Agency Interpretations of Executive Orders

Abstract: Executive orders are an important tool of presidential power that often rely on agencies to interpret and implement them. Moreover, agency interpretations of executive orders frequently arise in court. However, neither courts nor commentators have developed a well-reasoned interpretive methodology for agency interpretations of executive orders. Instead, relevant case law essentially has not developed since 1965, notwithstanding landmark shifts in administrative law marked by *Chevron*, *Auer*, and their progeny. This Article proposes a new legal test that both (i) reflects modern understandings of legal interpretation and (ii) outlines when courts should defer to an agency's interpretation of an executive order.

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Article Contents

Introduction

We live in an era of presidential unilateralism. A key tool of presidential power is the formal presidential directive, better known as the "executive order." But executive orders standing alone can accomplish little. Orders rely on the components of the Executive Branch—including agencies—to interpret and implement them. And questions about how the judiciary should evaluate these agency interpretations present frequently in litigation. They have arisen in cases involving major policy concerns: the 1971 nationwide wage-price freeze, protection of national monuments, management of nuclear energy security clearances, collective bargaining at federal agencies, and deportability of foreign nationals, among others.[1]

[1] *See* Montana Wilderness Ass'n v. Connell, 725 F.3d 988, 994 (9th Cir. 2013) (deferring to the Bureau of Land Management's interpretation of President Clinton's Proclamation establishing the Upper Missouri River Breaks

The interpretive rule in such cases is, technically, that courts should defer to agency interpretations of executive orders if they are "reasonable," according to the Supreme Court's 1965 opinion *Udall v. Tallman*.[2] But since 1965, case law has not developed this rule, notwithstanding landmark shifts in administrative law marked by *Chevron*,[3] *Auer*,[4] and their progeny. Nor have courts or commentators seriously discussed the potential interaction of these subsequent cases with *Tallman* doctrine. Therefore, it is perhaps unsurprising that courts inconsistently apply *Tallman*, if they do at all, and often instead strain to decide interpretation cases on alternative grounds.

A live example of a court wrestling an agency interpretation of an executive order appears in *County of Santa Clara v. Trump*,[5] the case preliminarily enjoining President Donald Trump's Executive Order 13,768. At stake in the case is approximately $1.6 billion in federal funds for Santa Clara and San Francisco *alone*.[6] By its text, EO 13,768 purports to order the Attorney General and the Secretary of Homeland Security to prohibit "sanctuary jurisdictions" from receiving "[f]ederal grants."[7] However, DOJ's trial attorneys characterized the order as merely an exercise of the President's bully pulpit with no independent legal effect.[8] The court rejected DOJ's interpretation as contradicted both by the order's plain language as well as public comments by the President and Attorney General Jeff Sessions. Citing several constitutional concerns based on its reading of the order, the court issued a nationwide preliminary injunction. In response, the Attorney General issued a two-page memorandum purportedly ratifying the DOJ's litigation position.[9] Nevertheless, after a motion for reconsideration, the court again rejected DOJ's interpretation as not an "accurate and credible reading" of EO 13,768.[10] Missing from the court's discussion was a clear legal framework for the level of deference owed agency interpretations of executive orders. Instead, the court extended a case limiting governmental discretion in the *First Amendment* context.[11]

As this Article will show, the *County of Santa Clara* court's fruitless search for more relevant case law indicates a larger problem: the underdeveloped and outdated nature of deference

National Monument in 2001); El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 183 (3d Cir. 2010) (deferring to Department of Energy interpretation of Executive Order 12,968 in case challenging revocation of a security clearance); Am. Fed'n of Gov't Employees, AFL-CIO (AFGE), Council 147 v. Fed. Labor Relations Auth., 204 F.3d 1272, 1275 (9th Cir. 2000) (holding Executive Order 12,871 did not constitute an election to bargain); Wong v. Ilchert, 998 F.2d 661, 663 (9th Cir. 1993) (allowing appellant's deportation by holding that Immigration and Naturalization Service (INS) correctly interpreted Executive Order 12,711 to exclude appellant as a beneficiary); Univ. of S. California v. Cost of Living Council, 472 F.2d 1065, 1071 (Temp. Emer. Ct. App. 1972) (deferring to Cost of Living Council and Office of Emergency Preparedness interpretation of President Nixon's Executive Order 11,615, which ordered a nationwide wage-price freeze).

[2] 380 U.S. 1, 4 (1965).

[3] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[4] Auer v. Robbins, 519 U.S. 452 (1997).

[5] 250 F. Supp. 3d 497 (N.D. Cal. 2017). Author disclosure: Under attorney supervision, I drafted an *amici curiae* brief in this case at the motion for reconsideration stage. *See* Brief of Amici Curiae Administrative Law Professors in Support of Plaintiffs' Motion for Summary Judgment, County of Santa Clara v. Trump, 267 F.Supp.3d 1201 (N.D. Cal. 2017) (3:17-cv-00485-WHO) (amici Anne Joseph O'Connell, David Freeman Engstrom, Daniel Farber, Peter M. Shane, and Peter L. Strauss). All thoughts and errors in this Article are my own, and do not reflect information learned in the course of representation.

[6] *See* 250 F. Supp. 3d at 512–13.

[7] Exec. Order 13,768, § 9(c), 82 Fed. Reg. 8799 (Jan. 30, 2017).

[8] 250 F. Supp. 3d at 507–08.

[9] 267 F. Supp. 3d at 1206.

[10] 267 F. Supp. 3d at 1209.

[11] *See* 267 F. Supp. 3d at 1210 (applying City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988) to reject the Attorney General's memorandum).

doctrine for agency interpretations of executive orders. The lack of case law and academic analysis has left several questions unanswered: To what extent do justifications for administrative deference—i.e., furthering lawmaker intent, political accountability, and technical expertise—apply to the executive order context? How should courts weigh presidential speech that contradicts the plain language of an executive order? What degree of deference to agency interpretations of executive orders is consistent with the rule of law? What is an appropriate new deference test for the modern era?

This Article is the first piece of scholarship to propose answers to these questions, and thereby guides courts in their decisions about whether and to what extent they should defer to agency interpretations of executive orders. In breaking new ground, this Article builds on a substantial literature on executive orders and judicial deference to agency interpretations of statutes and regulations. For instance, scholars like then-Professor Elena Kagan have argued that presidential directives should play a key role in evaluating agency interpretations of statutes.[12] Erica Newland has identified that executive orders command no coherent theory of judicial interpretation, resulting in the expansion of executive power.[13] But no one has yet analyzed how agency interpretations of orders should influence judicial constructions of those orders.

My argument proceeds in five Parts. Part I briefly describes the history and nature of executive orders, as well as how agency interpretations of executive orders can end up in court. Part II examines the muddled state of executive order deference doctrine, which the *Chevron* and *Auer* revolution have left behind. Part III applies general justifications for deference to agency interpretations of executive orders, and analyzes whether those justifications are stronger or weaker in the executive order context. Finally, Part IV proposes a new legal test that both (i) reflects modern understandings of legal interpretation and (ii) outlines when a court should defer to an agency's interpretation of an executive order, or instead give an order its best reading.

I. Background on Executive Orders

A. Defining Executive Orders

Executive orders have a long and storied history. In 1793, George Washington issued the Neutrality Proclamation, declaring the United States' neutrality in the conflict between Britain and France. And in the years since, presidents have used executive orders to purchase the Louisiana Territory, suspend habeas corpus, desegregate the military, implement affirmative action policies for federal contractors, channel proposed agency regulations through White House review, halt stem cell research, and create wide-ranging intelligence programs.[14]

And yet, there is no black letter definition of what constitutes an executive order.[15] Both Congress and the Executive Branch have avoided establishing a definition, thereby leaving in place a panoply of undefined terms for presidential orders: "executive order," "proclamation," "memorandum," "directive," and "determination" among them. The Federal Register Act of 1935 mandates publication in the Federal Register for "[e]xecutive orders" and "[p]residential proclamations," but not other presidential actions, if they have "general applicability and legal effect" for entities other than "[f]ederal agencies or persons in their capacity as officers, agents, or

[12] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001).
[13] *See* Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2033 (2015).
[14] *See* Newland, *supra* note 13, at 2033; Kagan, *supra* note 12, at 2291.
[15] *See generally* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 546–557 (2005).

employees thereof"—but does not define either term.[16] In 1999, House legislation seeking to define "presidential orders" failed to advance after a hearing before the House Subcommittee on Commercial and Administrative Law. As for Executive Branch efforts at defining executive orders, while several executive orders have instituted procedures for issuing future executive orders, none include a definition.[17] Therefore, not only are there no requirements about the types of presidential actions that the president must issue as an "executive order," but also the specific labeling of a presidential action does not alter its legal effect.[18]

The academy has also struggled to distinguish "executive orders" from other terms for presidential orders. One attempt at characterizing "executive orders" is that they are typically addressed to, and govern the actions of, federal government officials.[19] But this characterization ignores that even orders directed solely at government officials can have tremendous impacts on non-governmental parties, and can be intended to do so.[20]

Regardless of their exact definition, executive orders are relatively formal actions that carry significant weight compared to other presidential actions. Many commentators agree that executive orders written in mandatory language—and drawing upon legitimate source(s) of authority—are binding on executive, non-independent agencies.[21]

B. Sources of Executive Order Power

Executive orders derive their power from two sources of authority. The first source, Article II of the Constitution, implicitly authorizes the President to issue executive orders in areas (a) exclusive to presidential power, as well as (b) in areas of concurrent congressional-presidential authority, if the order is not "incompatible with the express or implied will of Congress."[22] Importantly, because the power to issue orders is not explicitly granted, presidents have essentially "invented" the power through practice.[23]

The second source of authority is Congressional delegations of power through statute. In areas of concurrent congressional-presidential authority, both Congress and the courts have historically acquiesced to the incremental expansion of presidential power. Members of Congress "are unlikely to oppose incremental increases in the relative power of presidents unless the issue

[16] 44 U.S.C. § 1505.
[17] *See, e.g.*, Exec. Order No. 11,030, 3 C.F.R. 610 (1959–1963).
[18] Stack, *supra* note 15, at 546–47.
[19] *See, e.g.*, House Comm. on Gov't Operations, 85th Cong., *Executive Orders and Proclamations: A Study of Presidential Powers* 1 (Comm. Print 1957); Stack, *supra* note 15, at 547 n.19
[20] *See* Kagan, *supra* note 12, at 2291–92.
[21] *See, e.g.*, Sherley v. Sebelius, 689 F.3d 776, 784 (D.C. Cir. 2012) ("NIH may not simply disregard an Executive Order. To the contrary, as an agency under the direction of the executive branch, it must implement the President's policy directives to the extent permitted by law."); *Am. Fed'n of Gov't Employees*, 204 F.3d at 1274–75 ("There is also no question that [Executive Order 12,871, which states that certain agencies "shall" negotiate] is mandatory and that agencies failing to obey the Order are answerable to the President."); Proposed Exec. Order Entitled "Federal Regulation", 5 U.S. Op. Off. Legal Counsel 59 (1981) (asserting the legality of Executive Order 12,291, which required executive agencies—but not independent agencies—to submit proposed major rules to Office of Management and Budget for cost-benefit review); *cf.* Kagan, *supra* note 12, at 2328 ("An interpretive principle presuming an undifferentiated presidential control of executive agency officials thus may reflect, more accurately than any other, the general intent and understanding of Congress.").
[22] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
[23] WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 7 (2015).

