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# Disclosing 'Political' Oversight of Agency Decision Making

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# DISCLOSING “POLITICAL” OVERSIGHT OF AGENCY DECISION MAKING

Nina A. Mendelson\*

*Scholars and courts have divided views on whether presidential supervision enhances the legitimacy of the administrative state. For some, that the President can supervise administrative agencies is key to seeing agency action as legitimate, because of the President’s accountability to the electorate. Others, however, have argued that such supervision may simply taint, rather than legitimate, an agency action.*

*The reality is that presidential supervision of agency rulemaking, at least, appears to be both significant and opaque. This Article presents evidence from multiple presidential administrations suggesting that regulatory review conducted by the White House’s Office of Management and Budget is associated with high levels of changes in agency rules. Further, this Article documents the comparative silence regarding the effect of that supervision. The Office of Management and Budget and the agencies generally do not report the content of supervision by presidential offices. They also do not report whether a particular agency decision is consistent with presidential preferences. Silence about content, this Article suggests, threatens to undermine the promise of presidential influence as a source of legitimacy for the administrative state.*

*This Article then argues for greater transparency. Agencies should be required to summarize executive influence on significant rule-making decisions. Such an ex ante disclosure regime is superior to proposals that judges be more receptive to political reasons in reviewing a particular agency action. Finally, this Article suggests that while some, but not all, political reasons for agency action are legitimate, only a more transparent system—one that facilitates public dialogue and accountability to Congress—can fully resolve the question of which reasons are legitimate and which are not.*

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\* Professor of Law, University of Michigan Law School. For useful comments and discussion, I am very grateful to Cynthia Farina, Rob Glicksman, Don Herzog, Riyaz Kanji, Ellen Katz, Sally Katzen, Rick Levy, Elizabeth Magill, Anne O’Connell, Sallyanne Payton, Richard Pierce, Jeff Rachlinski, Jodi Short, Peter Strauss, and participants in workshops at Cornell Law School, the University of Kansas Law School, the University of Michigan Law School, and the University of Chicago Law School. Thanks also go to Chris Kriva for terrific research assistance. Financial support for this project came from the Elkes and Cook Funds at the University of Michigan Law School.

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## INTRODUCTION

In the last few decades, scholars and judges have relied heavily on the presence of presidential supervision to lend legitimacy to executive branch agency action.<sup>1</sup> Executive branch agencies now possess considerable discretion to decide questions of value, such as how much risk government action should aim to address and how to balance economic costs against, say, safety or environmental protection. These aspects of agency decision making are generally not closely constrained by statute. And since they are not closely constrained by statute, they also may not be readily subject to other tools of accountability, such as rigorous judicial review.<sup>2</sup> In theory, presidential supervision can partially fill this gap by supplying political accountability. Further, anecdotal information suggests that executive supervision can have discernible effects on this type of agency decision.

Despite the claim of President-centered theories that such supervision can be an important source of agency accountability, agencies rarely, if ever, mention what might be termed political reasons in their decisions, particularly their rulemaking decisions.<sup>3</sup>

By “political reasons,” I mean reasons communicated from a particular source (rather than reasons with a particular content). “Political reasons” in this Article are those contributed by or adhered to by the President and the politically-appointed executive officials who oversee the administrative process and who answer most closely to the President. While views of members of Congress could also count as “political reasons,” I plan to focus on executive views. And in so doing, I am assuming that the views of White House officials entrusted with regulatory oversight, although they are not

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1. See *infra* text accompanying notes 46–48.

2. As long as agencies have considered “relevant factors” under a statute, courts rarely go much further in inspecting the rationale of an agency decision. Cf. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (giving deference to agency decision with regard to procedure where agency considered “relevant factors”).

3. See *infra* text accompanying notes 145–160.

elected, and although the views may not be perfectly refined or channeled, are highly likely to reflect the President's positions.<sup>4</sup> So, for example, an agency deciding that the environment should get the edge over economic costs or that more immediate motor vehicle safety should yield to a desire for greater manufacturing flexibility, will not generally mention whether, or to what extent, its decision reflects or has been influenced by presidential views. Nor will the decision generally describe the content of those views, even though presidential preferences and the weighing of the relevant considerations by presidential advisors may frequently figure into the decision, particularly through the regulatory review process.

There are two strains in the literature regarding executive influence on agency decision making. Consistent with President-centered theories, many academics and judges argue that agency decisions are normatively better due to this influence, and indeed, that some sort of presidential supervision is *necessary* to the legitimacy of executive branch agencies because it represents a mechanism of electoral accountability.<sup>5</sup>

In some tension with this position, others have argued that an agency policy choice at the President's direction may not be particularly defensible and may even be outright tainted—a “source of danger rather than of accountability.”<sup>6</sup> Jody Freeman and Adrian Vermeule recently argued that the Supreme Court may be increasingly concerned with “protect[ing] administrative expertise from political intrusion,” at least at times of alleged “widespread tampering” with an agency decision-making process.<sup>7</sup> Some, including Thomas McGarity, have argued that agency decision making should be carefully insulated from presidential supervision, which might cause agencies to make decisions that are inappropriate, or worse.<sup>8</sup>

As a means of encouraging agencies to rely more explicitly on political reasons, including those coming from executive supervision, three scholars have suggested that judges should be more receptive to “politics” as they review agency decisions under the Administrative Procedure Act's “arbitrary

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4. See CURTIS W. COPELAND, CONG. RESEARCH SERV., FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, Summary (2009) (“[OIRA] is part of the Executive Office of the President, and helps ensure that covered agencies’ rules reflect the President’s policies and priorities.”); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 65–69 (2006) (discussing the OIRA’s influence, as well as that of other White House offices); see also Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 714–15 (2007) (discussing possibility that White House guidance can be “conflicting, not unidirectional”).

5. See *infra* text accompanying notes 46–48.

6. Jody Freeman & Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 88 (describing this as an inference that can be drawn from the Supreme Court’s *State Farm* decision).

7. *Id.* at 54–55.

8. E.g., Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987) (arguing that Congress can and should enact stringent limitations on presidential influence on informal rulemaking).

and capricious” standard.<sup>9</sup> Christopher Edley, Dean of the University of California at Berkeley School of Law (Boalt Hall), has suggested that, in practice, courts “credit politics as an acceptable and even desirable element of decision making.”<sup>10</sup> Former Harvard Law School Dean Elena Kagan has suggested that courts “relax the rigors of hard look review” if there is demonstrable evidence of presidential involvement in the administrative decision at hand.<sup>11</sup> Most recently, Kathryn Watts has also advocated for judicial acceptance of political reasons if such reasons reinforce “accountability, public participation, and representativeness.”<sup>12</sup> Among other things, these commentators hope that greater judicial willingness to credit political considerations as legitimate will eliminate an obstacle to an agency’s disclosure of those considerations and prompt greater (or more visible) presidential supervision of agency action.

This Article seeks to make some fairly simple points against the backdrop of the literature on presidential control of agencies. I first suggest that presidential, or executive, influence on an agency decision is not clearly good or bad. It can potentially be seen as *either* increasing or decreasing the legitimacy of an agency’s decision depending on the content of the influence.

Second, I offer some current evidence both of an apparently significant level of White House influence on agency rules and of silence regarding the content of that influence, from both agencies and the Office of Management and Budget (“OMB”). Silence about content, I suggest, threatens to undermine the promise of presidential influence as a source of legitimacy for the administrative state.

Third, rather than addressing the issue indirectly through judicial review, I suggest that we proceed directly to regulating procedure. We should require that a significant agency rule include at least a summary of the substance of executive supervision. Requiring greater transparency in the agency decision-making process may not only increase accountability for agency action, but also help to deter inappropriate presidential influence and prompt Congress to refine statutory requirements if appropriate. Judges

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9. The Administrative Procedure Act provides broadly for judicial review of an agency’s “action.” 5 U.S.C. § 704 (2006) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”). In most cases, however, judicial review is limited to determining whether an agency’s action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2006).

10. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 192 (1990).

11. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001).

12. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 83 (2009). Similar to the proposal made here, Margaret Gilhooley has also proposed ex ante disclosure of executive oversight, on the grounds that there would be “greater accountability to Congress and the public for the explanation” and for the agency’s “accept[ance of] an administration position as an agency policy,” as well as a “safeguard that the agency has exercised independent judgment.” See Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 333 (1991).

could enforce disclosure requirements. In reviewing the decision under an arbitrary and capricious review standard, however, judges could be deferential regarding political reasons offered by the agency. Again, that would depend on the content of the reasons. A Department of Transportation (“DOT”) automotive fuel economy rulemaking finalized in March 2009 may be a potential model.<sup>13</sup>

Fourth, requiring disclosure is superior to proposals solely aimed at modifying judicial review. Because expertise-focused judicial review is not the only obstacle to disclosing political supervision, adjusting judicial review is unlikely to significantly increase the transparency of agency decision making. Moreover, a number of such proposals place an inappropriate burden on the judiciary to distinguish good and bad political reasons. Requiring disclosure would instead be aimed at engaging the public and Congress regarding the appropriateness of particular reasons and of executive supervision in agency decisions.

Finally, I offer some preliminary thoughts on political reasons and discuss the sorts of political reasons that might taint or improve the quality of an agency decision. I conclude that any discussion of political reasons cannot be finally resolved without improving the transparency of the decision-making process. Such an enhanced process is likely to be our best method to realize the promise of accountability for agency action and for identifying and distinguishing good political reasons from bad ones.

## I. THE PRESIDENT AND EXECUTIVE BRANCH AGENCIES

The role of the President in agency rulemaking may be viewed as raising two distinct, though interrelated, questions. Briefly, these include, first, the extent of the President’s legal authority to oversee agency rulemaking, and second, the extent to which executive supervision might affect the legitimacy of agency action. That second question may be subdivided further (though the categories are not entirely distinct) into whether presidential oversight enhances democratic responsiveness and whether oversight affects accountability for a particular agency decision, including in the courts.

To clarify briefly, my primary focus here is on agency rulemaking, including both interpretive rules and legislative rules, since these decisions as a group are far-reaching and are broadly framed. Agency rules are also generally subject to executive review, thus providing us with some information on how executive review has proceeded to date. Agency adjudication is beyond the scope of this Article.

Commentators and courts largely agree that the President can legally be involved in agency decisions such as rulemaking. From a constitutional standpoint, the “executive Power” is vested in the President,<sup>14</sup> she is authorized to “require the Opinion, in writing, of the principal Officer in each of

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13. See *infra* text accompanying notes 167–170.

14. U.S. CONST. art. II, § 1, cl. 1.

the executive Departments,”<sup>15</sup> and she is to “take Care” that the laws be faithfully executed.<sup>16</sup> This implies some authority to oversee agency action. Goldsmith and Manning have recently argued that these constitutional clauses and others imply not only the power of the President to oversee agency action, but also, somewhat controversially, a default presidential “completion power” to go beyond (though not against) statutory prescriptions.<sup>17</sup> They also suggest, however, that Congress is free to limit the scope of any such presidential completion power.<sup>18</sup>

Beyond this, unitary executive theorists also argue that Article II of the Constitution might be read to *entitle* the President to control—or even to make decisions for—executive branch and independent agencies.<sup>19</sup> With respect to executive branch agencies, Congress sometimes delegates rule-making authority to the “Administrator” or “Secretary” rather than to the “President,” for example, raising the question whether Congress’s intent is to insulate decisions made by the agency official from executive supervision. Unitary executive theory adherents might suggest that the Constitution bars such a reading of a statute.

In many cases, however, the question whether presidential oversight of administrative agencies is constitutionally required, or contemplated as a default constitutional rule, and whether executive supervision raises statutory questions, ought to be put aside. As Kagan has convincingly argued, statutory delegations to executive branch agencies should be read to include

15. U.S. CONST. art. II, § 2, cl. 1.

16. U.S. CONST. art. II, § 3, cl. 4.

17. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2297 (2006) (“[T]he executive branch has exercised an ambitious program of regulatory supervision that is a clear example of the President’s completion power . . .”).

18. *Id.* at 2282 (“It is a defeasible power; Congress can limit it, for example, . . . by specifying the manner in which a statute must be implemented.”). Sharp disagreement persists on Goldsmith and Manning’s theory. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1166 (2008) (finding Goldsmith and Manning’s theory unpersuasive); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2368–70 (2006) (challenging constitutional underpinnings of Goldsmith and Manning’s arguments); see also Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that errors in use of completion power would be very difficult to fix).

19. E.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994) (detailing the textual argument for the unitary executive); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 3 (1994) (analyzing both a historical and constitutional basis for the unitary executive). *Contra* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) (arguing that the President does not have unitary executive powers). On the Opinions Clause in particular, compare Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 979–80 (1997) (arguing that the Opinions Clause contemplates presidential involvement in agency decision making), with McGarity, *supra* note 8, at 480 (arguing that the Opinions Clause represents, at most, a “paperwork requirement for presidential monitoring of bureaucratic thinking”), and Strauss, *supra* note 4, at 703 (noting that some have concluded that the opinions clause suggests “constitutional obligations not only to oversee [agency officials] but also to respect their independent exercise of those duties”).

at least a delegation of oversight authority to the President in light of Congress's awareness of a longstanding pattern of executive supervision.<sup>20</sup>

For purposes of this discussion, I follow Kagan's arguments that statutes generally permit presidential oversight of executive agency decision making. I note in passing Peter Strauss's argument that such statutes delegating authority directly to an agency official should not be read to permit the President, even as Chief Executive, to exceed the role of an "overseer" and become a "decider."<sup>21</sup> Strauss of course notes that a President's primary formal recourse against a recalcitrant executive agency official remains removal from office, irrespective whether the President is acting as overseer or as decider. He nonetheless argues that mischaracterizing the President's role as "decider" might prompt an agency official to discount the agency's own independent decision-making process and, within statutory bounds, feel committed to follow the President's instructions.<sup>22</sup> As I discuss in greater detail below, greater disclosure of political reasons may help illuminate the actual nature of executive supervision and the extent to which agency officials buck executive supervision or feel unquestioning obedience to the President's requirements.<sup>23</sup> That in turn may prompt Congress, at the time it delegates authority to an agency, to be more specific about the level of executive supervision it finds acceptable.

This brings us to the second question raised by executive supervision of agency rulemaking. Assuming that some level of oversight is consistent with

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20. See Kagan, *supra* note 11, at 2326–35 (arguing that congressional delegation of authority to agencies is against backdrop and knowledge of presidential administration, and that interpretation is consistent with best reading of statute); *id.* at 2329–30 (inference to be drawn from delegation to "President" is that President has latitude to choose which agency official will receive subdelegation). *But see* Stack, *supra* note 18 (arguing that negative inferences should be drawn from statutory failure to mention the President by name). Although Stack presents delegations in which Congress specifically mentioned a presidential role as a contrast to those in which only an agency was mentioned, my view is that members of Congress are more likely to be aware of the general fact of executive supervision than sensitive to the precise words that might be used to draft a particular agency delegation. An alternative interpretation of Congress's decision to use the word "President" in a delegation, for example, is simply that it wishes to authorize the President to select which executive branch agency is the most appropriate implementer of a statute. For example, consider the climate change-related controversy in Congress in 2009 over whether the EPA or the USDA should be designated to run part of a climate change program. Agriculture groups wanted the USDA to run the program; environmentalists preferred the EPA. The Senate bill deferred by delegating authority to the President, with the understanding that the President would be responsible for assigning implementation responsibilities to the agencies. See Alison Winter, *Kerry-Boxer proposal leaves question mark for forestry groups*, ENV'T & ENERGY DAILY, Oct. 2, 2009, <http://www.eenews.net/public/EEDaily/2009/10/02/2> ("The new Senate text gives the president jurisdiction over the potential program, rather than defining clear roles for USDA and U.S. EPA."). What Kagan's arguments do not resolve, however, is how far this presidential influence could extend—such as whether a President could sign a proposed rule in the Federal Register over the objection of a reluctant administrator.

21. See Strauss, *supra* note 4, at 704–05 (arguing that "overseer" function is commensurate with presidential obligations and responsibilities as Chief Executive).

22. See *id.* at 704 ("The subordinate's understanding of [whether ordinary respect and political deference or law-compelled obedience] is owed, and what is her personal responsibility, has implications for what it means to have a government under laws."). Strauss describes a couple of cases in which agency heads have resisted presidential "direction." *Id.* at 736.

23. See *infra* Section IV.B.1.

both the Constitution and the terms of an agency's statutory delegation, to what extent might supervision by the President enhance the legitimacy of agency actions? As I have discussed in greater detail elsewhere, that inquiry may be broken down into whether agencies are accountable and democratically responsive; both are relevant to whether an agency is likely to be perceived as legitimate.<sup>24</sup>

An agency may be accountable if its authority is limited by meaningful constraints, and if it is obligated to disclose and justify its actions—and to suffer consequences—on the basis of its explanation or performance.<sup>25</sup> As Lisa Bressman and Peter Strauss have both recently argued in detail, permitting or encouraging administrative discretion in a form that is “‘legally uncontrollable’”<sup>26</sup> raises legitimacy issues, possibly at least as significant as those raised by assigning policy questions to an institution that is not democratically responsive.<sup>27</sup> Judicial review of agency action, for example, could serve as an important safeguard against such arbitrariness and protect these rule-of-law values. Further, the electoral process can be a potential source of accountability, to the extent that the decision of voters to elect a new President or new members of Congress is linked to a change in agency oversight and conduct.

If an agency is electorally accountable, the agency might also be said to be democratically responsive, because the availability of electoral recourse is an incentive for the agency to respond to popular preferences. On another procedural view of “democratic responsiveness,” an agency decision might be described as democratic to the extent the agency engages in a deliberative process and offers reasons to the public in support of its decision, so that the public can be engaged in a discussion about what approach best serves society.<sup>28</sup> Finally, an agency's decision might be judged as democratic based on its substantive content—perhaps, consistent with pluralism theories, the de-

24. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 577 (2003).

