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Legitimacy, Selectivity, and the Disunitary Executive: A Reply to Sally Katzen

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LEGITIMACY, SELECTIVITY, AND THE DISUNITARY EXECUTIVE: A REPLY TO SALLY KATZEN

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INTRODUCTION

This reply addresses the thoughtful comments that former OIRA Administrator Sally Katzen has provided on our Article, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*.¹ Our Article is the first to investigate the agency perspective on White House involvement in agency rule-making. We interviewed 30 of the 35 top political officials in the Environmental Protection Agency (“EPA”) during the George H.W. Bush (“Bush I”) and the William J. Clinton Administrations during 1989–2001.² Prior to our study, empirical studies of White House involvement in agency rule-making had focused almost exclusively on the White House side, mainly analyzing White House documents and interviewing White House officials.³ While these studies could describe how the White House exercises control of agency rule-making, they could not speak to how agencies experience such control. We began to remedy the imbalance and paint a more complete picture of presidential control.⁴

By engaging our study, Katzen has added a valuable perspective to the debate. She has also helped to confirm the value of empirical studies in this field. Empirical studies sharpen our understanding of the relevant facts and

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1. Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 MICH. L. REV. 1497 (2007).

2. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 63 (2006).

3. *See id.* at 56–61.

4. *See id.*

thus narrow the gaps in the theoretical debate. At the end of the day, Katzen's claims are based only on her own experience on the White House side and, as a result, are yet more anecdotes from that side of the executive branch. Nonetheless, her comments are important. They confirm the need to examine whether presidential control works from the agency side and the need, more than ever, to get additional data that might explain why her recollections seem strikingly different from those of the top EPA presidential appointees we interviewed for our study.

We use this brief reply to contextualize Katzen's comments about our data. Katzen not only comes at our data from the White House side, but she also views centralized rule-making review primarily from a practical standpoint. In her view, such review works well to manage the bureaucracy.⁵ Practice is important and worth considering. But missing from that perspective, and central to our Article, is consideration of whether such review serves the role that presidential control theorists have assigned to it of legitimating agency decisionmaking and grounding agencies within our constitutional structure.⁶ Missing from Katzen's account is the overarching importance of accountability and efficacy to executive branch decisionmaking. Our data suggest that there may be a problem on this front.⁷

I. SELECTING EPA

Katzen first suggests that our data are biased.⁸ She contends that EPA is not representative of other agencies and that we have used EPA data inappropriately to draw conclusions about a larger phenomenon—White House oversight of all agency rule-making.⁹ Importantly, Katzen does not argue that our data are biased regarding EPA in the way that empirical social scientists use that term. Selection bias in the social science literature refers to selecting a sample that is not representative of the population on a variable of interest.¹⁰ Katzen does not dispute that our sample (30 EPA presidential appointees subject to Senate confirmation, known as "PAS"s) is representative of the total population (35 PASs, of which 34 are living) regarding any of the variables we studied. Thus, she essentially raises issues as to whether EPA was a proper target for our study and whether we can draw inferences from our data regarding other regulatory agencies.

5. See Katzen, *supra* note 1, at 1498 (stating that "centralized review of rule-makings is only one piece of presidential control").

6. See Bressman & Vandenberg, *supra* note 2, at 52–53.

7. See *id.* at 70–91.

8. Katzen, *supra* note 1, at 1499–1502 (asking "[i]s [t]here a [b]ias in the [d]ata?" and concluding that there is).

9. *Id.* at 1499 (commenting that "EPA is certainly worth studying, but it is an atypical agency in almost every relevant respect").

