

Modern Management for the Administrative State

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NOTWITHSTANDING THE RECENT “bossless workplace” fad,⁷⁵ an organization generally needs a clear hierarchy with established lines of control and accountability to function effectively. A representative, deliberative body like the U.S. Congress has no such structure—the objectives and actions of its members are subject only to approval or rebuke at the ballot box. That arrangement has many benefits in promoting democratic governance and protecting against the dangers of consolidated power. But it also has severe limitations with respect to efficiency and effectiveness.

The administrative state represents a response to those limitations, and its legal justifications rest heavily on its purported technocratic and managerial excellence. But because of the ad hoc and legally ambiguous manner in which it emerged, it is also the arm of the federal government whose hierarchy and management is least well defined. The president, as head of the executive branch, is the only constitutional officer who might plausibly assert the prerogatives of control. But the U.S. Constitution barely alludes to an administrative state and grants the president no enumerated authority over domestic affairs except to nominate department heads, request their written reports, and “take Care that the Laws be faithfully executed.”⁷⁶ His actions must rest on those provisions, his general possession of “the executive power” of the United States, or authority inferred from the Constitution’s other structures.

Presidential oversight has thus evolved haphazardly through an administrative common law of congressional acquiescence, judicial rulings, and executive orders. As early as 1789, James Madison argued on the floor of the House of Representatives that the president *must*

have the power to not only appoint but also remove cabinet officers, because “if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws.”⁷⁷ As recently as October 2016, the D.C. Circuit struck down provisions of the 2010 Dodd-Frank Act that sought to insulate the Consumer Financial Protection Bureau from those very same powers.⁷⁸

Of course, if one’s goal for the administrative state is to divorce the bureaucracy from the democratic process and clear the field for whatever regulatory action it deems appropriate, haphazard oversight might be desirable. But if the goal is an administrative state that strikes an effective *balance* between democracy and bureaucracy — that produces not just copious but also cost-effective regulation, that pursues an agenda consistent with the broader priorities of the government, and that remains legally and politically accountable to the republican structures of power established by the Constitution — then someone must be in charge. And that someone must be the president.

This view has often been associated with conservative efforts beginning with President Ronald Reagan to slow the machinery of government and reduce the extent of regulation. But “presidential control of administration, in critical respects, expanded dramatically during the [President Bill] Clinton years,” observed Elena Kagan, the then-recently departed deputy director of Clinton’s domestic policy council, “disproving the assumption some scholars have made, primarily on the basis of that earlier [Reagan-era] experience, that presidential supervision of administration inherently cuts in a deregulatory direction.”⁷⁹ She continued:

[A]ccountability and effectiveness [are] the principal values that all models of administration must attempt to further. I aver that in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.⁸⁰

Recent presidential administrations have made only fitful progress in this direction. Sometimes political and legal obstacles have prevented assertion of firm control. In other cases, the president has found

convenient the ambiguity of roundabout or behind-the-scenes influence. Throughout, agencies have resisted efforts at supervision.

The result is a strange bargain struck amongst the branches, in which Congress and the courts have allowed enormous authority and latitude to congeal within the administrative state on the assumption that its strength will be diluted and its exercise impaired by the unmanageability of the apparatus. That is no way to run a government. Nor is the equilibrium, subject to ever-greater abuse by the president, stable in the long run (as some people comfortable with the Obama-era “pen and phone” model⁸¹ of the presidency discovered when faced with the prospect of a Trump administration).

If there is to be an administrative state, it should be managed by a White House that establishes processes and standards, controls budgets and timelines, directs activities, and must provide final authorization for formal action. But the net effect should not be an aggrandizement of the presidency; rather, as discussed elsewhere in this report, reforms in the other branches are necessary to account for this more energized office and to cabin its reach. The end goal should be an executive branch with narrowed scope of authority but greater capacity to use effectively the authority granted.

MODERN PRESIDENTIAL ADMINISTRATION AND THE EMERGENCE OF OIRA

George Washington “imposed his will through a consistent style of broad consultation, independent judgment, and continuous oversight,” reports Professor Jerry Mashaw.⁸² Still, most accounts of presidential administration begin in the Nixon administration, which imported specialists in cost-benefit analysis from the Army Corps of Engineers to establish the “Quality of Life Review” program.⁸³ Under QLR, agencies were required to submit to the Office of Management and Budget a schedule of planned regulatory actions “pertaining to environmental quality, consumer protection, and occupational and public health and safety” and then to provide information, including an analysis of costs and benefits, at least 30 days prior to each action.⁸⁴

President Carter replaced QLR with his own Office of Regulatory and Information Policy⁸⁵ and engaged in several high-profile battles with his Environmental Protection Agency in particular. EPA Administrator Douglas Costle warned White House economic advisors Alfred Kahn

and Charles Schultze that their requests for additional economic analyses of pending regulations were “inappropriate . . . counterproductive, contrary to the intent of Congress and not in the public interest.”⁸⁶ During congressional hearings on the issue, Senator Edmund Muskie complained to the *Washington Post* that “it’s not Schultze’s business to write the laws” and that the White House was influencing regulations “off in a corner, ad hoc, without the safeguards of exposure to public opinion.”⁸⁷

The White House, for its part, announced that EPA officials “should be aware that their resignations will be gladly accepted at the earliest opportunity and should not be hesitant at all in offering them.”⁸⁸ In a news conference several months after the hearings, President Carter lamented: “Before I became President I realized and was warned that dealing with the Federal bureaucracy would be one of the worst problems I would have to face. It’s been even worse than I had anticipated.”⁸⁹

