Essay

Judicial Review of Agency Noncompliance with Presidential Administration Orders and OMB Circular A-4

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Abstract

President Biden's Executive Order 14,094, Modernizing Regulatory Review, continues the line of presidential directives dating back to the Reagan Administration that centralize the President's control over administrative agencies' regulatory processes. Its express purpose is to ensure well-reasoned, high-quality regulations, but it affords no private right of action to enforce its terms.

The Administrative Procedure Act ("APA") shares a similar goal of achieving reasoned agency decision-making, however, unlike the executive orders, the APA authorizes judicial review and expects courts to set aside agency regulations that are arbitrary and capricious. These two authorities make overlapping demands from agencies, but one eschews judicial review while the other requires it. This creates an issue for courts when plaintiffs bring challenges alleging that an agency's failure to comply with the executive order requires vacating its final rule. Does the court have jurisdiction to consider the compliance failure?

Courts try to bifurcate the issues and dismiss arguments grounded in the executive order. The issues are so intertwined, however, that this approach fails to account for the reality that the President's views on what well-reasoned decision-making requires informs our conception of what good governance looks like and cannot be ignored, regardless of whether the executive order creates a private right of action.

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This Essay argues that Congress has given the courts an imperative under the APA to consider all the relevant facts when reviewing unelected experts' policy decisions. This obligation does not depend on whether the President has created a private right of action through executive order—the APA already does so. It is further argued that courts fail to fulfill Congress's expectations when they put on blinders to the executive orders' requirements; instead, courts should treat noncompliance with presidential directives as persuasive evidence of arbitrary and capricious agency action.

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Introduction

On April 6, 2023, President Biden signed Executive Order No. 14,094, "Modernizing Regulatory Review,"[1] which seeks to promote inclusivity in regulatory policy and more rigorous regulatory analyses.[2] Executive Order No. 14,094 ("Biden EO") represents the beginning of a new chapter in the story of "presidential administration," first told by then-Professor Elena Kagan.[3] The development of presidential administration traces its lineage through what this Essay refers to as "the presidential administration orders," back to President Ronald Reagan's Executive Order No. 12,291 ("Reagan EO"),[4] which gave way

1 Exec. Order No. 14,094, 3 C.F.R. 369 (2024).

2 *See id.*

3 *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001) (detailing a history of the shift toward presidents more closely overseeing and controlling the administrative state).

4 Exec. Order No. 12,291, 3 C.F.R. 127 (1982); *see also* Kagan, *supra* note 3, at 2272–78 (explaining the history of presidents' struggle to influence agencies and how Reagan's EO was the first of its kind to change the dynamic between presidents and executive agencies).

to President Clinton's Executive Order No. 12,866 ("Clinton EO")[5] and, later, President Obama's Executive Order No. 13,563 ("Obama EO").[6] Each of these represent different iterations of the same tool used to manage the process of regulatory rulemaking across the executive agencies; the Biden EO incorporates the Clinton and Obama orders by reference.[7] The core tenets of the orders on presidential administration have remained constant and transcended the political party of the President issuing them.[8] Each order has thus represented not a change in political ideology, but a concentration of power in the hands of the President, his staff, and the Office of Management and Budget ("OMB").[9]

Under the Biden EO, "[s]ignificant regulatory action[s]," those which require a complete regulatory impact analysis ("RIA"), are redefined as actions resulting in $200 million of annual economic impact, double the previous threshold.[10] Additionally, it requires earlier public engagement that is more robust and inclusive of historically marginalized communities.[11] To further these engagement efforts, it directs the Administrator of the Office of Information and Regulatory Affairs ("OIRA")—a powerful component within OMB—to consider guidance or tools to modernize the notice-and-comment process, including through technological changes like artificial intelligence.[12]

Finally, and perhaps most contentiously, the Biden EO will revolutionize the way that agencies conduct their cost-benefit analyses ("CBA").[13] It requires CBA to include "distributive impacts and equity;" and further instructs OMB to publish a new version of Circular A-4, the lengthy 2003 document meticulously detailing how executive agencies are to conduct their RIA.[14] After conducting a process of internal and external engagement, OMB released the updated Circular A-4 on

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5 Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

6 Exec. Order No. 13,563, 3 C.F.R. 215 (2012) (collectively these orders will be referred to as "the presidential administration orders").

7 *See* Exec. Order No. 14,094, 3 C.F.R. 369 (2024). Though not binding upon the independent agencies, they provide meaningful guidance to them. *See* Kagan, *supra* note 3, at 2288.

8 *See* Kagan, *supra* note 3, at 2247–49.

9 *See id.*

10 *Compare* Exec. Order No. 14,094, 3 C.F.R. 369 (2024) (amending the threshold amount for "[s]ignificant regulatory action" at $200 million), *with* Exec. Order No. 12,866, 3 C.F.R. 641–42 (1994) (setting the threshold amount for "[s]ignificant regulatory action" at $100 million).

11 *See* Exec. Order No. 14,094, 3 C.F.R. 369–70 (2024).

12 *See id.*

13 *See id.* at 21,880–81; *see also* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-4 (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/RC3Z-GMVE].

