
ARTICLE

THE MOST KNOWLEDGEABLE BRANCH

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In the modern era, the executive branch has extraordinary information-gathering advantages over the legislative and judicial branches. As a result, it will often know immeasurably more than they do, both on domestic issues and on foreign affairs. In general, it also has a strong system of internal checks and balances, reducing (though certainly not eliminating) the risk of factual error. Because the executive is the most knowledgeable branch, it often makes sense, within constitutional boundaries, to give it considerable discretion in both domestic and foreign affairs and to grant it considerable (though hardly unlimited) deference when it exercises that discretion. Both legislators and judges tend to be insufficiently aware of their epistemic disadvantages. The argument for restricting executive discretion depends on suspicion about the biases and motivations of the most knowledgeable branch and about its failure to give sufficient respect to liberty, and an associated fear of some form of “groupthink,” usually in the form of group polarization. In some times and places that suspicion is extremely important, but it is hazardous to invoke it as a basis for confining the authority of those who have the most knowledge. These points are illustrated with close reference to the debate over the Department of Transportation’s rear visibility rule, proposed in 2010 and finalized in 2014.

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I. THE THESIS	1608
II. WHO KNOWS MOST?	1611
A. <i>Technocracy and the Priority of Facts</i>	1611
B. <i>Sources of Knowledge</i>	1613
1. Judges and Lawyers	1613
2. Congress and Elections	1616
a. <i>In General</i>	1616
b. <i>Reelection</i>	1617
C. <i>Deliberative Democracy in the Trenches?</i>	1619
1. How Things Actually Work	1619
2. Regulation	1622
3. An Important Qualification	1625
4. Knowledge and Constraint	1627
5. Some Brief Doctrinal Notes	1628
III. THE TALE OF REAR VISIBILITY: A CASE STUDY	1630
A. <i>A Death and A Statute</i>	1631
1. Context	1631
2. Text	1631
3. What Congress Knew	1632
4. Options	1633
B. <i>Within the Executive Branch</i>	1636
1. In General	1636
2. The Proposed Rule	1637
3. Three Questions, Post-Proposal	1640
4. The Final Rule	1642
C. <i>Epistemic Advantages and General Lessons</i>	1645
IV. CONCLUSION	1647

I. THE THESIS

If policymakers are to resolve national problems, they must have access to a great deal of information, much of it highly technical. Of the three branches of the national government, the Executive is by far the most knowledgeable, not only in foreign affairs but also in the domestic domain. While this informational advantage could not easily have been anticipated by the founding generation, it continues to grow every year. In particular, the disparity between the knowledge of the executive branch and the knowledge of Congress is increasing. But judges face a similar informational deficit, and they do not know what they do not know. The grotesquely distorting prism of litigation often makes that deficit in knowledge less than fully visible to judges, who are hearing from mere translators in the form of lawyers. These

lawyers may not even speak the real language of the underlying dispute, especially in regulatory cases, which often involve highly technical matters. What are the risks posed by mercury? What is the best way to reduce the threat of salmonella in meat and poultry products? Is it dangerous for passengers to use Kindles and iPads on airplanes?

Within the executive branch, there are numerous specialists, many of whom have spent years or even decades engaged in concentrated work on particular subjects. On serious questions, such specialists bring their knowledge to bear. They work for political appointees, but they are not themselves political; they labor across administrations, sometimes for decades.¹ Those within the executive branch also have managerial responsibilities, which similarly entail possession of a great deal of information. They are aware of an immense set of priorities and duties, and, at least when things are working well, they tend to see how various substantive areas and questions relate to one another, and which deserves attention first.

If officials do not proceed on one task, their inaction might, in the abstract, seem objectionable or even scandalous. But the action might not be a product of neglect or dereliction, but rather of scarce resources and a belief that other tasks deserve priority. The real question might involve timing, and those in the executive branch are in a unique position to see why (and how) timing is important. For example, an issue that appears to be neglected in one year might, in reality, be subject to at least a general plan and might receive careful attention two years later (and that could be according to plan). The executive branch might also know that one apparent policy priority is, on reflection, not nearly as pressing. Pursuing it might even pose a serious risk of unintended adverse consequences. Moreover, the problem that concerns many people (including legislators and litigants) might not even be serious, in the sense that it does not pose significant risks in the real world. Their concern might be a product of well-organized private groups, anecdotes, or generalized suspicion of some entity (“polluters” or “the banks”). Government faces a constant bandwidth problem, and observers—focused on just one of a large number of issues—suffer from “bandwidth neglect.”

The legislative branch also suffers from a bandwidth problem, and it is at least as equally acute. It also leads in distinctive directions—not toward management of multiple problems, usually overseen by genuine specialists immersed in the details, but far more often toward an insistent focus on narrow political concerns and the concerns of the day, often voiced by powerful interests or raised by a

¹ For a superb account in the field of counterintelligence, see generally MICHAEL MORRELL WITH BILL HARLOW, *THE GREAT WAR OF OUR TIME: THE CIA'S FIGHT AGAINST TERRORISM FROM AL QA'IDA TO ISIS* (2015), drawing on the author's experience working for several administrations in the thirty-five years he served in the CIA.

newspaper story. Within the legislative branch, the sheer press of time and electoral incentives often lead to dependence on simple heuristics, interest groups, headlines and cable news, and “talking points,” which, in turn, ensures serious informational deficits. When members of Congress see incompetence or wrongdoing or call for someone’s resignation, they might be right, but they might also have no idea what they are talking about.

Judges face their own challenges. Though they typically have far more time, and hence less intense bandwidth issues, their information is partial and fragmentary, often a kind of cartoon. It is a product of the adversary process, run by lawyers, which can lead to distorted and wildly inadequate perspectives.² Judges cannot possibly have an adequate sense of the full range of issues with which executive officials must deal. Judges will sometimes be presented with, and convinced by, a narrative of executive indifference or overreaching, even if that narrative has little or no resemblance to reality.³

On purely epistemic grounds, there is special reason for deference to the decisions of the most knowledgeable branch. Here, as elsewhere, general propositions do not decide concrete cases. It is true that the motives and competence of executive branch officials cannot always be trusted. The executive branch might itself be influenced by interest groups. Its own perspective might be skewed. It might fail to respect liberty. Group polarization might lead executive branch officials in unfortunate directions.⁴ There is a particular problem of “happy talk,” by which such officials, attempting to please or calm the President in particular, present a rosy view of situations in a way that produces erroneous decisions.⁵

It is also true that not every executive branch, or every topic in every executive branch, is the same. Some issues may involve such partisan contestation, or such strong antecedent convictions, that the informational advantages of the executive branch are much less important. If high-level executive branch officials think that a dramatic increase in the minimum wage is an excellent idea, even though the evidence suggests otherwise, the

² For an arguable example, see *Michigan v. EPA*, No. 14-46, slip op. at 15 (U.S. June 29, 2015), finding the EPA’s interpretation of a provision of the Clean Air Act “unreasonable” because the agency did not take cost into consideration. A good explanation is offered by Justice Kagan. *See id.* at 20-21 (Kagan, J., dissenting) (contending that the majority’s opinion was flawed because it took too narrow a view of the EPA’s process in adopting the regulation).

³ For a vivid demonstration, see Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 *UCLA L. REV.* 1251, 1317 (1992), exploring the case of *Overton Park* and the Court’s inadequate understanding of the background of highway development.

⁴ *See* CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 4 (2009) (noting how being around like-minded people tends to lead to more extreme views).

⁵ *See* CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* 21 (2015) (emphasizing that a group of like-minded people “may reach a consensus on falsehood rather than truth”).

executive branch will support a proposal that lacks epistemic foundations. It is true, finally, that courts and Congress can provide valuable checks; in the case of the former, consistency with law, and in the case of the latter, indispensable authorization and limitations.

Nonetheless, the informational advantages of the executive branch are an essential part of thinking about the contemporary system of checks and balances. These advantages were not clearly visible until relatively recently, and they bear directly on a wide range of questions involving the allocation of authority. In particular, they raise questions not only about the helpfulness of certain forms of congressional scrutiny of executive action (as through politically motivated hearings), but also about the idea—newly receiving attention within federal courts—that courts should not defer to agency interpretations of ambiguities in their own regulations.⁶

II. WHO KNOWS MOST?

A. *Technocracy and the Priority of Facts*

Suppose that the question for some branch of government, acting in accordance with its distinctive role, is to decide the appropriate level of national ambient air quality standards for ozone; the right approach to mercury; whether to require graphic warnings on cigarette packages; how to respond to the problem of distracted driving; whether to ban ozone-depleting chemicals from asthma medicines; or whether to require trucks to be equipped with improved breaks. In each of these cases, government needs to assemble a great deal of information about the likely consequences. It might be, for example, that at low levels, ozone and mercury present serious public health risks, or, instead, de minimis ones. Graphic warnings may or may not turn out to be highly effective. Bans on ozone-depleting chemicals from asthma medicines may or may not have significant adverse effects on asthma patients.

In all of these cases, people might differ with respect to values, and those differences might well affect their ultimate judgments. Some people do have strong, immediate, value-driven reactions to words like “ozone” and “mercury.” As one high-level public official with strong environmentalist leanings told me, in government, mercury is “nasty stuff.” But consider another possibility: the real differences between people involves the facts, and when people genuinely understand the facts, they will usually agree on what to do, *whatever their values may be*. If ozone presents serious health risks at

⁶ For an excellent discussion, see Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1466 (2011), exploring the “idea that a court should deny . . . deference to an agency interpretation that is issued well after the regulation itself, or that differs from the agency's own prior construction of the same regulation.”

low levels in the ambient air, and if the costs associated with producing those low levels are not high, it would be hard to argue against regulation that would actually produce those low levels. And if ozone presents tiny risks at low levels, and if the costs associated with producing those low levels are in the many billions of dollars, the argument for regulation that would produce those low levels seems weak.⁷ On a certain demonstration of facts, differences of values turn out to be far less relevant than they might seem at first glance.

Of course it is true that values might affect people's assessments of the facts. People's reasoning is sometimes motivated, especially on high-level political issues.⁸ In Washington and elsewhere (but perhaps Washington in particular), judgments about the effects of environmental regulations, health care policies, and immigration reform frequently reflect, or are decisively influenced by, people's antecedent political convictions. This point might seem obvious, but it should be underlined and put in bold letters because it is such a serious and pervasive obstacle to agreement and progress.

Those who are inclined to favor environmental regulation tend to think that the benefits of such regulation are very high (and typically understated) and that the costs are low (and typically overstated). Those inclined to reject environmental regulation tend to think the opposite. In their view, agencies systematically overestimate the benefits and underestimate the costs.⁹ On many politically contested issues, judgments about facts are highly predictable¹⁰: *If you know people's values, you will know what they think about disputed questions of facts.* While beyond unfortunate, this is true and perhaps inevitable, at least for some actors and some institutions. One reason is that their incentives, and their sources of information, are not ambiguous. They learn from those they know and trust.

It is also true that some debates cannot be resolved by knowing the facts and really do depend on values. For example, some people would oppose gun control restrictions, torture, or capital punishment even if they could be

⁷ It is true, of course, that distributional issues might turn out to be important. But if the costs of regulation are in the billions, abstractions like "companies" are not likely to pay the bill. Employers and consumers, many of them not exactly rich, will be affected as well.