President Reagan, swept into office on an explicitly deregulatory agenda, consolidated and extended these nascent efforts and effected a genuine “sea change”⁹⁰ in White House oversight. Executive Order 12,291⁹¹ introduced the framework that persists to this day, in which agencies must submit significant regulatory actions for review by the Office of Information and Regulatory Affairs at OMB (which in turn resides within the Executive Office of the President). This order was modified and, in significant respects, expanded by President Clinton’s Executive Order 12,866.⁹² Presidents George W. Bush and Obama have made further revisions, but 12,866 remains the law of the administrative land.⁹³

Order 12,866 begins by outlining a series of broad principles to which an agency should adhere, such as clearly defining problems it seeks to address, reviewing alternative approaches, assessing costs and benefits and acting only where the latter justifies the former, and taking consideration of “incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.” The order assigns to OMB (and OIRA therein) the role of reviewing regulations for consistency with law and with “the President’s priorities,” providing guidance on methodologies and procedures that affect multiple agencies, and assisting in regulatory planning. It designates the vice president as the president’s principal advisor, responsible for coordinating the development of recommendations on regulatory policy, planning, and review.

The heart of the order is its processes for setting regulatory agendas and reviewing proposed regulations. The agenda process begins with an annual meeting of agency heads convened by the vice president to “seek a common understanding of priorities and to coordinate regulatory priorities” for the coming year. Each agency must provide to OIRA an agenda of all regulations it intends to pursue, and, for each of the “most significant regulatory actions,” it must also provide a regulatory plan that includes a statement of objectives and legal basis, preliminary estimates of costs and benefits, and an expected timeline for action. OIRA circulates these agendas and plans amongst agencies for purposes of coordination and publishes them each October in a “Unified Regulatory Agenda.”

The review process begins with the agency’s agenda submission, which OIRA may modify by moving actions into or out of the “significant” category—only those actions designated as “significant” are subject to subsequent review. Agencies must submit to OIRA draft text for significant actions along with detailed cost-benefit analyses and allow OIRA 90 days for review (with exceptions for shorter or longer reviews). OIRA may then “return” an action to the agency “for further consideration of some or all of its provisions,” specifying in writing the provisions of the order that provide the basis for such return; an agency head may in turn inform OIRA in writing if he disagrees with these bases. The president, or the vice president acting on his behalf, has final authority to resolve any conflict that OIRA and the agency cannot resolve themselves.

Debate about presidential oversight—and its evolution across administrations—has focused on two issues, one substantive and one legal. The substantive question concerns the propriety and effectiveness of cost-benefit analysis as a lens through which to evaluate regulation. (For more on this issue, see the discussion of cost-benefit analysis below.) The legal question concerns the president’s authority to influence or direct agency action and has been central to the form oversight has taken and the obstacles it faces. Many statutes, after all, delegate authority to a secretary or administrator, not to the president or his own staff. *Ex ante*, can the president direct an agency how to act? *Ex post*, can he veto agency actions he dislikes? As a last resort, can he fire disobedient subordinates?

Most formal analysis and litigation has centered on this last issue: the power of removal. From debates in the first Congress to the impeachment of President Andrew Johnson, the president’s power to

remove executive-branch officials was sporadically contested until the Supreme Court's holding in *Myers v. United States* (1926) that Congress may not interfere with that prerogative.⁹⁴ Subsequent holdings have limited the power to “purely executive officers” (allowing Congress to establish independent agencies like the Federal Trade, Election, and Communications Commissions)⁹⁵ and then specifically to situations where its loss would “interfere impermissibly with [the president’s] constitutional obligation to ensure the faithful execution of the laws” (allowing Congress to establish an independent counsel accountable only to the Attorney General).⁹⁶

Regardless, a well-established removal power has not translated to clarity over the extent to which the president may review, let alone direct, agency action. Mirroring the removal-based distinction between traditional and “independent” agencies, executive orders have presumed authority to review actions of the former but tread carefully on asserting any influence over the latter. Order 12,866 excludes independent agencies from its review processes but includes them in its agenda-setting processes.⁹⁷ (The constitutional question of whether the White House *can* subject independent agencies to oversight or control is beyond the scope of this report; to the extent it *can*, the recommendations below assume it *should*.)

Congress took strong issue with the review power of President Nixon’s QLR, subjecting it to “intensive hearings” and “severe criticism”; Senator Muskie threatened to slash the budget of President Carter’s review team.⁹⁸ When the Reagan administration issued Order 12,291, it was accompanied by an opinion from the Office of Legal Counsel laden with caveats:

This power of consultation would not, however, include authority to reject an agency’s ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative.⁹⁹

The order itself acknowledged the delicacy by stipulating that OIRA would impose requirements and agencies must comply with such requirements only “to the extent permitted by law.” Order 12,866

adopted this formulation and further specified that “[n]othing in this order shall be construed as displacing the agencies’ authority or responsibilities, as authorized by law.”¹⁰⁰

By contrast, an opinion issued the same year as Reagan’s order by the Court of Appeals for the D.C. Circuit, upholding oversight activities conducted in the Carter administration, suggested the scope of authority might extend much further:

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.¹⁰¹

But the limits of that authority have never been tested in court nor challenged formally by Congress. One critical innovation of Clinton’s Order 12,866 is its assertion of presidential authority to mediate and resolve disputes between agencies and OIRA, which would imply that by siding with OIRA the president could force an agency to take action it opposed.¹⁰² That authority was “never really used within the OMB process,” according to Kagan,¹⁰³ but “[a]s a theoretical matter . . . the conflict resolution provision of the Clinton executive order constituted a striking assertion of executive authority.”¹⁰⁴

Outside the OIRA context, however, President Clinton made frequent use of directives instructing agencies on what actions to pursue. Kagan viewed this “powerful mechanism for steering the administrative state toward Clinton’s policy objectives”¹⁰⁵ as one of the primary innovations of the Clinton administration, but also acknowledged that “[t]he courts never have recognized the legal power of the President to direct even removable officials as to the exercise of their delegated authority.”¹⁰⁶ Agencies followed the directives, so no legal issues arose. The George W. Bush administration and then especially the Obama administration have proceeded in much the same manner.¹⁰⁷ It remains an open question what would happen — inside or outside the OIRA review process — if an agency refused to obey.¹⁰⁸

THE OIRA QUAGMIRE

The gradual advancement of presidential control, through a no-man’s-land of legal ambiguity, may have been the only plausible course.

