ADMINISTRATIVE LAW — APA REVIEW — NINTH CIRCUIT HOLDS AGENCY ACTION DIRECTED BY EXECUTIVE ORDER ARBITRARY AND CAPRICIOUS. — *Nebraska v. Su*, 121 F.4th 1 (9th Cir. 2024).

Over two decades after then-Professor Elena Kagan published her seminal article *Presidential Administration*,[1] presidential involvement in agency action has increased so much that it might now be best described as presidential domination.[2] The Supreme Court confirmed in *Franklin v. Massachusetts*[3] that the central statute governing agency action, the Administrative Procedure Act[4] (APA), does not apply to the President.[5] But as the President assumes greater authority over agency activity, informally through White House oversight[6] and formally through presidential directives,[7] disentangling presidential action from agency action has become increasingly difficult. Lower courts also disagree on the contours of the President's APA exemption under *Franklin*.[8] Recently, in *Nebraska v. Su*,[9] the Ninth Circuit held that a Department of Labor (DOL) rule implementing an executive order (EO) by President Biden was both reviewable under the APA and arbitrary and capricious. While the majority's holding significantly cabins *Franklin*, the dissent's rebuttal risks hollowing out the APA. The court could have balanced the principles of *Franklin* and the APA by applying *Franklin* to President Biden's exercise of presidential statutory authority while subjecting delegated DOL decisions to arbitrary and capricious review. The case exhibits tensions between a strong view of executive power and congressional and judicial limitations on administrative agencies, which come to a head in the presidential domination era.

The Federal Property and Administrative Services Act[10] (FPASA) vests the President with authority to procure property and services for

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[1] *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (tracing and defending the historical increase in presidential involvement over agency action).

[2] *See, e.g.*, Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 105 (2021).

[3] 505 U.S. 788 (1992).

[4] Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[5] *Franklin*, 505 U.S. at 800–01.

[6] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (noting that "intra-Executive Branch meetings" and "undisclosed Presidential prodding" may impact agency action "in a way the courts could not police").

[7] *See* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2, 6–7 (2002) (detailing bipartisan increase in presidential orders).

[8] *See* William Powell, *Policing Executive Trademark: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71, 103–04 (2020).

[9] 121 F.4th 1 (9th Cir. 2024).

[10] Pub. L. No. 81-152, ch. 288, 63 Stat. 377, 378 (1949) (codified as amended in scattered sections of the U.S. Code).

the federal government.[11] Pursuant to that power, President Biden issued an EO setting a nationwide hourly minimum wage of $15 for federal contractors beginning on January 30, 2022.[12] He directed DOL to implement the order and define "relevant terms" and "exclusions."[13] After a notice and comment period, DOL issued its final rule.[14] Five states sought to enjoin or vacate the new policy, but the U.S. District Court for the District of Arizona granted the government's motion to dismiss.[15] As pertinent here, Judge Tuchi found that the EO fell squarely under the President's *Franklin* exception and was not reviewable under the APA.[16] He further concluded that *Franklin* covered DOL's final rule "to the extent it implements decisions made by the President pursuant to his delegated authority under the FPASA."[17] Four states appealed, claiming that the EO and rule violated FPASA and the major questions doctrine and that the rule violated the APA.[18]

The Ninth Circuit reversed in part, vacated in part, and remanded.[19] Writing for the divided panel, Judge Nelson[20] first held that the "minimum wage mandate" exceeded President Biden's and DOL's statutory authority under FPASA.[21] He found that FPASA's purpose statement[22] is not an independently "operative provision" of the statute.[23] Otherwise, FPASA would confer "unfettered authority [to] the President . . . to implement any procurement policy . . . so long as it has some relation to [FPASA's statutory purposes of] economy and efficiency."[24] Judge Nelson rejected the government's argument that three other statutory provisions authorized the mandate.[25] Next, the court held that the major questions doctrine, which advises courts to "hesitate" before approving "extraordinary" executive assertions of power, did not apply.[26] Since the EO followed a history of Presidents setting federal contractor minimum wage rules under FPASA,[27] it was neither "unheralded" nor a

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11 *See, e.g.*, *Su*, 121 F.4th at 5.

