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The Lost World of Administrative Law

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The reality of the modern administrative state diverges considerably from the series of assumptions underlying the Administrative Procedure Act (APA) and classic judicial decisions that followed the APA reviewing agency actions. Those assumptions call for statutory directives to be implemented by one agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation (in the form of a discrete action) is presumed to be through statutorily mandated procedures and criteria, with judicial review to determine whether the reasons given by the agency at the time of its action match the delegated directions. This is the lost world of administrative law, though it is what students largely still learn.

Today, there are often statutory and executive directives to be implemented by multiple agencies often missing confirmed leaders, where ultimate decision-making authority may rest outside of those agencies. The process of implementation is also through mandates in both statutes and executive orders, where the final result faces limited, if any, oversight by the courts. The mismatch has consequences for the legitimacy and efficacy of the federal bureaucracy: some positive, many negative. Because we do not think a return to the lost world is possible or perhaps even desirable, we propose some possible reforms in all three branches of the federal government to strengthen the match between current realities and administrative law and to further administrative law's objectives of transparency, rule of law, and reasoned implementation of statutory mandates. We also hope that the proposed reforms can help foster the public interest goals of modern regulation, such as environmental quality or financial stability.

We realize that many scholars and probably at least some judges are aware that formal administrative procedures, official records, and judicial review are only part of the dynamics of administrative governance. But administrative law, as developed by the courts and in governing statutes, has not meaningfully confronted the contemporary realities of the administrative state. It thus risks becoming irrelevant to the quality of governance.

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Introduction

Administrative law, derived from the Administrative Procedure Act (APA) and key judicial decisions, can seem like a minor presence in the modern regulatory process. Take just one example. When it comes to food safety, both the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA), among other agencies, have regulatory authority.[1] After President Obama signed the FDA Food Safety Modernization Act on January 4, 2011, the FDA, with input from the USDA and the Department of Homeland Security, had one year to propose enforceable preventative controls as well as safety requirements for growing and harvesting farm produce, among other mandates.[2] As every student learns in administrative law class, the rulemaking process "on the books" is a streamlined, three-part procedure, in which the agency crafts and publishes a notice of proposed rulemaking (NPRM) based on its own expertise and general presidential administration policy, then receives public comments, and lastly promulgates the final rule.[3] The actual process, however, bore little resemblance to the textbook description.

The FDA got straight to work, but agency expertise was only one element in drafting the proposed rules. After holding hundreds of meetings with farmers, state and local officials, researchers, and consumer groups,[4] it produced drafts of two proposed rules (one on preventative controls and one on produce), among others, before the Act's deadline.[5] But rather than publishing the NPRMs in the *Federal Register* for formal public input, it submitted the drafts (as it was required to do under Executive Order 12,866) to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), along with elaborate cost–benefit analyses.[6]

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1. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-289, FEDERAL FOOD SAFETY OVERSIGHT: FOOD SAFETY WORKING GROUP IS A POSITIVE FIRST STEP BUT GOVERNMENTWIDE PLANNING IS NEEDED TO ADDRESS FRAGMENTATION 1 (2011) (noting the large number of agencies that administer food-related laws).

2. FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 419, 124 Stat. 3885, 3899–900 (2011) (codified at 21 U.S.C. § 350h (2012)).

3. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 476 (2011) (elaborating on the textbook description of the agency rulemaking process).

4. *See* Press Release, U.S. Food & Drug Admin., FDA Proposes New Food Safety Standards for Foodborne Illness Prevention and Produce Safety (Jan. 4, 2013), *available at* http://www.fda.gov/newsevents/newsroom/pressannouncements/ucm334156.htm.

5. *See* Helena Bottemiller, *NYT to White House: Move Forward on Food Safety Rules*, FOOD SAFETY NEWS (Aug. 13, 2012), http://www.foodsafetynews.com/2012/08/nyt-calls-on-omb-to-release-food-safety-rules/.

6. *See id.*

Under the Executive Order, OIRA was supposed to approve or reject the NPRMs within 120 days at most.[7] OIRA sat on them for a year, also meeting with industry and public interest groups.[8] OIRA finally allowed the agency to move forward after eliminating certain testing and monitoring mandates.[9] The FDA formally proposed the revised versions on January 4, 2013, exactly a year later than the statutory deadline.[10] The FDA missed other deadlines under the Act as well, prompting a district court judge in April 2013 to order the agency to propose new deadlines it would meet.[11]

Little of this process fit with the vision of the administrative state underlying current administrative law. The one step that was "visible" to administrative law—the FDA's ultimate publication of NPRMs—was less important in the overall process of policy making than the less public White House role, which took place outside of judicial oversight. Focusing on the formal notice and the ensuing process of formal public comment would

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7. *See* Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. 638, 646–47 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802, 805 (2012) (limiting OIRA's review period to ninety days with the possibility of a thirty-day extension).

8. *See* Nancy Watzman, *Key Elements of Food Safety Law Stuck at White House Regulatory Agency*, SUNLIGHT FOUND. (May 7, 2013, 11:20 AM), http://sunlightfoundation.com/blog/2013/05/07/food-safety-law/ (noting how OIRA held on to the two draft rules for a year and providing a spreadsheet that lists meetings at OIRA and their attendees).

9. *See* Helena Bottemiller, *Documents Show OMB Weakened FDA's Food Safety Rules*, FOOD SAFETY NEWS (Mar. 25, 2013), http://www.foodsafetynews.com/2013/03/documents-show-omb-weakened-fdas-food-safety-rules/ (using released documents to show how OMB "significantly weakened the U.S. Food and Drug Administration's draft food safety rules").

10. Press Release, U.S. Food & Drug Admin., *supra* note 4. In August, the FDA extended the comment period for a second time. Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food; Extension of Comment Periods, 78 Fed. Reg. 48,636, 48,636–37 (Aug. 9, 2013). Strikingly, for the first extension, in February, comments were to be sent to OMB, not the FDA. *See* Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food; Extension of Comment Period for Information Collection Provisions, 78 Fed. Reg. 11,661, 11,661 (Feb. 19, 2013) (requesting that interested persons submit electronic or written comments directly to OMB).

11. Ctr. for Food Safety v. Hamburg, C 12-4529 PJH, at 10 (N.D. Cal. Apr. 22, 2013). The Court approved new deadlines in June. Ctr. for Food Safety v. Hamburg, C 12-4529 PJH, at 3 (N.D. Cal. June 21, 2013) (ordering the FDA to publish all proposed regulations under the FSMA by November 30, 2013, and to publish all final regulations in the Federal Register no later than June 30, 2015); *see also* Michael Patoka, *Three Food Safety Rules Grow Moldy at OIRA as Import-Related Outbreaks Continue*, FOOD SAFETY NEWS (June 26, 2013), http://www.foodsafetynews.com/2013/06/three-food-safety-rules-grow-moldy-at-oira-as-import-related-outbreaks-continue/ (acknowledging the import of the court's order but noting that the dates the court set were deferential to the FDA's projected timeline). The FDA appealed the new deadlines to the Ninth Circuit. The FDA then sought an emergency stay due to the government shutdown. Greg Ryan, *Shutdown Affected Food Safety Deadline, FDA Tells 9th Circ.*, LAW360 (Oct. 21, 2013, 5:43 PM), http://www.law360.com/articles/481762. The parties then settled, agreeing to a staggered schedule, with dates far later than the original statutory deadlines. *See* Sindhu Sundar, *FDA Agrees to FSMA Rollout Deadlines in Settlement*, LAW360 (Feb. 20, 2014, 5:49 PM), http://www.law360.com/articles/511920/fda-agrees-to-fsma-rollout-deadlines-in-settlement (describing the settlement agreement that establishes staggered final rule deadlines, beginning in August 2015 and ending in May 2016, for finishing the implementation of the FSMA).

give an entirely misleading picture of how food safety policy was created. This example is, however, far from exceptional for important regulatory initiatives.

Our thesis is simple but powerful: the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.[12]

Of course, some divergence between the "law on the books" and the "law in action" is to be expected in any field, but here the gap seems especially large and growing. The "lost world" was not a golden age in which agencies were free from influence by other parts of the Executive Branch and perfect transparency reigned. In addition, the "law on the books" is not that old, dating roughly from the second half of the twentieth century. But we have seen in recent decades a diffusion of authority away from individual agencies and erosion of statutory and administrative rules designed to achieve transparency.[13] As a result, there is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation. Or to put it another way, administrative law seems more and more to be based on legal fictions.

The mismatch (or legal fictions), in turn, has consequences for the legitimacy and efficacy of the federal bureaucracy. To be sure, there may also be benefits, and we discuss those later, but the costs must be taken seriously. We therefore need to rethink current approaches to bureaucratic operation and oversight if we still want to achieve administrative law's goals of transparency, rule of law, and reasoned implementation of statutory mandates.[14]

We are far from the first to point out aspects of this problem, but the scale of the problem and the need for pragmatic solutions are in need of further exploration.[15] This Article attempts to provide such an examination

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12. We should note that most, though not all, of our discussion focuses on executive agencies that are directly responsive to the President, such as the EPA, rather than independent regulatory commissions and boards that are more independent from the President, such as the SEC. This emphasis also reflects changes since the post-New Deal era of administrative law and the growing importance of Executive Branch agencies like the EPA and OSHA at the expense of independent agencies such as the SEC and NLRB.

13. We are not advancing here a causal narrative about how the "law in action" became so distanced from the "law on the books."

14. We make some key assumptions that we do not defend here. First, we believe the goals of transparency, rule of law, and reasoned implementation of statutory mandates are desirable ones, at least to some substantial degree. We do not pause here to elaborate the meaning of these goals or discuss potential conflicts. For a recent discussion of values underlying administrative legitimacy, see Emily Hammond and David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 320–30 (2013). Second, we adopt an institutionalist perspective—in other words, that outcomes are not solely a function of the constellation of political forces but also depend on institutions and process.

15. *Cf.* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 95 (2003) (arguing that the APA "fails to address the administrative

and potential reforms. In Part I, we describe the lost world—the world envisioned by the APA and key judicial rulings. We then turn in Part II to explain how the realities of the modern administrative state differ from the intended circumstances. The contrast is stark: someone whose knowledge of administration was based only on statutes and judicial rulings would be gravely misled about the real dynamics of modern governance. In Part III, we consider the benefits and costs of this shift, tentatively concluding that the costs trump the benefits. Because we doubt a return to the lost world is possible, we also propose some possible reforms in all three branches of the federal government to make the match between current realities and administrative law stronger.

Our extensive discussion of the role of OIRA may give the impression that this Article is yet another complaint about presidential directives authorizing OIRA review of agency cost–benefit analysis. At least for purposes of this Article, we have no quarrel with those administrative orders. Our concern regarding OIRA targets the drift of OIRA's role and procedures away from these presidential mandates as written in executive orders. We also see other important changes in the regulatory state, not involving OIRA, which may have undermined rule of law values. OIRA is an example of such modern practices, but it would be a mistake to see it as the root of the problem.

I. The Conceptual Framework of Administrative Law

The way we think or talk about a subject embodies certain background assumptions. For instance, when we say, "Jan owned Greenacre," we are assuming: (1) that ownership is a binary relationship between one or more persons and some physical object and (2) that Jan alone stands in this relationship to Greenacre.[16] Similarly, many observations about a baseball game can be structured as:

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character of the modern state" and that "a new, administratively oriented APA be drafted" that is "founded on the principle of instrumental rationality"); William H. Simon, *The Organizational Premises of Administrative Law*, LAW & CONTEMP. PROBS. (forthcoming 2014) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332079 (claiming that "[a]dministrative law is out of touch with forms of public administration developed since the Progressive and New Deal eras" and calling for new doctrine that "is more attuned to performance-based organization"). While there is much to admire in the Rubin and Simon pieces, they are rooted in making the bureaucracy function better, largely as a matter of social welfare. We agree that this is an important goal, but we also give weight to the traditional administrative law values such as transparency and fidelity to law, even though these goals may sometimes involve tradeoffs with agency efficiency and ability to maximize social welfare. For instance, Congress may have had other goals than welfare maximization, or the sole goal of efficiency may involve excessive sacrifices of fairness to individuals.

16. The analogy here is to what cognitive scientists call framers or schemas. *See* HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 37 (1987) (identifying "frames" and "schemas" as terms psychologists use to emphasize how individual

> *A Player* [hit, threw, caught, missed, dropped] *the ball or* [ran, walked, slid, jumped] *to* [a location on the field].

Again, note the tacit assumptions: there are designated people who make rulings and other designated people who play; there is one and only one ball; there is a designated field of play; and the core of the game is what the players and the ball are doing.

In the same sense, as we will see, much of administrative law invokes something like the following description of administration:

> *Using the authority granted to it by* [one or more statutes], *the* [agency issued (or occasionally, declined to issue)] *an* [order/rule] *by applying* [the standard established by the statute(s)] *to the facts before it.*

This description of administrative law is so commonplace that it seems entirely innocuous. Yet, it is loaded with assumptions: that statutes delegate authority to particular agencies (rather than, for example, to the Executive Branch as a whole); that agency decisions through discrete actions are based on evidence rather than political perspectives and that we can identify the particular evidence before the agency (also known as "the record"); that certain kinds of reasons and only those reasons are allowed; that one agency, rather than many, makes the decision; and that the output of the administrative process consists of discrete, severable decisions.

Conceptual frameworks of this kind are not rigid blinders. We may center our understanding of a baseball game on the motions of the ball and the players, but this might not exclude the potential for recognizing the operation of other factors such as umpires' rulings, signals from coaches, or changes in the wind. Similarly, centering our understanding of administrative law on discrete acts by agencies does not preclude recognizing that the President may have some influence on events or that some important agency programs may not be easily reduced to discrete actions. To be sure, the existence of OIRA is duly noted in administrative law courses, but its centrality to the modern regulatory state has not penetrated, and issues continue to be framed in terms of "agency" decisions. That framing influences the way problems are perceived, events interpreted, and solutions posed.

In Part II, we will show that in practice the administrative state has evolved well away from these assumptions. This does not mean that statutes, agencies, reasoned explanation, and formal records have become irrelevant, but fixation on these features of the administrative state may impair the ability to recognize and respond to current problems. Moreover, current doctrine may have effects very different than anticipated given the

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parts are perceived "only in the context of some (often implicit or imputed rather than overtly present) whole").

changed landscape of administrative governance. Before discussing relatively recent changes, however, we will provide support for our view of the centrality of the "discrete agency action" way of thinking in administrative law, as it was first established by the APA and then elaborated (some might say beyond recognition) by the courts. Perhaps this vision of administrative law seems so obvious and familiar that it needs no documentation. It is important, however, to be clear on just how pervasive and firmly embedded it is in the way we all understand administrative law.