10. See GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 27–28 (1994).

We have two responses. First, even if EPA is not representative of all agencies, it is a sufficiently large and important regulatory agency that no theory of presidential control can afford to ignore.¹¹ Katzen acknowledges that major rule-makings were the focus of OIRA review under the executive orders in place during the Clinton and Bush I Administrations.¹² She also acknowledges that EPA generated the most major rule-makings during the Clinton Administration and was third during Bush I.¹³ Whether EPA was first or third over any given period, it was—and is—clearly one of the most important rule-making agencies in the federal government. In addition, the total cost generated by an agency's regulations is arguably an even more important measure of importance than the number of major rule-makings.¹⁴ On that score, EPA dwarfs other regulatory agencies. In 1990, for example, the Office of Management and Budget ("OMB") noted that the EPA accounted for roughly half (\$70–\$80 billion) of all direct costs on the economy imposed by all federal regulations (\$175 billion).¹⁵ More recently, an OMB report estimated that between 1987 and the first quarter of 1999, environmental regulations imposed \$71 billion of the total \$92 billion in costs from all federal social regulations.¹⁶ Environmental regulations also provided \$75–\$145 of the \$198–\$274 billion in quantified, monetized benefits.¹⁷ Moreover, we further note that EPA has influence far beyond the mandates of specific major rule-makings. For example, environmental regulations have played a remarkable role in shaping judicial review¹⁸ and congressional oversight of executive branch decision-making.¹⁹

11. In her pivotal work describing and defending increased White House involvement in agency decision-making, Dean Elena Kagan acknowledged that President Clinton did not take an interest in issuing regulatory directives to EPA. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2308 n.254 (2001).

12. See Katzen, *supra* note 1, at 1509 (acknowledging that the major or significant rule-makings are "the most important items," and that such rule-makings were the focus of OIRA attention during the Clinton administration). Executive Order 12,866 applies to "significant" rule-makings, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C.A. § 601 (West, Supp. 2006), and Executive Order 12,291 applies to "major" rule-makings, Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (2000). For simplicity, we use the term "major" here to refer to both types.

13. Katzen, *supra* note 1, at 1500.

14. See W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 40 (4th ed. 2005).

15. *Id.* at 40.

16. OFFICE OF MGMT. & BUDGET, 105TH CONG., REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS tbl.2 (2000) [hereinafter OMB REPORT], available at <http://www.whitehouse.gov/omb/inforeg/2000fedreg-report.pdf>; see also Cass Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1659 (2001) (noting that federal environmental regulations imposed \$130 billion in economic costs in 2000).

17. OMB REPORT, *supra* note 16 tbl.2.

18. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

19. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). At least 110 congressional committees claimed jurisdiction over EPA in 1993. Only the Department of Defense ("DOD") had

Second, EPA has strong similarities to a sizeable number of executive branch regulatory agencies, many of which are sub-units of federal departments.²⁰ Examples include the Food and Drug Administration (“FDA”), the Occupational Safety and Health Administration (“OSHA”), the Fish and Wildlife Service, and the National Marine Fisheries Service. In the aggregate, agencies such as these generate large volumes of major and non-major rule-makings. It is likely that the responses of the top managers at FDA, OSHA, or other agencies will not differ a great deal from the responses of the top managers at EPA. Like EPA, these agencies have statutory mandates to achieve national health, safety, and environmental goals.

Of course, EPA is not like all agencies. It is dissimilar from non-regulatory agencies (e.g., the Department of Defense), as well as agencies without statutory mandates regarding health, safety, and the environment (e.g., considerable portions of the Departments of Commerce, Treasury, and Agriculture).²¹ Nevertheless, our EPA results may hold for an extremely wide swath of the regulatory state.

Although we think it likely that our results regarding EPA are generalizable to many other regulatory agencies, we do not claim that our EPA results hold for these agencies.²² For now, we can only speak to our data, which are solely derived from EPA. Our study demonstrates the importance of gathering data in a more systematic fashion from sources on both sides of the White House oversight process.²³ Katzen’s comments help identify the types of agencies that should be subject to future empirical studies. We are pleased if the value of that data collection is clear. We note, however, that our study cannot simply be dismissed or marginalized because it is the first on the agency side or because it is the first to reveal a picture that does not square easily with the view from the White House side.

more oversight committees, but the EPA budget was less than three percent of the DOD budget. Leslie Kaufman, *Cabinet Fever*, GOV’T EXECUTIVE, July 1993, at 32, 34.

20. EPA’s statutory directives also resemble in many ways those of independent agencies such as the Consumer Product Safety Commission and the Equal Employment Opportunity Commission. These agencies have a different relationship with the White House regulatory review process. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C.A. § 601 (West. Supp. 2006).