12 Exec. Order No. 14,026, 3 C.F.R. § 550 (2022).

13 *Id.*

14 Increasing the Minimum Wage for Federal Contractors, 3 C.F.R. § 550 (2022).

15 Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *13 (D. Ariz. Jan. 6, 2023).

16 *Id.* at *9.

17 *Id.* at *11.

18 *Su*, 121 F.4th at 5.

19 *Id.* at 17.

20 Judge Nelson was joined by Judge Forrest. *Id.* at 4.

21 *Id.* at 7.

22 40 U.S.C. § 101 ("The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities: (1) Procuring and supplying property and nonpersonal services, and performing related functions including contracting . . . .").

23 *Su*, 121 F.4th at 7, 7–10.

24 *Id.* at 10 (concluding that "[a] statutory purpose statement alone cannot bear that weight").

25 *Id.* at 11.

26 *Id.* at 14 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022)).

27 *Id.* at 5 (citing Exec. Order No. 13,658, 3 C.F.R. § 219 (2015); Exec. Order No. 13,838, 3 C.F.R. § 884 (2019)).

"transformative expansion" of authority under a "long-extant, but rarely used, statute."[28]

Finally, the Court held that DOL's implementing rule was subject to the APA and violated its bar on "arbitrary" or "capricious" agency decisionmaking.[29] Judge Nelson rejected the argument that *Franklin* exempted the DOL rule from arbitrary and capricious review.[30] He began with the text. Since "the APA's language is plain . . . apply[ing] to any 'final agency action,'" it indiscriminately covers agency rulemaking, including rules that implement presidential directives.[31] Surveying precedent, he concluded that caselaw supported APA review of regulations implementing presidential directives.[32] Judge Nelson rejected the district court's concern that agencies would be put in the "untenable position"[33] of choosing between presidential commands and APA requirements, both because such "policy justifications cannot supersede statutory text," and because this view "ignores the dynamic reality of executive branch policy development," in which a "back-and-forth debate" between the President and agencies during rulemaking may actually serve the APA's goal of "reasoned and informed policymaking."[34] As a result, the panel concluded that DOL acted arbitrarily and capriciously in "fail[ing] to consider alternatives" to the $15 minimum wage mandate.[35] Accordingly, the court "vacate[d] the rule under the APA."[36]

Judge Nelson separately concurred, concluding that the major questions doctrine applies to statutes delegating authority to the President.[37] He rejected the argument that the President's enhanced political accountability warrants exempting him from the canon and maintained that "[b]road legislative delegations" to any member of the executive branch "are inherently suspect."[38]

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[28] *Id.* at 14 (quoting West Virginia v. EPA, 142 S. Ct. at 2610).

[29] *Id.* at 14–15 (citing 5 U.S.C. § 706(2)(A)).

[30] *Id.* (citing Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992)).

[31] *Id.* (quoting 5 U.S.C. § 704). Noting that the President is also an "authority of the Government" under the APA, Judge Nelson argued that *Franklin* was wrongly decided as a matter of text, *id.* at 15 n.8 (quoting 5 U.S.C. § 701(b)(1)), and should not be expanded under "[e]ven a purposive approach." *Id.* at 15 (citing Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 86–88 (2020)).

[32] *Id.* at 16 (citing E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 773 (9th Cir. 2018), and Hawaii v. Trump, 878 F.3d 662, 681 (9th Cir. 2017), as cases in which agencies took action pursuant to presidential directives and the Ninth Circuit conducted APA review). Judge Nelson rejected lower court holdings to the contrary as "misapprehend[ing] the APA." *Id.*

[33] *Id.* (quoting Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *10 (D. Ariz. Jan. 6, 2023)).

[34] *Id.*

[35] *Id.* at 15, 17.