⁸ See Dan M. Kahan, *The Politically Motivated Reasoning Paradigm*, EMERGING TRENDS IN SOC. & BEHAV. SCI. (forthcoming) (manuscript at 1-22), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703011 [<https://perma.cc/67YK-PLM8>] (describing how politically motivated reasoning causes people to "conform their assessments of all manner of information . . . to the position associated with their respective groups").

⁹ See, e.g., CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 154-55 (2013) (discussing this split with regard to environmental regulation and how agencies actually approach cost-benefit analysis).

¹⁰ For valuable discussion, see Kahan, *supra* note 8, at 12-13, contending that individuals adopt political stances primarily in order to maintain their identity within their chosen "cultural group" and Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1305-11 (2003), exploring how cultural factors can predict an individual's position on gun control.

convinced that such practices might save lives. People might agree that an air pollution rule would save 200 lives annually while also costing \$1.5 billion, but disagree about whether it is worth proceeding. As a Cabinet official once asked me, “How do you put a price on a human life?” When facts are conclusive, it is not because values are irrelevant, but instead because there is a sufficient consensus on them. Sometimes there is no such consensus, leading to intractable disagreement even when no factual question is at issue.

But the broader point remains. Much of the time, the central political debates in the United States and abroad turn, above all, on the facts. If the facts can be sorted out and agreed on, the likelihood of disagreement will diminish dramatically. In nations that are intensely polarized along political lines, citizens greatly underestimate the extent to which a consensus on the consequences of a policy can eliminate seemingly intractable disagreements over whether it should be pursued (at least in principle).¹¹ If increases in the minimum wage led to dramatic decreases in employment, would it really make sense to favor them? If banning inhalers emitting ozone-depleting substances would seriously harm asthma sufferers without having significant environmental benefits, who would argue in favor of such bans?

B. *Sources of Knowledge*

With respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches. It has a large stock of specialists, often operating in teams, and the teams often have an impressive degree of epistemic diversity. Some of those specialists have spent many years studying and working on the subject. Of course, the executive branch’s capacity to obtain information is far from perfect. But most of the time, the executive branch knows incalculably more than other branches, and when it does not know something, it is in an excellent position to find out. While I will defend these claims shortly, I begin by considering some of the weaknesses of the other two branches.

1. Judges and Lawyers

For the judiciary, a great problem is that it cannot acquire information on its own. It must depend on arguments and briefs, and hence, on advocates. In any case involving issues like those sketched above, the knowledge of a judicial panel will inevitably be partial. This problem is compounded by the fact that judges are generalists who usually lack specialized knowledge of technical areas. True, some judges are specialists, and when they are not, they might be

¹¹ Some important qualifications can be found in Kahan, *supra* note 8, at 4-5, emphasizing political foundations of disagreements about facts.

able to obtain some mastery of an area. But even when they are specialists, their own understanding of a particular problem is likely to be only partial, simply because they must depend on advocates. And because advocates are self-interested, clever, and often superb with rhetoric, they will present judges with highly stylized and distorted pictures of reality. Lawyers who challenge executive action will suggest that there has been an important omission or confusion, when in fact, the relevant issue received sustained public attention for days, weeks, or even months. Because of the distorting prism of litigation, judges may never be made aware of that fact.¹²

A little secret: those who have worked in both Republican and Democratic administrations are stunned to see how often judges seize on some apparently weak argument, carefully considered by multiple officials in technical (not political) terms, and invoke that argument to invalidate executive action. The judges seem to think that executive officials were negligent or “captured,” when nothing could be further from the truth. Ignorant of the process, judges are convinced by an argument that clever lawyers (self-interested and in a deep sense clueless) were able to make convincing.

It is relevant that litigation focuses judges on a single case or dispute, when proper resolution often requires an understanding of a broader canvass. For example, an agency’s apparent slowness in proceeding on one rule, or in one area, might seem to suggest sloth or indifference, when it is actually a product of careful priority-setting—something that is not readily visible to judges.¹³ There may be no neglect at all, but simply an effort to produce sensible management.

To be sure, the Executive will often be a party to litigation, and it can try to provide judges with the information that it has. The problem—and it is a serious and insufficiently appreciated one—is that in litigation, the Executive consists of *lawyers*. They are not scientists or economists, and their understanding of both science and economics will be incomplete. Like judges, they are generalists. They might be adequate, better than average, or even sensational. But in many respects, they serve as mere translators. They will usually be latecomers to the problem, and what they know will reflect what they learn from others. Regardless of how intelligent and hardworking lawyers are, their own knowledge is likely to be partial and fragmentary, at least compared to that held by those who are involved in making actual decisions within the executive branch. They will do the best they can, but they are very unlikely to have the kinds of knowledge that come from genuine

¹² See Strauss, *supra* note 3, at 1317 (noting that the Court lacked a nuanced understanding of the political process behind the Overton Park highway development).

¹³ See Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 167 (2014) (noting that an agency “decision not to decide is a product of a complex process involving multiple actors within the Executive Branch”).

involvement in the underlying decisions. Judges take the lawyers as representing and speaking for the executive branch, and they are, but there is a large difference between a spokesperson—something like an official in a communications office—and a genuine decisionmaker.

Here is the worst part: in any case worthy of the name, good adversaries will be able to identify two, three, or perhaps even a dozen apparently reasonable objections to a decision by executive branch officials. They might be able to produce considerable alarm and even outrage. How could such officials have been so stupid? Were they captured by interest groups? Were they overzealous? Driven by ideology? But in all likelihood, *every one of those objections will have been carefully considered within the executive branch, often for many hours of substantive discussion by many people.*

That is no guarantee, of course, that the Executive will have gotten it right. Its officials might indeed be biased, confused, negligent, imperfectly competent, or, as discussed previously, have motivated reasoning. But as we shall see, the executive branch contains built-in safeguards against all of these risks, one of which takes the form of cost-benefit analysis. Of course these safeguards are imperfect, and a poorly functioning executive branch can override them, but even so, judges are likely unable to have sufficient access to the information on which the decision was originally made. In retrospect, one, two, or more of the lawyers' objections might seem quite plausible or even self-evidently convincing to generalist courts, even if the issue was carefully investigated within the executive branch and found unpersuasive for excellent reasons.

It is important, of course, to distinguish among the kinds of claims that lawyers might bring to court. If they are making a purely legal argument—for example, that the word “vehicle” cannot refer to motorcycles, or that the agency failed to use notice-and-comment procedures required by the Administrative Procedure Act (APA)—legal expertise might be sufficient, and the specialized knowledge of the executive branch might be irrelevant. It is in the domain of policy, typically raised by objections on the ground of arbitrariness, where specialized knowledge is most important.

But as the debate over *Chevron*¹⁴ and *Auer*¹⁵ suggests, specialized knowledge often bears on questions of interpretation as well.¹⁶ If, for example, an agency is interpreting the word “source” in a governing statute, or sorting

¹⁴ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-45 (1984) (setting out rules to govern when courts should defer to an agency's interpretation of a statute).

¹⁵ See *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997) (holding that the Court will defer to reasonable agency interpretations of ambiguous regulations).

¹⁶ See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 74 (2015) (“When a statute is unclear, and especially when a complex modern regulatory statute is unclear, resolution of the ambiguity will inevitably require policymaking competence—which courts lack and which agencies have.”).

out an ambiguity in a legislative rule, the considerations I have mentioned here are likely to matter. Words like “source” or “modify”¹⁷ or “gainful employment” are not best understood by staring at the dictionary—though, admittedly, agencies must adhere to statutory language if there is no ambiguity. In the presence of ambiguity, it is not possible to make an assessment without making judgments of policy and principle. Meaning is not a brooding omnipresence in the sky. Those who know the most are in the best position to ascertain meaning, and they are not federal judges.

2. Congress and Elections

a. *In General*

In theory, of course, Congress can obtain its own information by holding hearings or consulting experts. But members of Congress are also generalists, their staffs are relatively small, and they have to focus on reelection. When they are described as “experts”—on environmental issues, health care, or foreign policy—it might be true, but it might also be hyperbolic. Within Congress, members are usually experts at one thing: doing what it takes to get reelected. But in terms of substantive issues, they tend to lack the bandwidth to become experts. Of course there are exceptions, but that is the general rule.

Committee chairs or committee members often spend many hours on a general topic, but when it comes to particular issues, there is a real chance that their knowledge will be fragmentary, simply because of the multiple demands on their time, their incentives, their role, and their limited sources of information. At least it is usually true that members of Congress, even those with years of experience, lack the specific and detailed knowledge of those within the executive branch who deal with the same questions. I have acknowledged that some members are exceptions, but consider a comparative question: *Who knows more on a particular substantive topic, the most informed member of Congress or, say, the Administrator of the National Highway Traffic Safety Administration, or the Assistant Attorney General for Civil Rights?* The answer is almost always the latter, not least because members of the executive branch have large staffs on whose expertise they can draw.

We can see this point when members of Congress ask questions during hearings. Those questions are frequently a result of very recent briefing from their staffs, perhaps given shortly before the hearing itself. Sometimes members will not have much information about the topic at hand; they might even read the questions, prepared by their staff, without fully having a grasp

¹⁷ See *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225-229 (1994) (determining how to define “modify” in section 203(a) of Title 47 of the United States Code).

on them. If they press a member of the executive branch to answer a question—about an enforcement policy, a health care regulation, or an implementation delay—members of Congress will inevitably lack the background of the witness, who might well have spent numerous hours on the problem. They may make serious accusations, and they may be entirely sincere in doing so, but the accusations may have no justification in reality. (Usually they lack any such justification.) When their base of knowledge is thin, members will often be unable to ask decent follow-up questions. And even when their base of knowledge is thick—even when they are, in a sense, genuine experts on the underlying questions, having spent considerable time on them—they will have far less information than the witness from the executive branch.

It is important to take these points as descriptive rather than as criticisms or objections. The knowledge of public officials is a product of their distinctive roles and accompanying constraints. Like judges, members of Congress are generalists, and even more than judges, the pressures on their time are enormous. An executive branch official can draw on the expertise of public servants who have spent years on the problem of climate change or the situation in Egypt. A member of Congress cannot easily do the same: congressional staffs, many of whom focus in significant part on politics and electoral considerations, are unlikely to have an equivalent stock of knowledge. Their knowledge might be impressively wide, but it is not usually deep.

b. *Reelection*

Above all, the insistent focus on politics and reelection has four major effects. First, it makes it far more difficult for members to focus on complex or technical questions. The result is that they must resort to simple heuristics, or mental shortcuts. These are not “simple heuristics that make us smart;”¹⁸ they are instead “simple heuristics that make us polarized,” and are far too unidimensional to capture reality. A common example: “If the EPA is for it, I am against it.” Another common example: “If the President is for it, I am for it too.” Yet another: “I agree with the labor unions.” One more: “The National Association of Manufacturers is usually right.”

Second, electoral pressures can make short-term political calculations highly salient or even decisive, thereby pressing members’ decisions in particular directions and making the acquisition of complex or technical information far less important. In other words, members of Congress lack sufficient incentive to acquire that information. If reelection will be eased or facilitated if a member announces his view that a new ozone regulation is a

¹⁸ See generally GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART (1999) (exploring the accuracy of many fast and simple heuristics).

terrible idea, then it will be singularly difficult for that member to endorse a new ozone regulation, or even to remain silent on it. And what is the point of becoming an expert of the new ozone regulation? There are undoubtedly many cases in which a member takes a position not because she has a serious commitment to it, but because she believes that she must if she seeks to retain her job. For example, when I was seeking confirmation by the United States Senate in 2009, one prominent Senator told me that he strongly supported me, but would of course vote against me. (It was a very cordial conversation.)