21. Future empirical studies will need to account for this distinction when selecting target agencies to study and when drawing conclusions about whether to generalize their findings.

22. See Bressman & Vandenberg, *supra* note 2, at 91 (noting that the picture from the EPA side “is not conclusive; it too reflects a single perspective on a practice involving many players”).

23. We contended that:

[The presidential control model] requires reworking to remain valid. Scholars can no longer rest satisfied with generalities about political accountability, faction resistance, and regulatory effectiveness. They must take steps to improve the presidential control model so that it better delivers these goods in practice as well as in theory.”

Katzen also makes another claim of bias.²⁴ She argues that EPA officials are biased in favor of a “parochial” interest, while OIRA officials are focused on the “national” interest.²⁵ We dispute this claim at the theoretical and practical level. First, we dispute the general characterization of EPA’s institutional interest as parochial and OIRA’s interest as national. In theory, both have national interests at stake. Both pursue the goal of maximizing social welfare. We think it is incorrect to label as “parochial” an agency’s statutory obligation to reduce human health and environmental risks.

Second, we believe that EPA officials are no more or less likely to reflect a bias in favor of their mission than are OIRA officials to reflect a bias in favor of theirs. As a practical matter, the claim of bias cuts both ways. White House staffers, whether at OIRA or any other White House office, can become just as attached to the mission of their offices as agency officials. Katzen makes no bones about her high regard for and deep appreciation of the career staff of OIRA.²⁶ We do not doubt that the career staffers are the dedicated civil servants she believes them to be, but they are not immune from bias. Katzen goes out of her way to point out that both the Bush I and Clinton PASs at EPA often “had previously been environmental activists or state and local officials,” without noting that many also came from and returned to positions in corporations or corporate law firms.²⁷ She also does not respond to a point that we highlighted, well expressed by the EPA respondent who noted that “the civil servants in OIRA, who had been there largely since the Reagan Administration . . . were more conservative and suspicious of EPA regulations than the political appointees.”²⁸ Perhaps most important, she does not wrestle with whether the heavy emphasis on cost-benefit analysis and economic training at OIRA may have influenced its performance of its mission.²⁹ Her omissions do not give us confidence that

24. Katzen claims that:

[J]ust 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.

Katzen, *supra* note 1, at 1501 (internal quotations omitted).

25. *Id.* at 1505 (characterizing “protecting the environment” as a “parochial” interest).

26. *Id.* at 1510 (stating that “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”).

27. *Id.* at 1499.

28. Bressman & Vandenberg, *supra* note 2, at 74. Katzen criticizes us for recommending more turnover among OIRA career staff. See Katzen, *supra* note 1, at 1510 (stating that “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”). We made this recommendation because EPA respondents raised questions about whether the career staff had become so entrenched that they disregarded the views of their “political bosses.” See Bressman & Vandenberg, *supra* note 2, at 74. Furthermore, staff rotation or turnover may bring in a fresh perspective that can benefit many organizations. We favor the same for EPA.

29. There is a vigorous debate in the literature regarding whether cost-benefit analysis accounts adequately for the issues presented by environmental regulations, such as quantifying environmental benefits and developing appropriate discount rates for distant costs and benefits.

she is a more objective observer of EPA-OIRA interactions than were the thirty respondents to our survey. The goal of studies such as ours is to make sure that the empirical foundations on which theory is built include data from all perspectives.

In the final analysis, we cannot sort out these issues without further empirical studies. The next step is to survey the views of the PASs and top career managers at other agencies, including agencies that resemble EPA and those that do not. In addition, a rigorous survey of the views of the political and career staffs at the White House would be valuable.