in question directly harms the special interests of their constituents."[24] Empirical research confirms these institutional incentives. While presidents have issued thousands of executive orders, Congress has overridden only a handful through legislation.[25] Courts, too, have sometimes interpreted executive orders to deprive Congress and its statutes of their power.[26] Part of what drives this relatively unchecked expansion in presidential power is the presidential practice of amalgamating multiple sources of law (e.g., statutes and Article II powers)—or invoking no specific authority at all—to create an amorphous body of powers that justifies an executive order.[27]

C. Process for Issuing Executive Orders

There are essentially no legally enforceable procedural requirements for issuing, modifying, or repealing executive orders or other presidential directives.[28] The due process rights guaranteed by the Fifth Amendment theoretically serve as some constraint, but no due process challenge to an executive order has ever succeeded.[29] Moreover, in *Franklin v. Massachusetts*, the Supreme Court held that the Administrative Procedure Act does not apply to the President.[30]

However, as a matter of non-binding but codified custom, the President usually follows a three-step approval process when issuing an executive order.[31] First, a proposed order or proclamation, along with an explanation of the order's "nature, purpose, background, and effect," is submitted to the Office of Management and Budget.[32] Second, if OMB approves the order, the

[24] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 320 (2006) (quoting Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 443, 454 (Michael Nelson ed., 6th ed. 2000)).
[25] *See* Stack, *supra* note 24, at 321.
[26] *See* Newland, *supra* note 13, at 2040–41, 2065–67 (describing 152 judicial decisions on executive orders from 1865 to 2013 in the Supreme Court and the Court of Appeals for the D.C. Circuit); *see also* HOWELL, *supra* note 23, at 178–79 ("Federal judges ruled in favor of the president (or the party defending an order he issued) in fully 83 percent cent of the court challenges that went to trial between 1942 and 1998.").
[27] *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 304-06 (1979) (declining to decide whether Executive Order 11246 was "authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority" on the grounds that the case could be resolved without specifying the source of the President's authority); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 237 n.5 (1974) (rooting Executive Order 11,491's power in both "the President's [Article II] responsibility for the efficient operation of the Executive Branch" and 5 U.S.C. § 7301); Stack, *supra* note 15, at 556–57 (discussing Dames & Moore, 453 U.S. 654 (1981), which upheld a presidential assertion of statutory power in the conceded absence of any particular statute authorizing the president's action).
[28] Stack, *supra* note 15, at 552.
[29] Stack, *supra* note 15, at 553.
[30] 505 U.S. 788 (1992).
[31] In comparison, agency procedures for the issuance of significant guidance range from being relatively more onerous to non-existent. *See* NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 169–180 (2017) (describing three models for taking public comment on guidance documents, the most onerous of which can leave guidance unfinalized for years); GOV'T ACCOUNTABILITY OFFICE, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015) (finding that, historically, Department of Labor (DOL) and Health and Human Services (HHS) have had little to no written procedures for the issuance of significant guidance).
[32] Exec. Order 11,030 § 2(a), 27 Fed. Reg. 5847 (1962), https://www.archives.gov/federal-register/codification/executive-order/11030.html.

Attorney General will review both its "form and legality."[33] Third, if the Attorney General approves the order, the Director of the Office of the Federal Register will review it for clerical errors.[34] If either the OMB Director or the Attorney General disapprove of a proposed order, "it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval."[35]

The purpose of these procedures is two-fold. First and most important, the procedures shield the President from "decisions made on the fly in informal bilateral encounters with administrative officials," which may result in orders whose policy consequences and legality the President does not fully understand.[36] Second, by giving the Executive an opportunity to develop and publicly share policy rationales and legal justifications, the procedures further rule of law values and political accountability.[37]

D. Agency Interpretations of Executive Orders in Court

Courts have repeatedly reviewed executive orders for over 100 years,[38] and agency interpretations of executive orders have been contested in many of these cases.[39] Yet, the justiciability of executive orders—or agency action taken pursuant to executive order—is a matter of doctrinal inconsistency, and the universe of justiciable cases is bigger than some courts and commentators suggest.

Courts appear to conceptualize cases involving executive orders into two categories. The first category comprises cases brought to *prevent* enforcement of an order.[40] *Youngstown Sheet & Tube Co. v. Sawyer*[41] is paradigmatic. The *Youngstown* Court invalidated President Truman's Executive Order 10,340, which "authorized and directed" the Secretary of Commerce to seize steel mills under strike.[42] And Justice Jackson's famous concurrence outlined three levels of judicial deference to presidential action, with the courts providing the "widest latitude of judicial interpretation" in cases where the "President acts pursuant to an express or implied authorization of Congress," but "scrutin[y] with caution" when "the President takes measures incompatible with the express or implied will of Congress."[43] To obtain judicial review, plaintiffs seeking to enjoin an order echo *Youngstown* by alleging constitutional and/or statutory violations; the mere fact that

[33] *Id.* at § 2(b). In practice, the Department of Justice's Office of Legal Counsel (OLC) reviews all proposed executive orders for form and legality. *See, e.g.*, Developments in the Law, *Presidential Authority*, 125 HARV. L. REV. 2057, 2090 (2012).
[34] *Id.* at § 2(c).
[35] *Id.* at § 2(e).
[36] Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138, 148–49 (2012); *see* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 826–828 (2018).
[37] *See* Eggleston & Elbogen, *supra* note 36, at 828–29; Recent Social Media Posts, *Tweets on Transgender Military Servicemembers*, 131 HARV. L. REV. 934, 941–43 (2018).
[38] Newland, *supra* note 13, at 2094.
[39] *Supra* note 1.
[40] Newland, *supra* note 13, at 2091.
[41] 343 U.S. 579 (1952).
[42] Exec. Order 10,340, 17 Fed. Reg. 3139 (April 10, 1952).
[43] *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

agency action is pursuant to Presidential directive does not shield it from judicial review.[44] *County of Santa Clara v. Trump* is a recent example of a case in this first category.[45]

The second category comprises cases brought to *enforce* rights created by executive order, rather than to prevent implementation of an order.[46] In such cases, justiciability doctrine is considerably more muddled. Often, whether these cases are justiciable turns on whether the President intends the executive order at issue to create a justiciable right.[47] Consequently, orders are usually not justiciable, because the text of a modern executive order expressly states in its final section that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."[48]

However, the universe of justiciable cases is larger than many attest, because the rule of non-justiciability is not uniformly applied, particularly in the context of agency action inconsistent with an executive order. Notably, in the 2012 D.C. Circuit case *Sherley v. Sebelius*, neither the majority opinion nor the two concurring opinions even mentioned the order's express attempt to preclude review.[49] Instead, the court implicitly assumed justiciability, and stated: "NIH may not simply disregard an Executive Order. To the contrary . . . it must implement the President's policy directives to the extent permitted by law."[50] The district court opinion affirmed by the Court of Appeals made the same point, stating: "'An executive order is, for many purposes, a form of presidential law.' A regulation that is inconsistent with an executive order that authorizes its promulgation is unlawful."[51]

At first glance, *Sherley* is inconsistent with other D.C. Circuit opinions, namely *Manhattan-Bronx Postal Union v. Gronouski*,[52] a case repeatedly relied upon to decline review of agency action allegedly inconsistent with executive orders.[53] However, two characteristics of the opinion show *Manhattan-Bronx* does not categorically preclude judicial enforcement of executive orders.[54] First, the court rejected that the agency in question—the Postmaster General—was even

[44] *See, e.g.*, *El-Ganayni*, 591 F.3d 176, 183 (3d Cir. 2010); Chamber of Commerce v. Reich, 74 F.3d 1322, 1326–32, 1338 (D.C. Cir. 1996).
[45] 250 F. Supp. 3d 497.
[46] Newland, *supra* note 13, at 2091.
[47] *See, e.g.*, Meyer v. Bush, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("The Executive Order carefully stated that its purpose was only for internal management and that it created no private rights. As such, it is doubtful that it had any legal significance."); In re Surface Min. Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) ("[E]xecutive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.); Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1330 & n.14 (9th Cir. 1979) (reviewing an executive order and its implementing regulations because "[n]othing in Executive Order 11246 precludes judicial review," nor is the order "a housekeeping measure rather than [issued] pursuant to constitutional or statutory authority."); *see also* Defs. of Wildlife v. Perciasepe, 714 F.3d 1317, 1324 n.6 (D.C. Cir. 2013) (stating that Executive Order 13,563 does not create a procedural right that could establish standing because the order contains standard language precluding judicial review).
[48] *See, e.g.*, Exec. Order 13,768, § 18(c), 82 Fed. Reg. 8799 (Jan. 30, 2017).
[49] 689 F.3d 776.
[50] *Sherley*, 689 F.3d at 784.
[51] Sherley v. Sebelius, 776 F. Supp. 2d 1, 22 (D.D.C. 2011) (internal quotation marks omitted) (quoting *Meyer*, 981 F.2d at 1303 n.6), *aff'd*, 689 F.3d 776 (D.C. Cir. 2012).
[52] 350 F.2d 451 (D.C. Cir. 1965).
[53] *See, e.g.*, In re Surface Min. Regulation Litig., 627 F.2d at 1357.
[54] There is a plausible third characteristic that justifies a more permissive reading, but while it explains cases like *Reich*, 74 F.3d at 1322, it does not explain *Sherley*. This third characteristic is that Executive Order 10,988 did not refer to any statute other than a general civil service statute, making the order "simply in furtherance of a personal policy," *Manhattan-Bronx*, 350 F.2d at 452, and therefore "without specific foundation in congressional action." *In*

in conflict with the executive order.[55] Therefore, the court was arguably expounding dicta when it commented that judicial review would be inappropriate even if the Postmaster's decision conflicted with the order.[56] Second, in *prudentially* declining to hear the case, the court reserved the right of review on "compelling" occasions.[57]

In sum, whether cases brought to enforce an order are non-justiciable is inconsistent both within and across circuits. While neither the district court nor the Court of Appeals cited *Manhattan-Bronx* or its progeny in *Sherley*, *Sherley* could be conceptualized as (i) a step back from *Manhattan-Bronx*'s the expansive dicta, and/or (ii) a "compelling" situation of political and ethical salience (e.g., stem cell research). Moreover, *Sherley* is consistent with the law in the Third Circuit, which is that "[a]dministrative action pursuant to an Executive Order is invalid and subject to judicial review if beyond the scope of the Executive Order."[58]

II. Current Doctrine on Agency Interpretations of Executive Orders

A. Supreme Court Precedent: *Udall v. Tallman*

Given the power of executive orders and the frequency with which they arise in court, it is not ideal that legal doctrine surrounding executive orders—including how to evaluate agency interpretations of executive orders—is undertheorized and inconsistently applied.[59] That is, courts have not clarified whether deference doctrines or APA requirements apply to agency interpretations of executive orders. This Article focuses on judicial deference, mostly leaving APA requirements for another day.[60]

Only one Supreme Court case squarely addresses how courts should handle agency interpretations of executive orders. Not only is the case dated, but also it only addresses the appropriate judicial deference standard, not the applicability of APA requirements. In the 1965 case *Udall v. Tallman*, the Court held that courts should defer to agency interpretations of executive orders if they are "reasonable."[61] Thus, the Court unanimously upheld the Secretary of the Interior's authority to issue oil and gas leases notwithstanding President Franklin D. Roosevelt's Executive Order 8,979, thereby reversing the D.C. Circuit.