Third, the need to focus on reelection, especially when accompanied by the sheer press of time, increases the risk of influence by—and, on occasion, even near-exclusive attention to—information provided by private groups with clear commitments to one or another course of action. Reliance on that information may be a product of a simple heuristic, to the effect that certain groups are likely to be right (for example, the “AFL–CIO Heuristic,” the “Natural Resources Defense Council Heuristic,” or “the National Association of Manufacturers Heuristic”). A Democrat in the House of Representatives might simply channel the views of labor unions or a well-respected environmental organization. A Republican Senator might repeat the concerns of coal companies in a particular area. “Talking points” will matter greatly. They might well end up being determinative. Within the executive branch, of course, talking points are also important, especially when officials are speaking with the media. Officials are usually given a set of talking points and asked to stick closely to them. But in actual policy discussions—as opposed to communications events—talking points are almost always irrelevant. The questions involves substance, and talking points are a hindrance.

Within the legislative branch, there is of course nothing necessarily nefarious or untoward here. Again, time is short, and members are busy, with numerous issues to which to attend. Reliance on the views of trusted others might be the best available strategy, certainly if reelection is the goal, and perhaps also if the goal is to make the right decisions.

Consider a small example: When I was Administrator of the Office of Information and Regulatory Affairs (OIRA), I testified on a number of occasions before Senate and House committees. On one of those occasions, I was asked about a report from the Heritage Foundation, which purported to show an explosion, on my watch, of regulatory costs. In the upper right hand corner, the report contained the words “talking points,” and then listed them. Asked about the report, I noted, with what I thought was some wryness, that I had learned that in Washington, if a report has the words “talking points” in a prominent place, it is not necessarily objective. No one in the room seemed to have any idea what I was talking about—did they think I was offering a talking point?

Fourth, the focus on reelection tends to make political considerations the coin of the realm, so that it is not so simple to think of substantive issues in nonpolitical terms. Instead of asking about the costs and benefits of a regulation designed to increase safety in the workplace, it might be asked, “What does the Chamber of Commerce think?” Within the executive branch, it is easy to identify, almost immediately, people “with Hill experience,” because they think so readily in political terms. Such experience is of course invaluable. With respect to the operations of the legislative branch, and how to allay concerns or to promote interest or enthusiasm, those with Hill experience know far more than people who lack it. The only point is that their minds tend to go readily to interest groups and polls, rather than to real-world consequences or substantive issues. They have an epistemic advantage in the sense that they know how to “work the Hill,” but when it comes to policy, they have serious epistemic disadvantages. They do not tend to think in policy terms.

C. *Deliberative Democracy in the Trenches?*

In recent decades, a number of political theorists have explored the idea of “deliberative democracy.”¹⁹ The basic idea is that well-functioning democracies combine accountability with a commitment to reflection and reason-giving. They do not merely respond to popular pressure. They also try to “refine and enlarge the public views”²⁰ through the acquisition of relevant information and careful deliberation in the public sphere.

1. How Things Actually Work

Can deliberative democracy be found *within* the executive branch? In important ways, it can.²¹ Of course the executive branch is accountable for its decisions, and therefore subject to democratic constraints. These constraints often loom large, especially in the period right after an election (“What were our

¹⁹ See, e.g., DELIBERATIVE DEMOCRACY 8 (Jon Elster ed., 1998) (contending that deliberative democracy entails “collective decision making” by those “who will be affected by the decision or their representatives” and who “are committed to the values of rationality and impartiality”); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 7 (2004) (defining deliberative democracy “as a form of government in which free and equal citizens . . . justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future”); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 304-08 (William Rehg trans., 1996) (describing how deliberative democracy uses democratic procedures to ensure participation among equal citizens).

²⁰ THE FEDERALIST NO. 10 (James Madison).

²¹ See MORRELL, *supra* note 1, at 300-02 (discussing the importance of varied perspectives when dealing with national security issues).

campaign promises?”) and right before as well, including the midterms, where no executive branch wants to undermine the efforts of members of the President’s own party, much less “lose the House.”²² But as I have emphasized, there are numerous experts within any cabinet-level department. They have been working on the relevant issues for many years and through multiple administrations. They do not care at all about elections, politics, or interest groups. To be sure, they might well have their own institutional biases. They might be mired in, and wedded to, existing practices. They might be, and often are, resistant to significant change, on the theory that things have always been done a certain way. They tend to be Burkeans, supportive of tradition. They might suffer from an acute form of status quo bias. But they also have an immense stock of knowledge.

With respect to deliberation, the central point is that they will also be working and exchanging facts and views with numerous other people within the executive branch, at least on the most significant questions. For multiple questions, this process of interagency collaboration is formalized and routinized.²³ With respect to both domestic and international affairs, it typically takes something like the following (highly stylized) form: Some kind of interagency process, including representatives of various parts of the government, work together on some issue, whether short-term (in need of resolution within, say, three weeks) or long-term (not requiring resolution for many months).²⁴ Sometimes their discussions take months or more, and they have a degree of intensity and animation. Diverse people, with different knowledge and perspectives, are frequently involved.²⁵ For example, there might be participants from the National Economic Council, the Council of Economic Advisers, the Office of Management and Budget, the Department of Treasury, the Department of State, and the Department of Energy.²⁶ They might be “policy” officials, meaning people who have some connection to the

22 As an aside, when I was in the government, I helped write a “checklist” for regulatory impact analyses to promote accountability and make it easier to produce such analyses. OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, AGENCY CHECKLIST: REGULATORY IMPACT ANALYSIS, https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf [<https://perma.cc/35LW-UXYF>]. Within the Executive Office of the President, some people, especially those with “Hill experience,” were actually concerned: Perhaps the checklist could have adverse political effects? Perhaps it should not be released before the midterms? These questions seemed, to me, absolutely absurd, and eventually the checklist was released—midterms or no midterms. Within an hour after the Democrats lost the House in 2010, in a crushing defeat, a Cabinet official emailed me: “It was the checklist.” (I wrote back immediately: “That saved the Senate.”)

23 See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1854–63 (2013) (discussing the OIRA process of review for agency rules).

24 See *id.* at 1855 (discussing the “multiple departments and agencies” that OIRA consults when reviewing agency rules).

25 See *id.* (noting that OIRA’s “central goal” is to utilize the “wide variety of perspectives that can be found throughout the executive branch”).

26 See *id.* (discussing various “frequent recipients of regulatory actions”).

incumbent administration, some of whom might have been confirmed by the Senate. But those officials will be staffed and guided by people without any evident political affiliation; they are specialists and technocrats.²⁷

After they are done, they might be able to resolve the issue, or it might be “elevated” to some kind of “Deputies’ Committee,” consisting of, for example, the Deputy Secretary of State, the Deputy Secretary of Defense, the Deputy Secretary of Energy, and the Deputy Director of the Office of Management and Budget, who might, as the highest-ranking official within the Executive Office of the President, run the meeting.²⁸ After that, the issue might be resolved, or it might be elevated to a “Principals’ Committee,” which will consist of Cabinet-level officials.²⁹ The Principals’ Committee might be able to resolve the question, but at that stage, or thereafter, the question might go to the President.³⁰ If the issue is a very important one, the Principals’ Committee might be chaired by one of the highest-ranking officials in the White House—perhaps the National Security Adviser or the Chief of Staff, who is usually, next to the President, the most important person within the executive branch of the government.³¹

Stylized and brief though it is, this account should be sufficient to show that within the executive branch, there is a great deal of deliberation, and it often involves people with diverse perspectives and high levels of technical expertise. Everyone works for the President, of course, but there is often a surprising level of heterogeneity and disagreement that has to be worked through, typically as a result of substantive exchanges, with a high premium on the acquisition of relevant information.

To take an example with which I am familiar: In 2009–2010, an interagency working group produced a “social cost of carbon,” meaning the annual economic cost of a metric ton of carbon emissions suitable for use in regulatory impact analyses.³² The group included representatives of the Council of Economic Advisers, the Council on Environmental Quality, the Department of Agriculture, the Department of Commerce, the Department

²⁷ See *id.* (noting that “interagency comments are quite technical”).

²⁸ See *id.* at 1856–58 (discussing the stages of issue “elevation”).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV’T, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (2010), <https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf> [<https://perma.cc/LDF8-DZN8>] [hereinafter INTERAGENCY WORKING GRP.]; see also Cass R. Sunstein, *On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon*, 104 AM. ECON. REV. 547, 547 (2014) (discussing the institutional constraints in which the interagency working group charged with ascertaining the monetary value of carbon emission reduction had to work).

of Energy, the Department of Transportation, the Environmental Protection Agency, the National Economic Council, the Office of Energy and Climate Change, the Office of Management and Budget, the Office of Science and Technology Policy, and the Department of the Treasury.³³ Members of this group, like members of countless others, had different information and, in government jargon, different “equities,” meaning institutional interests associated with their office or department, or their “building.”

The EPA, for example, is inevitably a crucially important participant in discussions of the social cost of carbon and sees environmental protection as its major “equity,” while the Department of Commerce seeks to promote commercial activity. The Department of Energy has a great deal of expertise on the effects of carbon emissions and the science as a whole, and the Council of Economic Advisers has expertise on such issues as the appropriate discount rate. The result involved the aggregation of a great deal of scientific, economic, and legal expertise, with agreements being forged through substantive arguments. And notably for this decision, politics—understood as electoral considerations or possible press reactions—did not play the slightest role. The discussions were highly technical and involved the substance.

2. Regulation

With respect to the regulatory process, the system of internal review takes a somewhat different, but also highly formalized, form.³⁴ Suppose that the EPA wishes to issue a new national ambient air quality standard involving ozone. If the regulation is submitted to OIRA (and it certainly would have to be),³⁵ it will be scrutinized by numerous offices within the Executive Office of the President, including the Office of Management and Budget, the Domestic Policy Council, the National Economic Council, the Council of Economic Advisers, the Office of the Vice President, and the Office of the Chief of Staff. If it has international implications, it will be scrutinized as well by the Department of State, the National Security Council, and the Office of the United States Trade Representative.³⁶ Within the Executive Office of the President, the initial comments will come from staff, not from high-level officials or anyone concerned with politics. The principal focus will be

³³ See INTERAGENCY WORKING GRP., *supra* note 32.

³⁴ See Sunstein, *supra* note 23, at 144-48 (discussing the process by which the OIRA reviews agency rules).

³⁵ See Exec. Order No. 13563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011) (requiring each executive agency to submit significant regulations to OIRA).

³⁶ See Sunstein, *supra* note 23, at 1843 (discussing the agencies that are consulted when an issue implicates national security).

substantive rather than political. At the early stages, political considerations are not likely to be raised at all.

Draft rules, both proposed and final, are also subject to scrutiny by other departments within the executive branch. If a regulation has implications for the energy supply, it will also be assessed by the Department of Energy. The Departments of Commerce and Treasury might well be involved, especially if the regulation raises economic issues. To the extent that there are labor implications, the Department of Labor will comment, and what it says will greatly matter. If agriculture is affected, the Department of Agriculture will comment as well. The Department of Interior might well be involved. Within the agencies, technical analysts typically undertake the initial review. They will be civil servants, specialists in the issues at hand.

This process of scrutiny is often intense. Issues of policy and law might receive detailed attention. Perhaps people disagree. Perhaps there will be legal objections from lawyers within the Department of Treasury. Perhaps someone in the Department of Energy will suggest that some of the policy choices are wrong. Perhaps the economic analysis will be seen by someone in the Council of Economic Advisers to contain a serious mistake. Any analysis of benefits and costs will probably be seen and scrutinized by numerous people in different places within the executive branch.