14 Exec. Order No. 14,094, 3 C.F.R. 371 (2024) (quoting Exec. Order No. 12,866, 3 C.F.R. 639 (1994)).

November 9, 2023.[15] The new Circular A-4 requires CBA to include the social cost of carbon, updated discount rates, and the tallying of global costs and benefits rather than just domestic.[16]

The Biden EO, like each of its predecessors, expressly disclaims the creation of "any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States."[17] Courts have interpreted this language to mean that the presidential administration orders offer no cause of action and are, therefore, not subject to judicial review.[18] This language might suggest that the presidential administration orders are of little consequence to the practice of administrative law before Article III courts. However, this Essay demonstrates why that is not the case.

The Administrative Procedure Act ("APA")[19] has often been called a "superstatute" because of how it structures and influences the whole of government in ways akin to the Constitution.[20] As with the Constitution, there has been a movement to return our jurisprudence back to the original understanding of those who ratified it, known as "APA originalism."[21] Even a staunch APA originalist must acknowledge, however, that the Act's requirements of agencies may change over time because "[w]hat is 'arbitrary' depends on what is understood and known."[22] And what is understood and known is frequently uncovered by actions that agencies undertake pursuant to the presidential administration orders, like quantitative CBA.[23]

When courts review agency regulations under the APA, they seek to ensure that the agency engaged in "reasoned decision-making" to reach its conclusion.[24] The court is not invited to substitute its policy

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15 *See* Off. of Mgmt. & Budget, *supra* note 13.

16 *See id.* at 8–9, 75–81. Discount rates adjust quantitative analysis to appropriately weigh the timing of when costs and benefits will be realized. *Id.* at 75.

17 Exec. Order No. 14,094, 3 C.F.R. 371 (2024); Exec. Order No. 12,291, 3 C.F.R. 133–34 (1982); Exec. Order No. 12,866, 3 C.F.R. 649 (1994); Exec. Order No. 13,563, 3 C.F.R. 217 (2012).

18 *See, e.g.*, Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); Meyer v. Bush, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993); Helicopter Ass'n Int'l, Inc. v. FAA, 722 F.3d 430, 439 (D.C. Cir. 2013).

19 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

20 *See* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 Admin. L. Rev. 807, 808 (2018).

21 *See id.* at 809.

22 Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 Harv. Env't L. Rev. 1, 8 (2017).

23 The purpose of conducting CBA is to gather information, which increases knowledge and transparency about proposed regulations and their impacts. *See* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1489 (2002).

24 Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). The D.C. Circuit did not actually mention the APA in this case, but it has become recognized as a critical part of

views for those of the agency when determining whether a decision was arbitrary and capricious.[25] The presidential administration orders share the APA's objective of improving the quality of decision-making.[26] Circular A-4's attention to every detail of regulatory analysis is just one demonstration of this.[27] But as Professor Cass Sunstein, a former Director of OIRA, has concluded in an allusion to a famous Justice Oliver Wendell Holmes Jr.'s dissent: "If the Constitution does not enact Mr. Herbert Spencer's Social Statics," then "the APA [does not] enact Office of Management and Budget . . . Circular A-4[.]"[28] In other words, though both the APA and the presidential administration orders promote "reasoned decision-making," the term's use in each case is not necessarily coextensive.

Envision a government in which presidential administration and OMB were absent—what would reasoned decision-making entail? Which activities of the administrative state are required by the APA, and which obligations would disappear in the absence of the presidential administration orders? Answering these questions helps reveal the contours of where power over the administrative state rests. Although the presidential administration orders eschew the creation of judicially enforceable rights, it may nevertheless be the case that in requiring agencies to engage in certain practices, such practices become customary elements of good governance—the state of the art—thereby raising the floor on what reasoned decision-making requires under the APA.[29] Knowing what is required by executive order but not by the original APA—and where there is room for argument—is important for any litigant challenging regulatory actions.

This Essay proceeds in two parts. Part I provides background on the development of the requirement in administrative law that agencies engage in "reasoned decision-making" to ensure their actions

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the historical development of arbitrary and capricious review. *See infra* note 57 and accompanying text.

25 *See* 5 U.S.C. § 706(2)(A); *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

26 *See* Exec. Order No. 14,094, 3 C.F.R. 371 (2024) (directing OMB to update Circular A-4 with the goal of "[i]mproving [r]egulatory [a]nalysis"); *see also* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (issued "in order to . . . [e]nsure well-reasoned regulations"); Exec. Order No. 12,866, 3 C.F.R. 639 (1994) ("Each agency shall . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."); Exec. Order No. 13,563, 3 C.F.R. 215 (2012) ("[E]ach agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify) . . . .").

27 *See* Off. of Mgmt. & Budget, *supra* note 13, at 3–4.