Historically, we suspect it may have been particularly easy for this view of administration to take root because adjudication played an outsized role in thinking about administrative law.[17] With adjudication as a preoccupation, it is not surprising that administrative action would be envisioned as the work of a designated judge as opposed to, for example, a network of members of the Executive Branch contributing to the decision. It is also unsurprising that adjudicators would be expected to apply preexisting standards to formally created bodies of evidence. One of the impetuses behind the APA was to separate adjudication from other agency functions in the interest of fairness, walling it off from "[p]ressures and influences properly enough directed toward officers responsible for formulating and administering policy."[18] In other words, the APA ensures that decision makers consider only the relevant legal factors and are not subject to pressure by political actors. Finally, the prevalence of adjudication fostered the rise of the "appellate review model" in administrative law, where courts review agency action on the agency's record even in nonadjudicatory cases.[19] Of course, adjudications can also involve major policy decisions, but because of the due process tradition of nonpolitical adjudication, the process fostered a distinctive mindset.

Adjudicatory procedures continued to loom large in administrative law in the two decades after passage of the APA, whereas informal rulemaking

17. For discussion of adjudication-related concerns during the long and conflicted process that led to the APA, see Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986), and George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1575–77 (1996). As Shapiro observes, "the new health, welfare, safety, and environmental statutes of the sixties and seventies demanded more rulemaking." Shapiro, *supra*, at 456.

18. S. REP. NO. 79-752, at 3 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46, at 187, 189 (U.S. Gov't Printing Office 1946) [hereinafter APA LEGISLATIVE HISTORY] (quoting a report by the President's Committee on Administrative Management); *see also id*. at 7 (stating that the APA "provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies"); H.R. REP. NO. 79-1980, at 8 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra*, at 235, 242 (commenting that the committee's concern with this separation "reflects a widespread feeling, which has been greatly extended by the expansion of administrative controls during the subsequent war years" and is of "permanent importance").

19. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

received relatively little attention until the 1970s. For instance, as late as 1974, the Gellhorn and Byse casebook in the field devoted only twenty-two pages to rulemaking proceedings,[20] which mostly was a lengthy excerpt from a single case limiting the use of formal rulemaking. By contrast, it devoted two chapters (281 pages) to adjudication.[21] The 108 page section on the scope of judicial review contained only eight pages on review of informal actions, consisting of the then-recent *Overton Park*[22] decision.[23] Even more strikingly, the first edition of the Davis casebook in 1951 dedicated only three pages to notice-and-comment rulemaking, though it gave a whole chapter to formal rulemaking, which uses essentially adjudicatory techniques.[24] When courts started to pay more attention to informal rulemaking, they tended to respond by pushing it in the direction of adjudication through creation of a "paper hearing" requirement.[25] As recast in quasi-adjudicatory terms, rulemaking poses no challenge to the model of the discrete decision maker applying statutory authority to the facts in the record. Thus, it remained natural to think of the administrative state as a creature of congressional directives, with statutes providing the legal authority and standards of decision just as they do for courts. In addition, both these adjudications and rulemakings are seen to involve discrete decisions as opposed to more open-ended monitoring or other more continuous activities.

We will consider the features of this framework in turn, starting with the role of statutes as the sources of administrative authority and of governing standards; turning then to the role of "the agency" as the critical administrative actor and subject of administrative law; and ending with the connection among evidence considered, reasons provided, and decisions made by the agency.

A. Statutes as Sources of Administrative Authority

In challenges to an agency's action, a generally unspoken assumption is that the action must be authorized by a congressional enactment.[26] As

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20. WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 731–52 (6th ed. 1974).

21. *Id.* at 860–1140.

22. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

23. GELLHORN & BYSE, *supra* note 20, at 478–85.

24. KENNETH CULP DAVIS, CASES ON ADMINISTRATIVE LAW 327–28, 570 (1951) (on notice-and-comment rulemaking); *id*. at 321–59 (on formal rulemaking).

25. *See* Shapiro, *supra* note 17, at 462–64 (describing how courts have changed agency rulemaking from quasi-legislative to quasi-judicial with a procedural "paper trial" that reduces the scope of agencies' discretion).

26. Although it is difficult to document that something is an unspoken assumption—the point, after all, is that the assumption often is not mentioned explicitly—courts do sometimes explicitly articulate the assumption. *See, e.g.*, Lyng v. Payne, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress."); Ernst & Ernst v. Hochfelder, 425 U.S.

Professor Shapiro puts it, "[a]lthough the Constitution gives the President the general duty of enforcing all the laws, congressional statutes give particular agencies the particular duty of enforcing particular laws."[27] It is the rare case where the legality of the agency's action does not depend, at least in part, on a determination that it acted within the scope of the authority delegated by Congress—rare enough that such cases get excerpted in constitutional law casebooks. In the *Steel Seizure*[28] case, Justice Black's majority opinion adopted an approach that was too simplistic[29] but nonetheless correct in most cases:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.[30]

Finding no constitutional source of authority for the President's action, the Court found the action to be an illegitimate exercise in legislation, void because the Constitution "entrusted the lawmaking power to the Congress alone in both good and bad times."[31] While this language is not a definitive statement of the separation of powers among the three branches of the federal government, it is the rare case in which the agency claims any warrant for its decision other than a grant of power from Congress, at least in cases outside of the arenas of national security or international affairs.

In a very different legal context—application of the *Chevron*[32] doctrine of agency deference to jurisdictional matters—the Court recently emphasized the primacy of congressional authority over agencies:

> Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less

185, 213 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law."); FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Fed. Cir. 2002) ("It is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority." (citing So. Cal. Edison Co. v. FERC, 195 F.3d 17 (D.C. Cir. 1999))).

27. Shapiro, *supra* note 17, at 465. Of course, as Shapiro immediately points out, the next question is inevitably: "So to whom are the agencies answerable in implementing the laws—the President or Congress?" *Id.*

28. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

29. *Cf.* Shapiro, *supra* note 17, at 464 ("Under the most simplistic view of the Constitution, Congress makes laws and the executive branch carries them out.").

30. *Steel Seizure*, 343 U.S. at 585.

31. *Id.* at 589.

32. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842–43 (1984) (stating that courts must defer to an agency's reasonable interpretation of a statute in cases where Congress has not dictated a particular result and where Congress has delegated the authority to interpret the statute to the agency).

> than when they act beyond their jurisdiction, what they do is ultra vires. Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional."[33]

In important ways, then, the agency is conceptualized as the agent of Congress (strictly speaking, the enacting Congress rather than the current one), not the President. Indeed, a decade before the passage of the APA, the Supreme Court went so far as to say that independent regulatory commissions and boards did not exercise executive power at all but were purely creatures of Congress.[34]

Because the nondelegation doctrine is anemic, Congress may validly choose not to provide administrators much guidance or constraint, presumably leaving more room for other influences. Nonetheless, the requirement of congressional authority means that an administrator's ability to independently make policy requires at least some advance authorization from the legislature, and often Congress does provide considerably more guidance than the Constitution requires. The requirement of statutory authority also provides a basis for judicial review, which functions as another check on agency activity.

It may seem like a truism that administrators' "power to act and how they are to act is authoritatively prescribed by Congress." But as we will see in Part II, there are important situations where this idea breaks down. Today, some key administrators' authority to act stems as much from the President as from Congress, as do many of the procedural requirements governing "how they are to act."

B. Applicable Standards for Decision

Statutes are commonly thought to be not only the source of the agency's power but also the primary basis for how the agency exercises its discretion.[35] Thus, the vision of the agency as the maker of decisions is

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33. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1869 (2013).

34. As the Court explained:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.

Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

35. The cases discussed in this subpart illustrate the operation of this principle. To be fair, the Court has struck down only two laws that were interpreted as giving the agency unrestrained discretion on how to address a particular subject matter. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (holding that a section of the National Industrial Recovery Act granted unfettered discretion to the President and was thus an unconstitutional

closely tied to an assumption that the agency will act as an agent of the enacting Congress. As Professor Shapiro points out, "[s]ingle-agency deliberation followed by discrete judicial review of discrete agency decisions is never likely to shake off the particular enthusiasm that engendered the main thrust of the statute in the first place."[36]

For instance, the principle that the agency cannot consider extrastatutory factors, even when acting within its statutory authority, was critical to the Court's decision in *Massachusetts v. EPA*.[37] The statute in question directed the agency to regulate any air pollutant from new motor vehicles or new motor vehicle engines that endangered human health or welfare.[38] The EPA denied petitions asking it to initiate a rulemaking to determine whether greenhouse gases met the endangerment standard, relying partly on what turned out to be an erroneous interpretation of its statutory authority, but also partly on prudential arguments against using this statute to address the problem of climate change.[39] The Court chastised the agency for considering these broader policy considerations:

> EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. . . . To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.[40]

An agency must follow relevant statutory factors and must not consider impermissible factors. The principle that the agency's decision must rest on the statutory standard arguably has constitutional roots. In *Whitman v. American Trucking Ass'ns*,[41] the Court explained the basic principles of the nondelegation doctrine:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . .

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delegation of legislative power); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (same). Instead, Congress must provide an "intelligible principle" to guide agency discretion. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

36. Shapiro, *supra* note 17, at 468.

37. 549 U.S. 497 (2007).

38. Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006).

39. 549 U.S. at 529–34.

40. *Id.* at 533. Prior to this decision, the Court had arguably been more open to agencies relying on factors on which Congress had been silent. *See* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 79 (citing to the dissent, which "noted that the majority opinion was inconsistent with precedent by inferring from congressional silence a congressional decision to make a long list of logically relevant reasons for a decision to defer a judgment impermissible").

41. 531 U.S. 457 (2001).

> in a Congress of the United States." This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[42]

American Trucking involved a provision of the Clean Air Act (CAA) directing the EPA to establish national ambient air quality standards (NAAQS), and the Court ruled that in doing so the agency could not consider costs.[43] It began by saying that, given explicit attention to costs elsewhere in the statute, "respondents must show a textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1)."[44] Having failed to find such a textual commitment, the Court also made it clear that it was not simply saying that the EPA had to be able to write up a justification for its decision without reference to cost. Rather, cost could play no role in the EPA's deliberations:

> Respondents' speculation that the EPA is secretly considering the costs of attainment without telling anyone is irrelevant to our interpretive inquiry. If such an allegation could be proved, it would be grounds for vacating the NAAQS, because the Administrator had not followed the law.[45]

To similar effect, the Court said in the *State Farm*[46] case that a decision would be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider."[47]

The assumption that the agency's decision must actually be based on its interpretation of the statutory factors is deeply embedded in administrative law. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[48] in which the Court established the parameters for judicial review under the arbitrary and capricious standard,[49] the Court also made clear that the statutory standards did not merely limit the scope of the agency's discretion but also remained relevant in exercising that discretion:

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2) (A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or

42. *Id.* at 472 (alterations in original) (citations omitted).

43. *Id.* at 471.

44. *Id.* at 468.

45. *Id.* at 471 n.4.

46. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

47. *Id.* at 43.

48. 401 U.S. 402 (1971).

49. *Id.* at 420.

> otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.[50]

Moreover, the Court made clear, although the Secretary of Transportation's public explanation of his decision was entitled to a presumption of regularity, if a showing of bad faith were made, the Secretary could actually be required to testify in order to explain the reasons for his decisions.[51] It was not enough for the Secretary to file litigation affidavits in that case, which "were merely '*post hoc*' rationalizations,"[52] because those might not reflect the actual reasons for the decision.

The presumption of regularity widens the potential for a gap between the formal explanation and the true reasons for a decision by limiting judicial inquiry into the decisional process. But at least a contemporary explanation by the actual decision maker is more likely to resemble the actual explanation than an after-the-fact explanation by someone else. The assumption that even discretionary decisions will be made with reference to standards created by the legislature reinforces the nondelegation norm, providing a further possible check on independent action by administrators. It also provides advance warning about what sorts of evidence and arguments will be relevant to the decision and further structures judicial review. All of this begins to add up to a coherent picture of how the administrative state is supposed to operate. We doubt that courts naively

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50. *Id.* at 416 (citation omitted). In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court ruled that it would be improper for an agency to consider factors outside of its statutory mandate, including those in related statutes that it was not tasked with implementing:

> First, and most important, we do not think that the requirement imposed by the Court of Appeals upon the PBGC [to consider factors under other related statutes] can be reconciled with the plain language of § 4047, under which the PBGC is operating in this case. This section gives the PBGC the power to restore terminated plans in any case in which the PBGC determines such action to be "appropriate and consistent with its duties *under this title* [*i.e.*, Title IV of ERISA]" (emphasis added). The statute does not direct the PBGC to make restoration decisions that further the "public interest" generally, but rather empowers the agency to restore when restoration would further the interests that Title IV of ERISA is designed to protect. Given this specific and unambiguous statutory mandate, we do not think that the PBGC did or could focus "inordinately" on ERISA in making its restoration decision. Even if Congress' directive to the PBGC had not been so clear, we are not entirely sure that the Court of Appeals' holding makes good sense as a general principle of administrative law. . . . If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation.

Id. at 645–46 (first alteration in original). Some have read this case to allow agencies to rely on factors on which Congress was silent, though that principle was rejected in *Massachusetts v. EPA*. *See supra* note 40 and accompanying text.

51. *Overton Park*, 401 U.S. at 420.

52. *Id.* at 419.

believe that the process invariably corresponds with this picture, but this picture establishes a norm against which actual conduct can be measured.

C. The Centrality of "the Agency"

The idea that administrative actions are taken by discrete "agencies" runs deep in administrative law; it may even seem too obvious to deserve mention. Yet, it is certainly not impossible to imagine a system of administration in which decisions are made by shifting groups of administrators, depending on circumstances. But because we assume that administrative powers are created by statute and that Congress reposes them in specific government organs, it seems natural also to think of these organs as the fixed cast of players in administrative law.

The assumption that actions are taken by distinct government bodies, rather than by the Executive Branch as a whole,[53] is built into the structure of the APA itself. Section 551 defines an agency as an "authority of the Government of the United States."[54] According to the Senate Judiciary Committee, "authority" meant "any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority."[55] Notice that this definition invokes yet another unspoken assumption of administrative law—that the topic is defined by discrete "final and binding action[s]."

Section 551 goes on to define a rule as "an *agency* statement of general or particular applicability and future effect"[56] and "rule making" as an "*agency* process for formulating, amending, or repealing a rule."[57] An "order" means a "final disposition . . . of an *agency*,"[58] and "adjudication" means "*agency* process for the formulation of an order."[59] Note that, according to the Senate Judiciary Committee, "there are only two basic types of administrative justice—rule making and adjudication,"[60] so these

53. Or the Executive Branch plus independent regulatory commissions and boards, if you prefer.

54. Administrative Procedure Act, 5 U.S.C. § 551(1) (2012).

55. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., SENATE JUDICIARY COMMITTEE PRINT (Comm. Print 1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 11, 13.

56. 5 U.S.C. § 551(4) (emphasis added).

57. *Id.* § 551(5) (emphasis added).

58. *Id.* § 551(6) (emphasis added).

59. *Id.* § 551(7) (emphasis added).

60. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., SENATE JUDICIARY COMMITTEE PRINT (Comm. Print 1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 14. Similarly, the Attorney General's letter regarding the legislation remarked that the "basic scheme underlying this legislation is to classify all administrative proceedings into these two categories" of adjudication and rulemaking. Letter from Tom C. Clark, U.S. Att'y Gen., to Pat McCarran, Chairman, Senate Judiciary Comm., app. (Oct. 19, 1945), *in* S. REP. NO. 79-752, at app. B. at 37, 39 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 223, 226.

definitions of agency activity cover the relevant universe of the administrative management. It would be tedious and redundant to list all of the times the word "agency" is repeated in the APA, but § 551 itself clearly sets up the agency as the key decision maker and the major subject of administrative law.

If there were any doubts about the discrete nature of agency authority, they would be dispelled by § 558(a), which provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."[61] According to the Senate Report on the APA, this provision was intended to ensure, among other things, that "no agency may undertake directly or indirectly to exercise the functions of some other agency."[62] Thus, the Senate Report continued, this "subsection confines each agency to the jurisdiction delegated to it by law."[63]

The concept of "the agency" as the critical actor continues to figure heavily in the case law. For instance, in *Chevron*, the Court spoke of the "legislative delegation to an *agency*" on the question at hand and said that the Court had "long recognized that considerable weight should be accorded to *an executive department's* construction of a statutory scheme it is entrusted to administer."[64] The Court acknowledged the relevance of broader administrative policies, but only as something the agency could use to "inform its judgments."[65] Similarly, in *Vermont Yankee*,[66] in the course of limiting judicial power to determine administrative procedures, the Court said that under the APA, "the formulation of procedures was basically to be left within the discretion of the *agencies* to which Congress had confided the responsibility for substantive judgments."[67]

The Court also assumes the leaders of these agencies make the delegated decisions. In *Chevron*, for example, the Court treated the "agency" interchangeably with the administrator of that agency: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation

61. 5 U.S.C. § 558(b).

62. S. REP. NO. 79-752, at 25 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 18, at 211.

63. *Id.* Note that this restriction seems to limit the ability of the President to reallocate authority to other agencies, to White House staff, or to the Vice President. Whether the President has directive authority when a statute delegates authority to the agency (as opposed to the President) is the subject of some debate by scholars. *See infra* note 270.

64. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984) (emphasis added).

65. *See id.* at 865.

66. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

67. *Id.* at 524 (emphasis added).

made by the administrator of an agency."[68] For present purposes, what is important is not the realism of the Court's assumption about delegation but rather the emphasis on congressional primacy and on the agency head (not the Executive Branch as a whole) as the key decision maker. These agency heads contribute to the political accountability rationale for agency deference through their assumed connection to the President and Congress—in that they are supposed to be selected by the President and confirmed by the Senate and removable (sometimes for any reason and other times only if there is cause) only by the President.[69]

Conceiving of the administrative state as a collection of agencies, each with its own designated statutory powers, provides a greater sense of intelligibility than thinking of federal activities as emerging en masse from a black box consisting of significant numbers of federal employees. This agency-based worldview also resonates strongly with the delegated-power concept (running from Congress to designated actors).

D. Evidence and Reasoned Decision Making

Given the idea that an agency's orders and rules must be based on some intelligible principle provided by the legislature, it is a short step to the view that the agency must have evidence before it acts and must provide (or at least be prepared to provide) an explanation for its actions that links the decision to the statutory standards. Without evidence, how would we know whether the agency was just inventing a state of affairs that would justify its action given the statutory standard?[70] In practice, complete power to post the relevant facts would be little different from complete power to specify the legal standard.

The idea of reasoned explanation at the time of agency action is deeply embedded in administrative law. "We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner," the Court said in *State Farm*, going on to reaffirm emphatically this principle.[71] Moreover, *State Farm* held, "courts may not accept appellate counsel's *post hoc* rationalizations for agency action."[72] Instead,

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68. *Chevron*, 467 U.S. at 844.

69. *See* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242–43 (2002) (stressing that "[i]t is only the presence of high-level agency officials that makes plausible *Chevron*'s claimed connection between agencies and the public" and recognizing that this accountability flows through the President and the Senate); *cf. Chevron*, 467 U.S. at 865–66 (implying administrative authorities are accountable to the people by way of the Chief Executive).

70. *Cf.* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 762–64 (2006) (suggesting that the provision of evidence and reasoned explanation is a costly signal by agencies to courts).

71. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48–49 (1983).

72. *Id.* at 50.

"an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[73] Although the agency's view of the public interest may change, it must "supply a reasoned analysis" of its change in position.[74] This "hard look" review in *State Farm* of an agency's explanation had its roots in a much earlier decision, *SEC v. Chenery Corp.*[75] In that pre-APA decision, the Court stressed: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[76] (In all these decisions, the analysis also assumes that the agency is the relevant decision maker, not some broader group of administrators.)

Much of the APA is devoted to the process by which parties put information before agencies. Section 553 establishes the right to submit evidence in informal rulemakings,[77] while § 556 governs the right to submit evidence in formal adjudications and rulemakings.[78] In the latter class of proceedings, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."[79] In informal rulemakings and other actions, *Overton Park* also made clear that the decision is reviewed on the basis of "the full administrative record that was before [the head of the agency] at the time he made his decision."[80] After all, the APA provides that in applying all of the standards for judicial review, "the court shall review the whole record or those parts of it cited by a party."[81]

State Farm is the paradigmatic application of the concept that action must be based on reasoned consideration of the record before an agency. It also shows how this concept is related to the existence of a statutory delegation to the agency, which furnishes the standards that provide the foundations of the reasoned explanation. And the reasoned explanation would be only a post hoc rationalization unless the body issuing the explanation (the agency) is also the decision maker. Thus, *State Farm* aptly

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73. *Id.*

74. *Id.* at 57 (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

75. 318 U.S. 80 (1943).

76. *Id.* at 95.

77. Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

78. *Id.* § 556.

79. *Id.* § 556(d).

80. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

81. 5 U.S.C. § 706. Subsequent legislation in the 1960s and 1970s—primarily the Freedom of Information Act and the Government in the Sunshine Act—complemented the APA's mandate of a record. These Acts were specifically designed to foster transparent decision making. *See, e.g.*, Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241, 1241 (codified at 5 U.S.C. § 522b note) (declaring it the "policy of the United States that the public is entitled to the fullest practicable information regarding [its] decisionmaking processes").

illustrates how the standard framing of administrative law combines all the elements we have discussed.[82]

To summarize, we have seen that modern administrative law is characterized by a series of assumptions. It conceives of the administrative process as operating as follows: (1) The implementation of statutory directives (2) by statutorily designated administrators ("the agency") (3) based on reasoned consideration of the statutory standard (4) as applied to formally designated evidence (5) using procedures imposed by Congress or determined by the agency, which (6) can then be reviewed by the courts. The primary emphasis throughout is on the subordinate relationship of the agency to congressional directives, with fidelity to statutory policies as the main test of validity. This approach tends to leave agencies considerable leeway but does provide some check on executive policymaking. At a deeper level, these assumptions portray administrative activity in discrete, isolated terms, much like the kind of activity that judges engage in: there is a single decision maker applying predetermined standards to a formally created body of evidence.

Whatever normative force this way of structuring administrative law may have, it provides a framework that seems almost instinctive in considering an agency action. In inquiring into an such a decision, it seems obvious that the first questions to ask are what agency made the decision, under what statutory authority and standards, and how the agency explained its decision based on the evidence before it. But these questions seem obvious only because that is the way we are used to thinking about the U.S. federal administrative state and because, to some degree, the administrative state has been shaped accordingly.

II. The Reality

The reality of the modern administrative state diverges considerably from the series of assumptions described in the previous Part, on which current administrative law rests. Those assumptions call for statutory directives to be implemented by an agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation is presumed to be through statutorily mandated procedures and criteria, where the final result can then be reviewed by the courts to see if the reasons given by the agency at the time of action match the delegated directions. Yet, there are often statutory and executive directives to be

82. The *State Farm* framework does not rest only on expertise values of agency action. So long as the agency makes a decision on the statutory factors, political influence can shape what that decision is within the statutory framework. *See* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 284 (1986) (stating that the "arbitrary and capricious" standard exists to prevent agency capture but recognizing that political influences can be accommodated without violating that standard).

implemented by multiple agencies, frequently missing confirmed leaders, where practical decision-making authority may rest outside of those agencies. The process of implementation also follows mandates in both statutes and executive orders, where the final result faces limited, if any, oversight by the courts. We consider these discrepancies in turn below.

A. Statutes and Presidential Orders as Sources of Administrative Authority to Multiple Agencies

Administrative law presumes that the source of authority of agency action is statutory. In addition, it generally presumes that the relevant statutory framework gives only one agency the power to act. In practice, however, both legislative enactments and presidential directives compel agency action. This authority also is often directed to more than one agency.

Almost all administrative agencies sit at least partly within the Executive Branch.[83] It is therefore not surprising that the White House would try at times to direct agency action that the current Congress does not support or has not ordered.[84] For example, in June 2013, President Obama, by memorandum and public speech, directed the EPA Administrator to issue a new proposal to regulate greenhouse gas emissions for new stationary sources by September 20, to finalize the rule "in a timely fashion" thereafter, and to issue proposed and final standards for "modified, reconstructed, and existing power plants" by June 1, 2014, and June 1, 2015, respectively.[85]

Five months earlier, in the aftermath of the Newtown school shooting tragedy, President Obama, by memoranda, ordered all federal agencies to require any relevant mental health and criminal history information be provided to the National Instant Criminal Background Check System[86] and told agencies that recover firearms to ensure that the firearms are traced through the Bureau of Alcohol, Tobacco, Firearms, and Explosives as soon as possible.[87] He also directed the Secretary of Health and Human Services, through the Centers for Disease Control and Prevention, to "conduct or

83. DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 1, 10–11 (2012).

84. To survive judicial review, of course, the action must be justifiable under a directive enacted by some past Congress, even if the current Congress takes a different view of the subject.

85. Memorandum on Power Sector Carbon Pollution Standards, 2013 DAILY COMP. PRES. DOC. 457 (June 25, 2013) [hereinafter Carbon Standards Memo]; *see also* Remarks at Georgetown University, 2013 DAILY COMP. PRES. DOC. 452 (June 25, 2013) (announcing climate change directives to the EPA).

86. Memorandum on Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 2013 DAILY COMP. PRES. DOC. 22 (Jan. 16, 2013) [hereinafter NICS Memo].

87. Memorandum on Tracing of Firearms in Connection with Criminal Investigations, 2013 DAILY COMP. PRES. DOC. 23 (Jan. 16, 2013) [hereinafter Tracing Memo].

sponsor research into the causes of gun violence and the ways to prevent it."[88]

These recent agency directives take on large and contentious policy issues, climate change and gun control. Some Republicans charged that the President lacked the authority to issue them.[89] The climate change order rests explicitly on the CAA authority to impose regulatory obligations on new and existing stationary sources.[90] The gun control orders impose duties only on federal agencies.[91] If the CAA permits those mandates and if the presidential gun control directives do not regulate the public, such orders are permitted.[92] Thus, the President has and uses considerable practical authority to direct agencies.[93]

When presidential orders are connected to an underlying statute, the statute may not be the primary driver of agency action. For instance, the CAA was not enacted to address climate change.[94] The President used the broad regulatory authority in the Act to compel climate change regulations under a White House timeline.[95] The primacy that administrative law places on congressional mandates, therefore, diverges from the realities of modern agency action, where presidential directives can have equal importance with statutes to agencies. Of course, the agencies may sometimes be happy enough to take actions in these areas, but the timing and framing of the policies are not under their control.

Even within the statutory lens, administrative law tells too simple a story of congressional delegation of particular regulatory authority over nonfederal entities to a single agency. To start, Congress often has delegated to multiple agencies that then often have to coordinate action.[96]

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88. Memorandum on Engaging in Public Health Research on the Causes and Prevention of Gun Violence, 2013 DAILY COMP. PRES. DOC. 21 (Jan. 16, 2013).

89. *See, e.g.*, Jonathan Easley, *Freshman Lawmaker Threatens Impeachment over Gun Rights*, BRIEFING ROOM, THE HILL (Jan. 14, 2013, 7:29 PM), http://thehill.com/blogs/blog-briefing-room/news/277021-gop-rep-threatens-obama-with-impeachment-over-gun-action.

90. *See* Carbon Standards Memo, *supra* note 85.

91. *See* NICS Memo, *supra* note 86 (directing agencies to submit a report regarding any relevant records after the DOJ issues guidance); Tracing Memo, *supra* note 87 ("Federal law enforcement *agencies* shall ensure that all firearms . . . are traced through ATF . . . ." (emphasis added)).

92. *See* Peter M. Shane, *The Hysteria over the Obama Executive Orders*, HUFFINGTON POST (Jan. 18, 2013, 3:25 PM), http://www.huffingtonpost.com/peter-m-shane/the-hysteria-over-obama_b_2497292.html (observing that executive orders may be issued in the President's executive capacity or pursuant to a statute, although such orders may not "impose obligations or restrictions on the public").

93. *See generally* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003).

94. *See* Massachusetts v. EPA, 549 U.S. 497, 507 (2007) ("When Congress enacted these provisions [of the CAA], the study of climate change was in its infancy.").

95. *See* Carbon Standards Memo, *supra* note 85.

96. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (analyzing the strengths and weaknesses of assigning overlapping

As discussed in the introduction, the FDA and the USDA both have jurisdiction over food safety. In addition, the delegation of one task is often linked to the delegation of some other task, which could be in tension with the first.[97] Interior Department agencies, for example, have both economic and environmental mandates.[98] Relatedly, other agencies are not infrequently the subjects of regulations. For instance, the Defense Department's activities must comply with EPA regulations except in the rare cases where the President issues a national security exemption.[99] Finally, even within the conventional paradigm of congressional delegation to a single agency, scholars have recently noted "the delegation to agencies of the power to waive requirements that Congress itself has passed."[100] The No Child Left Behind Act and the Patient Protection and Affordable Care Act are two such examples.[101] Such overlapping delegations inevitably mean that coordination is required so that the policy development is not tied to a single agency. This may be a healthy situation, but it necessarily strains the idea of policy delegation to a unique agency decision maker.

B. Administrators of Agencies and White House Staff

Just as administrative law rests on oversimplified assumptions about the impetus for agency action, it also makes some questionable presumptions about the target of that delegation. First, the agency, not the wider Executive Branch, is Congress's executor.[102] Second, Senate-confirmed presidential appointees (or in the rare case, recess appointees) lead that agency.[103] In short, any decisions are agency decisions, and the decision maker is the agency leader (or top board), who is chosen by the President and confirmed by the Senate.

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authority to agencies); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2007) (examining *Gonzales v. Oregon*, 546 U.S. 243 (2006), to revisit the conventional wisdom regarding agency interpretations of statutes that share jurisdiction between more than one political institution); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006) (analyzing arguments for and against the unification of federal agencies in their responsibilities related to national security).

97. *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009) (examining options for addressing the problem of agencies underperforming in certain areas when faced with competing goals).

98. *See id.* at 2–3.

99. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1536 (2012); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6961 (2006); Clean Air Act, 42 U.S.C. § 7418 (2006); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9620 (2006).

100. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 265 (2013).