“Congressional preferences at the time tended to be highly skeptical of the regulatory-review regime,” noted Professor Michael Livermore:

Indeed, funding for OIRA’s entire regulatory-review operation was cut temporarily by Congress, because of fears of presidential overreach. Only after the OIRA Administrator was made subject to Senate confirmation was funding restored. . . . President Reagan also faced agency resistance to the imposition of regulatory review. Political scientists describe a “cycle of accommodation” between new presidential administrations and the existing federal bureaucracy in which “initial suspicion and hostility” on the part of incoming political appointees is gradually replaced by a relationship of “mutual respect and trust.” This road is not always smooth.¹⁰⁹

But rather than an efficient and accountable method of administration, organization design guided by legal gamesmanship has produced a quagmire. To the extent a president is satisfied with agency behavior, OIRA provides a rubber stamp and a gloss of objective technocratic assessment to the promotion of a politically determined agenda. If he is dissatisfied, it offers him only convoluted and notoriously bureaucratic responses, which have the counterproductive effect of encouraging further agency chicanery.

Because OIRA purportedly limits itself to “review,” “oversight,” “supervision,” and “consultation,” it relies on procedural responses to ill-advised regulatory proposals. It stalls their progress, requests additional information, or sends them back for reconsideration. It has relied on absurd sources of leverage like the legal requirement that OMB must approve agency information-gathering efforts to “get at a lot of rules.”¹¹⁰ Conversely, the Department of Justice has advised White House staff to avoid public involvement in agency action altogether, lest it negatively affect subsequent litigation.¹¹¹

Fear of over-centralization — or at least its perception — has also led to severe understaffing at OIRA, which had approximately 80 professional staff at the time President Reagan issued Order 12,291 but only about 40 as of 2012.¹¹² Its annual budget during that period fell from \$9.3 million to \$6.8 million (in constant 2005 dollars) — amounting now to roughly one in every \$7,000 spent by federal agencies on

regulatory activity.¹¹³ EPA alone has more than twice as many environmental economists as OIRA has total personnel.¹¹⁴

Unsurprisingly, agencies have found it worth their while to resist OIRA's influence. So-called "OIRA avoidance"¹¹⁵ can take many forms, including: underestimating the cost of rules or breaking rules into multiple parts to make them appear less significant; acting via guidance documents instead of formal rulemakings; producing intentionally opaque analysis; or timing submissions to ensure inadequate opportunity for review.¹¹⁶ Suffice to say, none of these behaviors furthers the causes of good government, efficient administration, or high-quality regulation.

The attempts to increase formality and quantification in regulatory processes have also redounded to the benefit of agencies, as asymmetries in information and expertise developed in their favor. Cost-benefit analysis, for instance, is supposed to equip OIRA with a tool to assess the wisdom of proposed regulation and check agency excesses. But it is the agencies, not OIRA, that have built the staff and developed the methodology used in their analysis.¹¹⁷ In addition to its superior in-house capacity, EPA also utilizes external consultants to support the vast majority of its largest analyses¹¹⁸ and relies heavily on hundreds of third-party research papers of which it is often the primary sponsor.¹¹⁹ Those consultants will tend to buttress the conclusions EPA prefers. The leading topic of economics research funded by EPA is how to assign monetary values to the environmental benefits it claims to achieve.¹²⁰

Former Obama EPA official Lisa Heinzerling has criticized the claim that agencies "avoid" OIRA, but not because she believes they act at all times in good faith. Rather, her experience with the Obama-era OIRA was that:

The distribution of decision-making authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow—or allow agencies to follow—most of the transparency requirements of the relevant executive order.¹²¹

Resistance is futile not because OIRA functions too well to fool, but because it is too unpredictable to strategize against. OIRA, in Heinzerling's

view, ignores the dictates of relevant executive orders and follows a “common law” that “manages to muddy the seemingly simple question: who runs EPA? Long gone, it appears, is the carefully articulated power structure of EO 12,866, with its process for elevating issues and for deciding them once elevated. In its place, a free-for-all of regulatory power has emerged, with no one clearly in charge.”¹²² Such behavior is a foreseeable result of living too long in administrative law’s Wild West.

The contortions, counter-contortions, and general lawlessness all derive from a single source: ambiguity about whether the president has the legal authority to direct agency action. Presidents have been hesitant to claim the authority and agencies have been hesitant to challenge it, both for fear of ensuing political crises and of losing power if the question were ultimately decided against them. Yet the debate is almost entirely academic.