II. DEFINING ACCOUNTABILITY AND EFFICACY

Katzen argues that we have chosen the wrong definitions of accountability. In her view, “transparency” and “responsiveness” really are the same, just two “process” measures of accountability.³⁰ Because EPA offers more process, it is therefore more accountable.³¹ But, Katzen argues, we have left out a substantive definition of accountability that requires an elected official to supervise agency decision-making.³² On that score, she continues, the White House does better.³³

Katzen has no answer, however, to the relative lack of transparency of White House decision-making (compared to EPA decision-making), other than to ask that we recognize that there are advantages to confidential deliberations.³⁴ We recognize that there are advantages to confidentiality. Our survey respondents worried more about the risks that arise from complex and technical decisions being made behind closed doors, and we cannot disagree.³⁵

Compare Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Regulations*, 150 U. PA. L. REV. 1553 (2002), with Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021 (2004). The EPA respondents raised questions about OIRA’s strong focus on quantifying and reducing costs, rather than quantifying and increasing benefits. One respondent remarked that OIRA staffers were “single-minded in their focus on monetizing the benefits of our rules and minimizing the costs.” Bressman & Vandenberg, *supra* note 2, at 74. In our study, we do not take a position on the strengths and weaknesses of cost-benefit analysis. We note here, however, that the very issue subject to debate in the literature is whether OIRA review is biased, as Katzen uses that term, either because cost-benefit analysis is biased or because OIRA staffers use it in that fashion.

30. Katzen, *supra* note 1, at 1502.

31. *Id.*

32. *See id.* at 1503 (noting that we offered a substantive definition of political accountability, but asserting that we did not “embrace” such a definition).

33. We note that current White House practice only meets Katzen’s own definition of political accountability if the sole relevant consideration is “product” rather than “process,” and if we are willing to replace an elected President with unelected executive branch officials. *See id.* (arguing that it is the “product” rather than the “process of the decision-making, that is the key to accountability,” and commenting that “OIRA and the White House offices all work for the president, staff the president, and answer to the president”).

34. *Id.* at 1508.

35. *See* Bressman & Vandenberg, *supra* note 2, at 78, 86 (noting that 97% of EPA respondents stated that White House involvement was either not visible or only somewhat visible to the

In addition, we question whether Katzen's definition of accountability really does any work for her. Elected officials supervise agency decision-making in part to ensure that such decision-making is responsive to the public. This is not the place for a grand debate over the proper definition of accountability. Nevertheless, our data raise questions about whether White House officials, simply by virtue of their proximity to the president, ensure that agency decision-making is responsive to the public than do EPA officials.³⁶

Katzen also criticizes our definitions of efficacy, which include intra-agency coherence and inter-agency coordination.³⁷ We drew these definitions from the leading *proponents* of OIRA review, who use concepts like reducing redundancies and avoiding unintended consequences to justify such review.³⁸ Katzen is another proponent of OIRA review, and she has more than an academic's perspective on the practice. She tells us, from inside OIRA, that 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."³⁹ Fair enough. We are happy to drop that definition, as our data suggest would be appropriate.⁴⁰ Others should do the same.

Katzen also says that our inquiry into whether OIRA stimulates regulatory change is misguided.⁴¹ In particular, she states that "by linking [agency activism and regulatory efficacy], the authors are revealing a bias *for regulation*, not for *regulatory efficacy*."⁴² Stimulating regulatory change is a measure of regulatory efficacy that we took from another important player in the Clinton Administration—Elena Kagan, now Dean of Harvard Law School, who served as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. Dean Kagan argued that the White House may stimulate regulatory change and thereby promote the effectiveness of regulatory decision-making.⁴³ We agree with Dean Kagan that the White House may have that effect. We did not find,

public and that a majority of EPA respondents believe the White House is more susceptible to faction capture than EPA).

36. *Id.* at 83.

37. Katzen, *supra* note 1, at 1506–08.

38. See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 830–31 (2003) (describing OMB's capacity to coordinate agency rule-makings); Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

39. Katzen, *supra* note 1, at 1506.

40. Bressman & Vandenberg, *supra* note 2, at 71 ("[M]ore than 60% of respondents said that OIRA involvement never or rarely helped to avoid inconsistencies, reduce redundancies, or eliminate unintended consequences between or among EPA regulations.").

41. Katzen, *supra* note 1, at 1508.

42. *Id.*

43. See Kagan, *supra* note 11, at 2353.

however, that such activism occurred with any frequency in EPA rule-making during the survey period.⁴⁴

Furthermore, Katzen's assertion that our recommendation reveals "a bias for regulation" on our part could not be further from the truth.⁴⁵ Presidential stimulation of regulatory change need not increase regulation. In fact, the White House could push for regulatory change that accomplishes regulatory ends with less regulation. Our survey and Article do not presume that the White House will increase the number or burdens of regulations, and the claims of bias on this point are unfounded.