101. *Id.* at 267–68.

102. *See supra* subpart I(C).

103. *See supra* notes 68–69 and accompanying text.

We will discuss the decision-making process at length in the subsequent two subparts. Here, we focus on the people involved. The time it takes for the President to choose an agency leader and then for the Senate to confirm her can be considerable. At the end of his first year in office, President Obama had filled only 64.4% of Senate-confirmed positions in executive agencies (excluding independent regulatory commissions and boards).[104] And because agency leaders often have relatively short tenures,[105] the delays are repeated within an administration. From 1977 to 2005, Senate-confirmed positions in these executive agencies were "empty," on average, between 15 and 25 percent of the time.[106]

In many cases, these top positions are not literally empty. An acting official is often at the desk. The Federal Vacancies Reform Act of 1998 allows temporary officials to wield full authority in most agencies[107] (but, critically, not in top jobs in independent regulatory commissions such as the National Labor Relations Board (NLRB)[108]). The law limits who can serve as acting officials and for how long.[109] These acting officials can be picked from three primary groups: political "first assistant[s]" to the vacant jobs, other political officials (if sufficiently senior), and high-level civil servants.[110] The first two groups share some similarities with the presumed Senate-confirmed leaders, in that the President has selected these officials, but the Senate has not confirmed them for the particular job, if at all.[111] The third group may be more faithful to congressional intent, as civil servants, but lacks the political stature of Senate-confirmed officials.[112] Commentators within and outside the government view the use of acting

104. ANNE JOSEPH O'CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP: PRESIDENT OBAMA'S RECORD IN STAFFING KEY AGENCY POSITIONS AND HOW TO IMPROVE THE APPOINTMENTS PROCESS 2 (2010), *available at* http://www.americanprogress.org/issues/2010/04/pdf/dww_appointments.pdf.

105. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 n.23 (2009) (compiling studies that measure the tenure lengths of agency leaders).

106. *Id.* at 965.

107. *See* Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345 (2012).

108. *See id.* § 3349c (listing exclusions).

109. *See id.* § 3345(a) (specifying who may be an acting officer in the event of a vacancy); *id.* § 3346(a)–(b) (providing time limits for the service of acting officers); *id.* § 3349a(a)–(b) (providing additional specifications for when the § 3346 time limits begin during periods of presidential inaugural transitions). Because the Act excludes independent regulatory commissions, it appears the President can fire acting officials at will. However, because a limited number of people can serve in an acting capacity for a vacant position, the President often has little incentive to replace an acting official. *See* O'Connell, *supra* note 105, at 944 (reasoning that an acting official is a placeholder until the President can find a permanent replacement).

110. *See* 5 U.S.C. § 3345(a)(1)–(3).

111. *See* O'Connell, *supra* note 105, at 944–45.

112. *See id.* at 942, 945 (describing how a career official does not have the authority of a permanent appointee in, for example, dealing with outside constituencies).

officials as less attractive than traditionally appointed leaders.[113] Lacking permanency and Senate imprimatur, acting officials are less able to advocate forcefully for the agency within the Executive Branch or fend off pressure from the White House or other agencies.[114] Unlike other components of the modern administrative state, the use of acting officials to fill empty administrative positions, by itself, would seemingly cut against a trend of increasing White House power (and decreasing congressional and judicial power). Yet, in combination with the increased role of White House staff, which we turn to next, the overall effect is more mixed.

The decision makers in administrative law are also assumed to be working in the agency.[115] In the modern Presidency, the size of White House staff has significantly expanded overall, though not always in a uniformly increasing manner.[116] Early on, President Obama chose some important policy advisors, including Carol Browner for energy and environmental topics, Larry Summers for economics and recovery areas, and Nancy-Ann DeParle for health care.[117] Republicans and Democrats in Congress, among others, have complained about these White House "czars."[118] Such high-level advisors operate out of the White House, not particular agencies, and thus do not face Senate confirmation or direct congressional oversight.[119] Officially, they do not exercise independent legal authority, but by many accounts they are key players in agency decisions.[120]

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113. *See, e.g.*, Michael D. Shear, *Politics and Vetting Leave Key U.S. Posts Long Unfilled*, N.Y. TIMES, May 2, 2013, http://www.nytimes.com/2013/05/03/us/politics/top-posts-remain-vacant-throughout-obama-administration.html (describing concern among various commentators regarding acting officials who have "little authority to make decisions" and weaken accountability in their agencies).

114. *See* Dan Eggen & Christopher Lee, *Late in the Term, an Exodus of Senior Officials*, WASH. POST, May 28, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052702641.html.

115. *See supra* notes 68–69 and accompanying text.

116. *See* ANDREW RUDALEVIGE, MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION 51, 52 & fig.3.3, 53–61 (2002).

117. *See* Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–78 (2011).

118. *See* Amy Harder, *Observers Worry White House 'Czars' Have Too Much Power*, GOV'T EXECUTIVE (Mar. 13, 2009), http://www.govexec.com/oversight/2009/03/observers-worry-white-house-czars-have-too-much-power/28755/ (reporting that both Senator Robert Byrd, a Democrat from West Virginia, and Yale law professor Bruce Ackerman had concerns that "czars" threatened the balance of powers).

119. *See* O'Connell, *supra* note 105, at 930–31 (noting the use of high-level advisors as an exception to the formal nomination and appointment process).

120. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49–50 (2006) (stating that, in the context of EPA rulemaking, White House offices often have more influence on important issues than OIRA); Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343, 343 n.* (2011) (stating that the author of the article served as Counselor for Energy and Climate Change in the White House and

The modern administrative state thus is often missing the presumed decision makers, Senate-confirmed agency leaders. Sometimes, acting officials take their place; other times, agencies, such as the NLRB, lack the necessary leaders to make decisions.[121] In addition, administrative law generally ignores the decision makers within the White House who have grown in number and power, who do not face congressional or judicial oversight, and who are now too numerous to be personally supervised by the President.[122] But their role is shielded from judicial scrutiny by decisions such as *Sierra Club v. Costle*.[123]

C. Procedural Mandates

The APA details what procedures agencies must follow to issue binding decisions.[124] Much of the APA focuses on formal rulemaking and adjudication, the use of which declined precipitously after the Court's decision in *Florida East Coast Railway*.[125] Nevertheless, judicial decisions have supplemented the Act's requirements for notice-and-comment rulemaking to create an alternative, robust "paper hearing" process.[126] The realities of modern rulemaking, however, often do not comport with this "paper hearing." First, agencies forgo prior notice and comment in a significant number of rulemakings. Second, agencies do follow detailed procedural mandates for important regulations, but those mandates are tied not to the APA but rather to executive orders of both Democratic and Republican presidents.

If agencies want their regulations to have the force of law, under the APA they must provide prior notice and comment unless they determine

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in that position contributed to the creation of the national auto policy discussed in the article); Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2582 (2011) (noting that "it seems clear that at least some of Obama's czars were tasked to bring about particular and significant policy change, and to do so from the White House").

121. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010) (holding that the NLRB, which has a three-member quorum requirement, could not exercise its authority when the agency's board fell to two members).

122. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146–59 (2010) (presenting evidence that the White House significantly influences agency decisions without agencies or others disclosing the content of this influence).

123. 657 F.2d 298 (D.C. Cir. 1981). The D.C. Circuit held that the court was limited to determining whether an agency decision was supported by its explanation and the record and that it would not be proper to inquire into whether the decision was actually based on reasons from the White House. *Id.* at 408.

124. *See* Administrative Procedure Act, 5 U.S.C. §§ 553–557 (2012).

125. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973); *see also* J. Skelly Wright, Commentary, *Rulemaking and Judicial Review*, 30 ADMIN. L. REV. 461, 462–63 (1978) (noting the shift away from formal rulemaking precipitated by *Florida East Coast Railway*).

126. *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 529, 553–54 (2006).

and explain that such process would be "impracticable, unnecessary, or contrary to the public interest."[127] The good-cause exception was intended to be narrow. In recent decades, however, agencies have increasingly relied on two broader forms of binding rulemaking that forgo prior notice and comment: direct final rulemaking and interim final rulemaking, neither of which is covered directly by the APA.[128] Direct final rules, which are supposed to speed up noncontroversial regulation, become effective a certain time after publication in the *Federal Register* unless "adverse" comments are submitted.[129] Interim final rules take effect immediately upon publication or soon thereafter and allow for commenting *ex post*.[130] Agencies can then issue final rules, but rarely do so, keeping the interim final rules on the books.[131] In an empirical study of rulemaking, one of us showed that the use of these new forms of rulemaking increased between 1983 and 2002.[132] The Government Accountability Office (GAO) determined that agencies did not publish an NPRM allowing the public to comment in about 44% of nonmajor rulemakings between 2003 and 2010.[133] Less than 10% of those rulemakings were interim final rules, which permit *ex post* commenting.[134]

Agencies are forgoing prior notice and comment in particularly important rulemakings as well. The GAO also found that agencies skipped this process in approximately 35% of major rulemakings (i.e., having an annual effect on the economy of at least $100 million or other significance) between 2003 and 2010; almost half of these major rules were, however, interim final rules with commenting after the fact.[135] To be fair, agencies typically claim that the good-cause exception in the APA or some other exemption allows them not to follow traditional procedures.[136] Yet,

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127. 5 U.S.C. § 553(b)(B).

128. *See* Adoption of Recommendations Notice, 60 Fed. Reg. 43,108, 43,110–13 (Aug. 18, 1995) (explaining these two types of rulemaking and how each has been partially justified using the good-cause exception); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 401–02 (1999) (arguing that direct final rulemaking does not comply with the APA despite its recent use and the good-cause exception).

129. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995).

130. *See* Recommendation 95-4, *supra* note 123, at 43,111; Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999).

131. *See* Asimow, *supra* note 130, at 736–37 (finding that many interim final rules remained unfinalized three years after their adoption).

132. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 929–36 (2008).

133. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (2012).

134. *Id.* at 13.

135. *Id.* at 7–8, 13.

136. *See id.* at 2 (noting prior notice and public comment is not always required and giving examples of exceptions).

agencies do not respond to *ex post* comments in the most significant rulemakings one-third of the time.[137]

While agencies may be skipping well-established statutory procedural requirements, they have been subject to process mandates through presidential directives for the past three decades. Specifically, since 1981, executive orders have required agencies to submit certain proposed and final rulemakings, along with a cost–benefit analysis, to OIRA, which sits within OMB, for prior approval.[138] Currently, only executive agencies (and not independent regulatory commissions like the NLRB) pursuing economically significant rulemakings have to conduct a cost–benefit analysis and wait for approval, though all agencies must submit notice of all of their nontrivial regulatory plans to OIRA annually.[139] OIRA also signs off on executive agency rules that do not meet the $100 million annual threshold but are considered otherwise significant because of interagency and other concerns.[140] There is some dispute about whether nonbinding (in the formal sense) but still significant guidance must be submitted to OIRA. President George W. Bush explicitly included major guidance in his regulatory review directive in the latter part of his administration.[141] Although President Obama repealed that executive order, OIRA maintains that such guidance still is covered.[142]

Just as with the APA's mandates, agencies have attempted, with mixed success, to evade review by OIRA.[143] Some avoidance is through the

137. *Id.* at 28.

138. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012); Exec. Order No. 12,291, §§ 7–9, 3 C.F.R. 127, 131–34 (1982), *revoked by* Exec. Order No. 12,866 § 11, 3 C.F.R. at 649.

139. Exec. Order No. 12,866 §§ 3(b), 4(c), 6, 3 C.F.R. at 641–48.

140. *Id.* § 3(f), 3 C.F.R. at 641–42. According to a recent estimate, fewer than 20% of rules reviewed by OIRA meet the $100 million annual threshold. Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1851 (2013).

141. *See* Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497 § 1, 3 C.F.R. 218, 218 (2010).

142. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts & Agencies: Guidance for Regulatory Review (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf; *see also* Sunstein, *supra* note 140, at 1853.

143. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (analyzing different strategies for agency behavior in relation to executive review); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011) (examining how and why agencies avoid OIRA review); *cf.* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 337, 360 (2014) (drawing on insider experience at the EPA to question the plausibility of agencies avoiding OIRA review).

choice of policymaking form.[144] Formal rulemaking and adjudication do not fall under OIRA's purview; yet, agencies rarely engage in formal proceedings.[145] Nonbinding policies generally are not reviewed by OIRA, though OIRA does examine, in some fashion, significant guidance, so there is some room to use guidance and other such mechanisms to avoid OIRA.[146] Nevertheless, avoidance of OIRA review through nonbinding action at the front end often comes with more scrutiny at the back end from the courts.[147] Perhaps, "regulation by deal" in the financial crisis has been the most effective mechanism of OIRA avoidance, though almost no one focuses on the OIRA angle.[148] Agencies also can try to break down regulations into smaller components or claim regulations are not significant to avoid White House review, for which they have had mixed success.[149]

These statutory and presidential procedures differ in their transparency. If agencies engage in traditional notice-and-comment rulemaking, the notice and comments are public.[150] Forgoing prior notice and comment, as is becoming more common, therefore makes the decision-making process considerably more opaque. Although presidents have increased the openness of the White House process over time, it remains much less transparent than the statutory process when both are followed.[151] During the review process, OIRA engages directly with the drafting

144. *See* Nou, *supra* note 143, at 1789 ("[A]gencies can choose between simple inaction, adjudication, guidance documents, or nonsignificant rules as instruments that are more likely as a class to bypass presidential review.").

145. *See* O'Connell, *supra* note 132, at 901 (noting that because so few statutes contain the phrase "on the record after opportunity for [a] . . . hearing," "agencies generally do not conduct formal rulemakings when promulgating legally binding regulations" (alterations in original)).

146. *See* Nou, *supra* note 143, at 1784–85.

147. *See* O'Connell, *supra* note 132, at 909, 917–18 (considering strategies for an agency's choice of rulemaking process and observing that "[m]ore formal procedures . . . produce greater deference from reviewing courts").

148. *Cf.* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466 (2009) (demonstrating that in the financial crisis the government largely used "deals" with the private sector rather than more traditional regulatory tools). *But see* David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 189 (2010) (noting that the Treasury Department did not consult OMB regarding the terms of the financial bailout).

149. *See* Nou, *supra* note 143, at 1788–89 (commenting on the possibility of avoiding White House review through a nonsignificant rulemaking form); Note, *supra* note 143, at 1002, 1006, 1012 (listing these two possibilities for avoiding OIRA review, finding mixed experiences among two former OIRA officials regarding the likely success of regulatory avoidance, and providing evidence that cost underestimation is used when making politically contentious rules).

150. *See Administrative Procedure Act*, 5 U.S.C. § 553(b) (2012) (requiring the publication of notice and comments in the *Federal Register*); REGULATIONS.GOV, http://www.regulations.gov (providing public access to proposed regulations, final regulations, and other documents published by the U.S. federal government).

