearly a century.[10] In a November 2019 statement associated with a denial of certiorari, Justice Kavanaugh, who did not take part in the consideration or decision of the *Gundy* case, indicated that Justice Gorsuch's dissent in *Gundy* "may warrant further consideration" of the nondelegation doctrine "in future cases."[11]

Yet, in a later nondelegation case in which one of the lower court judges practically invited the Supreme Court to revisit nondelegation, the Court denied certiorari.[12] The case, *American*

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nothing involving the expediency or just operation of such legislation was left to the determination of the President").

[6] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 429–30 (1935).

[7] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

[8] In a recent article, Professors Julian Davis Mortenson and Nicholas Bagley argue that we should "[f]orget the debate whether nondelegation is dead. It was never really alive to begin with." Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 285 (2021). Eric Posner and Adrian Vermeule have said, "Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum." Posner & Vermeule, *supra* note 3, at 1722.

[9] Many of these advocates have been weighing in with their own versions of a more robust nondelegation doctrine. *See, e.g.*, Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 781–88 (2019).

[10] *See* Gundy v. United States, 139 S. Ct. 2116, 2131, 2141 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort").

[11] Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.).

[12] Am. Inst. for Int'l Steel, Inc. v. United States, 141 S. Ct. 133, 133 (2020) (mem.).

Institute for International Steel, Inc. v. United States, did not involve congressional delegation to an agency, but congressional delegation to the President.[13] Specifically, President Trump, relying upon the authority Congress delegated to the President in the Trade Expansion Act of 1962,[14] imposed tariffs on steel and aluminum.[15] The American Institute for International Steel challenged President Trump's imposition of tariffs, arguing that the delegation in Section 232 of the Trade Expansion Act did not contain sufficiently narrow intelligible principles.[16] The U.S. Court of Appeals for the Federal Circuit found that the authority given to the President in the Trade Expansion Act was not an unconstitutional delegation of congressional authority.[17] The Federal Circuit's holding was based entirely on an earlier Supreme Court case, *Federal Energy Administration v. Algonquin SNG, Inc.*,[18] which held that the Trade Expansion Act "easily" fulfilled the intelligible principle standard because the Act contained a requirement that the Secretary of the Treasury find that importation of certain goods threatened to impair the national security prior to the President imposing tariffs and also allowed the President to act only to the extent "necessary" to ensure national security was not threatened.[19]

Following *Algonquin*, the Federal Circuit in *American Institute for International Steel* determined that President Trump's proclamation raising steel tariffs was not made pursuant to an unconstitutional delegation in the Trade Expansion Act.[20] The Court of International Trade had held the same.[21] However, in a dubitante opinion,[22] one of the three judges on the court, while acknowledging the Court was bound by *Algonquin*, suggested that

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[13] *See generally id.*

[14] 19 U.S.C. § 1862 (1988).

[15] *See* Proclamation No. 9705, 83 Fed. Reg. 11625, 11627 (Mar. 8, 2018).

[16] Am. Inst. for Int'l Steel, Inc. v. United States, 806 F. App'x 982, 983 (Fed. Cir. 2020).

[17] *Id.* at 983, 991.

[18] *Id.* at 983; *see generally* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

[19] *Algonquin*, 426 U.S. at 559.

[20] *Am. Inst. for Int'l Steel*, 806 F. App'x at 991.

[21] Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019).

[22] A "dubitante" opinion is one that indicates that "the judge doubted a legal point but was unwilling to state that it was wrong." *Dubitante*, BLACK'S LAW DICTIONARY (7th ed. 1999). Lon Fuller described it as an opinion a judge enters that shows "the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent." LON L. FULLER, ANATOMY OF THE LAW 93 (1968).

the delegation in the Trade Expansion Act was, in fact, impermissibly broad and violative of separation of powers because the Act contained no requirement that the President's action match the Secretary's findings nor did the Secretary's findings in any way bind the President's order.[23] Inviting the higher courts to revisit *Algonquin* and the nondelegation doctrine, Judge Katzmann asked, "[i]f the delegation permitted by [S]ection 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?"[24] And yet the Supreme Court did not take up the invitation.[25]

The issue that this Article considers is not whether the Supreme Court should wholesale revive the all-but-obsolete nondelegation doctrine, which, even under Justice Gorsuch's formulation in *Gundy*, has the potential to limit the ability of the modern administrative state to regulate. Rather, this Article considers whether there is a basis to revisit and revise nondelegation with respect *only* to delegations to the President. Notably, in the modern era of presidential administration, it is increasingly routine for presidents to use executive orders and proclamations to govern and set policy. For example, President Trump issued approximately 220 executive orders[26] and 70

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[23] *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1351 (Katzmann, J., dubitante).

[24] *Id.* at 1352.

[25] One might wonder whether, with the death of Justice Ruth Bader Ginsburg and the recent appointment of Justice Amy Coney Barrett, the Supreme Court *would* take up the invitation. Justice Ginsburg joined the majority opinion in *Gundy*, finding sufficient intelligible principles and refusing to revisit the nondelegation doctrine. Justice Barrett's views on nondelegation are not entirely clear. In a 2014 article on Congress's power to delegate authority to the President to suspend the writ of habeas corpus, then-Professor Barrett argued that it was improper for Congress to allocate authority over the suspension decision to the President. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 252–53 (2014). Instead, she argued that Congress itself must determine whether the conditions exist to justify the suspension of the writ. *Id.* at 253. Notably, in light of the argument I make in this Article, Justice Barrett argued that limiting Congress's ability to delegate authority to the President to suspend the writ of habeas corpus "provides structural protection from executive excess." *Id.* at 259. Although she argued for "a more demanding application of the nondelegation doctrine" in the context of suspending writs of habeas corpus, she made clear that her approach "[did] not challenge the premise of the nondelegation doctrine." *Id.* at 319.

[26] *See Executive Orders*, NAT'L ARCHIVES: FED. REG., https://www.federalregister.gov/presidential-documents/executive-orders [https://perma.cc/XW8U-3WCG] (last visited Feb. 10, 2022); *see also Executive Orders*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/executive-orders [https://perma.cc/R6PM-BJ2A] (last visited Feb. 10, 2022). By comparison, President Barack Obama issued 147 executive orders in his first four years in office and President George W. Bush issued over 170 executive orders in his

proclamations during his four-year term.[27] As Professor William Araiza noted, "[o]ne area where the current administration has distinguished itself from its predecessors is in its unusually aggressive use of emergency declarations to achieve policy goals in situations that feature only tenuous claims to constituting real emergencies . . . ."[28] While at least some of President Trump's executive orders were found to be unconstitutional,[29] what has become apparent, if it was not already, is how much power Congress has delegated to the President—any president—to issue such executive orders and to make policy and rules through proclamations. Constitutional law should not be based on the actions of one president, but certainly the amount of power wielded by the Executive in recent administrations,[30] and taken to an extreme during the Trump Administration, is cause for concern to both conservative and progressive constitutional law scholars alike.[31] A revived nondelegation doctrine "may help rein in any future administration that follows the [Trump Administration] in its questionable emergency declarations and extravagant claims of executive power."[32]

This Article therefore examines whether there is a basis for considering delegations to the President different from congressional delegations to independent agencies or even executive agencies. And, if treating delegations to the President differently is appropriate, this Article further asks whether the

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first four years in office. *See Executive Orders*, NAT'L ARCHIVES: FED. REG., https://www.federalregister.gov/presidential-documents/executive-orders [https://perma.cc/VQ8Y-9L8D] (last visited Feb. 10, 2022); *see also Executive Orders*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/executive-orders [https://perma.cc/8ZST-S5GN] (last visited Feb. 10, 2022).

[27] *Proclamations*, NAT'L ARCHIVES: FED. REG, https://www.federalregister.gov/presidential-documents/proclamations [https://perma.cc/E5NC-F26S] (last visited Feb. 10, 2022).

[28] William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. REV. 211, 245 (2019).

[29] *See, e.g.*, City & Cnty. of S.F. v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018).

[30] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2317 (2001).

[31] Back in 2002, Professors Posner and Vermeule speculated that "the slippery slope" of Congress delegating too much authority to the president "might not be bad." Posner & Vermeule, *supra* note 3, at 1741–42. They argued that there was "little reason to suppose, ex ante, that the grant would represent legislative abdication to an engorged presidency, rather than a desirable response to contemporary social needs." *Id.* at 1742. They also argued that it made no sense to develop constitutional rules "with a view to improbable political scenarios." *Id.* at 1743. Unfortunately, it appears that their predictions and optimism were unfounded.

[32] Araiza, *supra* note 28, at 213.

Court should view delegations to the President more narrowly than the broad intelligible principle standard it has up until now applied in analyzing all delegations.

This Article argues that congressional delegations to the President *should* be viewed differently from delegations to executive and independent agencies. First, the nature of the entity to which Congress delegates is significant as a matter of separation of powers. Thus, it is appropriate not only to look at the substance of the delegation, but also at the delegee. Allowing broad delegations to an administrative agency that is not specifically provided for in the Constitution but is a creation of Congress, and that is checked by the ways in which Congress and the President both exert control over the agency, raises no separation of powers concerns. Instead, an agency's structure guarantees its power is constitutionally cabined.

By contrast, allowing broad delegations to the President, whose executive power the Constitution specifically defines, does raise serious separation of powers concerns. The Court has recognized these specific separation of powers concerns with respect to delegation, making clear that at least in some contexts, the delegee does matter. More specifically, the Court has said that where Congress delegates authority to an entity in an area over which the Constitution already grants that entity authority, the delegation may be broader than usual.[33] The Court has therefore been clear that the nondelegation doctrine will and should account for the delegee in certain situations, and that delegations to the President, in particular, are bound up with particular separation of powers concerns.

Moreover, the purpose of the nondelegation doctrine is to ensure that a delegation contains sufficient detail to allow a court to determine whether, in fact, the delegee has complied with the terms of the delegation.[34] Thus, when Congress has delegated authority to an agency and the agency's actions are challenged, a court may review whether the delegation contains intelligible principles, and then determine whether the agency's actions were rational, based on findings of fact, or constituted an abuse of discretion.[35] In these circumstances, it is the review for abuse of discretion that does most of the work. Thus, the intelligible principle analysis need not be rigorous. However, the Supreme

[33] Loving v. United States, 517 U.S. 748, 772–73 (1996).
[34] *See* Yakus v. United States, 321 U.S. 414, 425–26 (1944).
[35] *See* The Administrative Procedure Act, 5 U.S.C. § 706 (1966).

Court has held that delegations left to the President's discretion cannot be reviewed for a determination of whether they are based on findings of fact, arbitrary or capricious, or constitute an abuse of discretion.[36] This means the only basis left for judicial review of the President's actions in such circumstances, besides the nondelegation doctrine, is a narrow one based on constitutionality—whether the President's actions are specifically authorized by the delegation or contradict it,[37] or whether the delegation violates the separation of powers altogether. Because the nondelegation doctrine is a primary basis of judicial review of the President's actions—but not as necessary when it comes to agency action—it makes sense to demand a more rigorous nondelegation approach when it comes to presidential conduct pursuant to a delegation.

This Article proceeds in Part I to describe the nondelegation doctrine, trace its evolution, and discuss the constitutional and separation of powers principles that underlie it. Part II considers the Supreme Court's jurisprudence in cases regarding the President's removal power as illustrative of an area of administrative law in which, by comparison to the Court's usual approach to nondelegation, the Court will take into account not just the substantive scope of Congress's efforts to control another branch, but also the *nature* of the entity over which it seeks to maintain control. Part III looks at the limited conditions under which, in the context of nondelegation, the Court has been willing to take into account the nature of the delegee. Part IV argues that separation of powers principles weigh in favor of a more robust approach to the nondelegation doctrine as applied to congressional delegations to the President, and Part V argues that other considerations also endorse such an approach. Part VI shows that the typical justifications for broad delegation also tend to favor treating delegations to the President in a more rigorous fashion than delegations to executive or independent agencies. Part VII then reviews the Supreme Court's nondelegation jurisprudence in cases involving congressional delegations to the President for principles that would make application of the nondelegation doctrine more robust in such cases. It proposes the application of a "heightened scrutiny" approach to the nondelegation doctrine that requires courts to ask certain questions about the delegation.

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[36] *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992); Dalton v. Specter, 511 U.S. 462, 476–77 (1994).

[37] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

Part VIII shows how this "heightened scrutiny" approach would be applied.

I. DELEGATION PRINCIPLES

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[38] establishing that Congress is the only entity in the federal government with the power and ability to legislate.[39] However, the Constitution is silent on the question of whether or to what extent legislative power may be delegated or shared.[40] Nevertheless, the Supreme Court has interpreted Article I, section 1 to mean that when Congress legislates, it must do so through bicameralism and presentment.[41] Thus, Congress cannot delegate the authority to legislate to a subset of itself.[42] The Court has also held that separation of powers means that Congress cannot delegate its legislative power to the Executive.[43] This is because Congress is the branch most suited to public and deliberative lawmaking.[44] By contrast, the Constitution vests the President with executive power,[45] and requires him to "take Care that the Laws be faithfully executed . . . ."[46] The Court has said that the Take Care Clause means that the presidency is "[i]ll suited" to the

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[38] U.S. CONST. art. I, § 1.