25. See *id.*; Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005) (offering definition of accountability and arguing, among other things, that elections cannot assure administrative agency accountability).

26. Strauss, *supra* note 4, at 704 (quoting EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 80–81 (4th rev. ed. 1957)).

27. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64 (2003) (“The presidential control model misleads us into thinking that [political] accountability is all we need to assure ourselves that agency action is constitutionally valid. . . . I suggest that a focus on the avoidance of arbitrary agency decisionmaking lies at the core of . . . a theoretical justification of administrative legitimacy . . .”); Strauss, *supra* note 4, at 704 (suggesting that the risk of a “‘legally uncontrollable’” branch of government must be addressed because of its implications for “what it means to have a government under laws”); see also Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 996 (2007) (arguing that nondelegation doctrine promotes core “rule of law” values such as protection against “arbitrary agency decision-making and [promoting] regularity, rationality, and transparency”).

28. See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 16, 40–41, 137 (1996) (describing procedural democracy as ensuring accountability for policies and results). Gutmann and Thompson further argue that democracy requires a deliberative process engaging both the decision-making institution and citizens. *Id.* at 12–13.

cision might be seen as legitimate because it reconciles the preferences of most voters.

Given the need to consider accountability and democratic considerations, how might presidential supervision enhance legitimacy? Presidential supervision clearly can make pragmatic contributions to agency decision making. A President can ensure that decision making among multiple federal agencies is coordinated.<sup>29</sup> A President can provide direction and energy to agency officials.<sup>30</sup> And centralized presidential supervision can counteract the tendency of an agency to take a “tunnel vision” approach by bringing a broad perspective to agency prioritization and decision making.<sup>31</sup>

These are surely valuable contributions, and some administrative law theorists have gone further, arguing that under current law, presidential supervision is a central source of legitimacy for actions taken by the administrative state because it can increase the democratic accountability of key government decisions through the electoral process.<sup>32</sup>

These arguments take account of two current realities regarding the delegation of administrative authority. First, Congress regularly delegates broadly to agencies, with minimal statutory constraints on even the most important administrative decisions. Agency powers typically include the discretion to set far-ranging and expensive regulatory standards. Second, although agencies were originally conceptualized as institutions filled with technocratic experts finding objective answers to technical questions posed by Congress,<sup>33</sup> the significant issues agencies must resolve very often include questions of “value.”<sup>34</sup> Even an agency’s interpretation of ambiguous statutory language can require the evaluation of policy or other value-laden issues.

For example, the National Traffic and Motor Vehicle Safety Act calls on the DOT to regulate “unreasonable risk” presented by motor vehicles,<sup>35</sup> while under the Clean Air Act, the Environmental Protection Agency (“EPA”) sets national air quality standards “requisite to protect the public

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29. E.g., Bressman, *supra* note 27, at 486.

30. Kagan, *supra* note 11, at 2339–40.

31. Bressman, *supra* note 27, at 506.

32. E.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) (noting that scholars and the judiciary have looked to the President to “supply the elusive essence of democratic legitimation”).

33. See JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 111 (1997) (describing a view of the administrative state as a “well-ordered input/output machine”); Bressman, *supra* note 27, at 479–80 (suggesting that the technocratic view of agency decision making argues that technical expertise would provide protection against arbitrary decision making); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1282–83 (1984); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675–76 (1975).

34. E.g., Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975) (asserting that regulatory agencies are heavily involved in “political” decisions in the highest sense of that term”).

35. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89–563, 80 Stat. 718 (repealed 1994).

health” with “an adequate margin of safety.”<sup>36</sup> And the Energy Policy and Conservation Act’s automotive fuel economy standards provisions require the Secretary of Transportation to set standards in light not only of technological feasibility, but also “economic practicability,” and “the need of the United States to conserve energy,” raising a host of policy issues.<sup>37</sup>

Deciding whether a risk is “unreasonable” or what margin of safety is “adequate” of course will involve an assessment of the level of risk presented by an air pollutant or a car. These decisions also include a judgment—implicit or explicit—regarding what level of risk is worth eradicating or tolerable to the American public. Similarly, considering “economic practicability” essentially requires a judgment about the level of cost that is tolerable by a particular industry or by consumers. During the Ford Administration, the DOT famously considered these sorts of issues in a several-hour-long public hearing on passive automobile restraints. Among other things, Transportation Secretary Coleman heard comments (though they were not ultimately reflected in the final, Reagan-era rule<sup>38</sup>) on whether there were limits “to public acceptance of government action to increase individual safety” and heard discussion on the extent to which auto safety would increase if passengers simply took responsibility for buckling up their own seatbelts.<sup>39</sup>

Similarly, in the context of interpretation, agencies must often confront value issues identified by statute. For example, as discussed in greater detail below, the Interior Department’s Office of Surface Mining had to interpret the ambiguous statutory phrase “surface coal mining operations,” an activity barred by the Surface Mine Control and Reclamation Act of 1977 within 300 feet of residences or within national parks.<sup>40</sup> Although the statute defined the term to include “surface impacts incident” to underground coal mining, the agency’s interpretation excluded subsidence from underground mining.<sup>41</sup> On review, the Court of Appeals for the D.C. Circuit agreed with

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36. Clean Air Act, 42 U.S.C. § 7409(b)(1) (2006).

37. Energy Policy and Conservation Act, 49 U.S.C. § 32902(f) (2006) (discussing “[c]onsiderations on decisions on maximum feasible average fuel economy”).

38. See Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 53,419 (Oct. 29, 1981).

39. *Transportation Unit Cuts Estimated Cost Of Air Bags, Other Safety Devices in Cars*, WALL ST. J., Aug. 4, 1976, at 3 (describing the hearing of August 3, 1976); see also Morton Mintz, *Coleman, Nader Exchange ‘Bigot’ Jabs at Air Bag Hearing*, WASH. POST, Aug. 4, 1976, at A2. Prior to the close of the Ford Administration, and seemingly connected to the public hearings, Coleman did announce an air-bag demonstration program intended in part to evaluate whether a full-scale air-bag program “would be badly received by the driving public.” Ernest Holsendolph, *Coleman Puts Off Air-Bag Ruling; Proposes a Limited Voluntary Plan*, N.Y. TIMES, Dec. 7, 1976, at 1.

40. See 30 U.S.C. §§ 1201–1328 (2006). Section 522(e) of the Surface Mining Control and Reclamation Act (SMCRA) prohibits “surface coal mining operations” in certain areas, including within national parks, national forests, and within 300 feet of occupied dwellings. Surface Mining Control and Reclamation Act of 1977 § 522(e), 30 U.S.C. § 1272(e).

41. Interpretative Rule Related to Subsidence Due to Underground Coal Mining, 64 Fed. Reg. 70,838, 70,843 (Dec. 17, 1999) codified at 30 C.F.R. § 761.200 (2009) (rule issued following notice and comment). The statute defines the term “surface coal mining operations” to include “activities conducted on the surface of lands in connection with a surface coal mine or subject to the

the agency that the statute did not clearly resolve the question whether “surface coal mining operations” included such subsidence.<sup>42</sup> The Department defended its interpretation by reference to the policy concerns of the statute, which included both environmental protection and the economic viability of underground mining.<sup>43</sup>

These statutory delegations are too broad to conceptualize agency officials making these decisions as a mere “transmission belt” for the implementation of congressional policy, as early scholars theorized.<sup>44</sup> Nor can agency officials generally be seen as “experts” on such value-laden (rather than solely scientific or technical) policy questions.<sup>45</sup> Instead, agencies are often tasked with resolving questions that one might expect to be resolved not by technical experts, but by institutions accountable to the electorate.

Close congressional control and detailed statutory instructions, enforceable in court against an agency, could increase both the democratic responsiveness and the accountability of agency decisions. Congress may not consistently have the resources, the expertise, or the will to enact highly-detailed statutes or to conduct extensive, systematic oversight, however.

Presidential control has accordingly become central, including in administrative law scholarship.<sup>46</sup> These theories have focused primarily on the President’s accountability to the electorate through a national election. Some have argued, Jerry Mashaw chief among them, that owing to the President’s national perspective, presidential supervision can assure an agency’s democratic responsiveness, perhaps even better than close control by Congress.<sup>47</sup> In theory, the President has the incentive to transmit broader electoral preferences to agencies, the ability to take more of a national perspective on

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requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine . . .” 30 U.S.C. § 1291(28)(A).

42. See *Citizens Coal Council v. Norton*, 330 F.3d 478, 483 (D.C. Cir. 2003) (finding that statute did not clearly answer question presented and affirming agency interpretation under *Chevron* Step Two); Interpretative Rule Related to Subsidence, 64 Fed. Reg. at 70,843 (Dec. 17, 1999) (“[T]he definition of ‘surface coal mining operations’ in SMCRA section 701(28) is not a model of clarity.”). But see *Citizens Coal Council v. Norton*, 193 F. Supp. 2d 159, 164 (D.D.C. 2002) (finding Congress clearly expressed intent to cover subsidence from underground mining in definition of “surface coal mining operations”), *rev’d*, 330 F.3d 478 (D.C. Cir. 2003).

43. Interpretative Rule Related to Subsidence, 64 Fed. Reg. at 70,849.

44. See *supra* note 33 (citing Stewart’s, Mashaw’s, and Frug’s descriptions of this viewpoint); Kagan, *supra* note 11, at 2334–36 (suggesting that the President has an important advantage in representing national majoritarian preferences compared with members of Congress, leaders of interest groups, and staff of permanent bureaucracy).

45. Kagan, *supra* note 11, at 2353 (“[A]gency experts have neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking.”).

46. See Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227, 229 (1998) (“[P]laced unambiguously under the President’s direction, [the regulatory state’s] democratic pedigree becomes impeccable.”).

47. See MASHAW, *supra* note 33, at 153. But see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1306 (2006) (suggesting President is no less immune to interest group pressures than agency officials).

policy issues, and the ability to be more responsive to the voters' will compared with Congress.<sup>48</sup>

This argument about presidential supervision is not limited to the academy. In the setting of domestic statutory or common law, one would be quite surprised to see a judge rely explicitly on the naked fact of presidential preferences in support of an agency decision. And agency reliance on such preferences is also rare.<sup>49</sup> When judges review agency action, however, the backdrop of *potential* presidential influence seems to confer greater legitimacy on an agency decision. The Supreme Court, in *Chevron v. Natural Resources Defense Council*, famously explained why an agency statutory interpretation deserved deference:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency . . . .<sup>50</sup>

The prospect of presidential supervision is only implicit; the agency rule reviewed in *Chevron* made no explicit mention of presidential preferences or of preferences that might have been expressed in the OMB review.<sup>51</sup>

And in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*, in evaluating the DOT's decision to revoke a rule requiring passive restraints in automobiles, Justice Rehnquist, in partial dissent, suggested that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."<sup>52</sup> Some commentators have read the *State Farm* majority opinion as rejecting political considerations as appropriate for agency decision making,<sup>53</sup> but this may be an overstated reading of the decision. The majority

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48. See MASHAW, *supra* note 33.

49. See *infra* text accompanying notes 140–160.

50. 467 U.S. 837, 865–66 (1984); see also *id.* at 865 (noting that deference is appropriate to interpretations that “rely upon the incumbent administration’s views of wise policy”).

51. In the final rule, the EPA stated only: “This action was submitted to the Office of Management and Budget (“OMB”) for review as required by [Executive Order 12,291].” Requirements for Preparation, Adoption, and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,771 (Oct. 14, 1981) (to be codified at 40 C.F.R. pts. 51–52). The proposed rule stated that the OMB had relieved the agency of the obligation of regulatory review because the proposed rule was deregulatory in nature. See Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16,280, 16,282 (proposed Mar. 12, 1981) (to be codified at 40 C.F.R. pts. 51–52).

52. 463 U.S. 29, 59 (1983).

53. E.g., Freeman & Vermeule, *supra* note 6, at 88 (“The inference [from *State Farm*] is that political influence is a source of danger rather than of accountability.”); Kagan, *supra* note 11, at 2380 (suggesting that the majority “implicitly rejected” Rehnquist’s approach); Stack, *supra* note 18, at 307 n.191 (noting that *State Farm* now serves as “common contemporary shorthand for the requirement that agencies rationalize their decisions in terms of statutory criteria, and that a change of administration is not a sufficient basis for agency action”); Watts, *supra* note 12, at 5 (“Agencies

simply did not reach this argument, and this perhaps was because the change in administration was not among the reasons offered by the agency.<sup>54</sup>

Most recently, Justice Scalia, writing for four members of the Court in *FCC v. Fox Television Stations*, hinted that political preferences could be a reason for an agency decision. In that case, a five-member majority of the Court upheld FCC orders finding indecent isolated expletives in broadcasts, and rejected arguments that changes in the FCC's position should be subject to more rigorous judicial review.<sup>55</sup> In a section of the opinion joined by Justices Roberts, Thomas, and Alito (but not by Justice Kennedy, who joined the rest of the opinion), Justice Scalia described the FCC's new position as "spurred by significant political pressure from Congress."<sup>56</sup> Justice Scalia suggested that a congressional preference for more stringent enforcement could, in theory, be an appropriate reason for the FCC to adopt a more stringent approach to expletives in broadcasting.<sup>57</sup> Admittedly, the dicta were penned assuming, *arguendo*, that the FCC was, and constitutionally could be, an agent of Congress, as well as based on further dicta to the effect that the Administrative Procedure Act does not apply to Congress and its agencies. Despite these potential differences from the case of agency supervision by the President, one implication of the plurality opinion's discussion is that an executive branch agency conceivably could rely on the preferences of the Chief Executive as a reason for decision.<sup>58</sup>

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should explain their decisions in technocratic, statutory, or scientifically-driven terms, *not* political terms.").

54. See Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 53,419 (Oct. 29, 1981) (to be codified at 49 C.F.R. pt. 571). Judge Stephen Williams has suggested that the reopening of the rule was justified in what he calls political terms (the "difficulties of the auto industry;"), citing to *State Farm* itself. See Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103, 1107 (1991) (reviewing EDLEY, *supra* note 10). However, the proposed rule cited to by the *State Farm* Court was in fact a different one: it was a proposal to delay all standards by one year. The notice of that proposed rule did state that the delay was proposed "in light of the fact that economic circumstances have changed since the standard was adopted in 1977." Occupant Crash Protection, 46 Fed. Reg. 12,033, 12,033 (proposed Feb. 12, 1981) (to be codified at 40 C.F.R. pt. 571). Although it may have been part of the atmospherics of the *State Farm* case, a conclusion suggested by the Supreme Court's decision to cite the rule that proposed it, that one-year delay was adopted in a different final rule, Federal Motor Vehicle Safety Standards, Occupant Crash Protection, 46 Fed. Reg. 21,172 (Apr. 9, 1981), a rule not before the Supreme Court. Edley's description of the case more fairly notes the "total absence from Justice White's majority opinion of any mention of politics." EDLEY, *supra* note 10, at 183.

55. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review."). Although he joined the majority opinion, Justice Kennedy also wrote a separate opinion to underscore his view that in some cases, a change in agency position might still require more rigorous judicial review. *Id.* at 1822 (Kennedy, J., concurring in part and concurring in the judgment) ("The question whether a change . . . requires an agency to provide a more-reasoned explanation . . . is not susceptible . . . to an answer that applies in all cases.").

56. *Id.* at 1815–16 (majority opinion).

57. *Id.* at 1816 (Scalia, J.) ("If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement . . .").

58. Another possible reading of the *Fox* dicta is that such preferences are permissible *because* the Administrative Procedures Act and its arbitrary and capricious review standard do not

Despite the apparent support for presidential supervision in these settings, some also argue that such political oversight undermines the legitimacy of agency decision making. For example, in response to indications that one EPA opinion (on the extent of Clean Air Act preemption of California's authority to regulate automotive greenhouse gas emissions) reflected White House views, Congressman Waxman attacked the EPA's decision as "pure politics," in contrast to a "fair process that is based on the science, the facts, and the law . . . one of the critical pillars of our government."<sup>59</sup> This reaction represents an important opposing strain in the dialogue on presidential supervision. As William Eskridge and Lauren Baer commented with respect to the Ashcroft Directive interpreting the Controlled Substances Act to bar physician-assisted suicide under Oregon law, "If the President's advisers took a poll which reliably found 51% of Americans opposed to 'death with dignity' or 'assisted suicide' (assume the terminology did not make a difference), would the Ashcroft Directive have been more legitimate? Not much."<sup>60</sup> Further, as Jerry Mashaw noted: "[A] retreat to political will or intuition is almost always unavailable to modern American administrative decisionmakers. . . . [S]uch claims delegitimize administrative action rather than count as good reasons."<sup>61</sup> And in *FCC v. Fox*, four dissenting Justices, led by Justice Breyer, expressed doubt that "nothing more than political considerations" could be the basis for change in major agency policies.<sup>62</sup>

While the *State Farm* majority opinion has been pointed to as an example of judicial reluctance to embrace political reasons as appropriate justification for an agency decision, a better example may be the Court's 2007 ruling in *Massachusetts v. EPA*.<sup>63</sup> A majority of that Court rejected the EPA's decision to deny a petition to regulate automotive greenhouse gas emissions. The agency said its decision was based in part on concerns about preserving the President's ability to negotiate emissions reductions with developing countries, avoiding a piecemeal approach to climate change, and relying on voluntary executive branch programs to respond to the problem.

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apply to congressional agencies. Perhaps, then, an executive branch agency could not rely solely on presidential preferences and still satisfy that review standard.