151. *See* Bressman & Vandenbergh, *supra* note 120, at 50–51; *id.* at 82 (reporting survey results).

agencies, sometimes intensively.[152] OIRA can also meet with interested parties within and outside government.[153] As former OIRA head Cass Sunstein explained, "[i]t accepts all comers."[154] OIRA now must invite the agency (or agencies) that drafted the regulation to each meeting and disclose all the participants in those meetings.[155] The directives also require OIRA to "make available to the public all *documents* exchanged between OIRA and the agency during the review by OIRA," including written materials given to OIRA by a private or public entity, but only after the final rule has been published in the *Federal Register* or the agency has publicly announced its decision not to issue the rule.[156] Oral communications and documents exchanged before the official review process, however, are not included.[157]

Even if the meeting and document-exchange disclosure mechanisms are followed, much of the interaction between OIRA and regulators remains shielded from public scrutiny.[158] In addition, the White House contends that these interactions are protected by executive privilege from congressional oversight and by the deliberative-process exemption from required disclosure under the Freedom of Information Act.[159] And if these or any other requirements in the presidential directives are not followed, there is no judicial review; the directives explicitly bar that oversight option.[160]

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152. *See* Heinzerling, *supra* note 143, at 356–57 (describing the direct engagement of OIRA with the EPA).

153. Sunstein, *supra* note 140, at 1860.

154. *Id.*

155. *See* Exec. Order No. 12,866 § 6(b)(4)(B)–(C), 3 C.F.R. 638, 647–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802, 805–06 (2012).

156. *Id.* § 6(b)(4)(D), 3 C.F.R. at 648 (emphasis added). In addition, the agency is supposed to disclose any technical information on which it bases its regulatory decisions, including from these meetings. *See* Sierra Club v. Costle, 657 F.2d 298, 397–98 (D.C. Cir. 1981).

157. *See* Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. at 648 (requiring disclosure only of *documents*, and those only during the official review process).

158. *See* Mendelson, *supra* note 122, at 1149 ("[P]ublic information about the content of executive supervision . . . is surprisingly rare.").

159. Assertion of Executive Privilege over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request, 32 Op. Att'y Gen. (June 19, 2008), http://www.justice.gov/olc/opiniondocs/ozonecalwaiveragletter.pdf (advising the President that he may lawfully assert executive privilege over subpoenaed documents regarding EPA's proposed regulations).

160. Executive Order 12,866 states:

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Exec. Order No. 12,866 § 10, 3 C.F.R. at 649.

In addition to transparency, the statutory and presidential procedures differ in their timing. At least as written, presidential mandates on agency decision making do impose time limits, unlike the APA requirements. Some of these limits restrict OIRA; others apply to the drafting agencies. Under the most recent executive order, OIRA generally has ninety days for its review process, which it can extend only once, by thirty days.[161] The directive also supplements the APA's commenting process by instructing agencies that "a meaningful opportunity to comment on any proposed regulation" requires "in most cases . . . a comment period of not less than 60 days."[162]

Just as agencies do not always follow statutory mandates, OIRA does not consistently comply with presidential requirements. Recent investigations have drawn attention to two discrepancies, in both Democratic and Republican administrations. First, written communications between OIRA and the drafting agency, whether generated by OIRA or given to it by outside parties, are often not disclosed once the final rule is issued. Indeed, on OIRA's website, there is no direct link to written documents to agencies by OIRA.[163] Despite the explicit mandate for disclosure, according to the GAO, OIRA "would not do so regarding exchanges between the agencies and OIRA staff at the level where most such exchanges occur."[164] Although OIRA's website does include some written documents provided to it by outside parties, much appears to be missing.[165] Specifically, between October 2001 and January 2013, OIRA noted that it had 581 meetings on EPA rulemakings but disclosed only 26 written documents from outsiders.[166] If nothing else, it seems implausible that there were at least 555 meetings where no outsider brought even a scrap of paper to the meeting. Thus, much of the actual process that shapes

161. *Id.* § 6(b)(2)(B)–(C), 3 C.F.R. at 647. If OIRA has previously reviewed the rulemaking and "since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based," OIRA gets only forty-five days, not ninety. *Id.* § 6(b)(2)(B), 3 C.F.R. at 647.

162. *Id.* § 6(a)(1), 3 C.F.R. at 644.

163. *See Regulatory Matters*, OFFICE MGMT. & BUDGET, http://www.whitehouse.gov/omb/inforeg_regmatters. The website does link to regulations.gov, which does contain a few redlined documents. For an example of a proposed rule and OMB's redlined changes, see *OMB Review of Proposed Rule re Executive Order 12866, Foreign Supplier Verification Programs for Importers of Food for Humans and Animals, July 29, 2013 - Memorandum*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=FDA-2011-N-0143-0036.

164. U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 13 (2003).

165. Sam Abbott, *Disclosure at the Office of Information and Regulatory Affairs: Written Comments and Telephone Records Suspiciously Absent*, CENTER FOR EFFECTIVE GOV'T (Feb. 26, 2013), http://www.foreffectivegov.org/disclosure-at-oira-written-comments-and-telephone-records-suspiciously-absent.

166. *Id.*

regulation, along with the supporting reasoning, if any, remains shielded from public scrutiny or judicial oversight.

Second, OIRA has not followed the express time limits on its review process. The time limits were imposed after criticism that Republicans in the White House were delaying regulations.[167] But Democrats too have delayed, particularly in this administration.[168] The *New York Times* has referred to the "purgatory of OIRA."[169] Of 136 rules recently under review at OIRA, more than half had been there longer than the ninety-day limit; of those, nearly forty had been there over a year.[170] Another study of reviews completed in 2012 found that approximately 20% of the year's completed reviews took more than 120 days.[171] The *Washington Post* reported that OIRA delayed "a series of rules on the environment, worker safety and health care to prevent them from becoming points of contention before the 2012 election."[172] Most recently, a report prepared for the Administrative Conference of the United States found that in 2012 OIRA review took, on average, 79 days and that in the first half of 2013 the review took even longer, on average 140 days.[173] The report did note that "data indicate that OIRA has reduced its backlog of long-term reviews and has improved review times in recent months, although those review times have still not returned to historic norms."[174]

This noncompliance may also generate conflicts with explicit statutory deadlines for agency action. For example, the proposed food safety

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167. *See* Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 88 (2008) (summarizing criticisms made during the Reagan Administration regarding the "costly delays" caused by OMB review).

168. *See* Heinzerling, *supra* note 143, at 371 (noting that as the process currently works "OIRA calls an official at the agency and *asks the agency to ask for an extension*" and "the agency is not to decline to ask for such an extension" and, therefore, that "not only is there no deadline for OIRA review, but OIRA itself controls the agency's 'requests' for extensions," allowing rules to remain at OIRA "for years").

169. Editorial Bd., Editorial, *Stuck in Purgatory*, N.Y. TIMES, June 30, 2013, http://www.nytimes.com/2013/07/01/opinion/stuck-in-purgatory.html.

170. *Id.*

171. *Regulatory Delay in 2012*, CENTER FOR EFFECTIVE GOV'T (Dec. 18, 2012), http://dev.ombwatch.org/regulatory-delay-in-2012. The new OIRA Administrator has promised "to ensure that regulatory review at OIRA occurs in as timely a manner as possible." John M. Broder, *Regulatory Nominee Vows to Speed Up Energy Reviews*, N.Y. TIMES, June 12, 2013, http://www.nytimes.com/2013/06/13/us/politics/environmental-rules-delayed-as-white-house-slows-reviews.html.

172. Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST, Dec. 14, 2013, http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html.

173. CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 4 (2013), *available at* http://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf.

174. *Id.*

standards discussed in the introduction sat at OIRA for about a year, far beyond the maximum 120 days allowed under the executive order, and the agency consequently missed the congressional deadline for issuing the proposed rules.[175] These delays not only slow the process (in this case violating a statutory deadline) but also provide the opportunity for more extensive lobbying and more intrusive White House review.

In short, important procedural mandates of administrative law come from the White House rather than from the APA and related case law. In addition, the combination of agencies avoiding prior notice and comment and OIRA not following the limited, express accountability mandates from presidential directives has resulted in agency decision-making procedures that are largely shielded from Congress, the courts, and the public.

D. Criteria for Decisions and Reason Giving

The presumptions of administrative law and the practices of modern agencies differ not just on the decision-making process but also on the substantive decisions. Administrative law rests on the agency reaching a decision based on statutory criteria provided when Congress delegated authority. We discuss first the criteria and then the decision maker, though the two are often connected.

The White House regulatory review process, on its terms, as well as political considerations can shape agency decisions in ways not permitted or imagined by the explicit terms of the statute. To start, the regulatory review process is premised on social welfare criteria. Specifically, "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."[176] Because executive agencies must provide a cost–benefit analysis to OIRA for economically significant rulemakings even when the statute provides a different basis for decision (for instance, by precluding consideration of cost),[177] critics of OIRA review argue that OIRA essentially forces agencies to violate the law in making decisions in particular circumstances.[178] Defenders contend, however, that the cost–benefit analysis serves only as a disclosure requirement in those situations and does not displace the statutory factors, as the directive explicitly notes

175. *See supra* notes 8–10 and accompanying text.

176. *See* Exec. Order No. 12,866 § 1(a), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802, 802 (2012).

177. *Cf. id.* § 6(a)(3)(C), 3 C.F.R. at 645–46 (noting no exception to the mandate).

178. *See* Heinzerling, *supra* note 143, at 338 (criticizing OIRA as "rest[ing] on assertions of decision-making authority that are inconsistent with the statutes the agencies administer").

that its requirements do not trump existing law.[179] The opacity of the review process makes it difficult to evaluate these competing descriptions, but there is at least some reason to think that OIRA can sometimes demand consideration of cost–benefit analysis even under statutes where the decision must be based on other factors.

Political considerations also factor into agency decisions. The opposite conclusion may be one of the strongest fictions of administrative law. Agencies rarely acknowledge these political considerations explicitly, though few commentators and scholars dispute their importance.[180] For example, Obama's pending reelection in November 2012 and the corresponding political need to avoid public conflict with the agricultural industry presumably contributed to the delay in proposing the new food safety standards.[181] So long as agencies can articulate some reasoned defense based on statutory terms, even if some political factor drove the decision, courts can manage to ignore politics.[182] The charade disintegrates only when the agency has no facially plausible alternative story it can tell. For instance, in striking down the Obama Administration's refusal to allow girls under seventeen to obtain the "morning-after pill" without a prescription—a decision that had the Secretary of Health and Human Services overruling the Administrator of the FDA—the district court found that "the Secretary's action was politically motivated, scientifically unjustified, and contrary to agency precedent."[183]

The statutory criteria may therefore be the basis for the decision in name only. Similarly, the agency may be the decision maker only in the formalist sense. There is increasing evidence that OIRA is no longer just a reviewer of the costs and benefits of agency decisions but rather is a reviewer of noneconomic judgments as well as a maker of policy decisions

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179. *See* Sunstein, *supra* note 140, at 1865–66. As we have seen, because it would be unlawful for the agency to consider the cost–benefit analysis in making its decision in such situations, even if the ultimate outcome could be rationalized under the applicable statutory standard, OIRA must claim that the cost–benefit analysis is merely for informational purposes.

180. Given the fiction's strength, it is not surprising that scholars have already examined it. *See, e.g.*, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); Mendelson, *supra* note 122; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 14–29 (2009).

181. *See* Sabrina Tavernise, *Groups Urge Action on Food Safety Law*, N.Y. TIMES, July 17, 2012, http://www.nytimes.com/2012/07/17/science/consumer-groups-criticize-delay-on-food-safety-law.html.

182. *See* Watts, *supra* note 180, at 7 (describing "the blanket rejection of politics" as the courts' status quo view of administrative decision making).

183. Tummino v. Hamburg, 936 F. Supp. 2d 162, 170, 192 (E.D.N.Y. 2013). According to reports, the Health and Human Services reversal came as "Mr. Obama was campaigning for reelection, and some Democrats said he was conscious of avoiding divisive issues that might alienate voters." Pam Belluck, *Judge Strikes Down Age Limits on Morning-After Pill*, N.Y. TIMES, Apr. 5, 2013, http://www.nytimes.com/2013/04/06/health/judge-orders-fda-to-make-morning-after-pill-available-over-the-counter-for-all-ages.html.

and a conveyer of input from White House staff and other agencies, no matter which party controls the White House.[184] Recent OIRA head Sunstein concedes that OIRA does more than review a particular cost–benefit analysis. He touts that the organization serves an even more important role as a clearinghouse for input into decisions by other parts of the Executive Branch—in other words, it pools information (or fosters interagency lobbying, depending on your perspective).[185] Critics, however, argue that OIRA second-guesses agencies' scientific and technological judgments as well as their economic analysis[186] and does not even achieve the claimed "regulatory effectiveness" and "intra-agency coherence."[187] A broader role for OIRA also provides a conduit for influence by regulated parties; the Agriculture Department, for instance, might represent the interests of farmers.

In a survey of EPA scientists during President George W. Bush's Administration (conducted by the nonprofit Union of Concerned Scientists), agency employees reported in free-form essays that OMB officials "insert[ed] themselves into decision-making at early stages in a way that shaped the outcome of their inquiries."[188] In addition, OIRA writes critical regulatory text rather than merely signing off on agency language. For instance, a red-lined version of a recently proposed EPA regulation on power plants' toxic discharges of pollutants showed it was "significantly altered during White House review to include additional regulatory options for industry."[189] White House staff members, separate from OIRA, also provide detailed drafting of regulations.[190] These practices show that instead of the agency making decisions on statutory criteria, the White House may call the shots, and the decision may result from criteria not found in the delegating statute. On the other hand, supporters of White

184. Michael Livermore argues that the agency role in developing the methodology for cost–benefit analysis undercuts arguments that OIRA's review of cost–benefit analysis undermines agency independence because the methodology can have important effects on regulatory outcomes. *See* Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, U. CHI. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2327554. Although this effect makes the analysis of OIRA's role more complex, its relevance is limited to the extent that OIRA's role now extends far beyond review of cost–benefit analysis.

185. Sunstein, *supra* note 140, at 1840.

186. *See* Heinzerling, *supra* note 143, at 367–68 (criticizing OIRA for "play[ing] an active role in adjusting EPA's discussions of technical matters in its NAAQS decisions. . . . [without] the scientific expertise necessary to make judgments about where the NAAQS should be set").

187. Bressman & Vandenbergh, *supra* note 120, at 50.

188. Judy Pasternak, *Hundreds of EPA Scientists Report Political Interference*, L.A. TIMES, Apr. 24, 2008, http://articles.latimes.com/2008/apr/24/nation/na-epa24.

189. Anthony Adragna, *Document Shows Power Plant Guidelines Rule Significantly Altered in White House Review*, BLOOMBERG BNA (Aug. 9, 2013), http://www.bna.com/document-shows-power-n17179875765/.

190. *See* Bressman & Vandenbergh, *supra* note 120, at 66.