[39] *See* Loving v. United States, 517 U.S. 748, 757–58 (1996).

[40] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 489 (2001) (Stevens, J., concurring) (Articles I and II "do not purport to limit the authority of either recipient of power to delegate authority to others."). Because the text of the Constitution is silent on whether and to what extent legislative power may be delegated, scholars have relied upon original meaning, the framers' intent, and historical practice to try to determine whether delegation is permissible. *Compare* Mortenson & Bagley, *supra* note 8, at 294–95 (arguing that the historical evidence makes clear that the framers and members of the first few Congresses believed delegation was permissible) *with* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 992–93 (2018) (arguing that members of the second Congresses did not believe Congress could delegate legislative power).

[41] INS v. Chadha, 462 U.S. 919, 958 (1983).

[42] *Id.* at 956–57.

[43] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

[44] *Loving*, 517 U.S. at 757–58 ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

[45] U.S. CONST. art. II, § 1, cl. 1.

[46] *Id.* § 3.

task of lawmaking, as the office is "designed for the prompt and faithful execution of the laws and its own legitimate powers . . . ."[47]

Nevertheless, Congress has and does often delegate authority to the President and administrative agencies to implement laws, engage in fact-finding, and make rules. One argument is that Congress's power to delegate and its ability to create administrative agencies, which are not explicitly provided for in the Constitution, arises out of the Necessary and Proper Clause, which allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[48] The Necessary and Proper Clause signals several important concepts as related to delegation. First, Congress may pass laws that allow for the "execution" of its own powers or the powers of the branches.[49] Second, although there is no explicit provision for the establishment of agencies in the Constitution, the Necessary and Proper Clause shows that the Framers understood that, in fact, entities not explicitly provided for in the Constitution—departments—would be created and exist, and that the font of their creation would be Congress, which could do so as "necessary and proper" to ensure that Congress's own powers and the powers of the other branches could be executed.[50]

Regardless of whether the Necessary and Proper Clause can be seen as an explicit basis for delegation, the Constitution recognizes the potential existence of officers, departments, and executive agencies in other places, intimating that the framers understood that they would exist and have authority delegated to them. First and foremost, the Constitution provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[51] This provision

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[47] *Loving*, 517 U.S. at 758.

[48] U.S. CONST. art. I, § 8, cl. 18.

[49] *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2129–31 (2004).

[50] For a different approach to the Necessary and Proper Clause as the constitutional basis for delegation, see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 348–51 (2002) (arguing that the Necessary and Proper Clause cannot constitute a source of authority for delegation of legislative power since it only allows Congress to adopt those additional means to permissible ends that are "proper").

[51] U.S. CONST. art. II, § 2, cl. 1.

illustrates that the Framers clearly understood that although the Constitution does not establish executive departments, Congress would, and provided that the President must at least have a small modicum of control over agencies through this reporting function. Moreover, one of the powers of the President is to appoint "Officers of the United States" whose appointments are not provided for in the Constitution, "and which shall be established by Law."[52] The Constitution thus recognizes that the Congress would establish officers, and ostensibly the agencies or departments they would oversee, by law, and that the President would appoint such officers. The Constitution also gives Congress the power to vest appointment of inferior officers in the President, the courts, or in the "Heads of Departments."[53] The Constitution requires "all executive and judicial Officers" to be "bound by Oath or Affirmation, to support this Constitution" and prohibits any religious test from being a requirement of qualification to "any Office or public Trust."[54] Thus, although there is no explicit provision for agencies in the Constitution, the Framers clearly foresaw that they would exist. And since the first Congress, the legislature has been delegating authority to executive agencies.[55]

Since soon after the founding of the nation, Congress has also consistently delegated power to the President[56] based on the President's authority and obligation to "take Care that the Laws be faithfully executed."[57] For example, in 1794, during the Washington administration, Congress delegated authority to the President to put in place port embargoes.[58] As the Supreme Court has explained:

> [I]n the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of our people . . . to invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.[59]

Congress has found it desirable to give the President discretion in matters outside the areas of trade and commerce as well, including

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[52] *Id.* cl. 2.

[53] *Id.* cl. 2.

[54] *Id.* art. VI, cl. 3.

[55] *See* Mortenson & Bagley, *supra* note 8, at 335–38.

[56] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 683–87, 89 (1892) (listing legislation delegating authority to the President).

[57] U.S. CONST. art. II, § 3.

[58] *Marshall Field*, 143 U.S. at 683–84.

[59] *Id.* at 691.

national security and immigration, among others, to allow him to execute the law consistent with current circumstances.[60]

In 1892, the Court first confronted separation of powers concerns regarding a congressional delegation to the President with respect to tariffs in *Marshall Field & Co. v. Clark*.[61] Specifically, in that case, the Court considered the constitutionality of the Tariff Act of October 1, 1890, which gave the President the authority to suspend a ban on duties on certain specific imported goods based on a finding that U.S. exports of the same types of goods were not being treated reciprocally by the country of import.[62] The Court noted: "That [C]ongress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution."[63] However, the Court also held that the delegation in the Tariff Act did not run afoul of that principle because it did not "in any real sense, invest the [P]resident with the power of legislation."[64] The Court observed that the Tariff Act required the President to suspend the ban on duties upon the ascertainment of certain facts.[65] Thus, instead of legislating, he was merely executing the law—he was "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."[66]

Thirty years later, in *J.W. Hampton, Jr. & Co. v. United States*, the Court again faced a constitutional challenge to a congressional delegation of authority to the President to raise tariffs and held that as long as Congress "lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[67] Since then, the nondelegation doctrine has allowed delegations from Congress to agencies and to the President as long as they are accompanied by "intelligible principles," on the theory that such principles

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[60] *See, e.g.*, Immigration and Naturalization Act, 8 U.S.C. § 1182(f) (2019) (giving the President authority to suspend certain classes of aliens if he deems their entry "detrimental to the interests of the United States").

[61] 143 U.S. 649 (1892).

[62] *Id.* at 680.

[63] *Id.* at 692.

[64] *Id.*

[65] *Id.* at 693.

[66] *Id.*

[67] 276 U.S. 394, 409 (1928).

circumscribe the discretion of the President or agency such that when they follow those principles, they are not impermissibly exercising the legislative power, but are merely executing the legislative will.[68]

Only twice in the 230-year history of constitutional jurisprudence has the Court found a congressional delegation unconstitutional, and both decisions came from the same Court in 1935. In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court held that a provision of the National Industrial Recovery Act (NIRA)[69] that authorized the President to approve criminal codes of fair competition violated the nondelegation doctrine.[70] The relevant provision of the NIRA allowed the President to approve and adopt codes promulgated by private industrial associations or groups if the President found that the associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative" and that the codes were not designed "to promote monopolies or to eliminate or oppress small enterprises and will not operate or discriminate against them . . . ."[71] In addition, the statute allowed the President, in adopting the codes, to impose his own conditions to protect consumers, employees, and others "in furtherance of the public interest."[72]

The Court acknowledged that in some circumstances, it would be appropriate for Congress to delegate its authority. The Court also noted that Congress can "lay[ ] down policies and establish[ ] standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."[73] However, the Court found that the delegation in the NIRA allowing the creation of codes of fair competition was a bridge too far.[74] The Court looked at whether Congress had "itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards ha[d] attempted to transfer that function to others,"[75] and concluded that the latter had occurred. First, the

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[68] *See id*. at 410–11.
[69] 15 U.S.C. § 703 (1933).
[70] 295 U.S. 495, 551 (1935).
[71] *Id.* at 521–23 (citing 15 U.S.C. § 701 *et seq.*).
[72] *Id.* at 523.
[73] *Id.* at 530.
[74] *Id.* at 550.
[75] *Id.* at 530.

Court found that the relevant provisions in the NIRA were exceptionally broad, allowing the President to act in whatever way he deemed fit to rehabilitate and expand trade or industry.[76] The Court also found that the terms in the Act that were said to circumscribe the President's ability to act—terms such as "fair competition"—were vague and subject to interpretation, giving the President impermissibly wide discretion to act.[77] The law allowed the President to create agencies and task them with providing him guidance, but did not require that he follow the agency guidance in any way and gave him full authority to accept, modify, or reject agency findings as he pleased.[78] Under these facts, the Court held that the delegation was unconstitutional as it constituted "a sweeping delegation of legislative power."[79]

In coming to this conclusion, the Court distinguished what it considered the impermissible delegation in NIRA from what it considered constitutional delegations in the Interstate Commerce Act and Radio Act of 1927. Notably, the delegations in the Interstate Commerce Act and the Radio Act of 1927 were both to agencies—what the Court called "an expert body"[80]—not to the President. Moreover, the delegations were narrow in scope, mainly because the agencies' purview was narrow in scope,[81] unlike the President's powers, which are broad. The Court also observed that these delegations were permissible because under both statutes, the agencies could only act in limited circumstances—where there was notice and a hearing and the agency's orders were supported by findings of fact and sustained by evidence.[82] Moreover, both statutes that contained the delegations provided standards for the agencies to help guide their determinations.[83]

In a companion case to *Schechter Poultry*, *Panama Refining Co. v. Ryan*, the Court found that a delegation to the President, also in the NIRA, to prohibit the transportation in interstate

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[76] *Id.* at 537.
[77] *Id.* at 533–34.
[78] *Id.* at 539.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 540 (noting that delegation in the Radio Act of 1927 was permissible because the standards established by Congress would be effectuated "by an administrative body acting under statutory restrictions adapted to [a] particular activity").
[82] *Id.* at 539–40.
[83] *Id.*

commerce of petroleum products produced in excess of state quotas violated the nondelegation doctrine.[84] The Court recognized the importance of allowing Congress the ability to delegate, saying:

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.[85]

The Court held, however, that the "hot oil" provision in NIRA went beyond the limits of the delegation authority because it contained no standards at all to cabin the President's discretion.[86] The Court explained: "As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[87]

While the Court in *Panama Refining* suggested that the nondelegation doctrine should not turn on whether the delegee was the President or an executive agency,[88] it nevertheless seemed to suggest that the types of activities normally delegated to agencies—fact-finding and agency rule-making—were more appropriate subjects of delegation. Indeed, the decisions that the Court discussed as being valid and distinguished at length are those involving such delegations to executive agencies—to the

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[84] Panama Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935).

[85] *Id.* at 421.

[86] *Id.* at 417–19, 430.

[87] *Id.* at 430.

[88] *See id.* at 420 ("If the Congress can make a grant of legislative authority . . . we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee.").

Secretary of the Treasury,[89] the Secretary of War,[90] the Interstate Commerce Commission,[91] and the Federal Radio Commission.[92] Moreover, the Court noted that part of the problem with the relevant provision of the NIRA was that it subjected individuals to criminal liability without requiring or providing judicial review of any factual findings to support the conclusion of liability.[93]

Since *Schechter Poultry* and *Panama Refining*, the Court has not explicitly found a single congressional delegation to an agency or to the President unconstitutional pursuant to the nondelegation doctrine.[94] In case after case, the Court has read the statute providing the delegation to contain sufficient intelligible principles to adequately circumscribe the delegee's decision-making

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[89] *See id.* at 426–27 (discussing Wayman v. Southard, 23 U.S. (1 Wheat) 1 (1825) and Buttfield v. Stranahan, 192 U.S. 470 (1904)).

[90] *Id.* at 427 (discussing Union Bridge Co. v. United States, 204 U.S. 364 (1907); Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910); and Phila. Co. v. Stimson, 223 U.S. 605 (1912)).

[91] *Id.* at 427–28 (discussing St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 287 (1908); InterMountain Rate Cases, 234 U.S. 476, 486 (1914); Avent v. United States, 266 U.S. 127, 130 (1924); and N.Y. Cent. Sec. Co. v. United States, 287 U.S. 12, 24–25 (1932)).

[92] *Id.* at 428 (discussing Fed. Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 279, 285 (1933)).

[93] *Id.* at 432. This issue is perhaps less rooted in nondelegation than in due process concerns, but the two are related. In order not to run afoul of due process concerns, a decision by the President would need to be accompanied by fact-finding to ensure that it is not arbitrary or capricious. The lack of required fact-finding in the hot oil provision of the NIRA was the basis for the Court finding the provision to violate the nondelegation doctrine. *See* David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1019–20 (2018) (examining the Supreme Court's discussion of the scope of review of executive orders in *Panama Refining Co. v. Ryan*). For more on the relationship between the nondelegation doctrine and due process, see Alexander Volokh, *The New Private-Regulation Skepticism*, 37 HARV. J. OF L. & PUB. POL'Y 931, 974–77 (2014).