Katzen claims that we have given short shrift to the data on the extent to which OIRA promotes inter-agency coordination.⁴⁶ On her reading, the data more strongly support the conclusion that OIRA review works as intended to achieve this purpose.⁴⁷ We noted that the EPA respondents "frequently" responded that OIRA helped inter-agency coordination but that the mean score was "not overwhelming."⁴⁸ We stand by our interpretation. Katzen contends that inter-agency coordination is perhaps OIRA's central role in regulatory review.⁴⁹ We therefore might have expected OIRA to rate highly on this measure. In fact, the most common response to the statement that OIRA promoted inter-agency coordination was that this was "sometimes" true (39%), and almost 25% said it was either "never" or "rarely" true.⁵⁰ It may be that further study will reveal a divide: the PASs of agencies with economic development missions may rate OIRA higher on this measure than those of agencies with environmental, health, and safety missions. But information on that point will have to await further empirical study.

Katzen takes us to task for our analysis of OIRA's role in promoting cost-effectiveness.⁵¹ From our review of the literature, this is the function for which OIRA attracts the most criticism.⁵² In particular, OIRA often is said to press the cost side with less attention to the benefits side in order to slant regulation in a deregulatory direction.⁵³ Of course, as we noted in our Article, there is a competing story—that OIRA prods the agency not to discount

44. Bressman & Vandenberg, *supra* note 2, at 77 ("EPA respondents provided little or no indication that White House involvement spurred the agency to undertake new regulatory activity and only weak indication that it spurred the agency to alter its regulatory priorities.").

45. Katzen, *supra* note 1, at 1508.

46. *Id.* at 1506.

47. *Id.*

48. Bressman & Vandenberg, *supra* note 2, at 71–72, 74.

49. See Katzen, *supra* note 1, at 1505 (noting that the "substantial influence of other federal agencies[] is key to evaluating centralized review of regulations").

50. Bressman & Vandenberg, *supra* note 2, at 72 n.139.

51. Katzen, *supra* note 1, at 1507 (asserting that we "walk[ed] away" from a more neutral interpretation of the data).

52. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

53. *Id.* at 1265.

the cost side in favor of the benefits side.⁵⁴ Our data cannot choose between the two stories, but they do raise cause for concern.⁵⁵ EPA respondents stated that OIRA rarely would help them develop the benefits side and even sought to undermine the science supporting the benefits side.⁵⁶ EPA respondents also stated that they had to spend time shoring up the cost side of their proposals.⁵⁷ These comments do not reflect even-handed treatment of costs and benefits at OIRA. OIRA is a much different beast if performing a neutral role that rationalizes and legitimates agency regulatory decision-making rather than simply reducing regulatory costs.

Katzen believes that there is value in having agencies better defend their regulatory proposals to OIRA.⁵⁸ We agree in the abstract. As an initial matter, though, we are uncertain whether OIRA causes agencies to do “a better job in thinking through and documenting support for their proposals,” as Katzen supposes.⁵⁹ Our data are consistent with a comment made by one of our respondents: “[Y]ou had to sharpen the arguments, which mean[s] you mustered both the scientific and the value arguments.”⁶⁰ Although OIRA undoubtedly forced more careful decision-making and more concern for costs in many cases, in the view of many of our respondents it often caused EPA to bolster a one-sided cost analysis rather than improve its decision-making process overall.⁶¹ In any event, we question whether this role justifies the cost and delay of OIRA review. At best, it seems like only a marginal side-benefit.

III. THE WIZARD(S) OF OZ

Katzen asks why we “devote so much effort to trying to determine whether it is OIRA or the White House that is the true Wizard of Oz behind the curtain?”⁶² We love this analogy, and not just because it casts us as the affable Toto. The problem is that there is no single Wizard behind the curtain. Rather, there is a cast of dozens—as many as 19 different White House offices, and 20 including OIRA—all vying for the controls while conveying the impression that it is the great and powerful unitary executive calling the

54. Bressman & Vandenberg, *supra* note 2, at 51–52, 76, 97 (noting competing story).

55. See Katzen, *supra* note 1, at 1507 (dismissing comments criticizing “OIRA’s review of the science or the risk assessment underlying the proposal or the monetization of lives saved”).