What would it mean to have a constitutionally cognizable power of “direction”? The president could issue a directive and, if disobeyed, could respond by removing the delinquent official. Alternatively, he might seek to deprive that official and his department of subsequent resources through the OMB’s budget process.¹²³ But if those are the only remedies (what other could exist?), then they are the only powers that matter. And they are ones that the president already possesses.¹²⁴

This is precisely the model operating in formally hierarchical corporate structures, which presidential administrations incorrectly assume they cannot emulate without an explicit power of direction. No boss holds a legal power of “direction” over a subordinate: the recourse for disobedience is not a judicial order to compel action; it is a pay cut or demotion or firing. If the CEO is dissatisfied with product design, he cannot “direct” better design; he can put someone else in charge. In the administrative-law context, scholars will often emphasize the political cost associated with removal. But private-sector firings come with very real political costs—with other employees, customers, vendors, and partners—as well as very real financial and operational costs. *How do I get these people to do what I want them to do* is at the top of every manager’s mind every day. That does not prevent management systems from operating against the background presumption of directive authority that accompanies the concrete power of removal.

Administration of the executive branch should begin from the same premise. The president and his staff should be firmly in control and

have the resources required to exercise that control. Conflicts will surely arise, necessitating compromises and removals. But a baseline assertion of directive authority is critical not only to addressing the maddening inefficiencies of the present system, but also to restoring accountability to the administrative state.

EFFECTIVE MANAGEMENT OF THE ADMINISTRATIVE STATE

A president committed to reform should aim both to achieve substantive improvements in management of the administrative state and to entrench those reforms against successors who might reverse course. Actions by other branches could meaningfully reinforce such commitment mechanisms—for instance, Congress could pass legislation requiring presidential approval of new regulations (for more on congressional actions, see “Reasserting Congress in Regulatory Policy,” p. 19) and courts could modify their doctrines of deference and scrutiny to afford more leeway to regulation where the president has played a central role¹²⁵ (for more on judicial actions, see “Reforming Administrative Law to Reflect Administrative Reality,” p. 51). But for the proposals described here, no such support is necessary. The reforms we propose fall into three categories: organization structure and decision-making authority, centralized planning processes, and information and methodologies.

The critical first step in improving presidential administration, necessary to subsequent reforms, is a clear assertion of presidential control. The president should formally establish that authority in his executive order governing review of regulatory action and, in particular, should require that all agency actions with force of law to be published in the Federal Register receive his signature first. This step has the substantive effect of eliminating the ambiguity surrounding the executive-branch hierarchy. It also serves as a commitment mechanism because a future president would be unlikely to take the formal legal step of disavowing responsibility for approving the actions of his own administration.

Signing every new regulation would undoubtedly consume significant time (though likely more so for White House staff required to review and summarize each item than for the president himself), but this is hardly a disadvantage of the process. Insofar as it is the legal obligation of every individual and organization in the nation to comply with not only each new edict but also the entire mass of pre-existing ones, it hardly seems unfair to require the politically accountable

supervisor of the regulatory apparatus at least to study each incremental addition as it emerges. A claim that “we cannot keep up with the rate of new regulation our agencies are issuing!” induces little sympathy. Increased awareness within the White House policymaking staff of the sheer volume and complexity of regulatory activity should also have a salutary effect on their own calculations regarding the costs and benefits of new initiatives.

Any conflicts that might arise between a congressional or judicial command to regulate by a certain date and a president’s refusal to approve such regulation would be similar in character to conflicts that might arise today between those other branches and officials within an agency. Where it is administration policy to reject the command, elevating the conflict to one between Congress or court and the president is desirable, both because the fight is a “fairer” one and because it will focus attention on the most politically accountable actors. An agency official unwilling to stand by the president in such a conflict would of course have the option to resign, a consideration which in turn might influence the president’s willingness to trigger an inter-branch confrontation.

OIRA should be expanded dramatically, as befits its actual role as the headquarters of the administrative state.* Its resources should be of sufficient *quantity* to keep abreast of actions occurring across all federal agencies and conduct the management functions described below and of sufficient *quality* to hold its own against specialists within those agencies. While this would be expensive relative to OIRA’s current budgetary footprint, its cost would remain minuscule relative to the overall cost of federal regulation and relative to the benefit that even occasional and marginal improvements in that regulation would bring.

Importantly, OIRA should be funded *by the agencies* and in proportion to the volume of regulation they produce. For instance, if agencies were required to allocate to OIRA operating funds equal to 3% of the

* Congress would ideally leave OIRA to play its originally intended role as a coordinator of information flows, while establishing a separate office within the Executive Office of the President — perhaps to play the role of both the current Domestic Policy Council and the current OIRA. But the ideal organization of EOP, and congressional versus presidential responsibility for establishing it, is well beyond the scope of this report.

cost of the regulations they publish, OIRA's budget would increase approximately 30 fold,¹²⁶ while agencies would see their budgets for regulatory activity reduced in aggregate by half of 1%.¹²⁷ This tradeoff should significantly increase the overall quality and net benefits of federal regulation, even with marginally fewer resources left to the disposal of each agency.

A funding structure tied directly to the cost of proposed regulations would also create a strong incentive for OIRA to focus intently on regulatory costs. Agency personnel understandably prefer to emphasize the benefits of proposed regulations and have invested considerable resources in equipping themselves to make those benefits appear as large as possible. An effective regulatory process requires the counterbalance of another key actor giving comparable attention to the cost side of the equation.

The president has significant latitude to shift necessary resources from the agencies into OIRA through his own budget proposals and through the flexibility inherent in congressional appropriations. Even in the face of direct obstruction by Congress, a White House could approximate the desired allocation by commandeering and directing resources within the agencies themselves or seconding those resources into OIRA. Unlike in situations when a president improperly substitutes his own legislative preferences for those of the Congress, the executive is at least a co-equal branch when the issue is what organizational structure will best ensure that the laws are faithfully executed.