[94] Arguably, there is one more case in which the Court has found a delegation unconstitutional—Clinton v. City of New York, 524 U.S. 417, 449 (1998). In that case, the Court found that Congress's delegation to the President of the authority to strike out certain provisions of appropriations bills violated the explicit provisions of the Constitution because it allowed the President to veto a portion of a bill after it was enacted, rather than vetoing an entire bill prior to enactment. *Id.* at 440–41. However, both Justices Scalia and Justices Breyer saw the issue raised as a nondelegation issue. *See id.* at 468–69 (Scalia, J., concurring in part and dissenting in part) (noting that what was at issue in the case was "the doctrine of unconstitutional delegation"); *id.* at 471 (Breyer, J., concurring in part and dissenting in part) (noting that the Court has interpreted the Constitution's provisions delegating all "legislative" power to Congress and vesting all "executive" power to the President "generously in terms of the institutional arrangements that they permit").

authority to ensure the delegee is not "legislating."[95] Moreover, the Court in *Panama Refining* asserted that whether the delegation is to the President or an agency is irrelevant in the analysis of whether the delegation is constitutional.[96] Indeed, the Court has rarely looked at the nature of the entity to which Congress has delegated authority in determining whether the delegation is constitutionally valid. Instead, the Court looks at the substance and contours of the delegation to determine whether it contains sufficient standards to circumscribe the delegee's decision-making.[97]

Nevertheless, the Court in both *Schechter Poultry* and *Panama Refining* seemed to show special suspicion with respect to the delegations to the President in the NIRA, which it compared unfavorably with delegations to agencies. Certainly, in other administrative law contexts, important separation of powers questions often are determined not just based on the *scope* of the power Congress provides, or withholds, but also on the *identity* and *nature* of the entity involved.

II. THE IDENTITY AND NATURE OF THE ENTITY MATTERS IN OTHER ADMINISTRATIVE LAW CONTEXTS, INCLUDING THE PRESIDENT'S REMOVAL POWER

In another context having to do with the administrative state and separation of powers—whether Congress can limit the President's ability to remove officers—the nature of the entity where the officer is situated is dispositive to the decision of whether the limitation is constitutionally valid. The Supreme Court has held that Congress has more power to limit the President's ability to remove officers that require independence from the President or exercise a quasi-judicial role; however, Congress has no power to limit the President's ability to remove officers who are purely executive, meaning whose agencies or roles are necessary to the President's ability to fully and faithfully execute the law.[98]

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[95] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 423–24 (1944); Am. Power & Light Co. v. SEC, 329 U.S. 90, 104–06 (1946); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473–76 (2001); Gundy v. United States, 139 S. Ct. 2116, 2129–30 (2019).

[96] Panama Refin. Co. v. Ryan, 293 U.S. 388, 432–33 (1935).

[97] *Id.*

[98] *Compare* Myers v. United States, 272 U.S. 52, 163–64 (1926), *with* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

The Constitution explicitly provides the President with the power to appoint officers, with the advice and consent of the Senate, and gives Congress the power to bestow authority on the President, the courts, and heads of departments to appoint inferior officers.[99] However, the Constitution is silent with respect to the President's ability to remove officers, and more specifically, the extent to which Congress may limit the President's removal power. Thus, the Court has had to decide under what circumstances it is permissible for Congress to limit the President's removal power.

In *Myers v. United States*, the Court held that the Tenure in Office Act, which, among other things, allowed the President to remove a postmaster only with the consent of the Senate, was unconstitutional because the inability to remove an executive officer would "make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed."[100] However, less than ten years later, in *Humphrey's Executor*, the Court found constitutional a for-cause limitation that Congress had placed on the President's ability to remove officers of the Federal Trade Commission.[101] In distinguishing *Myers*, the Court noted that "[a] postmaster is an executive officer restricted to the performance of executive functions" who is not charged with any duty "at all related to either the legislative or judicial power"[102]—he was "merely one of the units in the executive department" and thus subject to illimitable removal by the President.[103] By contrast, the Federal Trade Commission is "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed . . . ."[104] Thus, it cannot "be characterized as an arm or an eye of the executive."[105] With respect to such agencies, the Court held that Congress can "require them to act in discharge of their duties independently of executive control" and therefore limit the President's ability to control them by limiting his power of removal.[106] Notably, the Court did not believe that Congress's ability to limit the President's removal authority was based

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[99] U.S. CONST. art. II, § 2.
[100] *Myers*, 272 U.S. at 164.
[101] *Humphrey's Ex'r*, 295 U.S. at 631–32.
[102] *Id.* at 627.
[103] *Id.*
[104] *Id.* at 628.
[105] *Id.*
[106] *Id.* at 629.

entirely on whether Congress deemed an agency "independent" or placed it in the Executive branch.[107] Indeed, the Court noted that James Madison believed that the Comptroller of the Treasury, which was located in the executive branch, may not have been a position "purely of an executive nature" and thus may have been subject to having his removal limited by Congress.[108]

Since *Myers* and *Humphrey's Executor*, the Court has moved away from categorizing the entity of the officer whose removal is subject to limitation as "quasi-legislative" or "executive" in nature, but the Court does look at the nature of the entity where the officer is located and the nature of the officer's duties to decide whether Congress's imposition of a limitation on removal is constitutionally appropriate. Thus, in *Wiener v. United States*, the Court noted that "the most reliable factor for drawing an inference regarding the President's power of removal . . . is the nature of the function that Congress vested" in the commission where the relevant officer is located.[109] In that case, because the Court determined that the War Claims Commission was intended to be "entirely free from the control or coercive influence" of the Executive, it held that it was unconstitutional for the President to remove a commissioner prior to the end of his tenure.[110] In *Morrison v. Olson*, the Court moved further in this direction, looking at whether the inability to remove an officer interfered with the President's ability to fully and faithfully execute the laws in accordance with the Take Care Clause.[111] Thus, although the independent counsel could be considered "purely executive," what mattered was that she required independence from the President, and the President's inability to remove her without cause was not considered to interfere with his duties to execute the law.[112]

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[107] *See id.* at 630.

[108] *Id.* at 631; *see also* Bowsher v. Synar, 478 U.S. 714, 731–34 (1986) (holding that the Comptroller General exercises an executive function and that it did not matter that Congress considered the position to be legislative in nature); Mistretta v. United States, 488 U.S. 361, 420 (1989) (Scalia, J., dissenting) ("I doubt whether Congress can 'locate' an entity within one Branch or another for constitutional purposes by merely saying so . . . .").

[109] 357 U.S. 349, 353 (1958).

[110] *Id.* at 355–56 (quoting *Humphrey's Ex'r*, 295 U.S. at 629).

[111] 487 U.S. 654, 689–93 (1988).

[112] *See id.* at 690–93; *see also Bowsher*, 478 U.S. at 732–33 (holding that the Comptroller General's functions, which included the authority to issue budget reports that specify budget reductions and to make decisions regarding which budget cuts are to be made, are executive in nature and therefore his removal could not be controlled by Congress).

The removal cases thus establish several important principles. First, Congress can create agencies and "require them to . . . discharge . . . their duties independently of executive control."[113] As then-Professor Elena Kagan pointed out, the Court's removal powers cases "strongly suggest that Congress may limit the President's capacity to direct administrative officials in the exercise of their substantive discretion."[114] This means that Congress can create agencies that have "a zone of independent administration."[115] Where Congress has created such an agency, the Court will look at the nature of that agency and the agency officials' duties to determine whether they require independence and whether such independence would interfere with the Executive's ability to execute the laws in deciding whether it is constitutionally permissible for Congress to limit the President's ability to remove such officials.[116] Importantly, whether Congress deems the agency or agent "independent" and whether the official is part of an independent agency or an executive agency is not entirely dispositive of the issue.[117] Instead, where it is clear that Congress has indicated that the agency or official requires independence and such independence will not interfere with the President's constitutional duties, the Court has allowed Congress more leeway to control, or at least protect, the official. Thus, the separation of powers and checks and balances[118] concerns that underlie the removal cases suggest that Congress ought to be

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[113] *Humphrey's Ex'r*, 295 U.S. at 629.

[114] Kagan, *supra* note 30, at 2323.

[115] *Id.* Recently, the Supreme Court has imposed an outer limit on the ability of Congress to create such zones of independent administration, holding that an independent agency led by a single official who is not subject to removal at will is unconstitutional. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203–04 (2020) (holding that "[t]he CFPB's single-Director structure" and the Director's "insulation from removal," among other unique aspects of the agency, contravene the constitutional conception of the executive).

[116] *Seila Law*, 140 S. Ct. at 2245 n.3.

[117] *See supra* note 108.

[118] Different from separation of powers, the checks and balances concern looks at whether the liberty of citizens is sufficiently protected from "tyrannical government" by ensuring that "multiple heads of authority" are "pitted one against another in a continuous struggle" that will deny to any of them the capacity to consolidate all governmental authority in itself. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984). Indeed, underlying the Court's decision in *Seila Law* seems to be not such separation of powers concerns but the concern that the Consumer Financial Protection Bureau was so sheltered from the Executive branch that it was not subject to the checks and balances necessary to ensure it did not consolidate too much authority to itself. *Seila Law*, 140 S. Ct. at 2203–04.

given more deference with respect to its efforts to control "quasi-legislative" agencies—agencies or officials that are considered not to be essential to the President's executive authority. In light of those concerns, however, Congress's attempts to control the "purely executive" must be subject to closer scrutiny. In the realm of considering whether a limitation on the President's ability to remove an agency official violates separation of powers, the Court will not just look at the substance of the limitation, but also at the nature of the official and entity whose removal is limited.[119] In these cases, the nature of the official and the entity where she is located matter.

III. THE COURT HAS OCCASIONALLY TAKEN INTO ACCOUNT THE NATURE OF THE DELEGEE IN NONDELEGATION CASES

Thus far, distinctions based on the *nature* of the agency or entity involve that undergird the removal cases have had little valence in nondelegation cases, except in two limited circumstances. First, the Court has said that Congress has broader ability to delegate authority to another entity, including the President, where the Constitution provides that entity with independent authority. Second, the Court has also intimated that Congress may have more limited ability to delegate where the delegee is not a governmental actor.

In *Loving v. United States*, the Court determined that a very broad delegation allowing the President "to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed [Services] convicted [for] murder" was constitutional.[120] To the Court, the two factors that mattered most in deciding that the delegation, which had almost no circumscribing factors, was constitutional was that the delegation was to the President and the President has broad authority as Commander-in-Chief.[121] The Court said a delegation can be very broad—and not subject to the normal intelligible principle limitations—"where the entity exercising the delegated authority itself possesses independent authority over the subject matter."[122]

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[119] *Seila Law*, 140 S. Ct. at 2197.

[120] 517 U.S. 748, 751 (1996).

[121] *Id.* at 772.

[122] *Id.* (citing United States v. Mazurie, 419 U.S. 544, 556–57 (1975)). In United States v. Mazurie, the Supreme Court held that Congress's delegation to local tribal councils the authority to regulate the sale of alcoholic beverages on reservations was proper because Native American tribes typically have authority and sovereignty over

Thus, because Congress delegated to the President in an area over which the Constitution already grants him authority, the almost limitless delegation was valid.[123] However, the Court noted that "if delegation were made to a newly created entity without independent authority in the area," "[p]erhaps more explicit guidance as to how to select aggravating factors would be necessary."[124] The Court has thus indicated that the requirement for specificity in the intelligible principle standard can, in fact, depend on the nature of the delegee, including the constitutional status of the delegee.

The concept that Congress may broadly delegate depending on the constitutional powers provided to the delegee is also the basis of the Court's decision in *United States v. Curtiss-Wright*.[125] That case, decided by the same Court as *Schechter Poultry* and *Panama Refining* just one year after those decisions, found constitutional a broad delegation to the President allowing him to suspend sales to the Chaco region of South America where he deemed such a suspension would reestablish peace between the countries involved in armed conflict in the region.[126] Although, arguably, the delegation was as broad and vague as the delegations the Court had found unconstitutional in *Schechter Poultry* and *Panama Refining*, the Court found the delegation valid because it believed that the President had independent authority in the area of foreign affairs.[127] The Court said:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . .[128]

In *Curtiss-Wright*, then, as in *Loving*, the Court showed a willingness to look not just at the scope and substance of the

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their members and territory. *Mazurie*, 419 U.S. 544, 555–56 (1975). The Court stated: "[W]hen Congress . . . delegated its authority control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." *Id.* at 557.

[123] *Loving*, 517 U.S. at 772.

[124] *Id.*

[125] 299 U.S. 304, 321–22 (1936).

[126] *Id.* at 322, 327–28.

[127] *Id.* at 319–20.

[128] *Id.*

delegation, but at the *nature* of the delegee and his scope of authority under the Constitution to determine whether a delegation is valid. And it has been willing to vary the scrutiny with which it has applied the intelligible principle test based on the nature of the delegee.