The facts of *Tallman* were as follows. In the 1950s, D. J. Griffin and James K. Tallman filed competing applications for oil and gas leases in the Alaskan Kenai Moose Range. The Department of the Interior (DOI) granted the leases to Griffin, not Tallman.[62] Tallman sued,

re Surface Min. Regulation Litig., 627 F.2d at 1357. However, the order at issue in *Sherley*, EO 13,505, does not refer to any statute either.

[55] *Manhattan-Bronx*, 350 F.2d at 455–56 & n.10.

[56] *See Manhattan-Bronx*, 350 F.2d at 457. For a definition of dictum and an argument on why it should receive less weight, *see* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256–58, 1259–63 (2006).

[57] *Manhattan-Bronx*, 350 F.2d at 456.

[58] Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 175 (3d Cir. 1971); *see also El-Ganayni*, 591 F.3d at 190 n.9 ("The Executive Order is a delegation of inherently executive authority by the President to another member of the Executive Branch. *See* 3 U.S.C. § 301 (authorizing the President to delegate executive functions to the head of agencies). An agency head is bound by the terms of that delegation.").

[59] *See* Newland, *supra* note 13, at 2026.

[60] *See infra* note 82.

[61] 380 U.S. 1, 4 (1965).

[62] *Id.* at 2.

arguing that EO 8,979 had closed the Moose Range to leasing until a revised regulation reopened the lands on August 14, 1958—the date of Tallman's application. EO 8,979 provided:

> None of the above-described lands excepting (a described area) shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of [1926 and 1927 statutes pertaining to leasing Alaskan public lands].[63]

But in 1947, DOI had promulgated a regulation, which "provided simply that such leases had to be subjected to an approved unit plan and contain a provision prohibiting drilling or prospecting without the advance consent of the Secretary."[64]

The D.C. Circuit agreed with Tallman, stating "the Executive Order clearly did remove the land involved from oil and gas leasing."[65] But the Supreme Court reversed, holding that while "the Secretary's interpretation may not be the only one permitted by the language of the orders [i.e. EO 8,979 and DOI's Public Land Order No. 487], but it is quite clearly a *reasonable* interpretation; courts must therefore respect it."[66] The Court hinged its reasonableness determination on three grounds. First, the text of EO 8,979 barred only "'settlement, location, sale, or entry'," on designated lands; these terms all contemplate *transfer of title* to the lands in question, which an oil and gas lease does not effect.[67] Second, the EO's reference to the 1926 and 1927 statutes, which pertained to leasing, strengthened DOI's interpretation of "disposition" to not include leasing. Third, the Secretary's expansive interpretation was reasonable because the President had delegated to him through subsequent executive orders "full power to withdraw lands or to modify or revoke any existing withdrawals."[68]

Given how much deference doctrine has changed since 1965, courts are possibly confused about the vitality of the *Tallman* standard. In the intervening 52 years, the Supreme Court has decided *Chevron* and its progeny,[69] and called into question *Auer* deference—i.e., the strong deference owned to an agency's interpretations of its own regulations.[70] Evidencing this possible confusion is the lower courts' uneven application of *Tallman*, detailed in the next section.

B. Lower Court Applications of *Tallman*, and *Tallman*'s Instability

Circuits are split on how to apply *Tallman*, if they do at all. Only the Third, Ninth, and Federal Circuit courts of appeals and a D.C. district court—the district court affirmed in *Sherley* by a court of appeals expressly declining to decide on *Tallman* grounds[71]—have expressly applied

[63] *Id.* at 19 (quoting Exec. Order No. 8,979, 6 Fed. Reg. 6471 (Dec. 16, 1941)).
[64] *Id.* at 5.
[65] Tallman v. Udall, 324 F.2d 411, 414 (D.C. Cir. 1963), *rev'd*, 380 U.S. 1 (1965).
[66] 380 U.S. at 4 (emphasis added).
[67] *Id.* at 19.
[68] *Id.* at 17; *see id.* at 20,
[69] *Chevron*, 467 U.S. 837; *see, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
[70] *See, e.g.*, United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (stating *Auer* "doctrine is on its last gasp," and compiling cases in which Roberts, C.J., and Alito, Thomas, and Scalia, JJs., called for reconsideration of *Auer*).
[71] *Sherley*, 689 F.3d at 785. In a concurring opinion, then-Judge Janice Rogers Brown worried that "executive power will expand at the expense of the APA's regulatory scheme and judicial review will be reduced to rubberstamping

Tallman's deference toward executive orders.[72] Of the approaches to *Tallman* deference in the aforementioned circuits, the Ninth Circuit's 1981 case *Kester v. Campbell* is arguably the most notable, because both the Seventh Circuit and the D.C. district court in *Sherley* have cited it.[73] In *Kester*, the Ninth Circuit Court of Appeals stated: "In light of an agency's presumed expertise in interpreting executive orders charged to its administration, we review such agency interpretations with great deference. . . . The agency interpretation is considered reasonable 'unless it is plainly erroneous or inconsistent with the (order).'"[74] Subsequent Ninth Circuit cases have confirmed *Kester* to be good law.[75]

Other circuits—namely the Seventh, Fifth, and Fourth—have applied *Tallman* in a more oblique manner. The Seventh Circuit, in the 1994 case *Dehainaut v. Pena*, applied *Kester*'s deference standard without citation to *Tallman*.[76] The Fifth Circuit applied *Tallman* once, but in an opinion that was later vacated by the Supreme Court.[77] And the Fourth Circuit has cited *Tallman*'s executive order deference standard in the context of an agency's interpretation of its own *regulation*, and oddly quoted from a section of *Tallman* pertaining to *statutory* deference.[78]

These opinions do not even acknowledge the substantial deference doctrine that has accumulated since *Tallman*. In fact, only one opinion—a Court of Federal Claims opinion—directly discusses the interaction of general deference doctrine (e.g., "*Mead* and its progeny") with *Tallman* deference, and it was reversed by the Federal Circuit on separate grounds.[79] Less directly,

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preordained results," but "[left] the more technical questions of Executive Orders and deference for a later day." *Id.* at 790 (Brown, J., concurring).

[72] *See* Yanko v. United States, 869 F.3d 1328, 1335 (Fed. Cir. 2017) (citing *Tallman* and stating that in cases where an executive order or other presidential directive charges Office of Personnel Management (OPM) with administering the order, "we have held that the court must accord broad deference to the agency's interpretation of the Executive Order."); *El-Ganayni*, 591 F.3d at 187 (citing *Tallman* and stating "In reviewing the DOE's actions in this case, we note that we owe 'great deference' to the DOE's interpretation of Executive Order 12968 because the DOE has been charged with administering that Order."); Kester v. Campbell, 652 F.2d 13, 15-16 (9th Cir. 1981); *Sherley*, 776 F. Supp. 2d at 22 (citing *Kester* and *Tallman*, and stating "an agency is presumed to have special expertise in interpreting executive orders charged to its administration, and so judicial review must afford considerable deference to agency interpretations of such orders.").

[73] 652 F.2d 13, 15-16. For citations of *Kester* in other circuits, *see* Dehainaut v. Pena, 32 F.3d 1066, 1073–74 (7th Cir. 1994); *Sherley*, 776 F. Supp. 2d at 22.

[74] 652 F.2d 13, 15-16.

[75] *See, e.g.*, *Montana Wilderness Ass'n*, 725 F.3d at 994.

[76] *Dehainaut*, 32 F.3d at 1073–74.

[77] United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465 (5th Cir. 1977) (citing *Tallman* and stating "we give special deference to the Labor Department's interpretation of the Order [Executive Order 11,246] which that department was charged to administer."), *vacated*, 436 U.S. 942 (1978); *see also* United States v. Mississippi Power & Light Co., 638 F.2d 899, 905 (5th Cir. 1981) (stating in reference to *New Orleans Pub. Serv.*, but without citing *Tallman*, "[w]e thus hold fast to our previous determination that E.O. 11246 was a proper exercise of congressionally delegated authority.").

[78] *See* Kentuckians for Commonwealth Inc. v. Rivenburgh, 317 F.3d 425, 446 n.3 (4th Cir. 2003) (Responding to the opinion concurring in the judgment in part and dissenting in part of then-Judge Michael Luttig by stating that: "the Corps' regulatory practice reflects its interpretation. *Cf. Tallman*, 380 U.S. at 18 (explaining that an administrative interpretation of two Executive Orders had "long ... been a matter of public record and discussion" and applying the "rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons") (quotation marks omitted).").

[79] Shell Oil Co. v. United States, 108 Fed. Cl. 422, 440 n.10 (2013) (stating *Tallman* deference is inapplicable where the agency interpretation fails to "meet[] the standards established in *Mead* and its progeny," and refusing to give deference to the Biddle Opinion, which interpreted Executive Order 9001), *rev'd and remanded*, 751 F.3d 1282,

the Seventh Circuit has implied it limits its applications of *Tallman* deference. In *Dehainaut*, the panel stated that "'[a]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'"[80] But it is unclear to what extent this particular condition on *Tallman* deference endures after the Supreme Court's 2009 decision in *F.C.C. v. Fox Television Stations, Inc.*, which rejected the principle that agency changes in policy be subjected to more searching review than initial decisions (with limited exceptions).[81]

Moreover, while not the focus of this Article, it is also unclear to what extent APA requirements apply to agency interpretations of executive orders. To my knowledge, there is only one opinion—a Ninth Circuit opinion by Judge Ronald Gould concurring in part and dissenting in part—that has suggested the APA's requirements should apply in parallel with *Tallman* deference.[82] That is, in Gould's view, a court could strike down an agency's action pursuant to a reasonable or even mandatory interpretation of an executive order if it were, for example, arbitrary and capricious on policy grounds. At least one justice, Elena Kagan, likely supports this view.[83]

Therefore, through their silence, these opinions suggest that the usual administrative law framework may not apply to agency interpretations of executive orders. But interestingly, lower courts have not simply adopted *Tallman*'s deference standard that the agency's interpretation must be upheld if it is simply "reasonable." Instead, with the exception of the Seventh and Ninth Circuits, they have rephrased *Tallman* or selectively quoted from it to establish a vaguer deference standard that is potentially weaker.[84] As for the Ninth Circuit—and by extension the Seventh Circuit, which cites *Kester*—they have imported *Auer*-like deference into the *Tallman* standard, which may be even *stronger* than what the *Tallman* court intended.[85] This inconsistency in *Tallman*'s application evidences at least doctrinal confusion, if not concern, with *Tallman*'s highly deferential standard.

1032 (Fed. Cir. 2014) (reversing and expressly not considering the lower court's holding on Executive Order 9001 or Executive Order deference more generally).

[80] *Dehainaut*, 32 F.3d at 1074 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

[81] 556 U.S. 502, 514 (2009).

