Essay

Presidential Influence over Agency Rulemaking Through Regulatory Review

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Abstract

Under Executive Order 12,866, the Office of Information and Regulatory Affairs ("OIRA") is responsible for ensuring that regulatory actions taken by federal agencies are consistent with the President's priorities and do not conflict with the policies or actions of another agency. Although issued by the Clinton Administration in part to address concerns with executive interference with agency decisionmaking, OIRA review remains characterized by indefinite delay of agency rules, a lack of transparency, and the absence of accountability in the review process.

The current state of OIRA review raises serious questions about the proper scope of executive influence over decisions committed by law to the discretion of agency officials. This Essay argues that OIRA review as currently practiced fails to comply with Executive Order 12,866, results in violations of statutory deadlines, and undermines the openness in administrative policymaking codified by the Administrative Procedure Act. It further argues that the present form of OIRA review exceeds the President's constitutional authority to influence agency action through the removal power by circumventing the structural limits on the use of this power, resulting in impermissible

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direction of agency decisionmaking. To address these issues, the Essay calls for legislative and executive action to provide enforceable time limits for and increase the transparency of OIRA review.

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Introduction

When President Reagan issued Executive Order 12,291[1] early in his first term, it marked the first time a President had expressly required agency heads to follow a set of policy goals and substantive mandates in the exercise of their administrative and statutory discretion.[2] The order enforced this requirement by centralizing review power in the Office of Management and Budget ("OMB"), requiring agencies to follow specified review procedures,[3] and giving OMB's Of-

1 Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 473–76 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

2 Jerry L. Mashaw, Richard A. Merrill & Peter M. Shane, Administrative Law: The American Public Law System, Cases and Materials 267 (6th ed. 2009).

3 *See id.*

fice of Information and Regulatory Affairs ("OIRA") responsibility for reviewing proposed and final agency regulations prior to publication.[4]

Executive review of agency actions today continues to reflect this basic structure.[5] Under Executive Order 12,866,[6] agencies are required to adhere to specified regulatory principles, must submit significant regulatory actions to OIRA for its review, and may not publish an action subject to review until OIRA either completes or waives its review.[7] OIRA is tasked with providing "meaningful guidance and oversight" to ensure that regulatory actions are consistent with the President's priorities and the principles set forth in the Executive order and do not conflict with the policies or actions of another agency.[8] The program of review as a whole is intended "to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."[9]

Despite having been in force for nearly two decades, the regulatory review provided for under Executive Order 12,866 has yet to achieve these goals. As detailed below, OIRA regulatory review in practice is opaque, is characterized by pervasive delay, and as a whole gives the President such immense and unaccountable control over agency rulemaking as to raise constitutional concerns regarding the scope of permissible presidential influence over decisions committed to an agency by statute.[10]

This essay argues that OIRA review, as currently practiced, results in impermissible executive direction of decisions committed to agency officials by statute by removing the political and structural constraints on the President's ability to influence agency officials through the removal power. Part I describes the regulatory review process as currently practiced, finding that OIRA review does not comply with Executive Order 12,866, results in the violation of statutory deadlines, and is inconsistent with the principles of good administrative governance underlying the Administrative Procedure Act

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4 Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2502–03 (2011).

5 MASHAW ET AL., *supra* note 2, at 267.

6 Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

7 *Id.* §§ 1(b), 6(a)(3), 8, 3 C.F.R. at 639–40, 645–46, 648–49.

8 *Id.* § 6(b), 3 C.F.R. at 646–48.

9 *Id.* pmbl., 3 C.F.R. at 638.

10 *See infra* Parts I, II.

("APA").[11] Part II distinguishes the President's influence over agency rulemaking through the removal power from a general power of direction that would allow the President to dictate agency officials' decisions, concluding that the use of the removal power must be subject to the structural and political constraints on its use inherent in the requirement that the Senate approve the removed official's replacement. Part II then argues that OIRA review, by eliminating these constraints, results in impermissible direction of agency action by the Executive. Finally, Part III proposes reforms to restore the limits on presidential influence over agency action by providing for transparency, accountability, and effective time limits in the OIRA review process.

I. OIRA REVIEW UNDER EXECUTIVE ORDER 12,866

A. OIRA Review and Compliance with Executive Order 12,866

Issued by President Clinton in 1994, Executive Order 12,866 preserved the Reagan-era requirement that agencies obtain OIRA approval before publishing certain regulatory actions.[12] President Clinton's order, however, also addressed concerns with OIRA review as it had been practiced during the Reagan and Bush administrations.[13] To address OIRA's ability to indefinitely delay disfavored regulations,[14] the order set out specific time limits for completion of OIRA's review.[15] The order also set forth a procedure for resolution of disagreements between OMB and an agency in which agency heads or the OMB director may appeal directly to the President.[16]

In response to concerns that the review process was opaque and served as a back door for industry influence,[17] the order included transparency provisions requiring OIRA to disclose the status of the action,[18] all contacts with outside parties during the period of review,[19]

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11 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

12 *Compare* Exec. Order No. 12,291 § 3(f)(1), 3 C.F.R. 127, 129–30 (1982), *reprinted in* 5 U.S.C. § 601 app. at 473–76 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638, *with* Exec. Order No. 12,866 § 8, 3 C.F.R. at 648–49.

13 *See* MASHAW ET AL., *supra* note 2, at 302; Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1267 (2006); 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. 325, 330–33 (2014).

14 *See* Percival, *supra* note 4, at 2504.

15 Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. at 646–47.

16 *Id.* § 7, 3 C.F.R. at 648.

17 *See, e.g.*, Heinzerling, *supra* note 13, at 331–32.