The Court has also intimated that a delegation may be *invalid* based on the nature of the entity to which Congress has delegated power when the delegation is to a private, rather than a government, entity. In *Carter v. Carter Coal Co.*, the same Court that decided *Schechter Poultry* and *Panama Refining* found that a congressional delegation allowing a group of private coal producers to set binding regulations applicable to the entire industry was "legislative delegation in its most obnoxious form" because it was a delegation "to private persons whose interests may be and often are adverse to the interests of others in the same business."[129] In *Yakus v. United States*, the Court distinguished *Schechter Poultry* by observing that part of the problem with the delegation in that case was that the "function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated."[130] Although the Court has not been entirely consistent on this point,[131] it has at times held that delegations to private entities are impermissible, taking into consideration the nature of the delegee, rather than the scope or substance of the delegation itself. In at least some nondelegation cases, the Court has found that both the validity and scope of the delegation can depend on the nature of the delegee and the scope of that delegee's authority.

IV. SEPARATION OF POWERS PRINCIPLES WEIGH IN FAVOR OF CONSIDERING THE NATURE OF THE DELEGEE IN NONDELEGATION CASES

If the Court has been willing to look at the nature of an entity and its authority in other administrative law contexts and even, to a limited extent, in applying the nondelegation doctrine, does it make sense for the Court to extend this analysis? More specifically, should the Court treat congressional delegations to

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[129] 298 U.S. 238, 311 (1936).

[130] Yakus v. United States, 321 U.S. 414, 424 (1944).

[131] *See* James M. Rice, Note, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 540–41 (2017).

independent agencies differently from executive agencies? Should it treat congressional delegations to agencies in general differently from congressional delegations to the President? I believe that both separation of powers and checks and balances principles weigh in favor of the latter, but not the former: the Court should scrutinize more closely congressional delegations to the President than it does delegations to agencies, but there are no separation of powers or checks and balances concerns that call for delegations to executive agencies to be treated differently from delegations to independent agencies. In this Part, I provide separation of powers and checks and balances justifications for a limited revival of the nondelegation doctrine to apply to congressional delegations to the President.[132] I then discuss some practical concerns that weigh in favor of treating congressional delegations to the President differently from congressional delegation to agencies. I also review the justifications for delegation and consider whether limiting delegations to the President are supported by these justifications. Finally, I turn back to the nondelegation cases involving delegations to the President to see if a more robust approach to the nondelegation doctrine can be gleaned from these cases.

First, to understand how separation of powers and checks and balances concerns may be different when Congress delegates to the President from when it delegates to an agency, we must look at the nature of delegation. Under one theory, delegation raises no separation of powers concerns—regardless of the delegee—because once Congress, using its legislative power, delegates authority, the President or agency, when acting under that delegated authority, is merely executing the law.[133] James Madison made this point when he described congressional creation of and delegation to the agencies as follows: "The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its

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[132] My concern here is whether separation of powers, checks and balances, or practical concerns should require congressional delegations to the President be treated differently from congressional delegations to agencies. My concern is not whether as a historical matter they have been or whether as an originalist matter, they ought to be. *Compare* Mortenson & Bagley, *supra* note 8, at 334–38, *with* Wurman, *supra* note 40, at 991–93.

[133] Posner & Vermeule, *supra* note 3, at 1723 ("A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power. Conversely, agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.").

duration, and annexes a compensation. This done, the Legislative power ceases."[134] The Court has also occasionally described each branch as presumptively exercising only the power constitutionally ascribed to it. In *INS v. Chadha*, for example, the majority said that when any branch acts, "it is presumptively exercising the power the Constitution has delegated to it."[135] This means that when the Executive acts, "it presumptively acts in an executive or administrative capacity as defined in Art. II."[136]

While such a conception may work on an intellectual or theoretical level, as a practical matter, it makes little sense. As Justice White pointed out in his dissent in *INS v. Chadha*, the presumption that each branch acts only in its realm is a fiction.[137] He noted that, in fact, independent agencies and executive departments engage in rulemaking and the "sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process."[138] Peter Strauss noted that one understanding of "acting legislatively" is "creating general statements of positive law whose application to an indefinite class awaits future acts and proceedings."[139] He has also argued:

> The very purpose of delegation is to permit the delegate to create legally binding prescriptions—that is, to act *as if* it were a legislature, albeit within legislatively created substantive and procedural constraints. Of course the agencies *are* lawmakers, in any conventional sense of the term, when they engage in rulemaking pursuant to statutory authorization.[140]

Looked at from this perspective, it is clear that both agencies and the President "legislate" when engaged in rulemaking or other delegated activity. As Justice White put it, "[t]here is no question but that agency rulemaking is lawmaking in any functional or

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[134] *See* Madison in 1 ANNALS OF CONG. 581, 582 (1789) (Joseph Gales ed., 1834).

[135] INS v. Chadha, 462 U.S. 919, 951 (1983).

[136] *Id.*

[137] *See id.* at 985–86 (White, J., dissenting).

[138] *Id.*

[139] Strauss, *supra* note 118, at 576.

[140] *Id.* at 636. This contrasts with Posner and Vermeule's "naïve" view on delegation, which posits that the authority that the President exercises pursuant to a statutory grant is executive authority because the President is "simply executing the statute according to its terms, and in obedience to the constitutional obligation to 'take Care that the laws be faithfully executed.'" Posner & Vermeule, *supra* note 3, at 1725 (internal citation omitted).

realistic sense of the term."[141] As Justice Stevens has said, "[i]t seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is 'legislative.'"[142]

The problem, then, with delegation is that it allows a transfer of legislative power, constitutionally only provided to Congress, to branches of government that have not been given such power as a constitutional matter. To cure this constitutional defect, the nondelegation doctrine has worked thus far by engaging in another fiction: as long as Congress has set out intelligible principles that circumscribes agency or presidential action, such principles curb the discretion allowed to the agency or President and thus ensure that the agency or the President is acting to "execute" the laws, rather than engaging in lawmaking. However, due to concerns about judicial competency to enforce the doctrine,[143] since 1935, the courts have abandoned any rigorous analysis under the intelligible principle test and have found every congressional delegation meets the standard.

As I explain below, this lax approach to the intelligible principle standard makes sense with respect to agencies—whether executive or independent—because agencies are not products of nor are explicitly constrained by the Constitution. The approach makes less sense with respect to delegations to the President, whose powers are explicitly limited by the Constitution, and whose aggrandizement has more serious consequences from a constitutional perspective.

The President is a creation of the Constitution and is thus bound by the explicit terms of the document: his powers are circumscribed by the scope of authority provided to him in Article II and prohibited to him by Articles I and III.[144] The actions of the President are therefore especially concerning from a separation of powers perspective because it is the defining and cabining of the

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[141] *Chadha*, 462 U.S. at 986 (White, J., dissenting).

[142] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring). Note that Justice Gorsuch has described the delegation to the Attorney General under the federal Sex Offender Registration and Notification Act to decide whether pre-Act offenders come within the purview of the statute as a "blank check to write a code of conduct governing private conduct for a half-million people," Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting), admitting that the executive may be engaged in legislating when it acts pursuant to a congressional delegation.

[143] *See, e.g.*, Sunstein, *supra* note 7, at 321.

[144] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

President's power in particular that was the Framers' concern in the Constitution. As Peter Strauss explains, "the separation-of-powers idea is an essential element of the [F]ramer's plan only" for the President, not for executive agencies, which may have been contemplated by the [F]ramers, but whose formation was clearly not their concern.[145] Because of the special place of the President in the constitutional structure, expansion of his power is particularly dangerous, in a way that the exercise of agency power is not:

> Special questions are raised when the acting body is one of the named actors of the Constitution—Congress, President, and Supreme Court—who occupy the apex of power and whose excesses are for that reason the most greatly to be feared. It is the potential powerfulness of those heads of government that gives special meaning to the formalities of the document. For the inferior parts of government, subject to law and the webs of control woven by all three of the named heads, the same risks do not arise; agency actions are of lesser concern than the President's for just this reason. Presidential actions are more threatening to the stability and balance of government, to the containment of power at its apex, than any authority given an agency under partial control of all three named heads of government is likely to be.[146]

When Congress delegates authority to the President, there is much greater concern that it is augmenting his power in violation of constitutional constraints and that such augmentation puts at risk the stability of government as contemplated by the Framers.[147] Indeed, separation of powers requires the branches to remain "radically separate" in order to keep each branch within the constraints of law.[148] When Congress delegates legislative power to the President, this clearly violates separation of powers because it augments or "aggrandizes" the President's power beyond what is contemplated in the Constitution.[149] A robust

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[145] Strauss, *supra* note 118, at 635.

[146] *Id.* at 635–36 (emphasis omitted).

[147] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 438–40 (1998) (finding the Line Item Veto Act unconstitutional because it augmented the President's power beyond the scope of powers provided in the Constitution).

[148] Strauss, *supra* note 118, at 577.

[149] *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 114–15 (1994) (describing the Court's distaste for allowing "aggrandizement" of any of the branches of government provided for in the Constitution); *Clinton*, 524 U.S. at 438–40 (finding the Line Item Veto Act unconstitutional because it augmented the President's power beyond the scope of

version of the intelligible principle standard is therefore needed to ensure that the delegation gives the President the power only to execute the law, not create it, guaranteeing that the President's powers are not augmented beyond what is provided in the Constitution.

By contrast, congressional delegations to an agency, whether executive or independent, do not create such separation of powers concerns. First, all agencies are creations of Congress; as Todd Rakoff has observed, administrative agencies have "no obvious constitutional status."[150] Rather, what makes agencies constitutionally acceptable is that they are subject to the push and pull of all three branches of government—what Peter Strauss calls "checks and balances."[151] Checks and balances do not require the separation of the branches, and in fact, recognize that such separation is not practical. Instead, a checks and balances approach looks at whether the liberty of citizens is sufficiently protected from tyrannical government by ensuring that "multiple heads of authority" are "pitted one against another in a continuous struggle" that will deny to any of them the capacity to consolidate all governmental authority in itself.[152] Executive and independent agencies generally meet this test because both Congress and the President can exercise some form of control over them, and their actions are subject to judicial review.[153]

More specifically, although Congress cannot control the agencies by legislative veto,[154] by providing for congressional removal of agency officials,[155] or by creating a truly independent

powers provided in the Constitution); Bowsher v. Synar, 478 U.S. 714, 722–24 (1986) (finding provision that allowed removal of an agency official only by a joint resolution of Congress unconstitutional because it aggrandized Congress's power in a way that was inconsistent with separation of powers); INS v. Chadha, 462 U.S. 919, 955–58 (1983) (finding the legislative veto unconstitutional because it confers "special powers on one House" beyond the scope of what the Constitution explicitly contemplates and therefore augments the power of Congress beyond constitutional purview).

[150] Todd D. Rakoff, *The Shape of Law in the American Administrative State*, 11 TEL AVIV UNIV. STUD. L. 9, 22 (1992).

[151] Strauss, *supra* note 118, at 578.

[152] *Id.*

[153] When executive agencies do not meet this test—when, for example, the Court finds them to be too independent from the President's control, as in Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020), the Court will modify the "checks and balances" to ensure a sufficient amount of shared control over the agency as between Congress and the President. *See id.* at 2211 (severing the for cause removal provision that limited the President's ability to remove the single-director head of an independent agency).

[154] *Chadha*, 462 U.S. at 958.

[155] Bowsher v. Synar, 478 U.S. 714, 723 (1986).

agency with a unitary head whose ability to be removed is limited,[156] when Congress delegates authority to an agency official, the President cannot override that authority. In other words, once Congress has conferred authority on an agency head, the President has no power to make decision within the scope of that authority himself.[157] While an agency head in an executive agency, who can be fired at will, may be more likely to follow the President's directives than an officer in an independent agency, where the President's removal power is limited, as Richard Pildes and Cass Sunstein have pointed out, a "discharge is highly visible and comes with significant political costs."[158] Thus, "while the President may discharge, he may not otherwise force decisions, at least if Congress has allocated decisional authority to a particular agency."[159] This means that when Congress delegates power to an administrative agency, the implication may be that it wishes to insulate the exercise of that power from the President.[160] Even if that is not the proper implication, what is clear is that all agencies, whether executive or independent, are subject to some form of congressional control—through delegation, hearings, appropriations, and sometimes through limitations on removal[161]—and are also subject to Presidential direction in some respects.[162] The push and pull of both Congress and the President on agencies, and the judiciary's ability to review their actions, creates a system of checks and balances that assures that there is "no danger of either aggrandizement or encroachment"[163] of any one branch.[164]

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[156] *Seila Law*, 140 S. Ct. at 2201–04.

[157] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 24–25 (1995); Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. 710, 716 (1993) (stating that "the power to regulate remains where the statute places it: the agency head ultimately is to decide what to do"); Strauss, *supra* note 118, at 649–50 (stating that "the agencies to which rulemaking is assigned," rather than the President, possess "ultimate decisional authority").

[158] Pildes & Sunstein, *supra* note 157, at 25.

[159] *Id.*

[160] *See* Kagan, *supra* note 30, at 2329.

[161] *See id.* at 2257–60.

[162] Strauss, *supra* note 118, at 583; *see also* Kagan, *supra* note 30, at 2281–82.

[163] Mistretta v. United States, 488 U.S. 361, 382 (1989).