[82] *See Montana Wilderness Ass'n*, 725 F.3d at 1011 (Gould, J., concurring in part and dissenting in part) (agreeing with majority that agency's interpretation of Presidential Proclamation deserves deference pursuant to *Kester*, but disagreeing the interpretation can survive APA "hard look" review under Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm), 463 U.S. 29, 43 (1983)).

[83] *See* Kagan, *supra* note 12, at 2351.

[84] *See Yanko*, 869 F.3d at 1335 ("broad deference"); *El-Ganayni*, 591 F.3d at 187 ("'great deference'" (quoting *Tallman*, 380 U.S. at 16, which pertains to "statutory construction," not interpretations of executive orders)); *Sherley*, 776 F. Supp. 2d at 22 ("considerable deference"); *see also New Orleans Pub. Serv., Inc.*, 553 F.2d at 465 ("special deference"); *Kentuckians for Commonwealth Inc.*, 317 F.3d at 446 n.3 (quoting from section of *Tallman* pertaining to statutory construction, and stating the Supreme Court deferred to DOI because of long-standing agency practice, and stating that the agency interpretation "will not be disturbed except for cogent reasons").

[85] *Compare Kester*, 652 F.2d at 16 ("The agency interpretation is considered reasonable 'unless it is plainly erroneous or inconsistent with the (order).'" (quoting *Larionoff*, 431 U.S. at 872)), *with Auer*, 519 U.S. at 461 (holding that an agency's interpretation of its own regulations is controlling unless the interpretation is "'plainly erroneous or inconsistent with the regulation.'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))). Granted, *Tallman*, *Kester*, and *Larionoff* all pre-dated *Auer*'s publication in 1997. But the Ninth Circuit has come to recognize that it has imported the *Auer* standard into the *Tallman* standard. *See W. Watersheds Project*, 719 F.3d at 1043 ("To determine reasonableness, we adopted the standard applied for reviewing an agency's interpretation of its own regulations.").

III. Examining and Applying Modern Justifications for Deference

A. The Four Goals Underlying Deference

To introduce conceptual clarity and lay the foundation for updated doctrine, this Article starts with first principles: the three underlying justifications for interpretive deference to agencies or the President, plus a fourth factor constraining deference—the rule of law. First, deference may accurately reflect the *intent* of the substantive law (and that law's source) at issue. In the case of statutory interpretation, the *Chevron* Court argued that with respect to ambiguous statutes, Congress intends the agencies to exercise delegated legislative power, and for courts to defer to the exercise of that power.[86] And in the case of agency interpretations of their own regulations, the rationale of *Auer* is very similar: that agencies are best suited to accurately understand their own actions (or those of their predecessors).[87]

Second, judicial deference may improve *democratic accountability*. Unlike Article III judges who serve for life assuming "good behavior,"[88] executive agencies (and to a lesser extent independent agencies) are accountable to a democratically-elected president. Therefore, agency interpretations may more accurately reflect the will of the people—and if they do not, voters can express their disapproval through the ballot box.[89]

Third, judicial deference may lead to better policy results because the Executive Branch has greater *technical expertise* relative to the judiciary. For instance, in *Chevron*, the Court observed that "[j]udges are not experts" in a "regulatory scheme [that] is technical and complex." And in *Curtiss-Wright*, the Court couched its super-strong deference to the President in military and foreign policy in not only the President's constitutional prerogatives, but also his relative expertise.[90]

Counterbalanced against these three affirmative justifications is one seemingly necessary condition for judicial deference implied by the courts and identified by scholars—that deference would accord with the rule of law. The Supreme Court implicitly articulated this condition in *Mead*, in which it held *Chevron* analysis applies only if Congress had delegated "force of law" authority to an agency, and the agency is in fact acting in exercise of its authority with respect to the interpretation at issue.[91] Factors relevant to this "force of law" determination include, *inter alia*: "the degree of the agency's care, its consistency, formality"; whether the agency action has "precedential value"; and whether the agency action is authoritative/centralized view of the agency or merely decisions "churned out at a rate of 10,000 a year at an agency's 46 scattered offices."[92] And though the Court muddied the *Chevron* "Step Zero" analysis in *Barnhart* by deferring to an agency interpretation that was *not* the result of a formal process, *Barnhart* emphasized "the careful consideration the Agency has given the question over a long period of time"[93]—and echoed *Mead*'s focus on "care" and "consistency."

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[86] *Chevron*, 467 U.S. at 844–45.
[87] *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629–31 (1996).
[88] U.S. CONST., ART. III § 1.
[89] Manning, *supra* note 87, at 629–31.
[90] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).
[91] 533 U.S. at 226–27; *see* Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 225–26 (2006).
[92] 533 U.S. at 228, 232, 233.
[93] 535 U.S. at 222.

B. Applying the Justifications to Executive Orders

Applying the aforementioned framework to agency interpretations of executive orders reveals that while the *intent* and *political accountability* justifications for deference are stronger with respect to executive orders vis-à-vis statutes, adherence with the *rule of law* is weaker. The *technical expertise* justification is equally strong.

1. Intent

i. General Analysis: President vs. Congress

The intent rationale is stronger for deferring to agency interpretations of executive orders vis-à-vis statutes for two reasons. First, presidential intent is less of a legal fiction than congressional intent. The most obvious support for this idea is that the President is an individual vested with the unilateral authority to issue and revoke executive orders, whereas Congress is a 535-member body that can only pass legislation through bicameralism and presentment. Therefore, while it can be said that congressional intent is a fiction because "Congress is a 'they,' not an 'it,'"[94] presidential intent is the will of an individual.

Second, as an individual with unilateral authority, the President can more easily correct or endorse erroneous agency interpretations than Congress. While Congress does have many oversight tools for disapproving of agency actions (e.g., calling burdensome public hearings;[95] inserting instructions into the legislative history of appropriations bills[96]), there is only one *binding* oversight tool available to Congress: legislation.[97] Arguably the next-closest thing to a binding oversight mechanism is legislative history in appropriations bills, which is usually inserted by the committee(s) with oversight over an agency.[98] However, inserting such legislative history requires some level of collective action. Not only must a committee agree to include the legislative history in an appropriations bill and ensure that the bill becomes law, but also the legislative history must be backed by the credible threat that disobeying it will be met by *statutory* action. Otherwise, an agency could likely disregard the legislative history in light of current statutory interpretation doctrine, which favors the statutory text over extra-textual considerations like legislative history.[99]

On the other hand, the President undoubtedly wields many weapons against erroneous agency interpretations of an executive order, including informal communications, vetting of appointees and high-level staff, regulatory review, and influence over DOJ litigation authority.[100]

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[94] Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

[95] *See, e.g.*, Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. (forthcoming 2018), https://ssrn.com/abstract=2943074.

[96] *See, e.g.*, Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 768 (2014); Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. L. REV. 51, 88 (1979).

[97] *Id.*

[98] *Id.*

[99] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[100] Stack, *supra* note 24, at 294; *see* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 698 (2016) (arguing that the Obama presidency "elevated White House control over agencies' regulatory activity to its highest level ever, relying on a mix of covert control and overt command.").

Indeed, while the President's control over agencies is increasing, Congress's oversight capabilities are decreasing.[101] In particular, two presidential powers can definitively put the stop to an erroneous interpretation: (1) amendment of the executive order at issue to remove ambiguities and/or specifically (dis)approve of certain agency actions taken pursuant to the executive order; and (2) removal of the heads of "executive" agencies. Of these two weapons, the power to amend executive orders is itself a theoretically sufficient check against an erroneous agency interpretation, because even under current doctrine, an agency interpretation of an executive order that unambiguously contradicts the order would not be "reasonable."[102] If for whatever reason amending an order is infeasible or insufficient, the power to fire agency officials and therefore at least significantly hamper an agency's functioning is an alternative.

Granted, political backlash or limited decision-making resources may limit the extent to which the President may employ the aforementioned powers. However, these political and managerial constraints apply not only to the President, but also to Congress as well. Therefore, to the extent deference is owed to agency interpretations of statutes notwithstanding congressional inertia, there is no reason that presidential inertia should be particularly damaging to agency interpretations of executive orders.

What *does* complicate this simple account of intent is two issues. One: when an agency is interpreting an executive order issued by a former President, should the former President's intent or the current President's intent control? Two: where there is conflict within the Executive Branch and/or the President's own statements, how should courts discern presidential intent, assuming coherent intent even exists? I address these two issues in the following subsections.

ii. Complication 1: Past vs. Current Presidential Intent

An initial important difference between judicial deference to statutes/regulations and judicial deference to executive orders is that when interpreting ambiguous executive orders, the current President's intentions should control. In contrast, when interpreting ambiguous statutes, courts generally look to what the *enacting* legislature intended.[103] In a nutshell, the reason for prioritizing the current President's intent is simple: unlike Congress, the President can unilaterally and easily amend his "laws." As such, if it is clear what the current President wants of a textually ambiguous order, requiring the President to "reissue" a carbon copy of the order in order to make his intentions effective would impose a pointless and significant burden.

iii. Complication 2: Presidential Speech and Agency Interpretations Inconsistent with an Order's Text

A second, more complex issue is how to evaluate presidential speech (or informal presidential documents) that conflict with the unambiguous text of an executive order. On the one

[101] *Compare id.*, *with* Peter Hanson, *Weakening Oversight: Two Warning Signs in Appropriations*, THE HILL (Feb. 5, 2018), http://thehill.com/opinion/finance/372060-weakening-oversight-two-warning-signs-in-appropriations (quantifying a "staggering decline" in oversight activity since the 104th Congress, and highlighting failures in the House and Senate to complete appropriations bills).

[102] *Tallman*, 380 U.S. at 4.

[103] *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the *enacting* Legislature's understanding of otherwise ambiguous terms." (emphasis added)); EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 41 (2008).

hand, courts lack a strong formalistic justification for disregarding presidential speech as they might disregard legislators' floor statements, because textualism carries less force in the executive order context than it does in the statutory context. As discussed in Part I, executive orders lack an express constitutional basis for being more binding than other presidential statements or actions. Instead, to imbue executive orders with their unusual force, presidents rely on the historical weightiness of executive orders as well as The Federal Register Act, which requires publication of proclamations and executive orders "having general applicability and legal effect."[104] But other forms of presidential actions or speech can also have "general applicability and legal effect." The Act subsection immediately after the subsection addressing executive orders mandates that other "documents or classes of documents that the President may determine from time to time have general applicability and legal effect" shall also be published in the Federal Register.[105] Therefore, while bicameralism and presentment gives statutory text its power over extra-textual elements, nothing formally privileges executive order text. Extending this anti-formalist argument further, one might think that *agency* interpretations should be able to contradict an order's plain text, because agencies might have a sense of what the President "really wants," and any litigated interpretations will be represented in court as bona fide.

