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## A Reality Check on an Empirical Study: Comments on "Inside the Administrative State"

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# A REALITY CHECK ON AN EMPIRICAL STUDY: COMMENTS ON “INSIDE THE ADMINISTRATIVE STATE”

Sally Katzen\*

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## INTRODUCTION

Presidential control is the term used for the process (or some would say, the model) by which agency decision-making (more particularly, rule-making) is brought under the direction of the president to “render such decision-making accountable and effective.”<sup>1</sup> Until now scholars, who have generally endorsed both the theory and the practice of the process, have written from the perspective of those who *exercise* presidential control<sup>2</sup>—those at the White House or the Office of Information and Regulatory Affairs (“OIRA”).<sup>3</sup>

In a recent article in the *Michigan Law Review*,<sup>4</sup> Lisa Schultz Bressman and Michael Vandenbergh (“the authors”) decided to study presidential control from the perspective of those who *experience* it—those inside the agencies. They undertook a significant empirical study, interviewing top political appointees who served at the Environmental Protection Agency (“EPA”) during the George H.W. Bush and William J. Clinton Administrations. The authors find, based on their data, that presidential con-

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1. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 47 (2006).

2. See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 872 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001); see also Bressman & Vandenbergh, *supra* note 1, at 56–61.

3. OIRA is the office within the OMB that is tasked with the responsibility for reviewing proposed and final regulations from all Executive Branch agencies. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006).

4. See Bressman & Vandenbergh, *supra* note 1.

trol "is more complex and less positive than previous accounts acknowledge"<sup>5</sup> and that presidential involvement in rule-making "may not sufficiently enhance political accountability"<sup>6</sup> and "may not achieve regulatory efficacy."<sup>7</sup> Because they acknowledged that the president "has a role to play in controlling agency decision-making," they conclude that the model "requires reworking" and identify "next steps in that direction."<sup>8</sup>

I served as the Administrator of OIRA during the Clinton Administration, I am unabashedly a proponent of centralized review of rule-making, and I have a very different take on some of the data presented in Bressman & Vandenberg's article. Nonetheless, I value continued productive dialogue, rather than an adversarial contest, on the issues. My comments in this Article, therefore, are presented as just that—comments, as in the thoughts, observations, or reactions of someone who has been involved in the process—with the hope that they may be useful to those doing follow-on work in this field.

First, however, let me give praise where praise is due. The authors quite rightly decided to look at the "other side" of the process. Not only is it wholly appropriate and highly desirable to have the perspective of those who are subject to presidential control, but the information serves as a valuable counterpoint to the material presented by those who have studied the process from the perspective of the White House or OIRA. More broadly, more data are always helpful in gaining an understanding of a process and testing preconceived notions about it. The Bressman & Vandenberg article indisputably makes an important positive contribution to the on-going discussion and debate.

That said, it is important to recognize that just as rule-making is only one piece of an administration's activities,<sup>9</sup> the centralized review of rule-makings is only one piece of presidential control. The Office of Management and Budget ("OMB") presides over the whole mosaic, where review of rule-making occurs along side review of legislative proposals, review of Executive Orders, and, very importantly, review of resource (budget) decisions. Future studies of presidential control should, therefore, consider how these other pieces fit together with the review of rule-makings, because they dramatically affect agencies' responsibilities, priorities, and capabilities.

Turning now to Bressman & Vandenberg's article, I look first at the data generated by the study, then some of the findings and conclusions drawn from those data, and lastly the authors' recommendations for next steps.

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5. *Id.* at 47.

6. *Id.* at 83.

7. *Id.* at 50.

8. *Id.* at 47.

9. In environmental matters alone, *non-regulatory* initiatives during the Clinton years included Superfund Reauthorization, Global Climate Change negotiations at Kyoto, and The Northwest Forest Plan.