[164] This was the very problem with the Consumer Financial Protection Bureau. Because it was a single-director agency and that director was insulated by Congress from presidential control through limits on removal, it was not subject to "multiple heads of authority" who were "pitted one against another in a continuous struggle," Strauss, *supra* note 118, at 578, and thus sufficient checks and balances to make it

All agencies are essentially the same in this regard, and thus whether an agency is executive or independent—and the extent to which it may be subject to presidential control—is not important in assessing how the nondelegation doctrine should be applied to it. As Peter Strauss has put it:

> The federal agencies are placed in the structure of federal government—as cabinet agencies, independent executive agencies, or independent regulatory commissions—without apparent regard for the functions they are to perform. Their internal and public procedures do not vary with their placement. The functions they perform belie simple classification as 'legislative,' 'executive,' or 'judicial,' but partake of all three characteristics.[165]

Thus, what matters is not what an agency is called, or where Congress decides to locate it, or even the extent to which the President can control it. What matters is that all agencies are subject to some form of checks and balances, and thus congressional delegations to them do not raise separation of powers concerns.

Indeed, because all agencies partake of the three characteristics of government and are subject to the push and pull of the three branches, although to different degrees and in different ways, congressional delegations of authority to them do not raise constitutional concerns. Within agencies, it is their very *structure* that assures their constitutionality. As long as an agency is subject to some form of control by more than one branch of government, it remains constitutionally sound.[166] The scope of Congress's delegation to an agency has no bearing on this concern, because it does not matter if an agency engages in legislation, so long as it is, in some respect, subject also to the President's authority.[167] Thus, the analysis of whether Congress has provided an intelligible principle to guide agency decision-making matters not because such cabining of the agency's power converts its activities to executive action, but because Congress's provision of an intelligible principle permits the agency to be subject to the third branch of government—the judiciary. In other words, the

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constitutionally permissible. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203–04 (2020) (holding that "[t]he CFPB's single-Director structure" and the Director's "insulation from removal," among other unique aspects of the agency, contravene the constitutional conception of the executive).

[165] Strauss, *supra* note 118, at 583.

[166] *See id.* at 579–80; *Seila Law*, 140 S. Ct. at 2202–04.

[167] *See* Strauss, *supra* note 118, at 597.

provision of an intelligible principle matters because it allows a court "to ascertain whether the will of Congress has been obeyed."[168] In this context, a court's only concern when reviewing whether Congress has provided an intelligible principle when delegating authority to an agency is determining whether those principles exist.[169] The current lax approach to the intelligible principle analysis does just this and is therefore constitutionally sufficient when applied to congressional delegations to agencies.

Another way to conceptualize the difference between agencies and the President with respect to delegations is through the analytical lens that Todd Rakoff has described. Professor Rakoff has argued that the Court has not found administrative agencies to be constitutionally circumspect even when they are "omnipowered," meaning that they may have two or more powers of the three branches of government, as long as they are also "unicompetent," meaning that they are entitled to exercise their many powers "over only a small terrain."[170] By comparison, the President's authority is proper when it is "unipowered"—having only the power pursuant to the Constitution to execute the law—but not "omnicompetent."[171] Professor Rakoff has argued that one way to understand the Court's rejection of the delegations to the President in *Schechter Poultry* and *Panama Refining* is due to the breadth of delegated authority that existed in the National Industrial Recovery Act: it delegated to the President "[o]mnicompetence."[172] Chief Justice Hughes noted this in his opinion, describing the delegated authority as "extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."[173]

I would argue that it is was not just a concern about omnicompetence that motivated the two 1935 decisions. After all, the President already has omnicompetence—his powers include not just the requirement to execute the law, but to act as Commander-in-Chief and to appoint officials, among others.[174] The real concern was that the delegations gave the President

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[168] Yakus v. United States, 321 U.S. 414, 425–26 (1944).
[169] *See id.*
[170] Rakoff, *supra* note 150, at 22.
[171] *Id.* at 22–24.
[172] *Id.*
[173] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935).
[174] U.S. CONST. art. II,§ 2.

omnicompetence *and* omnipower.[175] In other words, the delegations not only gave the President authority over many areas of activity, but augmented his authority to include the power to legislate, making him omnicompetent and omnipowered. In this regard, almost *every* delegation to the President raises constitutional concerns, because it runs the risk of adding omnipower to his omnicompetence.[176] By contrast, congressional delegations to agencies do not raise such concerns, because while they may provide omnipower to the agency—a characteristic agencies already have—they generally do not provide the agency with power outside their realm of authority, and thus do not make the agency omnicompetent.[177] Thus, a congressional delegation almost never runs the risk of making an agency both omnipowered and omnicompetent, while a congressional delegation to the President almost always does. Indeed, the Court seemed to imply as much in *Schechter Poultry* and *Panama Refining*, finding the delegations in the NIRA to the President unconstitutionally broad, while describing favorably delegations to "expert bod[ies]," the agencies.[178]

As then-Professor Elena Kagan pointed out "[t]he Supreme Court has applied the [nondelegation] doctrine only when Congress has delegated power directly to the President—never when Congress has delegated power to agency officials."[179] The nondelegation doctrine as applied thus expresses some justified "special suspicion of the President as a policymaker."[180] Based on *Schechter Poultry* and *Panama Refining*, and on separation of powers concerns, it makes sense for delegations to the President to be scrutinized more carefully than delegations to agencies to ensure that the power given to the President is indeed only executive and does not aggrandize his authority. The President can remain omnicompetent, but his omnipower must be cabined.

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[175] *See* Rakoff, *supra* note 150, at 22.

[176] The exception to this, of course, are delegations to the President involving a power that has already been constitutionally committed to him. *See* Loving v. United States, 517 U.S. 748, 768 (1996).

[177] Rakoff, *supra* note 150, at 22.

[178] *See Schechter Poultry*, 295 U.S. at 539; Panama Refin. Co. v. Ryan, 293 U.S. 388, 431–32 (1935).

[179] Kagan, *supra* note 30, at 2364.

[180] *Id.* at 2365.

V. OTHER CONSIDERATIONS ALSO WEIGH IN FAVOR OF SUBJECTING CONGRESSIONAL DELEGATIONS TO THE PRESIDENT TO MORE SCRUTINY THAN DELEGATIONS TO AGENCIES

This "special suspicion" of congressional delegations to the President as policymaker is justified not only based on the separation of powers concerns set out above, but also based on practical concerns. First, agencies have the power to limit their authority through rulemaking, which the President does not, making the necessity of subjecting agencies to a more robust nondelegation doctrine less essential.[181] Second, agencies' decision-making is subject to judicial review if arbitrary and capricious, while the President's decision-making can only be subject to judicial review based on constitutionality.[182] While the nondelegation doctrine, other constitutional concerns, and the Administrative Procedures Act (APA) provide a vehicle for subjecting agency decision-making to judicial review, the nondelegation doctrine is the only viable basis for challenging presidential policymaking unless the policy violates separation of powers under *Youngstown Sheet & Tube Co. v. Sawyer*.[183]

Both of these points were made by Justice Breyer in his dissent in *Clinton v. City of New York*. In considering whether the delegation to the President in the Line Item Veto Act was constitutional, Justice Breyer pointed out that "there are important differences between the delegation [of authority to the President to cancel an appropriation line] and other broad, constitutionally acceptable delegations to Executive Branch agencies . . . ."[184] First, Justice Breyer explained that "a broad delegation of authority to an administrative agency differs from [a delegation to the President] in that agencies often develop subsidiary rules under the statute, rules that explain the general 'public interest' language."[185] Although the Court has held that an agency may not cure an unlawful delegation by adopting rules to

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[181] *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

[182] Franklin v. Massachusetts, 505 U.S. 788, 801 (1992).

[183] *See generally* 343 U.S. 579 (1952).

[184] Clinton v. City of New York, 524 U.S. 417, 489 (1998) (Breyer, J., concurring in part and dissenting in part); *see also* Kagan, *supra* note 30, at 2367 (noting that Justice Breyer has argued that there are "several reasons for holding delegations to the President to a stricter standard than delegations to administrative agencies").

[185] *Clinton*, 524 U.S. at 489 (Breyer, J., concurring in part and dissenting in part).

limit the construction of the statute,[186] the fact that agencies do develop subsidiary rules "diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation."[187] The President, by contrast, does not narrow his discretionary power through rulemaking.[188] Thus, it makes sense for the nondelegation doctrine to be more robust as applied to delegations to the President.

Perhaps more important, "agencies are typically subject to judicial review, which review provides an additional check against arbitrary implementation."[189] The President's implementation of a congressional delegation, however, is not subject to judicial review under the terms of the Administrative Procedure Act.[190] Thus, it may be appropriate to strengthen the heft of the nondelegation doctrine to ensure presidential fidelity to congressional intent and thereby ensure the President has not impermissibly encroached on the legislative realm.[191]

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court."[192] It allows a court to set aside agency action, findings, and conclusions that a court finds to be:

> [A]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . without observance of procedure required by law; . . . unsupported by substantial evidence . . . ; or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[193]

However, in *Franklin v. Massachusetts*, the Court held that because the APA only explicitly applies to "agencies," it does not

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[186] *Whitman*, 531 U.S. at 472.

[187] *Clinton*, 524 U.S. at 489 (Breyer, J., concurring in part and dissenting in part).

[188] *Id.* at 490.

[189] *Id.* at 489.

[190] Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

[191] Of course, another solution to this problem would be to amend the Administrative Procedure Act to have the provisions of that statute apply to presidential actions. But thus far, Congress does not seem inclined to do so, and as far as I can tell, no one is calling for such changes to the law. Further, amendment of the Administrative Procedure Act to allow for abuse of discretion review of presidential action may alleviate one concern that animates my suggestion for a more rigorous nondelegation approach to presidential delegations, but it would not ameliorate the separation of powers concerns raised in Part IV.

[192] 5 U.S.C. § 704 (1966).

[193] *Id.* § 706(2).

apply to the President.[194] The Court therefore found that "[a]lthough the President's actions may still be reviewed for constitutionality, . . . they are not reviewable for abuse of discretion under the APA."[195] In indicating that the President's actions could be reviewed for constitutionality, the Court cited to two cases: *Youngstown Sheet & Tube Co. v. Sawyer*[196] and *Panama Refining Co. v. Ryan*.[197] In other words, there are two primary means for challenging the President's actions pursuant to a congressional delegation. First, the President's actions could be challenged based on the nondelegation doctrine. The other primary available means would be to challenge the President's actions based on a separation of powers argument that would consider whether the President's actions contravene the authority delegated to him or otherwise usurp another branch's power.[198] However, the ability to challenge the President's authority is quite narrow and not available with respect to every presidential action taken pursuant to a delegation: there would actually have to be a basis to argue that the President's actions contravene congressional intent or otherwise violate separation of powers. Merely arguing that the President's actions are in excess of, rather

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[194] *Franklin*, 505 U.S. at 800–01.

[195] *Id.* at 801.

[196] 343 U.S. 579 (1952).

[197] 293 U.S. 388 (1935).

[198] *Youngstown*, 343 U.S. at 587–89 (1952). Ostensibly, a concern about a particular delegation could also be addressed through the vagueness doctrine as well. Justice Gorsuch recognized this in his dissent in *Gundy*. He noted that, like the nondelegation doctrine, the Court's doctrine prohibiting vague laws is "an outgrowth and 'corollary of the separation of powers.' " Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (quoting Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2019)); Sessions v. Dimaya, 138 S. Ct. 1204, 1226–28 (2019) (Gorsuch, J., concurring in part and concurring in judgment). He also observed that the use of the vagueness doctrine has grown since the Court began to relax its approach to the nondelegation doctrine. *Gundy*, 139 S. Ct. at 2142. Gorsuch argued, in part, that rather than shift the responsibility of ensuring separation of powers to different doctrines, the Court should revitalize the nondelegation doctrine to do that work. *Id.* at 2141 ("[T]he Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here."); *see also Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting) ("[P]erhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation."). Rather than have the work done by the vagueness doctrine—which although concerned with separation of powers, is mainly based on due process concerns—it makes sense to reinvigorate the nondelegation doctrine, which is firmly based on separation of powers concerns, when reviewing the constitutionality of congressional delegations to the President. *See id.* at 1212 (majority opinion).

than contrary to, his statutory authority is not enough.[199] To the extent that the President's actions may be arbitrary or capricious or unsupported by factual evidence, his actions cannot be challenged and judicially reviewed.[200] Moreover, even where the President's actions are based on fact-finding by an executive or administrative agency, if the final decision made pursuant to the delegation is the President's, the executive agency fact-finding is not subject to review under the APA.[201]

The unavailability of judicial review of presidential fact-finding raises troubling separation of powers questions. In his article on presidential fact-finding, Shalev Roisman argues that requiring the President to engage in honest, reasonable inquiry in conducting fact-finding is necessary to ensure separation of powers.[202] He argues that because the President executes the law, if the law requires the President to find particular facts in order to exercise a power, the President must be honest in engaging in fact-finding because otherwise, "it is hard to see how [the President] is executing the law, rather than operating on her own notions of when power ought to be exercised."[203] Yet, as the law currently stands, there is no basis for a court to review whether, in fact, the President has engaged in honest, reasonable fact-finding and therefore has impermissibly encroached into the realm of legislating.