59. *Hearing on EPA's New Ozone Standards Before H. Comm. on Oversight and Government Reform*, 110th Cong. 1 (2008), (statement of Rep. Waxman, Chairman, H. Comm. on Oversight and Government Reform), available at <http://purl.access.gpo.gov/GPO/LPS111049>. Other members of Congress did point out that "Presidents of both parties have asserted the right to oversee and direct the actions and decisions of regulatory agencies." *Id.* at 7 (statement of Congressman Issa, Member, H. Comm. on Oversight and Government Reform).

60. Eskridge & Baer, *supra* note 18, at 1177; see also *id.* at 1175 (noting that "other commentators object" to presidentialist focus because it undermines institutional competence and rule-of-law notions).

61. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 21 (2001).

62. 129 S. Ct. at 1832 (Breyer, J., dissenting) ("Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?").

63. 549 U.S. 497, 531–33 (2007).

The broadest reading of the majority opinion is that it was rendered against the backdrop of allegations of inappropriate political interference in an agency decision and is meant to ensure that agencies base their decisions solely on “executive expertise,” rather than politics.<sup>64</sup> A narrower reading of the case is that it rejected the agency decision for relying, not on political factors per se, but on factors beyond those permitted in the statute. As the Court stated, “[t]o the extent that this [statute] constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.”<sup>65</sup> And in a 2009 decision invalidating a Food and Drug Administration (“FDA”) decision to make the emergency contraceptive Plan B available only to women eighteen and older, a federal judge found that contact between the White House and the agency was a factor weighing *against* upholding the agency action.<sup>66</sup> In general, courts have not offered clear guidance on whether political reasons, if offered, can serve as an adequate basis for an agency’s decision. The one exception: political reasons prompting an agency to decide based on factors irrelevant under the authorizing statute are clearly out-of-bounds.<sup>67</sup>

I want to make a fairly straightforward point at this juncture. Leaving aside, perhaps, interference in formal agency adjudication,<sup>68</sup> very little about presidential influence upon agency decision making seems *inherently* delegitimizing. Instead, whether presidential influence is a negative influence on agency decision making, rather than, on another view, the main force shoring up the administrative state, largely turns on the likely *content* of that influence, about which we do not currently possess sufficient information.

Certain types of presidential pressure seem clearly out of bounds. Three such situations are presidential influence that is inconsistent with the agency’s legal constraints; presidential influence that prompts the agency to ignore its factual or technical conclusions; and influence that is aimed at achieving some goal other than service to the public interest. Consider the first type of inappropriate presidential pressure. A President cannot, of course, push an agency to take action not authorized by law. For example,

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64. Freeman & Vermeule, *supra* note 6, at 52 (arguing that the case is an attempt to “ensure that agencies exercise expert judgment free from outside political pressures, even or especially political pressures emanating from the White House”).

65. *Massachusetts*, 549 U.S. at 533.

66. *Tummino v. Torti*, 603 F. Supp. 2d 519, 547 (E.D.N.Y. 2009) (“The second departure was the unusual involvement of the White House in the Plan B decision-making process. . . . Whether or not it was permissible . . . these discussions were not the norm for the FDA with respect to this type of decision.”).

67. See, e.g., *D.C. Fed’n of Civic Ass’ns v. Volpe* (The Three Sisters Bridge Case), 459 F.2d 1231, 1236 (D.C. Cir. 1971). What factors a statute may make relevant is, of course, an interpretive question.

68. The Administrative Procedure Act bars *ex parte* contacts in formal adjudication. See Administrative Procedure Act, 5 U.S.C. § 554(d) (2006); see also § 556(e) (“The transcript of testimony and exhibits . . . constitutes the exclusive record for decision . . .”); *Myers v. United States*, 272 U.S. 52, 135 (1926) (suggesting that the President cannot “properly influence or control” agency decisions of quasi-judicial nature); *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) (“[T]here is no inherent executive power to control the rights of individuals in such settings.”).

suppose one accepts (as one should) the Supreme Court's conclusion that the Ashcroft Directive interpreting the Controlled Substances Act to bar physician-assisted suicide under Oregon law was simply beyond the scope of the Justice Department's statutory authority.<sup>69</sup> A presidential position favoring the directive, for whatever reason, should of course make no difference to the legality or legitimacy of the agency's decision, because the agency remains bound by the statute.<sup>70</sup>

Closely linked is the second situation in which the President pressures an agency to disregard the facts it has found (does Tylenol present liver risks?) or to base its decision on concerns irrelevant under a statute (cost, in the case of national ambient air quality standards).<sup>71</sup> One recent example, taken from the state law setting, involved the siting of a low-level nuclear waste disposal facility in Nebraska.<sup>72</sup> Nebraska was a signatory to an interstate compact on nuclear waste disposal, and the interstate commission had identified a site in Nebraska for the regional waste disposal facility. In accordance with its statutory requirements, the state environmental agency prepared technical studies for the site in question which suggested its suit-

69. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

70. Consider as well the classic example of congressional pressure in the Three Sisters Bridge case, in which a member of Congress threatened to hold hostage funding for the Washington, DC subway system unless a federal agency agreed to fund an unrelated bridge-building project. *See Volpe*, 459 F.3d at 1236. Some might suggest that such an attempt to influence agency action is similarly "contravening the law" when the statutory delegation is to the agency head, not to the President. For the reasons described above, the best reading of such statutes includes the possibility of presidential influence. *See supra* text accompanying note 20.

71. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . ."); *cf. Kagan, supra* note 11, at 2308 (suggesting that Clinton may have elected to be less involved in agency decisions that were highly technical in nature). Kathryn Watts suggests that, unless Congress has specifically foreclosed political factors and influences in a statute, an agency is likely free to consider them. Watts, *supra* note 12, at 49 ("Congress's silence could be read to leave agencies *free* to consider political factors and influences."). Whether a particular factor can be considered is ultimately an issue of interpreting Congress's intent, however. *E.g.*, *George E. Warren Corp. v. EPA*, 159 F.3d 616, 624 (D.C. Cir. 1998) (upholding the EPA's interpretation of Clean Air Act to permit it to consider treaty obligations and the market for imported gasoline under *Chevron* Step Two). On some occasions, congressional silence in the text of a statute has been interpreted to foreclose consideration of a factor. *See, e.g.*, *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 471 (2001) (interpreting Clean Air Act "in its statutory and historical context . . . [to] unambiguously bar[] cost considerations" in the EPA's setting of ambient air quality standards). Other evidence has led an agency (or court) to interpret the statute to permit consideration of the factor despite congressional silence. *E.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1521 (2009) (interpreting statutory silence respecting cost in Clean Water Act's cooling water intake regulatory provision to permit the EPA to consider relative costs and benefits of a particular limit; upholding the EPA's interpretation of statute as reasonable); *see also Whitman*, 531 U.S. at 490-91 (Breyer, J., concurring) ("I believe that, other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation [in which regulators take account of a proposed regulation's adverse effects]"). The critical issue for an agency's accountability on judicial review, however, should not be who advanced the concern, but whether the substance of it accords with the agency's statutory authorization.

72. *Entergy Ark., Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004) (agreeing with Central Interstate Low-Level Radioactive Waste Commission that Nebraska breached duty of good faith under regional compact).

ability, but the agency nonetheless found the site unsuitable and denied the license. Memoranda in the agency's file suggested that the agency was under strong political pressure to deny the license whatever the outcome of the studies.<sup>73</sup> This political pressure seemed linked to Governor Nelson's campaign pledge to keep nuclear waste out of Nebraska.

Similarly, consider the judicial decision invalidating the FDA's decision to make the emergency contraceptive Plan B available over the counter only to women eighteen years of age or older.<sup>74</sup> The judge reasoned that political pressure caused the agency to disregard the record before it and the recommendations of scientific experts, stating, "Plaintiffs have proffered evidence that the Commissioner did not make the decision on his own, but was pressured by the White House and 'constituents who would be very unhappy with . . . an over-the-counter Plan B.'"<sup>75</sup> According to the judge, the record before the agency contained "overwhelming evidence that Plan B could be used safely by 17-year-olds without a prescription,"<sup>76</sup> and that the contraceptive's availability would not have a significant impact on sexual behavior.<sup>77</sup> The court found that political pressure to serve the unspecified constituents likely was responsible for the FDA's decision nonetheless to limit access and found the decision to be arbitrary and capricious.<sup>78</sup> One final example also comes from the FDA. That agency approved a new device for repairing the knee as "substantially equivalent" to grandfathered devices. In December 2008, the agency acknowledged that political pressure from, among others, four members of Congress caused the agency to disregard its scientific reviewers' conclusions that the device was not "equivalent" and thus that the device should not have been approved without further study of safety and efficacy.<sup>79</sup>

Allegations regarding political manipulation of scientific research fall in the same general category.<sup>80</sup> At the federal level, President Obama has recently instructed the agencies to ensure the integrity of scientific

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73. See *id.* at 549–51.

74. *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

75. *Id.* at 546 (quoting plaintiffs' exhibit).

76. *Id.*

77. *Id.* at 531.

78. *Id.* at 548 ("The FDA simply has not come forward with an adequate explanation, nor has it presented any evidence to rebut plaintiffs' showing that it acted in bad faith and in response to political pressure.").

79. See Gardiner Harris & David M. Halbfinger, *F.D.A. Reveals It Fell to a Push By Lawmakers*, N.Y. TIMES, Sept. 25, 2009, at A1 (discussing approval of Menaflex knee repair device); Editorial, *Science and Lobbying at the F.D.A.*, N.Y. TIMES, Oct. 3, 2009, at A22.

80. For a discussion of political manipulation strategies, see generally Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601 (2008), and Wendy Wagner & Rena Steinzor, *Rescuing Science from Politics: Regulation and the Distortion of Scientific Research* (Ctr. for Progressive Reform, White Paper No. 604, 2006), available at [http://www.progressivereform.org/articles/Rescuing\\_Science\\_604.pdf](http://www.progressivereform.org/articles/Rescuing_Science_604.pdf).

information.<sup>81</sup> The concern here is that political views submerged in the process of executive supervision may work themselves out through pressure on an agency to skew its scientific or technical findings.<sup>82</sup>

The final case of illegitimate political pressure is where the content of the pressure diverges from any notion of the public interest. What “public interest” refers to is subject to obvious debate. “Public interest” could be defined in a variety of substantive ways or procedurally (say, a majoritarian view, the result of deliberative debate among elected representatives, or a conclusion representing a compromise reached among the preferences of a range of interest groups). But suppose, for example, the President pressures an agency to decide in a way that benefits a brother-in-law because of the family tie or a campaign contributor in order to obtain more funding for a reelection campaign. Whatever the definition of “public interest,” neither motivation would seem to qualify as serving it. This type of executive influence obviously undermines the legitimacy of an agency decision, rather than enhancing it.

These are, of course, fairly clear examples of presidential influence that does not belong in agency decision making. The agency should not be pressured either to disregard the law or the factual record or by influence in the service of something other than legitimate public objectives. With respect to pressure to disregard the law or factual record, the agency’s action still must be bounded, roughly speaking, by the terms of the law under which the agency operates and by a demand for reasoned, nonarbitrary decision making.<sup>83</sup> Judicial review of agency action incorporates these norms to a large extent because a court may vacate an agency action, under the Administrative Procedure Act, if it is “arbitrary, capricious . . . or otherwise not in

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81. See Memorandum from Barack Obama, President of the U.S., for the Heads of Executive Dep’ts & Agencies (Mar. 9, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/).

82. E.g., UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICYMAKING: AN INVESTIGATION INTO THE BUSH ADMINISTRATION’S MISUSE OF SCIENCE (2004), available at [http://www.ucsusa.org/assets/documents/scientific\\_integrity/rsi\\_final\\_fullreport\\_1.pdf](http://www.ucsusa.org/assets/documents/scientific_integrity/rsi_final_fullreport_1.pdf); James Glanz, *Scientists Say Administration Distorts Facts*, N.Y. TIMES, Feb. 19, 2004, at A18 (describing Union of Concerned Scientists report); Christopher Lee, *Ex-Surgeon General Says White House Hushed Him*, WASH. POST, July 11, 2007, at A1. As Holly Doremus has thoroughly discussed, scientific integrity within the agencies can also face other threats, including political pressure coming from within the agency. See Doremus, *supra* note 80.

83. My argument here is consistent with Lisa Bressman’s suggestion that scholars should not overemphasize concerns of political accountability at the expense of ensuring that the administrative state acts nonarbitrarily. Bressman, *supra* note 27, at 462–63; see also Rubin, *supra* note 25. Whether these norms are “quasi-constitutional,” as she suggests, however, need not be addressed at this juncture. Bressman, *supra* note 27, at 503. They are obviously and appropriately part of a discussion on whether the administrative state’s power is legitimately exercised. The appropriate comparison would be with an evaluation of whether Congress’s deliberation is meaningful or focused or instead whether Congress enacts bills hundreds of pages long that no one has read. E.g., Interview of Congressmen John Conyers, Jr. and Jim McDermott, FAHRENHEIT 9/11 (Tristar Home Entertainment 2004) (alleging that no members of Congress read the USA Patriot Act prior to passage). An alleged congressional failure to read legislative proposals before voting raises no constitutional problem—nor any legal problem enforceable in the courts—but it surely raises questions of legitimacy, which in Congress’s case may be responded to in the electoral process.

accordance with law.”<sup>84</sup> The brother-in-law case probably will be subject to a judicial check only if the agency offers no valid reasons in support of the decision or if the President is refreshingly candid. Failing that, the political system will have to be the safeguard against this extreme case.

In some cases, needless to say, drawing the line between appropriate and inappropriate executive influence can be more challenging. Consider, for example, extremely close executive supervision of agency technical decision making. Another difficult case is executive pressure to minimize negative effect on the economic viability of a well-organized industry, where the agency making the decision *is* permitted by the statute to consider economic cost.

In this vein, it is worth noting the significant developing literature suggesting that executive review may tend toward the technocratic issues, rather than the policy questions. My colleague Steven Croley, for example, has discussed the extent to which employees of the Office of Information and Regulatory Affairs (“OIRA”) are mostly civil servants, thus tending to make OIRA review less focused on a political agenda than it might otherwise be.<sup>85</sup> Lisa Bressman and Michael Vandenbergh’s survey of EPA officials suggests that a focus of OIRA review has been on second-guessing EPA cost estimates.<sup>86</sup> Finally, a staff report of the House Committee on Science and Technology suggested that OIRA staff scientists used a “peer review-type” approach to directly challenge the conclusions of EPA scientists of a particular chemical’s risks for the EPA’s Integrated Risk Information System.<sup>87</sup> The Congressional Research Service recently described the fields of new OIRA staff members as including epidemiology, risk assessment, engineering, and health economics, suggesting that OIRA is boosting its own scientific and technical resources, rather than relying solely on agency experts.<sup>88</sup> The appropriateness of executive second-guessing of agency technical findings is a question beyond the scope of this Article.

Suppose, for purposes of discussion, we put these three cases of executive influence over agency policy decisions completely to one side. A large space still remains in which potential presidential influence should be seen as clearly appropriate. This space includes areas in which an agency must

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84. 5 U.S.C. § 706(2)(A) (2006).

85. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 874 (2003).

86. See Bressman & Vandenbergh, *supra* note 4, at 67–68 (quoting survey respondents who commented that OIRA became involved in rulemaking details and issues of lower political visibility while other White House offices became involved when potential political impact reached a minimum threshold); see also David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1112–13 (2008).

87. MAJORITY STAFF OF H.R. SUBCOMMITTEE ON INVESTIGATIONS & OVERSIGHT, 111TH CONG., *NIPPING IRIS IN THE BUD: SUPPRESSION OF ENVIRONMENTAL SCIENCE BY THE BUSH ADMINISTRATION’S OFFICE OF MANAGEMENT AND BUDGET 5* (2009), available at [http://democrats.science.house.gov/Media/file/Commdocs/hearings/2009/Oversight/11jun/IRIS\\_Staff\\_Report.pdf](http://democrats.science.house.gov/Media/file/Commdocs/hearings/2009/Oversight/11jun/IRIS_Staff_Report.pdf).

88. See COPELAND, *supra* note 4, at 22 (“Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics.”).

make “policy judgments,” as well as, perhaps, decisions on some more technical or legal issues. Take the Interior Department’s recent interpretation of “surface coal mining operations,” mentioned above, to exclude subsidence impacts from underground coal mining operations. This had the effect of permitting underground coal mining within national park boundaries and within 300 feet of residences. The resolution of the statutory question required some balancing of environmental protection against the economics of mining. These are inevitably value-laden decisions, no matter who makes them. Congress might have provided more precise instructions on how to balance these concerns. Without such instructions, agencies would seem to possess “neither democratic warrant nor special competence” to make these value judgments.<sup>89</sup> Within this space, many theorists and the Supreme Court have suggested that some level of presidential supervision can be critical and can make agency action more legitimate than if the agency acted alone.

## II. THE LACK OF MENTION OF POLITICS IN AGENCY DECISIONS

The reality is, of course, that Presidents have long exerted significant influence over agency policymaking through the use of executive orders and coordinating offices in the White House. Examples of relatively systematic presidential supervision over executive branch agencies include Nixon’s Quality of Life review group, Ford’s executive order requiring the consideration of inflation, and Carter’s regulatory analysis executive order.<sup>90</sup> As Paul Verkuil wrote in 1980, “President Carter was hardly embarking on a new undertaking as he tried to make the administrative process more responsive to the executive branch, which, in turn, is accountable to the electorate.”<sup>91</sup>

President Reagan systematized regulatory review with Executive Order 12,291, calling for comprehensive review by the OMB of all major rules issued by executive branch agencies.<sup>92</sup> President Clinton replaced this with Executive Order 12,866,<sup>93</sup> which also provided for centralized OMB review of all “significant” regulatory actions. President George W. Bush’s administration continued to implement Executive Order 12,866, as modified by Executive Order 13,422.<sup>94</sup> President Obama, too, is implementing Executive Order 12,866 (though revoking Executive Order 13,422 on the ground that it

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89. Kagan, *supra* note 11, at 2353 (“[A]gency experts have neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking.”).