18 Exec. Order No. 12,866 § 6(b)(4)(C)(i), 3 C.F.R. at 647.

19 *Id.* § 6(b)(4)(B)(ii)–(iii), (C)(ii)–(iii), 3 C.F.R. at 647, 647–48.

and all documents exchanged between OIRA and the agency during the review period.[20] If OIRA rejects an agency action and returns it to the agency for further consideration, it must provide a written explanation of its rejection and cite which provision of the Executive order it relied upon for the rejection.[21] To ensure that OIRA's role in the review process is transparent, the order tasks the agency with identifying the substantive changes between the draft submitted for review and the final action "in a complete, clear, and simple manner," as well as "those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."[22]

President Bush adopted Executive Order 12,866 with only minor changes, which were revoked by President Obama soon after taking office.[23] The structure of OIRA review thus remains mostly unchanged since the Clinton Administration, and Executive Order 12,866 remains in place. Despite being in place for nearly twenty years, however, the order has been largely ineffective in making OIRA review more limited and more transparent.[24] Instead, OIRA review is characterized by indefinite delay of agency rules, a lack of transparency, and the absence of accountability for influencing agency decisionmaking.[25]

1. Delay of Agency Actions

OIRA review regularly exceeds the time limits for review set by Executive Order 12,866.[26] As of October 20, 2014, 48 of the 115 pending actions under regulatory review at OIRA had been under review for more than ninety days.[27] Only nineteen of the delayed actions were officially extended for the additional thirty days allowed under the Executive order, meaning that reviews of the other twenty-nine actions exceeded the ninety day deadline without obtaining an exten-

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20 *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.

21 *Id.* § 6(b)(3), 3 C.F.R. at 647.

22 *Id.* § 6(a)(3)(E)(ii)–(iii), 3 C.F.R. at 646.

23 Percival, *supra* note 4, at 2513–14, 2528. A later memorandum from OMB Director Peter Orszag reinstated the expansion of OIRA's scope of review to include significant agency documents that had been established in President Bush's Executive order. *See* Heinzerling, *supra* note 13, at 338–39.

24 *See infra* Part I.A.2–3.

25 *See infra* Part I.A.1–3.

26 *See* Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. at 646–47.

27 Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Regulatory Review Dashboard*, REGINFO.GOV, http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp (last visited Oct. 20, 2014).

sion.[28] Eighteen of the nineteen pending actions that were officially extended have exceeded the 120-day maximum review period.[29] And of the forty-eight actions that have been under review for more than ninety days, seven have been at OIRA for more than a year, far beyond the 120-day maximum.[30]

The current statistics are consistent with the longstanding state of OIRA review. A 2011 analysis of 501 completed reviews over ten years found that fifty-nine lasted longer than the maximum review period.[31] Of these delayed reviews, twenty-two lasted more than six months.[32] If anything, the trend of delay appears to be growing: OIRA's average review time for all actions in 2012 was the highest since Executive Order 12,866 went into effect,[33] and the number of completed reviews lasting 120 or more days has risen from five in 2009 to seventy-five in 2012.[34]

These statistics, showing consistent and repeated violations of the deadlines for review set out by Executive order, do not tell the full story of OIRA delay. OIRA has interpreted Executive Order 12,866 to allow an agency head to request an indefinite extension of OIRA review.[35] This appears to be a reasonable interpretation of the language of the order, which provides that "[t]he review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."[36]

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28 *Id.* According to several agency officials, many of the rules with the notation "Review Extended" in OIRA's public data system were not the subject of an extension request from either the agency or OIRA. CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 48 (2013), *available at* http://www.acus.gov/sites/default/files/documents/Revised%20Draft%20OIRA%20Report%20110113%20CIRCULATED.pdf.

29 Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *supra* note 27.

30 *Id.*

31 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 5, 51 (2011).

32 *Id.* at 51.

33 MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *Federal Register* 12 tbl.5 (2013), *available at* http://www.fas.org/sgp/crs/misc/R43056.pdf.

34 *Regulatory Delay in 2012*, CENTER FOR EFFECTIVE GOV'T (Dec. 18, 2012), http://www.foreffectivegov.org/regulatory-delay-in-2012; *see also* COPELAND, *supra* note 28, at 4 (reporting that the average length of completed reviews, after never exceeding 62 days, increased to 79 days in 2012, and 140 days for the first half of 2013).

35 Heinzerling, *supra* note 13, at 359 (citing Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013)).

36 Exec. Order No. 12,866 § 6(b)(2)(C), 3 C.F.R 638, 647 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

Viewing the clauses separated by numerals as two separate means of extending review, the provision limits OIRA's ability to extend review by allowing it to do so once for a period of 30 days while granting the agency head the ability to request extensions of any length at her discretion.

This interpretation preserves the restrictions on OIRA's ability to independently extend review and thus indefinitely delay disfavored or controversial regulations. The way OIRA uses this interpretation to evade the order's restrictions on its own authority to extend review, however, raises serious concerns. In practice, agency heads often request extensions because OIRA asks the agency to do so in such a way that it is clear that OIRA's request may not be refused.[37] Given the control OIRA exerts over agency actions, it is not difficult to imagine how OIRA could leverage review of various pending agency actions to demand that the agency request delay of another. Agency officials have indicated that "virtually all agency requests for extensions of review were actually made because OIRA suggested they do so."[38] OIRA thus effectively controls agency requests for extensions, allowing it to obtain indefinite delays of agency regulation while still facially complying with the time limits set by Executive Order 12,866.

OIRA also avoids the mandated time limits on its review by manipulating when the review period begins. Substantial discrepancies between the dates agencies record sending actions to OIRA and the dates OIRA reports receiving the actions suggest that OIRA has the ability to extend its review period by waiting to report having received an agency action.[39] For example, the Environmental Protection Agency ("EPA") sent a rule on renewable fuels to OIRA on November 20, 2012, but OIRA reported that it did not receive the rule until more than two months later.[40] A notice of data availability related to coal combustion waste was sent by EPA to OIRA on March 12, 2012, but was not reported as being under review until April 13, 2013—more than a year later.[41]

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37 Heinzerling, *supra* note 13, at 359; *see also* U.S. GENERAL ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 45–46 (2003) [hereinafter GAO 2003].