On the other hand, as a pragmatic matter of accurately discerning intent, there are two reasons to privilege unambiguous executive order text over both (1) other presidential statements or documents not published in the Federal Register; and (2) agency interpretations. First and most importantly, letting unambiguous executive orders speak for themselves without the interference of other presidential or agency communications preserves the binding status of executive orders, and consequently, preserves an important form of presidential power. As discussed above, executive orders derive their force largely from historical practice, especially if they are "effective only against Federal agencies"[106] as opposed to non-governmental parties. If governmental and non-governmental parties alike were to believe that executive orders should *not* be taken at face value, then the president would have to expend more effort to execute directives. That is, he would have to provide some extrinsic evidence that he "really means it"[107]—an ultra-plain statement rule for presidential actions that would not only hamper the implementation of presidential intent,[108] but also increase the costliness of judicial interpretation as courts find and weigh competing extrinsic evidence. In contrast, a better approach makes the plain statement the text of the executive order itself. After all, if the text of an executive order and subsequent presidential statements seem to contradict one another, defaulting to the executive order is the best course of action because the president *could have amended the order* had he truly wanted to.

Second, not every lawsuit against agency action reaches the attention of the President.[109] The President or his staff cannot police the activities of all federal agencies.[110] Therefore, a court cannot be positive that an agency's representations in court accurately reflect the President's intentions instead of merely the agency's wishes, which have gone inadvertently unchecked due to presidential inertia or mismanagement. When the text of an executive order in question is

[104] 44 U.S.C. § 1505(a)(1).
[105] 44 U.S.C. § 1505(a)(2).
[106] 44 U.S.C. § 1505(a)(1).
[107] Bond v. United States, 134 S. Ct. 2077, 2097 (2014) (Scalia, J., concurring in the judgment).
[108] Significant confusion over what the President intends may even be an unconstitutional violation of the President's prerogatives. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1902 (2015).
[109] Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 125 (2017).
[110] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 996 (1992).

ambiguous, it may be reasonable to assume the president has intentionally delegated interpretative authority to an agency. However, when an executive order is textually unambiguous, this assumption is less plausible.

Framing these two reasons another way, focusing on the text of an executive order to determine its effect enables all political actors—including the President and the courts—to bifurcate presidential communications into campaign/messaging speech vs. speech intended to have legal effect. Failing to preserve distinctions between these two types of speech would be, at the extreme, unworkable for both the President and the courts.[111] The Executive Branch itself has recognized this distinction between non-binding and binding speech.[112] For instance, the military declined to act on President Trump's July 26, 2017 tweets, which purported to exclude transgender individuals from the military, until the President issued a presidential memorandum.[113] Whether tweets will remain non-binding will be a question of future Executive Branch practice and what courts will deem law. While tweets may be "official statements of the President of the United States" in the view of the Department of Justice as of November 13, 2017,[114] it is unclear whether (i) "official statements" necessarily have binding effect; (ii) this view reflects the entire government's view, or (iii) this view should indeed be one that courts adopt.

2. Political Accountability

The greater political accountability of agencies relative to courts is generally considered one of the strongest justification for judicial deference to agency interpretations of statutes.[115] In the context of statutes, while it is unlikely that every agency interpretation is an intentional delegation of legislative authority from Congress, it is likely that every agency interpretation is a *de facto* act of lawmaking.[116] Therefore, where there is statutory ambiguity, courts defer to agencies in part because agencies are more accountable to voters (through the President, who is democratically elected) than judges, who serve for life.

The political accountability rationale is also a persuasive reason for courts to defer to agency interpretations of executive orders. Here, the rationale is at least as strong as it is in the statutory context, even though the source of the substantive law at issue differs. That is, the choice between the interpretive actor is still either the courts or an agency. Faced with only these two options, an agency is obviously better from a democratic accountability standpoint. Moreover, just as the public can theoretically hold Congress accountable for ambiguous statutes that delegate power to the Executive, the public could hold the President accountable for vague executive orders that diffuse power within the Executive Branch.

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[111] *See generally* Shaw, *supra* note 109.

[112] *See* Kagan, *supra* note 12, at 2284–85 (describing how a written memorandum accompanying a spoken announcement by President Clinton gave the Secretary of Labor more leeway than Clinton's oral remarks at a commencement address, and distinguishing between "formal directives" and non-binding "appropriation" of agency action, which take the form of informal public announcements).

[113] Recent Social Media Posts, *supra* note 37.

[114] Defendant's Supplemental Submission and Further Response to Plaintiffs' Post-Briefing Notices at 2, James Madison Project v. Dep't of Justice (D.D.C.) (1:17-cv-00144-APM).

[115] *See, e.g.*, Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2048 (2010).

[116] *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 121 (2016); Manning, *supra* note 87, at 626.

In fact, the political accountability rationale may even be *stronger* for deference to agency interpretations of executive orders. This is because while deference to agency interpretations of statutes is effectively judicial acquiescence to a form of inter-branch delegation of powers (i.e. Congress delegating legislative power to the Executive Branch),[117] judicial deference to an interpretation of an executive order implicates few delegation issues. Deference to the latter promotes the separation of powers by reducing judicial intervention in the Executive Branch. After all, if an agency interpretation of an executive order is inaccurate, the President has tools to unilaterally correct the interpretation.[118] On the other hand, deference to the former is technically constitutionally dubious, given that inter-branch delegation of powers is still unconstitutional as a matter of law (but not practice).[119]

Granted, the political accountability rationale is weaker—although arguably viable[120]—for the subset of agencies that are independent. Commentators such as Professor Thomas Merrill have argued that the less directly accountable an interpreter is to the President, the less the interpretation partakes of the President's constitutional authority and the weaker it should be regarded as executive precedent.[121] Independent agencies are less accountable to the President due to the lesser degree of control the President can exert over them by statute.[122]

3. Technical Expertise

The expertise rationale is grounded in a few different principles. Some commentators have collapsed the expertise rationale with the intent rationale, arguing that an agency has "superior knowledge of congressional intent" because of its greater substantive expertise in its organic statute(s) relative to the courts.[123] Others combine the expertise justification with the political accountability justification, citing the "often-inextricable relationship between politics and expertise."[124] But the expertise should also be conceptualized as a separate rationale grounded in policy outcomes—i.e., that courts should defer to agency interpretations because they generally lead to better results than judicial interpretations. Indeed, in the context of arbitrary-or-capricious review, the Supreme Court requires agencies to justify policy decisions in terms of expertise; it is insufficient to merely cite congressional intent or active political support.[125]

The idea that expertise will lead to better policy outcomes itself has two parts. First, an agency may select a better policy *goal* than a court.[126] Second, and perhaps less intuitive, is that an agency will be better at *implementing* a coherent and administrable program. That is, even if a court would select a theoretically superior policy goal, an agency achieves superior real-world

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[117] *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988).
[118] *See supra* Part 1.
[119] Note, *supra* note 115, at 2051
[120] *See* Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1980) ("[A]gencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policy making function [of choosing between interpretations].").
[121] Merrill, *supra* note 110, at 1011.
[122] Merrill, *supra* note 110, at 996.
[123] Silberman, *supra* note 120, at 823.
[124] Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 146 n.312 (2015).
[125] Nou, *supra* note 124, at 146 n.312 (citing *State Farm*, 463 U.S. at 43).
[126] *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 137–139 (1944); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406, 419–421 (2007).

results in light of (i) administrative constraints, such as the costs of switching to or adding a new policy goal;[127] and (ii) differing implementation methods, such as rulemaking vs. adjudication.[128] Applying these concepts to executive orders, we should generally expect better policy goals and policy implementation from agencies vis-à-vis courts, especially because the President—as Chief Executive—can presumably identify who has the expertise to execute his orders.

However, the expertise rationale for deference is weaker than the intent and accountability rationales, regardless of whether an agency is interpreting a statute or an executive order. One commentator has even stated that in the context of statutory interpretation, the agency expertise justification "may be dispensed with immediately."[129] The logic of the rationale, if taken at face value, demands that courts inquire whether an agency has actually employed its expertise when issuing an interpretation.[130] Moreover, it follows that a judge could decline to defer to an agency if she felt technically adept in the subject matter of the interpretation.[131] However, under the current doctrine, courts take neither of these logical steps.

Similarly, in the context of agency interpretations of executive orders, it would create problems of judicial economy and accuracy for judges to inquire whether an agency has exercised its subject-matter expertise in interpreting an executive order. Contemplating such an inquiry raises tough questions about what would be feasible yet sufficient. For example, would a judge have to discover the résumé and thought processes of the agency employees who worked on the interpretation? If not, what type of information would suffice to demonstrate expertise? Moreover, if a judge is truly expert at the subject matter of the interpretation (thereby weakening the expertise rationale), who would verify the judge's expertise upon review—an advisory committee, a panel of generalist judges, or something else altogether?[132] Therefore, although the expertise rationale is of some weight, conclusions on judicial deference should not hinge on expertise.

4. Rule of Law

Counterbalancing the three affirmative justifications for deference is the requirement that deference accord with the rule of law. The concept of the rule of law has many dimensions. However, most conceptions of the rule of law have the prevailing principle that people in power should act "within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong."[133] In addition, many formulations of the rule of law emphasize formality,[134] "legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state."[135] As discussed in Part IV.A, *Mead* and *Barnhart* codified rule of law principles in determining whether to defer to agency interpretations of statutes.

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[127] *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 532–33 (1989).
[128] *See* Sec. & Exch. Comm'n v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947).
[129] Note, *supra* note 115, at 2045.
[130] Note, *supra* note 115, at 2046 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
[131] Note, *supra* note 115, at 2046.
[132] For an account of the pros and cons of technical advisory committees, *see generally* SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS (1990).
[133] Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA L. REV. 1, 6 (2008).
[134] *See, e.g.*, Waldron, *supra* note 133, at 18, 40, 55.
[135] Waldron, *supra* note 133; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.").

The rule of law rationale for deferring to agency interpretations of executive orders is weaker than the rationale vis-à-vis statutes, because executive orders lack some crucial characteristics of law that statutes have. In particular, executive orders are characterized by less formality, less legal certainty, and less predictable administration by the state. That is, even though executive orders undoubtedly can act with the force of law, they are less law-like than statutes. And consequently, judicial deference to agency interpretations of executive orders may be in tension with the rule of law if the underlying executive order is not law-like.

There are two major ways in which an executive order may not have the customary characteristics of law. First, as discussed in Part I, executive orders (unlike statutes) do not have express constitutional mooring, which leaves their status uncertain and dependent on norms. Nor is it usually clear from where any given executive order even purports to source its power, because presidents often aggregate multiple sources of law—both statutes and general Article II powers—to authorize their executive orders.[136] As a result, historical practice, not legal necessity, makes executive orders relatively formal, legally certain, and predictably administered. Indeed, while executive orders can generate significant reliance interests,[137] they often are not judicially enforceable unless the President omits language precluding review.[138] That is, the President can toggle the judicial enforceability of an operative executive order on and off—an odd result for documents that can bear the force of law.