Frequently, issues and concerns can be worked out at the staff level, as a result of extended substantive discussion. OIRA will convene staff-level discussions where most of the issues can be resolved, whether they involve economics, policy, or law. But here as well, issues might be “elevated.” For example, an Assistant Secretary of one department might engage with the Assistant Secretary at the rulemaking agency and with OIRA’s Deputy Administrator to explore interagency concerns. Sometimes the issue will be raised to the OIRA Administrator himself. If (and this is rare) agreement is not possible at that level, further discussions will be required, with ultimate resolution by a group of principals or (in a very rare case) by the President personally.

Importantly, the regulatory process is not only an internal one; it also involves citizens, not merely public officials. For regulations, public comment is frequently involved, and it can make a large difference. OIRA’s institutional inclination—and it is a strong one—is to make clear that comments are invited on a wide range of choices in a proposed rule, and that they are also invited on alternatives to those choices. Agencies often think, and OIRA often urges them to think, that their own judgments are provisional and that the role of the comment process is to learn whether or not they are right. For that learning to occur, the public must be urged to comment on the provisional choices and on alternatives to them.

It is not much of a stretch to see the inspiration for this form of deliberative democracy in Friedrich Hayek, and especially his emphasis on the dispersed nature of knowledge in society.³⁷ Of course, Hayek was not a great fan of the modern regulatory state, but his work on widely dispersed information has helped inspire the effort to go outside of government and learn from what others know.

One reason for the great length of final rules is that their preambles engage with comments, frequently in considerable detail. And in many cases, public comments help produce substantial changes. Sometimes agencies learn that their proposals need to be withdrawn.³⁸ Sometimes they learn that a fundamentally different approach, one that saves costs, is best.³⁹ Sometimes they learn that a more expansive approach, which increases benefits, is justified.⁴⁰ A great deal of deliberation thus occurs between public officials and citizens, not only as a result of meetings, but also perhaps most fundamentally through the process of public comment. It might not live up to the very highest ideals, but much of the time, it is worthy of the idea of deliberative democracy.

These points suggest strong reasons to reject the view, offered energetically by some law professors, that courts should be less willing to defer to executive action when that action is not a product of the autonomous decisionmaking of the rulemaking agency involved, but of numerous officials within the executive branch.⁴¹ Put to one side the fact that courts will not ordinarily know about the internal process of deliberation or be able to sort out the precise role of various officials. The much deeper problem is that this view has things *exactly backwards*. If an agency is acting on its own, there might well be reason to worry about myopia, mission orientation, and tunnel vision, potentially compromising the ultimate judgment. If multiple officials

³⁷ See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945) (noting how “knowledge of the relevant facts is dispersed among many people”).

³⁸ See, e.g., Press Release, U.S. Dep’t of Labor, US Department of Labor’s OSHA Withdraws Proposed Interpretation on Occupational Noise: Agency Examines Other Approaches to Prevent Work-Related Hearing Loss (Jan. 19, 2011), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19119 [<https://perma.cc/SZ77-UGJB>] (announcing that OSHA was withdrawing its proposed interpretation on occupational noise).

³⁹ See, e.g., Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category, 77 Fed. Reg. 29,168, 29,191-99 (May 16, 2012) (to be codified at 40 C.F.R. pts. 9, 449) (discussing the costs and benefits of the EPA’s final rule).

⁴⁰ See, e.g., Press Release, U.S. Food & Drug Admin., FDA Finalizes Menu and Vending Machine Calorie Labeling Rules (Nov. 25, 2014), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm423952.htm> [<https://perma.cc/59E5-KNUX>] (noting that movie theaters, among other businesses, are required to provide nutritional information on their menus, thus broadening the scope of that requirement beyond that of the proposed rule).

⁴¹ See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1185-88 (2014) (calling for more intense scrutiny of decisions that did not result solely from judgments of a rulemaking agency).

are involved, there are of course no guarantees, but the risks are reduced because of the safeguards provided by diverse perspectives. The case for judicial deference to executive action is far stronger if the action is supported and produced by numerous officials, not just by the rulemaking agency.

With respect to law, there is a supporting fact, based on my own experience: general counsels within agencies are usually excellent, but in at least some cases, their legal judgments are influenced by the substantive goals and hopes of their own cabinet secretaries. Lawyers in other parts of government—the Department of Justice, the White House Counsel’s Office, the Office of Management and Budget General Counsel, other agencies—may have greater objectivity even if they have less specialized expertise. Often lawyers outside of the rulemaking agency have more distance from the agency’s political mission and are sometimes more reliable on the underlying law. What is true of legal issues can be true of policy questions as well, including predictions of likely consequences, such as costs and benefits, where economists at the Council of Economic Advisers might be more reliable than economists at rulemaking agencies.

3. An Important Qualification

The picture that I have presented might well seem to be an idealized one. While it generally matches reality (at least in my experience), not every executive branch, and not every issue in the same executive branch, is the same. Some people will be deeply skeptical about any picture of the Obama Administration as embodying an appealing form of deliberative democracy. Others will point to their own preferred examples—real or imagined—in which it seems misleading, incomplete, or worse to depict the Executive as the most knowledgeable branch, or to neglect the extent to which political judgments and biases can dwarf knowledge of facts. Sometimes those examples are not good ones, depending as they do on incomplete information, and examples are no more than that. But perhaps they illustrate a more general problem, at least in some domains. And whatever we think of the Obama Administration, it is easy to find or to envision other administrations, past or future, that draw my characterization into serious doubt.

To put the point most vividly: how would these arguments work if the President were X, where X is one’s least favorite possibility? (Some people would see Donald Trump, the 2016 Republican nominee, as X; other people would single out Bernie Sanders, the surprisingly strong Democratic contender in that year.) Perhaps X has terrible but fixed convictions and is unwilling to listen to reason; perhaps X does not much care about the facts; perhaps X does not care about public comments; or perhaps X is unduly influenced by well-organized interest groups.

During a Republican administration many years ago, I sent some suggestions about how to deal with climate change to a high-level public official, who was (and is) a committed conservative as well as a technical expert and was (and is) also a good friend. My suggested approach would not have imposed high costs. I was puzzled to receive no answer (though after my own experience in government, learning about the potential risks of using email, my puzzlement dissipated). When I saw him at the White House, he came right up to me and said, “Cass, your suggestion isn’t bad at all, but you have absolutely no idea how conservative my colleagues are!”

Note, however, that even if the President were X, many decisions of the executive branch would probably not be affected. Most decisions would be relatively routine (even if important), and they would be settled by the facts—even under X. But it must be acknowledged that if the President were X, or anyone like X, the epistemic advantages of the executive branch would matter much less, at least on high-profile questions, where relevant interest groups are able to exert their influence or where the antecedent convictions of the President and his high-level officials are fixed and firm.

If such officials believe that climate change is a myth, or not worth attention, technical experts within the executive branch are likely to have a hard time establishing the social cost of carbon. If such officials are committed to an immigration policy that is designed to deport many millions of people—regardless of a fine-grained investigation of likely consequences—then it might not matter that the executive is the most knowledgeable branch. If the President or high-level officials favor very stringent regulation of ozone, mercury, and particulate matter—whatever the facts show—decisions will not reflect the epistemic advantages of the executive branch. If such officials are enthusiastic about renewable fuels and want to maximize their use—whatever the facts show—it is useless to emphasize that executive branch officials have unique access to information.

It must therefore be acknowledged that the arguments I am making here depend on the assumption that most of the time, the executive branch operates as if it were not run by X. I believe that this has been, and is likely to be, true under both Democratic and Republican Presidents, certainly outside of the context of the most politicized questions (and frequently enough, in that context as well). But it must be acknowledged that under any President, the influence of interest groups cannot be discounted and the risk of politicized decisionmaking, or of excessive domination by antecedent convictions, is well above zero. If the President really were X, the arguments I have made here would lose most of their force.

4. Knowledge and Constraint

Institutional questions cannot be resolved in the abstract. Some system of judicial review is foundational to the American system of public law, but the argument for its existence depends on a set of contingent assumptions. The costs of decisions and the costs of errors are fundamental. What kinds of decision costs does such review introduce? How many errors, and of what magnitude? There is no abstract or a priori justification for the American system of judicial review.

In a hypothetical and unrealistic (but not unimaginable) world, the most knowledgeable branch should proceed on its own and without much in the way of judicial constraints. Suppose, for example, that the most knowledgeable branch were expert in the law as well as everything else, and also that it was most unlikely to proceed arbitrarily. Suppose that judges' judgments were highly unreliable with respect to law, including in their review of the exercise of discretion. On those assumptions, judicial review would not be a good idea. It would increase the costs of decisions while also increasing the costs of errors.

Or suppose that because of its ability to combine accountability, deliberation, and fact-finding expertise, the Executive could make excellent judgments about a wide range of policy questions. In those circumstances, the argument for judicial review of agency action for "arbitrariness" would be significantly weakened. Suppose too that because of its focus on short-term electoral prospects and scoring points, and also its lack of knowledge, Congress could not make excellent judgments, and indeed that Congress would make it difficult or impossible for the executive branch to do so. On those assumptions, the Executive should proceed untrammelled.⁴²

Our constitutional order, of course, rejects these assumptions, and for excellent reasons. Notwithstanding what I have said here, there is a risk that the legal judgments of the executive branch, influenced by its own policy preferences, will be erroneous, self-aggrandizing, or self-serving.⁴³ To the extent that they are not, it is in significant part because the courts are available to contest their legal judgments. My own experience in government was that

⁴² Cf. *STAR WARS: EPISODE III—THE REVENGE OF THE SITH* (20th Century Fox 2005) (showing the Emperor assuming power in response to the failures of a fragmented and polarized legislative branch). See generally CASS R. SUNSTEIN, *THE WORLD ACCORDING TO STAR WARS* (2016) (discussing separation of powers issues raised by the Star Wars series).

⁴³ On one view, the risk of self-serving judgments is best understood as translating into, or as part of a series of dangers that translate into, denials of liberty. On certain assumptions, those dangers justify relatively aggressive judicial review, even if agencies have epistemic advantages. See *In Hayek Lecture, D.C. Circuit Judge Douglas Ginsburg Argues Against Judiciary's Marginalization in Administrative Law*, NYU LAW (Oct. 23, 2015), <http://www.law.nyu.edu/news/douglas-ginsburg-2015-hayek-lecture> [<https://perma.cc/6ZA2-QSYD>] (asserting the valuable role of courts as a check on agency discretion).

the prospect of *ex post* judicial review was a powerful constraining force. The risk of unlawful action would be far higher without it. If the courts were unavailable, there is no doubt that the rule of law and liberty itself would be at a serious risk.⁴⁴

It is true that enthusiasm for the constraining force of law depends on a judgment in favor of congressional restrictions on the authority of the most knowledgeable branch, and above all, in favor of a requirement of statutory authorization for action on its part. The best justification for that judgment begins with the time-honored proposition that Congress's distinctive form of accountability, and the difficulty of achieving sufficient support for legislation, provide constraints on action that would invade liberty or threaten welfare.⁴⁵ It is important in this regard that all executive branch officials work for the same person (the President) and notwithstanding internal safeguards, deliberation by relevantly like-minded people might ensure a degree of extremism, or at least confidence in a position that has not been adequately tested by reference to sufficiently diverse views.⁴⁶ I have noted that within the executive branch, many perspectives are available, but the fact remains that everyone works for a single person, which will reduce the level of heterogeneity. Recall the problem of "happy talk." Democratic administrations do not usually have a lot of Republicans in high positions, and vice-versa, and so, at times, strong challenges to basic direction of the kind that members of an opposing party might make are essentially absent.