38 COPELAND, *supra* note 28, at 48.

39 *See* Heinzerling, *supra* note 13, at 360–61; *see also* COPELAND, *supra* note 28, at 40–41.

40 Heinzerling, *supra* note 13, at 360–61.

41 *Id.*; *see also* COAL. FOR SENSIBLE SAFEGUARDS, DOWN THE REGULATORY RABBIT HOLE: HOW CORPORATE INFLUENCE, JUDICIAL REVIEW AND A LACK OF TRANSPARENCY DELAY CRUCIAL RULES AND HARM THE PUBLIC 26 (2013) (reporting that appliance, lighting, and equipment energy efficiency standards had been sent to OIRA by the Department of Energy months before OIRA publicly acknowledged receiving them).

These delays are made possible in part by the fact that there are no clear consequences for failing to meet the deadlines set out in Executive Order 12,866.[42] Section 6(b) provides that "OIRA shall waive review or notify the agency in writing of the results of its review" within the specified time periods,[43] but does not set out what will happen if OIRA fails to do so.[44] Section 8 appears to provide some clue, providing that an agency "shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review" until either OIRA waives or completes its review or "the applicable time period . . . expires without OIRA having notified the agency that it is returning the regulatory action for further consideration."[45] On its face, this language would appear to allow the agency to publish regulations without OIRA approval if OIRA fails to notify the agency that it has rejected the agency action within the order's time limits.[46] In practice, however, agencies do not use this apparent avenue around OIRA delay.[47]

2. Circumventing Transparency Requirements

OIRA has also managed to avoid most of the disclosure and transparency requirements of Executive Order 12,866. It has done so largely by reviewing agency action outside of the formal review framework, increasingly using informal review to demand changes to agency actions without having to comply with the order's disclosure requirements.[48] Notably, Executive Order 12,866 does not grant OIRA the authority to substantively review agency actions before the agency submits the action for review.[49] Informal reviews nevertheless begin well before the formal review period and feature extensive OIRA in-

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42 *See* COPELAND, *supra* note 28, at 4, 21–22.

43 Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. 638, 646 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

44 COPELAND, *supra* note 28, at 21–22.

45 Exec. Order No. 12,866 § 8, 3 C.F.R. at 648–49.

46 *See id.*

47 It is unclear why agencies do not invoke this provision in cases of indefinite OIRA delay, and the issue is not discussed in contemporary reports on OIRA's review practices.

48 *See* COPELAND, *supra* note 28, at 35–36 ("Most of the senior agency employees interviewed for this report indicated that OIRA had increased its use of informal reviews of rules in recent years. Employees in one agency said they must informally send OIRA a draft of *every* significant rule before formally submitting the rule for review."); STEINZOR ET AL., *supra* note 31, at 41–49; *see also* GAO 2003, *supra* note 37, at 7–8.

49 While OIRA does get a look at rules before formal review under Executive Order 12,866, these procedures are meant to facilitate—not replace—formal review. *See* Exec. Order No. 12,866 § 6(a)(3)(A), 3 C.F.R. at 645 (requiring each agency to provide OIRA with a list of planned regulatory actions so that OIRA may determine whether an action is subject to review);

volvement in the early formation of agency actions.[50] A former OIRA official characterized communication between OIRA and the agency at this stage as "continuous,"[51] allowing it to affect agency action "before the agencies' positions become too entrenched."[52] OIRA has acknowledged that its influence on draft rules during the informal review period is significant.[53] Agency officials have concurred, describing informal review as "very effective" at changing an agency's regulatory plans.[54]

Despite the importance of informal review to rulemaking outcomes, OIRA has taken the position that its duty to disclose documents exchanged with the agency[55] and the agency's duty to identify changes made during OIRA review[56] apply only to formal review.[57] Given the significant changes made during informal review, this interpretation effectively frustrates the purpose of the order's disclosure requirements—to allow the public to understand what changes have been made to agencies' rules during OIRA review and at OIRA's suggestion. Instead, an agency can submit a draft rule for informal review, make substantial changes in response to OIRA comments, and neither the agency nor OIRA is required to disclose the changes to the public.[58] Changes made during informal review become part of the agency's formal submission; if the rule is not subsequently changed, OIRA can quickly approve the action while coding the rule as "consistent with no change" during formal review.[59]

OIRA enforces the effectiveness of informal review by making informal review a gateway to formal review. If an agency fails to submit a proposed action for informal review, OIRA has suggested it will

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id. § 4(c), 3 C.F.R. at 642–43 (requiring agencies to submit significant regulatory actions that the agency expects to issue in that fiscal year).

50 STEINZOR ET AL., *supra* note 31, at 41.

51 *Id.* (internal quotation marks omitted).

52 GAO 2003, *supra* note 37, at 7–8.

53 *Id.* at 14, 56–57.

54 STEINZOR ET AL., *supra* note 31, at 42.

55 Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

56 *Id.* § (6)(a)(3)(E)(ii)–(iii), 3 C.F.R. at 646.

57 GAO 2003, *supra* note 37, at 7, 14.

58 *Id.* at 56–57, 95.