[36] *Id.* at 17.

[37] *Id.* at 20 (Nelson, J., concurring).

[38] *Id.* at 17, 17–20 (repudiating the analysis in Mayes v. Biden, 67 F.4th 921, 932–34 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023)).

Judge Sanchez dissented.[39] He found President Biden's EO consistent with past presidential invocations of FPASA.[40] He urged the adoption of a test from other circuits that permits presidential orders so long as there is "a nexus to [FPASA's] stated goals of improving efficiency and economy in federal procurement,"[41] which he found the EO satisfied.[42] Finally, he disputed the panel's APA holding, arguing that "an agency does not act 'arbitrarily and capriciously' by implementing a binding presidential directive."[43] He argued that DOL correctly "decline[d] to consider alternatives it could not modify because those choices would have contravened the President's clear directive, and the President is the head and embodiment of the Executive Branch."[44]

The court's decision that President Biden's EO exceeded his FPASA authority made headlines[45] and created a circuit split over what FPASA allows.[46] But an interesting and underdiscussed aspect of the Ninth Circuit's opinion is its holding that agencies must consider alternatives to a binding presidential directive in order to survive arbitrary and capricious review.[47] This case highlights three types of presidential directives: (1) The President exercises *his* statutorily delegated powers to set policy but requests agency implementation, as President Biden did when setting the wage rate and timing in this case; (2) the President subdelegates some of his statutory authority to an agency, as President Biden did by requesting that DOL consider definitions and exclusions; or (3) the President commands an agency to exercise *its* congressionally delegated statutory powers in a certain way, which did not occur in *Su* but loomed in the background of the court's analysis.[48] Balancing the competing logics of *Franklin* and the APA, the panel could have applied

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39 *Id.* at 22 (Sanchez, J., dissenting).

40 *Id.* at 24 (noting that "[t]he statutory power to direct federal agencies as they specify the terms of federal contracts is a key lever that presidents of both parties have used to further their policy agendas").

41 *Id.* at 26, 25–26 (noting the D.C. Circuit, Fourth Circuit, and Tenth Circuit have adopted variants of this formulation). The Ninth Circuit had previously adopted this test in a now-vacated opinion. *See Mayes*, 67 F.4th at 940.

42 *Id.* at 26 (pointing to the President's judgments that increased wages would "enhance[] worker productivity and generate[] higher-quality work" (citing Exec. Order No. 14,026, 3 C.F.R. § 550 (2022))).

43 *Id.* at 31.

44 *Id.* at 31–32.

45 Daniel Wiessner, *Trump-Appointed US Judges Say Biden Can't Dictate Federal Contractor Minimum Wage*, REUTERS (Nov. 5, 2024, 3:51 PM), https://www.reuters.com/legal/government/trump-appointed-us-judges-say-biden-cant-dictate-federal-contractor-minimum-wage-2024-11-05 [https://perma.cc/V3PD-KFH4].

46 In *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707 (10th Cir. 2024), and *Texas v. Trump*, 127 F.4th 606 (5th Cir. 2025), the Tenth and Fifth Circuits diverged from the Ninth Circuit, holding that President Biden's minimum wage requirement was permissible under FPASA.

47 *Su*, 121 F.4th at 17.

48 *See id.* at 16 ("To hold as the Government urges would allow presidential administrations to issue agency regulations that evade APA-mandated accountability by simply issuing an executive order first.").

Franklin to President Biden's type one exercise of *presidential* statutory authority under FPASA as implemented by DOL, while still subjecting type two *discretionary* DOL decisions to APA review.[49] Yet this case also foreshadows the ways *Franklin* and the APA may be increasingly hard to reconcile given the rise in concurrent congressional delegations to both the President and agencies as well as the increasing prominence of the unitary executive theory.