Second, not only can the president toggle the judicial enforceability of an executive order on and off, but also, the Executive Branch secretly purports that the President can toggle the very *operation/force* of public executive orders on and off—and *without public notice*. This purported presidential authority stems from three declassified legal propositions from otherwise "highly classified" Office of Legal Counsel (OLC) opinions related to government surveillance.[139] As stated by Senator Sheldon Whitehouse, a former member of the Senate's Select Committee on Intelligence, the three propositions are:

> One:
> An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.
>
> No. 2:
> The President, exercising his constitutional authority under article II, can determine whether an action is a lawful exercise of the President's authority under [A]rticle II.
>
> And 3:
> The Department of Justice is bound by the President's legal determinations.[140]

[136] *See supra* note 27.
[137] See, for example, Executive Order 11246, which since 1965 has protected employees of federal contractors—approximately one-fifth of the entire U.S. labor force—from discrimination on the basis of race, color, religion, and national origin. *See* Office of Federal Contract Compliance Programs, "History of Executive Order 11246," https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html.
[138] See *supra* note 47.
[139] Statement of Sen. Whitehouse, Congressional Record, S15011–S15012 (Dec. 7, 2007), http://www.fas.org/irp/congress/2007_cr/fisa120707.html.
[140] *Id.*

Three caveats apply to the impact of these OLC opinions. First, it is unclear to what extent these OLC opinions purport to apply outside the surveillance context, or whether the current Administration has amended or revoked the opinions. Second, while OLC opinions may be binding as a matter of practice within the Executive Branch, the D.C. Circuit and the Second Circuit have recently suggested that OLC opinions cannot constitute working law.[141] And third, it is arguable that in the context of administrative guidance, courts have essentially condoned the Executive Branch's right to execute sudden changes in policy without much consideration or public notice.[142] But even with these caveats, the possibility that the President can secretly act contrary to an executive order—an order that the public (and potentially the vast majority of the Executive Branch itself) believes to be binding—cuts at the heart of "legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state."[143]

Moreover, even when the President wants an order to be in full effect, *agency* non-compliance is troubling from the standpoint of deference doctrine—at least assuming that non-compliance with executive orders is more frequent and severe than non-compliance with other sources of law that receive deference, i.e., statutes and regulations. As stated by President Clinton in 2007, "[o]ne of the things that I was frustrated about, when I was president, was that I had all these great ideas, and I'd issue all these executive orders, and then you can never be 100 percent sure that they were implemented."[144] While at least one empirical scholar speculates that executive orders may receive more White House oversight and agency compliance than statutory requirements,[145] the fact is that the absolute level of compliance with executive orders is far from perfect, thereby leaving room for doubt about relative levels of compliance.[146]

However, the rule of law argument against agency interpretations of executive orders should not be overstated. To the extent we believe *Auer* deference is permissible, agency interpretations of executive orders should likely receive deference as well. The rule of law rationale for deferring to agency interpretations of executive orders is *stronger* than the legalistic rationale for *Auer*—i.e., deference to agency interpretations of their own regulations. Both judges and scholars have identified that *Auer*'s greatest flaw is that it weakens the separation of powers by combining legislative and executive power, if not also judicial power.[147] In contrast, agency interpretations of executive orders do not formally violate the separation of powers to the same

[141] *See* Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, 126 YALE L.J.F. 242, 245–248 (2016) (discussing Elec. Frontier Found. v. U.S. Dep't of Justice, 739 F.3d 1 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 356 (2014) and New York Times Co. v. U.S. Dep't of Justice, 806 F.3d 682 (2d Cir. 2015)).
[142] *See Perez*, 135 S. Ct. at 1199 (eliminating the "one-bite" doctrine for agency interpretive rules, a doctrine which required agencies to promulgate relatively formal regulations if they wished to change a type of relatively informal agency guidance); *Fox Television*, 556 U.S. at 502 (rejecting the principle that agency changes in policy be subjected to more searching review than initial decisions, with limited exceptions).
[143] Waldron, *supra* note 133.
[144] *Philanthropy and the Presidency*, ABC NEWS (Sept. 26, 2007), http://abcnews.go.com/WN/story?id=3656216.
[145] *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L.J. 101, 161 (2015).
[146] Joshua B. Kennedy, *"'Do This! Do That!' and Nothing Will Happen": Executive Orders and Bureaucratic Responsiveness*, 43 AM. POL. RES. 59, 72 (2015). For an example of seemingly systemic non-compliance with one recent executive order, President Trump's Executive Order 13,771 (the "two for one" deregulatory executive order), *see* Roncervert Almond et al., *Regulatory Reform in the Trump Era – The First 100 Days*, 35 YALE J. ON REG. BULLETIN 29, 38–49 (2017) (Author disclosure: I served as the Yale Journal of Regulation editor for this article.).
[147] *See* Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Manning, *supra* note 87, at 631.

extent. Unlike regulations, executive orders derive their power either solely from the President's Article II powers, or *at most* from an amalgam of Article II power and statutory authority. Consequently, agency interpretations of executive orders are more purely an exercise of the executive power alone than the interpretations at issue in *Auer*. Granted, while values like notice and predictability are still implicated in the executive order deference context as they are in *Auer*, it is difficult to see how interpretations of executive orders threaten these values more than interpretations of regulations.

IV. A New Framework

This Article's foregoing analysis demonstrates that—rule of law concerns aside—the justifications for deferring to agency interpretations of executive orders are stronger than the justifications for deferring to agency interpretations of statutes. Therefore, in the executive order context, any proposed legal test should give agencies at least *Tallman* or *Chevron* "reasonable[ness]" deference if those rule of law concerns are addressed, *and* there are no special circumstances weakening the intent, political accountability, or technical expertise rationales for deference. To summarize, the rule of law concerns are two-fold. First, executive orders risk losing their legal force and usefulness to the Executive in the event of political or judicial overreach, because they source their authority primarily from history and practice, not express constitutional authorization. For instance, a judicial interpretive doctrine that weighed all presidential speech as legally equivalent to (or amendments of) executive orders would significantly erode the usefulness of executive orders. Second, executive orders raise notice and predictability concerns, because some executive orders are secret and, according to OLC, even public orders may be secretly modified.

My proposed test is therefore as follows:

- *Step 1*: Is the text within the four corners of the executive order ambiguous in relation to the agency's interpretation? If the text is *un*ambiguous, the text controls.

- *Step 2*: If the text is ambiguous, then a court should defer to the agency's interpretation if it is "reasonable" *unless* one or more of following exceptions are true, in which case a court should give the text of the order its best reading.

    - *Exception 1*: The agency's interpretation conflicts with a prior interpretation of the order (whether by that same agency or other executive agencies), or is a *post hoc* rationalization in response to litigation.

    - *Exception 2*: The agency is an independent agency, not an executive agency.

A. Step One: Prioritizing Unambiguous Text

Prioritizing the unambiguous text of an executive order over all other indicia of interpretation—e.g., agency interpretation or presidential speech—addresses both of the rule of law concerns highlighted above. First, with respect to preserving executive orders as a presidential tool imbued with the force of law, imagining the operation of a *contrary* rule illustrates why courts should not ignore unambiguous text. If an agency could override unambiguous text, then executive

orders would be better called "executive suggestions." In judicial review of agency action taken pursuant to a constitutionally-valid order—such as in *Tallman* or *Sherley*—the agency would automatically prevail, because its action would by definition be consistent with the order, regardless of its language. It is improbable that this rule is one the President would choose. The implausibility of this alternative rule is underscored by the empirical reality that the President and agencies are often in imperfect alignment or even conflict.[148]

Thus, an agency's inconsistency with an unambiguous executive order is strong evidence that the agency is in fact in conflict with the President. Said another way, if one assumes that the President and agencies are in fact of one mind, that assumption raises the question of why the President issued the unambiguous order, and what (if anything) the order affects. In sum, under an alternative regime of unambiguous executive order language signifying nothing, it is unclear why executive orders would retain any legitimacy or force.

Moreover, as discussed in Part III, Section B.1.iii, even a more limited rule that only enables agency departures from unambiguous text when presidential speech supports the agency interpretation would collapse the distinction between presidential communications intended to have legal effect and the myriad non-binding instances of presidential speech. Preserving the distinction has little cost, because the President can unilaterally and easily designate any communication as an "executive order" or as otherwise bearing legal force. Therefore, the proposed Step 1 notably differs from *Chevron* in that it looks only to the text within the four corners of the order, not the expanded universe of sources available as "traditional tools of statutory construction."[149]

Second, with respect to furthering public notice and predictability, prioritizing unambiguous text avoids the absurd result of a court upholding agency action that hurts reliance interests because either (a) the agency unilaterally decided to deviate from an unambiguous order, or (b) the President secretly amended the order to authorize the action. Scenario (a) would transform executive orders into de facto executive "guidance," which cannot have the force of law.[150] Scenario (b) raises serious due process concerns, particularly if a secret modification is used to retroactively justify agency action.[151] Said another way, it would likely breed public confusion and distrust if courts were to rule that a president's unambiguous words (as written in an executive order) can mean something entirely different than expected.[152]

B. Step Two: Deference to a "Reasonable" Interpretation of Ambiguous Text

In contrast, when an order's text is ambiguous, deference to an agency interpretation generally will not weaken the rule of law. One may conceptualize the effect of deference as creating a "space," bounded by the extent of textual ambiguity, within which an agency has interpretive power.[153] The fact that some standard—in this case *reasonableness*—limits deference

[148] *See, e.g.*, HOWELL, *supra* note 23, at 21–22; JOHN P. BURKE, THE INSTITUTIONAL PRESIDENCY 35–36, 91–97, 125, 132, 148, 183 (2d ed. 2000); Kagan, *supra* note 12, at 2272.
[149] *Chevron*, 467 U.S. at 843 n.9.
[150] *See Perez*, 135 S. Ct. at 1204.
[151] *See* Jaffer & Kaufman, *supra* note 141, at 242.
[152] *Cf.* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 5 (1949) ("[T]he three slogans of the Party: WAR IS PEACE / FREEDOM IS SLAVERY / IGNORANCE IS STRENGTH").
[153] Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145, 1164 (2012).

ensures that executive order text maintains it force, and that agency interpretations cannot be so unpredictable as to harm reliance interests.

Moreover, substantial empirical research indicates that creating a two-step framework and deferring to "reasonable" interpretations would be more than a formalistic exercise. Instead, it would further intent, political accountability, and technical expertise values by increasing the likelihood that agencies will prevail in court.[154] Consequently, to have a real-world impact on judicial outcomes, it is unnecessary to resolve the live debate over the exact operation of a two-step test—e.g., distinguishing ambiguous text from clear text, and delimiting "reasonableness."[155]

A more immediate consideration is the ideal strength of the deference standard. The Supreme Court has recognized a spectrum of deference ranging from super-strong (for foreign affairs and national security matters) to anti-deference (e.g., for criminal cases).[156] This Article's "reasonable[ness]" standard mirrors *Tallman* and *Chevron*. Clearly, a weaker standard would be inappropriate, because justifications for deference are generally stronger vis-à-vis executive orders than statutes. Of the two stronger standards, the strongest is likely too deferential because it has historically guaranteed agency victory.[157] The remaining standard, *Auer*, may very well be a distinction without an empirical difference after *Gonzales v. Oregon*.[158] Therefore, even if agency interpretations of executive orders are closer in theory to *Auer* than *Chevron*, "reasonable[ness]" is the best standard because it achieves similar outcomes while according some *stare decisis* value to *Tallman*, a unanimous decision.