28 Sunstein, *supra* note 22, at 9.

29 *See id.* at 8 ("It may not have been arbitrary to refuse to assign a value to statistical life in 1960, or to use a value that would seem hopelessly ill-informed by 2017; but in 2017, the refusal to assign such a value, or the use of a hopelessly ill-informed value, could indeed be arbitrary.").

are nonarbitrary. It explores how the D.C. Circuit, which was chiefly responsible for the development of the "hard look review" doctrine, debated the proper role of judges as it relates to the federal bureaucracy. It also discusses the impact of the presidential administration orders on control over agencies and the idea of what well-reasoned regulatory analysis entails. The discussion presents a problem: both the APA and the presidential administration orders conceptualize what reasoned decision-making looks like, but the two do not perfectly overlap. This poses a challenge to any attempt to argue an agency's action is invalid because it failed to comply with a presidential order. It may very well be the case that the agency's noncompliance is arbitrary, but if that is to have any legal effect, it must be because the APA recognizes it as such.[30]

Part II attempts to unravel what is required by reasoned decision-making under the APA versus under the presidential administration orders and Circular A-4. Courts have typically sidestepped the issue in cases challenging agency noncompliance with the executive orders by finding no right to judicial review.[31] This Essay argues that this approach abandons the judiciary's responsibility under the APA, as determined by the D.C. Circuit debates, to ensure decisions are well-reasoned. Moreover, it shies away from confronting the reality that our conceptions of reasonableness and arbitrariness are inevitably informed by the presidential administration orders, even though they disclaim the creation of procedural or substantive rights. In place of this approach, this Essay proposes an alternative in which courts take notice of the requirements of the presidential administration orders and Circular A-4 and consider agency noncompliance as persuasive evidence of arbitrary and capricious decision-making under APA section 706(2)(A).

I. The Development of the "Reasoned Decision-making" Requirement of Agencies

Since the dawn of the administrative state, there has been a tension between Americans' commitment to democratic pluralism and the efficiencies and benefits created by trusting unelected, expert officials to make public policy.[32] To temper this problem, both the President and the courts have developed requirements that agencies engage in reasoned decision-making and bring their expertise to bear on an issue. The courts have done this through the development of multiple review doctrines,

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30 *See id.* at 8–9.

31 *See infra* Section II.A.

32 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1676–79 (1975).

chief of which is the so-called "hard look" review. The President has done this by issuing the presidential administration orders and expanding OMB's role in regulatory policy, particularly through Circular A-4. This Part details the development of the reasoned decision-making requirements as one coherent chronology.

A. The D.C. Circuit Debates

In 1946, Congress, seeking to require uniform standards from the burgeoning bureaucracy borne by the New Deal, passed the APA.[33] The APA conceptualized agency action as falling into two primary categories: rulemaking and adjudication.[34] This Essay deals with the former. Additionally, in APA section 702,[35] Congress authorized judicial review of agency action under standards set forth in section 706.[36] These standards laid the foundation for the development of the requirement of reasoned decision-making, which is used to determine whether an agency's action was impermissible.[37] Although the APA empowered courts to "hold unlawful and set aside"[38] agency actions for a host of reasons, it is the justification provided in section 706(2)(A) that has become the most ubiquitous: agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39]

But arbitrary and capricious review did not become fashionable until decades after the APA's enactment. In 1946, the public shared positive sentiments toward agency experts overall, seeing them as harbingers of popular New Deal programs.[40] Views of the courts, on the other hand, were negatively tainted by the judiciary's conservative bend and disastrous *Lochner v. New York*[41] decision that struck down worker safety protections under a now discredited theory that they violated business' economic substantive due process.[42] Citations to the APA were made sparingly until the era of the Cold War, when the failures of "the best and the brightest" minds made the public disenchanted with

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33 *See* 5 U.S.C. §§ 551–559, 701–706.

34 *See id.* §§ 553–554.

35 *See id.* § 702.

36 *See id.* § 706.

37 *See* Citizens to Pres. Overton Park, Inc., v. Volpe, 401 U.S. 402, 417 (1971) (requiring the Secretary of Transportation to state the reason for his decision to build a highway through a park).

38 5 U.S.C. § 706(2).

39 *Id.* § 706(2)(A); *see, e.g.*, Alexander Mechanick, *The Interpretative Foundations of Arbitrary or Capricious Review*, 111 Ky. L.J. 477, 480 (2022) ("The importance of 'arbitrary [or] capricious' review under the Administrative Procedure Act (APA) § 706(2)(A) can hardly be overstated." (alteration in original) (quoting 5 U.S.C. § 706)).

40 *See* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 Geo. L.J. 2599, 2601–03 (2002).

41 198 U.S. 45 (1905), *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

42 *See* Warren, *supra* note 40, at 2601–03.

agency expertise.[43] Furthermore, people feared that agencies had been "captured" by special interest groups.[44]

As distrust of agency expertise grew, courts began to wrestle more deliberately with how judicial review of the administrative state should function. Even so, they often neglected to ground their administrative law decisions in the APA.[45] The earliest scrutiny of agency decision-making focused primarily on whether an agency had adequately completed the record, grounded its decision in the facts found, and considered relevant parts of the problem, especially those parts required by its organic statute.[46]

During this transformative era in administrative law, three judges of the D.C. Circuit—David Bazelon, Harold Leventhal, and J. Skelly Wright—advanced competing visions of the judicial role in the administrative context.[47] Judge Bazelon recognized that judges are generalists, thus he argued their role should be limited to rigorously ensuring agency experts adhere to procedures required by law.[48] Judge Leventhal took a different view. He believed that courts have a duty to study the agency record, explicitly called into focus by the APA, and cannot defer when the job is difficult.[49] If an agency matter is truly too technical, it is incumbent upon Congress to create specialized courts.[50] Otherwise, judges are required to investigate the substantive matters underlying agency decision-making.[51] Judge Wright struck a middle approach emphasizing the importance of congressional intent, wary of requiring additional procedures more demanding than what Congress prescribed.[52] Despite this hesitation to dictate additional procedures, he insisted that judges "review agency action aggressively if the court believe[s] that an agency [is] not carrying out congressional will."[53]

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43 *Id.* at 2602 (quoting DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1972)).