If Congress must authorize the Executive to act, that is a built-in constraint on the exercise of national power. That constraint makes most sense if, as is plainly the case, the most knowledgeable branch cannot always be trusted—and if, as is less plain, the requirement of congressional authorization does not impose an excessive restriction on the government's ability to promote or protect liberty and welfare. It also makes sense if we insist that a degree of authorization, from diverse elected officials with their own values and concerns, is an important safeguard of liberty.

5. Some Brief Doctrinal Notes

Do the epistemic advantages of the Executive bear on doctrinal disputes? Sometimes they play an explicit role. Courts have been reluctant to police agency inaction, and indeed have generally deferred to agency enforcement

⁴⁴ *See id.* (emphasizing the importance of courts in protecting individual rights).

⁴⁵ It must be acknowledged that this conclusion depends on a contestable conception of liberty. *See* CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 33-34 (2004) (noting various conceptions of liberty).

⁴⁶ *See* SUNSTEIN & HASTIE, *supra* note 5, at 77 (discussing how deliberating group members tend to adopt a more extreme vision).

practices, on the ground that the courts do not have a sufficient sense of the full set of executive branch priorities.⁴⁷ That is a sensible form of humility. Managerial authority, backed by information, is an important reason for judicial deference. When litigants bring suit, they might have a seemingly strong argument that the problem they want to address is highly significant and deserves attention. If the problem is viewed in isolation, they might be convincing. But if the agency, or the Executive as a whole, is grappling with numerous problems that also deserve attention, judicial scrutiny might be a terrible idea. The executive branch should be permitted to say “not now,” and when it does so, courts should generally respect that answer.⁴⁸

In modern law, a far more controversial issue involves the *Auer* doctrine, which states that courts will defer to reasonable agency interpretations of ambiguous regulations.⁴⁹ On one view, the *Auer* doctrine is a large mistake: courts, and not agencies, should interpret the law, even or perhaps especially if it comes in the form of a regulation. But suppose, as is frequently the case, that interpretation of an ambiguous term calls for technical expertise. In one case, for example, an agency issued a legislative rule requiring employers to report occupational diseases within ten days after they are “diagnosed.”⁵⁰ The agency clarified, in an interpretive rule, that chest x-rays that “score” above a specified level of opacity count as a diagnosis.⁵¹ Does it make even a little sense to say that courts ought to be making independent judgments about the meaning of the term “diagnosed,” so long as that term is genuinely ambiguous?⁵²

An appreciation of the epistemic advantages of the executive branch, and the relevance of those advantages to the ascertainment of meaning in the face of genuine ambiguity, strongly suggests that *Auer* is entirely right.⁵³ A critic might respond, as Justice Scalia did, in a passage that is worth quoting at length:

Making regulatory programs effective is the purpose of *rulemaking*, in which the agency uses its “special expertise” to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to “say what the law is.” Not to make policy, but to determine what policy has been made and promulgated by the agency, to which the public owes obedience. Indeed, since the leadership of agencies (and hence the policy

⁴⁷ See Sunstein & Vermeule, *supra* note 13, at 186 (noting how courts often defer to agency inaction).

⁴⁸ See *id.* at 160 (outlining the conditions under which “agencies may defer action or decide not to decide”).

⁴⁹ *Auer v. Robbins*, 519 U.S. 452, 458 (1997).

⁵⁰ 30 C.F.R. § 50.20 (1977).

⁵¹ See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (describing the agency’s scoring thresholds for a “diagnosis”).

⁵² I mean the question to be rhetorical.

⁵³ For a detailed discussion, see generally Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. (forthcoming).

preferences of agencies) changes with Presidential administrations, an agency head can only be sure that the application of his “special expertise” to the issue addressed by a regulation *will be given effect* if we adhere to predictable principles of textual interpretation rather than defer to the “special expertise” of his successors. If we take agency enactments as written, the Executive has a stable background against which to write its rules and achieve the policy ends it thinks best.⁵⁴

The problem with this argument is that we are dealing with cases in which regulations are genuinely ambiguous. To be sure, it might well make sense to say that courts should follow “predictable principles of textual interpretation,”⁵⁵ and to enlist those principles rather than to defer to special expertise. But *Auer* becomes relevant when predictable principles leave room for reasonable dispute. What is a “diagnosis”? Should we answer that question by consulting the dictionary? What if the dictionary does not give a clear answer? The space for *Auer* would be eliminated if we really believed that when armed with “predictable principles,” there would always be a uniquely correct answer to interpretive disputes. But that belief defies reality. Too much of the time, regulations are genuinely unclear—not for strategic or opportunistic reasons, but because the problem has not arisen yet or been thought through.

The *Auer* question is related, of course, to the debate over the *Chevron* principle, which instructs courts to defer to agency interpretations of ambiguous statutory terms, so long as their interpretations are reasonable.⁵⁶ On one view, which continues to draw academic and legal attention, *Chevron* is quite wrong: interpretation of statutory ambiguities is for the courts, not agencies, because it is, as they say, the province and duty of the judicial branch to say what the law is.

Often, however, “what the law is” depends on an assessment of the likely consequences of one or another judgment. If so, the agency’s informational advantages are exceedingly important. To be sure, it would be a gross misunderstanding to insist that the executive department has *preeminent* authority to say what the law is. But within the bounds of ambiguity, it makes sense to say that those with epistemic advantages are entitled to speak to that question.

III. THE TALE OF REAR VISIBILITY: A CASE STUDY

I now turn to a particular controversy—one that operates as a useful testing ground for the propositions thus outlined, and one that is also

⁵⁴ *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring) (emphasis in original) (internal citation omitted).

⁵⁵ *Id.*

⁵⁶ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

unusually interesting in its own right. The debate over rear visibility regulation reveals a great deal about congressional weakness, resulting in a remarkably open-ended grant of authority, and about the immense knowledge held by the executive branch. It also has a happy ending (I think). There are limits to how much one can learn from a single case, but in my view, the debate over rear visibility regulation is both representative and illustrative, above all because of the centrality of facts and of the intense focus of the executive branch on those facts.

A. *A Death and A Statute*

1. Context

We begin with a tragedy. In 2002, Cameron Gulbransen was a happy, smiling two-year-old boy.⁵⁷ One day, his father decided to back his SUV into the driveway, because in the morning the street tends to be “filled with children and people walking dogs.”⁵⁸ As always, he used his “side view mirrors and the rear view mirror” and “looked over [his] shoulder in an attempt to avoid hitting anything.”⁵⁹ But as he backed in, he heard a “small bump” on the front wheel and was not sure “what it could have been.”⁶⁰ As it turned out, it was Cameron, who was “lying down with his blanket in his hand while bleeding profusely from his head.”⁶¹ Cameron died shortly thereafter.⁶²

2. Text

Five years later, Congress enacted the Cameron Gulbransen Kids Transportation Safety Act of 2007 (the Act).⁶³ The central provision of the Act states its purpose and provides a deadline:

Not later than 12 months after the date of the enactment of this Act, the Secretary shall initiate a rulemaking to revise Federal Motor Vehicle Safety Standard 111 (FMVSS 111) to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce

⁵⁷ See *Cameron Gulbransen*, KIDSANDCARS.ORG, <http://www.kidsandcars.org/cameron-gulbransen.html> [<https://perma.cc/YJK4-BZBH>] (describing an automobile accident involving Cameron Gulbransen).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Pub. L. No. 110-189, 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (2012)).

death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons.⁶⁴

In a plain grant of discretion, the Act authorizes (without requiring) the Secretary to “prescribe different requirements for different types of motor vehicles to expand the required field of view.”⁶⁵ In a further grant of discretion, it states that any standard “may be met by the provision of additional mirrors, sensors, cameras, or other technology to expand the driver’s field of view.”⁶⁶ With respect to timing, however, the Act has a degree of rigidity, requiring issuance of a final standard “not later than 36 months after the date of enactment of this Act.”⁶⁷ At the same time, it authorizes the Secretary to determine “that the deadlines applicable under this Act cannot be met,” in which case he must “establish new deadlines” and “notify the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate of the new deadlines” with an account of “the reasons the deadlines specified under this Act could not be met.”⁶⁸

In that sense, the Act has an unusual structure. Like many other statutes, it obligates the Executive to meet a deadline, and thus overcomes its usual power of priority-setting and time management. But unlike most statutes, it allows the Secretary to fail to meet the deadline so long as he offers a public statement of reasons (apparently, but not self-evidently, with judicial review for arbitrariness).⁶⁹

3. What Congress Knew

In imposing the Act’s requirement, Congress knew that backover crashes occur and that they sometimes end in tragedy. What else did Congress know? From the evidence of the Senate Committee Report, it⁷⁰ knew some important things.⁷¹ Having asked the National Highway Traffic Safety Administration of the Department of Transportation, it had significant, though provisional, information about effectiveness. For example:

⁶⁴ *Id.* § 2(b).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* § 4.

⁶⁹ There is an argument that the decision not to proceed at a particular time should be immune from review under *Heckler v. Chaney*, 470 U.S. 821 (1985), but in view of the deadline and the requirement of an explanation, that argument would not be likely to succeed.

⁷⁰ I bracket for now the meaning of the word “it.”

⁷¹ See generally S. REP. NO. 110-275 (2008) (describing the Cameron Gulbransen Kids Transportation Safety Act of 2007, its costs, and its expected impact).

The data the NHTSA received reported that sensor-based warning systems were generally able to detect adult pedestrians but were lacking in their ability to consistently detect child pedestrians. The report stated that camera systems performed well visually in daylight and indoor lighted situations, but required drivers to be able to quickly and accurately interpret the video information to be effective.⁷²

With respect to cost, the Congressional Budget Office had provided Congress with some data, suggesting that the total expense could be in the billions because “it would cost vehicle manufacturers approximately \$350 per car to install the equipment that would best enhance rearward visibility.”⁷³

As far as the record shows, no one in Congress, and no one consulted by Congress, did a formal comparison between costs and benefits, and, remarkably, the Act did not specify a rule of decision. But the Senate Committee Report suggests that a large expense was anticipated.⁷⁴ Congress therefore had, at least, access to some important information suggesting that cameras could be effective, but that they would also be costly. At the same time, we might question in what sense it is fair to say that “Congress,” as such, understood that point. How many members of Congress knew about that possibility? How many of those who strongly supported the Act?

While writing this Article, I asked such questions to one member of Congress, an extremely intelligent and hardworking Senator, who had been there for the enactment of the Act. He had no idea what I was talking about.

4. Options

Now imagine that you are working at the Department of Transportation. Your questions are: What, exactly, has Congress directed you to do? How much discretion do you have? It is clear that whatever the answer, you have to do it by a specific date, or explain why that date proved not to be feasible. It is also clear that whatever you do, you must “expand the required field of view” to allow drivers to “detect areas behind the motor vehicle,” with the goal of reducing backing incidents, “particularly incidents involving small children and disabled persons.”⁷⁵ So far, perhaps, so good.

At the same time, you seem to have a great deal of discretion. You are authorized to consider “additional mirrors, sensors, cameras, or other technology.”⁷⁶ You can “prescribe different requirements for different types

⁷² *Id.* at 3.