90. See Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978) (Carter administration order providing for detailed regulatory analysis of rules with “major economic consequences”); Exec. Order No. 11,821, 39 Fed. Reg. 41,501, 41,501 (Nov. 27, 1974) (requiring agencies to prepare inflation impact statements); Kagan, *supra* note 11, at 2276–77 (describing Nixon quality of life program); see also COPELAND, *supra* note 4, at 1–6 (summarizing early history of OMB review).

91. Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 947 (1980).

92. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,196 (Feb. 17, 1980).

93. 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

94. 72 Fed. Reg. 2763 (Jan. 18, 2007).

embodied some political commitments not welcome in the Obama Administration).<sup>95</sup> Each of these executive orders has also included broad statements of policy, ranging from Executive Order 12,291's statement that no rule shall be undertaken unless its potential social benefits outweigh its potential social costs, to Executive Order 12,866's statement that an agency shall attempt to tailor its regulations to impose the "least burden on society."<sup>96</sup> Moreover, Presidents have further sought to increase their influence by increasing the layers of political appointments within executive branch agencies.<sup>97</sup> Meanwhile, administrative scholarship during this period has documented and argued (usually) in support of the increasing importance of presidential supervision over administrative agencies.<sup>98</sup> So, for better or worse, presidential supervision appears to be here to stay.

Perhaps needless to say, OMB actions, including actions of its OIRA, should be seen as part of this presidential supervisory effort.<sup>99</sup> As a formal matter, the regulatory review executive orders have expressly granted the OMB and OIRA review and approval authority over significant agency rules; an executive branch agency generally is not to publish such rules until regulatory review is completed.<sup>100</sup> And as Kagan has written, references to the President ought to include "his immediate policy advisors in OMB and the White House."<sup>101</sup> Although top OMB officials, like agency officials, are selected by the President and confirmed by the Senate rather than elected, others have similarly treated OIRA, within the OMB, as an agent of the President that is known for "pushing the political agenda of the White House"<sup>102</sup> and as the "central White House voice . . . on regulations of all varieties."<sup>103</sup> Official statements of the OMB and OIRA similarly state that their functions include

95. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

96. 58 Fed. Reg. at 51,736.

97. See Barron, *supra* note 86, at 1126.

98. E.g., MASHAW, *supra* note 33; Kagan, *supra* note 11. For some disagreement on the precise effect of executive review, compare Bagley & Revesz, *supra* note 47, with Bressman & Vandenberg, *supra* note 4, and Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State"*, 105 MICH. L. REV. 1497 (2007).

99. The OMB is an agency located within the Executive Office of the President; its primary function is to "assist the President in overseeing the preparation of the federal budget and to supervise its administration in Executive Branch agencies." OMB's Mission, [www.whitehouse.gov/omb/organization\\_role](http://www.whitehouse.gov/omb/organization_role) (last visited Jan. 17, 2010). OIRA, located within OMB, oversees, among other things, "[t]he implementation of government-wide policies and standards with respect to Federal regulations and guidance documents." Information and Regulatory Affairs, [www.whitehouse.gov/omb/regulatory\\_affairs/default/](http://www.whitehouse.gov/omb/regulatory_affairs/default/) (last visited Jan. 17, 2010).

100. Exec. Order No. 12,866, 58 Fed. Reg. at 51,743 ("Except to the extent required by law, an agency shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review [until OIRA has completed or waived its review].").

101. Kagan, *supra* note 11, at 2338.

102. *OIRA Transparency Improves as Action Increases*, OMB WATCH, Feb. 25, 2002, <http://www.ombwatch.org/node/360>.

103. MAJORITY STAFF OF H.R. SUBCOMM. ON INVESTIGATIONS & OVERSIGHT, 111TH CONG., *supra* note 87, at 2.

“ensur[ing] that agency reports, rules, testimony, and proposed legislation are consistent with the President’s Budget and with Administration policies.”<sup>104</sup>

If we take the executive order requirements together with the theory that presidential supervision supplies needed legitimacy to agency action, we might expect to see some disclosure either by White House offices or by the agencies, or both, explaining what effect presidential supervision has had on agency positions. Indeed, since the outset of the Clinton Administration, the regulatory review executive order has provided that the regulating agency is to disclose “those changes in the regulatory action that were made at the suggestion or recommendation of OIRA,”<sup>105</sup> and OIRA is to disclose to the public “all documents exchanged between OIRA and the agency.”<sup>106</sup>

We do occasionally see presidential announcements that an agency has been directed to examine a particular issue, or announcements of a particular agency decision. Kagan has documented memoranda to agencies issued by President Clinton, such as a 1995 “directive” to the FDA to propose a rule to reduce youth smoking and another to the Labor Department to propose a rule allowing states latitude to use unemployment insurance programs for parenting leave.<sup>107</sup> Within a few days of arriving in office, President Obama issued a memorandum to the EPA, directing it to revisit a Bush Administration decision denying California’s Clean Air Act application to regulate greenhouse gas emissions from motor vehicles. The memorandum stated, “In order to ensure that the EPA carries out its responsibilities for improving air quality, [the EPA is] hereby requested to assess whether the EPA’s decision to deny a waiver based on California’s application was appropriate in light of the Clean Air Act.”<sup>108</sup>

Further, a Westlaw search of presidential documents beginning in the Clinton Administration and continuing through the second Bush Administration uncovered literally hundreds of presidential statements directing agencies to take action of one sort or another, including the promulgation of rules.<sup>109</sup> At

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104. OMB’s Mission, *supra* note 99; *see also* Information and Regulatory Affairs, *supra* note 99 (describing OIRA’s function as “implementation of government-wide policies and standards”).

105. Exec. Order No. 12,866 § 6(a)(3)(E)(iii), 58 Fed. Reg. at 51,742; *see also* Kagan, *supra* note 11, at 2286–87 (noting that the executive order required OMB to log any written or oral communications regarding rulemaking involving outsiders).

106. Exec. Order No. 12,866 § 6(b)(4)(D), 58 Fed. Reg. at 51,743. OIRA is also to provide to the agency all written materials relevant to a rulemaking that it has received from outside groups. *Id.* at § 6(b)(3)(B)(ii), 58 Fed. Reg. at 51,743.

107. Kagan, *supra* note 11, at 2282–84.

108. Memorandum from Barack Obama, President of the U.S., to the Adm’r of the Envtl. Prot. Agency (Jan. 26, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Presidential\\_Memorandum\\_EPA\\_Waiver/](http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/).

109. The Westlaw “Presidential Daily” database of presidential press conferences, announcements, and speeches issued by the White House Communications Office begins in January, 1993; its “Presidential Documents” database begins with executive order coverage in 1936, and covers all presidential documents published in the Federal Register beginning in 1984 (usually executive orders, proclamations, and trade agreement letters); and its coverage of the Weekly Compilation of Presidential Documents begins in Jan. 2000. I directed the following query to this database, aiming at documents dated after January 20, 1993 and before January 20, 2009: “direct the Administrator” OR “direct the Secretary” OR “Secretary is hereby directed” OR “Administrator is hereby directed”

least in these statements, the President acts as if the resources and authority of executive branch agencies are at his disposal.<sup>110</sup>

Whether a President is willing to explicitly stand behind an agency decision has varied widely, however. For example, in early 2009, President Obama very publicly marked as his policy a 35.5 miles-per-gallon automotive fuel-efficiency standard—required by statute to be issued by the Transportation Department.<sup>111</sup> Meanwhile, he kept his distance from a proposed EPA finding that automotive greenhouse gases presented a potential danger to public health and welfare, with the director of the OMB grudgingly acknowledging the White House's support for the EPA's proposed rule only in response to controversy at a Senate hearing.<sup>112</sup>

Despite the directives and the executive order disclosure requirements, however, public information about the content of executive supervision of an agency decision itself, such as through regulatory review, is surprisingly rare.<sup>113</sup> During the Clinton Administration, regulatory review documents and data were “not searchable, incomplete, and difficult to understand.”<sup>114</sup> Nonetheless, presidential influence was apparently very significant during that period. “Of the rules reviewed by the Clinton OMB, the percentage approved without change sharply decreased from prior years, the percentage approved with change increased proportionately, and the small percentage either returned to or withdrawn by the initiating agency remained roughly constant.”<sup>115</sup> According to a recent presentation of data from the Congressional Research

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OR “Secretary is directed” OR “Administrator is directed.” The search produced 247 relevant documents.

110. E.g., Kagan, *supra* note 11, at 2316 (“[Clinton’s methods] purposefully trumpeted (indeed, sometimes exaggerated) the President’s involvement in agency proceedings . . .”).

111. John M. Broder, *Obama to Toughen Rules on Emissions and Mileage*, N.Y. TIMES, May 19, 2009, at A1.

112. At a hearing in which EPA Administrator Jackson was testifying, Wyoming Senator Barrasso suggested that the EPA’s proposed finding that automotive greenhouse gases endangered public health and welfare was political and not founded on sound science, waving a document prepared by the OMB. Posting of John M. Broder to N.Y. Times Green Inc., *E.P.A.’s Greenhouse Gas Proposal Critiqued*, <http://greeninc.blogs.nytimes.com/2009/05/12/epas-greenhouse-gas-proposal-critiqued/?scp=1&sq=barrasso&st=cse> (May 12, 2009, 15:39 EST). OMB Director Peter Orszag responded that “OMB would have not concluded review, which allows the finding to move forward, if we had concerns about whether EPA’s finding was consistent with either the law or the underlying science.” Posting of Jesse Lee to The White House Blog, *OMB Director Orszag Corrects the Record on the OMB & EPA*, <http://www.whitehouse.gov/blog/OMB-Director-Orszag-Corrects-the-Record-on-the-OMB-and-EPA/> (May 12, 2009, 16:31 EST). The EPA has now finalized the endangerment finding. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Again, this decision did not seem to be embraced closely by the White House. See Briefing by White House Press Secretary Robert Gibbs, Dec. 7, 2009, available at [www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-12709](http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-12709) (describing EPA decision as the result of process “set in motion by a 2007 Supreme Court decision . . . . The President continues to strongly believe that the best way forward is through the passage of comprehensive energy legislation . . .”).

113. During the Reagan Administration, the OMB reportedly objected to approximately one-third of federal regulatory proposals. Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 540–41 (1987).

114. See *OIRA Transparency Improves as Action Increases*, *supra* note 102.

115. Kagan, *supra* note 11, at 2287.

Service, the Clinton OIRA, by the end of Clinton's term in office, was permitting fewer than 40 percent of significant agency rules to proceed without change.<sup>116</sup>

Under President George W. Bush, the OMB and OIRA made a greater practice of posting on the internet so-called "review" and "return" letters prepared under Executive Order 12,866. Even with this improvement in transparency, however, the documents released seem to concern only a small portion of the "economically significant" rules reviewed and changed during the OIRA review process, and an even smaller portion of all such rules reviewed by OIRA.<sup>117</sup> A search of OIRA's database on regulatory review revealed that between January 20, 2001, and January 19, 2009, OIRA concluded review of 755 economically significant agency rules. Of those, OIRA approved only 128 without change. It approved 555 rules consistent with a change that took place during the review process, and returned 2 rules to the agency.<sup>118</sup> The agency withdrew the remaining 64 rules.<sup>119</sup> At this time, we do not know that the changes in the rulemaking documents were prompted by the OMB, but many of them probably were.<sup>120</sup>

Meanwhile, despite the several hundred economically significant rules that were modified during the review process, the Bush Administration OMB posted only *forty-two* review and return letters that explain its problems with the agency rule under review.<sup>121</sup> President Obama's OIRA appears to be even less committed to disclosure. As of January 20, 2010, it had posted no further review or return letters at all.<sup>122</sup> Despite campaign pledges

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116. Significant agency rules are those subject to regulatory review, including rules with an annual economic effect of \$100 million or more or a material adverse effect on particular sectors, as well as rules that raise "novel legal or policy issues." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993); *see also* COPELAND, *supra* note 4, at 13 (percentage of rules approved consistent without change in 1994 was 53.4%; in 1995, 53.1%; in 1996, 41.4%; in 1997, 37.4%; in 1998, 36.1%; in 1999, 31.5%; and in 2000, 34.3%). Searches in the RegInfo.gov database disclose that the Clinton OMB reviewed 5,554 rules between January 21, 1993 and January 19, 2000, both economically significant and not economically significant. Of those rules, 2,898 were approved consistent without change, 2,214 were approved consistent with change, and the remainder were withdrawn or concluded in other ways. Historical Reports, <http://www.reginfo.gov/public/do/eoHistoricReport> (last visited Jan. 17, 2010) (search results on file with the author).

117. Some changes, of course, could have been initiated by internal managers at the agency rather than prompted by comments from the OMB. Future research might attempt to distinguish these categories with greater specificity.

118. Searches were conducted on the RegInfo.gov webpage. *See* Historical Reports, *supra* note 116. In addition, four rules were marked "statutory or judicial deadline," and two more were marked "emergency." Search results marked "'Consistent with Change' means OIRA has approved the regulation with changes from when it was received." *OIRA Transparency Improves as Action Increases*, *supra* note 102.

119. Historical Reports, *supra* note 116. OIRA reviewed over 4000 rules total during this time period.

120. An agency official's possible motivations for responding to White House pressure has been amply discussed by others and is beyond the scope of this Article. *See, e.g.*, Strauss, *supra* note 4, at 713–15.

121. *See* OIRA Letters, <http://www.reginfo.gov/public/jsp/EO/letters.jsp> (last visited Jan. 26, 2010) (listing return and review letters along with prompt letters).

122. *Id.*

to “stream[] portions of cabinet meetings live on the Internet,”<sup>123</sup> his first presidential memorandum on “transparency and open government” states more guardedly, “My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.”<sup>124</sup> Between January 20, 2009 and January 20, 2010, Obama’s OIRA reviewed 120 economically significant proposed or final rules. Of these, only 8 were issued without change; 46 were issued consistent with change; and 12 were withdrawn.<sup>125</sup> In other words, over 90 percent of economically significant rules underwent some change or withdrawal during the OIRA review process. That figure remains stable even excluding economically significant rules that were submitted to the OMB prior to the change in administration. Again, *no* review or return letters of any sort appeared to have been posted electronically by Obama’s OIRA during that time.

In view of the data, OMB review over the past several presidential administrations has almost certainly had significantly greater effects on agency rulemaking than the number of public or posted review or return letters would suggest. Consider, as well, a couple of anecdotal examples. In 2002, the Army Corp of Engineers and the EPA jointly issued a rule defining “fill material” under the Clean Water Act. The agencies defined “fill” to be material placed in the water that would replace some water with dry land or change the bottom elevation of the water body, and specifically interpreted “fill” to include overburden from mining.<sup>126</sup> The rule was widely recognized as facilitating so-called “mountaintop mining” of coal, because it would

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123. Daniel Lyons & Daniel Stone, *President 2.0*, NEWSWEEK, Dec. 1, 2008, at 40, 41.

124. Memorandum from Barack Obama, President of the U.S., for the Heads of Executive Departments & Agencies on Transparency and Open Government (Jan. 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government). Obama has been praised for his clearer stance on Freedom of Information Act disclosures, in which he stated that “[a]ll agencies should adopt a presumption in favor of disclosure . . .” Memorandum from Barack Obama, President of the U.S., for the Heads of Executive Departments & Agencies on Freedom of Information Act (Jan. 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

125. All data in this paragraph and this footnote are based on searches conducted at <http://www.reginfo.gov/public/do/eoAdvancedSearchMain> for the period January 20, 2009 through January 21, 2010. All search results are on file with the author. The percentages remain stable even when the first month of the Administration is excluded; several draft rules, submitted by the agencies prior to inauguration, were withdrawn from regulatory review during that period. Thus, even during the period February 20, 2009, through January 20, 2010, over 90% of economically significant rules were approved consistent with change or withdrawn. Fewer than 10%—7 economically significant rules out of 101 submitted for review—were approved without change.

With respect to *all* rules undergoing review during the first year of the Obama Administration, including those that did not qualify as economically significant, fewer than 30% were approved without change. One hundred of 572 reviewed rules were approved without change, 409 were approved consistent with change, and 61 were withdrawn. Two rules were marked as subject to a statutory or judicial deadline; it is unclear whether they were modified during OIRA review.

Even if the first month of the Obama Administration’s regulatory review is excluded from these counts, fewer than 30% of reviewed rules were approved without change.

126. 40 C.F.R. § 323.2(6)(1) (2008); Final Revisions to the Clean Water Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129 (May 9, 2002) (codified at 33 C.F.R. pt. 323; 40 C.F.R. pt. 232).

authorize the Army Corps of Engineers to use its Clean Water Act authority to grant permits for “valley fills” for the excess mining overburden that accompanies mountaintop removal, rather than requiring mining companies to meet the more difficult permit requirements set by the EPA.<sup>127</sup> This issue received extensive media coverage and attention in Congress.<sup>128</sup> The *New York Times* quoted “the administration” as suggesting that limiting these actions might mean “severe economic and social hardship for the region,” including placing tens of thousands of jobs at risk.<sup>129</sup> As a “significant rule,” the agency’s “fill” definition was reviewed by the OMB, and the rulemaking documents suggest that some changes were made.<sup>130</sup> Despite actual executive review and the high visibility of the issue, no public documents appear on the OMB’s websites detailing the extent to which OMB review may have affected the content of the rule or the OMB’s position on the rule.