59 *Id.* at 57; STEINZOR ET AL., *supra* note 31, at 42. This appears to occur quite frequently, as indicated by the fact that many informal reviews last significantly longer than the formal reviews that follow. STEINZOR ET AL., *supra* note 31, at 45 & fig.12. In several cases the formal review period has lasted between zero and one day, indicating OIRA had made its desired changes during informal review and was "simply rubber-stamping a pre-negotiated outcome." *Id.* at 45 (internal quotation marks omitted).

return the rule to the agency once it is formally submitted.[60] OIRA has gone so far as to require that agencies receive its approval before submitting proposed actions for formal review, forcing agencies to keep proposed actions out of the public eye until OIRA determines that formal review may begin.[61] Agency officials have reported having to wait months, and in some cases more than a year, before receiving permission to send their rules to OIRA for review.[62] Because the time limits and disclosure requirements governing review have been interpreted to apply only to formal review, this requirement allows OIRA to operate a shadow review process entirely unchecked by Executive Order 12,866 that can effect substantial changes in agency action or even prevent an action from ever reaching formal review—all without disclosing OIRA's role in the process.[63]

Even when changes are made during final review and thus required to be disclosed under OIRA's interpretation of the Executive order, inconsistent agency practices further obscure OIRA's role in influencing reviewed rules.[64] The resulting difficulty in determining OIRA's role in affecting agency actions is made worse by the fact that OIRA has interpreted the requirement that it disclose all documents exchanged between it and the agency during review[65] to apply only to exchanges made by OIRA staff at the branch chief level and above.[66] As a result, any deliberative documents exchanged between OIRA desk officers, who engage in the vast majority of communication with

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60 COPELAND, *supra* note 28, at 17–18 (reporting a former OIRA director's statement that agencies that wait until formal review to seek OIRA input are "rolling the dice" (internal quotation marks omitted)); STEINZOR ET AL., *supra* note 31, at 41 (noting that "OIRA has made it clear that an agency faces the risk of having its rule ultimately 'returned for reconsideration' if it waits until the formal-review period to get OIRA's input").

61 *See* COPELAND, *supra* note 28, at 4, 38–39 (reporting that since 2012, OIRA "has required agencies to get OIRA approval before submitting rules" for formal review); Heinzerling, *supra* note 13, at 359–60 (reporting that "OIRA has lately been in the habit of not allowing agencies to send rules for review until OIRA has cleared them").

62 COPELAND, *supra* note 28, at 39.

63 Significantly, nothing in Executive Order 12,866 authorizes OIRA to prevent an agency from submitting a significant action for review. *Id.* at 40.

64 GAO 2003, *supra* note 37, at 97–98; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 32 (2009) [hereinafter GAO 2009]; STEINZOR ET AL., *supra* note 31, at 54; Heinzerling, *supra* note 13, at 362–63.

65 Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

66 *See* GAO 2003, *supra* note 37, at 57.

an agency, and agency officials, no matter how senior, are not disclosed to the public.[67]

Finally, OIRA has also found a way around the requirement that it set forth a written explanation when it returns some or all of an action to an agency for further consideration.[68] Because no disclosure requirements attach to an agency's decision to withdraw a rule under review, whether at its own initiative or at the recommendation of OIRA,[69] OIRA return letters containing the written explanation required to dispose of disfavored actions have been largely replaced by having the agency withdraw the action itself.[70] OIRA issued a total of nine return letters involving thirteen rules between January 2003 and June 2013, with none issued in the last two years of that period.[71] By contrast, eight rules were withdrawn by agencies just in the first half of 2013.[72] In the last seven months of 2013, four rules that had been pending at OIRA for over a year were withdrawn by EPA and the Department of Transportation with no explanation.[73]

3. A Lack of Accountability

Given OIRA's successful evasion of the transparency requirements of Executive Order 12,866, it is perhaps unsurprising that the review process is characterized by a lack of of accountability. Most basically, the review process fails to disclose who is responsible for the choices made regarding agency actions. Former OIRA Administrator Cass Sunstein lists nearly a dozen White House offices, in addition to other agencies, the White House Chief of Staff, and sometimes members of Congress, that play a significant role in shaping regulatory policy.[74] Because the transparency provisions of Executive Order 12,866 apply only to communications between OIRA and "persons not employed by the executive branch of the Federal Government,"[75] if OIRA communicates with any of these influential government officials, only those between OIRA and members of Congress would have to be reported.

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67 *Id.*; STEINZOR ET AL., *supra* note 31, at 53.

68 Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. at 647.

69 *See* GAO 2003, *supra* note 37, at 58.

70 COPELAND, *supra* note 28, at 49–50; STEINZOR ET AL., *supra* note 31, at 48.

71 COPELAND, *supra* note 28, at 18–19.

72 *Id.* at 28.

73 *CPR's Eye on OIRA*, CENTER FOR PROGRESSIVE REFORM, http://www.progressivereform.org/eyeonoira.cfm (last visited Oct. 20, 2014).

74 Sunstein, *supra* note 35, at 1852, 1855, 1858.

75 Exec. Order No. 12,866 § 6(b)(4), 3 C.F.R. 638, 647–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

As a result, OIRA review is often used as vehicle for executive officials to affect agency rulemaking, particularly on politically controversial rules.[76] Agency officials have reported receiving unwritten instructions from officials in the Executive Office of the President to delay issuing controversial rules and to preclear them with OIRA before submitting them for review.[77] Sunstein has acknowledged that other executive offices take political concerns into account, and that "OIRA will of course be made aware of their views and act accordingly."[78] The public (and sometimes even the agency), however, is rarely made aware of the role of other executive officials in changing, delaying, or even rejecting agency actions.[79]

The lack of transparency in decisionmaking during regulatory review is compounded by the fact that the procedure set out by Executive Order 12,866 for the resolution of conflicts between OIRA and the agency is rarely used. Although potentially problematic from the standpoint of the proper scope of presidential authority,[80] the provision providing for elevation of disputes to the President has the advantage of clearly defining the person ultimately responsible for resolving conflicts that arise during OIRA review, thus allowing that person to be held accountable for the decision.[81] This procedure, however, is hardly ever used[82]—presumably because the President prefers to avoid personal accountability by passing responsibility on to a different executive office or by continuing to exercise personal influence in the opaque environment of regular OIRA review.