⁷³ *Id.* at 5.

⁷⁴ *Id.*

⁷⁵ Pub. L. No. 110-189, § 2(b), 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (2012)).

⁷⁶ *Id.*

of motor vehicles.”⁷⁷ The latter provision seems to disable you from choosing to prescribe *no* requirements, but on the face of the statute, the available options appear to have a wide range. You could require all motor vehicles to have cameras, sensors, or additional mirrors. You could require some types of vehicles—say, trucks—to have cameras, while requiring all others to have additional mirrors. You could mix and match.

If your options have such a wide range, you might immediately ask: What is my rule for deciding? How should I choose among the alternatives? From the fabric of current law, you might wonder about these possibilities:

1. A safety-based, cost-blind standard, which would require the technology most likely to improve safety, at the highest level of stringency;
2. Same as (1), but subject to a constraint of technological feasibility;
3. Same as (1), but subject to a constraint of both economic and technological feasibility;
4. Same as (3), but also subject to a constraint of cost-effectiveness;
5. Some form of cost–benefit balancing;⁷⁸
6. Same as (5), but also with a “least burdensome alternative” standard, which would require adoption of the approach that imposes the lowest costs.

Remarkably, the text of the Act seems to give the Department no guidance on how to think about the choice among the six possibilities. It appears to be a nearly blank check. If executive branch officials are effectively given the authority to choose the rule of decision for important regulations—with no constraints on content—might there be a legitimate nondelegation problem?⁷⁹ Under current law, the answer is almost certainly “no,”⁸⁰ because the Court has not invoked the nondelegation doctrine to strike down an act of Congress in eighty years (and counting).⁸¹ Nonetheless, the fact that the question is worth asking attests to the breadth of the statutory grant of authority.

⁷⁷ *Id.*

⁷⁸ An approach of this kind was given a general endorsement, in the face of congressional ambiguity, in *Michigan v. EPA*, Nos. 14-46, 14-47, & 14-49 (U.S. June 29, 2015).

⁷⁹ See Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1421-25 (2008) (characterizing the nondelegation doctrine as “dead”).

⁸⁰ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474-76 (2001) (upholding section 109(b)(1) of the Clean Air Act against a nondelegation challenge that Congress had impermissibly delegated legislative power to the EPA).

⁸¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (striking down a resolution of the poultry industry as an invalid delegation of legislative authority).

5. “Fix the Problem, as You See Fit.”

Let us put that question to one side and ask another: Why, exactly, did Congress fail to specify anything like standards by which to cabin the discretion of the executive branch? What Congress appears to have done here is to say: “*Here is problem. Now fix it.*” And Congress appears to have done that without giving the executive branch criteria by which to decide what kind of fix would be best. Perhaps that particular question never occurred to relevant members. Perhaps members never even asked about appropriate standards.

Or perhaps they did ask that question, but thought better about trying to enact any answer into law. We are speculating here, of course, but an effort to specify any one of the six options described above would likely have encountered serious resistance. A cost-blind standard would run into obvious and convincing objections: Should the Department really insist on safety standards that would cost a great deal (billions of dollars perhaps) but generate only modest safety benefits? Would a \$2 billion expenditure be justified in order to save, say, twenty lives? In principle, there is much to be said for cost–benefit balancing, but with respect to the lives of young children, could that approach command a consensus within Congress? Would it be acceptable to value a child’s life, implicitly or explicitly, at \$9 million, \$20 million, or \$40 million? From the standpoint of political self-interest and consensus building, a standard-free statute would have broad appeal.⁸²

There is a further problem. Notwithstanding what the Senate Committee Report learned from NHTSA and the CBO, it is fair to think that most members of the enacting Congress did not have a great deal of information about the problem.⁸³ They might have known about Cameron Gulbransen, to be sure, and perhaps about other tragic cases, but they did not have anything like detailed information about possible technologies, their likely effectiveness, and their costs and benefits. In these circumstances, the “fix the problem” approach might seem to be attractive.

One final question: if the Act allows the Department a great deal of room to maneuver, does the APA impose constraints on the Department’s discretion? Of course, it forbids action that is “arbitrary” or “capricious.”⁸⁴ We could well say that some decisions about rear visibility would run afoul of that prohibition—perhaps by imposing large costs for modest benefits or by failing

⁸² These points cast grave doubt on the clever and influential suggestion that because Congress must take political “heat” for failing to speak precisely, it is as accountable for vagueness as it is for specificity. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 87 (1985) (questioning the assumption that voters hold politicians accountable for voting on specific legislation). Sometimes vagueness has unique or decisive political appeal.

⁸³ See *supra* subsection II.B.2.a.

⁸⁴ 5 U.S.C. § 706 (2012).

to produce significant benefits for low costs. Under *Michigan v. EPA*, it appears clear that an agency must weigh advantages and disadvantages, at least making some comparison between the two.⁸⁵ The Court has not yet resolved the question of whether and when the arbitrary or capricious test, by itself, requires the Executive to consider costs, or exactly how to consider costs. The *Michigan* case, however, strongly signals that cost–benefit balancing, of one kind or another, will be mandatory. As we shall see, the rear visibility problem raises challenging questions about what such balancing might entail.

B. *Within the Executive Branch*

1. In General

Let us now turn to the actual thinking of executive branch officials. Since 1981, American Presidents have required such officials to show—to the extent permitted by law—not only that all regulations pass some kind of cost–benefit test, but also that the chosen approach maximizes net benefits.⁸⁶ The most recent guidance comes from Executive Order 13,563.⁸⁷ At first glance, the Act unquestionably “permits” the Department to use those ideas as the rule of decision.⁸⁸ And because the President requires the Department to use those ideas as permitted,⁸⁹ the essential task seems straightforward: *ensure that the benefits justify the costs and maximize net benefits.*

If the numbers turned out a certain way, then that task might be straightforward. Suppose, for example, that cameras cost \$400 million and create \$600 million in benefits, that sensors cost \$100 million and create \$80 million in benefits, and that additional mirrors cost \$50 million and create \$25 million in benefits. With such numbers, the argument for cameras would seem conclusive, and the Department would have no discretion under Executive Order 13,563. The principal qualification involves “different requirements for different types of motor vehicles.”⁹⁰ Suppose that trucks

⁸⁵ No. 14-46, slip op. at 15 (U.S. June 29, 2015) (holding an agency’s interpretation of a statute unreasonable because it did not consider the costs imposed by its regulation).

⁸⁶ See, e.g., Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011) (noting that agencies must account for “benefits and costs”); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (stating that “agencies should assess all costs and benefits of available regulatory alternatives”); Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 19, 1981) (requiring agencies to describe the potential costs and benefits of an action).

⁸⁷ See 76 Fed. Reg. at 3821 (directing agencies to find the “least burdensome tools for achieving regulatory ends”).

⁸⁸ Pub. L. No. 110-189, 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (2012)).

⁸⁹ See 76 Fed. Reg. at 3821 (directing agencies to “select . . . those approaches that maximize net benefits” and to consider “[w]here appropriate and permitted by law . . . values that are difficult or impossible to quantify”).

⁹⁰ § 2(b), 122 Stat. at 640.

accounted for \$100 million of the total cost of cameras, but \$500 million of the total benefits. If so, Executive Order 13,563 would appear to require the Department to make relevant distinctions, by requiring cameras in trucks but sensors or additional mirrors in other smaller vehicles.⁹¹

The basic point is that if the numbers work out in certain ways, Executive Order 13,563 might make the Department's task fairly straightforward and sharply constrain its discretion. At least, this would be so if the technical experts within the Department could generate relatively precise numbers.

2. The Proposed Rule

As it happens, however, the numbers, generated by those experts, did not make things nearly so easy. At the proposal stage, cameras would have cost \$1.9 billion to \$2.7 billion, sensors \$300 million to \$1.2 billion, and mirrors \$600 million.⁹² The monetized benefits would have been between approximately \$780 million and \$920 million for cameras and around \$47 million for sensors, and much less for mirrors.⁹³ The upshot is that, of the three alternatives, cameras would have been the only substantial response to the problem, with the other two options contributing very little.⁹⁴ Further, cameras would have had, by far, the most favorable cost–effectiveness ratio.⁹⁵ In terms of cost per life saved, cameras were unquestionably the best option considered.⁹⁶ At the same time, all three options would have had negative net benefits,⁹⁷ which appears to mean that they would be worse than doing nothing at all—and, of the three options, cameras would have had *by far* the highest net costs.⁹⁸ What seems, on one view, to be unquestionably the best option is, on another view, unquestionably the worst. Congress did not think at all about this prospect, and it might be doubted whether it was equipped to do so. By contrast, the executive branch certainly did think about this.

⁹¹ See 76 Fed. Reg. at 3821 (directing agencies to “tailor” their “regulations to impose the least burden on society”).

⁹² See Federal Motor Vehicle Safety Standard, Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76,236 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585) (explaining the costs of implementation).

⁹³ See *id.* at 76,237 tbl. 15 (reporting the lifetime estimated benefits at a 3% discount rate). The Department did not present a calculation of benefits for additional mirrors because it determined that they had “shown very limited effectiveness and thus would not satisfy Congress’ mandate for improving safety.” *Id.* at 76,239.

⁹⁴ See *id.* at 76,239–40 (noting the superiority of cameras as compared to sensors and mirrors).

⁹⁵ See *id.* at 76,239 (“Video camera-based systems are by far the comprehensive and cost-effective currently available solution . . .”).

⁹⁶ See *id.* at 76,237 tbl. 16 (reporting the cost per life saved of each measure analyzed).

⁹⁷ See *id.* at 76,237 (“[N]one of the systems are cost effective based on our comprehensive cost estimate . . .”).

⁹⁸ See *id.* at 76,236 (“The most expensive technology option . . . is the rearview camera.”).

Under Executive Order 13,563, the issue would seem to be resolved, at least on these numbers. (As we shall see, the word “seem” is important here.) The Department should do nothing because no approach would have net benefits, and, if the Department did end up doing something (as the Act seems to require), additional mirrors would be preferable because they would impose the lowest net costs.⁹⁹ In this regard, the decisive question is not the cost–benefit *ratio*, on which cameras look like the best option,¹⁰⁰ but instead the net benefits or costs.¹⁰¹ The reason is that the latter figure provides information about the social welfare effects, whereas the former does not.¹⁰² A rule that costs \$1 billion, but that has \$1.5 billion in benefits, has a cost–benefit ratio of 1.5 to 1, which is not nearly as impressive as a rule that costs \$2, but has only \$1000 in net benefits, for a ratio of 1 to 500. But in welfare terms, it is much better to deliver \$500 million in net benefits than to deliver merely \$998. Under the governing guidance document from the Office of Management and Budget, the task of the Department is to produce the highest net benefits or the lowest net costs.¹⁰³ On those counts, mirrors would be best. Note that the whole point of cost–benefit analysis is to provide information about the effects on social welfare;¹⁰⁴ the net figure is what matters, not the ratio. The executive branch has thought these issues through with considerable care.

Under the Act and Executive Order 13,563, there is a further question: whether to make distinctions among vehicles. It should go without saying that much depends on the costs and benefits of doing so. We could imagine an analysis showing that it would be best to require cameras on some vehicles and mirrors on others. Here as well, the Department had a great deal of information, some of which is captured in the following table:

⁹⁹ See *id.* (discussing the cost of mirrors compared to cameras and sensors).

¹⁰⁰ Relatedly, the Department calculated the net cost per equivalent life saved to be between \$11.8 million and \$19.7 million for camera systems, compared to between \$95.5 million and \$192.3 million for sensors. *Id.* at 76,237.