Ideally, though, efforts to significantly strengthen OIRA would be welcomed by Congress in the context of broader reforms to the administrative state that enhance the latter's budgeting and regulatory-oversight powers. The goal, as noted above, should not be a net aggrandizement of the president's power. Rather, Congress should ultimately have greater control over the parameters within which the president's administration operates, while the president should have greater control over his administration's operation within those parameters.

Next, reformers should institute centralized planning processes, focusing first on a regulatory budget. The concept of holding the federal government to a "regulatory budget," limiting the cost of regulations just as the fiscal budget limits expenditures from the Treasury, dates at least to the Carter administration and was highlighted by President Carter in his 1980 Economic Report of the President.¹²⁸ Jeff

Rosen provides a comprehensive assessment of current options for such a process in the spring 2016 issue of *National Affairs*.¹²⁹ But while most proposals assume that Congress would establish the process and legislate the budgets, Congress already struggles to perform its fundamental fiscal-budgeting duty. Further, a president committed to pursuing regulation in excess of a congressionally-set “budget” would find no shortage of mechanisms for circumventing the attempt at control.

The better promise for a regulatory budget lies in its use as a tool of presidential administration, in a context where the president has asserted the authority necessary to hold agencies to their regulatory appropriation. In a centrally governed administrative state, a regulatory budget would be a critical tool for communicating the policy priorities and expectations of the president to the agencies, setting *ex ante* limits on their agendas and forcing them to conduct their own exercises in prioritization before moving forward with new proposals. A regulatory budget would also give an agency a strong, ongoing incentive to conduct retroactive reviews of existing regulations that might identify opportunities to reduce cost, thereby increasing scope for new action. By contrast, such reviews, when they are required under the current regulatory-oversight regime, represent for an agency a thankless chore of acknowledging past shortcomings. (Unsurprisingly, such reviews have tended to achieve little.¹³⁰) A properly staffed OIRA would have the resources both to conduct the budgeting process and to monitor ongoing compliance.

Once established by a president committed to effective management of and constraints on the administrative state, a regulatory-budgeting process would be difficult to unwind. This is because the process has value not just as a tool of administration but also as one of transparency and accountability. A regulatory budget would assign concrete values to the costs each agency imposes on the nation and the trend in those costs over time. A positive budget for a given agency in a given year would indicate an affirmative decision to increase regulation in that area; a default value of zero would indicate an intention to maintain the status quo and a requirement that the agency find regulations to remove for every new one it might seek to impose; a negative budget would indicate an intention to reduce regulatory burdens. One could envision a proposed regulatory budget becoming a presidential platform staple just as tax and spending plans are today. It is much harder to envision, against this backdrop, a president announcing his intention

to simply stop keeping track or setting goals. While Congress is ill-suited to act first in this area, it might eventually codify in legislation an already-proven process, further entrenching the practice and asserting its own role in directing the rate of rulemaking.

Regulatory reformers should also institute a tiered review system. Section 4 of Order 12,866 specifies the “planning mechanism” overseen by OIRA, including an annual planning meeting to coordinate regulatory efforts across agencies and the creation by each agency of a “regulatory plan,” highlighting the significant regulatory actions it expects to take that year.¹³¹ Only those actions deemed “significant” are then subject to OIRA review.¹³² Whether one credits the concerns that agencies actively seek avoid OIRA review or Heinzerling’s experience that OIRA defines its jurisdiction arbitrarily, the result is one set of planned regulations “in” the review process and another set “out” of it. That decision should not be binary, nor necessarily tied to a faux-objective standard of significance.

For instance, the most important or politically sensitive actions — regardless of expected cost — might fall into an “intensive” category that requires regular engagement from both OIRA and the White House. Other actions might require only progress reports on a pre-established timeline. Some could be deemed “pre-approved” and require no further involvement. Where appropriate, actions should have not only milestones in the development process but also targeted results that are evaluated after enactment. OIRA, not the agency, should dictate the mechanisms for managing the rulemaking process and, upon review of an agency’s agenda, choose which mechanism is most appropriate to a given action.

For regulatory reforms to be effective, they must also include improvements to the information and methodologies used by the agencies, starting with cost-benefit-analysis standards. OMB maintains a document called “Circular A-4,” which “is designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”¹³³ But while the document provides detailed (and generally very good) guidance on best practices for conducting cost-benefit analysis, the only guideline it offers for acceptable inputs to an analysis is a recommended range of discount rates.

Yet many cost-benefit analyses require a standard set of inputs and should be guided by a common set of assumptions. Perhaps best known

is the concept of the “value of a statistical life,” used to calculate a monetary “benefit” for a life “saved.”¹³⁴ Estimates for this value can range by an order of magnitude, and, despite its self-interest in choosing the highest possible value, the EPA has become the *de facto* standard setter for the U.S. government (it recently concluded that its clean-air regulations alone have delivered more than \$1 trillion in annual benefits).¹³⁵ Such methodological decisions have much greater influence on the trajectory of the administrative state than any given regulation could, yet it is the occasional tree rather than the forest that occupies OIRA’s time today.¹³⁶

An important counter-example is the Social Cost of Carbon (SCC), an estimate developed by an interagency working group within the Obama administration for the long-term costs associated with climate change and the marginal cost imposed by emitting a ton of carbon-dioxide.¹³⁷ Both the conceptual and technical merits of that particular exercise deserve a great deal of skepticism,¹³⁸ but the establishment of a standardized value is admirable. As with many of the proposals here, it serves dual purposes of improving management within the administration and improving accountability and transparency externally. The decision of a future administration to significantly increase or decrease the SCC — whether for political or scientific reasons — would significantly impact regulatory analyses and would also send a highly salient public signal of a shift in the government’s climate policy.