In the APA, "agency" is defined as "each authority of the government of the United States," excepting Congress, courts, and the governments of U.S. territories and D.C. — there is no mention of the President.[50] As a result, in *Franklin*, the Supreme Court concluded that given "the separation of powers and the unique constitutional position of the President, . . . textual silence [was] not enough to subject the President['s]" actions to APA review absent an "express statement by Congress."[51]

The majority's approach, applying the APA to DOL's implementation of President Biden's decision, threatens to render *Franklin* meaningless in a world where Presidents frequently exercise their authority by prescribing agency action. By faulting DOL for not considering alternatives to the President's directive, essentially asking DOL to consider rewriting a presidential order,[52] the Ninth Circuit de facto subjected the President's decision to APA review, despite *Franklin*'s de jure bar on doing so. The holding was particularly striking given that, as in type one, the President exercised *his* congressionally delegated FPASA power and merely tasked DOL with implementation. In his survey of *Franklin* caselaw, William Powell calls this "[t]he 'last act' approach," which only applies *Franklin* to cases "in which the President herself takes the final action," providing a backdoor to APA review when the agency is the last actor.[53] Meanwhile, other courts, employing what Powell calls "the 'presidential nature' approach," read *Franklin* more broadly.[54] Following *Franklin*'s reasoning about the President's unique constitutional role, this line of cases exempts from APA review any "presidential action": a "discretionary . . . exercise of authority

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[49] Even if a President's actions are not reviewable under the APA, constitutional review and nonstatutory challenges may be available. *See* Powell, *supra* note 8, at 75 & n.18. Whether the President's EO was otherwise authorized is beyond the scope of this comment.

[50] Franklin v. Massachusetts, 505 U.S. 788, 800 (1992) (quoting 5 U.S.C. §§ 701(b)(1), 551(1)); *see* Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2145 (2023).

[51] *Franklin*, 505 U.S. at 800–01. For separation-of-powers reasons, the Court sometimes applies a clear statement rule exempting the office from implied inclusion under statutes. *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2353 n.3 (2024) (Barrett, J., concurring) ("The Court has sometimes applied an avoidance canon when interpreting a statute that would interfere with the President's prerogatives." (citing *Franklin*, 505 U.S. at 800–01; Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 465–67 (1989); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993))).

[52] *See* Exec. Order No. 14,026, 3 C.F.R. § 550 (2022) ("[T]he minimum wage . . . *shall be* at least . . . $15.00 per hour . . . ." (emphasis added)).

[53] Powell, *supra* note 8, at 77, 104.

[54] *Id.* at 77, 108.

committed to the President by the Constitution or by Congress."[55] Here, the Ninth Circuit panel effectively reviewed the *President's* assertion of his FPASA authority under Congress's framework for *agency* decisionmaking, undermining *Franklin*'s clear statement canon. The court's approach would substantially limit *Franklin*'s application; Presidents often must enlist agency help to execute their statutorily delegated authority.[56] Frequently, Presidents issue "nonlegally binding orders" to "prompt subsequent executive branch action that [has] legal effect."[57]

On the other hand, the dissent's overbroad position may make APA review toothless in cases where an agency acts according to a presidential command. Judge Sanchez did not apply *Franklin* but argued that an agency never acts "'arbitrarily and capriciously' by implementing a binding presidential directive."[58] This stance is not without precedent; in *Sherley v. Sebelius*,[59] the D.C. Circuit held that the National Institutes of Health (NIH) did not have to consider alternatives to a presidential directive to survive arbitrary and capricious review because "under the direction of the executive branch, [NIH] must implement the President's policy directives to the extent permitted by law."[60] That logic allows the President to circumvent arbitrariness review by fiat in type three cases, even though Congress statutorily delegated decisionmaking to agency heads and expected this review to apply. Such was the case in *Sherley*, where the EO pertained to appropriations powers Congress had conferred upon the agency head.[61] Similarly, the *Su* dissent does not stake its analysis on the fact that FPASA delegates authority to the President, and Judge Sanchez's unequivocal language suggests that he would approach type three directives similarly to *Sherley*.[62]