House involvement often lament what they perceive as agency fixation on their governing statutes at the expense of other policies.[191]

E. Judicial Oversight

Modern administrative law, particularly the APA, venerates the courts.[192] We teach students that judicial review can ensure that the agency justification for a decision matches the delegated directions from Congress. Specifically, under the APA, aggrieved parties can bring challenges to the courts, which can then set aside unlawful agency action.[193] The "background presumption" of judicial review is that of "congressional intent."[194]

A variety of judicial decisions have helped to limit the courts' oversight of the policymaking process by restricting the class of aggrieved parties and reviewable actions as well as by lightening the intensity of review even when such aggrieved parties and reviewable actions exist. Decisions have made it harder to show the requisite injury, causation, and redressability to have standing to sue.[195] To the extent that these barriers are particularly difficult for regulatory beneficiaries to overcome, they could reinforce the advantage that regulated parties may already have in lobbying OIRA. Other decisions have made it difficult to challenge agency policies until they have been applied in enforcement actions, in effect allowing adoption of broad policies that can only be challenged through expensive, piecemeal litigation.[196] Relatedly, decisions have made it nearly impossible to force agencies to undertake broad actions, even if required by statute.[197]

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191. *See* Sunstein, *supra* note 140, at 1871–72.

192. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 76–78 (2012) (comparing the limited role of judicial review of administrative actions in early U.S. history with its more robust conception after the APA). To be sure, judicial review of agency action since the APA has been uneven. The courts took a particularly active role in overseeing agencies in the 1960s and 1970s, for example. *See* Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1392 (2000).

193. Administrative Procedure Act, 5 U.S.C. §§ 702, 706 (2012).

194. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

195. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (denying plaintiffs standing for failure to establish injury in fact); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45 (1976) (denying plaintiffs standing because too many inferences were required to establish causation); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998) (denying plaintiff standing for failure to pass the redressability test). *See generally* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1185–98 (2009).

196. *See*, *e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003) (finding a challenge to an agency regulation on national park concessions not ripe for judicial review and requiring the challenger to wait to dispute a concrete contract).

197. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 62–63 (2004) (holding that the courts have the authority to compel only discrete, legally required actions that agencies have failed to perform).

Even if agency actions are reviewable, deference doctrines have developed that generally favor agency discretion and therefore foster White House influence. *Chevron* permits any reasonable interpretation of an ambiguous statute even if it is not a compelling one.[198] *Mead*[199] does restrict this deference to binding interpretations,[200] which encourages notice-and-comment rulemaking, or, often, good-cause rulemaking.[201] *Brand X*,[202] however, allows agencies to switch binding interpretations of such statutes even if a court has found another interpretation persuasive.[203] The latest major case, *City of Arlington*,[204] furthers *Chevron*'s view by incorporating jurisdictional questions into the agency deference framework.[205]

Judicial decisions targeting the process of agency decision making (including but not limited to the process of reaching substantive interpretations of statutes) under § 706(2)(A) of the APA may not be as deferential as the second step of the *Chevron* framework. But "hard look" review may be getting a bit lighter. *Fox Television*[206] permits agencies to reverse policies without a real defense of the need for change.[207] It is conventional to see these decisions as giving more discretion to agencies.[208] That may be true (if thinking against the background of the courts versus the agencies), but they also give more room to the White House to intervene

198. *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843–44 (1984). *Chevron* has a cult-like status, standing now for far more than it did at the time, when it was perceived as summarizing existing law. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) (recognizing that "*Chevron* has come to stand for judicial deference to administrative interpretations of law" in spite of the fact that Justice Stevens "was not especially deferential to agency decisions" in his majority opinion).

199. United States v. Mead Corp., 533 U.S. 218 (2001).

200. *Id.* at 229–33.

201. *See* O'Connell, *supra* note 132, at 909, 917–18 (articulating that many believe that notice-and-comment rulemaking could make *Chevron* deference more likely); *see also Mead*, 533 U.S. at 245 (Scalia, J., dissenting) (positing that the Court's decision in *Mead* will encourage agencies to use notice-and-comment procedures to gain more deference in judicial challenges).

202. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

203. *See id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

204. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013).

205. *See id.* at 1873.

206. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

207. *Id.* at 514 (finding no basis in the APA to subject "all agency change . . . to more searching review").

208. *See, e.g.*, Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433 (2010) (discussing the discretion afforded by some of these decisions and characterizing this discretion as problematic).

in policymaking.[209] Indeed, portions of *Chevron*'s reasoning seem to provide affirmative support for White House intervention. *Chevron* maintains that statutory decisions about ambiguous statutes should be made by politically accountable actors; it does not primarily base deference on agency expertise,[210] as under *Skidmore*.[211]

The political accountability side of *Chevron* seems to license a shift toward the political venue of the White House since the agency has no comparative advantage in terms of political accountability. Yet, to the extent that *Chevron* is based on the idea of a delegation of interpretative power to the agency, displacement of the agency by OIRA or other governmental actors undercuts that rationale.[212] *Mead* can be seen as an attempt by the courts to bring agency action more in line with the lost world; though by imposing procedural requirements to get *Chevron* deference,[213] it might push more agency action into OIRA's ambit. It is written as a case about congressional intent, but it too increases presidential power.

Agencies also work to keep cases out of court entirely by relying heavily on settlement. For example, approximately 90% of the Securities and Exchange Commission (SEC)'s and 80% of the Equal Employment Opportunity Commission (EEOC)'s and Federal Trade Commission (FTC)'s enforcement actions are settled.[214] Such settlements permit agencies to evade the statutory process, often entirely. In some sense, settlements are like direct and interim final rules: they implement policy decisions, but they face no public scrutiny before they are reached.

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209. *Cf.* Sunstein, *supra* note 82, at 288–90 (noting that "the [*Chevron*] approach is unlikely to serve Congress' own goals and expectations" and suggesting that this is because excessive judicial deference allows the agency too much latitude to deviate from congressional intent).

210. *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 865–66 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is . . . .").

211. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

212. *See* Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1113–17 (2006) (arguing against *Chevron* deference in the context of a Clean Water Act regulation because OIRA, rather than the EPA, was responsible for the decision on how to interpret the statute).

213. *See supra* notes 199–201 and accompanying text.

214. Brief of the Securities and Exchange Commission, Appellant/Petitioner at 23, U.S. SEC v. Citigroup Global Mkts. Inc., 673 F.3d 158 (2d Cir. 2012) (Nos. 11-5227, 11-5375, 11-5242); Hamilton Jordan Jr., Should Courts Take a "Hard Look" at Agency Enforcement Settlements? 3 (May 22, 2013) (unpublished manuscript) (citing SEC v. Clifton, 700 F.2d 744 (D.C. Cir. 1983)) (on file with authors); *see also* FTC, THE FTC IN 2010: FEDERAL TRADE COMMISSION ANNUAL REPORT 2 (2010) (listing the number of consents per total FTC antitrust enforcement actions from 2005 to 2010); P. DAVID LOPEZ, EEOC, OFFICE OF GENERAL COUNSEL FISCAL YEAR 2009 ANNUAL REPORT 62 (2009) (stating that 83.9% of EEOC suit resolutions in FY 2009 were settlements).

Interestingly, the General Counsel of OMB apparently signs off on many agency settlements, informally consulting with OIRA. At the back end, courts rarely question settlement agreements. The D.C. Circuit typically treats enforcement settlements as unreviewable under *Chaney*;[215] other courts often give only a quick glance.[216] District Court Judge Rakoff's refusal to sign off on the SEC settlement with Citigroup was top national news when it happened because it deviated from this norm,[217] and was quickly stayed by the Second Circuit and is likely to be struck down.[218] Free of any meaningful oversight, agency settlements may therefore function as implicit waivers of congressional delegation as well.

In short, the courts are not the dominant overseer of agencies that the APA anticipated, though they can still play a powerful role in particular circumstances. Rather, the White House—typically through OIRA—is now at least as important as an overseer of agency action, at least if that action is significant rulemaking or guidance, particularly because it holds almost unreviewable power to block regulation entirely. This is not to say that judicial review is unimportant, but it is not necessarily the most significant restraint on agencies. Moreover, OIRA's role may step beyond oversight into active participation in making policy.

III. Assessment of Disjunction and Potential Policy Responses

As a descriptive matter, the previous two Parts have hopefully demonstrated that the realities of modern agency practices do not fit well with the theoretical framework established by the APA and judicial decisions. Sometimes, we may actually find agencies led by Senate-confirmed presidential appointees with decision-making power implementing statutory directives through statutorily mandated procedures where courts can ensure that the agency's reasoning matches the delegated directions. Yet, at many other times, multiple agencies missing confirmed leaders and lacking independent decision-making authority are implementing statutory and executive directives through mandates in both

215. Heckler v. Chaney, 470 U.S. 821 (1985); *see also* Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1030 (D.C. Cir. 2007) (asserting that enforcement actions are excluded from judicial review under § 701(a)(2) of the APA); N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1216 (D.C. Cir. 1993) ("Such agency enforcement decisions, which often turn on careful calculations about finite resource allocation, are ill-suited to judicial oversight."); Schering Corp. v. Heckler, 779 F.2d 683, 685–86 (D.C. Cir. 1985) (explaining the Supreme Court's conclusion in *Chaney* that an agency's exercise of its enforcement power is "beyond the reach of APA review"). *See generally* Jordan, *supra* note 214, at 15–18.

216. *See generally* Jordan, *supra* note 214, at 4–9.

217. *See, e.g.*, Edward Wyatt, *Judge Blocks Citigroup Settlement with S.E.C.*, N.Y. TIMES, Nov. 28, 2011, http://www.nytimes.com/2011/11/29/business/judge-rejects-sec-accord-with-citi.html.

218. U.S. SEC v. Citigroup Global Mkts. Inc., 673 F.3d 158, 161 (2d Cir. 2012).

statutes and executive orders where the final result faces limited, if any, review by the courts.

Legal fictions are, of course, commonplace. The question then becomes whether the real world improves on the lost world. If so, we would want to determine whether the legal rules should shift to better accommodate these practices. If they make things worse, however, we would want to assess whether the practices should change. Yet, in order to not create more fictions, any proposed changes also have to be feasible. We aim here to start a conversation about how to address the consequences of the mismatch between the concepts and realities of administrative law, aware of the constraints on any reform.

A. Assessing the Mismatch

There are some benefits to the current reality of the administrative state, or at least to some of its features.[219] Economists laud cost–benefit analysis as an important mechanism to weed out socially (in terms of aggregate welfare) undesirable regulations.[220] As former OIRA head Sunstein has suggested, OIRA permits the pooling of information and expertise and, along with cost–benefit analysis, helps foster more rational regulation.[221] In addition, as Justice Kagan argued before joining the Court, White House involvement produces not only greater coherence but also potential democracy benefits.[222] From this perspective, we have seen a desirable shift from the reign of unaccountable bureaucrats who could be captives of particular interest groups or overly attached to their own missions to increased economic rationality and democratic legitimacy through the White House.

There are, however, some very real costs, which extend beyond attacks on cost–benefit analysis as a regulatory methodology.[223] A quick list would

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219. We are not examining what the ideal administrative state might look like. For instance, we do not consider how many agency positions ideally should be vacant at any given time, or how many regulations ideally should go through no or abbreviated prior public process, based on a set of normative criteria.

220. *See, e.g.*, W. Kip Viscusi & Ted Gayer, *Safety at Any Price?*, REGULATION, Fall 2005, at 54 (recognizing that proper cost–benefit analysis can be socially optimal but critiquing the efficacy of the current approach).

221. *See* Sunstein, *supra* note 140, at 1840–41.

222. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334–39 (2001). Agency employees believe presidential involvement in agency decisions provides democratic legitimacy, even if they disagree with the views of the White House. *See* Bressman & Vandenbergh, *supra* note 120, at 89–90 (noting that EPA employee comments convey that the President plays a "democratizing role" in balancing competing interests).

223. *See, e.g.*, SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 40, 46–72 (2003) (defending Congress's choice not to rely on cost–benefit analysis when shaping risk regulation); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1556 (2002).

include: loss of transparency for the regulated parties and the public; greater difficulty of congressional oversight; more politicization of the rulemaking process (the flip side of the democracy benefit); decreasing influence of the agency's unique expertise and knowledge of the record; and blurring or undermining delegation as the agency's statutory mandate is diluted by other policy and political goals. For instance, OIRA meets far more often with industry representatives than with public interest groups; the content of these meetings is largely unknown; and there are plausible fears of special interest influence.[224] Even if the agency's role in the process is exhaustively documented and subject to judicial oversight, such transparency may be deceptive if the real decisions are being made elsewhere based on considerations that never see the light of day.

The old-style administrative process of the lost world—where Senate-approved agency heads are in charge of implementing their statutory mandates through APA procedures subject to judicial review—has tremendous appeal. We suspect, however, that a return to that world is not a realistic possibility. Even at the time the APA was enacted, it lacked uniform support.[225] The Act was a compromise of New Deal politics between those who wanted New Deal programs implemented quickly (claiming administrative efficiency) and those who did not (claiming protection of individual rights).[226] Today, the increased difficulty and delay in staffing top agency positions through the traditional process means that agencies will often be run by acting heads promoted from the staff or other

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224. *See* RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 2–15 (2011) (examining data from 2001 to 2011 to conclude that industry special interests warped agency regulations through meetings with OIRA); William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611, 612 (2002) (arguing that inappropriate OMB involvement in rulemaking may necessitate a judicial or legislative response); *see also* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 855–59 (2003) (analyzing OIRA meeting records by industry, agency, rule stage, and significance). An early article by Cass Sunstein, who later headed OIRA, recognized the risk of interest group influence:

> OMB supervision may of course generate risks of its own, principally in the form of increased power by private groups with disproportionate access to OMB officials. The creation of a second low-visibility decision may also increase rather than diminish the dangers of self-interested representation and factional tyranny.

Sunstein, *supra* note 82, at 294 (footnote omitted).

225. *See, e.g.*, Herbert Kaufman, *The Federal Administrative Procedure Act*, 26 B.U. L. REV. 479 (1946). An editorial note at the beginning of Kaufman's article acknowledged the conflict:

> It is recognized that many readers of this *Review* will disagree with Mr. Kaufman's speculations as to the probable effects of the [APA], and that even more will disagree with his personal opinions as to the desirability of such legislation (his conclusions being based on an apparent bias in favor of complete, non-reviewable administrative freedom of action) . . . .

Id. at 479.

226. *See* Shepherd, *supra* note 17, at 1560, 1679–81 (describing the APA as "the armistice of a fierce political battle over administrative reform").

political appointees in the agency, who will not be in a strong position to insist on agency prerogatives or to make tough decisions. Overlapping agency jurisdiction or other conflicts between agencies are not easily eliminated and will inevitably call for coordination efforts from above. Like it or not, cost–benefit analysis seems to be a well-entrenched feature of the administrative state. Congress has never blessed OIRA's role with explicit statutory authorization as a general matter, but it has made presidential selections to the top position of OIRA subject to Senate confirmation in recognition of the importance of its role, and it continues to fund OIRA's rulemaking oversight. In short, regulatory review by the White House seems here to stay.[227]

Most importantly, it seems unrealistic to expect the White House to leave regulatory agencies alone to do their business. Regulations by the EPA and other agencies have too much political salience to be ignored by the White House.[228] Even from the point of view of lost world (agency) advocates, it may be a mistake to overlook the need for political oversight. Many key statutes, such as the federal pollution laws, were products of vanished political coalitions.[229] Given the polarization of American politics, even relatively recent legislation may no longer enjoy broad political support, and broad regulatory statutes of the kind passed in the

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227. *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 37–42 (1994) ("Regulatory review is now a routine part of the executive process.").