Another important benefit of centralized, standardized assumptions would be the opportunity to ensure emphasis on regulatory *costs*. While agencies have invested significant resources in assigning large values to the benefits of their proposed regulations, they have shown no comparable interest in capturing costs. In some cases, analysis of a rule will include the following: second- and third-order benefits that are highly attenuated and speculative, like lower air pollution leading to fewer cases of childhood asthma leading to fewer missed workdays for parents;¹³⁹ “co-benefits” that comes not from addressing the legally cognizable target of regulation but rather from a side-effect the agency lacks authority to pursue directly;¹⁴⁰ and/or “private benefits” that accrue to private actors forced to make choices a regulator believes to be for their own good, like purchasing more costly but fuel-efficient vehicles.¹⁴¹ Benefits like these accounted for the overwhelming majority of total benefits claimed by agencies for their regulations during President Obama’s first term.¹⁴²

Yet often the only costs even considered are the immediate compliance

costs of regulated firms, while no consideration is given to the negative economic effects rippling outward.¹⁴³ When broader economic impacts are considered, they can be minimized through obscure technical details—for instance, the Department of Energy recently concluded that new requirements raising the cost of commercial refrigeration equipment would lead to *no* reduction in demand for that equipment.¹⁴⁴

Thus, effective guidance from OIRA to agencies could standardize analysis, limit speculative and attenuated claims of benefit, and ensure cost received equal attention. Alongside the SCC, it could provide a default price elasticity of demand and presumed multipliers that translate direct compliance costs into reduced capital investment, employment, and productivity.¹⁴⁵ Alongside the value of a statistical life, it could produce the value of a statistical job—taking into account the voluminous research linking unemployment to negative economic and health outcomes for both individuals and their families.¹⁴⁶ Agencies would be free to argue, based on the specific circumstances of a regulation, for values other than the defaults. But the final decision would be OIRA's.

OIRA's expanded resources should be used not just to employ additional personnel but also to fund third-party research and support a broader ecosystem of academics and private-sector specialists, just as agencies do today. But whereas current incentives are weighted heavily toward validating agency actions, OIRA's participation would shift that balance toward a more productive emphasis on the quality and rationality of regulation.

As noted above, research efforts to quantify the effect of regulation on capital investment, employment, and productivity could significantly improve the quality of cost-benefit analysis. Broader issues like the obstacles to entrepreneurship or the effects of uncertainty and litigation risk would also benefit from additional study. Perhaps most important, OIRA would be best positioned to study the empirical questions of how real people perceive the tradeoffs that cost-benefit analyses attempt to simulate and conduct retrospective reviews of how closely results tracked forecasts. How do people perceive improvements that have been achieved in environmental quality and how do they value them? In what situations do people want to see industrial activity expanded versus constrained, or to pay more for more safety? Did compliance ultimately cost more or less than expected and did fatalities decline or efficiency improve as much as hoped? In some instances, OIRA might even design and incorporated

controlled studies into the implementation of some new regulations.

The ideological orientation of OIRA, and the questions it asks, would change across administrations. That is a good thing.¹⁴⁷ While OIRA would, by its nature, tend to be more skeptical of regulation than the agencies themselves, one could envision a president even more aggressive than agency personnel in his regulatory approach. Regardless, once created, knowledge would persist. A president eager to denigrate the value of regulation would remain constrained by well-established data and methodologies to the contrary, and vice-versa.

AGENCIES AND THE EXECUTIVE

At first glance, this proposed role for OIRA might appear to swallow the agencies whole. But that is only because, in an era of expansive congressional delegation, rulemaking and other regulatory actions have come to seem like the core role that agencies play. In fact, most of what agencies do—from information gathering and monitoring to permitting and management of day-to-day operations to enforcement and adjudication—is the actual work of the executive branch for which they were constituted long before they were thrust into the role of substitute legislators.

In a well-functioning government, the president would continue to leave those responsibilities to his chosen secretaries and administrators. But to the extent agencies must behave as a quasi-legislature for the sake of the modern administrative state, they will best serve the public if subject to the control of the democratically elected chief executive.

69. Government corporations, meaning those federal agencies that are natural monopolies providing commercial products and services (the Postal Service and the St. Lawrence Seaway Corporation, for example), can safely continue as self-funded entities.
70. Yuval Levin, “Four Steps for Reviving the First Branch,” in *Restoring Congress as the First Branch*, ed. Kevin R. Kosar et al., R Street Institute policy study no. 50, January 2016.
71. The House and Senate full appropriations committees would be eliminated as the roles would be absorbed by the joint congressional budget committee and the small appropriation committees.
72. A modest reform would have Congress work five days a week for three weeks out of every five weeks.
73. Kosar, “How to Strengthen Congress.”
74. Philip Wallach and Kevin R. Kosar, “The Case for a Congressional Regulation Office,” *National Affairs* (Fall 2016).