Recent reports regarding a February 2010 EPA rule strongly suggest that regulatory review affected the substantive content of the rule. That rule set an air quality standard for nitrogen dioxide, which can cause respiratory illnesses and other problems.<sup>131</sup> The rule provided for monitoring devices along heavily polluted roads. The EPA reportedly preferred that devices be located in metropolitan areas with populations of 350,000 or more; following discussion of the issue with OIRA officials that took place over a two-day period, the rule was finalized with monitoring devices located in metropolitan areas with a population of 500,000 or more, resulting in 41

127. *E.g.*, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 430–31 (4th Cir. 2003) (describing problem of excess overburden from mountaintop mining). The approach was upheld by the Supreme Court in litigation challenging a mining company’s proposal to use a mountain lake for disposal of its mining overburden. *Coeur Alaska, Inc., v. Southeast Alaska Conservation Council*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2458 (2009).

128. *E.g.*, Francis X. Clines, *Judge Takes On the White House on Mountaintop Mining*, N.Y. TIMES, May 19, 2002, § 1, at 118 (describing district court opinion vacating rule, later overturned by the Fourth Circuit). A subcommittee of the Senate Environment and Public Works Committee held a hearing on the rulemaking on June 6, 2002. *Clean Water Act: Review of Proposed Revisions to Section 404 Definitions of “Fill” and “Dredged Fill”: Hearing Before the Subcomm. on Clean Air, Wetlands, and Climate Change of the S. Comm. on Environment and Public Works*, 107th Cong. (2004), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_senate\\_hearings&docid=f:83696.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:83696.pdf). Senators Lieberman and Jeffords wrote the President seeking reconsideration of the rule, while fifty-seven members of the House of Representatives wrote the EPA opposing the rule change. *Clean Water: Jeffords, Lieberman Urge White House to Oppose New Mine Regs*, GREENWIRE, May 3, 2002; see also *Clean Water: Bush Administration Proposes to Allow Mine Dumping*, Greenwire, Apr. 26, 2002.

129. Clines, *supra* note 128.

130. 33 C.F.R. § 323.2 (2009); Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material”, 67 Fed. Reg. 31,120, 31, 140 (May 9, 2002) (“[T]his action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.”). Searches in the regulations.gov database uncovered no such document, though it is conceivable it may be present on request in the Army Corps of Engineers’ Washington, D.C. office. See Proposed Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material”, 65 Fed. Reg. 21,292, 21,292 (proposed Apr. 20, 2000) (to be codified at 33 C.F.R. pt. 323; 40 C.F.R. pt. 232) (listing phone number to call to inspect supporting documents and comments filed on the rule).

131. Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474 (Feb. 9, 2010) (to be codified at 40 C.F.R. pt. 50, 58, app. S).

fewer monitors—approximately one fourth fewer monitoring devices.<sup>132</sup> Again, the rulemaking document contains no mention of this discussion process and no documents are posted on the OIRA website.<sup>133</sup>

In addition, the White House, with the OMB, may shape agency policy more subtly than through the regulatory review process. Consider the 2008 story regarding the OMB's treatment of the EPA's draft finding that greenhouse gases require regulation under the Clean Air Act. Following the Supreme Court's 2007 decision in *Massachusetts v. EPA*,<sup>134</sup> the EPA was required to determine whether greenhouse gases represent a danger to health or the environment, thus requiring Clean Air Act regulation. In December 2007, the EPA prepared a document, apparently a proposed rule, concluding that greenhouse gases did in fact require Clean Air Act regulation. The document reportedly concluded that greenhouse gases endangered public welfare, a conclusion that would have triggered an obligation to regulate under the Clean Air Act.<sup>135</sup> Unnamed officials reported that OMB officials told the EPA that its email containing the document would not be opened.<sup>136</sup> The EPA responded in the summer of 2008 with a "watered-down version of the original proposal that offers no conclusion."<sup>137</sup> (Ultimately, in the Obama Administration, the EPA did make the finding that greenhouse gases endanger public health and welfare, finalizing the rulemaking in December, 2009.<sup>138</sup>)

As this example suggests, an agency may not only respond to expressed OMB views, but may feel pressure to reshape a decision before submission to the OMB.<sup>139</sup> As with any response to executive review, this type of

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132. See Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. at 6508 (noting that roughly 167 monitoring devices could be placed if metropolitan areas of 350,000 were covered, compared with 126 if the 500,000 population threshold were used); Matthew Madia, *White House Meddling in EPA Rule on Air Pollution Monitors*, OMB WATCH, Jan. 28, 2010, <http://ombwatch.org/node/10733>.

133. Searching the hundreds of documents in the regulations.gov rulemaking docket also uncovered no further information besides the e-mails referenced in the OMB Watch article, Madia, *supra* note 132.

134. 549 U.S. 497 (2007).

135. See John Shiffman & John Sullivan, *An Eroding Mission at EPA*, PHILA. INQUIRER, Dec. 7, 2008, at A1, available at [http://www.philly.com/philly/inquirer/online\\_extras/35668114.html](http://www.philly.com/philly/inquirer/online_extras/35668114.html).

136. Felicity Barringer, *White House Refused to Open Pollutants E-Mail*, N.Y. TIMES, June 25, 2008, at A15; Shiffman & Sullivan, *supra* note 135 ("White House aides . . . called Johnson and asked him to take it back.").

137. Barringer, *supra* note 136. The Bush Administration EPA eventually published an Advance Notice of Proposed Rulemaking on July 30. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1); see also Shiffman & Sullivan, *supra* note 135 ("Johnson instead echoed the White House's wishes and called for more study on global warming, delaying any dramatic government action until the next administration took office.").

138. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496,66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1).

139. See COPELAND, *supra* note 4, at 17 ("[S]ome agencies have indicated that they do not even propose certain regulatory provisions because they believe that OIRA would find them objectionable.").

adjustment ultimately may make the decision a better one if the agency is responding in a way that better serves the public interest. The adjustment could also make the decision worse, again depending on the content of the pressure and the goals of executive review. Either way, as the example shows, executive pressure can be quite difficult to observe. Despite the high profile of greenhouse gas and climate change issues, this story regarding the manner in which the OMB exercised influence on the EPA did not reach the newspapers until six months after it took place. And leaks to newspapers do not seem to be a reliable or systematic method of increasing the accountability of agencies.

In short, it seems clear that public documents describing OMB views on agency decisions in the George W. Bush Administration significantly understate the impact of OMB review. With respect to the Clinton and Obama Administrations, little or no public information regarding the content of OMB influence is available. That public information may understate OMB influence appears to be consistent with the history of OMB regulatory review as others report it.<sup>140</sup> The Government Accountability Office ("GAO") reported in April 2009 that in twelve case studies of agency rules issued beginning in 2003, OIRA review had resulted in changes to ten of those rules. The GAO classified those changes as significant language changes or preambular changes in four of the rules.<sup>141</sup> In an earlier study, the GAO analyzed eighty-five agency rules reviewed by OIRA between July 1, 2001 and June 30, 2002, and coded as changed, withdrawn, or returned, and concluded that OIRA review had had a significant effect on at least twenty-five of those rules.<sup>142</sup> The Congressional Research Service observed that the GAO study, if anything, "understate[d] the influence that OIRA has on agencies' rules because its findings were often limited to the documentation that was available," excluding, for example, changes OIRA might informally have suggested prior to submission of a draft rule for regulatory review.<sup>143</sup> Consider the words of a Reagan-era senior OMB reviewer: "I don't like to leave fingerprints."<sup>144</sup>

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140. *E.g.*, Houck, *supra* note 113, at 544 n.54 ("An examination of the existing record makes it clear that the claim that OMB does not influence or control many or all agency decisions is simply untenable.").

141. U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS, GAO-09-205, at 6 (2009).

142. U.S. GEN. ACCOUNTING OFFICE, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS, GAO-03-929, at 5 (2003).

143. COPELAND, *supra* note 4, at 17. In 2003, the GAO stated:

In some cases, OIRA also reviews drafts of agencies' rules before formal submission . . . . OIRA indicated that these informal reviews are increasing, and that reviews can have a substantial effect on the agencies' regulatory analysis and the substance of the rules . . . . OIRA also informally consulted with agencies and reviewed agencies' draft rules before formal submission during previous administrations.

U.S. GEN. ACCOUNTING OFFICE, *supra* note 142, at 7–8.

144. Houck, *supra* note 113, at 540 (quoting Reagan Administration OMB Deputy Administrator Tozzi).

Given the argument that presidential influence increases the legitimacy of an agency decision, together with the executive order disclosure requirements, we also might expect to see clearer reliance by an agency on presidential preferences in explaining a particular policy decision. We do not, however, generally see references to presidential supervision or preferences among an *agency's* reasons for decision. Take the Interior Department coal-mining example discussed above.<sup>145</sup> Reversing an apparently longstanding position interpreting the Surface Mining Control and Reclamation Act,<sup>146</sup> the agency, beginning in 1991, interpreted the prohibition not to cover subsidence from underground mining. In its interpretations, rendered first in an opinion of the Solicitor of the Interior and second in a notice-and-comment rule,<sup>147</sup> the Interior Department not only considered a variety of traditional statutory interpretation tools, such as the statute's language and legislative history, but also quite explicitly considered policy concerns.<sup>148</sup> These included the need, in the agency's view, to balance protection for national parks and residences against the desire to make so-called longwall mining (as opposed to "room and pillar" mining, which removes a smaller percentage of coal) economically viable. Longwall mining nearly always creates subsidence, and so applying this section to cover subsidence would reduce (though not eliminate) the geographic area in which longwall mining could be conducted. The Interior Department was quite explicit that the statutory interpretation question might have a significant impact on the economic viability of longwall mining.<sup>149</sup>

The agency's reasons for its interpretation involved the explicit balance of the statutory considerations of environmental protection against economic impacts. Further, the rule was considered to raise "novel legal and policy issues" and was thus reviewed by the OMB under Executive Order

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145. See *supra* text accompanying notes 40–43.

146. E.g., Areas Unsuitable for Mining; Areas Designated by Act of Congress; Applicability of the Prohibitions of the Surface Mining Act to the Surface Impacts of Underground Coal Mining, 53 Fed. Reg. 52,374, 52,381 (proposed Dec. 27, 1988) (to be codified at 30 C.F.R. pt. 761) (suggesting that prohibition should be read to cover only "subsidence causing material damage" as a relevant "surface impact").

147. See Interpretative Rule Related to Subsidence Due to Underground Coal Mining, 64 Fed. Reg. 70,838, 70,839, 70,843 (Dec. 17, 1999) (codified at 30 C.F.R. pt. 761) (stating that the rule issued following notice and comment); Notice of Inquiry, 56 Fed. Reg. 33,170, 33,171 (July 18, 1991) (describing solicitor's opinion).

148. See Interpretive Rule Related to Subsidence Due to Underground Coal Mining, 64 Fed. Reg. at 70,843 (mentioning "environmental values" and "encouraging longwall mining;" stating that "this interpretation best balances all relevant policy considerations").

149. See *id.* at 70,849 (discussing the relationship of interpretation to economic feasibility of longwall mining); see also Matt Spangler, *Supreme Court punts case, affirming Interior changes to coal mining rule*, INSIDE ENERGY, Mar. 1, 2004, at 6. See generally Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 184 (1986) ("[T]rade-offs [belong in the] hands of officials who are politically accountable; and they are rightly subject to public scrutiny and review during the regulatory process.").

12,866.<sup>150</sup> Nonetheless, the agency's reasons for its decision include no mention—beyond boilerplate—of the presidential agenda or presidential preferences or even of OIRA review.<sup>151</sup> Nor do OIRA's publicly posted documents or those of the agency appear to include this information.

For another more recent example, consider the EPA's decision denying California's request for a waiver of Clean Air Act preemption for its automobile greenhouse gas emissions standard. The Clean Air Act preempts states from regulating automotive emissions,<sup>152</sup> with one exception. By statute, the EPA can grant a waiver for a particular California automotive emissions standard unless that standard is not needed to meet "compelling and extraordinary conditions."<sup>153</sup> In response to California's submission of a draft greenhouse gas standard for cars, the EPA interpreted the breadth of the Clean Air Act preemption waiver provision to require that the "compelling and extraordinary conditions" also be distinctively local.<sup>154</sup> Because the EPA found that California had not made such a showing, it denied the waiver.

Among the considerations bearing on the EPA's decision was the question of how much autonomy states such as California should have to devise their own pollution control standards. Newspaper stories suggested that EPA career scientists supported a grant of the waiver to California.<sup>155</sup> Meanwhile, preferences of top White House officials reportedly played a role in the ultimate decision, and EPA Administrator Johnson acknowledged in congressional testimony that he had discussed the application with the White House.<sup>156</sup> One former EPA official told a newspaper that Johnson returned to the agency after White House meetings and reported that "he had been reminded of the president's policy preferences."<sup>157</sup> Despite the value-laden nature of the agency decision and despite apparent White House

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150. Interpretative Rule Related to Subsidence Due to Underground Coal Mining, 64 Fed. Reg. at 70,863 (noting that rule raised such issues and accordingly was subject to regulatory review).

151. The rule stated, "This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866," and further noted that although the rule is not considered economically significant, it "does raise novel legal and policy issues," within the meaning of Executive Order 12866. *Id.* at 70,863. A search of OIRA's website also uncovered no information on regulatory oversight of this rule, although the conclusion action was marked "Consistent with Change." See *supra* note 118 (advanced search performed using rulemaking identification number of 1029-AB82).

152. Clean Air Act, 42 U.S.C. § 7543(a) (2000).

153. *Id.* at § 7543(b)(1)(B).

154. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156, 12,160 (Mar. 6, 2008).

155. See, e.g., Shiffman & Sullivan, *supra* note 135.

156. Nina A. Mendelson, *The California Greenhouse Gas Waiver Decision and Agency Interpretation: A Response to Professors Galle and Seidenfeld*, 57 DUKE L.J. 2157, 2164 n.44 (2008) (reprinting Johnson's congressional testimony).

157. Shiffman & Sullivan, *supra* note 135 (quoting former Deputy Associate Administrator Jason Burnett describing Johnson's experience with the White House).

involvement, however, the EPA's opinion denying the waiver did not mention presidential preferences.<sup>158</sup>

With a couple of notable exceptions, numerous searches of Federal Register statements issued since January 1981 have disclosed no proposed or final rules in which the agency referred to the content of OMB or OIRA review or presidential preferences, directives, or priorities.<sup>159</sup> As a rule, then, agencies generally do not say, "Options A, B, and C all seem open to us under the statute; we are going with Option C because the President (or the OMB or OIRA) thinks that one is most consistent with his priorities." Further, while documents reporting changes from OIRA review are sometimes placed in the agency's docket, which also includes all comments received from various sources, it is fair to say that they can be extremely difficult to locate.<sup>160</sup>

It is worth turning to the exceptions at this point. Research has uncovered mentions of executive preferences in two agency decisions *not* to pursue a regulatory initiative.<sup>161</sup> In 2003, the EPA declined to regulate greenhouse gas emissions from motor vehicles; its decision does reference "the President's policy,"<sup>162</sup> including both presidential policies of "reduc[ing] key

158. Kathryn Watts also gives the example of the Clinton Administration tobacco rule issued by the FDA, which President Clinton announced from the Rose Garden, but which made no mention of presidential preferences or executive supervision. Watts, *supra* note 12, at 4.

159. Sample searches I performed included: TI ("RULES AND REGULATION") & (REVIEW W/5 (OMB "OFFICE OF MANAGEMENT AND BUDGET" "OFFICE OF INFORMATION AND REGULATORY AFFAIRS" OIRA) /P (REVIS! CHANG! PREFE!)). The same search was repeated for documents with a title of "proposed rule" or "proposed rules." I also searched for the following terms in proposed rule and final rule documents: directive /s "president! or presiden! /p priorit!". Each of the small number of documents turned up by these searches was then reviewed individually for relevance. I have also read widely in Federal Register statements, but it is certainly possible that my searching is incomplete.

160. The GAO documented its difficulty—similar to my own—in searching electronic agency dockets for the sixteen rulemaking case studies it analyzed in a 2009 report. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 141, at 34 ("[[U]sing a variety of searching strategies], [GAO] found it more difficult to find agencies' documentation of OIRA's regulatory reviews, primarily because of difficulties using the search capabilities in the centralized electronic Federal Docket Management System under [www.regulations.gov](http://www.regulations.gov)").

In addition, a member of the public is less likely to resort to searching through the electronic docket if an agency's Federal Register notice has not mentioned that changes were made during the OIRA review process.

161. Agencies also have occasionally mentioned, almost in passing, that they are taking action in response to a presidential directive to consider an issue. For example, in 1982, the EPA announced that it was dropping plans to issue noise control regulations under the Noise Control Act for truck transport refrigeration units, power lawn mowers, and a few other products. The agency stated that it was reevaluating its "objectives and priorities . . . giving careful consideration to existing Federal budgetary constraints and the attendant effects on these activities," and that it was doing so "[i]n response to the President's directive." Proposed Withdrawal of Products From the Agency's Reports Identifying Major Noise Sources and Withdrawal of Proposed Rules, 47 Fed. Reg. 54,108, 54,109 (proposed Dec. 1, 1982) (to be codified at 40 C.F.R. pts. 204, 205); *see also* Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 Fed. Reg. 14,196, 14,440 (Mar. 30, 2009) (referencing a presidential directive to proceed only with CAFE standards for model year 2011). The fuel economy rule discussed in the text is unusual in the specificity of its references to presidential priorities.

162. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (proposed Sep. 8, 2003).

uncertainties that exist in our understanding of global climate change,” and relying on “voluntary actions and incentives.”<sup>163</sup> The statement also notes the “President’s prerogative to address . . . important foreign policy issues” raised by climate change.<sup>164</sup> (This decision was ultimately vacated by the Supreme Court in *Massachusetts v. EPA* on the ground that the factors the agency considered were outside those permitted by statute.<sup>165</sup>)

In a more minor example, the Mine Safety and Health Administration in 2004, on remand from a court decision vacating an earlier action, noted that its decision to reallocate resources away from massive air-quality rulemaking was “consistent with a federal agency-wide initiative intended to maintain sound regulatory practice” and cited a memorandum written by the President’s Chief of Staff.<sup>166</sup> Here the agency does reference executive supervision, but only in a fairly general way.

Most notably, however, a rule finalized while this Article was being written represents a striking counterexample to the general agency silence on executive supervision. In March 2009, very early in the Obama Administration, the DOT issued new fuel-economy standards for cars, repeatedly referencing presidential preferences and executive supervision. The agency stated that it followed (precisely) the President’s memorandum in issuing fuel economy standards only for Model Year 2011, and separating those standards from an ongoing rulemaking addressing subsequent model years. The agency also stated that in its standards, it attempted to meet, “to the maximum extent possible under [the relevant statutes] . . . the energy and environmental challenges and goals outlined by the President [including] . . . maximum incentives for innovation, providing flexibility to the regulated parties, and meeting the goal of making substantial and continuing reductions in the consumption of fuel.”<sup>167</sup> The agency ultimately selected 30.2 miles-per-gallon for passenger cars and 24.1 miles-per-gallon for light trucks.<sup>168</sup> The agency engaged in a sustained discussion of its ultimate choices, including balancing the need to reduce greenhouse gas emissions, the “very serious conditions of the automobile industry, the national economy, and even the global economy,” and the need of the United States to conserve energy.<sup>169</sup> Executive supervision is not specifically mentioned in this latter discussion, or in the agency’s reports that its rule was reviewed by

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163. *Id.* at 52,930.

164. *Id.*

165. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (stating that relied-on reasons were “divorced from the statutory text”).

166. Air Quality, Chemical Substances, and Respiratory Protection Standards, 69 Fed. Reg. 67,681, 67,686 (proposed Nov. 19, 2004). I am indebted to Kathryn Watts’s work in identifying this document. As Watts discusses, this agency statement was a response to a decision of the D.C. Circuit striking down an earlier proposed rule withdrawal as inadequately reasoned. *Int’l Union, United Mine Workers v. U.S. Dep’t of Labor*, 358 F.3d 40 (D.C. Cir. 2004).

167. Average Fuel Economy Standards [for] Passenger Cars and light Trucks Model Year 2011, 74 Fed. Reg. 14,196, 14,199 (Mar. 30, 2009).

168. *Id.* at 14,205.

169. *Id.* at 14,395–96.

the OMB and other agencies prior to issuance.<sup>170</sup> Nonetheless, the overall impression is of significant executive supervision of the content of the Model Year 2011 standards and even executive direction of the agency's decision to issue standards distinct from those for later automotive model years.

As discussed in greater detail below, the 2009 fuel-economy rulemaking might serve as something of a model of disclosure of executive influence. However, it remains an exception to general agency practice. At the level of individual agency decisions—even highly significant ones—agencies usually submerge executive influence or control, rather than open it to public view.

### III. INCREASING THE TRANSPARENCY OF EXECUTIVE REVIEW

#### A. *The Costs of an Opaque Process*

To sum up, there is a space in which we might legitimately expect to see presidential influence, and in which—if we accept President-centered theories—presidential involvement could increase the legitimacy of the decision and the administrative state by potentially increasing its democratic responsiveness, its democratic accountability, or both. Presidential supervision also could, in theory, threaten the legitimacy of an agency's decision by pushing the agency to take an action that disregards the facts or the law, or that does not serve the public interest. As discussed in greater detail below, such supervision may also affect agency accountability in judicial review.

Meanwhile, however, the supervision process is largely opaque. The lack of adequate transparency has significant adverse consequences, both for the appropriateness of presidential influence and for the legitimacy of agency decision making. It makes it less likely that the electorate will perceive that there *is* meaningful presidential supervision of agency decision making, making the agency actions less legitimate. The lack of adequate transparency also reduces the chance of the electorate understanding the *content* of that presidential supervision, further reducing the accountability of the President for those decisions.<sup>171</sup>

For example, take the “surface mining operations” interpretation example. Deciding this question calls on the agency to balance environmental protection and economic cost. Presidential supervision would seem to lend legitimacy to the ultimate decision, in contrast to it having been made solely by an “unelected bureaucrat.” Conceivably, the balance the agency struck did in fact reflect considered presidential priorities, but it is impossible to

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170. *Id.* at 14,442 (OMB review); *id.* at 14,213 (discussing early cooperation with other agencies).

171. *E.g.*, EDLEY, *supra* note 10, at 190–91 (“The failure of courts to demand disclosure encourages secret politics, pretermittting the process of continuing, between-elections political accountability.”).

know this from the record we have. This silence in the record reduces the legitimacy of the agency decision.

Consider the best-case scenario. A publicly interested President could attempt to detect public preferences and use that information to oversee or to help shape agency decisions. Whether or not the President's actions are publicly reported, it may well be that the President has influenced the agency decision for the better. If the President gets it right, so much the better for the public. Without some public reporting, however, this cannot amount to an accountability mechanism for the political supervision. As Edward Rubin has argued, holding an actor truly accountable requires a public explanation from the actor and some sort of consequence if the actor fails to follow through or to respond appropriately to a situation.<sup>172</sup> The greater the information regarding presidential influence, the more able the public will be to "assign[] blame or credit."<sup>173</sup> So, for example, the content of presidential supervision, even if well motivated, might simply mistake what best serves the public interest, however defined. Perhaps the President's priorities misjudge the extent to which the majority of the public is willing to trade some risk to the environment for economic stability, if one adopts a majoritarian conception of democracy. Perhaps the President might have done a poor job persuading the public—given a more deliberative conception of democracy—that this is the best outcome for the country. Unless the voters know of the supervision and its content, however, holding the President accountable and registering feedback is difficult.

The worst case is that there is presidential supervision and it is damaging. Suppose, hypothetically, the President's major campaign contributors were to be sustained by income from the longwall mining industry. Less transparency would mean that the public would have a harder time detecting the influence of the President and his advisors that pushes an agency decision away from the public interest—and less transparency would, of course, reduce the political costs to the President of the "potential problems of subjective willfulness."<sup>174</sup>

Even if presidential supervision of agency decisions is well known to the voting population, holding a President accountable for particular agency decisions is hard enough, given the infrequency of elections, the number of issues typically on the agenda at the time of a presidential election, presidencies that only last two terms, and presidential candidates who are vague about how the administrative state would run.<sup>175</sup> It is all the more difficult if

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172. Rubin, *supra* note 25.

173. See Kagan, *supra* note 11, at 2333. But see Philip J. Harter, Commentary, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 565 (1987) (suggesting it does not matter if "the agency head made the political choice based on his or her abstract political belief, experience, cocktail party chit-chat, or whether the President or his delegate expressed their preferences").

174. See EDLEY, *supra* note 10, at 189.

175. E.g., Farina, *supra* note 32, at 995–96; Mendelson, *supra* note 24, at 619. For one example of candidate vagueness regarding prospective agency appointees, both Barack Obama and John McCain indicated in a 2008 presidential campaign debate that if elected, each might choose Warren

the public does not know what influence the President may have had or may end up having on particular agency decisions. "To the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to [assist] parochial interests."<sup>176</sup>

Calling for greater disclosure to the electorate is not to say that majoritarian preferences should dictate agency decision making. Increasing transparency regarding presidential influence on a particular agency decision may or may not make agency decision making simply a "handmaiden of majoritarianism," as Bressman suggests.<sup>177</sup> Instead, it could facilitate a public dialogue where citizens are persuaded that the decision made, though not the first-cut "majoritarian preference," is still the correct decision for the country. By comparison, submerging presidential preferences undermines electoral accountability for agency decisions and reduces the chances of a public dialogue on policy.

One might respond that the public already knows that the President appoints agency heads and can remove them, and that White House offices review significant agency rules before they are issued. And the public knows the content of the agency's decision. Shouldn't that be sufficient to ensure democratic accountability through the electoral process?<sup>178</sup>

That level of knowledge might suffice, but only if the public perceives federal agencies as indistinguishable from the President. Voters are sophisticated enough to know, however, that agencies represent large and sometimes unresponsive bureaucracies, a view sometimes promoted by Presidents themselves. Presidents certainly do not consistently foster the view that executive branch agencies are under their complete control. Instead, they have been known to blame the agencies for unpopular decisions and to try to distance themselves.<sup>179</sup> Bressman gives the example of the second Bush Administration distancing itself from the IRS, while at the same time quietly pressuring the agency to revise a proposed rule requiring domestic banks to reveal the identity of all depositors, including foreign ones.<sup>180</sup> Administrators may also "take the fall" for an unpopular decision that is influenced by the White House, as EPA Administrator Johnson appeared to do in denying the California greenhouse gas waiver.<sup>181</sup> And as mentioned earlier, President

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Buffett as Treasury Secretary, despite the lack of any showing of interest on Buffett's part. See Posting of Cyrus Sanati to NYTimes DealBook Blog, *Asked About Treasury Post, Buffett Just Smiles*, <http://dealbook.blogs.nytimes.com/2008/10/08/both-candidates-suggest-buffett-for-treasury-post/> (Oct. 8, 2008, 13:06 EST).

176. Kagan, *supra* note 11, at 2337.

177. Bressman, *supra* note 27, at 503–04.

178. E.g., Katzen, *supra* note 98, at 1503 ("[I]t is the *product* of the decision-making, not the *process* of the decision-making, that is the key to accountability—however desirable it would be to know who said what to whom in the oval office (or in the office of a presidential aide).").

179. E.g., Bressman, *supra* note 27, at 506 ("[T]he President has the incentive and ability to hide control.").

180. *Id.* at 508–09.

181. Shiffman & Sullivan, *supra* note 135 ("Johnson declined to directly talk about White House involvement. He said again and again, 'The decision was mine and mine alone.'").

Obama has selectively taken credit for federal agency actions relating to automotive greenhouse gas emissions, with his OMB only grudgingly backing an EPA proposed rule in response to political controversy.<sup>182</sup>

Similarly, President George W. Bush distanced himself from an EPA report concluding that global warming was anthropogenic, even though that report had been reviewed by White House offices prior to its release. In answer to questions from reporters, President Bush commented, "I read the report put out by the bureaucracy."<sup>183</sup> More recently, when news reports suggested that the White House was pressing the EPA to "edit" its climate change findings, the White House spokesman stated that the agency alone "'determines what analysis it wants to make available' in its documents."<sup>184</sup> Finally, take the rash of resignations at the EPA in the mid-1980s, including Administrator Gorsuch and Assistant Administrator Lavelle, arising out of allegations of serious misconduct and conflicts of interest within the agency. President Reagan succeeded in distancing himself from the agency's problems by presenting the agency as acting more or less independently.<sup>185</sup>

Despite issuing directives,<sup>186</sup> Presidents certainly have a significant incentive to keep influence on agency decisions low-key and to maintain "deniability" with respect to agency actions. This minimizes the risk that influence can be characterized later as improperly motivated, that debate within the executive branch can fuel litigation over the ultimate decision, or that the President will have a political price to pay for guessing wrong about

182. See *supra* note 112 and accompanying text (discussing lukewarm White House reactions to both proposed and final endangerment findings).

183. Katharine Q. Seelye, *President Distances Himself From Global Warming Report*, N.Y. TIMES, June 5, 2002, at A23.

184. Barringer, *supra* note 136 (quoting White House spokesman Tony Fratto).

185. C.M. Cameron Lynch, Note, *Environmental Awareness and the New Republican Party: The Re-Greening of the GOP?*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 215, 222 (2001). Reagan successfully distanced himself as well from the Agriculture Department's 1981 decision, never implemented, to meet budget restrictions by substituting ketchup for vegetables in subsidized school lunches. See Howell Raines, *Reagan Beats No Retreat in War on Bureaucracy*, N.Y. TIMES, Oct. 12, 1981, at A14. He did so despite the fact that the leading official advocating the plan was his political appointee. See *id.* Earlier presidencies provide numerous other examples. President Truman famously stated about President Eisenhower's transition: "He'll sit right here . . . and he'll say do this, do that!! And nothing will happen. Poor Ike—it won't be a bit like the Army." Mendelson, *supra* note 24, at 559 (quoting MARGARET TRUMAN, HARRY S. TRUMAN 551–52 (1973)) (internal quotations omitted). About his own presidency, "Truman complained, 'I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing.'" Kagan, *supra* note 11, at 2272. Presidents Nixon and Carter both viewed themselves as being surrounded by hostile and unresponsive bureaucracies. *Id.* at 2272–73.

Michael Herz describes an amusing example of the President's separateness from other portions of the executive branch: "[O]ne newsletter reported [with respect to a dispute over an EPA rule] that 'many sources . . . are convinced that [President George H.W.] Bush will side with the White House.'" Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) (quoting *President to Resolve EPA, White House Deadlock Over CAA Permit Reg.*, *This Week*, INSIDE EPA (Wash., D.C.), May 1, 1992, at 3–4).

186. Kagan argues that President Clinton may have been something of an exception in his desire to take credit for selected agency actions. But she declines to suggest that Clinton "never influenced agency decisions in ways designed to avoid leaving fingerprints." Kagan, *supra* note 11, at 2333.

what option best serves the public interest. And, of course, keeping a low profile for presidential influence also allows more successful presidential pressure that is the result of presidential capture.<sup>187</sup> All this amounts to reduced electoral accountability for actions taken by administrative agencies.<sup>188</sup>

If presidential supervision is submerged, rather than declared publicly, it may also undercut a claimed advantage of presidential leadership—the ability of the President to be responsive to national views. Voters often do not know what they think, particularly about focused issues that are the subject of agency action.<sup>189</sup> It may take an event, a government action, or a public discussion to engage an individual voter with specifics so that she can form preferences. As I have described in an earlier work, controversy over the Clinton Administration’s “midnight rulemaking” relating to issues such as road building in national forests and the level of arsenic in drinking water prompted significant public discussion on those issues and probably helped voters crystallize their preferences regarding them.<sup>190</sup> While the electorate could also react to individual agency decisions, presidential actions are often more visible, and voters may also be more engaged, given their entitlement to help select or decide whether to retain a President.

## B. Making Presidential Influence More Transparent

### 1. Increasing Political Accountability Through Requiring Disclosure

So what can be done to increase the visibility of presidential preferences and executive supervision within the context of agency decisions? A helpful first step would be to require the agencies to summarize the content of

187. See Verkuil, *supra* note 91, at 951 (“[The] fear is that government regulation will be co-opted by private groups through the intercession of the White House.”). For a recent accusation along these lines, see *White House Climate Change Policy—Delay, Delete, and Deny*, OMB WATCH, July 22, 2008, <http://www.ombwatch.org/node/3741> (alleging that “the oil industry, most notably ExxonMobil, drove the administration’s decision” to pressure EPA not to take action regulating greenhouse gases).

188. See McGarity, *supra* note 8, at 451 (“[S]ecret interactions between the agencies and the White House or OMB staff in no way increase overall governmental accountability, because the electorate cannot distinguish those policies attributable to the agencies from those attributable to the President and his aides.”).

189. See, e.g., B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 146 (1994) (“On the vast majority of issues dealt with by the bureaucracy, citizens have no specific demands or needs; they operate in a vague, impressionistic world . . .”); Mendelson, *supra* note 24, at 617.

190. See Mendelson, *supra* note 24, at 628–41. This is why work focusing purely on the extent to which political accountability makes agencies more responsive to majoritarian views is incomplete. E.g., Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 58 (2008) (arguing that an insulated bureaucracy can reduce variance in policy outcomes and thus make policy more responsive to majoritarian preferences, because an elected politician’s views are unlikely to deviate from majority views). My argument suggests that transparency ought to be a greater focus, rather than the extent of pure political control, because transparency is needed to generate a dialogue with voters that will result in the formation of preferences and a greater understanding of policy decisions.

regulatory review in issuing rulemaking documents. In the setting of agency decisions, this would make political considerations, including on questions of value, more transparent and the President more accountable for them.

Take once again the Interior Department's interpretation of "surface mining operations" to exclude subsidence from underground mining. The Interior Department might have said (if true) that the balance struck between protection for national parks and other special landscape features and the economic viability of longwall mining had been reviewed by OIRA and was consistent in important details with the President's political preferences. That would surely increase public accountability for the decision balancing economics with the environment.

As mentioned, the March 2009 DOT rulemaking on automotive fuel efficiency might serve as something of a model. Although the rulemaking did not specifically mention the content of OIRA review, the DOT indicated that it had attempted to issue the rule by balancing competing policy concerns in a way that responded to presidential preferences.<sup>191</sup>

How might a disclosure requirement be implemented? First, Congress might enact a statute along the lines of Clean Air Act section 307(d), which requires an agency to docket and make publicly available written rulemaking materials it has submitted to the OMB, the OMB's response, and written comments from other agencies.<sup>192</sup> The statute might go further and provide that the agency's "concise general statement" of the basis and purpose of a rulemaking decision, required under the Administrative Procedure Act,<sup>193</sup> also include any views expressed in consultation with other agencies, including those of OIRA and the OMB.<sup>194</sup> The agency would not have to report the content of every conversation. Instead, the agency would need to summarize the critical details of, say, executive review positions and explain the extent to which those positions are connected to the agency's ultimate decision. For example, that might include reporting that the balance struck between safety and cost was the one favored by OIRA and summarizing the reasons that balance was viewed as appropriate and, if true, that the agency's initial position shifted as a result of executive review.