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76 COPELAND, *supra* note 28, at 41–42.

77 *Id.*

78 Sunstein, *supra* note 35, at 1874.

79 *See* Heinzerling, *supra* note 13, at 342–43. One prominent exception to the general lack of transparency in the participation of other executive officials in the review process was the Obama Administration's return of the Environmental Protection Agency's proposed final ozone standard in 2011. *See* Letter from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Lisa P. Jackson, Adm'r, EPA (Sept. 2, 2011); *see also* Deborah Solomon & Tennille Tracy, *Obama Asks EPA to Pull Ozone Rule*, WALL ST. J., Sept. 3, 2011, at A5.

80 The provision marks the first time an Executive Order dealing with regulatory review has suggested that the President has the authority to direct executive department heads in the exercise of their delegated power. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2288 (2001).

81 *See* Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

82 Heinzerling, *supra* note 13, at 342.

B. Compliance with Statute: Statutory Deadlines and the Administrative Procedure Act

In addition to OIRA's compliance with Executive Order 12,866, the delays that characterize OIRA review often implicate the substantive statutes under which the regulations were issued. OIRA's frequent failure to meet the deadlines set for review often forces agencies to miss statutory deadlines for agency action.[83] Delays in the regulatory review process thus implicate not only the limits set by the President, but deadlines for agency promulgation of rules mandated by law. This issue has existed since the institution of mandatory OIRA review of agency regulations under the Reagan Administration. In *Environmental Defense Fund v. Thomas*,[84] a district court found that OIRA review had contributed to EPA's failure to comply with its duty to promulgate standards under the Resource Conservation and Recovery Act[85] by the statutory deadline.[86] At the time the case was brought, OMB had extended its review beyond the time periods set by Executive Order 12,291 in over half of the 169 regulations submitted by EPA that were subject to statutory or judicial deadlines.[87] Despite *Environmental Defense Fund*'s holding that OMB has no authority to delay regulations subject to a statutory deadline,[88] OIRA review continues to cause agencies to miss statutory deadlines for the promulgation of regulations. To take a few recent examples, safety standards for the rear visibility of motor vehicles, food safety regulations, and energy efficiency standards have all been delayed beyond the statutory deadlines for their promulgation due to delays caused by OIRA review.[89]

The frequency with which OIRA review causes agencies to fail to comply with statutory requirements for the promulgation of rules

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83 *See, e.g.*, COAL. FOR SENSIBLE SAFEGUARDS, *supra* note 41, at 5.

84 Envtl. Def. Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986).

85 Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2012).

86 *Envtl. Def. Fund*, 627 F. Supp. at 570.

87 *Id.* at 571.

88 *Id.*; *see also* Am. Lung Ass'n v. Browner, 884 F. Supp. 345, 349 (D. Ariz. 1994) (refusing to factor OMB review into its order setting a schedule for EPA action); Natural Res. Def. Council, Inc. v. EPA, 797 F. Supp. 194, 198 (E.D.N.Y. 1992) (finding the requirement that OMB review agency regulations does not apply where it would conflict with statutory deadlines and holding that OMB's review of draft proposed regulations did not justify EPA's delay).

89 *See* COAL. FOR SENSIBLE SAFEGUARDS, *supra* note 41, at 12, 17, 27–28; Editorial, *Rules Delayed, Governing Denied*, N.Y. TIMES, Aug. 12, 2012, at SR12; Helena Bottemiller, *More Deadlines Missed as FSMA Rules Remain Stalled at OMB*, FOOD SAFETY NEWS (July 2, 2012), http://www.foodsafetynews.com/2012/07/more-deadlines-missed-as-fmsa-rules-remain-stalled-at-omb; *CPR's Eye on OIRA*, *supra* note 73.

raises the question whether the clause "Except to the extent required by law" in section 8 of Executive Order 12,866 has any real force.[90] This express limit on the agency's obligation to withhold publication of a regulatory action prior to receiving OIRA's approval would seem on its face to allow an agency, when faced with a statutory deadline for promulgation of a rule before OIRA has completed its review, to publish without OIRA's approval in order to meet the statutory deadline. In practice, however, such deadlines routinely come and go while rules are under review without any apparent move by either OIRA or the agency to comply with the deadline for promulgation set by Congress.[91]

The lack of transparency in the review process also creates tension with the values of openness in administrative policymaking underlying the APA, which governs the process by which federal agencies develop and issue regulations.[92] Two of the basic purposes of the Act are to keep the public informed of agency organization, procedures, and rules and to provide for public participation in the rulemaking process.[93] Although OIRA itself is not subject to the requirements of the APA,[94] it is nevertheless significant that OIRA's regulatory review process is inconsistent with the values of openness in governmental decisionmaking, public participation, and procedural justice underlying that statute.

The extreme lack of transparency in the review process[95] directly conflicts with the goal of keeping the public informed of agency procedures and rules.[96] Under the APA, an agency is required to publish a notice of proposed rulemaking to inform the public of the time, place, and nature of the rulemaking proceedings, the legal authority under which the rule is proposed, and a description of the proposed rule.[97] OIRA, on the other hand, is not required to give notice that it has

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90 *See* Exec. Order No. 12,866 § 8, 3 C.F.R. 638, 648–49 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012) ("Except to the extent required by law, an agency shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review under section 6" until OIRA approves the action or waives review.).

91 *See supra* Part I.A.1.

92 *See* 5 U.S.C. § 553 (2012) (setting out requirements for informal rulemaking).

93 *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

94 OIRA does not issue "rules" as defined in 5 U.S.C. § 551(4), and is thus not subject to the requirements placed on agency rulemaking by § 553.