## I. IS THERE A BIAS IN THE DATA?

The authors wanted to get "inside the administrative state,"<sup>10</sup> and they chose EPA for the period 1989 to 2001, covering the terms of the first President Bush ("Bush I") and President Clinton.<sup>11</sup> The authors explain that EPA had "more high-cost rules than any other" agency and that the time period selected would encompass both a Republican and a Democratic Administration.<sup>12</sup>

EPA is certainly worth studying, but it is an atypical agency in almost every relevant respect. Although some degree of self-selection occurs in almost all agencies, EPA has a singular history of attracting highly motivated and intelligent political and career staff dedicated to its institutional mission. During both the Bush I and the Clinton Administrations there were a significant number of senior officials (within the study group identified by the authors) who had previously been environmental activists or state or local environmental officials and who had forcefully advocated the importance of protecting—indeed, improving—the environment.<sup>13</sup> This does not constitute "agency capture" in the traditional sense of the word,<sup>14</sup> nor does it necessarily produce "environmental overreaching."<sup>15</sup> But it is an answer to the authors' concern that the Clinton White House did not issue any directives to EPA "to energize [it] and induce [it] to take action."<sup>16</sup> In any event, in my experience senior political appointees at EPA clearly stand out from their colleagues at other agencies for both the intensity of their enthusiasm for their agency's mission and their faith in regulatory solutions.

EPA is also unusual in that its authorizing statutes provide multiple mandates, allowing ample opportunities (if not affirmative obligations) for developing new regulations. And, more importantly for present purposes,

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10. Bressman & Vandenberg, *supra* note 1, at 49.

11. Michael Vandenberg was the Chief of Staff to the EPA Administrator during much of the Clinton Administration.

12. Bressman & Vandenberg, *supra* note 1, at 49.

13. Bush I campaigned as the "environmental president" and he presided over the enactment of the 1990 amendments to the Clean Air Act, arguably the most pro-regulatory changes to an authorizing statute in the last several decades. This may have contributed to the absences of substantial differences in the responses between Bush I and Clinton EPA officials. *See id.*

14. *Id.* at 76.

15. *Id.* at 88.

16. *Id.* at 50. The authors cite the lack of presidential directives to EPA to initiate regulatory proposals as a sign of a lack of involvement by the president, *id.* at 82–83, and as proof that presidential control does not stimulate regulatory change, *id.* at 78. But in the Clinton White House, it was the Vice President, rather than the President, who had the environment on his radar screen, and his passion for those issues was well known and well understood by EPA, CEQ, OMB, and the rest of the White House. More on point, the task of generating ideas for directives and coordinating their implementation was delegated to the Domestic Policy Council ("DPC") (where Elena Kagan served as Deputy Director) and to a lesser extent to the National Economic Council ("NEC") (where I was Deputy Director for a little over a year). Environmental issues were not within the DPC's or the NEC's portfolio, and generally these issues came to the attention of the policy councils only when other agencies or departments had concerns about how an EPA proposal or action would affect the programs of those other agencies or departments.

EPA is atypical in terms of its relations with the White House because EPA is the only agency with an office in the Executive Office of the President dedicated to its subject-matter jurisdiction—the Council on Environmental Quality (“CEQ”).<sup>17</sup>

To be sure, EPA produces many high-cost regulations, but there are many other agencies which produce appreciably more and varied regulations, and which would therefore provide a more representative sample. For example, for Bush I the agency with the most economically significant rules<sup>18</sup> was the Department of Agriculture (“USDA”) (111), followed by Health and Human Services (“HHS”) (92), EPA (86), and the Department of Transportation (“DOT”) (41); for the Clinton years, EPA had the most economically significant rules (158) reviewed by OIRA, followed by USDA (144), HHS (137), and DOT (57).<sup>19</sup> When all the rules reviewed by OIRA in those administrations are considered, EPA’s relative position drops to third in the Clinton Administration and fifth in the Bush I Administration.<sup>20</sup>

With respect to the time period chosen, I agree with the authors that it is useful to look at administrations of both political parties. But there was no Senate-confirmed OIRA Administrator for most of the Bush I period; instead, the “political” oversight was exercised by the Competitiveness Council—which was placed in the White House and thus logically viewed by the Bush respondents as a White House office.<sup>21</sup> Also, the Bush I OIRA was operating under Executive Order 12,291,<sup>22</sup> while the Clinton OIRA operated under Executive Order 12,866.<sup>23</sup> There are significant differences between the two Executive Orders,<sup>24</sup> although except for the provisions re-

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17. In addition, EPA’s trade press is especially energetic in reporting on the agency’s activities and in strongly criticizing the agency for not being more aggressive. This may seem trivial, but the authors apparently included several questions about general media and trade press coverage of presidential review, from which they are able to find that “EPA was more subject to media coverage than the White House regarding an EPA regulation undergoing White House review.” *Id.* at 81.