Second, and less satisfactorily, would be presidential incorporation of similar requirements in an executive order. A President might order OIRA to communicate with agencies only in writing and then to publicly disclose those documents, or simply direct the agencies to summarize the content of the OMB communications in rulemaking documents. As noted, however, the disclosure requirements of Executive Order 12,866 have been honored in the

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191. See *supra* text accompanying notes 167–170.

192. Clean Air Act § 307, 42 U.S.C. § 7607(d)(4)(B)(ii)(2006) (requiring proposed and final rule drafts submitted to OMB, as well as written comments from OMB and other agencies, to be entered on agency docket).

193. Administrative Procedure Act § 553, 5 U.S.C. § 553 (2006).

194. 42 U.S.C. § 7607(d)(4)(B)(ii).

breach.<sup>195</sup> Finally, agencies might self-regulate and issue rules requiring disclosure of this information in future agency actions. Ideally, the outcome of any of these approaches would be the inclusion, by an agency, of information regarding the executive review process, and the extent to which the agency's ultimate decision reflects the views expressed in that process.

Including executive review information and the political reasons embodied therein would have at least four significant benefits from the standpoint of public accountability. First, this information would clarify the role of executive review, and make it significantly more likely that the public would see the value-laden aspects of the decision as a reflection of presidential preferences, rather than the decision of an unelected agency official. OIRA and agency views need not be different to realize greater electoral accountability for a particular agency action. An agency could disclose a modification in its rule resulting from executive review, or it could note, if true, that its policy tracks presidential preferences. Under either scenario, disclosure would increase electoral accountability for the content of the agency policy decision.

Second, greater disclosure would help reveal the actual nature of executive supervision. That might include the extent to which executive supervision is directed to value-laden issues or, by contrast, the extent to which it amounts to second-guessing expert decisions made within the agencies. It might also help us better understand the extent to which agency officials either act with unquestioning obedience to presidential preferences or else demonstrate significant independence and push back against executive supervision.

Relatedly, increased disclosure of executive influence also ought to help deter such influence that serves inappropriate, non-public-regarding goals. This is most likely to be effective when presidential influence is expressed through the executive review process either as an executive endorsement of an agency policy decision or in a way that documents its effect on the direction of a proposed agency decision.

Third, making this aspect of the agency decision-making process more transparent would not only make it more visible to the public, but of course to *Congress* as well. If Congress viewed the level of executive supervision as helpful—or as interfering and inappropriate—Congress could legislate its wishes with far more clarity.

Finally, a straight-out disclosure requirement seems superior to the Watts, Edley, and Kagan proposals that judicial review of agency actions be revised to treat political reasons with greater respect, in the hope of prompting greater disclosure by agencies or promoting a greater presidential role.<sup>196</sup>

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195. See *supra* text accompanying notes 105–106 (describing disclosure requirements); see also Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 784–87 (2004) (reporting severe undercompliance by agencies with Executive Order 13,132, on federalism, and suggesting that “[p]erhaps the Office of Management and Budget . . . has not been particularly interested in compelling agencies [to comply with the ‘federalism’] executive orders”).

196. E.g., Kagan, *supra* note 11, at 2372 (arguing that a “sounder view” of both *Chevron* and arbitrary and capricious doctrines would take account of presidential involvement).

First, as Watts and Edley acknowledge, such a scheme would require a “bold agency to set aside its fears and to decide to act as a ‘guinea pig’ by openly relying upon political factors in a rulemaking proceeding.”<sup>197</sup> Proposals focused only on how courts review political reasons, if they are offered, still leave it up to the agency to decide whether to offer political reasons as a justification at all. An agency, however, might be unwilling to be the first mover for fear of risking reversal in court or public disapproval.

Moreover, Watts and Edley seem to assume that technocratic judicial review is the primary disincentive to an agency’s explicit discussion of political reasons. However, there may be other obstacles. As discussed above, for example, Presidents (and OIRA) have often chosen to lie low with respect to particular agency decisions. A President may thereby seek to maintain “deniability” and to avoid political risks, such as a wrong calculation regarding which policy best serves the public interest or is most popular.<sup>198</sup> In short, a judicial review approach that is more receptive to political reasons likely would be insufficient to prompt a substantial increase in disclosure. In the meantime, we would not realize the greater political accountability that would flow from increasing transparency.

By contrast, a disclosure requirement could be unambiguously enforced by courts. Indeed, it could be coupled with instructions from Congress on how courts are to evaluate political reasons. Even if no such instructions were forthcoming, a disclosure requirement would likely mean that the judiciary would be presented with a stream of administrative review cases posing questions regarding the treatment of political reasons. These would provide an avenue for the development of judicial review approaches. What that judicial review might look like is discussed in greater detail in the next section.

## 2. Process and Enforcement Concerns

Greater disclosure might be criticized on several grounds. First, it might be objected that disclosure would undermine effective decision making by deterring full and frank discussion of policy options. Similar discussions, when in documents, receive protection from the Freedom of Information Act disclosure requirements through the Act’s “deliberative process” exception.<sup>199</sup> Any proposal to increase transparency will burden private

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197. Watts, *supra* note 12, at 75; see EDLEY, *supra* note 10, at 192 (“[Developing judicial doctrine] requires a substantial number of cases that squarely address the politics issues. Only leadership can overcome the chicken-and-egg problem.”).

198. See *supra* text accompanying notes 179–189.

199. See 5 U.S.C. § 552 (2006). See generally STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 685 (6th ed. 2006) (“The purpose of privilege is to preserve free and frank discussions within government, which would be hindered if opinions and recommendations advanced during the deliberative process could be obtained by the public.”); Cary Coglianese, *The Transparency President? The Obama Administration and Open Government* 13 (Univ. Pa. Law Sch., Public Law and Legal Theory Research Paper No. 09-18) (expressing concern about undue transparency that “officials will not engage in as probing and self-critical forms of deliberation”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1433815](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1433815).

discussions somewhat. The net cost is arguably larger if one views the executive staff as highly competent and motivated to serve only the public interest. In that case, the disclosure obligation might simply serve to underscore that the agencies are under executive supervision, but have less value in terms of deterring inappropriate presidential oversight. If executive supervision were less appropriately motivated and aimed, say, at getting agencies to distribute rents to narrowly focused interest groups, the disclosure obligation would have significantly greater value on balance.

With this proposal, moreover, not every conversation between officials in different offices would be subject to disclosure. Instead, at the time the agency publishes its proposed or final rule, the agency would have to summarize the final position reached in the executive review process. This would still leave considerable room for private deliberations both within OIRA and within the agency.<sup>200</sup>

A second concern is that a disclosure requirement could conceivably prompt a President to try to *deny* involvement with a particular agency decision, by stating that executive review was not conducted or that the agency was left to its own devices in reaching a decision. That could reduce, rather than increase, electoral accountability. If a disclosure requirement is consistently applied, however, this seems unlikely. As the data suggest, executive influence over agency rulemaking decisions appears to be widespread. A disclosure requirement is likely to confirm that generalized influence, and to create a baseline norm that executive supervision occurs. If a President were to take a “hands off” approach with respect to a particular agency decision, then the public would be more likely to perceive not a rogue agency (if the decision is a bad one), but a presidential failure to oversee the agency.

Another concern is that disclosure might not be thorough enough to accomplish its purposes. For example, one result of this sort of disclosure requirement might simply be a “new kind of boilerplate” in agency publications,<sup>201</sup> which has resulted from some executive orders.<sup>202</sup> To the extent disclosure requirements are statutory, and at least some discovery is possible, however, the availability of judicial enforcement would increase the chances that disclosure is not merely boilerplate but genuine.

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200. Some have suggested that greater disclosure of executive influence might expose agencies to more pressure from special interest groups, because an agency might have to reveal that it did not take a position consistent with the one desired by the interest group. Past vagueness regarding the influence of executive oversight in rulemaking perhaps has allowed the agency to avoid blame for not agreeing with an interest group. On the other hand, more clarity regarding the role of executive oversight in value-laden decisions made by an agency might reduce special interest group pressure on agencies, since it would be clearer that agencies are not in a position to deliver on any sort of promise. It might in turn shift that pressure to OIRA.

201. *E.g.*, Bressman, *supra* note 27, at 510–11 (discussing a “new kind of boilerplate”—a presidential seal of approval disconnected from genuine presidential participation in the decision); Houck, *supra* note 113, at 547 (“The result of disclosure will be paperwork that sanitizes the messages to avoid reversible error.”).

202. *E.g.*, Mendelson, *supra* note 195 (noting Executive Order 13,132’s lack of impact on agency considerations of federalism issues).

A further concern is that disclosure might not be altogether candid. Public-regarding reasons for a particular balance of policy concerns, perhaps, might be offered in lieu of the real, less publicly focused ones. Even such an outcome, however, may well represent an improvement over the status quo. If agency and OIRA officials feel constrained by the presence of an audience to articulate reasons grounded in the public interest and to hide more unappealing motives, this oversight may push them in the direction of moderating their actual motives.<sup>203</sup> As Garrett and Vermeule have argued with respect to legislators having to articulate reasons for their decisions, "The need to articulate public-regarding rationales requires participants to move away from positions too obviously tailored to their self-interest, and partially commits them to maintain prior positions even in changed circumstances."<sup>204</sup>

Another concern is that a disclosure requirement might simply prompt political supervision to move in other, less-subject-to-disclosure directions. Political decisions might be pushed down into the agencies and executive review of particular agency decisions nearly eliminated. As a replacement for direct supervision of decisions, the White House might select agency officials whose views very closely resemble their own and thus require less supervision.

A significant move in this direction seems unlikely, however. First, Presidents have already availed themselves of the appointment option. President George W. Bush took it a step further by imposing a now-repealed requirement of the designation of a presidentially appointed "Regulatory Policy Officer" within each agency, whose approval was necessary in order to commence a rulemaking.<sup>205</sup> It is unclear how much potential there is for even greater alignment between appointee and presidential views.

Moreover, given the inherent difficulties in discerning an appointee's views on every topic and in fully anticipating an agency's agenda, personnel selection alone is a comparatively weak means for a President to obtain desirable agency decisions. Centralized supervision of particular decisions is a

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203. See Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 78 (1985) ("[R]equiring justifications does serve an important prophylactic function. . . . [It] should improve representative politics by ensuring that the deliberative process is focused on those purposes and the extent to which the classifications serve them . . .").

204. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1291 (2001); see also Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 111 (Jon Elster ed. 1998); cf. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) (arguing that even if Congress's claims of public reasons for laws are hypocritical, interpreting them to effectuate those goals will make legislation more public-regarding overall). Similarly, disclosure also might be less than candid, which might lead to greater public confusion rather than public accountability. This type of disclosure, however, would undoubtedly not comply with statutory terms.

205. The only exception was a rulemaking "specifically authorized by the head of the agency." See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007) ("Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office . . ."), repealed by Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

far more direct way of getting those decisions to track a President's agenda. This is undoubtedly a reason for the prevalence of that supervision. Presidents have exerted supervisory authority over significant administrative decisions at least since the Reagan Administration. The data presented above confirm its existence. Even with a disclosure requirement, a President is unlikely to give up this influence over the administrative state's direction and instead rely on personnel selection alone to achieve her goals.

If executive supervision over agency decisions were indeed eliminated in reaction to disclosure requirements, however, there might be two consequences for the treatment of value-laden decisions. First, value questions might be explicitly resolved by agencies themselves in notices of proposed and final rules. For example, the agency itself might explain—assuming that such factors were permissible for it to consider by statute—that the agency was electing a longer lead time to achieve an environmental goal in order to preserve manufacturing flexibility. Such statements are already made by agencies. A disclosure regime might still represent an increase in accountability over a nondisclosure regime because it could establish a norm of executive supervision. Rather than blaming the agency for making an inappropriate decision, the electorate might hold the President accountable for failing to adequately supervise agency decisions.

A second possible consequence is that the “value” aspects of agency decisions would no longer receive focused attention, either through the executive supervision process or within public documents issued by agencies. Perhaps sensitive to concerns that such decisions should not be made by unelected bureaucrats, an agency could shade scientific or other expertise-laden aspects of decisions to get to a particular outcome without disclosing the real reason for the decision. Such shading is alleged to occur already, though largely in response to executive supervision.<sup>206</sup> If increased shading took place in response to subtle executive pressure, a well-designed disclosure regime should, at least, result in the revelation of some of that pressure, thereby deterring shading. However, if the shading were to take place solely within the agencies, the disclosure proposal described above, which applies only to executive supervision, would not help. It is unclear why an executive supervision disclosure proposal, however, would result in greater shading inside an agency that would not also be considered a response to executive influence (and thus covered by the disclosure requirements). Moreover, the same incentives that have prompted Presidents to centralize executive supervision of agency decisions are likely to deter a President from forgoing supervision altogether.

Another concern about a disclosure requirement is that extensive discovery of agency officials, if part of enforcing the disclosure requirement, could disrupt agency decision making. One answer to this is to permit only limited discovery. Limited discovery would represent a good balance between enforcing disclosure and avoiding disruption. In a similar setting, in

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206. See e.g., Doremus, *supra* note 80.

*Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court suggested there could be discovery of agency documents, as well as of officials, relating to a decision under review, if formal findings were lacking or in the event of bad faith or improper behavior.<sup>207</sup> The D.C. Circuit has found limited discovery appropriate in reviewing an agency's compliance with particular procedural requirements.<sup>208</sup> A similar standard could be applied in the setting of executive supervision.

Finally, a disclosure requirement could be undermined if an agency or the OMB asserted executive privilege in response to discovery requests. Such arguments might raise the same sorts of issues already raised (though apparently not resolved) by section 307 of the Clean Air Act. Executive privilege arguments could, of course, be strong if the President were directly involved in communication with the agency.<sup>209</sup> They are likely to be weaker where communications involve only officials other than the President and are aimed at informing an agency decision, rather than a presidential one.<sup>210</sup>

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207. 401 U.S. 402, 420 (1971).

208. *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989) (permitting partial discovery regarding agency's compliance with procedural requirements). Other decisions of the D.C. Circuit similarly contemplate discovery from an agency under some circumstances, though arguably in a more limited fashion than under *Esch*. See, e.g., *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997) (holding plaintiffs could not obtain discovery of an agency because plaintiffs did not show agency "failed to examine all relevant factors or to adequately explain its grounds for decision, or that the agency acted in bad faith or engaged in improper behavior in reaching its decision"). While development of a precise discovery standard is beyond the scope of this Article, one possibility would be to authorize extensive discovery only if there are allegations of bad faith, improper behavior, or suppression of documents, e.g., *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971), and otherwise to permit an agency to submit an affidavit detailing its compliance with such a statute, see, e.g., *Trentadue v. FBI*, 572 F.3d 794 (10th Cir. 2009) (permitting agency to demonstrate Freedom of Information Act compliance through affidavit submissions).

209. See *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) ("Where the President himself is directly involved in oral communications with Executive Branch officials, Article II considerations—combined with the strictures of *Vermont Yankee*—require that courts tread with extraordinary caution in mandating disclosure beyond that already required by statute.").

210. The White House reportedly asserted executive privilege in response to a congressional subpoena seeking documents "relating to the E.P.A.'s handling of recent climate-change and air-pollution decisions." Barringer, *supra* note 136; see also Letter from Michael B. Mukasey, Attorney Gen. of the U.S., to George W. Bush, President of the U.S. (June 19, 2008), available at <http://www.justice.gov/olc/2008/ozonecalwaiveragletter.pdf> (discussing privileges asserted by the EPA and the Justice Department). The House Government Reform Committee prepared a draft memorandum arguing that no such privilege is appropriate with respect to communications between OIRA and the agency. See Draft Report of the Committee on Oversight and Government Reform, U.S. House of Representatives, Regarding the Bush Administration's Abuse of Power in Asserting Executive Privilege in Response to Committee Subpoenas to Stephen Johnson, Administrator, Environmental Protection Agency, and Susan Dudley, Administrator, White House Office of Management and Budget (Oct. 14, 2008), available at <http://www2.grist.org/gristmill/images/user/6337/oversightEP.pdf>.

Indeed, while the question is not settled, it seems unlikely that an executive privilege claim would succeed with respect to communications from OIRA to the agency. Such a claim would not likely qualify as a privileged "presidential communication," since it is not a communication to or by the President or a communication made for the purpose of assisting a direct decision made by the President. See *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) ("The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President."). In addition, the communication might not be held to relate to a quintessential Article II function, such as the use of

### 3. Judicial Review

Suppose agencies do indeed begin disclosing political reasons in their decisions. Judges responsible for reviewing agency decisions would need to take account of those reasons. That could raise two largely opposed concerns. On one side, such a regime could result in overly intrusive review, if judges second-guess value-laden political reasons and insert their own values into the process. On the other, out of deference to the President or concern about institutional competence, judges might be tempted to avoid examining political reasons altogether, raising the possibility that some agency decisions would be immunized from effective judicial review.

The first concern is the risk of overly intrusive judicial review. Under a regime of greater disclosure, courts would presumably continue to review an agency's rulemaking under the APA's "arbitrary or capricious" standard.<sup>211</sup> The argument might be that with more information about the content of executive supervision and likely greater candor about policy calls, a judge would be tempted to second-guess OIRA's or the President's reasons on questions of value, such as the circumstances under which the environment is prioritized ahead of (or behind) the economic impact.

This would be undesirable, since by hypothesis, these sorts of questions often implicate policy issues we prefer to see resolved by politically accountable institutions. Executive and congressional oversight both seem superior to judicial review in this respect. The judiciary, being the least democratically accountable of the three branches, would also be the least competent, from an institutional standpoint, to resolve these questions of social value and to second-guess the executive decision-making process. (Of course, if the views of OIRA relate to how to read the text of a statute or to technical issues, courts could review them in the usual way.)