¹⁰¹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 (2003), https://www.whitehouse.gov/omb/circulars_a004_a-4/ [<https://perma.cc/YN7M-UH6H>] (instructing agencies to look for “the largest net benefits”).

¹⁰² See *id.* (acknowledging that it is not always possible to quantify all benefits, but emphasizing that the important measure is net benefits, rather than simply a good ratio).

¹⁰³ See *id.* (discussing the cost–benefit analysis and emphasizing net benefits, not the ratio).

¹⁰⁴ See *id.* (stating that “the welfare of others should supplement benefits and costs equally”).

Table 1: Rear Visibility Proposal and Alternatives Discounted at 3%¹⁰⁵

(In decreasing order of installation costs and monetized safety benefits)

(Millions of \$, in 2007 terms/levels of inflation)

Proposal and Alternatives	Per Vehicle Costs and Benefits				Net Cost per Equivalent Life Saved
	Installation Costs	Monetized Safety Benefits	Property Damage Costs	Net Costs	
LT CAMERA PC CAMERA	\$1,919 to \$2,275	\$778	\$ -414	\$727 to \$1,084	\$11.8 to \$14.6
LT CAMERA PC RADAR	\$1,512 to \$1,710	\$439	\$ -149	\$924 to \$1,122.92	\$18.9 to \$21.793
LT CAMERA PC ULTRASONIC	\$1,215 to \$1,413	\$437	\$ -165	\$613 to \$811	\$14.7 to \$17.4
LT CAMERA PC NOTHING	\$841 to \$1,039	\$415	\$ -189.	\$237 to \$435.	\$9.6 to \$12.5

This table does not include mirrors, but it does show that with different forms of mixing and matching, net costs can move in significantly different directions. The precise choice is less important than the general lessons. From this information, we might conclude that if the Department seeks to comply with Executive Order 13,563, it should do nothing; that if it must do something, it should be inclined to favor mirrors; and that whatever it does, it ought to make distinctions among categories of vehicles in a way that maximizes net benefits or minimizes net costs.

But these conclusions raise their own complications. We should agree that the Act requires the Department to do something, even if all options have negative net benefits. Indeed, the statute appears to contemplate that the Department must do something with respect to every class of vehicle, even if each class might be treated differently.¹⁰⁶ But as a matter of law, there is also a strong argument that the Act does not permit the Department to choose an option that has a *de minimis* effect on the problem that motivated it. If

¹⁰⁵ 75 Fed. Reg. 76,238 tbl. 17.

¹⁰⁶ See Pub. L. No. 110-189, 122 Stat. 639, 369-41 (2008) (codified as amended at 49 U.S.C. § 30111 (2012)) (giving the Secretary of Transportation a deadline “to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle” where “motor vehicle” is defined to exclude motorcycles, trailers, or any motor vehicle over 10,000 pounds).

additional mirrors would achieve almost nothing in terms of the statutory goal, it might be inconsistent with the Act to mandate them, even if the more effective responses had significantly lower net costs. To that extent, engagement with the evidence has the virtue of sharply narrowing the category of possible responses that the Department might select.

A more fundamental problem is that the monetized numbers do not appear to capture all of the variables at stake. As the Department itself emphasized, with reference to the technical literature, “the quantitative analysis does not offer a complete accounting.”¹⁰⁷ It noted that “well over 40 percent of the victims of backover crashes are very young children (under the age of five), with nearly their entire life ahead of them.”¹⁰⁸ It added that “this regulation will, in many cases, reduce a qualitatively distinct risk, which is that of directly causing the death or injury of one’s own child.”¹⁰⁹ In addition, “[d]rivers will also benefit from increased rear visibility in a variety of ways, including increased ease and convenience with respect to parking.”¹¹⁰ The Department said that if the “nonquantified benefits” would amount to “\$65 to \$79 per vehicle, the benefits would justify the costs.”¹¹¹

Skeptical readers might have wanted a fuller analysis. Some of the relevant values could have been quantified. For example, the Department could have specified upper and lower bounds for an increase in ease and convenience with respect to parking. But within the Obama Administration, there was general agreement that a nonquantitative analysis was sufficient for a proposed rule designed for public comment. The Department had been candid about the numbers and the alternatives. It asked for comments on a wide range of possibilities. It did not commit itself to only one approach. While it emphasized what was quantifiable, it also recognized what was not, and it did not treat the quantifiable as if it were all that mattered.

3. Three Questions, Post-Proposal

Officials within the executive branch were broadly supportive of the proposal, but also keenly interested in the public’s comments and alert to a number of substantive issues. Of these, three stood out. The first was the evident cost of the proposal. A required regulatory expenditure of \$1 billion or more should have to meet a heavy burden of justification. This was

¹⁰⁷ Federal Motor Vehicle Safety Standard, Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76,238 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

especially true in a difficult economic period when automobile companies were struggling and already facing a number of significant regulatory burdens, perhaps above all involving fuel economy. In any administration, both political officials and technical experts are likely to ask serious questions about whether there is an adequate *substantive* justification for a regulatory burden of this magnitude. Regulations very rarely exceed the \$1 billion mark.¹¹² Indeed, any regulation of that kind would account for a significant percentage of the total costs of “economically significant” regulations in any given year.¹¹³ Such an expensive regulation should, in principle, have a compelling justification.

The second concern involved the apparently low benefits of the proposal, at least in comparison to other regulations with similarly high costs. For example, some air pollution regulations would save 1000 or more lives per year,¹¹⁴ and the Department of Transportation issues regulations expected to save hundreds of lives annually.¹¹⁵ The rear visibility rule would not have anything like that impact. No one should diminish the costs of even a small number of unnecessary human deaths, not least in the context of deaths of small children killed by their parents. But it must be acknowledged that the benefits of the rear visibility rule would be far lower than the corresponding benefits for other comparably expensive rules. In terms of net benefits, the rule would be a genuine outlier.

The third issue, and in some ways the most pressing, involved the reliability of the evidence on which the benefits had been projected. At least for outsiders, it is natural to wonder whether cameras might prove distracting and counterproductive, at least for some drivers (perhaps older ones), and thus diminish rather than increase safety. The Department did not, of course, have a randomized controlled trial. Instead it had experimental evidence, involving the behavior of drivers under artificial conditions, which seemed to support its extrapolations. But for a regulation of this magnitude, the most reliable evidence, involving diverse kinds of drivers and diverse kinds of vehicles, would be highly desirable.

¹¹² See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 14-15 tbl. 1-2, https://www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf [<https://perma.cc/TSF6-HQ4C>] (showing that the cost of most major rules is usually under or slightly above \$1 billion).

¹¹³ *Id.* at 11.

¹¹⁴ See *id.* at 17-18 n.20 (discussing the effect of regulations designed by the EPA and the Department of Transportation and the agencies' decisions with respect to the “value of a statistical life”).

¹¹⁵ See CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE 186 app. C (2014) (providing estimates of the costs and benefits of, inter alia, Department of Transportation regulations).

In a letter to members of Congress in 2013, Secretary Ray LaHood elaborated on some of these points.¹¹⁶ He noted that in the aftermath of the original proposal, the Department completed “additional research, which included not only a different vehicle type, but also 143 additional participants.”¹¹⁷ In his account, the new work had “expanded and increased the robustness of the available information on the backover crash problem as well as on the ability of drivers to use rear visibility systems to their advantage in avoiding backover crashes.”¹¹⁸ At the same time, he said that:

[T]he Department believes that analyzing additional information through its Special Crash Investigations program will contribute significantly to its understanding of the backover crash problem. By identifying and analyzing cases that involve vehicles equipped with rear visibility systems, the Department will be able to further refine its understanding of how the proposed requirements address the real world safety risk.¹¹⁹

Between the proposal and 2014, all of these issues received extensive discussion among a variety of officials, including, and above all, technical experts.¹²⁰ To this point it might be added that the executive branch was dealing with a large number of regulations, many of which were required by law. At any given time, the Department of Transportation was focused on a wide range of priorities. Similarly, at any given time, OIRA, with its staff of about forty-five people, was dealing with 120 or more regulations, each of which was also subject to interagency scrutiny.¹²¹ Important issues must sometimes take a temporary back seat to other issues; there is inevitably a queue.

4. The Final Rule

The regulation was finalized in 2014.¹²² While some changes were made, the essentials of the proposal evidently survived both internal and external scrutiny, but the analysis of benefits and costs was changed in material ways.

¹¹⁶ See Letter from Ray LaHood, Sec’y, U.S. Dep’t of Transp., to Fred Upton, Chairman, Comm. on Energy and Commerce, U.S. House of Representatives (June 20, 2013), <http://www.citizen.org/documents/In-re-gulbransen-LaHood-Delay-Letters-6-20-13.pdf> [<https://perma.cc/J8ZG-4WGC>] (requesting more time to identify and analyze different cases).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *id.* (describing the research undertaken by the Department of Transportation).

¹²¹ Cf. Scot J. Paltrow, *Braking the Rules: How a Small White House Agency Stalls Life-Saving Regulations*, REUTERS (Oct. 29, 2015), <http://www.reuters.com/investigates/special-report/usa-regulations-oira/> [<https://perma.cc/2ACM-8XB8>] (noting that while the office has only about forty-five people, its job is to “vet” all “proposed regulations to be enforced by the executive branch”).

¹²² Federal Motor Vehicle Safety Standards; Rear Visibility, 79 Fed. Reg. 19,178 (Apr. 7, 2014) (to be codified as amended at 49 C.F.R. pt. 571).

The most important change stemmed from the fact that the automobile industry was moving rapidly in the direction of installing cameras on its own, a step that would decrease both the costs and benefits substantially.¹²³ According to the Department of Transportation, about 73% of covered vehicles would “be sold with rearview video systems by 2018.”¹²⁴ With that assumption, the rule would “cost \$546 to \$620 million” and “produce \$265 to \$396 million in monetized benefits.”¹²⁵ The agency was aware that the proposed rule might itself have accounted for some of the growth of cameras, and that without the rule, adoption might be as low as 59%, which would increase the costs to \$827 million to \$924 million and increase the benefits from \$398 million to \$595 million.¹²⁶ Because of the growth of voluntary use of cameras, the agency expected to prevent a small number of deaths each year (between 13 and 15), along with 1,125 to 1,332 injuries.¹²⁷ In addition, the Department’s value of statistical life had changed in the interim to about \$9 million.¹²⁸

These various numbers raised several further questions. Even with a degree of market penetration, mandatory cameras would cost hundreds of millions of dollars, without the kinds of safety benefits usually associated with rules with that level of expense.¹²⁹ Return then to the options of sensors and mirrors: might either approach be preferable to cameras? The Department concluded, for highly technical reasons, that both would be inadequate.¹³⁰ With respect to sensors, the agency found, on the basis of its evidence, “that sensor-only systems have various technical limitations that lead to inconsistent object detection and that drivers with sensor-only systems generally either failed to respond to the sensor system’s audio warning, or paused only momentarily before resuming the backing maneuver.”¹³¹ With respect to cameras, the agency found “that drivers were unable to avoid targets behind the vehicle when assisted with additional rear-mounted mirrors such as rear convex ‘look-down’ or cross-view mirrors.”¹³²

¹²³ *Id.* at 19,179.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 19,179 tbl. 1.

¹²⁷ *Id.* at 19,180 tbl. 2.