This was part of what Judge Katzmann identified as the problem in his dubitante opinion in *American Institute for International Steel, Inc. v. United States*. In that case, the President's decision to raise steel tariffs by 10% and 25% was based on a report by the Secretary of Commerce, finding that steel was being imported into the country in such quantities as to "threaten to impair the national security."[204] As Judge Katzmann noted, this finding could not be scrutinized, even though the record revealed that the Secretary of Defense had noted that "the U.S.

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[199] Dalton v. Specter, 511 U.S. 462, 473–74 (1994).

[200] *Id.* at 469.

[201] *Id.* at 469–70.

[202] Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 857 (2019).

[203] *Id.* at 858 (emphasis omitted).

[204] Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1338 (Ct. Int'l Trade 2019) (citing 19 U.S.C. § 1862(b)(3)(A)); *see also* U.S. DEP'T OF COM. BUREAU OF INDUS. AND SEC. OFF. OF TECH. EVALUATION, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (Jan. 11, 2018), https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf [https://perma.cc/82AT-HF3K].

military requirements for steel and aluminum each only represent about three percent of U.S. production."[205] Neither could the President's ultimate decision raising tariffs, which provided "no rationale for how a tariff of 25% was derived in some situations, and 10% in others."[206] The Court's prohibition of review of delegations left to the President's discretion pursuant to the APA thus meant that with respect to the Trade Expansion Act "identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress" was elusive "because judicial review would allow neither an inquiry into the President's motives nor a review of his [or the Secretary of Commerce's] fact-finding."[207] In other words, since the only restraint on the delegation in that case was that the President had to base his decisions on the Secretary of the Treasury's finding that the national security was threatened, that discretion was unbounded because the court could not review or test whether, in fact, there were sufficient facts supporting the finding that the national security was indeed threatened.

The case illustrates why a more robust version of the nondelegation doctrine is required with respect to congressional delegations to the President. Because of the limited nature of review to which such delegations are subjected, to ensure that the President's actions are actually circumscribed by fact-finding, and that he is not engaging in legislation, when the nondelegation doctrine is applied in these circumstances, it must actually have some teeth.[208] Or, as Justice Breyer has put it, "given the difficulty of controlling the exercise of discretion delegated to the President[,] rule of law values may counsel extra hesitation in allowing the delegation in the first instance."[209] Because the President's actions are not subject to any review for arbitrariness or capriciousness, to ensure separation of powers and protect individual liberty and concern for the rule of law, the Court should more carefully scrutinize delegations to the President for indicia that there are elements of the delegation that restrain the President's actions.

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[205] *Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1351 (Katzmann, J., dubitante).

[206] *Id.*

[207] *Id.* at 1344–45 (majority opinion).

[208] Despite the focus on presidential fact-finding with respect to trade policy in this Article, in fact, delegations to the President that in some way are supposed to be informed by fact finding are pervasive. *See* Roisman, *supra* note 202, at 837–45.

[209] Kagan, *supra* note 30, at 2369.

In addition, because presidential action cannot be reviewed for abuse of discretion, the nondelegation doctrine must do more work in assisting courts in ensuring that the President is actually following the will of Congress. The Supreme Court has said that one purpose of requiring Congress to include "intelligible principles" in its delegations is to permit a court "to ascertain whether the will of Congress has been obeyed."[210] Posner and Vermeule have argued that the nondelegation doctrine thus begs the relevant question.[211] According to their thinking, instead of engaging in a nondelegation analysis, the legal question for judicial review should simply be "whether the agent . . . complied with the terms of the statutory grant."[212] However, pursuant to *Franklin* and *Dalton*, courts cannot review delegations left to the President's discretion for rationality, findings of fact, or abuse of discretion.[213] Thus, to a certain extent, courts are *prohibited* from reviewing whether the President in particular has "complied with the terms of the statutory grant."[214] In such circumstances, even under Posner and Vermeule's theory, the nondelegation doctrine should exist—and arguably be more rigorous—to allow courts to ensure that Congress has sufficiently circumscribed the President's discretion and that the President is not acting outside the scope of his authority.

Justice Marshall once noted that "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."[215] Indeed, the Supreme Court has consistently made clear that the availability of judicial review of administrative action is an essential predicate to upholding broad delegations of congressional power.[216] This is because it is the availability of judicial review that guarantees executive compliance with congressional will, thereby ensuring

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[210] Yakus v. United States, 321 U.S. 414, 425–26 (1944); *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (stating that the "intelligible principle" test "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards").

[211] Posner & Vermeule, *supra* note 3, at 1731.

[212] *Id.* at 1732.

[213] Franklin v. Massachusetts, 505 U.S. 788, 801 (1992); Dalton v. Specter, 511 U.S. 462, 474 (1994).

[214] Posner & Vermeule, *supra* note 3, at 1732.

[215] Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring).

[216] *See* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218–19 (1989); Mistretta v. United States, 488 U.S. 361, 379 (1989); INS v. Chadha, 462 U.S. 919, 953 n.16 (1983); *Yakus*, 321 U.S. at 436; *Touby*, 500 U.S. at 170 (Marshall, J., concurring).

that the executive branch is limited to enforcing the law, rather than making it.[217] As one jurist has put it, "Congress has been willing to delegate its legislative powers broadly and the courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits."[218] However, without judicial review—or with only limited judicial review—broad delegations are especially dangerous. Thus, because judicial review of the President's substantive decision-making is limited, the scope of Congress's permissible delegation to the President should also be more limited, and the nondelegation doctrine therefore must be more robust to ensure that Congress does its duty to sufficiently circumscribe the President's discretion.

VI. POLICY ARGUMENTS ALSO WEIGH IN FAVOR OF HEIGHTENED SCRUTINY FOR CONGRESSIONAL DELEGATIONS TO THE PRESIDENT

Although Justice Breyer raised special concerns with respect to congressional delegations to the President in *Clinton v. City of New York*, he ultimately dismissed those concerns because the President is politically accountable to the people.[219] Indeed, the fact that the President is an elected official who is responsible to the voters, while administrative agencies are not politically accountable, seems to suggest that delegations to the President should be seen more favorably, not less favorably, than delegations to agencies. Justice Scalia made this argument in his dissent in *Mistretta v. United States.*[220] He argued that although delegations to other branches of government are problematic, at least a delegation to the President ensures that the actor is politically accountable.[221] By contrast, when Congress delegates to an agency or commission that is not one of the other branches but is a pure creation of Congress, this is "an undemocratic precedent . . . because its recipient is not one of the three Branches of Government."[222]

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[217] *See Touby*, 500 U.S. at 168–69.

[218] Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring).

[219] Clinton v. City of New York, 524 U.S. 417, 490 (1998) (Breyer, J., concurring in part and dissenting in part) (stating that the Court must take into account the Constitution's delegation of "[e]xecutive power" to a "President" when applying the Constitution's nondelegation doctrine to questions of Presidential authority).

[220] *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting).

[221] *Id.*

[222] *Id.* at 422.

While it is true that the President is more politically accountable than agencies, the notion that agencies are not accountable, or that Congress would not be held accountable for a broad delegation to an agency may not be entirely accurate. Cass Sunstein has pointed out, for example, that Congress may face electoral pressure by virtue of delegating broad authority to the agencies.[223] If Congress has been seen to "pass[ ] the buck," it may face retribution at the polls.[224] Likewise, if a politician is seen to have failed at sanctioning an agency that makes bad policy, he or she may be voted out of office.[225] Thus, while it is true that the President is accountable to voters while agencies are not, it is less clear whether the voting public would punish the President, and not Congress, when the President acts pursuant to a broad delegation provided by Congress. Thus, the value of accountability in informing whether delegations to the President should be treated differently from delegations to agency is somewhat nebulous.

Other arguments made in favor of broad delegation are based on attributes that also are either neutral as between delegations to agencies and to the President or support a more rigorous approach to the nondelegation doctrine as applied to delegations to the President as opposed to agencies. One of the most cited justifications for allowing broad delegations to agencies—and thus a lax approach to the intelligible principle standard—is scale. The argument is that because Congress is purposefully designed to be slow and inefficient, delegations to agencies and ostensibly the President are needed "to leverage up the lawmaking function of government in order to generate the volume of regulations necessary to carry out the wide-ranging functions of modern government."[226] Related to this argument is one regarding responsiveness. Again, because Congress is, by constitutional design, slow and inefficient, delegation is necessary to allow law and policymaking that is responsive to current conditions.[227] As the Court has explained, "[t]he legislative process would frequently bog down if Congress were constitutionally required to

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[223] Sunstein, *supra* note 7, at 323.

[224] *Id.*

[225] Posner & Vermeule, *supra* note 3, at 1746 ("If citizens have the capacity to sanction politicians who make bad policy in statutes, they should also have the capacity to sanction politicians who fail to punish agencies that make bad policy, or who delegate authority to such agencies in the first place.").

[226] Merrill, *supra* note 49, at 2153.

[227] *Id.* at 2154–55.

appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation."[228]

While both of these arguments provide a cogent rationale for allowing broad delegation, they are neutral with respect to whether a delegation to the President should be viewed less favorably than a delegation to an agency. Both agencies and the President are nimbler than Congress and more able to respond to current conditions. While arguably the President is somewhat nimbler than an agency, given that he is a unitary figure rather than a sprawling bureaucracy,[229] the President's actions pursuant to a delegation would in many cases have to be informed by either the expertise or fact-finding of an agency.[230] Thus, these justifications for congressional delegation tell us nothing about whether delegations to the President should be less favored than delegations to agencies.

The justifications of scale and responsiveness for delegation certainly do not counsel *against* a stricter view of delegation to the President. Requiring Congress to define ambiguous terms like "national security" or to require the President's decisions to be based on fact-finding, rather than be informed by it, do not limit the President's ability to more quickly and responsively make policies pursuant to congressional delegation. If anything, there is an argument that if Congress provides more specific definitions and intelligible principles, the President will be more able to take quick and efficient action, as such action will be within a clearly defined and narrow scope.

Another justification for broad delegation is expertise. Todd Rakoff has argued that the desire to have "expert judgment on economic and social problems" has been "the most important legitimating theory" justifying the growth of the administrative

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[228] Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

[229] Interestingly, Justice Gorsuch has noted that when rulemaking is delegated to a unitary official, it raises greater constitutional concerns, because it allows for "frequent and shifting" policymaking "with fair notice sacrificed in the process." Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting).

[230] *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 402 (1928) (noting that before the President reaches a conclusion as to whether tariffs ought to be raised on certain products, the Tariff Commission must make an investigation, and give notice and provide its findings to all interested parties); Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1338–39 (Ct. Int'l Trade 2019) (describing Section 232 of the Trade Expansion Act as requiring the President's actions to be based on findings by the Secretary of Commerce).

state.[231] Underlying this theory is the idea that Congress, filled with politicians and lawyers, does not always have the expert knowledge—for example, the scientific knowledge—or the factual evidence to promulgate relevant rules.[232] If it is desirable to have policy formulated by persons with expertise in the subject matter,[233] then allowing broad delegation to administrative agencies makes sense, since such agencies usually have large professional staffs, protected by civil service laws, who have specialized training and extensive experience with specific regulatory issues.[234] Related to this concern is one that certain decisions be made on the basis of expertise and evidence, rather than politics—the idea that expertise be based on "knowledge, rather than political choice."[235] Under this theory, an agency can be the better decisionmaker in certain circumstances precisely because it is not accountable to voters, and thus can make decisions based on facts and expertise, rather than on a desire to be reelected.[236]

This need for expertise as a justification for broad delegation is not undermined by requiring congressional delegations to the President to be more specific. Indeed, the President, as compared to members of Congress, has no particular scientific or other expertise nor is he shielded from politics or political accountability. Instead, he faces more political accountability than agencies. Thus, the expertise justification for broad delegation does not apply to him.

Moreover, this desire for expertise actually provides further justification for a nondelegation doctrine that requires more specific intelligible principles when the delegation is to the President. Currently, the Court's lax approach to the nondelegation doctrine means that Congress need not require the President's decision-making to be based on any particular factual findings by expert agencies.[237] For example, Section 232 of the Trade Expansion Act contains no statutory requirement "that the President's actions match the Secretary's report or

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[231] Rakoff, *supra* note 150, at 25.
[232] *See id.*
[233] *See* Merrill, *supra* note 49, at 2151–52.
[234] *Id.*
[235] Rakoff, *supra* note 150, at 25.
[236] *See id.*
[237] *Id.* at 23–24.

recommendations."[238] Moreover, the President "is not bound in any way by any recommendations made by the Secretary, and he is not required to base his remedy on the report or the information provided to the Secretary through any public hearing or submission of public comments."[239] Nevertheless, based on the Court's current approach to the nondelegation doctrine, the delegation in Section 232 is perfectly valid because it does contain some intelligible principles.[240] The lax nondelegation approach thus provides no incentive for Congress to actually require the President to use or rely on expertise in effectuating a delegation. If one of the purposes of allowing delegation is to ensure expert-based, non-political decisions in certain circumstances, a more searching application of the nondelegation doctrine to delegations to the President can be a means to ensure that Congress does, in fact, require reliance on such expertise when it delegates. Of course, no such rigorous approach is necessary in reviewing congressional delegations to an agency, because the agency will necessarily have expertise and be politically shielded in its decision-making.[241]

Separation of powers principles, practical concerns, and even most of the justifications for delegation all weigh in favor of the Court treating congressional delegations to the President in a more rigorous manner than it treats delegations to executive and independent agencies. But what should this more rigorous nondelegation doctrine look like? A review of the Court's nondelegation cases with respect to congressional delegations to the President provides some guiding principles.