228. Clearly, successive presidents have not thought that the power to appoint agency heads and key subordinates was a sufficient means of ensuring consistency between agency and White House preferences. *See* Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 352 (2012) (finding that preferences of agency personnel are not aligned with the appointing President or Congress). There are several possible reasons for this presidential belief in a principal–agent problem. First, there is the possibility that constant interaction with agency staff will "corrupt" the views of political appointees. Second, White House preferences may change after an appointment is made, but replacing the appointee may be impractical. Third, the White House may be motivated by partisan political calculations that agency heads are not competent to make. And fourth, advice-and-consent appointees have to go through Senate committees (and the full Senate), whose policy views have to be accommodated when selecting appointees, so the appointee's policy views may be a compromise due to the needs of confirmation rather than purely reflecting the views of the White House. Although one might argue that this mismatch is a "feature rather than a bug" in systemic terms—perhaps the requirement of confirmation is actually intended to produce this effect—from the President's point of view it may lead to agency heads having policy preferences that contrast with those of the President.

229. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 26–27 (1981) (identifying how a coalition of disparate groups was able to take advantage of institutional shortcomings in Congress to shape environmental policy); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1159 (1995) (noting that broad, grassroots support for environmental measures in the early 1970s "contributed to a political climate extremely favorable to environmental legislation").

1960s and 1970s would have no chance of enactment.[230] Blindly implementing their provisions might result in a congressional backlash that would be at least as damaging to those original interests as White House interference.[231] In the meantime, cost–benefit analysis may help the agency in attracting political support, and OIRA oversight may help legitimate the agency's positions.[232]

Nevertheless, the current situation is somewhat dismaying for those who still believe in the "rule of law" values underlying the lost world of administrative law. The changing realities of administrative law have left behind the mechanisms that the APA and the courts have drafted to achieve these values. Finding new ways to ensure transparency, accountability, rationality, and fidelity to statutes will be a major undertaking.

We suspect that some readers will find our proposals disappointingly incremental and perhaps lacking in coherence. We ourselves would be happy to propose more elegant solutions. But we are consigned to a kind of muddling through because we see the current situation as a sign of deep and unresolved tensions in American political culture. Many regulatory statutes and a good portion of the public favor whole-hearted pursuit of goals such as environmental quality and public health, with cost as a secondary consideration.[233] But this view is not universal, either among the public or among key political actors. Another major segment of the public thinks regulation has become a Leviathan-like threat to liberty,[234] while elite opinion seems oriented toward economic rationality as the goal.[235] Even on issues of process, there is a deep, unresolved tension about the balance between agency expertise and political accountability.[236] We doubt that these tensions will be resolved in the near future—and for us to simply posit

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230. *See* Percival, *supra* note 229, at 1165.

231. *Cf.* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, U. PA. L. REV. (forthcoming) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393033 (noting that "[r]ather than 'going for broke,' [agencies] tend to choose policies that stop short of open conflict with Congress, yet reflect the agency's mission, the president's priorities, and the limits of their statutory authority").

232. *See* Sharon Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. (forthcoming 2014) (manuscript at 29–31), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2355988 (stressing the importance for agencies of cultivating and maintaining presidential goodwill).

233. *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 153–58 (2004); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 185–86 (2008).

234. *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 35–45 (1990) (summarizing arguments).

235. *See, e.g.*, CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 51–52, 164–65 (2013) (describing the primacy of economic rationality espoused by some prominent scholars at the University of Chicago and stressed by some members of Congress).

236. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2008).

our preferred solution would be to little avail. So our proposals are meant to accommodate rather than resolve the tensions, an effort that may not lend itself to simplicity or intellectual elegance.

B. What to Change

Before turning to specific ideas about how administrative law can deal more effectively with the realities of current administrative practice, there are some broader strategic issues to consider. Although we will argue on behalf of a more incremental, pragmatic approach, three more sweeping responses to the problem are worth discussing. The first is simply to ignore the recent changes, clinging to the traditional view of regulation as a useful legal fiction. This approach could be supported by appeals to legal stability as well as doubts about how well courts and other institutions can assess and respond effectively to changing administrative practices. Moreover, the need to produce viable post hoc rationalizations for decisions would continue to provide some constraint on decision making. This approach necessarily involves some sacrifice in terms of achieving the general goals of administrative law, but it does have the advantage of simplicity. The risk is that administrative law will serve a primarily ceremonial purpose, providing the appearance, but not the reality, of public participation and accountability in policymaking. In our view, the goals of transparency, participation, and accountability are worth continued effort to strengthen them beyond their modest traction today.

A second, equally simple strategy (as a theoretical matter) would be to try to undo the changes that have made the conventional view untenable. Such an approach would require eliminating, or at least neutering, OIRA, removing the emphasis on cost–benefit analysis as a generalized approach to regulation, and shielding agency decision processes from other parts of the Executive Branch.[237] Although this approach will be appealing to those who applaud implementation of the congressional vision of the 1960s and 1970s, the basic problem we see is implicit in that very description: the Congresses that enacted those statutes are no more, and the political equilibrium that led to their enactment is gone as well. Under our constitutional system, statutes remain in effect until repealed, and the Executive has a duty to execute those statutes—but these ideals have to be pursued with a degree of political realism.

The third strategy is the opposite of the second: embrace the current system, acknowledge that real policy is often made behind closed doors in the Executive Branch for extrastatutory reasons, and eliminate the various constraints that are now embodied in administrative law, such as *State*

237. For a recent proposal in this vein, see Rena Steinzor, *The End of Centralized White House Regulatory Review: Don't Tweak EO 12,866, Repeal It*, CPR BLOG (Oct. 4, 2013), http://cprblog.org/CPRBlog.cfm?idBlog=837F8E83-9DA1-F501-FC902B3836C8542D.

Farm/*Overton Park* review or step two of *Chevron*. Courts would then limit themselves to ensuring that the Executive Branch is not violating clear constraints imposed by Congress, leaving the exercise of administrative discretion within those constraints entirely to the Executive Branch's combination of expertise and political judgment.[238] This solution may have a certain brutal realism to recommend it. But leaving this degree of unchecked discretion to the Executive Branch may be disturbing to those who are already distrustful of either the "imperial presidency" or its mirror image, "the faceless bureaucracy." Even apart from these two points, an additional concern is that the administrative mechanisms that would substitute for judicial review were created under a regime of strong judicial review, and we cannot be sure that they would continue to function in the same way once courts are largely taken out of the picture. So even if we are resigned to (or enthusiastic about) the current status quo, overturning current administrative law might change Executive Branch review in unpredictable and possibly undesirable ways.

We do not regard these alternative strategies as wholly unreasonable, but we think they fail to take seriously enough the need for new ways of achieving the goals of administrative law in a changed world. We also have doubts about their political feasibility, even if they were considered desirable. Once these straightforward strategies are put aside, we are left with the messy strategy of pragmatic accommodation.[239] This strategy entails looking for relatively incremental changes that can help bring administrative law and the actual operation of the administrative state into greater alignment. Hopefully, that realignment would further core concerns such as transparency and public accountability, fairness to regulated parties and regulatory beneficiaries, and efficient decision making. Below, we discuss possible steps toward such realignment.

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238. In many ways, this third option might seem like a return to the world of New Deal governance. But if judicial review were limited to determining whether an agency action is clearly prohibited by statute, this would not be a complete return to the pre-APA world for two reasons. First, standing to challenge administrative action is much broader than it was then, and in particular, beneficiaries of regulation would have the power to enforce statutory limits on agencies in certain contexts. Second, prior to *Chevron*, courts had more power to review an agency's statutory interpretations. In short, in one way agencies would be less subject to judicial oversight than they were prior to the APA, while in another way they would be more constrained by the courts.

239. We are putting aside two other possible strategies. The first is to eliminate the administrative state in favor of a libertarian watchdog state or a socialist state in which government regulation of business is unnecessary because the government runs all businesses. We consider these equally improbable. The second is a radical transformation in methods of governance: for example, replacing agency rulemaking with the use of some combination of an open-source drafting platform and prediction markets, or delegating authority to some AI (artificial intelligence). We leave consideration of the second of these strategies to less earthbound thinkers than ourselves.

C. Potential Reforms

We propose some changes for consideration by each branch of government to help reduce the gap between theory and practice. We believe the changes are feasible ones, though they are not costless to the relevant institutions.

1. By Congress.—In the lost world of the APA, Congress is a major actor in administrative law. The same year Congress enacted the APA, it also passed a massive reorganization of itself, reducing the number of committees and strengthening oversight of agencies.[240] But changes in the administrative process have taken place in the modern era largely without any initiative by Congress.

Assuming that Congress has an institutional interest in achieving agency compliance with statutory requirements, it could do more to keep agencies and their administrative overseers within statutory bounds.[241] To begin with, Congress could make better use of existing tools to supervise agency implementation of statutory directives. It could mandate more regular GAO investigations of key agencies. Even without such congressional mandates, because the GAO treats a committee chair and ranking minority member identically, a requested GAO investigation in real time may be less of a hostage to party control of Congress than a traditional hearing.[242] Such investigations could accomplish a range of objectives, including making legitimate agency actions more transparent, flagging when agencies are being pushed away from statutory mandates by cost–benefit analysis, and helping to distinguish technical input originating from (or passing through) OIRA from more nakedly political interventions.[243]

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240. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 2, 3, 5, 10, 15, 28, 31, 33, 34, 40, 44, 46, 50 U.S.C.); JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE 111 (2012) (explaining that the Act "revamped the congressional committee structure" in part by consolidating numerous committees into new standing committees with more "functionally defined" oversight of administrative agencies). We suspect that changes in Congress have eroded that Branch's ability to rely on congressional committees to support the statutory missions of agencies against incursions by other parts of the Executive Branch.

241. We recognize that at present Congress seems too paralyzed by political polarization to undertake this role, at least on any consistent basis, but we are hopeful that this paralysis will prove temporary. If not, the problems confronting the American system of governance will far transcend the issues discussed in this Article. Even if Congress becomes more active in governance, it may or may not view compliance with law as a significant independent factor in oversight, as opposed to approval or disapproval of outcomes on policy or political grounds.

242. *See* Anne Joseph O'Connell, *Intelligent Oversight*, *in* THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE: THE DAY THAT CHANGED EVERYTHING? 157, 168 (Matthew J. Morgan ed., 2009) (arguing that increased GAO evaluation of the intelligence community would be feasible in today's political climate because the GAO does not differentiate between chairman and ranking minority member requests for review).

243. *See* Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. (forthcoming 2014) (manuscript at 2, 24–26), *available at* http://papers.ssrn.com/sol3/

The Senate can also confirm top agency officials faster (by providing credible commitment devices, such as timelines on confirmation).[244] Confirmed officials may be more attentive to congressional oversight, having promised to respond to congressional requests (including appearing at hearings) during their confirmation process. Confirmed agency officials may also have more leverage in internal administration disputes about policy. Because of their institutional role as agency heads, they are more likely to represent the agency and its authorizing statute to a greater degree than other administration officials outside the agency. The recent elimination of the cloture requirement,[245] at least as applied to agency positions, is a positive step.

The changes we describe in the operation of the administrative state are also relevant to drafting substantive legislation. If Congress wants to ensure that agency heads rather than White House staff members make relevant decisions—or at least that they have a major role in key decisions—it may need to delegate more frequently to independent regulatory commissions and boards, which face less scrutiny from OIRA, as opposed to giving authority to executive agencies like the EPA. This could propel the White House to revise its regulatory review directives to include regulatory commissions and boards, though the legal authority to do so is disputed.[246] Congress can also specify procedures that have to be followed by agencies in taking action. Along these lines, Congress should also be clear in cases when it does not want cost–benefit analysis to be the basis of decisions.

Congress can also think more about agency design and coordination. Specifically, it can create structures outside of OIRA to coordinate agency

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papers.cfm?abstract_id=2320471) (noting how the GAO provided "crucial information" in an episode involving the Plan B pill).

244. *See* O'CONNELL, *supra* note 104, at 17–18 (advocating the imposition of deadlines on the confirmation process).

245. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html.

246. *See* VIVIAN S. CHU & DANIEL T. SHEDD, CONG. RESEARCH SERV., R42720, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES 12 (2012) (noting "there may be lingering questions as to whether the President has the legal authority to extend requirements of the executive order to the [independent regulatory commissions] without . . . congressional action"). One of the authors of this Article (O'Connell) has written in support of proposed legislation that permits the President to extend regulatory review to independent regulatory commissions and boards. Letter from Admin. Law Professors to Senator Joe Lieberman, Chairman, Senate Comm. on Homeland Sec. & Governmental Affairs, and Senator Susan Collins, Ranking Member, Senate Comm. on Homeland Sec. & Governmental Affairs, on S. 3468, The Independent Agency Regulatory Analysis Act (Jan. 2, 2013), *available at* http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=3f7b2523-c274-438e-9892-5d8dcbcc0345; *see also* S. 1173, 113th Cong. §§ 3–4 (2013) (affirming the President's authority to require independent regulatory commissions and boards to comply with regulatory directives but not creating a right of judicial review over those directives).

action. For instance, the Financial Stability Oversight Council in the Dodd-Frank legislation, which draws together leaders of multiple agencies engaged in financial regulation, functions in such a manner.[247] Finally, it can issue statutory deadlines, which can be a tool against White House foot-dragging (through OIRA delay and other mechanisms).[248] Even under *SUWA*, which restricts judicial review of agency inaction, deadlines for discrete agency action can permit judicial review. As noted earlier, before the parties settled, a district court recently ordered the FDA to issue regulations under the Food Safety and Modernization Act after the agency missed deadlines.[249]

Congress may also want to take steps to strengthen its oversight of OIRA. Given OIRA's importance as a "super-agency," it may not be enough that the head of OIRA is subject to Senate confirmation; perhaps this requirement should extend one level lower in the organization.[250] The GAO could also be tasked with more investigations of the regulatory review process.[251] Some members of Congress have even proposed creating a competitor to OIRA, a division within the Congressional Budget Office (CBO) to perform regulatory analysis.[252] Such an arrangement might parallel the functioning of OMB and the CBO for budgetary forecasts. Finally, the various committees with jurisdiction over the regulations that OIRA supervises may want to coordinate on oversight of OIRA rather than leaving OIRA matters to each chamber's general government operations committee, since that committee may have a weaker interest in the faithful implementation of the relevant regulatory statutes.

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247. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 111–112, 124 Stat. 1376, 1392–98 (2010) (codified at 12 U.S.C. §§ 5321–5322 (2012)). *See generally* Jacob E. Gersen, Recent Development, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013) (describing the organization and role of the Financial Stability Oversight Council).