56. Bressman & Vandenberg, *supra* note 2, at 94–95.

57. *Id.* at 77.

58. Katzen, *supra* note 1, at 1507.

59. *Id.*

60. Bressman & Vandenberg, *supra* note 2, at 77.

61. *Id.* (“As one respondent remarked, the EPA staff ‘tended to get energized to clarify or gain support for their position.’”).

62. Katzen, *supra* note 1, at 1503.

shots.⁶³ Katzen would have us pay no attention to that cast of dozens behind the curtain, for they are all just the embodiment of the unitary executive.⁶⁴

But consider the ramifications of that claim for the very theory on which presidential control rests. According to its advocates, presidential control claims power to legitimate agency action within our constitutional structure because the president is a single actor.⁶⁵ As a single actor, the president is uniquely visible, so he may be held responsible when he directs agency action. As a single actor, he is uniquely energetic, so he may direct agency action with dispatch and efficiency. As a single actor, he has a national constituency, so he may represent all the people when he directs agency action.

These are abstractions to be sure. But these abstractions are integral to the legitimacy of the administrative state, as envisioned by presidential control theorists. If White House staffers influence agency action and if they do not share the characteristics of the presidency, then they may give rise to a multi-headed executive, which presents a problem for presidential control theorists. That is why we devote so much time to trying to determine which office is the source of presidential control. We are seeking to explore whether the agencies are subject to the control of the president or merely to the control of another set of unelected officials who may share his general philosophies but disagree even with each other on the actual implementation.

Our data call into question the strongest claims about the unitary executive thesis. EPA respondents often did not know which official or office spoke for the White House.⁶⁶ Even during the Clinton Administration, when OIRA had a Senate-confirmed head and an excellent one at that, EPA respondents did not always perceive her as the woman behind the curtain.⁶⁷ Perhaps worse, EPA respondents often thought that the White House view was reflected by officials other than the OIRA administrator.⁶⁸ Many of these officials have less democratic pedigree to determine regulatory policy than do the EPA respondents. Most White House staffers are selected by the president and serve at his pleasure. But the EPA respondents also are selected by the president. In addition, the EPA respondents are subject to Senate confirmation and are often called to testify before Congress.⁶⁹ They

63. Bressman & Vandenberg, *supra* note 2, at 64 n.107.

64. Katzen, *supra* note 1, at 1503–1504 (“OIRA and the White House offices all work for the president, staff the president, and answer to the president. Thus it is almost meaningless to inquire ‘who is on top’ or even ‘who has the ball.’”) (footnote omitted).

65. For these arguments, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985), and Kagan, *supra* note 11, at 2332–35.

66. Bressman & Vandenberg, *supra* note 2, at 69.

67. *Id.* (noting that, according to EPA respondents, OIRA was frequently in the middle of inter-agency conflict, and, according to one Clinton-era respondent, that it was “[n]ot always clear whether OIRA was carrying other offices’ water”).

68. *Id.* at 66–68 (describing the involvement of other White House offices).

69. Although the OIRA Administrator is subject to Senate confirmation, most White House staffers are not. In addition, although White House staffers occasionally are called to testify before

are subject to Freedom of Information Act⁷⁰ requests, Federal Advisory Committee Act⁷¹ requirements, and Administrative Procedure Act⁷² provisions, including judicial review. They are less able to assert executive privilege. In this sense, they may be more accountable than most White House staffers.