18. These are the rules that were called “major” under Executive Order 12,291 and “economically significant” under Executive Order 12,866. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006).

19. These figures come from the RISC database, which can be found at <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init>.

20. The numbers and order are slightly different when you add together all rules reviewed by OIRA during the relevant periods—for Bush I, DOL (1,411), HHS (1,214), DOT (938), DOC (869), and EPA (655); for Clinton, HHS (1079), USDA (918), EPA (644), and DOT. (489)

21. Bressman & Vandenberg, *supra* note 1, at 64 n.107.

22. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000).

23. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006).

24. Among other things, all notices of proposed rule-makings and all final rules were subject to review by OIRA under Executive Order 12,291, whereas Executive Order 12,866 called for review of only significant regulations (which covered about 10–15% of the total). In addition, Executive Order 12,866, unlike Executive Order 12,291, provided that all meetings OIRA had with persons outside the Executive Branch would be noted in the public record, that agency representatives were invited to (and generally did attend) any such meetings, that all documents provided by outsiders to OIRA were sent to the agency to be placed in the public record, and that the time for review of proposed and final rules was generally limited to 90 days.

lating to openness, the differences probably would not have a significant effect on the conclusions of the study. Nonetheless, I would hope that any follow-up study would compare the eight years under Clinton with the eight years under Bush II, which operated under Executive Order 12,866 and a Senate-confirmed Administrator for the majority of the time.

In addition, there are aspects of the survey itself that lead me to question whether it is appropriate to accept its data uncritically and to draw conclusions (and recommendations) from it without qualification. First, the authors are clear that just because OMB says something, that is not necessarily what the agency hears.<sup>25</sup> So too, what the agency hears is not necessarily what OMB is saying. Second, just as White House officials might introduce their biases for centralized review into their comments about the effect of their interventions in rule-makings, so too agency officials might incorporate their biases for greater agency autonomy into their comments about relations between the White House (and/or OMB) and their agency.<sup>26</sup> This would not be the first time that strategic responses were supplied for an academic survey. Third, there is not always a good fit between the respondents and the questions asked of them. The survey's subjects were all political appointees, who are often the recipients of messages from the White House and can therefore speak to those messages. But political appointees are simply not positioned to be reliable sources of information about other topics they were asked about.<sup>27</sup> They are personally involved in only a fraction of the interactions between an agency and OIRA (or the White House), and they are bound to resent any suggestions that they are told have come from the civil servants at OMB.

There is also a potential problem from the way some of the questions were framed.<sup>28</sup> At a minimum, the survey was not completely successful in capturing the dynamics of the review process, which the authors ultimately recognize is "more complex than scholars generally have acknowledged."<sup>29</sup> I

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25. Bressman & Vandenbergh, *supra* note 1, at 49.

26. The authors acknowledge this potential bias in the data, *id.* at 62, though they appear not to make any adjustment for it. One example of uncritical acceptance is their treatment as a statement of fact (rather than opinion) respondents' claim that the agency "more often represented the public's view on particular regulatory matters" than did the White House. *Id.* at 82. I would have been shocked if the agency officials did not believe they had the upper edge, but that doesn't make it true.

27. For example, questions as to OIRA's workload, its resources, and even its knowledge base are clearly beyond the ken of most political appointees at other agencies. I therefore have difficulty giving any credence to the finding that the OIRA "career staff exercised independence from the political control of the OIRA Administrator or other White House political appointees," *id.* at 73–74, from which the authors conclude that "the independence of the OIRA career staff may be problematic," *id.* at 75. In fact, my experience as the OIRA Administrator was to the contrary—that is, all matters of moment were cleared with me, if not before they were discussed with the agency, then certainly if the agency was resistant to the suggested changes.

28. See, e.g., *infra* note 60. Perhaps the best evidence of this is the fact that there were a very large number of non-responsive answers to questions which were relatively simple—for instance, when the survey asked respondents to choose between two options, some still chose "other." See *infra* text accompanying notes 40–42; *infra* note 47.

29. Bressman & Vandenbergh, *supra* note 1, at 69; see also *id.* at 49 ("[S]cholars may have underestimated the complexity of White House involvement.")

agree that the process is more complex than has been depicted in scholarly writings—almost any process involving people invariably is more complicated than the narrative description of it—and regrettably I have no suggestion for framing a survey that would capture the many nuances and different permutations that exist without making the survey so burdensome that respondents would decline to participate. Yet to the extent there are problems with the survey, the confidence one might otherwise have in its findings and conclusions would certainly be undermined.