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[55] Detroit Int'l Bridge Co. v. Gov't of Can., 189 F. Supp. 3d 85, 98–99 (D.D.C. 2016) (emphasis added); *see* Tulare County v. Bush, 185 F. Supp. 2d 18, 28–29 (D.D.C. 2001) (arguing that the contrary position "would suggest the absurd notion that all presidential actions must be carried out by the President . . . in order to receive the deference Congress has chosen to give to presidential action"), *aff'd on other grounds*, 306 F.3d 1138 (D.C. Cir. 2002). *Tulare* applied *Franklin* to a type one exercise of presidential authority; *Detroit* to a type two subdelegation. *See* Powell, *supra* note 8, at 108, 111.

[56] Powell, *supra* note 8, at 121 ("Because the President spends most of her time telling other people what to do, she almost never acts last, and the rule of *Franklin* would almost never apply.").

[57] Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1765 (2019).

[58] *Su*, 121 F.4th at 31 (Sanchez, J., dissenting). Despite not mentioning *Franklin*, the dissent's conclusion mirrors *Franklin*'s upshot: Presidentially directed agency action will be upheld even if no alternatives are considered. *Id.*

[59] 689 F.3d 776 (D.C. Cir. 2012).

[60] *Id.* at 784 (citing Bldg. & Const. Trades Dep't v. Allbaugh, 295 F.3d 28, 32–33 (D.C. Cir. 2002)).

[61] *See* Nick Bagley, *Sherley You're Joking,* TAKE CARE BLOG, (Mar. 27, 2017) https://takecareblog.com/blog/sherley-you-re-joking [https://perma.cc/LUQ3-8XUY] ("Congress vested in Secretary of Health and Human Services Kathleen Sebelius the authority to distribute research funding . . . [not] the president.").

[62] *Su*, 121 F.4th at 32 (Sanchez, J., dissenting) ("[T]he President is the head and embodiment of the Executive Branch.").

The reasoning of both cases enables the President to "indemnify every agency action by issuing an executive order telling the agency how to use its [congressionally delegated] discretion."[63] Of course, neither *Sherley* nor the dissent would exempt type two subdelegated agency exercises of discretion from standard arbitrariness review.[64] But any decision specified in a presidential directive would be exempt — which may, as the *Su* panel feared, "shockingly allow Presidents to insulate any desired rulemaking from judicial review with the single stroke of an executive pen."[65] It would essentially nullify one of the APA's major safeguards every time the President orders agency action.

Thus, while the Ninth Circuit's holding neglects *Franklin*'s separation of powers rationale in type one circumstances where the President exercises his own statutory authority, the dissent's analysis may severely diminish the APA's potency in type three fact patterns where the agency was Congress's intended decisionmaker. In its petition for en banc review, the Government urged the Ninth Circuit to distinguish between congressional statutes conferring power on the President versus on an agency in the court's APA analysis.[66] Neither the majority nor the dissent considered the object of Congress's delegation, but this may have been a promising way to balance the principles of *Franklin* with fidelity to the APA.[67] Powell suggests a two-step formulation in which courts first look to Congress's choice of delegee, as the Government suggested, and next, to who actually exercises the statutorily delegated discretion.[68] For type one directives, where the President exercises presidential statutory authority, *Franklin* should apply, but the APA should otherwise govern in type two and three scenarios, where the President or the

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[63] Powell, *supra* note 8, at 109. Independent agencies may still be an exception. *See* Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637, 662 (2021).

[64] *See Sherley*, 689 F.3d at 784–85 (distinguishing the "President's policy directives," *id.* at 784, from discretionary "factor[s] relevant to implementing the Executive Order," *id.* at 785); *Su*, 121 F.4th at 31 (Sanchez, J., dissenting) (distinguishing the presidentially defined "amount and timing of the minimum-wage requirement" from DOL's "authority to" define exclusions).