248. Deadlines may generate costs, including encouraging agencies to forgo procedural mandates under the APA, *see* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 972 (2008) (noting that agencies may use deadlines as an excuse to "opt out" of certain procedures), and allocating agency resources inefficiently, *see* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 186–200 (1987) (demonstrating the costs imposed by statutory deadlines in terms of wasted and misallocated resources).

249. *See supra* note 11 and accompanying text.

250. The Deputy Administrator is currently a nonpolitical position. Sunstein, *supra* note 140, at 1845.

251. It does some of that work already. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-423T, FEDERAL RULEMAKING: REGULATORY REVIEW PROCESSES COULD BE ENHANCED (2014).

252. Strengthening Congressional Oversight of Regulatory Actions for Efficiency, S. 1472, 113th Cong. (2013).

At a more fundamental level, most of OIRA's operation is entirely a creature of administrative fiat.[253] It is anomalous that such an important feature of the regulatory state has no statutory basis. Congress might want to consider providing a statutory framework for OIRA's role, which could also address the process issues. This framework might address the substantive role of cost–benefit analysis in decision making,[254] either expanding or contracting the current practice.[255] Alternatively, the statute might be limited to process issues to ensure that the review process is transparent and fair, if only by codifying the procedures already embodied in executive orders so that they would have the force of law and be judiciously reviewable.

2. By the President.—In the real world of administrative law, the White House is the main player. Presidents will therefore presumably be loath to give up power, but they may, at least under pressure, be willing to make some changes. Other changes may be desirable simply to improve the effectiveness of the current process.

Along the latter lines, it might make sense to separate OIRA's technical role from its more general managerial role, which might better be performed by appointees with broad government or political experience, which is typical for the head of OMB but not for the head of OIRA. In terms of OIRA's mission of improving the economic rationality of regulation, the person in charge of cost–benefit review should have substantial economics training. The current head of OIRA, Howard Shelanski, is one of the few Ph.D. economists to hold the position.[256] It is also possible that we would be better off with a peer review process for cost–benefit analysis rather than a White House agency for the purpose. The EPA's Science Advisory Board could be a model for such a process, or

253. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 23, 28 (2009) ("Congress has enacted legislation expanding OIRA's statutory responsibilities [for example, related to the Unfunded Mandates Reform Act of 1995], and has considered (but not enacted) legislation that would provide a statutory basis for OIRA's regulatory review function.").

254. Given *Chevron*, agencies may find it hard to resist OIRA pressure to employ cost–benefit analysis as a basis for decision. Congress could provide presumptions regarding the application of cost–benefit analysis, universalize its use, or forbid the use of cost–benefit analysis under certain statutes or provisions of statutes.

255. The two of us are not in complete agreement about the desirability or direction of change. For one example of an attempt to make agency decisions be justified by cost–benefit analysis, see Regulatory Responsibility for Our Economy Act of 2013, S. 191, 113th Cong. § 3 (2013).

256. *See Professor Howard Shelanski Confirmed as Administrator, Office of Information and Regulatory Affairs*, GEO. L. (June 28, 2013), http://www.law.georgetown.edu/news/press-releases/professor-howard-shelanski-confirmed-as-administrator-office-of-information-and-regulatory-affairs.cfm.

this role could be given to the Council of Economic Advisors (CEA).[257] With the technical quality of cost–benefit analysis dealt with separately, OIRA's role could then be focused on agencies' coordination with other agencies and with White House policy staff.

In terms of OIRA's executive coordination role, it is very clumsy to wait until the agency has actually formulated a NPRM to try to coordinate with the rest of the federal government.[258] Informal interactions undoubtedly begin earlier,[259] but there would be something to be said for formalizing the process and making it transparent.[260] Perhaps more could be done with the required annual regulatory plans (that announce future actions) and Memorandums of Understanding between multiple agencies. Such a change might well be desirable from the point of view of the White House.

Perhaps the most pressing issue is transparency. The natural inclination of the Executive Branch is probably to limit transparency. Although President Clinton made the OIRA process far more transparent in Executive Order 12,866 than it had been under Presidents Reagan and George H.W. Bush,[261] OIRA could do more: it could follow the deadlines in the current executive order; it could distribute written communications with agencies at the time of the final rule as the directive prescribes; it could provide that information earlier; and it could provide more information about oral communications (for instance, a summary of meetings) instead of just the list of participants that is now available.[262]

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257. Although we are unaware of any formal documentation to this effect, we have some reason to believe that CEA sometimes plays this role as an adjunct to OIRA.

258. *See* Freeman, *supra* note 120, at 362 (stating that the late-stage input from other agencies typical of OIRA-led regulatory review inhibits substantive changes in rulemaking).

259. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085–87 (1986) (discussing the extent of OMB's informal involvement in the rulemaking process).

260. The Administrative Conference of the United States (ACUS), a nonpartisan agency tasked with improving the operation of the administrative state, recently called for more "informal discussions" to predate OIRA review as one mechanism to decrease OIRA delays. Memorandum from the Admin. Conference of the U.S. to the Comm. on Admin. & Mgmt. and the Comm. on Regulation 6 (Nov. 12, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Draft%20OIRA%20Statement%2011-12-13%20CIRCULATED.pdf. The Center for Effective Government, among others, has objected to this recommendation, at least without more transparency on these consultations. *See* Letter from the Ctr. for Effective Gov't to the Comm. on Admin. & Mgmt. and the Comm. on Regulation (Nov. 12, 2013), *available at* http://acus.gov/sites/default/files/documents/CEG%20Public%20Comment%20for%20OIRA%20Project.pdf.

261. In addition, OIRA Administrator John Graham, who served under President George W. Bush, also increased transparency by posting more information (including meeting logs) online, among other items. *See* John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 966–68 (2006).

262. ACUS recently "offer[ed] a discrete set of principles for improving the timeliness of review and the transparency concerning the causes for delay." ADMINISTRATIVE CONFERENCE STATEMENT #18: IMPROVING THE TIMELINESS OF OIRA REGULATORY REVIEW 5 (Admin.

All of these reforms could be implemented without undermining presidential prerogatives under Article II, although the price might be occasional political embarrassment. On the other hand, if it is true that the process is largely technical and apolitical, greater transparency might actually give the process more legitimacy without impairing its effectiveness.

3. By the Courts.—Taking a more realistic view of administrative practice could change judicial doctrine in at least two directions, which are not altogether consistent. One type of change is to redesign doctrine to pursue core administrative law values in a different way, which sometimes means pushing back against some of the recent evolution of the process. If courts were to become more realistic, they may have to admit that some existing doctrines that attempted to achieve these goals are no longer capable of doing so and that in some situations solutions, if any, will have to be political.

Here, we focus on changes along the first line, which do not attempt to undo recent changes but do seek to regularize procedures and reinforce to some extent the efforts of agencies to apply their expertise to the pursuit of statutory goals.[263] We do not attempt to cordon off agencies from White House influence, but at the least, we think they could usefully be given additional bargaining chips in their negotiations with the rest of the Executive Branch.

Like Congress, the courts can undertake actions to capture some of the lost world values within modern administrative practices. There have been suggestions that the courts should bring more of the realities of the administrative process into the open by allowing agencies to rely on "political" factors.[264] We do not have a position on this.[265] The hope would be that by bringing some of the perspectives of political actors into view, agencies would have fewer incentives to make disingenuous use of evidence to support outcomes that are really based on political priorities. The fear would be that doing so would only legitimize and strengthen interference with an agency's judgments and could provide a screen for less acceptable types of influence based on purely partisan considerations.

Conference of the U.S. 2013), *available at* http://acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%2012-9-13.pdf.

263. This function of agencies has been justified by neorepublican theories that stress deliberation and achievement of broad public interests. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1445–48 (2013).

264. *See, e.g.*, Watts, *supra* note 180, at 8–9 (arguing that certain political influences should qualify as valid reasons to uphold agency decision making).

265. A more constrained position, which we discuss *infra*, would be to require agencies to disclose political input, subject to constitutional constraints, but not to allow agencies to rely on those factors in judicial review. *See* Mendelson, *supra* note 122, at 1163–75.

Courts might also want to move from *Chevron* to *Skidmore* deference, which gives the agency more leverage since it has the statutory expertise, although this might have the downside that *Skidmore* makes it harder for agencies to change policies.[266] The effect would be to increase the influence of line agencies in internal administration debates over statutory interpretation, while also increasing the role of the courts as compared with the Executive Branch. Of course, for *Chevron* enthusiasts, the shift toward judicial control of statutory interpretation would be an undesirable side effect of this change.

A more modest shift would involve increased review of regulatory inaction. Courts might show greater willingness to mandate action when delays are not internal to the agency itself, particularly when the agency has already invested substantial resources in a possible regulation. For instance, some proposed regulations have sat in OIRA for months or years. Similarly, courts might try to normalize OIRA review by treating it as part of the administrative process before them for review. While providing a statutory basis for OIRA review would make such judicial review easier, even without such a basis, the courts might require more disclosure of OIRA's role in shaping regulations and provide a harder look at changes made in response to OIRA pressure, on the theory that those changes do not reflect the agency's expertise under the statute delegating authority to the agency.[267] Similarly, courts might take a harder look at settlements and also at direct and interim rules where the agency has not provided prior notice and comment.

To the extent that effective decision-making power has moved away from the agency to the White House and may incorporate extrastatutory factors, we may need to reconceptualize parts of administrative law. For instance, some of the arguments for notice-and-comment decision making (such as improving agency rationality) assume that the public record and justification are the real basis for the decision.[268] This appears to be something of a fiction, or at least an oversimplification, and the natural response might be to require the agency to reveal and justify changes made in response to White House pressure.

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266. In a recent article, Daniel Walters highlights that litigation can provide agency staff with leverage against political directives. Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 175–78 (2013). It has been suggested that agencies generally prefer *Chevron* deference. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1061–62 (2011). The effort to consider how administrative law affects the internal distribution of power within agencies is very much in the spirit of this Article, but we would suggest that such consideration should not overlook potential impacts on the distribution of power between the agency and other parts of the Executive Branch.

267. *See* Mendelson, *supra* note 122, at 1163–75 (summarizing the pros and cons of increased scrutiny of White House involvement in agency decision making).

268. *See supra* subpart I(D).

On the other hand, perhaps we should give up on the idea that the public explanation corresponds to the actual reasons for a regulation. Even if the public explanation were only an after-the-fact justification for a decision made on other grounds, judicial review based on the public explanation would not be completely pointless. There is separate value to the production of a public and rational explanation showing that the agency's decision is legitimately within the scope of the congressional delegation, even if the explanation has little to do with the reasons for the decision. In some cases, at least, it will be impossible to draft a satisfactory rationalization for actions based on partisan politics or on nonstatutory policies. In such cases, judicial review (even of factual issues) functions just as a way of policing the boundaries of the agency's authority, not of improving decisions or even fairness to the regulated parties.[269] We think it is premature, however, to give up on the idea that administrators should make a good faith effort to implement statutes in favor of viewing statutes as unfortunate constraints that sometimes interfere with their ability to implement their own policy preferences.

There are legitimate reasons to be wary of excessive intrusion into Executive Branch deliberations. But at least when challengers can show probable cause to believe that statutory policies have been swamped by other considerations or that control of a decision has passed to the White House rather than the agency designated by Congress, judicial intervention may be warranted.[270] In sum, we are not advocating that the courts should

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269. *But see* Heinzerling, *supra* note 243 (manuscript at 59) (calling such an approach a "lie").

270. For discussion of a striking example of just such a situation, see *id.* There is considerable dispute about whether the President has statutory or constitutional authority to make decisions unilaterally or to mandate particular decisions when a statute purports to vest authority in an executive agency rather than directly in the President. *Compare* Kagan, *supra* note 222, at 2327–28 (arguing that unless a statute forecloses it, presidents have directive authority), *and* Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455 (2011) (arguing in favor of such presidential authority and advocating greater disclosure rather than efforts to limit this power), *with* Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011) (arguing that "even if the President has unfettered removal authority over the heads of non-independent agencies, it matters that this removal power does not imply the power to control decision making entrusted by law to agency heads"), *and* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that presidents have directive authority only if the statute delegates to the President and not an agency head). We would observe, however, that even if the President has such power, it seems clear that he or she cannot freely delegate it to other administration officials. Otherwise, the President could reorganize the government at will simply by reallocating statutory powers among officials, a power not granted to the President by Congress. Therefore, this debate is directly relevant only in the case where the President personally intervenes in a decision and overrides a contrary determination by an agency head. It is difficult, we think, to account for the Constitution's requirement of Senate confirmation for principal officers if the President may freely delegate control of those officials to individuals confirmed for other posts or staff members who have not been subject to confirmation. In terms of personal presidential interventions, we are

generally apply increased scrutiny of political factors; rather, the courts should at least make those factors more transparent.

The proposals in this subpart are admittedly fragmentary and somewhat costly to implement. One could certainly imagine a new Administrative Procedure Act ("APA 2.0"?) based on a holistic vision of the modern administrative state. But at least in the near future, potential reforms are likely to be piecemeal and incremental, with correspondingly modest aspirations. It will be important to think about how these reforms might place our normative goals in conflict; for example, increased transparency (or process) may make socially desirable regulation take longer to achieve. Our goal is not to return to the lost and perhaps unrecoverable world of the APA. But we do suggest that it may be worth making some incremental changes from the current practices in order to ensure that other administrative forces do not swamp statutory directives and agency expertise. In any event, we would also note that the current system of Executive Branch review does not live up to its own expectations regarding efficiency and transparency.

Conclusion

The lost world of the APA and administrative law and the real world of modern administrative practice do share the same overall focus: the exercise of discretion. The cleavages, some rather deep, turn on the sources, the wielders, and the reviewers of that discretion.

Almost forty years ago, Richard Stewart posited that interest groups might become the basis of a "fully-articulated model" of administrative discretion.[271] In his view, if a wide range of interests could be captured in the administrative state, "policy choices would presumably reflect an appropriate consideration of all affected interests and the pluralist solution to the problem of agency discretion might prove both workable and convincing."[272] Today, pluralism or some wider form of democratic legitimacy is just one goal of not only administrative law but administrative practice as well.

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inclined to side with those who do not find a basis for such directives in Article II when Congress has reposed power elsewhere, in part because the requirement of confirmation for senior officials seems senseless unless they were intended to be more than presidential hand puppets. Moreover, when agency officials are removable by the President, we see a genuine practical difference between a rule that requires the President to fire an obdurate subordinate and one that allows the President to get his or her way, putting the onus on the official to resign afterwards in protest. In any event, personal intervention by the President is unlikely to be the norm except in the most sensitive rulemakings.

271. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1813 (1975).

272. *Id.* at 1715.

These goals include agency efficiency and effectiveness, democratic legitimacy, and the rule of law. With such complex ends, it should not be surprising that the sources, exercise, and review of discretion are not simple, either as a descriptive or as a normative matter. We not only need to acknowledge the increasingly fictional yet deeply engrained account of administrative law, but also need to think seriously about how that account can better reflect current practices while still retaining its tractability and original objectives. This Article has been an attempt to focus the attention of scholars, judges, and policymakers on this crucial task.