## II. WHAT DO THE DATA SHOW?

The authors conclude that White House/OIRA involvement in rule-making “may not sufficiently enhance political accountability”<sup>30</sup> and “may not achieve regulatory efficacy.”<sup>31</sup> I disagree. To be clear, I am not saying presidential control works perfectly—far from it; I agree with the authors that it could work better.<sup>32</sup> But we may not agree on what “better” means. More importantly, while we both believe that the values of centralized review of regulations are political accountability and regulatory efficacy, we apparently do not agree on the definitions and measures of those terms.

### A. Political Accountability

For the most part, the authors equate accountability with transparency and responsiveness<sup>33</sup>—essentially, a process definition. By that measure, EPA scores well—much better than the White House/OIRA. As evidence of the agency’s accountability, the EPA respondents cite the notice-and-comment process, public hearings, advisory committee meetings, and other activities undertaken by the agency during a rule-making, which are then contrasted with the more limited (and opaque) information about the review process at OIRA. All true. And I would be among the first to tout the value of transparency and responsiveness in a democratic society and their contribution to acceptance (or legitimacy) of the administrative state.<sup>34</sup> I also acknowledge that the particular steps cited by the EPA respondents are invaluable to better decision-making. But the transparency of the process and the receptiveness to the public’s views are not at the heart of accountability.

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30. *Id.* at 83.

31. *Id.* at 50.

32. *See id.* at 49.

33. *See id.* at 50–51; *see also id.* at 78

34. For this reason, Executive Order 12,866 included several provisions requiring greater openness and transparency than had been required under Executive Order 12,291. *Compare* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000), *with* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006). The additional provisions of Executive Order 12,866 can be found at Section 6(a)(3)(E) and Section 6(b)(4).

The dictionary defines accountability as "liable to be called to account; answerable."<sup>35</sup> This is close to a definition offered, but not embraced, by the authors: an "elected official supervises agency decision-making."<sup>36</sup> In this context, accountability means that the president is answerable for the activities of those in the Executive Branch: the president gets the credit or takes the blame for whatever the agencies do, and the public can—and should—hold the president to account for the decisions the agencies make.<sup>37</sup> But the president is answerable for the regulations that emerge from agency action, not the transactions that produce the regulations. Stated another way, it 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 an office of a presidential aide).<sup>38</sup>

The authors accept that the president cannot himself attend to all the details of agency decision-making and may instead look to his staff to exercise presidential control.<sup>39</sup> Why then do they devote so much effort to trying to determine whether it is OIRA or the White House offices that are the true Wizard of Oz behind the curtain?<sup>40</sup> OIRA and the White House offices all work for the president, staff the president, and answer to the president.<sup>41</sup>

35. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 12 (3d ed. 1992).

36. Bressman & Vandenberg, *supra* note 1, at 51 (emphasis added). The authors acknowledged that if this were the operative definition, they would give presidential control higher marks.

37. See *Sierra Club v. Costle*, 657 F.2d 298 (1981). This opinion by Judge Wald, written before the time period considered by the authors, said:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.

*Id.* at 405.

38. The authors' call for "focus on exposing the workings of the White House offices themselves, as well as the relationship among them and with the president, OIRA, and other federal agencies," Bressman & Vandenberg, *supra* note 1, at 84, is setting this pyramid on its head and in any event goes well beyond the subject of review of rule-making to encompass all presidential activities. See also *infra* text accompanying notes 71 & 72.

39. Bressman & Vandenberg, *supra* note 1, at 69.

40. See *id.* at 65–69. On an organizational chart, OIRA is in OMB, which is in the Executive Office of the President ("EOP"), while many of the "White House Offices" listed in footnote 107 of the article are in the White House Office ("WHO"). However, there are several other offices, that, like OIRA, are actually part of the EOP rather than the WHO, including the Council of Economic Advisors, the Council on Environment Quality, the rest of OMB, the Office of Science and Technology Policy, and the Office of the Trade Representative. Also, OMB is housed in what used to be called the Old Executive Office Building, while some of the heads of some of the offices listed by the authors occupy space in the West Wing; the heads of the rest of those offices, like OMB, occupy space in the Old Executive Office Building or the New Executive Office Building.