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75. See, for example, Avinoam Nowogrodski, “The Bossless Workplace: A New Frontier,” *Entrepreneur*, October 20, 2015, <https://www.entrepreneur.com/article/250052>.
76. U.S. Const., art. II, § 3.
77. 1 *Annals of Cong.* 463 (1789).
78. See *PHH Corp. v. Consumer Financial Protection Bureau*, slip op. (D.C. Cir. 2016); see also *Free Enterprise Foundation v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).
79. Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245, 2248-49.
80. *Ibid.*, 2251-52.
81. See, e.g., Jennifer Epstein, “Obama’s Pen-and-Phone Strategy,” *Politico*, January 14, 2014, <http://www.politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151>.
82. Jerry L. Mashaw, “Recovering American Administrative Law: Federalist Foundations, 1787-1801,” *Yale Law Journal* 115 (2006): 1256, 1304.
83. See Jim Tozzi, “OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding,” *Administrative Law Journal* 63 (2011): 37, 43.
84. George P. Shultz, “Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and

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- Public Health and Safety,” Office of Management and Budget Memorandum, October 5, 1971, <http://www.thecre.com/ombpapers/QualityofLifer.htm>.
85. See Tozzi, “OIRA’s Formative Years,” 52.
86. Margot Hornblower, “Muskie Criticizes White House Meddling with EPA Rules,” *Washington Post*, February 27, 1979, <https://www.washingtonpost.com/archive/politics/1979/02/27/muskie-criticizes-white-house-meddling-with-epa-rules/fb232762-b600-43c0-aab5-4e062d2e1204/>.
87. *Ibid.*
88. Edward Walsh, “If You Don’t Like It, Get Out, White House Tells EPA Staff,” *Washington Post*, February 23, 1979, http://www.thecre.com/pdf/20110612_WashPostIfYouDontLikeIt.pdf.
89. President Jimmy Carter, “The President’s News Conference” (Washington, DC: April 25, 1978), <http://www.presidency.ucsb.edu/ws/index.php?pid=30704>.
90. Kagan, “Presidential Administration,” 2277.
91. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981), <https://www.archives.gov/federal-register/codification/executive-order/12291.html>.
92. Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993), https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf.
93. See, for example, Robert Percival, “Who’s in Charge?” *Fordham Law Review* 79 (2011): 2487.
94. *Myers v. United States*, 272 U.S. 52 (1926).
95. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935); but see *Free Enterprise Foundation v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).
96. *Morrison v. Olson*, 487 U.S. 654 (1988).
97. See Sec 3(b) excluding independent agencies from definition of agency; Sec 4(b), 4(c) including independent agencies for purposes of unified regulatory agenda and regulatory plan.
98. Hornblower, “Muskie Criticizes White House Meddling.”
99. Proposed Executive Order Entitled “Federal Regulation,” 5 Op. Off. Legal Counsel 59 (1981), <https://www.justice.gov/sites/default/files/olc/opinions/1981/02/31/op-olc-0005-p0059.pdf>.
100. Exec. Order No. 12,866 § 9.
101. *Sierra Club v. Costle*, 657 F.2d 298 (DC Cir. 1981).
102. See Kagan, “Presidential Administration,” 2288.
103. *Ibid.*, 2294.
104. *Ibid.*, 2289.
105. *Ibid.*, 2294.
106. *Ibid.*, 2271.

107. See, for example, Kathryn Watts, “Controlling Presidential Control,” *University of Michigan Law Review* 114 (2016): 683, 685.
108. See, for example, Percival, “Who’s in Charge?”
109. Michael A. Livermore, “Cost-Benefit Analysis and Agency Independence,” *University of Chicago Law Review* 81 (2014): 609, 681-83.
110. Eric D. Olson, “The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12,291,” *Virginia Journal of Natural Resources Law* 4 (1984): 1, 6 (quoting Jim Tozzi, Deputy Administrator of OIRA in the Reagan administration).
111. See Kagan, “Presidential Administration,” 2375.
112. See Sally Katzen, “The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform under the Obama Administration,” Testimony before the House Judiciary Committee (March 21, 2012), <https://judiciary.house.gov/wp-content/uploads/2016/02/Katzen03212012.pdf>.
113. Jerry Ellig and James Broughel, “OIRA Spending Falls as Agency Spending Swells,” Mercatus Center, October 17, 2013, <http://mercatus.org/publication/oira-spending-falls-agency-spending-swells>.
114. Livermore, “Cost-Benefit Analysis and Agency Independence,” 627.
115. Notes, “OIRA Avoidance,” *Harvard Law Review* 124 (2011): 994; see also Jennifer Nou, “Agency Self-Insulation Under Presidential Review,” *Harvard Law Review* 126 (2013): 1755; Nina A. Mendelson and Jonathan B. Weiner, “Responding to Agency Avoidance of OIRA,” *Harvard Journal of Law & Public Policy* 37 (2014): 447.
116. See Nou, “Agency Self-Insulation.”
117. Livermore, “Cost-Benefit Analysis and Agency Independence,” 613.
118. *Ibid.*, 629.
119. *Ibid.*, 631-32.
120. *Ibid.*, 632.
121. Lisa Heinzerling, “Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House,” *Pace Environmental Law Review* 31 (2014): 325-26.
122. *Ibid.*, 346.
123. See “Circular A-11,” Office of Management and Budget, July 1, 2016, https://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc.
124. While the president’s direct power of removal may extend only to principal officers, his power to take action against other administration personnel is transmitted via his control of the principal officers who may in turn take action directly. See *Morrison v. Olson*, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting). This is no different from other organizational contexts in which a chief executive has no plausible