44 *See* Kagan, *supra* note 3, at 2264–69 (quoting ROBERT C. FELLMETH, THE INTERSTATE COMMERCE COMMISSION 15–22 (1970)).

45 *See, e.g.*, Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 608–09, 611 (2d Cir. 1965); Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 841 (D.C. Cir. 1970).

46 *See, e.g.*, *Scenic Hudson*, 354 F.2d at 612.

47 *See* Warren, *supra* note 40, at 2600. The D.C. Circuit was uniquely positioned to immerse itself in administrative law issues after the removal of its criminal docket, especially given its geographic area of jurisdiction. *See id.* at 2604–05.

48 *See id.* at 2617–26.

49 *See* Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976); *id.* at 69 (Leventhal, J., concurring).

50 *See id.* at 68 (Leventhal, J., concurring) ("Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions. It may be that some judges are not initially equipped for this role . . . . If technical difficulties loom large, Congress may push to establish specialized courts.").

51 *See id.* at 69.

52 *See* Warren, *supra* note 40, at 2626.

53 *Id.*

All three judges have their fingerprints on the doctrine of "hard look review," the approach courts take to review agency action for reasoned decision-making.[54] This has led to a lack of clarity about whether hard look review is an investigation into the substantive or procedural aspects of agency rulemaking. The distinction is an important one because the Supreme Court has held that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies."[55] This means that if hard look review is a procedural review, as Judge Bazelon argued, it has a narrower role for judges than if it is an investigation into an agency's substantive reasoning.

Judge Leventhal was the first to coin the phrase "hard look" in the context of reviewing agency decision-making.[56] He zeroed in on the procedural versus substantive dichotomy, writing that courts must "intervene not merely in case of procedural inadequacies," but also when there are signs that "the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[57] Leventhal undoubtedly understood his version of hard look review as substantive, not procedural.[58]

Judge Bazelon contrastingly argued that judges should not "dig deeper into the technical intricacies of an agency's decision," but that they must "go further in requiring the agency to establish a decision-making *process* adequate to protect the [public interest]."[59] Judge Bazelon's approach is somewhat at odds with the text of the APA, however, which lists the review standard for arbitrary and capricious action in section 706(2)(A) separately from section 706(2)(D) which already covers agency actions taken "without observance of procedure required

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54 Though Leventhal is largely credited with the doctrine's creation and claimed to be the "sponsor" of it. *Id.* at 2616–17 (quoting WNCN Listeners Guild v. FCC, 610 F.2d 838, 859 (D.C. Cir. 1979) (Leventhal, J., concurring), *rev'd by* FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)).

55 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 524 (1978).

56 *See* Pikes Peak Broad. Co. v. FCC, 422 F.2d 671, 682 (D.C. Cir. 1969) ("We are satisfied that the Commission gave petitioners' predictions a hard look."); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (finding when a permit applicant's allegations are "stated with clarity and accompanied by supporting data," they should not receive "perfunctory treatment, but must be given a 'hard look'" (quoting *Pikes Peak Broad. Co.*, 422 F.2d at 682)).

57 Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (footnote omitted).

58 *See* Ethyl Corp. v. EPA, 541 F.2d 1, 69 (D.C. Cir. 1976) (Leventhal, J., concurring) ("The substantive review of administrative action is modest . . . . Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably.").

59 Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, J., concurring) (emphasis added).

by law."[60] If arbitrary and capricious review is only a procedural hard look, then the two subsections are redundant.[61]

B. The Rise of Presidential Administration

While the debate over what reasoned agency decision-making should look like raged on in the D.C. Circuit, a new actor weighed in on the issue: President Ronald Reagan. The Reagan Administration entered government with a distinctly antiregulatory point of view.[62] In Reagan's eyes, the administrative state was to blame for all of America's ills.[63] From labor protections to airline safety to environmental regulations, Reagan took every measure he could to remove the administrative state's influence.[64] He famously quipped that the scariest words someone could say were, "I'm from the government, and I'm here to help."[65]

The Reagan EO was the first of what have been called in this Essay "the presidential administration orders."[66] Today, the term "presidential administration" may almost seem like a redundancy, meaning nothing different than just "administration." That was not so in the 1980s.[67] In fact, the President's role in managing the bureaucracy was quite limited and faced stiff competition from Congress, experts, and interest groups for control.[68] Each of these other competitors' authority predominated at some time or another in the 20th century.[69] As noted previously, prior to this point, the public had viewed the administrative state favorably, understanding the career employees who worked in it to be neutral

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60 5 U.S.C. § 706(2).