41. The political appointees at EPA also work for the president, and the issue that has long plagued scholars is why officials of EPA (or any agency) have a different view of how best to serve the president than those who work in the White House/OMB. This issue obviously goes well beyond centralized review of rule-making and is one that deserves more empirical study. I would, however, surmise that the differences are due in large part to the lens through which the various aides and advisors look at the issues facing the president. As discussed below, agency personnel tend to see

Thus it is almost meaningless to inquire “who is on top” or even “who has the ball.”<sup>42</sup> Rather, for purposes of centralized review or presidential control of rule-making, OIRA and the White House offices all work together, although they may not always initially agree with one another.

In any event, the agency may not always be aware who crafts the message and who carries the message. The authors quote one survey respondent as noting that it was “[n]ot always clear whether OIRA was carrying other offices’ water.”<sup>43</sup> Good comment. I can recall (though I cannot document) several times when a White House office raised an issue about an agency’s rule-making and asked OIRA to transmit the comment/concern to the agency. Other times, a White House office participated in transmitting an OIRA comment to an agency to underscore support for the suggestion. Usually, OIRA did take the lead and that was expected, given that both Executive Order 12,291 and Executive Order 12,866 delegated to OIRA the responsibility of centralized review of rule-makings.<sup>44</sup> But OIRA did not act independently of the White House offices (nor did the White House offices act independently of OIRA): we were all in it together.

The authors provide not only a process-based definition of accountability, but also a substantive definition—namely, representing public preferences and resisting factions or parochial pressures.<sup>45</sup> Specifically, they assert that the aim of political accountability is faction resistance or “public-regarding decisions,” which they contrast with “narrowly interested” decisions.<sup>46</sup> The authors find that EPA better reflects public preferences, while the White House and OIRA favor special interests, which the authors ulti-

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the world through the lens of their agency’s mission; White House/OMB personnel tend to see the world through a much broader lens that takes in multiple points of view. And any agency head can always escalate the particular issue on which there may be a disagreement, all the way to the Oval Office if s/he thinks that White House/OMB aides have misunderstood the president’s true preferences.

42. Bressman & Vandenberg, *supra* note 1, at 66–67. This is one area of the survey where there were a significant number of non-responsive answers to binary questions. *Id.* The authors could not account for the non-responsive answers from the quantified data and sought to draw explanations from the qualitative responses offered by some of the respondents. I suspect that the problem was that the question presented a false choice for respondents. *See, e.g., id.* at 66 n.113–16 (discussing questions three, nine, ten, and eleven).

43. *Id.* at 69.

44. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006). In fact, during the Clinton Administration, White House Counsel sent a memo to all White House staff reminding them that they were not to meet with anyone outside the Executive Branch regarding an ongoing rule-making except under the auspices of OIRA, that any documents received from outsiders regarding a rule-making were to be sent to OIRA, and that other strictures were in place reflecting the same mindset. In other words, rule-making issues were to be coordinated through OIRA.

45. Bressman & Vandenberg, *supra* note 1, at 52, 83.

46. *Id.* at 52 (emphasis added). The authors state, “In general, public preferences might be understood as ones that reflect the majority will and extend beyond the parochial interests of narrow groups.” *Id.* at 83.

mately link with business interests.<sup>47</sup> By their reasoning, therefore, centralized review does not promote accountability.

I see it very differently. The agencies focus like a laser, as they should, on their statutory missions—in the case of EPA, protecting the environment. The White House and OIRA take a broader view and consider how, for example, an environmental proposal will affect energy resources, tax revenues, health policy, etc. Stated another way, EPA is pursuing a parochial interest; OIRA is tempering that with the national interest, as it should.<sup>48</sup>

In fact, the data presented in the article support this interpretation. EPA respondents acknowledged that the White House/OIRA sought changes that would advance national interests over the position of interest groups;<sup>49</sup> several respondents explicitly characterized the White House/OIRA as "conveying a broader perspective on rule-making than the EPA alone. . . . 'which can be based too narrowly on environmental interests.'"<sup>50</sup> In addition, the survey data are clear that White House/OIRA involvement "was most influenced by other federal agencies."<sup>51</sup> This latter point—the substantial influence of other federal agencies—is key to evaluating centralized review of regulations. It enables the input of different (sometimes complementary, sometimes orthogonal) perspectives and the consideration of different (sometimes compatible, sometimes conflicting) public interests. Our government is organized as a series of stovepipes, whereas the public interest is an amalgam of them all.