[65] *Su*, 121 F.4th at 15 (majority opinion); *see also* Bagley, *supra* note 61 (criticizing *Sherley* as "badly reasoned" but recognizing that "[r]ead for all it's worth," it could "insulate [agency] choices from a significant form of judicial scrutiny"); *see also, e.g.*, Exec. Order No. 14,264, 90 Fed. Reg. 15619 (Apr. 9, 2025) (recent EO, "Maintaining Acceptable Water Pressure in Showerheads," stating "[n]otice and comment is unnecessary because I am ordering the repeal").

[66] Petition for Rehearing En Banc at 19, *Su*, 121 F.4th 1 (No. 23-15179) (noting that "[t]he relevant power here . . . is not delegated to an agency; Congress vested it directly in the President").

[67] Some scholars have embraced this approach. *See* Kagan, *supra* note 1, at 2351; Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 290 n.121 (2006). A possible limitation of this test, however, is reflected in the scholarly debate over whether Congress structures the distribution of executive branch power through targeted delegations. *Compare* Kagan, *supra* note 1, at 2327 (arguing delegations to agency heads authorize presidential directives since "Congress knows . . . that executive officials stand . . . in a subordinate position to the President"), *with* Stack, *supra*, at 267 (arguing the President has directive authority "only when the statute expressly grants power to the President in name").

[68] Powell, *supra* note 8, at 122. For a full defense of this proposal, see *id.* at 122–27.

statute delegates discretion to the agency. Such an approach preserves *Franklin*'s attention to the President's unique constitutional role. Yet it also preserves robust APA review when the agency is the primary decisionmaker, ensuring the requisite procedural and judicial safeguards constrain administrative discretion.

Applying this approach to the case would be fairly straightforward. Since President Biden invoked his FPASA authority to choose a $15 minimum wage, DOL need not consider alternatives to survive an APA challenge.[69] The agency would not be in the impractical position of choosing whether to follow the EO's mandate or satisfy the APA. By contrast, the APA would apply to discretionary decisions that President Biden left to DOL's expert judgment with the benefit of notice and comment, like the definition of "contractor" or potential exceptions.[70] As the agency had latitude, these considerations should not be exempt from arbitrariness review merely because they were prompted by an EO.

While the implementation of this framework is straightforward in this case, it will not always be so easy to navigate the tension between *Franklin* and the APA in the era of presidential domination. An analysis looks more complicated with the rise of "[m]ixed [d]elegations": concurrent congressional delegations to both the President and agencies.[71] And scholars have increasingly argued under the unitary executive theory that the Constitution affords the President unconstrained directive authority over agencies.[72] If these trends continue, the tension between presidential prerogatives and the governing principles of the APA will grow. The stakes of resolving that tension have been raised as Presidents increasingly exert control over agencies to accomplish core parts of their policy agendas. The Supreme Court has not spoken on the issue since *Franklin*,[73] nor has Congress clarified whether or how it wants courts to review presidential actions. In the interim, courts must balance the guidance of *Franklin* with the principles of the APA in the increasingly complex world of administrative law.

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[69] As the panel observed, if the agency discovers superior possibilities in the process of notice-and-comment, it is free, but not required, to relay those to the President. *See Su*, 121 F.4th at 16.

[70] Both the panel and dissent appear to agree with this application of Powell's second prong. The panel, of course, applied APA review "to any 'final agency action.'" *Id.* at 15 (quoting 5 U.S.C. § 704). The dissent would only exempt agency actions pursuant to "binding presidential directive[s]," not delegated decisions such as contractor exemptions. *See id.* at 31 (Sanchez, J., dissenting).

[71] Stack, *supra* note 67, at 276.

[72] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994). In this case, Judge Nelson considered unitary executive theory not for its *Franklin* and APA implications but for support in his major questions analysis. *Su*, 121 F.4th at 18–19 (Nelson, J., concurring).

[73] Some scholars have urged the Court to reconsider the President's exemption from the APA and overturn *Franklin*. *See, e.g.*, Kovacs, *supra* note 31, at 120.