VII. A FRAMEWORK FOR A MORE ROBUST NONDELEGATION DOCTRINE FOR PRESIDENTIAL DELEGATIONS

Before the demise of the nondelegation doctrine, the Supreme Court considered several instances in which Congress had

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[238] Am. Inst. for Int'l Steel, Inc. v. United States., 376 F. Supp. 3d 1335, 1351 (Ct. Int'l Trade 2019) (Katzmann, J., dubitante).

[239] *Id.*

[240] Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976) (finding that "Section 232(b) easily fulfills" the intelligible principle test because it establishes preconditions to presidential action and requires the President to consider certain factors in making decisions pursuant to the statute).

[241] *See* Araiza, *supra* note 28, at 249 ("[A] focus on the congruence between the delegation and the inherent authority and expertise of the delegee could help immunize regulatory delegations of the type the modern federal government relies on to accomplish progressive regulatory ends.").

delegated authority to the President. A close review of these cases provides some principles that can help guide a more rigorous approach to reviewing the constitutionality of congressional delegations to the President.

In *Marshall Field & Co. v. Clark*, the Court decided that the Tariff Act of October 1, 1890 did not contain an unconstitutional delegation of Congress's authority to the President.[242] The Act allowed the President to suspend the Act and to place duties on sugar, molasses, coffee, tea, and hides imported into the United States when the President "shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides . . . imposes duties or other exactions upon the agricultural or other products of the United States" such that the imposition, or lack thereof, of duties is no longer reciprocal.[243] The Court held that the delegation was constitutional because there were several aspects of the Tariff Act that ensured that it did not "in any real sense, invest the president with the power of legislation."[244] First, the President had no discretion as to *whether* to suspend duties; the Act gave him discretion only with respect to the duration of the suspension.[245] Once the President ascertained the fact that another country had imposed reciprocally unequal duties and exactions on a particular product, "it became his duty to issue a proclamation declaring the suspension, as to that count[r]y, which [C]ongress had determined should occur."[246] The suspension, therefore, "was absolutely required when the [P]resident ascertained the existence of a particular fact."[247] Notably, the facts that Congress required the President to ascertain were also objective and cabined: the Statute required him to examine the commercial regulations of countries producing the relevant goods "and form a judgment as to whether they were reciprocally equal" or not, in their effect upon American products.[248] The Court thus held that "[n]othing involving the expediency or the just operation of such legislation was left to the determination of the [P]resident."[249]

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[242] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).
[243] *Id.* at 680.
[244] *Id.* at 692.
[245] *Id.* at 693.
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*

Likewise, in *J.W. Hampton, Jr., & Co v. United States*, the Court found the delegation of authority to the President in the Tariff Act of September 21, 1922 constitutional because it determined that the statute contained "intelligible principle[s] to which the person or body . . . is directed to conform," ensuring that the "legislative action is not a forbidden delegation of legislative power."[250] The Tariff Act of September 21, 1922 provided:

> [W]henever the President, upon investigation of the differences in costs of production of articles . . . wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country . . . . [H]e shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same.[251]

The Tariff Act also provided that the President had to take into account certain factors in ascertaining the differences in costs of production, including the differences in conditions of production, the differences between wholesale and prices of domestic and foreign articles in the U.S. market, and advantages provided to foreign companies by foreign governments.[252] The investigations required by the statute were delegated to the United States Tariff Commission.[253]

The Court found that the power delegated to the President in the Tariff Act was not the legislative power.[254] Instead, Congress had vested in the President the authority to "interpret[ ] a statute and direct[ ] the details of its execution."[255] The Court held that the Tariff Act did not invest the power of legislation in the President for several reasons, similar to those set out in *Marshall Field*. First, the Tariff Act was constitutional because "nothing involving the expediency or just operation of such legislation was

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[250] 276 U.S. 394, 409 (1928).
[251] Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858, 942 (1922).
[252] *Id.*
[253] *J.W. Hampton*, 276 U.S. at 402.
[254] *Id.* at 413.
[255] *Id.* at 406.

left to the determination of the President."[256] Second, the delegation required the President to act once he ascertained certain facts; he had no discretion to do otherwise.[257] The President had to act "upon a named contingency" and thus "[h]e was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect."[258] Third, the delegation provided only a narrow range of circumstances in which the President could act: he could raise tariffs only when there was not reciprocity in the way other countries treated U.S. imports.[259] Moreover, according to the Court, the finding of whether there was reciprocity would be based on objectively verifiable facts that would have provided a finite limit on when the President could increase duties.[260] Finally, the delegation only provided a narrow range of remedies the President could impose: duties could be imposed only to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue.[261] And even then, the increase could be no more than 50% of any existing duties.[262] Justice Gorsuch has described the delegation in this case as follows: "The President's fact-finding responsibility may have required intricate calculations, but it could be argued that Congress had made all the relevant policy decisions" such that it left the President merely "the responsibility to find facts and fill up details."[263]

Of course, the provisions in the National Industrial Recovery Act failed the test the Court elucidated in *Marshall Field* and *J.W. Hampton* because they did not contain the same kinds of circumscribing factors as the two tariff acts that had passed muster. The "hot oil" provision in *Panama Refining* provided "no policy," established "no standard," and "laid down no rule."[264] More specifically, the Court noted that the delegation was unconstitutional because it provided "no definition of

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[256] *Id.* at 410.

[257] *See id.*

[258] *Id.* at 410–11.

[259] *Id.* at 410.

[260] *Id.* at 405, 410–11. Whether the finding of reciprocity was an entirely objective undertaking may be questioned, but the point is that it has been important to the Court, in ascertaining an intelligible principle, that statutes have required some level of objective fact-finding to inform the President's decision-making.

[261] *Id.* at 401.

[262] *Id.*

[263] Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

[264] Panama Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935).

circumstances and conditions in which the transportation" of the oil would be allowed or prohibited.[265] The Court also found the provision problematic because it did not require the President to conduct, rely on, or elucidate any type of fact-finding.[266] The Court noted that the provision allowing the President to prohibit sale of excess oil without requiring any fact-finding failed to ensure that the President's actions "have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority."[267] The problem with the statute, then, was that it did not require the executive to "ascertain[ ] the existence of [certain] facts to which legislation is directed . . . ."[268] It also did not require the President "to fill up the details" "within the framework of [a] policy which the Legislature has sufficiently defined."[269]

The Court's issues with the provision it considered in *Schechter Poultry* overlap with those it enunciated in *Panama Refining*, but were also somewhat different. First, while the problem in *Panama Refining* was that the relevant provision contained no definitions, the delegation in *Schechter Poultry* was problematic because it included a vague term, "fair competition," that was not clearly defined.[270] Like the provision in *Panama Refining*, the provision in *Schechter Poultry* was also concerning from a constitutional standpoint because it did not require the President to base his actions on any fact-finding.[271] The Court noted that the law allowed for the President to create administrative agencies to assist him in his delegated duty, "but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases."[272] Unlike the provisions in the tariff bills considered in *Marshall Field* and *J.W. Hampton*, the delegations in the NIRA impermissibly delegated legislative authority to the President because they did not require the President to rely on any fact-finding to effectuate the

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[265] *Id.*
[266] *Id.* at 418, 431.
[267] *Id.* at 431.
[268] *Id.* at 426.
[269] *Id.* at 426, 429 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).
[270] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531 (1935).
[271] *Id.* at 530, 538.
[272] *Id.* at 539.

delegation nor did they require that his actions be tailored in any way to fact-finding.[273]

Prior to the nondelegation doctrine falling into desuetude, the Court clearly considered certain factors in deciding whether a congressional delegation to the President contained intelligible principles and thus did not impermissibly delegate legislative authority to him. These factors, framed as questions, are:

- Does the delegation contain clearly defined terms that cabin the President's authority to act, ensure that his actions are based on objective considerations, or ensure that the President has no authority to decide the "expediency" or "just operation" of the statute?[274]
- Does the delegation include criteria or factors that the President must take into consideration to inform his decision-making?
- Does the delegation require fact-finding to support any actions the President may take and does it *require* the President to find certain facts prior to taking action?[275] Does the delegation require some type of nexus between the fact-finding and the President's actions?[276]
- Does the delegation provide a limited number of actions or circumscribe the type of action that the President can take?

I believe that when it comes to discerning whether a congressional delegation to the President has sufficient intelligible principles to ensure that it does not violate separation of powers, courts should be required to apply a heightened form of scrutiny that considers and weighs all of these questions.

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[273] *Id.* at 541–42.

[274] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 693 (1892).

[275] Another way to put this is does the delegation require the President's actions to be "contingent on factfinding," Roisman, *supra* note 202, at 839, rather than merely informed by it. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410–11 (1928).

[276] *See* Roisman, *supra* note 202, at 892–94. Requiring a nexus between fact-finding and the President's actions does not do all of the work of ensuring that the President is actually engaging in honest, reasonable fact-finding. In other words, there is a question of whether requiring fact-finding means much if there is no judicial review to determine whether the decision-making that is based on the fact-finding is arbitrary or capricious. While this is a reasonable question, I believe that at least requiring there to be a tight relationship between presidential fact-finding and presidential action in the first instance will go some way to cabining the President's power and will, as Justice Breyer has said, provide a "check against arbitrary implementation" of the President's authority. Clinton v. City of New York, 524 U.S. 417, 488–89 (1998) (Breyer, J., dissenting). For other ideas on regulating presidential fact-finding, see generally Roisman, *supra* note 202, at 894–903.

Such a test would also include a few other considerations. First, it would ask whether the congressional delegation to the President is in an area that is constitutionally committed to the Executive, such as military affairs or foreign policy. In such circumstances, it would be inappropriate to apply a stricter intelligible principle test, since, in fact, a broad delegation would be allowed.[277] Second, the test I propose would also ask in the first instance whether the statute containing the delegation provides for judicial review of the delegation. If so, this alone may satisfy the inquiry, as it cures the concerns the nondelegation doctrine is meant to address, although separation of powers concerns would still exist.[278]

I propose that if a congressional delegation to the President is not in an area already constitutionally committed to his authority and does not include a provision for judicial review of the delegation, a court, in reviewing whether the delegation violates the nondelegation doctrine, should consider all of the questions set out above and ensure that the greater weight of them be satisfied for the delegation to be considered constitutional. This analytical framework, which requires courts to consider several factors, none of which is dispositive and no total number of which is dispositive, is similar to the one the Supreme Court uses in other areas of constitutional law—for example, in its approach to the Necessary and Proper Clause[279] or to discerning whether a state action that has a disparate impact based on race is motivated by animus.[280]

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[277] *See supra* Part III; Loving v. United States, 517 U.S. 748, 768–69 (1996) (allowing for very broad delegation of authority to prescribe punishment for court martial to the President because of the President's authority as Commander in Chief). Even some who call for a robust nondelegation doctrine that would apply to all delegations and gut the administrative state admit that "Congress has broad license to delegate rulemaking authority to the president in the area of foreign affairs . . . ." Gordon, *supra* note 9, at 781–82, 816; *see also* Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (noting that even under his more robust version of the nondelegation doctrine, he would accept a congressional statute that confers wide discretion to the executive in certain instances, because "no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power,'" such as in the realm of foreign affairs) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)).

[278] *See supra* Part V.

[279] *See* United States v. Comstock, 560 U.S. 126, 133 (2010) (holding that the Necessary and Proper Clause gives Congress the power to enact a civil commitment statute based on "five considerations, taken together").

[280] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–268 (1977) (noting that "[t]he foregoing summary identifies, without purporting to be

Thus, it is not an unusual framework or one that courts do not have competence to apply.

Furthermore, it is similar to the approach that Justice Gorsuch proposed in his dissent in *Gundy*: he suggested that the intelligible principle test should be viewed as requiring the Court to ask certain particular questions that would help answer whether a delegation is constitutional.[281] While his questions are somewhat different from the ones I propose here, and the scope of the application of my standard is of course much narrower than his, a version of the nondelegation doctrine that requires the Court to ask certain questions in applying the intelligible principle standard has been accepted by at least three justices on the Court.[282]

Moreover, the questions that I suggest be asked to determine whether Congress has provided intelligible principles to guide presidential decision-making can be thought of as requiring a "heightened scrutiny" standard of review when it comes to determining whether a congressional delegation to the President is constitutional. Indeed, one way to understand this proposed test requiring courts to take into account several additional questions when applying the intelligible principle standard to congressional delegations to the President is to see that it is based on principles that are similar to the ones that underlie the Court's substantive due process and equal protection jurisprudence. In that context, the Court has made clear that when legislation on its face does not appear to be within a specific constitutional prohibition, the Court will apply a rational basis test, but when legislation "appears on its face to be within a specific prohibition of the Constitution," it will apply a higher form of scrutiny to such action.[283]

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exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed").