95 *See supra* Part I.A.2.

96 *See supra* text accompanying note 93.

97 5 U.S.C. § 553(b).

begun informal review of an agency action,[98] fails to acknowledge that it has received proposed actions for formal review for months at a time,[99] and requires agencies to obtain its approval before publishing a proposed rule and carrying out the accompanying APA notice requirements[100]—requirements meant to inform the public of administrative actions. Although agencies are required to respond to material comments submitted in what amounts to an open dialogue with interested persons,[101] OIRA effectively avoids disclosing both its communications with the agency and the changes it requests during review of agency actions.[102]

OIRA review is also inconsistent with the public participation provided for under the APA. Although OIRA maintains an "open door policy" with regard to meetings with interested stakeholders and discloses all meetings held with individuals outside of the executive branch during both informal and formal review of agency actions,[103] public participation in OIRA review is different from the participation that occurs under APA-mandated rulemaking procedures in significant respects. When interested persons offer comment through the agency's regular notice and comment process, their comments appear in the public docket so that the public can review and respond to both the content and the source of the comments submitted to the agency.[104] The occurrence and content of meetings between an agency and interested parties are also frequently published under agencies' respective rulemaking procedures.[105] Comments submitted in meetings with OIRA, however, are not disclosed to the public.[106] All that is required by Executive Order 12,866 is that OIRA maintain "a publicly available log" containing a notation of written communications from outside parties and, for substantive oral communications, "[t]he dates and names of individuals involved" and the subject matter discussed.[107] Thus although it is possible to know who met with OIRA

98 *See supra* text accompanying notes 48, 50.

99 *See supra* text accompanying notes 39–41.

100 *See supra* text accompanying note 60.

101 *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

102 *Supra* Part I.A.2.

103 *See* GAO 2009, *supra* note 64, at 35; STEINZOR ET AL., *supra* note 31, at 40.

104 Comments submitted through the notice and comment process are available in the public docket at REGULATIONS.GOV, http://www.regulations.gov/#!home.

105 *See infra* note 170.

106 GAO 2009, *supra* note 64, at 35.

107 Exec. Order No. 12,866 § 6(b)(4)(C), 3 C.F.R. 638, 647–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

and which rulemaking they discussed, the content of the discussion remains undisclosed, making it difficult to determine what effect, if any, input from outside parties had on OIRA's review.[108]

The failure to comply with the Executive order that authorizes it, the resulting violations of statutory mandates, and inconsistency with the values underlying the APA are all troubling aspects of OIRA review in and of themselves. Perhaps most troubling, however, are their implications for the scope of presidential influence over agency action. The next section argues that OIRA regulatory review as currently practiced exceeds the bounds of presidential power under the Constitution to influence decisions committed by statute to agency officials.

II. Presidential Power to Influence Agency Decisionmaking: Direction Versus Removal

The extent to which OMB may properly review and influence agency regulatory actions depends on the proper scope of presidential power over regulatory decisionmaking. This question has been the focus of extensive study and debate, owing in large part to the fact that the Constitution, although granting to the President "[t]he executive Power,"[109] says very little about what that power is to include.[110] Some have argued that the nature of the executive power is unitary—that the President, as the sole head of the executive branch and charged with faithful execution of the laws, must have the power to direct inferior officers as to how they perform their duties even when they are entrusted with decisionmaking authority by statute.[111] The nonunitary view of the presidency, by contrast, holds that the President may not affirmatively direct the decisions of agency officials unless given such power by law.[112] Although recognizing that the ability to remove officers at will gives the President substantial power over agency decisionmaking, the nonunitary view maintains that this power does not imply that the President may dictate the substantive deci-

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108 *See* GAO 2003, *supra* note 37, at 89–92 (attempting to determine whether OIRA's actions were traceable to the suggestions of outside parties by identifying instances in which outside parties met with OIRA concerning rules that OIRA later significantly affected).

109 U.S. Const. art. II, § 1, cl. 1.

110 *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1266 (2006) (noting that "as it was written . . . there was a hole in the U.S. Constitution. The Constitution provided a legislature, a Supreme Court, and two executive officers. Administration was missing.").

111 Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 4 (2008).

112 Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 Duke L.J. 963, 965–66 (2001).

sions of officials whom Congress has entrusted with decisionmaking power.[113]

Although the debate remains ongoing, the weight of the evidence found in the Constitution's text, early federal practice, and modern authority supports the nondirective view of presidential power.[114] Perhaps recognizing the shaky legal basis for direct presidential control of decisions entrusted to agency heads by statute, the Executive orders dealing with regulatory review have not attempted to assert such control. Executive Order 13,563,[115] issued by President Obama in 2011, provides that "[n]othing in this order shall be construed to impair or otherwise affect . . . authority granted by law to a department or agency, or the head thereof."[116] The order thus makes clear that it is not intended to assert presidential control over the decisionmaking authority delegated to agencies or agency officials by statute.[117] Prior Executive orders contain similar express disclaimers of directive authority,[118] and the Department of Justice memorandum setting out the legal justification for Executive Order 12,291 cautioned that OMB's power of consultation did not include the authority to reject an agency's ultimate judgment delegated to it by law.[119]

Given the President's responsibility to take care that the laws be faithfully executed,[120] however, the President must have some influ-

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113 *Id.*

114 *See* MASHAW ET AL., *supra* note 2, at 180; Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 534–41 (1989); Mashaw, *supra* note 110, at 1288–89; Percival, *supra* note 112, at 965; Percival, *supra* note 4, at 2490; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608–23 (1989); *see also* THE FEDERALIST NO. 77 (Alexander Hamilton) (discussing the role of Senate confirmation in ensuring that executive officers retain some degree of independence from the President); Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees,"* 30 WM. & MARY L. REV. 375, 379–80 (1989). *But see* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606–07 (2005).