The literature has not squarely addressed the question of who represents the president when the president himself is not directly involved in setting policy. Multiple staffers might claim that privilege, while offering contradictory views. None possess obvious priority in the hierarchy. Indeed, Katzen calls into question whether such a hierarchy even exists. Rather, she suggests that White House and OIRA officials are “all in it together.”⁷³ Yet, when arguing that EPA is not representative of other agencies, she seeks to distinguish EPA because there is an office in the White House dedicated to environmental matters (the Council on Environmental Quality or “CEQ”).⁷⁴ If it doesn’t matter who in the White House is involved, then why does the existence of CEQ distinguish EPA from other agencies? In any event, we are left wondering “who is on top” and “who has the ball” within the White House.⁷⁵ The executive orders on regulatory review provide for a hierarchy of sorts, placing the Vice President and ultimately the President at the top.⁷⁶ But most issues will not rise to the level of vice presidential or presidential involvement. In that vast array of cases, who is responsible for the final decision?

We are concerned about the answer to this question, and other administrative law scholars share our concern.⁷⁷ The unitary executive thesis does not run on a slogan of “we were all in it together.” Rather, it depends on the notion, at a minimum, that the president’s advisors reflect presidential preferences, not their own preferences. We believe that the president should

Congress, the White House often vigorously resists such demands. See, e.g., *Dingell, White House at Odds Over Request For Economic Advisor to Testify on CAFE*, Daily Env’t Rep. (BNA) No. 29, at A-8 (Feb. 13, 2007) (noting dispute over whether White House policy prevents president’s personal staff from testifying before Congress). In contrast, EPA officials testified before Congress ninety-eight times in 1992 alone. Kaufman, *supra* note 19, at 34.

70. 5 U.S.C. § 552 (2000 & Supp. IV 2004).

71. 5 U.S.C. app. §§ 1–16 (2000).

72. 5 U.S.C. §§ 551–59, 701–06 (2000).

73. Katzen, *supra* note 1, at 1504.

74. *Id.* at 1499–1500.

75. *Id.* at 1504 (stating that “it is almost meaningless to inquire ‘who is on top’ or even ‘who has the ball’”).

76. See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993) (providing that “disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President”).

77. One preeminent administrative law scholar, Peter Strauss, has recently expressed concern about this issue. See Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949649 (noting that ordinary decisions are made by “one unelected operative, whose political salience is high, whose expertise is stretched and staff support limited, and whose exposure to public view and obligations of procedural regularity are low”).

care who represents him because democracy is on the line. Thus, we believe that the president is obligated to set up a system for ensuring that his advisors are faithful agents. Otherwise, perhaps the ultimate decision-maker ought to be the one to whom the statute assigns decision-making authority or the one to whom alternative checks attach: dual-branch selection, legislative oversight, procedural regularity, and judicial review. These checks favor the EPA respondents. We grant that White House staffers are closer in proximity to the president, but we are unprepared to conclude without further information that those staffers are better positioned to control policy outcomes on environmental matters than are the EPA respondents.

We make this argument on normative grounds, but we also might frame it in positive political terms. Political scientists have recognized for some time that the president must address the risk that staffers might impose their own preferences. The president confronts an almost overwhelming task of monitoring his advisors to avoid this principal-agent problem.⁷⁸ This management task has grown as the White House seeks to control more and more regulatory matters, and the president is able to clear fewer and fewer. Political scientists have shown that some presidents have managed the White House staff better than others.⁷⁹ But no political scientist has made the extraordinary claim that Katzen seems to be making: Because the president cannot decide every major issue, he should be indifferent to which of his advisors does decide.⁸⁰ From a positive political perspective, the president should care whether his agents reflect his preferences because his legacy is on the line.

In sum, we believe that it matters who behind the curtain is pulling the levers. Katzen was satisfied that the collective adequately represented the Wizard because they were part of the same team.⁸¹ But when reasonable minds *within that team* might radically disagree on a particular policy judgment, we are unprepared to conclude without further information that EPA presidential appointees are less reflective of presidential preferences on environmental issues than any other official.

IV. SELECTIVITY OF WHITE HOUSE INVOLVEMENT

Katzen believes that we are wrong to criticize White House or OIRA involvement in rule-making as overly selective in its focus. As she writes,

78. See, e.g., Samuel Kernell, *The Evolution of the White House Staff*, in *CAN THE GOVERNMENT GOVERN* 185 (John E. Chubb & Paul E. Peterson eds., 1989); Karen M. Hult, *Advising the President*, in *RESEARCHING THE PRESIDENCY* 111 (George C. Edwards, John H. Kessel & Bert A. Rockman eds., 1993); Terry M. Moe, *Presidents, Institutions and Theory*, in *RESEARCHING THE PRESIDENCY*, *supra* at 337.