- mechanism to *personally* conduct all Human Resources tasks but can nevertheless exercise necessary authority through his direction of his own subordinates.
125. See Kagan, “Presidential Administration,” 2364, 2369 (arguing *Chevron* more appropriate where president’s role ensures accountability); but see Heinzerling, “Inside EPA,” 350 (arguing *Chevron* less appropriate where president treads on agency’s expertise).
 126. “2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act,” Office of Management and Budget, 2015, https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf (estimating annual cost of regulations issued between 2005 and 2014 at \$57 to \$85 billion in 2001 dollars).
 127. In 2016 dollars, OIRA’s budget would increase to approximately \$300 million out of approximately \$60 billion in spending on Federal regulatory activity. See Ellig and Broughel, “OIRA Spending Falls.”
 128. “Economic Report of the President,” January 1980, 125-26, http://www.presidency.ucsb.edu/economic_reports/1980.pdf.
 129. Jeff Rosen, “Putting Regulators on a Budget,” *National Affairs* (Spring 2016).
 130. See, e.g., Howard Shelanski, “Making All Levels of Government More Efficient and Effective Through Retrospective Review,” White House Blog, Mar. 4, 2016, <https://www.whitehouse.gov/blog/2016/03/04/making-all-levels-government-more-efficient-and-effective-through-retrospective> (claiming a total of less than \$6 billion in annual cost reductions).
 131. Exec. Order No. 12,866 § 4.
 132. Exec. Order No. 12,866 § 6(b)(1).
 133. “Circular A-4,” Office of Management and Budget, September 17, 2003, https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.
 134. For a discussion of shortcomings in the VSL framework, see Trudy Ann Cameron, “Euthanizing the Value of a Statistical Life,” *Review of Environmental Economics and Policy* 4 (2010): 161-178.
 135. See Livermore, “Cost-Benefit Analysis and Agency Independence,” 611.
 136. *Ibid.*, 621.
 137. “Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,” Interagency Working Group on the Social Cost of Carbon, February 2010, <https://www3.epa.gov/otaq/climate/regulations/scc-tsd.pdf>.
 138. See, for example, Oren Cass, “The Carbon-Tax Shell Game,” *National Affairs* (Summer 2015).

139. See, for example, “Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone,” Environmental Protection Agency, November 2014, <https://www3.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf>.
140. See, for example, “Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards,” Environmental Protection Agency, December 2011, <https://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf>; see also Susan E. Dudley, “Review of Mercury Pollution’s Impacts to Public Health and the Environment,” Testimony Before the Committee on Environment and Public Works (April 17, 2012), http://www.epw.senate.gov/public/_cache/files/b269df79-8ef3-4897-8483-c5f33fb3ec62/41712hearingwitness testimonydudley.pdf.
141. See, for example, “Corporate Average Fuel Economy for MY 2017-MY 2025 Passenger Cars and Light Trucks: Final Regulatory Impact Analysis,” Department of Transportation, August 2012, http://www.nhtsa.gov/staticfiles/rulemaking/pdf/cape/FRIA_2017-2025.pdf; see generally Ted Gayer and W. Kip Vancusi, “Overriding Consumer Preferences with Energy Regulations,” Mercatus working paper, July 2012, <https://www.mercatus.org/system/files/Overriding-Consumer-Preferences-with-Energy-Regulations-Final.pdf>.
142. See Susan E. Dudley, “OMB’s Reported Benefits of Regulation: Too Good to Be True?” *Regulation* (Summer 2013); see also “The Rule of More,” *Economist* (February 18, 2012), <http://www.economist.com/node/21547772>.
143. See Oren Cass, “The New Central Planners,” *National Affairs* (Spring 2016).
144. See “Final Rule—Technical Support Document,” Regulation EERE-2010-BT-STD-0003, Department of Energy, February 2014, 9-8, 9-9, <https://www.regulations.gov/document?D=EERE-2010-BT-STD-0003-0102>.
145. The RegData project of the Mercatus Center at George Mason University offers an illustrative starting point. Omar Al-Ubaydli and Patrick A. McLaughlin “RegData: A numerical database on industry-specific regulations for all United States industries and federal regulations, 1997-2012,” *Regulation & Governance* (2015), doi: 10.1111/rego.12107. By compiling detailed data on regulatory burdens and economic performance across industries, the database allows for analysis of the broader economic implications of increased regulation—in many ways akin to the epidemiological research used to establish relationships between concentrations of air pollutants and public health outcomes. See, for example, James Bailey and Diana Thomas, “Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment,” Mercatus working paper, September 9, 2015, <http://mercatus.org/publication/regulating-away-competition-effect-regulation-entrepreneurship-and-employment>; Antony

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- Davies, “Regulation and Productivity” Mercatus research paper, May 8, 2014, <http://mercatus.org/publication/regulation-and-productivity>.
146. See, for example, Austin Nichols et al., “Consequences of Long-Term Unemployment,” Urban Institute, August 20, 2013, http://www.urban.org/research/publication/consequences-long-term-unemployment/view/full_report.
147. Cf. *Motor Vehicles Manufacturers Association v. State Farm*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“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.”).

REFORMING ADMINISTRATIVE LAW
TO REFLECT ADMINISTRATIVE REALITY

148. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015).
149. 5 U.S.C. § 553.
150. 5 U.S.C. § 553(b)(A).
151. *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013).
152. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
153. See Transcript of Oral Arg., *Perez v. Mortgage Bankers Ass’n*, Nos. 13-1041 *et al.* (Dec. 1, 2014).
154. Emphasis added.
155. 135 S. Ct. at 1206–07.
156. See, for example, Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982), 121–162; Jerry L. Mashaw, *Creating the Administrative Constitution* (New Haven: Yale University Press, 2012), 187–208.
157. Joanna L. Grisinger, *The Unwieldy American State* (Cambridge: Cambridge University Press, 2012), 59.
158. See Richard J. Pierce, *Administrative Law Treatise*, 5th ed., vol. 1 (New York: Aspen Publishers, 2009), 15.
159. See *Final Report of the Attorney General’s Committee on Administrative Procedure* (1937), 1.
160. *Ibid.*
161. *Ibid.*, 2.
162. *President’s Committee on Administrative Management* (1937), 2.
163. Pierce, *Administrative Law Treatise*, 18.
164. George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics,” *Northwestern University Law Review* 90