The authors essentially dismiss the significance of the influence of other federal agencies by speculating that these agencies are in fact representing the very "favored business interests,"<sup>52</sup> which the authors see as the epitome of narrow special interests. They conclude that "EPA respondents tended to confirm the fears of critics that the White House frequently favors special

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47. *Id.* at 83, 87. For present purposes, I am accepting the data from the study, although as noted above, *supra* note 27, it is questionable whether EPA respondents are in the best position (or even a good position) to answer questions about how often and which interest groups were able to influence the White House/OIRA, *see, e.g.*, Bressman & Vandenberg, *supra* note 1, at 85, or whether EPA or the White House/OIRA is more likely to be captured by an interest group, *id.* at 86. Certainly, several of my colleagues strongly believed that EPA was the captured entity, with the environmental groups having virtually open access to, and a strong influence on, the agency during the Clinton Administration. Also, this is another area where there were a significant number of "other" (i.e., non-responsive) responses to a choice between two entities.

48. To quote again from Judge Wald:

Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. . . . Single mission agencies do not always have the answers to complex regulatory problems. An over-worked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policy-makers in other agencies as well as in the White House.

Sierra Club v. Costle, 657 F.2d 298, 406 (1981) (footnote omitted).

49. Bressman & Vandenberg, *supra* note 1, at 87–88.

50. *Id.* at 89

51. *Id.* at 86 (emphasis added); *see also id.* at 87.

52. *Id.* at 88.

interests when it gets involved in agency decision-making.”<sup>53</sup> Did the authors really give the process a fair shake on this point?

### B. Regulatory Efficacy

This is a good segue to the second measure of effectiveness of centralized review of rule-making—regulatory efficacy. According to the authors, “[e]fficacy means not only whether OIRA review enhances cost-effectiveness but also whether it promotes what might be called intra-agency coherence and inter-agency coordination.”<sup>54</sup> Their judgment of the process on this score is unequivocally negative and harsh. I think they are wrong.

Taking the parts of the definition in reverse order to continue with the subject of inter-agency coordination, I note that the EPA respondents give OIRA generally good, if not high, marks for OIRA’s efforts and its successes in this area.<sup>55</sup> As just discussed, this aspect of centralized review—the inter-agency coordination—is a vital part of the process and is indispensable to effective presidential control.<sup>56</sup> Yet the authors relegate the information regarding this aspect of OIRA’s work to a single sentence in the text and an accompanying footnote.<sup>57</sup> This should be contrasted with the textual material that precedes these positive comments about *inter-agency* coordination, which features a large chart showing very low marks for OIRA’s efforts to “[a]void [i]nconsistencies [b]etween or [a]mong EPA [r]egulations.”<sup>58</sup>

I agree that OIRA does not expend substantial effort on avoiding inconsistencies *within* EPA, or reducing redundancies *within* EPA, or eliminating “unintended consequences between or among EPA regulations.”<sup>59</sup> That is because *intra-agency* coordination is not generally viewed as a goal of centralized review, nor would it be particularly feasible given the size of the regulatory government. Rather the responsibility for intra-agency coordination is peculiarly within the province of the Administrator of EPA (as it would be for the head of any department or agency), and it is a task which the agency has itself recognized as its own. During the period covered by the study, EPA had in place an intra-agency Working Group of senior staff, which was charged with looking at all major regulations to ensure that there was consistency within the agency. It is not surprising, therefore, that the

53. *Id.* at 90.

54. *Id.* at 70.

55. *Id.* at 73 n.139.

56. One of the points of agreement between those for and against centralized review of rule-making is that inter-agency coordination is a legitimate and essential aspect of executive management.

57. *Id.* at 71–72. The authors later also note, “OIRA more regularly helped to coordinate EPA regulations with the regulations of other agencies. But even here, the mean score is not overwhelming: according to respondents, only occasionally did OIRA improve inter-agency coordination.” *Id.* at 74. The data, as I read them, support more than the restrained praise OIRA receives.

58. *Id.* at 72 (emphasis added).

59. *Id.* at 71.

EPA respondents did not think that OIRA or the White House did a lot in this area—they would have been called upon to do so only if EPA itself had failed in its assigned task.