61 Such a redundancy ought to be avoided as "[i]t is [courts'] duty 'to give effect, if possible, to every clause and word of a statute.'" Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

62 *See* Jefferson Decker, *Deregulation, Reagan-Style*, Regul. Rev. (Mar. 13, 2019), https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style [https://perma.cc/P5V6-VJ3X] (explaining that the two kinds of regulation "have been attacked with different levels of intensity by administrations that have made a political commitment to deregulation, from the Administration of President Ronald Reagan").

63 *See id.*

64 *See id.*

65 *News Conference—I'm Here To Help*, Ronald Reagan Presidential Found. & Inst., https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/news-conference-1/ [https://perma.cc/YVY5-8UTK].

66 *See* Kagan, *supra* note 3, at 2277 (describing how Reagan created "a centralized mechanism for review of agency rulemakings unprecedented in its scale and ambition—and soon shown to be unprecedented in its efficacy as well, though perhaps still not to the degree its advocates desired").

67 *See id.* at 2253–55.

68 *See id.*

69 *See id.*

experts.[70] The President's relationship with the executive agencies looked more like today's relationship with the independent agencies in the sense that it allowed bureaucrats to act relatively autonomously.[71]

The Reagan EO, however, completely overhauled the dynamic between the President and the executive agencies. It leveraged what, to that point, had been the relatively dormant powers of OMB and OIRA to oversee all the regulatory actions of the executive agencies.[72] The Reagan EO provided additional review procedures for any "[m]ajor rule[s]," which included any regulations "likely to result in . . . [a]n annual effect on the economy of $100 million or more;" cause "[a] major increase in costs or prices"; or have "[s]ignificant adverse effects on competition."[73] Key among these procedures was the requirement of an RIA which required, inter alia, a CBA, a description of alternative approaches and why they were not adopted, and, if relevant, the legal reasons why the rule should not be based on costs alone.[74]

Then-Professor Elena Kagan wrote the following in her seminal work coining the term "presidential administration":

> Although the order and the legal opinion supporting it explicitly disclaimed any right on the part of OMB, or the President himself, to dictate or displace agency decisions, the order effectively gave OMB a form of substantive control over rulemaking: under the order, OMB had authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process.[75]

Ironically, the Reagan EO intentionally gummed up the works of an administrative state that the President had criticized for being inefficient.[76] Although the President's power to manage the executive agencies through executive order arises from the Constitution,[77] not the APA, it is nevertheless the case that each embodies a commitment to promoting an ideal of reasoned decision-making; the Reagan EO's stated purpose is to "[e]nsure well-reasoned regulations."[78]

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70 *See supra* note 40 and accompanying text.

71 *See* Kagan, *supra* note 3, at 2272–74.

72 *See id.* at 2278.

73 Exec. Order No. 12,291, 3 C.F.R. 127–28 (1982).

74 *See id.* at 128–30.

75 Kagan, *supra* note 3, at 2278 (footnote omitted).

76 *See id.* at 2249.

77 *See id.* at 2319–31 (discussing the constitutionality of the President's control over the administrative state, particularly as it concerns the President's directive authority).

78 Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

C. The Supreme Court Weighs In

President Reagan's aggressive antiregulatory philosophy overreached in at least one instance, when he directed the National Highway Traffic Safety Administration ("NHTSA") to reverse course on issuing a rulemaking initiated by the previous administration requiring automatic seatbelts in cars.[79] In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[80] the Supreme Court found the agency had crossed the line into arbitrary and capricious action.[81] In doing so, the Court provided today's leading authority on what the hard look review should include: an examination of whether the agency (1) "relied on factors which Congress ha[d] not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," or (3) "offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be ascribed to . . . agency expertise."[82] Additionally the Court required agencies to articulate the basis of their decision, explain any deviations from prior regulatory policy, and consider reasonable alternatives.[83]

Decided only two years after President Reagan's announcement of the Reagan EO, it should not escape attention that *State Farm* was the first reported Supreme Court case to reference an agency's RIA.[84] Although the Reagan EO disclaimed the creation of a right to judicial review, the decision indicates that if requirements of the Executive Order are going to form the basis for an agency's decision, then they will become de facto reviewable under arbitrariness review.[85] The APA does not require agencies to conduct a formal RIA, but it does impose an expectation that if an agency is to do so, it must be well-reasoned and nonarbitrary.[86] Since the beginning of the era of presidential

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79 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34, 46, 59 (1983).

80 463 U.S. 29 (1983).

81 *See id.* at 56.

82 *Id.* at 43.

83 *See id.* at 42–43, 46, 51.

84 *See id.* at 48; Catherine M. Sharkey, State Farm *"With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. Rev. 1589, 1619 (2014) ("[R]egulatory impact analyses should—and as a practical matter do—play a role in substantive judicial review of the underlying regulation under *State Farm* arbitrary and capricious review."). In the period between the issuance of the Reagan EO and the *State Farm* opinion, none of the cases reviewing agency actions for reasoned decision-making referred to an agency's RIA, suggesting that *State Farm* was the first to do so. *See, e.g.*, Env't Def. Fund, Inc. v. Higginson, 655 F.2d 1244 (D.C. Cir. 1981); LeFebre v. Westinghouse Elec. Corp., 549 F. Supp. 1021 (D. Md. 1982), *rev'd by* 747 F.2d 197 (4th Cir. 1984); Marinette Marine Corp. v. Dep't of Navy, 527 F. Supp. 587 (D.D.C. 1981), *overruled by* Amertex Enters., Ltd., SBA No. 2442 (June 30, 1986); Curtis, Inc. v. Interstate Com. Comm'n, 662 F.2d 680 (10th Cir. 1981).