To avoid this, courts ought to apply an approach that is deferential to value preferences or policy calls, as they have in other settings. An example of such an approach is that was outlined by Justice Marshall in his *Heckler v. Chaney* concurrence.<sup>212</sup> In that case, the Supreme Court declined to review an agency's decision not to enforce its authorizing statute, in large part because such a decision "involves a complicated balancing of a number of factors which are peculiarly within its expertise," such as resource allocation and the agency's overall priorities.<sup>213</sup> Justice Marshall advocated review in his concurring opinion, but argued for a highly deferential review standard in recognition of the "sort of choice over which agencies generally have been left substantial discretion . . ."<sup>214</sup>

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the appointments power. The deliberative process privilege, a common law privilege, would seem to encompass OIRA communications with an agency, but such a privilege likely would more readily yield to statutory override, representing the congressional determination that access is appropriate. *See id.* at 737.

211. *See* 5 U.S.C. § 706 (2006).

212. *Heckler v. Chaney*, 470 U.S. 821 (1985).

213. *Id.* at 831.

214. *Id.* at 842 (Marshall, J., concurring).

The best balance in the setting of disclosure of executive supervision might be struck by following the lead of the Marshall concurrence, in which courts review the reasons but treat them highly deferentially.

The approach to judicial review that I describe here has some similarities to the one laid out by Watts. She, too, suggests that review should be deferential, in the sense that a judge might need merely to determine that an agency's reliance on "the factual existence" of presidential preferences was rational.<sup>215</sup> However, she also argues that courts would need to consider whether political influence was expressed in a form reinforcing "accountability, public participation, and representativeness," or whether it was more of a "back door" nature.<sup>216</sup> By contrast, my approach would directly require the disclosure of executive supervision.<sup>217</sup>

A court could be more deferential to an agency's value choice that is expressly stated to reflect presidential preferences than one that is not. That would encourage further executive supervision.<sup>218</sup> However, just as with an agency's value choice, one offered through executive supervision would still need to comport with the statutory factors relevant to a particular decision.<sup>219</sup> Similarly, such a reason could not be a justification for slanting or ignoring the results of a scientific or technical analysis. Beyond that, however, a presidential preference for one of two regulatory options that otherwise are each well supported on the facts, where the preferences are permissible considerations under the terms of the statute, should receive deference.<sup>220</sup>

By contrast, Watts suggests that judges would have to distinguish between a "real" political reason and one that is "raw politics," upholding a decision based on the former, but not the latter. As she acknowledges, "courts are not likely to be comfortable with this line-drawing task."<sup>221</sup> Despite Watts's position, the key issue for a judge reviewing agency action in which political reasons are disclosed ought to be whether *all* the considerations offered in support of the agency action, political and nonpolitical, are consistent with the requirements of the statute and meet basic requirements of rationality—that the agency, for example, articulates a "‘rational connection between the facts found and the choice made.’"<sup>222</sup>

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215. Watts, *supra* note 12, at 82.

216. *Id.* at 83.

217. Influence from Congress is beyond the scope of this Article, though requiring disclosure of such influence is worth considering.

218. This is Kagan's recommendation. See Kagan, *supra* note 11, at 2364.

219. See *supra* text accompanying notes 63–65 (discussing *Massachusetts v. EPA*).

220. It is an interesting question whether an express presidential preference to help a particular organized interest group could be a legitimate reason to overturn an agency decision. Again, the answer would seem to depend on the characteristics of the particular statute at hand. Beyond statutory requirements, the question of legitimacy is one that the electorate seems better suited to answer than the judiciary.

221. Watts, *supra* note 12, at 83.

222. *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

In short, I suggest here that judicial review of reasons offered through executive supervision should be deferential, within the confines of the authorizing statute and the usual criteria that apply to scientific and technical decisions rendered by agencies. Nonetheless, I am not advocating that judicial review be hands off. Overly deferential review would raise other concerns. In particular, agency activity could become less constrained by the rule of law.<sup>223</sup> The argument would be that agencies might be tempted to shroud their “real reasons” in politics, and once the agency invoked the name of the President, the judiciary would be so deferential to this co-equal branch of government that little meaningful review could be had.<sup>224</sup>

Even with judicial review that is deferential to political reasons disclosed through a regime such as the one I propose, agency decisions would still be subject to effective judicial review. If anything, increased candor in agency decisions might increase the meaningfulness of judicial review. First, even with deferential treatment of political reasons, and even assuming, following Kagan, that the mere fact of “presidential leadership” can be a reason in support of an agency decision, there are other aspects of an agency decision that are clearly amenable to judicial review and that would not be shielded from review because of newly disclosed information about executive preferences.<sup>225</sup> The agency rule is still issued within bounds set by Congress.<sup>226</sup> The decision is highly likely to have other obviously reviewable aspects, such as expert implementation of statutory requirements and the resolution of legal issues. Return, for example, to the Clean Air Act and its provisions requiring the EPA to set national ambient air quality standards “requisite to protect the public health” with “an adequate margin of safety.”<sup>227</sup> Although “requisite” and “adequate” both implicate policy issues, the standard still requires the agency to perform significant expert work

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223. Watts argues that increased deference to political reasons could be a good thing because it would offset excessively intrusive judicial review of agency decisions. Some have argued that intrusive judicial review has caused ossification of agency rulemaking procedures. Watts, *supra* note 12, at 41–42. It is unclear, however, that judges would be deferring on the same sorts of issues on which they were previously too intrusive. Technical issues, for example, would presumably continue to be reviewed in the same manner.

224. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (“[The Secretary of State] . . . is to conform precisely to the will of the President. . . . The acts of such an officer, as an officer, can never be examinable by the courts.”), discussed in Peter L. Strauss, *Legislation That Isn’t—Attending to Rulemaking’s Democracy Deficit* 98 CAL L. REV. (forthcoming 2010) (manuscript at 3–4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1486221](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1486221). As Kevin Stack has observed, the extent to which reasons for a President’s action should be subjected to judicial review is a contested question. In his article seeking a constitutional basis for the *Chenery* requirement that an agency decision be evaluated only on the basis of the reasons the agency itself has offered, Stack reasons that although the President is “not immune from the constitutional principles that govern an agency’s exercise of delegated power,” the “exceptionalism” of the President’s status would “call into question the basis for importing a constraint from the agency context.” See Stack, *supra* note 27, at 1017–19.

225. See Kagan, *supra* note 11, at 2382.

226. Cf. *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting) (“As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”).

227. 42 U.S.C. § 7409(b)(1) (2006).

relating to the health and safety issues presented by a particular air pollutant. Even if a court were to treat value-laden reasons from the executive branch highly deferentially, the legal- and expertise-laden aspects of the decision should remain as susceptible to judicial review as before.

A risk remains that a particular issue could be characterized as a policy or value issue rather than a technical or legal issue, and thereby receive more deferential treatment in the courts. Drawing precise boundaries between these issues would be challenging, whether drawn by agencies or by courts, but the risk that boundaries are improperly drawn is primarily a marginal risk. Some issues will clearly be more technical or legal, as opposed to value-laden policy questions, and an agency is highly unlikely to be able to immunize such issues from review by calling them political or policy issues.

Second, most cases of this sort will involve review of an agency's decision, not (directly) a decision of the President. Courts accordingly would be less reluctant to review the decision, even if there is some presidential involvement. For example, in *Sierra Club v. Costle*,<sup>228</sup> the D.C. Circuit considered arguments that political pressure (from Senator Byrd, in that case) had tainted a Clean Air Act rule issued by the EPA. The court also rejected arguments that the rule violated the statute's procedural requirements because intra-executive branch meetings between the President and EPA officials were not docketed.<sup>229</sup> Judge Wald, writing for the D.C. Circuit panel, reaffirmed the rule announced in *D.C. Federation of Civil Associations v. Volpe*<sup>230</sup> that an agency decision would be overturned due to political pressure only if the content of the pressure upon the agency is to force it to decide on factors not made relevant by Congress in the authorizing statute and the agency did so decide.<sup>231</sup> The fair conclusion to be drawn is that even if courts are deferential, they should at least be willing to inquire into the content of political reasons considered by agencies to determine whether those reasons are consistent with the agency's authorizing statute.<sup>232</sup> And in *Massachusetts v. EPA*, the Court did not shy away from striking down, as based on irrelevant factors, the EPA's decision not to make an endangerment finding for greenhouse gases simply because the EPA referenced presidential priorities in its decision.<sup>233</sup>

Third, as Watts suggests, encouraging an agency to publicly disclose political reasons may make for more candid scientific and technical decision making, instead of having those analyses skewed by buried political rea-

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228. 657 F.2d 298 (D.C. Cir. 1981).

229. *Id.* at 387–91.

230. 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

231. *Id.* at 1245–49.

232. See also EDLEY, *supra* note 10, at 176–77 n.12 (describing judicial and congressional debate over “political interference”).

233. 549 U.S. 497 (2007).

sons.<sup>234</sup> Judicial review of a more candid record is, in turn, likely to be more meaningful.

In short, while it seems likely that judicial review will continue to be meaningful even if agencies include political reasons and information about executive supervision in rulemaking documents, all this will depend on the precise review standard, whether defined by Congress or developed by the courts in the absence of specific statutory instructions. At a minimum, courts should review the content of political reasons to ensure that they are consistent with an agency's authorizing statute and that they have not caused the agency to skew expertise-based findings. Beyond that, courts ought to be deferential to the content of the political reasons.

### C. Political Reasons

By arguing for greater disclosure and discussion of an agency's political reasons for a decision, such as those resulting from executive review, I do not mean to suggest that all reasons coming from such a process are equally legitimate. Again, by "political reasons" I mean reasons communicated from a particular source, rather than reasons with a particular content. At this juncture it is difficult to predict what might be encompassed in that class of reasons. Such reasons could range from an articulation of core values ("we must reduce workplace risks unless it is grossly, disproportionately costly to do so") to seeking the support of key constituencies ("we must have the support of Big Pharma") to simple political will ("the President wants this"). They could also include the views of technical and scientific experts employed, say, by OIRA. It is also difficult to render a complete array of predictions regarding which reasons would be perceived as legitimate. I have already suggested that a court should be relatively deferential to the content of political reasons once the court confirms that the reasons are consistent with an agency's authorizing statute and do not cause the agency to disregard or slant factual findings. With respect to legitimacy from the perspective of other institutions, including Congress and the electorate, I want to make just a few preliminary observations.

First, Mashaw suggests the illegitimacy of an administrative "retreat to political will"—in other words, an agency saying, "The President told us to do it."<sup>235</sup> Eskridge and Baer suggest that an agency decision would not be any more justifiable if the agency cited polling numbers in support of its decision.<sup>236</sup> Both of these might well be perceived as illegitimate by some members of the electorate. But the Mashaw example, perhaps, does not strike us as illegitimate because the President is involved. Instead, it seems

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234. See Watts, *supra* note 12, at 13 ("[E]ncouraging agencies to disclose political factors could help to take some of the pressure off of science, creating a more effective separation between science and politics.").

235. See *supra* text accompanying note 61.

236. See *supra* text accompanying note 60.

illegitimate because it does not seem to be much of a reason at all.<sup>237</sup> Saying, “The President said so,” seems arbitrary because it does not identify any more general principle that might explain the choice made either within the agency or within the executive review process.<sup>238</sup>

Return to the Office of Surface Mining’s interpretation of the limitation on “surface mining operations” within national park boundaries or within 300 feet of a house. Suppose the agency reported, “During executive review, the OMB and OIRA indicated that presidential policy preferences favor an interpretation that maintains the long-term economic viability of the long-wall coal mining industry. The ability under other statutory provisions to address environmental risks will be adequate to address major subsidence concerns.” Or perhaps the agency might have reported, “This interpretation serves the goal of maintaining the economic viability of the longwall coal-mining industry. It is consistent with the President’s preferences.” The reason for this policy decision seems more legitimate, perhaps, because the agency has offered a more detailed, less apparently arbitrary explanation, which also discloses the White House’s involvement in the finally arrived-at reasons. Or, to return to the seatbelt example, the DOT might have said, “We are required to regulate ‘unreasonable’ risks from motor vehicle operation. Our view is that when individuals can minimize their own risks by buckling their already-available seatbelts, the risks cannot be deemed ‘unreasonable.’ As executive review has confirmed, that position is consistent with presidential policy preferences.” These, too, are political reasons, but more legitimate—at least, I would argue they are—because they are less arbitrary than “The President said so.”

Similarly, courts have usually treated deferentially—and as legitimate—an agency’s expression of certain concerns viewed as “peculiarly within [the agency’s] expertise,” in the words of *Heckler v. Chaney*.<sup>239</sup> That opinion discussed factors an agency often considers in deciding whether to enforce a particular statutory regime:

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.<sup>240</sup>

It seems likely that an agency’s reasons relating to resource allocation and prioritization, including those reflecting executive preferences, ought to

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237. For nonadherents to the unitary executive theory, relying on such a presidential statement seems illegitimate because it appears that the President has gone beyond influencing or supervising the agency’s decision and made the decision in lieu of the agency.

238. E.g., Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1995) (“The act of giving a reason . . . is an exercise in generalization.”).

239. 470 U.S. 821, 831 (1985).

240. *Id.*

be treated as legitimate, especially if they appear to be articulated and applied more or less consistently.

What about the polling-data example? That surely could also be a political reason, if the White House told an agency, say, "We want you to pick this option because it is consistent with the public's views as expressed in this poll." Such a reason might well be legitimate if one thought that the administrative state should operate simply to realize majoritarian preferences. One might also imagine, however, that just as with a presidential candidate accused of "pandering,"<sup>241</sup> executive review consistently aimed at the goal of responding to polling data might also be viewed not as legitimate, but as poor leadership.<sup>242</sup>

The question of which political reasons should qualify as legitimate does not need to be—and indeed, should not be—definitively resolved at this point. A more transparent system would have the advantage of prompting debate on these questions. More disclosure would enable the public to react to political reasons and to better register its views on which ones are sufficient to justify a particular agency decision. As then-Professor Scalia wrote regarding such political judgments, "the retribution or reward . . . will be meted out by Congress, or at the polls, but not in the courts."<sup>243</sup>

Relatedly, it is possible that greater transparency may reveal something else about executive review that might help us evaluate its validity. It may turn out that executive review is not primarily focused on the value-laden policy issues, but instead amounts to reviewing and second-guessing an agency's more technical or scientific conclusions. If a more transparent process reveals this to be the primary function of executive review, then we might start to see executive review as less legitimate to the extent it operates to skew or displace the expertise that has long resided within the agencies.<sup>244</sup>

## CONCLUSION

It is worth contrasting the views articulated here with the D.C. Circuit's influential decision in *Sierra Club v. Costle*.<sup>245</sup> In that case, the D.C. Circuit declined to apply the Clean Air Act's docketing requirement to post-comment period communications directly between the President and the EPA. The court acknowledged that "undisclosed presidential prodding" might drive a result different from the choice the agency might have made in

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241. Cf. Editorial, *Unworthy Pandering by Mr. Gore*, N.Y. TIMES, Sept. 12, 2000, at A26.

242. Cf. THE FEDERALIST NO. 10 (James Madison) ("When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.").

243. See Antonin Scalia, *Chairman's Message: Rulemaking as Politics*, 34 ADMIN. L. REV. xxv, xxxi (1982).

244. An agency decision can, of course, contain errors, and identifying them in the executive review process seems more than appropriate. But if the executive review process seems, overall, aimed at redirecting the expertise of the agencies or creating a new research agenda for them, then we might rethink whether that is an appropriate displacement of agency authority.

245. 657 F.2d 298 (D.C. Cir. 1981).

its absence. But, in rejecting the docketing requirement, the court stated, “[W]e do not believe that Congress intended that the courts convert informal rulemaking into a rarefied technocratic process, unaffected by political considerations or the presence of Presidential power.”<sup>246</sup>

About this, however, the *Sierra Club* court may be wrong. Seeking greater disclosure of the content of executive influence will not convert agency decision making into a technocratic process.<sup>247</sup> That influence is here to stay—and many now view it as a necessary component of administrative legitimacy. Disclosing more information regarding executive influence is likely to make agency decisions more candid and to increase the political accountability of the administrative state for decisions that are inevitably value-laden. Further, having agencies disclose the reasons of White House actors in their decision documents is likely to help ensure that political power is more appropriately and responsibly exercised.

The other lingering possibility, however, is that it may be time to revisit presidential supervision as a basis for the legitimacy of the administrative state. The potential taint that some perceive coming from presidential fingers in the regulatory pie may be a signal that submerged presidential supervision may, on balance, undermine, rather than reinforce, the legitimacy of agency decisions. Greater transparency in executive control might confirm that view if, for example, executive oversight turns out generally to be motivated by clearly improper political considerations or aimed, not at policy or value issues, but at manipulating technical or scientific conclusions when agency officials possess superior expertise. Meanwhile, the continuing absence of transparent political explanations for an agency’s balance between safety and cost, or choice of “reasonable risk,” might also suggest that, electoral accountability notwithstanding, we might rather have our “experts” make our value choices for us than our politicians.<sup>248</sup> To the extent the politicians are making these calls, however, that still needs to be more in the public eye than it currently is.

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246. *Id.* at 408. The court also indicated that it wished not to require disclosure in order to avoid any Article II considerations that might be raised by requiring disclosure when the “President himself is directly involved in oral communications.” *Id.* at 407.

247. As Bagley and Revesz have discussed, political factors can play a role within the agencies as well as without. Bagley & Revesz, *supra* note 47.

248. Cf. Harter, *supra* note 173, at 559 (“[A major New Deal theory] contends that technocratic experts are best suited to make regulatory decisions because those experts are able to reach the ‘right’ or ‘correct’ answer if left alone to exercise their professional judgment.”).