C. Exceptions

1. Conflict with a Prior Interpretation Anywhere in the Executive Branch, or a *Post Hoc* Rationalization

When the text is *ambiguous*, the court should defer to reasonable interpretations unless special circumstances weaken the intent, political accountability, and rule of law rationales for deference. A non-contemporaneous agency interpretation—at least one that is not merely codifying long-standing practice pursuant to the order—raises problems related to intent and rule of law. With respect to intent, the empirical literature suggests that pressure to faithfully implement an executive order subsides over time,[159] because the White House's extremely limited supervisory

[154] *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).
[155] *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Kavanaugh, *supra* note 99, at 2134–44.
[156] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008).
[157] *Id.*
[158] *See* William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 GEO. L.J. 515, 547 (2018) (analyzing impact of 546 U.S. 243 (2006)).
[159] If we analogize new executive orders to new statutory mandates, *see* Raso, *supra* note 145, at 130, 166–67 (showing empirically that after Congress passed laws to expand procedural requirements under the Regulatory Flexibility Act in 1996, agency compliance of approximately 20% to 30% lasted only about one year before plummeting to about 2% to 10%).

attention turns elsewhere,[160] and publicity surrounding the order fades.[161] In addition, to defer to a non-contemporaneous interpretation is to assume that the President has implicitly delegated *permanent* interpretive authority to an agency, which may not be empirically accurate.[162] And with respect to the rule of law, Aditya Bamzai has recently argued that Congress intended that the APA permits judicial deference to agency interpretations "if and only if that interpretation reflected a customary or contemporaneous practice" under the law at issue.[163] Consequently, it may appear attractive to impose a *Barnhart*-like prerequisite to deference, i.e., that only long-standing agency interpretations should receive deference.[164]

However, there are two reasons to believe withholding deference from *all* non-contemporaneous interpretations of executive orders would go too far. First, as discussed above, the principal-agent relationship between the President and his agencies is likely to be more effective, on average, than the principal-agent relationship between the President and the courts. Therefore, even when an agency makes a non-contemporaneous interpretation of an ambiguous executive order, it is not obvious that a court's "best reading" of that order will be more accurate than the agency's *unless* there are other indicia of the agency's unfaithfulness.

Second, a rule withholding deference from *all* non-contemporaneous interpretations of executive orders would be inconsistent with how courts currently treat an agency's interpretation of its own *regulations*. The comparison to *Auer* is relevant because, if the case for deferring to agency interpretations of executive orders is at least similar in strength to the case for *Auer*, getting deference for agency interpretations of executive orders should not be significantly more difficult. Moreover, *Auer* and its progeny provide doctrinal guideposts for when courts should deny deference even though normally, strong deference would be granted.

Under *Auer*, courts defer to an agency's interpretation of its own ambiguous regulation unless: (i) the agency's interpretation is "plainly erroneous or inconsistent with the regulation," [165] —a defensible deference standard nevertheless rejected in favor of "reasonable[ness]" in Part IV, Section B—or, (ii) there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in

[160] *See* Kagan, *supra* note 12, at 2273 ("In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy."); *cf.* Nou, *supra* note 124, at 1816; (stating that while executive orders have created mechanisms for sharing information within the Executive Branch, they have fallen into disuse over time).

[161] *See* Anthony Downs, *Up and Down with Ecology – the "Issue-Attention Cycle"*, 28 PUBLIC INTEREST 38, 40–41 (1972); *see also* Kagan, *supra* note 12, at 2299 ("Especially when agency resistance to presidential preferences need take only the form of inertia, publicity can serve as a useful weapon in the hands of a President – turning a spotlight on and creating a constituency for the action ordered, and thereby increasing the costs of noncompliance to agency officials.").

[162] *Cf.* Kagan, *supra* note 12, at 2379 ("The delegation of power to an agency to administer a statute, even when manifested in explicit rulemaking and adjudicatory authority, does not necessarily entail a delegation of power to the agency (rather than the courts) to answer any and all interpretive questions to which the statute may give rise.").

[163] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 987 (2017). While Bamzai only explicitly refers *statutory* interpretation, the case law and APA legislative history underlying his argument is broadly applicable to agency interpretations of any substantive law, which would include presidential directives with the force of law. *See id.* at 935 (stating the contemporaneous exposition "canon was not directed at statutes alone: it was viewed as a generalized method of proper interpretation, applicable to all manner of legal instruments."); *id.* at 988 (discussing legislative history).

[164] *Barnhart*, 535 U.S at 222.

[165] Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (quoting *Auer*, 519 U.S. at 461) (quotation marks removed).

question,"[166] such as when "the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a 'convenient litigating position' or a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack."[167] To justify a more limited deference rule for executive orders, one would have to show at least two things. First, one would have to show that agencies are significantly less accurate in interpreting executive orders entrusted to their administration than interpreting their own regulations—a plausible story.[168] But then, second, one would have to show that this reduced interpretive faithfulness outweighs the fact that the most severe problem with *Auer* deference—that it allows agencies to exercise both executive and legislative powers—is arguably nonexistent when agencies interpret executive orders and thus exercise only executive power. Taken together, these two points offset each other indeterminately.

Therefore, unless the Supreme Court narrows or overrules *Auer*, courts should defer to an agency's interpretation of an ambiguous executive order unless the interpretation bears established indicia of unreliability. Such indicia include those mentioned in *Christopher* and *Fox Television*.[169] Moreover, these indicia are not merely formalistic judicial creations. It is consistent with traditional *Executive Branch* practice to disfavor legal interpretations that conflict with prior practice[170] or issue in the midst of litigation.[171]

This scenario of intra-Executive Branch conflict with respect to an executive order is not merely academic speculation. Consider, for example, President Trump's Executive Order 13,769 (a.k.a. the "Travel Ban"), which barred for 90 days "the immigrant and nonimmigrant entry into the United States of aliens"[172] from seven countries. Trump issued the order "without traditional interagency consultation," surprising the agencies addressed in the order.[173] Therefore, at the time of the order's issuance on January 27, 2017, the Department of Homeland Security and White House officials disagreed whether the order applied to lawful permanent residents (a.k.a. "green-card" holders).[174] Senior White House advisors insisted that the order also barred permanent

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[166] *Christopher*, 567 U.S. at 155 (quoting *Auer*, 519 U.S. at 462) (quotation marks omitted).
[167] *Christopher*, 567 U.S. at 155 (quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 213 (1988) and *Auer*, 519 U.S. at 462) (quotation marks and citations omitted); *see also* Bamzai, *supra* note 163, at 944–47 (summarizing a line of Supreme Court precedent invalidating executive action on the grounds such action conflicted with contemporaneous or customary interpretations of the law).
[168] *See supra* note 148.
[169] *See Fox Television*, 556 U.S. at 515 (stating that agencies must provide more detailed justifications for changes in policy "when, for example, the new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.").
[170] *See* Bamzai, *supra* note 163, at 945 n.149 (compiling Opinions of the Attorney General, including 19 Op. Att'y Gen. 354 (1889), which stated that long-standing and uniform executive practice precluded reaching a different statutory interpretation).
[171] *See* Texas State Comm'n for the Blind v. United States, 796 F.2d 400, 428 (Fed. Cir. 1986) (stating "[t]he Department of Justice is not allowed to issue a ruling on a matter already in litigation" and citing 38 Op. Att'y Gen. 149 (1934), 37 Op. Att'y Gen. 34 (1932), and 32 Op. Att'y Gen. 472 (1921)); *see also* Office of Legal Counsel-Limitation on Opinion Function, 3 U.S. Op. Off. Legal Counsel 215, 216 (1979); OLC, Best Practices for OLC Legal Advice and Written Opinions, at 3 (2010) ("As a prudential matter, OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party . . . .").
[172] Exec. Order 13,769, § 3(c), 82 Fed. Reg. 8977 (Jan. 27, 2017).
[173] Int'l Refugee Assistance Project v. Trump, No. CV TDC-17-0361, 2017 WL 4674314, at *31 (D. Md. Oct. 17, 2017) (citing *IRAP*, 241 F.Supp.3d at 558–59); *see* Aziz v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (internal citations omitted).
[174] Evan Perez, et al., *Inside the confusion of the Trump executive order and travel ban*, CNN (Jan. 30, 2017), https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html.

residents and purported to overrule DHS's interpretation.[175] DHS thus barred permanent residents from entering the country.[176] But by January 29, DHS had seemed to reverse course again by declaring that legal residents could enter the United States "absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare."[177] And on February 1, White House Counsel Donald F. McGahn issued "authoritative guidance" to the Secretary of State, Attorney General, and the Secretary of Homeland Security.[178] In the one-page memo, McGahn seemingly went even further than DHS, writing: "I now clarify that Sections 3(c) and 3(e) do not apply to such individuals."[179] However, it was and is doubtful that the White House Counsel can bind the Secretary of State, the Attorney General, or the Secretary of Homeland Security; nor, obviously, can the White House Counsel issue an executive order.[180]

In addition to the indicia of unreliability expressly enumerated in *Christopher* and *Fox*, there is one prominent signal of unreliability that is not spelled out in *Christopher* but logically follows from it. Namely, when different agencies (or high-ranking Executive officials) have taken (or directed) agency action pursuant to conflicting interpretations of an executive order, courts should give the order its best reading. This scenario of intra-Executive Branch conflict has not arisen in the *Auer* context because *Auer* is limited to an agency's interpretations of its *own* regulations. But if we conceptualize the Executive Branch is one large "agency" for *Auer* and *Christopher* purposes, the reasons for not deferring in such a chaotic scenario becomes clear. A court would not give *Auer* deference to an agency if the agency could not internally agree on an interpretation for its regulation. Analogously, if there is conflict within the Executive Branch over how to interpret an ambiguous order, and the President has not resolved that conflict by amending the order, then courts cannot be sure which agency's interpretation—*if any*—is accurate.

It is clear that in circumstances similar to the rollout of Executive Order 13,769, an agency's interpretation likely does not reflect "fair and considered judgment on the matter in question."[181] Moreover, in such circumstances, judicial deference does not further the intent, political accountability, or rule of law aims of deference. No matter which interpretation the court defers to, at least one agency (e.g., DHS) would potentially be conflict with another agency or significant executive branch official (e.g., White House Counsel). It is difficult to believe the President would intend that an executive order result in internecine conflict, or that contradictory

[175] *Id.*

[176] Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html.

[177] Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents into the United States, Department of Homeland Security (Jan. 29, 2017), https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states; *see* Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html.

[178] Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security from Donald F. McGahn II (Feb. 1, 2017), https://case.edu/executive-order-updates/docs/f.pdf.

[179] *Id.*

[180] Washington v. Trump, 847 F.3d 1151, 1165–66 (9th Cir.), reconsideration en banc denied, 853 F.3d 933 (9th Cir. 2017), and reconsideration en banc denied, 858 F.3d 1168 (9th Cir. 2017), and cert. denied sub nom. Golden v. Washington, 138 S. Ct. 448, 199 L. Ed. 2d 331 (2017); *see also* Bob Bauer, *Thoughts on the Proper Role of the White House Counsel*, LAWFARE (Feb. 21, 2017), https://www.lawfareblog.com/thoughts-proper-role-white-house-counsel. It is also unclear whether the Attorney General—and by extension, OLC, who exercises the Attorney General's delegated powers—can authoritatively interpret executive orders. *See* W. Neil Eggleston & Amanda Elbogen, *supra* note 36, at 841; *supra* note 141.