85 *See* Sharkey, *supra* note 84, at 1618 n.125 and accompanying text.

86 *See* 5 U.S.C.§ 706(2)(A).

administration, the APA's rejection of arbitrary and capricious agency actions has left the door open to challenges to agency actions required by presidential orders.

The Supreme Court stopped short, however, of explicitly adopting any of the D.C. Circuit jurists' views of whether the hard look review constituted a procedural or substantive review.[87] The closest the opinion comes to broaching the topic is in its reaffirmation of its prior ruling that the APA imposes the maximum procedural requirements of agencies.[88] The Court's reassurance that it did "not require . . . any specific procedures which NHTSA must follow," gave a strong implication that the hard look review is substantive.[89] However, ambiguity over this point remained, as "*State Farm*'s hard look [did] not rest on the same philosophic basis as Judge Bazelon's, Judge Leventhal's, or Judge Wright's reviews."[90] Professor Sunstein writes that the opinion "endorses the primary elements, both substantive and procedural, of the hard-look doctrine."[91]

The consequences of this failure to choose between the D.C. Circuit jurists' approaches revealed themselves in the Supreme Court's 2016 decision in *Encino Motor Cars, LLC v. Navarro*.[92] There, Justice Anthony Kennedy, writing for the majority, described *State Farm*'s requirement that "an agency must give adequate reasons for its decisions" as providing "[o]ne of the basic *procedural* requirements of administrative rulemaking."[93] Had the *State Farm* court explicitly adopted Judge Leventhal's approach, this confusing line of judicial precedent likely would have been avoided.

Nevertheless, *State Farm* remains the most detailed guidance the Supreme Court has provided on arbitrary and capricious review. The 20th century began with a popular New Deal administrative state on the rise and the judiciary in a historically weak position following *Lochner*. By the century's conclusion, roles were reversed with the public trust in agency expertise dwindling and the Supreme Court flexing its muscle to methodically conduct a hard look into agencies' decision-making. This hard look review represented only one check on the administrative state, however. At the same time, successive presidents of both parties tightened their grip on the regulatory state and introduced their own expectations of what high-quality bureaucratic

87 *See State Farm*, 463 U.S. at 50–51.

88 *See id.*

89 *Id.*

90 Warren, *supra* note 40, at 2632.

91 Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 Sup. Ct. Rev. 177, 210 (1983).

92 579 U.S. 211 (2016).

93 *Id.* at 221 (emphasis added).

decision-making entails. The interplay between these two checks on the administrative state is the focus of the remainder of this Essay.

II. Disentangling the Executive Orders from the APA

This Part proceeds in two Sections. Section II.A reviews the body of caselaw that has concluded that judicial review of agency actions that fail to comply with the presidential administration orders and Circular A-4 is unavailable. This Section argues that discarding these matters as unreviewable is an abdication of the duty Congress entrusted to the courts under the APA to strike down arbitrary and capricious actions. Section II.B argues a better alternative is available which would allow courts to treat noncompliance with the presidential administration orders or Circular A-4 as persuasive evidence of arbitrariness under the APA. This approach does not require abrogating past decisions; it helps the legal system conform to people's expectations about how agencies should behave, and it still respects the separation of powers.

A. The Traditional Approach: Judicial Review Unavailable

The presidential administration orders, which direct agencies to conduct RIAs, disclaim the creation of "any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States."[94] Likewise, OMB Circular A-4, which provides the methodology for conducting RIAs, portrays itself as merely a "guidance," not a legally binding document.[95] The new Circular A-4 states that "[a] high-quality regulatory analysis is designed to inform policymakers, other government stakeholders, and the public about the effects of alternative actions."[96] It follows naturally that a good RIA is something one would expect from an agency engaged in reasoned decision-making. Similarly, one might also plausibly wonder whether the APA's reasoned decision-making requirement demands an RIA as well.

This was not the conclusion reached in *Michigan v. Thomas*[97] when the State of Michigan challenged the Environmental Protection Agency's ("EPA") disapproval of rules Michigan had proposed to mitigate fugitive dust emissions—a reversal from the position EPA had previously adopted.[98] Michigan raised two arguments relevant here: first, that the agency had not adequately considered the problem nor explained the reasons for its change in position, and second, that the

94 *See, e.g.*, Exec. Order No. 14,094, 3 C.F.R. 369, 371 (2024).

95 Off. of Mgmt. & Budget, *supra* note 13, at 2.

96 *Id.*

97 805 F.2d 176 (6th Cir. 1986).