115 Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 102–03 (2012).

116 *Id.* § 7(b), 3 C.F.R. at 217.

117 Percival, *supra* note 4, at 2530.

118 *Id.* at 2512–13; *see also* Exec. Order No. 12,291 § 3(f)(3), 3 C.F.R. 127, 130 (1982), *reprinted in* 5 U.S.C. § 601 app. at 473–76 (1988) ("Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law."), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012); Exec. Order No. 12,866 § 9, 3 C.F.R. at 649 ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.").

119 Memorandum from U.S. Dep't of Justice for David Stockman, Dir., Office of Mgmt. & Budget, *in* MASHAW ET AL., *supra* note 2, at 269, 271.

120 U.S. CONST. art. II, § 3, cl. 5.

ence over executive officers. This section reviews the President's power of removal, which can be used to influence decisions committed to agency officials who serve at the pleasure of the President.[121] This section then argues that OIRA's current regulatory review practices constitute impermissible direction of agency action, distinguishing the influence allowable through use of the removal power from the control of agency decisionmaking exerted through OIRA review.[122]

A. The Removal Power as a Tool of Presidential Control and Influence over Policy

Interestingly, the President's power to remove subordinate officers is just as absent from the Constitution's text as the theoretical general power to direct agency officials discussed above. Unlike presidential directive power, however, the President's power to remove executive officials at will is widely accepted.[123] The Supreme Court has inferred this authority as a necessary incident to the President's power of appointment[124] and his responsibility to take care that the laws be faithfully executed under Article II, Section 3 of the Constitution.[125] Given the practical need to execute the laws through subordinate officers, it is essential that the President have the power to remove those officers who have failed to fulfill their constitutional duties in order to ensure the faithful execution of the laws under the Take Care Clause.[126]

The removal power has long been recognized to allow the President to exert influence over decisions entrusted to executive officials by statute. In his advisory opinion in the case of The Jewels of the Princess of Orange, Attorney General Roger Taney argued that the President could lawfully direct a district attorney (now known as United States Attorneys) to discontinue a prosecution based on the President's duty to take care that the laws be faithfully executed.[127] Such authority was necessarily implied by the Take Care Clause and

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121 *See infra* Part II.A.

122 *See infra* Part II.B–C.

123 The debate over the President's power of removal was a contentious one in the early days of the republic. *See, e.g.*, Mashaw, *supra* note 110, at 1282–84; *see also* Myers v. United States, 272 U.S. 52, 109–14 (1926) (discussing the debate over the President's removal power in the First Congress). The question has been well-settled, however, at least since the Supreme Court's decisions in *Myers* and *Shurtleff v. United States*. *Myers*, 272 U.S. at 176; Shurtleff v. United States, 189 U.S. 311, 314–15 (1903).

124 *See Myers*, 272 U.S. at 119, 126; *Shurtleff*, 189 U.S. at 314–15.

125 *Myers*, 272 U.S. at 117; *Shurtleff*, 189 U.S. at 315.

126 *Myers*, 272 U.S. at 117.

127 The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 487 (1831).

founded in the President's "general supervisory powers" necessary to fulfill that duty.[128] If a district attorney were prosecuting a suit "against justice, and for the purpose of oppressing an individual," the prosecution would not be a faithful execution of the laws, and the President would have a duty to take corrective action—namely, by ordering the attorney to halt the prosecution.[129]

Significantly, the attorney could refuse to obey the President's order—the discretion to prosecute is granted to the attorney, and he is thus under no legal obligation to follow the President's instruction on how to exercise this discretion.[130] If the attorney refuses the President's order, however, the President may remove him and replace him with a substitute willing to carry out the President's wishes.[131] This use of the removal power to influence officials is entirely legitimate—the district attorney "is made dependent upon [the President], for the very purpose of placing him under his control."[132]

In practice, however, the President faces significant constraints on the exercise of the removal power. Most significantly, the Senate must confirm the removed officer's replacement under Article II, Section 2.[133] The Senate's power of advice and consent represents a fundamental structural check on the President's ability to replace executive officials with appointees who will be more responsive to his policy preferences. If the Senate opposes the policy underlying the President's decision to remove an officer, it may be unwilling to confirm a nominee that is willing to carry out the President's policy preference.[134]

Additionally, high executive officials often have political constituencies of their own. Prominent recent examples might include former Secretary of State Hillary Clinton, who had previously served as a

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128 *Id.* at 488.

129 *Id.* at 489.

130 *See id.*

131 *Id.*

132 *Id.* at 491.

133 U.S. CONST. art. II, § 2.

134 Individual members of the Senate may singlehandedly block confirmation of a replacement nominee—whether out of displeasure with related administration policies, or to gain leverage to extract concessions on unrelated matters—through the use of procedural "holds." *See* WALTER J. OLESZEK, CONG. RESEARCH SERV., RL31685, PROPOSALS TO REFORM "HOLDS" IN THE SENATE 1–3 (2007), *available at* http://assets.opencrs.com/rpts/RL31685_20071220.pdf. Significantly, however, senators will no longer be able to filibuster the President's executive branch nominees under the unprecedented rule change recently effected by Democrats in the Senate. *See* Paul Kane, *Senate Eliminates Filibusters on Most Nominees*, WASH. POST, Nov. 22, 2013, at A1.

U.S. Senator and drew widespread popular support as a presidential candidate in 2008,[135] and former Secretary of Homeland Security Janet Napolitano, who had previously served two terms as the Governor of Arizona.[136] Firing such officials is likely to have political ramifications that may make it unpalatable for the President to take that step even if he would prefer someone who would more faithfully carry out his policy wishes.[137]

Perhaps most obviously, removing executive officers, at least in the case of high officials, generates bad publicity. At a fundamental level, firing major figures in the President's own administration is a clear signal to the public that something has gone wrong.[138] The firing is often in the news for days, with reporting on the officer's removal followed by inquiries into the presumably controversial events that led to the decision and the palace intrigue that inevitably surrounds such actions.[139] This is the kind of news that presidents want to avoid making, and the reluctance to do so provides an additional brake on the President's removal power.