¹²⁸ See Memorandum from Polly Trottenberg, Under Sec’y for Policy, U.S. Dep’t of Transp. & Robert S. Rivkin, Gen. Council, U.S. Dep’t of Transp., to Secretarial Officers Modal Administrators (Feb. 28, 2013), <http://www.transportation.gov/sites/dot.dev/files/docs/DOT%202013%20Signed%20VSL%20Memo.pdf> [<https://perma.cc/5KSH-VMZN>] (noting that the estimated value of statistical life in 2012 was \$9.1 million). Note that this was a technical document, not a political one, and that it was the result of peer review.

¹²⁹ See *supra* note 125 and accompanying text.

¹³⁰ 79 Fed. Reg. at 19,182.

¹³¹ *Id.*

¹³² *Id.*

Perhaps surprisingly, the agency did not offer actual benefits numbers for the two approaches, but it did say that “sensor-only and mirror-based rear visibility systems have demonstrated little to no success in inducing drivers to stop a backing maneuver to avoid a crash with a pedestrian behind the vehicle”¹³³ In these circumstances, cameras would be “not only the most effective systems at addressing the backover safety problem but also the most cost effective system,”¹³⁴ and therefore were the only way to fulfill the requirements of the Act. It added that ultrasonic sensor systems would be far more expensive than originally thought, costing between \$79 and \$138 per vehicle.¹³⁵

What about the fact that the quantifiable benefits were lower than the quantifiable costs? On this count, the Department essentially repeated its conclusions in its proposal. It pointed to “strong reasons, grounded in unquantifiable considerations, to take action to prevent the deaths and injuries at issue here.”¹³⁶ It added: “In many cases, parents are responsible for the deaths of their own children. We continue to believe that avoiding that horrible outcome is a significant benefit which is not fully or adequately captured in the traditional measure of the value of a statistical life.”¹³⁷ It also noted that: “Drivers will benefit in numerous ways from increases in rear visibility. For example, parking will be simplified, especially in congestion.”¹³⁸

Perhaps surprisingly, the Department did not undertake a formal breakeven analysis, which would have required an exploration of what the benefits would need to be to justify the costs, along with an analysis of the assumptions that would support its conclusion.¹³⁹ Perhaps it declined to do so on the ground that any such analysis would rest on highly speculative assumptions. But it would nonetheless have been possible. The crudest form of breakeven analysis would have started by noting that the monetized shortfall was in the vicinity of \$200 million.¹⁴⁰ The question was therefore whether the nonquantifiable values could make up the difference. Taken in the abstract, without saying more, that question is difficult to answer. But the Department might have made a great deal more progress by saying more about the relevant values.

For example, the Department properly referred to the increased ease and simplification of driving. Suppose that the relevant improvement is valued at merely \$20, taken as a reasonable lower bound. Suppose too that the regulation

¹³³ *Id.* at 19,183.

¹³⁴ *Id.*

¹³⁵ *Id.* at 19,237.

¹³⁶ *Id.* at 19,236.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369, 1387-89 (2014) (outlining a “breakeven” analysis in which an agency determines whether the benefits of a regulation are worth the costs).

¹⁴⁰ This is of course an approximation, used for purposes of simplifying the analysis.

would apply to eight million cars that would otherwise lack cameras. If so, it would produce \$160 million in additional benefits. At that point, the monetized benefits become very close to the monetized costs. By itself, we are very close to the breakeven point.

The Department might have also noted that some preliminary work suggests that parents value a young child's life at \$13.5 million,¹⁴¹ a number that would add \$45 million to the existing benefits figure. At that point, the benefits and costs are essentially equivalent. And indeed, that \$13.5 million figure captures the parents' valuation of children's lives, not children's valuation of their own lives. Surely the latter valuations—those of the children whose lives are at stake—have value independently of how much parents are willing to pay to protect them. If we add \$9 million for a child's life, then we are at \$21.5 million. It would have been an unusual step in view of the tentative nature of the existing research, but the Department might have undertaken a sensitivity analysis with values of \$13.5 million and \$21.5 million—with the latter adding over \$70 million, leaving a shortfall of \$130 million. When the monetary value of additional ease of driving (\$160 million) is added in the mix, the rule no longer has a shortfall at all. Perhaps we could say that the \$160 million is a reasonable lower bound for that additional ease and that even at a reasonable lower bound, the value of protecting young children would add \$40 million, meeting the costs.

Recall finally that we are speaking here of parents who would not only (only!) lose their children, but would also be directly responsible for that loss. How much would it be worth to reduce the risk of that eventuality? Any reasonable lower-bound figure would fortify the conclusion that the costs would be justified. With analysis of this kind, the Department's conclusion seems eminently sensible—not because of a laundry list of nonquantifiable benefits, but because once we begin to speak of lower bounds and expected ranges, an apparently intractable puzzle begins to dissolve.

C. Epistemic Advantages and General Lessons

The final rule was not challenged in court—an interesting fact that might be taken as a testimony to its essential reasonableness (and perhaps the extreme awkwardness, in terms of the “optics”, of an industry-led challenge to a rule designed to save the lives of young children). But it is easy to see the form that such a challenge might take. Indeed, there were many possible avenues:

1. Companies could have argued that the agency lacked sufficient evidentiary basis for its benefits calculations, which were based, in part, on an extrapolation from experimental evidence.

¹⁴¹ Sean Williams, *Statistical Children*, 30 *YALE J. REG.* 63, 76 (2013).

2. Companies could have contended that the costs were wildly underestimated, and that without the government's own initial proposal, which moved the market toward cameras, an estimate of \$1 billion or more in costs would be more accurate.
3. Companies could have objected that it was arbitrary for the agency to proceed in the face of a "benefits shortfall" of hundreds of millions of dollars.
4. Companies could have said that if the agency was to consider nonquantified factors, it was arbitrary not to attempt to quantify those factors, or at least to explain why it failed to do so.
5. Companies could have argued that it was arbitrary for the agency to disregard the less burdensome options (sonar and mirrors) without quantifying their costs and benefits.¹⁴²

Under existing law, some of these challenges might have a genuine chance of success.¹⁴³ That is not exactly good news. The Department's ultimate choice was deeply informed, and it was fully reasonable. From any point of view, it would not be desirable to force it to go back to the drawing board.

This is merely one rulemaking, of course, and we cannot be confident about drawing any general lessons from a single example. Nevertheless, two institutional points stand out. The first is that Congress had a tragedy on its hands, indeed a set of tragedies, along with access to relevant information from the National Highway Traffic Safety Administration and the Congressional Budget Office, but nothing resembling technical expertise.¹⁴⁴ It had no sense of what approach would be best, and it was unable or unwilling even to specify criteria for deciding on that approach.¹⁴⁵ The second is that the executive branch compiled a truly exhaustive amount of information, giving a clear sense of the likely consequences.¹⁴⁶ To be sure, both its account and its ultimate decision could be criticized in good faith. But its comparative advantages over Congress, in epistemic terms, are overwhelming.

In terms of my thesis here, however, there is a cautionary note. The rule was finalized in the midst of ongoing litigation, attempting to force it to do

¹⁴² See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1219 (5th Cir. 1991) (outlining a "breakeven" analysis to be used when the agency cannot quantify the benefits of a regulation).

¹⁴³ See, e.g., *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (invalidating an SEC regulation for being "arbitrary and capricious").

¹⁴⁴ See *supra* notes 71-73 and accompanying text.

¹⁴⁵ See *supra* Section III.A.4.

¹⁴⁶ See *supra* Section III.B.2-4.

exactly that.¹⁴⁷ To be sure, it is not clear whether the litigation would have succeeded. The Secretary had explained, as he was required, why he was unable to meet the statutory deadline.¹⁴⁸ Under the APA, the question would have been whether continued delay would have been arbitrary or capricious or otherwise a violation of the Act. Nor is it clear, from the public record, whether the Administration's decision to finalize the rule was in any sense a product of the litigation. If it was, we might conclude that a judicial role remains valuable, not to second guess the substantive judgments of the most knowledgeable branch, but to ensure compliance with statutory deadlines. Nothing said here is inconsistent with the view that a judicial role of that sort is important and valid.¹⁴⁹

IV. CONCLUSION

My goal here has been to underscore what is, in many ways, the principal advantage of the executive over the legislative and judicial branches: it knows far more. Members of Congress must focus on election and reelection, and while they know a great deal about how to win elections, their knowledge of substantive issues is often shallow, and inevitably so. Often they must rely on "talking points" and short briefing materials, filled with bullet points. They might well be exceptionally quick studies, but most of the time, they cannot obtain even a small fraction of the information held by executive branch officials, who will sometimes have devoted weeks, months, or even years to a topic. They often have to depend on simple heuristics, typically rooted in the views of trusted others, many of which are interest groups. Sometimes members will offer serious accusations about a topic, pointing to what they see as incompetence, bias, or even corruption. Those accusations will be sincere and apparently plausible, even though they have no basis in reality.

For their part, judges must rely on translators, in the form of lawyers, whose knowledge will inevitably be partial. This problem may not be serious where the question is genuinely and only one of law. In that event, no translation need be involved; we are speaking of a single language. But where the problem involves policy and fact, it might well be difficult for courts to

¹⁴⁷ Pet. for Writ of Mandamus, *In Re Gulbransen* (2d Cir. Sept. 25, 2013); *see also* Chris Morran, *DOT Sued for Failing to Issue Rule on Rear Visibility in Cars*, CONSUMERIST (Sept. 25, 2013), <http://consumerist.com/2013/09/25/dot-sued-for-failing-to-issue-rule-on-rear-visibility-in-cars/> [<https://perma.cc/FGJ5-5M35>] (discussing the suit brought by parents and consumers against the Department of Transportation to compel it to act).

¹⁴⁸ *See* Letter from Ray LaHood, *supra* note 116 (contending that due to the importance of children's safety, the Department needs additional time to conduct "robust analysis").

¹⁴⁹ *See* Sunstein & Vermeule, *supra* note 13, at 181 (asserting that while courts serve a valuable role, they should usually defer to agency decisions to delay issuing a rule).

obtain a full sense of the underlying issues. Litigation will inevitably contain a kind of distorting mirror, turning the issues into a cartoon version of reality.¹⁵⁰

The epistemic advantages of the executive branch do not by any means justify insulating it from scrutiny and constraint. Administrations are not all the same. Under worst-case scenarios, the epistemic advantages of the executive branch might not matter much, because of antecedent commitments on the part of the President or the influence of powerful private groups. Even under a single administration, some issues might be treated very differently, and far less responsibly, than others.

As James Madison wrote in *The Federalist No. 10*, “Enlightened statesmen will not always be at the helm.”¹⁵¹ Congressional authorization is always required, and for good reasons. Congressional scrutiny might well be a valuable way not only of combating biases, interest group influence, and undue insulation, but also of protecting liberty, rightly conceived. As I have noted, the prospect of *ex post* judicial review has significant (and beneficial) *ex ante* effects, certainly when the question is one of law. But the immense epistemic advantages of the executive branch are a central and insufficiently appreciated aspect of the real world of checks and balances. In any evaluation of executive discretion, an understanding of those epistemic advantages must play a central role.

¹⁵⁰ See Jerry L. Mashaw & David L. Harfst, *THE STRUGGLE FOR AUTO SAFETY* 152 (1990) (asserting that judicial hard look inquiry is “puzzling” and “perverse”); Strauss, *supra* note 3, at 1317 (describing what the author sees as the Court’s distorted perspective on *Overton Park*).

¹⁵¹ *THE FEDERALIST NO. 10* (James Madison).