98 *See id.* at 180.

agency violated the Reagan EO by failing to conduct an RIA.[99] The Sixth Circuit ruled against Michigan, finding that EPA had articulated a reasonable basis for its action in its final rule and that EPA's failure to conduct an RIA was judicially unreviewable under the express terms of the Reagan EO.[100] The court recognized the Reagan EO served only as an internal management tool, and the President "clear[ly] and unequivocal[ly] inten[ded] that agency compliance with Executive Order 12,291 not be subject to judicial review."[101] Similar challenges since have met the same fate.[102]

This outcome is surprising considering that the Supreme Court has found that a complete failure to consider costs at all is arbitrary and capricious.[103] To reconcile these decisions, it is necessary to conclude that there are various reasonable ways to consider costs, of which Circular A-4 is but one. But is it possible that an inadequate consideration of costs, as demonstrated by noncompliance with an executive order or Circular A-4, is functionally the same as the failure to weigh costs at all? This does not seem to be the case either.

In 2021, the Eleventh Circuit considered a petitioner's argument that an agency's RIA failed to abide by the requirements of the presidential administration orders, and thus its regulation was invalid.[104] The court easily disposed of the issue by engaging in a three-part test to conclude that judicial review was unavailable under the express terms of the presidential administration orders.[105] In May 2023, the Eastern District of Virginia, following the Eleventh Circuit's framework, rejected a challenge to a Bureau of Alcohol, Tobacco, and Firearms ("ATF")

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99 *See id.* at 184–87.

100 *See id.*

101 *Id.* at 187.

102 *See, e.g.*, Meyer v. Bush, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("Executive Order [12,866] 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. An Executive Order devoted solely to the internal management of the executive branch—and one which does not create any private rights—is not, for instance, subject to judicial review."); Helicopter Ass'n Int'l, Inc. v. FAA, 722 F.3d 430, 439 (D.C. Cir. 2013) ("To the extent HAI contends that the FAA violated Executive Order 12,866, . . . which require[s] that the agency perform cost benefit analyses for each proposed regulation, . . . an agency's failure to comply with th[is] order[] [is not] subject to judicial review.").

103 *See* Michigan v. EPA, 576 U.S. 743, 751–54 (2015). While this decision postdates *Michigan v. Thomas*, the finding of unreviewability has persisted. *See supra* note 102.

104 *See* Nat'l Mining Ass'n v. United Steel Workers, 985 F.3d 1309, 1326 (11th Cir. 2021).

105 *See id.* at 1327. This three-part test asked: (1) does the EO have specific statutory foundation, (2) does either the statute or EO preclude judicial review, and (3) is there an objective standard by which the agency's actions can be judged? *Id.* As later discussed, this analysis is misplaced because the APA's requirement to engage in reasoned decision-making does not depend upon whether judicial review of compliance with an executive order is available.

interpretive regulation defining handguns equipped with certain braces as rifles.[106]

The plaintiff framed the issue somewhat differently, arguing that the RIA's failure to monetize costs and consider negative externalities was a violation of the executive orders and Circular A-4 *in addition* to the APA.[107] Nevertheless, the district court analyzed the question of whether ATF's alleged failure to conduct an adequate RIA under both the Clinton EO and OMB Circular A-4 should require the rule be set aside separately from its analysis of whether the agency action had been arbitrary and capricious.[108] The court wrote:

> [W]hile Defendants' regulatory analysis may have room for improvement, the law does not require perfection . . . . [S]ince '[c]ompliance with [OMB] Circular A-4 is not required by any statute or regulation,' including the APA, compliance with the circular is not subject to judicial review. Similarly, EO 12,866 provides no private right of action, meaning that non-compliance with the order is also not subject to judicial review.[109]

The court's analysis attempts to handle the noncompliance issues separately from the APA issues as if the two exist in separate universes. This leads to an incongruency in the opinion in which one part, focused on the executive order and Circular A-4, concludes that the agency's analysis may have room for improvement while another, focused on the APA, concludes the agency engaged in reasoned decision-making.[110] The court's excuse that "the law does not require perfection" does not explain why imperfections in an RIA (or other requirements of the presidential administration orders) should not at least be taken into account when deciding on arbitrariness.[111]

An agency's failure to comply with the presidential administration orders and Circular A-4 is deeply concerning since these documents encapsulate what the President and OMB understand to be the best standards for reasoned decision-making.[112] These tools provide benchmarks of good governance to "improve the internal management of the

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106 Miller v. Garland, 674 F. Supp. 3d 296, 306–07 (E.D. Va. 2023).

107 *See* Application for a Nationwide Temporary Restraining Order and a Preliminary and Permanent Injunction at 10–15, *Miller*, 674 F. Supp. 3d 296 (No. 1:23-cv-195).

108 *See Miller*, 674 F. Supp. 3d at 306–08.

109 *Id.* at 306–07 (citations omitted).

110 *See id.* at 306–11.

111 *See id.* at 306.

112 The new Circular A-4 underwent lengthy interagency review, public comment, and peer review to develop a product "designed to assist analysts in regulatory agencies by providing guidance on conducting high-quality and evidence-based regulatory analysis." *See* OFF. OF MGMT. & BUDGET, *supra* note 13, at 1–2.