This brings us to the authors' third test of regulatory efficacy—OIRA's role in enhancing cost-effectiveness. The authors find that OIRA focuses almost exclusively on the cost side of cost-benefit analysis, routinely seeking to reduce regulatory burdens, and that OIRA rarely urges the EPA to seek to achieve greater benefits.<sup>60</sup> As noted above, the choice of EPA as the survey's subject was justified on the ground that it had more high-cost rules than any other agency. I believe it is therefore legitimate to focus on the projected costs and see if they can be reduced while still meeting the projected objectives. And as also noted above, EPA officials are not reticent in stressing the benefits of their proposals, though in my experience OIRA would on occasion suggest that the agency could achieve greater benefits for the same costs by modifying the proposal. Also, several respondents commented (usually not very favorably) on OIRA's review of the science or the risk assessment underlying the proposal or the monetization of lives saved—all of which has to do with the benefit side of the analysis.<sup>61</sup>

The authors acknowledge that their "findings are consistent with a more 'neutral' account,"<sup>62</sup> but they essentially walk away from such an interpretation by calling for more research.<sup>63</sup> I am not opposed to more research, but several aspects of this section of the article cause me to question whether the authors may have overinterpreted their data or viewed the responses they received through a lens that is unsympathetic, if not hostile, to centralized review. Consider, for example, the EPA respondents' comments to the effect that centralized review makes them "better defend existing regulatory proposals"<sup>64</sup>—that is, to sharpen their arguments, muster scientific information,<sup>65</sup> and "clarify or gain support for their position."<sup>66</sup> In other words, the very existence of OIRA causes the agencies to do a better job in thinking through and documenting support for their proposals. That is, I would submit, a valuable contribution to decision-making. This point, however, is given short shrift by the authors.

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60. *Id.* at 74. In this section, I found particularly baffling that the authors asked respondents "how often OIRA focused on cost-benefit analysis rather than the substance of regulatory provisions." *Id.* at 72. I am not sure I could have answered that question because it assumes that you can separate the two. Yet when issues were presented to me by the staff, the "substantive provision" was invariably tied to its benefits and costs. Perhaps I am not alone—almost 20% of the respondents provided non-responsive answers to this question. *Id.* at 72 n.140.

61. *Id.* at 97.

62. *Id.* at 76.

63. *Id.*

64. *Id.* at 50; *see also id.* at 77.

65. *See id.* at 77.

66. *Id.*

Another example comes when the authors discuss “regulatory efficacy defined as stimulating regulatory change.”<sup>67</sup> Previously, regulatory efficacy was defined by the authors as enhancing cost-effectiveness and promoting intra- and inter-agency coordination.<sup>68</sup> This new definition equates the promotion of regulatory efficacy with generating “agency activism.”<sup>69</sup> It strikes me that by linking the two, the authors are revealing a bias *for regulation*, not for *regulatory efficacy*. This is not a neutral definition of regulatory efficacy against which OIRA, the White House, or even the agencies should be judged.

### III. WHERE DO WE GO FROM HERE?

Given my different take on some of the data and my resulting disagreement with some of the authors’ findings and conclusions, it should come as no surprise that I do not fully agree with their “six areas for improvement.”<sup>70</sup>

First, I discussed above their views of transparency and how far we should push to make the White House a goldfish bowl.<sup>71</sup> I would only add that those who advocate unfiltered sunshine should, at some point, acknowledge that confidentiality is often important to honest deliberations and that candor is an important ingredient in collegial decision-making.<sup>72</sup>

Second, with respect to straightening out (and publicizing) the lines of responsibility among OIRA and the White House offices, there is undoubtedly some confusion from the present arrangement, and sometimes several voices are sending slightly (or very) different messages.<sup>73</sup> I believe that is a positive rather than a negative force. The discourse that takes place is no different than what occurs within an agency—for example, when the program office finds itself at odds with the Office of Policy and Planning, and the dispute has to be sorted out on a collegial basis or, if that fails, taken to the Deputy Administrator or Administrator.<sup>74</sup> Make it too hierarchical, too streamlined, too simplified, and I think you would lose something in the process.

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67. *Id.*

68. *See supra* text accompanying note 54.

69. Bressman & Vandenberg, *supra* note 1, at 78.

70. *Id.* at 91.

71. *See supra* text accompanying note 38. I suspect there are more than a “few” who “would dispute that White House involvement in agency decision-making should be more visible to the public.” Bressman & Vandenberg, *supra* note 1, at 92.