[281] *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). Justice Gorsuch formulated the test as follows:

> To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

Id.

[282] *Id.* at 2131, 2141.

[283] United States v. Carolene Prods., 304 U.S. 144, 152, 152 n.4 (1938).

The Court's current lax approach to the intelligible principle test can be said to be similar to the rational basis test.[284] In applying the lax intelligible principle standard, the Court will merely look for evidence of some intelligible principle in the statute.[285] Similarly, when it applies the rational basis test, the Court will merely look at whether the government has or can enunciate any rational or legitimate purpose for the action it has taken, without further scrutiny of the statute.[286] Both standards are highly deferential to the legislature[287] and both standards have meant that the Court has almost never found either standard to have been violated.[288] In the context of congressional delegations to executive and independent agencies, as I argued above, such a lax, deferential standard makes sense because such delegations do not, on their face, raise separation of powers concerns, as they do not involve a delegation to an "acting body" that "is one of the named actors of the Constitution."[289] By contrast, congressional delegations to the President do, on their face, raise special separation of powers concerns, and thus, applying a version of the intelligible principle standard that requires a more searching inquiry into the scope and nature of the delegation makes sense.

Scholars have expressed concern that reinvigorating the nondelegation doctrine to require more robust judicial enforcement of it "would raise serious problems of judicial

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[284] *Gundy*, 139 S. Ct. at 2129 ("[T]his Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority. . . . Th[at] standard[ ], the Court has made clear, [is] not demanding.").

[285] *Id.*

[286] *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 487–88 (1955) (holding that a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[287] *See Gundy*, 139 S. Ct. at 2129 ("[T]his Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority."); *Williamson*, 348 U.S. at 488 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[288] *See supra* notes 6–7 and accompanying text; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 690 (6th ed. 2019) ("The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. [T]he Court often has said that a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government's actual purpose. The result is that it is rare for the Supreme Court to find that a law fails the rational basis test.").

[289] Strauss, *supra* note 118, at 635.

competence and would greatly magnify the role of the judiciary in overseeing the operation of modern government."[290] This proposal mitigates both concerns. First, it would not greatly magnify the role of the judiciary in overseeing the operation of modern government, because the more robust version of the doctrine would only apply to congressional delegations to the President, not all delegations to the administrative state. Indeed, all my proposed test does is require courts to engage in a more searching inquiry where the underlying concerns animating the nondelegation doctrine are most prevalent—where Congress has specifically delegated authority to the President. Second, my proposal merely requires courts to take into account certain additional factors in deciding whether a congressional delegation to the President contains sufficient intelligible principles. Whether characterized as a multifactor analysis or a heightened scrutiny test, the test I propose is not so different from ones courts use often in other constitutional contexts.

VIII. APPLICATION OF THE "HEIGHTENED SCRUTINY" INTELLIGIBLE PRINCIPLE TEST

To see how applying this "heightened scrutiny" intelligible principle test would work—and to show that it is workable—I will end where I started, with Section 232 of the Trade Expansion Act of 1962, that was considered in *Algonquin* and *American Institute for International Steel v. United States*.[291]

Section 232 of the Trade Expansion Act provides that if the Secretary of Commerce finds that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President can "take such action, and for such time, as he deems necessary to adjust the imports of [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security."[292] While the Act certainly has sufficient intelligible principles to meet the current lax version of the

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[290] Sunstein, *supra* note 7, at 321.

[291] Am. Inst. for Int'l Steel v. United States, 806 F. App'x 982, 983 (Fed. Cir. 2020); Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 550 (1976).

[292] Tariff Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 877 (1962). The version of the Trade Expansion Act that the Court considered in *Algonquin* gave authority to the Secretary of the Treasury rather than the Secretary of Commerce to make findings. *Algonquin*, 426 U.S. at 550.

nondelegation doctrine,[293] would it survive a heightened scrutiny version of the intelligible principle test that takes into account the questions enumerated above?

Under my proposed test, the first question is whether the delegation is in an area where the Constitution gives the President independent authority. Section 232 of the Act delegates authority to the President to raise tariffs, an area of law where delegation to the President is common, but not an area of law constitutionally committed to the Executive. Indeed, the power to "collect Taxes, Duties, Imposts and Excises" and "[t]o regulate Commerce with foreign Nations" lays squarely at the feet of Congress.[294] The second question is whether Section 232 contains a provision for judicial review; it does not.

Next, the delegation in Section 232(b) must be evaluated pursuant to the four questions I set out in the previous section. Section 232(b) directs the Secretary of Commerce, on the application of any department or agency, the request of an interested party, or on his own initiative, to undertake an investigation to determine the effects of imports of a particular article of commerce on the national security.[295] Under Section 232(c), if the Secretary concludes that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,"[296] the President has ninety days to determine whether he concurs with the conclusion. If he does concur that the national security is threatened, the President may then "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[297] The statute provides certain factors that the President and the Secretary must take into consideration in determining whether the national security is threatened, including:

> [D]omestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies

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[293] *Algonquin*, 426 U.S. at 559.
[294] U.S. CONST. art. I, § 8, cl. 1; *id.* cl. 3.
[295] 19 U.S.C. § 1862(b).
[296] *Id.* § 1862(c)(1)(A).
[297] *Id.* § 1862(c)(1)(A)(ii).

> and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.[298]

However, the statute also says that the Secretary and President may take into account other "relevant factors" not enumerated,[299] essentially requiring the President to take into account certain specified factors but also allowing him to take into account any other factors he deems relevant as well.

How does Section 232 fare when subjected to the questions in the heightened scrutiny version of the intelligible principle test? Does the delegation contain clearly defined terms that cabin the President's authority to act, ensure that his actions are based on objective considerations, or ensure that the President has no authority to decide the "expediency" or "just operation" of the statute? I do not believe so because the delegation does not clearly or narrowly define "national security." While it does provide criteria the Secretary and the President have to consider in determining whether the national security is threatened,[300] it does not *limit* the inquiry to these criteria, and instead allows the President to base the decision on whatever factors he determines relevant. This means that the President may make his decision about whether national security has been threatened based on nebulous and even highly subjective factors, rather than based on objectively identifiable facts. Thus, it can be said that Section 232 allows the President to determine the "expediency" of the statute.

Does the delegation require fact-finding to support any actions the President may take and does it *require* the President to find certain facts prior to taking action? In other words, does the delegation require some type of nexus between the fact-finding and the President's actions? While the delegation does require fact-finding, it does not require the President to base his decision-making on this fact-finding or for there to be any nexus between the solution the President provides and any fact-finding. Thus,

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[298] *Id.* § 1862(d).

[299] *Id.*

[300] This is the second question in the analysis: Does the delegation include criteria or factors that the President must consider prior to acting?

whatever fact-finding is required does not cabin the President's decisions.

Does the delegation provide a limited number of actions or circumscribe the type of action that the President can take? Here, the answer is also in the negative. The delegation gives the President very broad authority to address any national security threat he finds. He is allowed to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[301] Thus, Section 232 provides no limit or guidance on which types of import adjustments the President can impose. He can increase existing tariffs by any amount, can impose unlimited new tariffs on goods that have previously been determined to be duty-free, and can impose quotas without limit, for whatever duration of time he wants. Section 232, therefore, in no way circumscribes the President's ability to act pursuant to the statute. Applying the factors that I believe should be considered under my proposed heightened scrutiny version of the intelligible principle standard, it becomes clear that the Section 232 threatens separation of powers and should be considered unconstitutional.[302]

This exercise shows that applying this heightened scrutiny version of the intelligible principle test is no more difficult or judicially unmanageable than applying any other test the courts have used to determine the constitutionality of legislation. The only difficulty that this approach poses is it requires the Court to wrestle with *Algonquin* and *stare decisis*.[303] However, as set forth above, I believe that the separation of powers concerns that are raised by aggrandizements of presidential power are serious

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[301] § 1862(c)(1)(A)(ii).

[302] Given that the delegation is, under my proposed test, unconstitutional, the remedy would be to merely strike the delegation provision, which is severable from the rest of the statute, rather than striking down the entire statute. This is how the Court dealt with the delegation provisions in the NIRA, striking down just the provisions that they found invalid, rather than the entire NIRA. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

[303] The current Court has had a love-hate relationship with *stare decisis*. In the past few terms, it has refused to abide by *stare decisis* and explicitly overruled its previous holdings in several cases. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1492 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)); Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) (overruling Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356, 364–65 (1972)). It has also found *stare decisis* to be particularly compelling in other cases. *See, e.g.*, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (following Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)).

enough that the Court should revisit not only *Algonquin*, but its nondelegation doctrine jurisprudence as applied to congressional delegations of power to the President.

CONCLUSION

In a piece advocating a different sort of limited reinvigoration of the nondelegation doctrine, William Araiza has pointed to the President's use of the National Emergencies Act (NEA)[304] as raising serious concerns about Congress's broad delegations of authority to the President.[305] He said, "the President's use of the NEA power, and analogous powers under other statutes, raises serious questions whether Congress should—or should be constitutionally compelled to—impose conditions on such open-ended delegations of power to bypass the legislative process and make federal government policy on his own."[306] Indeed, Congress has enacted a plethora of statutes with such open-ended delegations of power. As an example, in 136 different statutes, Congress has delegated emergency powers authority to the President.[307] While some of those delegations, including in the NEA, are ostensibly in areas where the President has independent power under the Constitution, such as over the military, many are not. As the Brennan Center has noted, "[e]mergency powers cover almost every imaginable subject area, including the military, land use, public health, trade, federal pay schedules, agriculture, transportation, communications, and criminal law."[308] In 123 of the 136 statutes, the President may declare a "national emergency" rather than Congress, and 96 of the statutes require no nexus between any fact-finding and the President's declaration: they require nothing more than the President's signature on the emergency declaration.[309]

There is no doubt that, as the COVID-19 pandemic has made clear, the President needs emergency powers to deal with real issues that threaten the well-being of the nation.[310] However, the

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[304] 50 U.S.C. § 1601 *et seq*. (1976).

[305] Araiza, *supra* note 28, at 246,

[306] *Id.* .

[307] Brennan Center for Justice, *A Guide to Emergency Powers and Their Use*, 1, 3 (Sept. 14, 2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf [https://perma.cc/8PJW-CRVU].

[308] *Id.*

[309] *Id.*

[310] Ironically, President Trump was loathe to use such powers to address the COVID-19 outbreak. *See* Nathaniel Weixel, *Frustration Mounts at Trump's*

fact that presidents have increasingly relied on congressional delegations of emergency powers when it is less clear that there is a national emergency[311] raises real concerns about the aggrandizement of the presidency.

Thus, I agree with Professor Araiza that Congress *should* impose more restrictive conditions on these open-ended delegations of power. Unfortunately, Congress rarely acts to preserve its own power or to deny authority to the other branches of government.[312] Thus, as Professor Araiza puts it, Congress must be "constitutionally compelled" to act.[313] A more robust application of the nondelegation doctrine to congressional delegations to the President can provide the impetus for Congress to cabin the President's authority.[314]

In sum, because of the President's special place in the constitutional structure, the threat of augmenting his power is particularly acute, and frankly, today, more palpable. Of course, as I have admitted, there are circumstances where it makes sense for Congress to delegate authority to the President to act, usually because a more nimble approach that takes into account current circumstances is required. However, such delegations, if not narrowly circumscribed, are subject to abuse. A more rigorous and robust approach to the nondelegation doctrine that applies a form of heightened scrutiny to the intelligible principle standard would help ensure that congressional delegations to the President are sufficiently circumscribed to prevent abuse, and ultimately, tyranny.

Reluctance to Use Emergency Production Powers, THE HILL (Mar. 19, 2020, 5:55PM), https://thehill.com/policy/healthcare/488526-frustration-mounts-at-trumps-reluctance-to-use-emergency-production-powers [https://perma.cc/X7M8-TF3L]; Kim Wehle, *For Trump, Power Is for Self-Preservation Only*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/trump-claimed-unlimited-power-now-refuses-use-it/609046/ [https://perma.cc/JHH2-YMBW].

[311] Brennan Center for Justice, *supra* note 307 ("Presidents Obama and Trump invoked nonexistent economic crises to decrease or eliminate statutory pay increases for federal workers.").

[312] Kagan, *supra* note 30, at 2314; *see also* Araiza, *supra* note 28, at 246 ("[T]he existence of political pathologies preventing . . . congressional action is the entire reason the nondelegation doctrine has been deployed to begin with.").

[313] Araiza, *supra* note 28, at 246.

[314] *See* Kagan, *supra* note 30, at 2330–31 ("Interpretive principles often derive from an effort to promote better lawmaking . . . .").