Federal Government"—a state of the art, if you will.[113] The judiciary's rigid approach to the issue starts and ends with whether judicial review is available; this fails to consider how the reasoned decision-making requirements under the presidential administration orders and Circular A-4 inform and overlap with those of section 706(2)(A). The APA espouses Congress's intent that the judiciary assist in guaranteeing well-reasoned decision-making by the federal bureaucracy.[114] Courts abdicate this duty by hiding behind jurisdictional barriers constructed higher than legally required.

B. A Proposed Alternative: Persuasive Evidence of Arbitrariness

Contrast the above cases with *California v. Bernhardt*,[115] a case in which the Bureau of Land Management ("BLM") was sued for its recission of a previous rule that had addressed waste prevention in oil and natural gas production.[116] While reaching its recission decision, the BLM claimed to be limited to considering domestic costs and prohibited from considering global costs.[117] The district court rejected this regulatory approach as arbitrary and capricious.[118] In support of its conclusion, the court highlighted how the presidential administration orders require agency RIAs to consider "'*all* costs and benefits' of regulatory actions."[119] The court did not go through the process of determining whether the executive order itself was judicially reviewable. Instead, it simply used noncompliance with one of its requirements as a barometer of whether reasoned decision-making under the APA had taken place.[120] The opinion silently recognizes that the executive order need not be judicially enforceable for it to be judicially noticeable.[121]

The approach in *Bernhardt*, which essentially treats noncompliance with the presidential administration orders and Circular A-4 as persuasive evidence of arbitrariness, contains several advantages over dismissing these matters as unreviewable. The approach resolves the tension between the competing authorities on reasonableness while maintaining respect for the separation of powers. It cannot be avoided that requiring certain procedures, like RIA, alters the universe of what is known. This inherently changes what the APA substantively requires

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113 Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) (quoting Exec. Order 12,291, 3 C.F.R. 133 (1982)).

114 *See* 5 U.S.C. §§ 702, 706.

115 472 F. Supp. 3d 573 (N.D. Cal. 2020).

116 *See id.* at 582–83.

117 *See id.* at 612.

118 *See id.* at 614.

119 *Id.* at 612 (quoting Exec. Order 12,866, 3 C.F.R. 638 (1994)).

120 *See id.*

121 *See id.* at 611–12.

because "[w]hat is 'arbitrary' depends on what is understood and known."[122] Once this knowledge exists, the APA does not require courts to put on blinders to it. The duty to set aside agency action that is arbitrary and capricious encapsulates a duty to take judicial notice of what is known or readily knowable.

This duty does not depend on the President's creation of any procedural or substantive rights. Accordingly, adopting this approach would not require abrogating the body of cases finding that judicial review is unavailable under the presidential administration orders. These decisions are grounded in the express language that disclaims the creation of "any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States."[123] Treating noncompliance as persuasive evidence of arbitrariness, however, does not require the creation of any right or benefit. A right to nonarbitrary agency action *already exists*, thanks to section 706(2)(A).[124]

In *State Farm*, the NHTSA conducted an RIA not because the APA required it but because the Reagan EO did.[125] Once the RIA was conducted, however, the Supreme Court found a judicial obligation under the APA to give a "hard look" at the agency action to ensure that the analysis was the product of reasoned decision-making; this was despite the fact that the Reagan EO eschewed the creation of any right of judicial review.[126] *State Farm* shows that when the President requires agencies to follow certain procedures, those agencies have an obligation under the APA to carry out the substantive elements of those procedures in a nonarbitrary manner.[127]

This duty is a substantive one, which means that failure to comply with the precise procedure directed by the presidential administration orders and Circular A-4 is not a death knell for agency action. However, procedural requirements are imposed to advance substantive goals.[128] The D.C. Circuit debates, as well as the ambiguity over the dichotomy created by *State Farm* and *Encino Motor Cars*, demonstrate that the two cannot always be readily distinguished.[129] In these instances, it is appropriate for judges to treat the failure to follow procedural requirements under the presidential administration orders and Circular A-4 as persuasive evidence of arbitrariness. As merely persuasive evidence, it

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122 Sunstein, *supra* note 22, at 8.

123 Exec. Order No. 14,094, 3 C.F.R. 371 (2024).

124 5 U.S.C. § 706(2)(A).

125 *See* Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983).

126 *See id.* at 48–52; Exec. Order No. 12,291, 3 C.F.R. 133–34 (1982).

127 *See supra* note 84 and accompanying text.

128 President Clinton recognized that in a divided government, controlling the administrative process was the best method he had available for achieving his domestic policy goals. *See* Kagan, *supra* note 3, at 2281–82.

129 *See supra* notes 88–93 and accompanying text.

is within the fact finder's discretion to decide how much weight, if any, to afford the agency's noncompliance. All section 706(2)(A) requires is that agencies engage in reasoned decision-making.[130] If this is achieved despite noncompliance with presidential directives, then the APA does not empower courts to undo the agency action or redress the procedural failure on the President's behalf. If the substantive ends are achieved, they may justify the procedural flaws.

Conclusion

Judicial review of agency action will be more faithful to Congress's intent under the APA if an approach that recognizes agency noncompliance with the President's mandates as persuasive evidence of arbitrariness is adopted, and the legal system will better conform to our expectations of what a well-reasoned decision requires.

130 *See supra* Section I.C.