[181] *Christopher*, 567 U.S. at 155.

policies could clearly vindicate public preferences, or that such conflict enhances the predictability and legitimacy of executive orders. Therefore, when there is intra-Executive Branch conflict, a court should give an order its best reading, and leave it to the President to definitively clarify the meaning of the order should he disagree.

2. Independent Agencies

Deference to independent agency interpretations of executive orders runs contrary to the intent and political accountability justifications for deference. With respect to intent, it seems unlikely that Presidents would implicitly delegate interpretive authority to independent agencies. As evidenced by the plain text of multiple executive orders, Presidents recognize their limited control over independent agencies.[182] Presumably, Presidents would not normally delegate broad authority to entities they cannot control. With respect to political accountability, independent agencies have an "almost inexorabl[e]" gap between them and the president due to (1) legal insulation from the presidential removal power, (2) an organizational structure that often features multiple agency heads of diverse parties serving staggered terms, and (3) longstanding norms of independence widely held within both the bureaucracy and Congress.[183] Therefore, any political accountability for incorrect interpretations of executive orders would somehow have to stem primarily from Congress or the public at large, not Presidential pressure.

Admittedly, in the context of *Chevron* deference, the courts have historically refused to distinguish independent and executive agencies,[184] although some commentators (including then-Professor Kagan) have argued that they should.[185] However, the 2009 case *F.C.C. v. Fox Television Stations* revealed a Supreme Court split on whether and how to distinguish independent vs. executive agencies in the context of APA arbitrary and capricious review. In *Fox Television*, Justice Scalia wrote in the plurality portion of his opinion (joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, but not Justice Kennedy, who was the fifth vote for his majority opinion) that "it is assuredly not 'applicable law' [under the APA] that rulemaking by independent regulatory agencies is subject to heightened scrutiny."[186] Scalia therefore rejected two different dissenting perspectives presented by Justices Stevens and Breyer. Echoing the contemporaneous interpretation canon discussed above, Justice Stevens (writing for himself) argued that changes in FCC interpretation should be disfavored because "[t]here should be a strong presumption that the FCC's *initial* views . . . also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute."[187] In contrast, Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg), echoed Kagan-like concerns in arguing that the FCC's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons."[188] Justice Kennedy's (arguably) controlling opinion did not indicate Justice Kennedy's views.

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[182] *See, e.g.*, Nou, *supra* note 124, at 1804 n.274.
[183] Kagan, *supra* note 12, 2376–77.
[184] *See, e.g.*, Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433, 437 (2010).
[185] *See* Kagan, *supra* note 12, at 2376–77 & n.506; May, *supra* note 184.
[186] *Fox Television*, 556 U.S. at 525 (plurality opinion).
[187] *Id.* at 541 (Stevens, J., dissenting) (emphasis added).
[188] *Id.* at 547 (Breyer, J., dissenting).

But importantly for our analysis, "heightened scrutiny"[189] of independent agency interpretations is even more warranted in the executive order context than the statutory context. Examining Justice Scalia's plurality opinion and Justice Stevens' and Justice Breyer's dissents in turn is instructive. If we maintain, as Justice Scalia does, that "independent agencies are sheltered not from politics but from the President, and . . . that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction,"[190] then deferring to an independent agency's interpretation of an *executive order* would be to essentially allow the current Congress to exercise Presidential power. If we believe, as Justice Stevens does, that independent agencies are agents of the Congress that *enacted* the statutory provision at issue, a similar separation of powers problem arises, with the potential twist that a *past* Congress—which, assuming some congressional turnover, cannot be held politically accountable—is now exerting influence. If we think, as Justice Breyer does, that independent agencies are politically insulated, that political insulation is even more complete when an independent agency is interpreting an executive order instead of a statute. When an independent agency is acting pursuant to statute, both the President and Congress have an institutional stake in oversight, because the independent agency is part of the Executive Branch (at least nominally) and implementing a legislative mandate. On the other hand, when an independent agency is acting pursuant to an executive order, Congress has a weaker incentive and/or authority to conduct oversight, because executive orders generally draw upon a vague amalgam of Article II and statutory powers (if they cite a statute at all).

The strongest counterargument to "heightened scrutiny" for independent agency interpretations of executive orders is, as discussed in the above section on Exception 1, that even *independent* agencies will be more faithful and politically-accountable agents of the President than the courts.[191] But this counterargument proves too much. Reliance on comparative institutional competencies and/or principal-agent faithfulness could justify strong deference to legal interpretations that courts do *not* assign the force of law—e.g., interpretations by low-level agency staff[192] and individual legislators.[193] After all, in cases involving legal interpretation, such actors are more involved in the executive action or legislation at issue than judges are, and they are also certainly more politically accountable. Therefore, it is clear that a principal-agent theory alone will not justify deference to independent agencies. One must show affirmative reasons to defer, and such reasons do not exist.

3. Rejected Exception: *Mead* "Step Zero"

This Article's proposed test includes only two major exceptions. But courts could also conceivably require that agency interpretations of executive orders satisfy *Mead*—i.e., take place

[189] *Id.* at 525 (plurality opinion).
[190] *Id.* at 523 (plurality opinion).
[191] *See id.* at 525–26 (plurality opinion) ("There is no reason to magnify the separation-of-powers dilemma posed by the headless Fourth Branch, by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." (citation omitted)); Silberman, *supra* note 120.
[192] *See, e.g.*, Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 810 (D.C. Cir. 2006) (holding that agency guidelines were non-binding policy statements rather than legislative rules, because the official that issued the guidance had no authority to issue binding regulations or make certain final determinations).
[193] *See, e.g.*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017) ("[E]xcerpts from committee hearings and scattered floor statements by individual lawmakers [are] the sort of stuff we have called 'among the least illuminating forms of legislative history.'" (quoting NLRB v. SW General, Inc., 137 S.Ct. 929, 943 (2017))).

in a relatively formal process like formal adjudication or notice-and-comment rulemaking—in order to receive judicial deference. However, such a requirement would not only be inconsistent with the intent and political accountability justifications for deference, but also contrary to the Court's justifications for *Mead*.

With respect to intent, it is dubious that Presidents intend that agencies cannot interpret ambiguous terms in executive orders without either (a) using formal procedures, or (b) receiving an express delegation of interpretive authority within a given order. Presidents issue executive orders to *avoid* procedural hurdles and to effect changes in administrative action. In the words of a senior advisor to President Clinton, "[s]troke of the pen, law of the land."[194] Importing *Mead* into executive orders would mutate this aphorism to something like: "stroke of the pen, law of the land after notice-and-comment rulemaking (or on-the-record adjudication) and successfully defeating legal challenges to these agency actions."[195] Moreover, when the President wants to direct formal procedures for the interpretation of ambiguous terms, the history of executive orders shows he knows how to do it, even with respect to seemingly trivial subject matters.[196] And when an Executive Order does set out formal procedures, the White House's priority is generally to accomplish underlying policy goals, rather than follow process for its own sake.[197]

Said another way, because "ambiguity is unavoidable as a practical matter" in legal drafting,[198] an interpretive rule that demands unambiguity or express delegations of interpretive authority would be inefficient. Under such an interpretive regime, a President would have to label the appropriate interpretive actor (e.g., particular agen(cies) or the courts) for each provision of an executive order, or risk a court incorrectly forcing formal procedures on an agency acting pursuant to the order. But rather than go through this costly drafting exercise, a President may want to act in broad strokes quickly—perhaps even before deciding whether and which agencies should receive interpretive deference—and then resolve questions about interpretation *ex post* through informal channels.

Furthermore, because a default rule requiring formal procedures would generally not reflect the President's intentions, *Mead*'s own reasoning militates against importing a *Mead*-like rule into the executive context. *Mead* rests on the idea that when Congress intends to delegate interpretive authority to an agency, it generally indicates that intent by authorizing agency rulemaking or formal adjudication.[199] As just discussed, it is unlikely Presidents generally intend their agencies to be so constrained.

A *Mead* requirement would also reduce political accountability in three ways. First, it would weaken the causal link between presidential directives and agency action. As Kagan persuasively argues, "more nakedly assertive (and legally aggressive)" modes of presidential control are better at furthering political accountability, because assertive control enables "the

[194] James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES (July 5, 1998), http://www.nytimes.com/1998/07/05/us/true-to-form-clinton-shifts-energies-back-to-us-focus.html (quoting Paul Begala, Counselor to President Clinton).
[195] *See, e.g.*, PARRILLO, *supra* note 31, at 30–34 (summarizing reasons to prefer guidance to legislative rulemaking).
[196] *See, e.g.*, Exec. Order 7,998, § 5, 3 Fed Reg. 2603 (Oct. 29, 1938) (creating the Interdepartmental Committee on Printing and Processing, and stating "[t]he Committee *shall* promulgate rules and regulations relating to the establishment, coordination, and maintenance of uniform policies and procedures, consistent with law, for the efficient and economical utilization of printing and processing in the executive branch of the Government." (emphasis added)).
[197] *See* Raso, *supra* note 145, at 160; Kagan, *supra* note 12, at 2289.
[198] Kavanaugh, *supra* note 99, at 2144.
[199] *See Mead*, 533 U.S. at 229.

public, Congress, and interested parties to identify the true wielders of administrative authority."[200] Compared to an interpretive regime without a *Mead* default rule, an interpretive regime with *Mead* would have more executive orders bogged down in formal processes and litigation. The final outcome after such an extended, legalistic, and multilateral process is not as easily traceable to the President. Second, because Presidents would realize that the *ex post* cost of issuing executive orders has increased, they would increase their use of secretive and/or informal channels not subject to judicial scrutiny. Lower public scrutiny makes it more likely the President will play to parochial interests.[201] Third, agencies will alter their behavior too. As the cost of complying with an executive order increases, compliance will decrease. In addition, to the extent an agency anticipates that a court will be reluctant to uphold an interpretation issued in a formal process if the court had previously rejected that same interpretation issued in *informal* guidance, agencies may abstain from announcing informal interpretations of executive orders.[202] This lag in interpretation may lead to under-enforcement of an executive order and broad uncertainty about what the order means.

Conclusion

Executive orders are crucial in defining and exerting presidential power. But while executive orders can have the force of law, courts have avoided the question of how to determine what an executive order means. This lack of an interpretive methodology is particularly relevant when agencies act pursuant to an executive order, and that agency action ends up in court. While *Chevron*, *Auer*, and their progeny have developed a comprehensive framework for evaluating agency action pursuant to statute or regulation, there is no such framework for executive orders. To create a framework, I examined the four goals underlying judicial evaluations of agency legal interpretations: effectuating lawmaker intent, furthering political accountability, enabling better policy outcomes through technical expertise, and preserving the rule of law. The resulting two-step test satisfies these goals. Moreover, by drawing on existing doctrine, it aspires to be judicially-administrable. But regardless of whether this test is necessarily correct, it is clear that the meaning of presidential directives—which determines their purported legal force—deserves more rigorous analysis than it has so far received.

[200] Kagan, *supra* note 12, at 2333.
[201] Kagan, *supra* note 12, at 2337.
[202] *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1490 (2011) (advocating adding *Mead* as a prerequisite to *Seminole Rock*/*Auer* deference, but describing difficulties with the idea).