72. The authors come close, but their acknowledgement comes as a third-tier reaction to a suggestion that the White House not only be more open but also be required to put any comments on the record. *See id.*

73. *See id.* at 93–94.

74. Perhaps one difference is that the Deputy Administrator or the Administrator can effectively close down the discussion and quiet the dissent by making a decision or saying s/he does not want to hear that view anymore. By contrast, OIRA and the White House offices cannot really silence any interested agency or office, and even a decision cannot hold unless all concur.

Third, with respect to the issue of selectivity, I could not disagree more with the authors. Throughout the article, they make much of the fact (which I don't dispute) that centralized review of EPA rule-makings is on an "uneven or unsystematic basis."<sup>75</sup> Essentially, they contend that a model of agency decision-making should promote rationality *in a systematic way* and that, even if there are many responsibilities to juggle and too few resources to reach every major agency decision, "[i]t nevertheless is reasonable to expect *method* to the madness."<sup>76</sup> They conclude, "Unless White House involvement is reasonably methodical, it does not really constitute a *model* of control at all."<sup>77</sup>

For me, selectivity is an important and effective management tool—if you looked over everything, you might well lose the forest for the trees. Executive Order 12,866 deliberately limited centralized review to "significant regulations" rather than all regulations, so that OIRA could focus on the most important items.<sup>78</sup> In my experience, even among the "significant regulations," there were some that merited more scrutiny than others and there were a variety of reasons why that might have been so for any particular regulation.<sup>79</sup> The authors seem to say that unless the selection criteria are publicly articulated or otherwise discernable to everyone—apparently not only those in the agencies but also those in the media and those in the academy—then it is a deficient filter or "model." Not so. Its success will depend on how it is used, and that is the task of the political leadership at OIRA and OMB.

On a positive note, I generally agree with the authors about the fourth area—the timing of review. The earlier the consultation process begins the better, with the caveat that it is generally more productive to enable the agency to work out most of the issues itself before it starts getting the view of others in the Administration. At the same time, I would urge the authors to reconsider their belief that timing issues are secondary to the authors' fifth area of concern—"fixing the focus of OIRA review."<sup>80</sup> I think timing goes to the heart of effective review. Of course, maybe my reluctance to endorse the "fixing the focus" recommendation is driven by the fact that, as

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75. *Id.* at 69, 94.

76. *Id.* at 70 (emphasis added).

77. *Id.* at 94.

78. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006). This provision can be found in Section 6(a)(3)(C) of the Executive Order. Among other things, special scrutiny might be triggered by how many people would be benefited, how costly the proposal is, whether it is a novel approach or an approach that has been tried before without much success, or how critical the problem is for those adversely affected and thus how important it is to get the solution right.

79. The authors' suggestion that the true test driving the selectivity of review is "political salience," Bressman & Vandenberg, *supra* note 1, at 95, is both unsupported and inconsistent with some of their previous suppositions about OIRA's priorities.

80. *Id.* at 96.

discussed above, I do not think the authors have proven that OIRA has an undue focus on costs in the case of EPA.<sup>81</sup>

Finally, I do not believe that the civil servants at OIRA are part of the problem rather than part of the solution, to use Ronald Reagan's familiar phrase.<sup>82</sup> In all my positions in the private sector and the public sector (and in the academy), I have never had the privilege of working with such an intelligent, dedicated, committed, and caring professional group of people as the civil servants at OIRA, and the notion that more turnover would benefit anyone (other than those at the agencies who may not like an informed critique of their work) is simply wrong headed.<sup>83</sup>

I recognize that the authors introduced their recommendations with the important qualification that they are not endorsing specific changes but merely focusing attention on possible weaknesses which could serve as "an agenda for further empirical investigation."<sup>84</sup> So I return full circle to my praise for their efforts and their contribution to the on-going discussion about the value and efficacy of centralized review of rule-making. If I may, I join them in urging more work in this field.

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Author's Note: The reply by Professors Bressman & Vandenberg that follows was given to me at the final stages of production, with the condition that I not engage in any surrebuttal. The reader, therefore, will be left on his or her own to pass judgment on the merits of our positions.

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81. See *supra* text accompanying notes 60–61. Moreover, I strongly disagree with the gratuitous assertion that OIRA has an "institutional bias in favor of business interests." *Id.* at 97.

82. See *id.* at 98–99.

83. See *id.*

84. *Id.* at 91.