79. See Kernell, *supra* note 78, at 189–92 (describing different administrations).

80. See Katzen, *supra* note 1, at 1504 (arguing that it is “meaningless” to worry about who among the many White House officials is actually making the final decision because such officials are “all in it together,” even if they do not agree with one another.).

81. See *id.* at 1503–04.

“selectivity is an important and effective management tool—if you looked over everything, you might well lose the forest for the trees.”⁸² She describes us as saying 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.’”⁸³

From an internal management perspective, maximum flexibility often seems like the better move. The White House and OIRA remain free to choose which proposals they will scrutinize, and at what level of intensity. But the question is whether democracy demands a better understanding of how government works. If proponents of the strong president model wish to legitimate agency decisions, then we might expect to know *which* decisions. Furthermore, we might demand reassurance that such decisions are selected on the basis of some public-regarding criteria rather than the personal proclivities of individual officials.⁸⁴

Katzen suggests that the success of any model depends on how well the political leadership uses it.⁸⁵ We certainly agree. Our point, however, is that on complex regulatory matters, the public lacks any way to evaluate how well the political leadership uses the model unless they explain the basis for their decisions. We are not alone in this demand. Other scholars have recommended more transparency from the White House.⁸⁶ And Administrator John D. Graham, in the George W. Bush Administration, took some action on that front, putting in place measures to help the public better evaluate OIRA involvement in particular rule-makings—and some of those measures built on the innovations that Katzen herself put in place.⁸⁷

Our point goes one further. We seek more information from the White House not only about the extent of its involvement in particular rule-makings, but also about its process for determining in which rule-makings

82. *Id.* at 1509.

83. *Id.*

84. See Strauss, *supra* note 77, at 39 (characterizing White House involvement in agency decision-making as “the product of a politically driven accident making this one issue salient, out of the thousands that remain unattended—a bolt of lightning hurled by an unelected operative”).

85. Katzen, *supra* note 1, at 1509.

86. See, e.g., Croley, *supra* note 38, at 879 (acknowledging room for improvement in OIRA review, particularly as to transparency); Kagan, *supra* note 11, at 2337 (advocating greater transparency for White House involvement in agency decision-making).

87. See John D. Graham, Memorandum for OIRA Staff (Oct. 18, 2001), http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html (stating that “the transparency of the OIRA’s regulatory review process is critical” and describing steps to make available draft regulations, agency analyses, other material submitted by the agency, change pages, correspondence between OIRA and the agency, and correspondence between OIRA and outside parties); Testimony of Sally Katzen, Adjunct Professor and Public Interest/Public Service Fellow, University of Michigan Law School before the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law on Feb. 13, 2007, <http://judiciary.house.gov/OversightTestimony.aspx?ID=726> (noting that Executive Order 12,866, of which she was a principal architect, improved the transparency of the OIRA review process).

to get involved.⁸⁸ We do not recommend that the White House or OIRA reveal every aspect of their management process. Rather, we ask for more transparency and more regularity.⁸⁹ We recognize and respect the countervailing pull for flexibility. In the end, we believe that the White House and OIRA could do a better job without sacrificing the maneuvering room necessary to effective management.

CONCLUSION

We are fortified by the interest that our Article has generated in empirical study of White House involvement in agency rule-making. We are certain now that the debate has finally been joined. Our data show a picture of White House involvement from the agency side. Perhaps it is not surprising that the agency picture is more complex and less positive than the White House picture. What that tells us is not that the data are biased but rather that we are coming closer to seeing how this important practice works in reality, not just in theory or in the views of a select few. Only when we see clearly how White House involvement in agency rule-making does work may we think sensibly about how it should work.

* * *

Authors' Note: We encourage Professor Katzen to publish a surrebuttal, as we would like to see this debate continue.

88. Bressman & Vandenberg, *supra* note 2, at 91-95.

89. *Id.*