These political considerations are best viewed not merely as practical constraints on the President's decision to remove executive officials, but rather as extensions of the fundamental structural constraint imposed on the President's removal power by the Constitution's requirement that the Senate confirm executive officers.[140] The Senate, after all, is a political body, and confirmation of the President's nominations is often a highly political undertaking.[141] As elected officials, senators are sensitive to the political ramifications of the removal and appointment of executive officers, whether related to an officer's own political constituency, policy issues underlying an officer's removal, or

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135 *See* Scott Wilson, *Obama Is Able to Fire, But Not So Willing*, WASH. POST, Oct. 25, 2013, at A1; *Biographies of the Secretaries of State: Hillary Rodham Clinton*, OFFICE OF THE HISTORIAN, http://history.state.gov/departmenthistory/people/clinton-hillary-rodham (last visited Oct. 20, 2014).

136 *Janet Napolitano*, U.S. DEP'T OF HOMELAND SECURITY, http://www.dhs.gov/person/janet-napolitano (last updated Dec. 20, 2013).

137 *See* Wilson, *supra* note 135.

138 *Id.*

139 The press accounts of the dismissal of General Stanley McChrystal in 2010 and the resignation of Secretary of Defense Donald Rumsfeld in 2006 provide relatively recent examples of the publicity surrounding departures of major executive officers. *See, e.g.*, Helene Cooper & David E. Sanger, *Obama Fires Afghan Commander, Citing Need for Unity in the War*, N.Y. TIMES, June 24, 2010, at A1; Sheryl Gay Stolberg & Jim Rutenberg, *Rumsfeld Resigns; Bush Vows 'To Find Common Ground'; Focus Is on Virginia*, N.Y. TIMES, Nov. 9, 2006, at A1.

140 *See* U.S. CONST. art. II, § 2.

141 *See supra* Part II.A.

policy issues that a new nominee will act upon if confirmed.[142] Senators regularly use Senate confirmation hearings as fora to raise substantive policy concerns related to the executive office at issue, and senators have been known to base their positions on confirmation of a nominee on disagreements with an agency policies rather than the nominee's qualifications for the office.[143] Politics are thus inherent in the Senate's advice and consent power, and the importance of political considerations to the President's removal power should therefore not be overlooked in the discussion of the constitutional constraints on its exercise.

B. The Removal Power Is Distinct from an Affirmative General Directive Power

Given the President's influence over agency decisionmaking through the removal power, one might ask why it matters that the President lacks general directive authority. The President may not be able to legally require agency officials to carry out his orders, but he can fire them for failing to do so.[144] As a result, one might argue, the President's removal power effectively affords the same control over agency decisionmaking as the directive power—if an official refuses to obey the President's instructions, he will be replaced by someone who will, rendering the final outcome the same. OIRA's review of agency regulation could thus be viewed as merely facilitating the President's removal power through a staff dedicated to ensuring that the President's instructions are followed. After all, the only remedy for an official's refusal to follow OIRA's instructions—for example, by refusing to accept a change requested by OIRA during its review of an agency action—would be to fire the official.

This account, however, fails to give proper weight to the real constraints on the President's use of the removal power. As discussed above, the constitutional requirement that the Senate confirm executive officials is a powerful check on the President's ability to implement his policy preferences by replacing uncooperative officials with ones that will accede to his wishes.[145] Where a general directive power would allow the President to carry out his preferences without inter-

142 *See supra* note 134.

143 Senator David Vitter's opposition to Gina McCarthy's nomination for EPA Administrator is a recent example. *See* Bruce Alpert, *Continued GOP, Vitter Opposition Threatens Confirmation of Obama's EPA Nominee*, TIMES-PICAYUNE (June 10, 2013, 5:36 PM), http://www.nola.com/politics/index.ssf/2013/06/continued_gopvitter_opposition.html.

144 *See supra* Part II.A.

145 *See supra* note 134 and accompanying text.

ference, executing these preferences through the removal power necessarily includes securing the approval of the Senate—a famously slow-moving institution that may disagree with the policy choices that prompted the President's removal decision and thus be disinclined to confirm a nominee who will carry them out.[146] Although directing an official to carry out the President's policy preference might have its own political consequences, such direction would avoid the political ramifications of displeasing the official's constituency and the negative publicity surrounding a presidential firing and would not require the Senate's approval.[147]

The removal power is thus subject to structural and political constraints that effectively limit the extent of its use. Whereas the general directive power would give the President complete and direct control over the decisions of subordinate officials,[148] the influence afforded to him through use of the removal power is more limited.[149] If an officer refuses to carry out the President's wishes, the President's only recourse is to remove him and appoint someone who will—subject to the Senate's approval of the replacement and the associated political considerations that attend confirmation and removal of executive officers.[150] Given that the weight of legal authority does not support a general presidential power of direction,[151] it is essential that the President's use of the removal power be subject to these constraints in order to avoid crossing the line between permissible influence through the removal power and impermissible direction of agency decisionmaking.

C. OIRA Review As Currently Practiced Constitutes Impermissible Direction of Agency Action

Regulatory review by OIRA, as currently practiced, appears to cross that line by evading the structural and political constraints on the President's exercise of the removal power. Absent the requirement that agencies submit significant actions to OMB for review, the

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146 *See, e.g.*, Alpert, *supra* note 143.

147 The negative political consequences of removing high executive officials have even extended to formal congressional censure. After President Jackson removed two consecutive Treasury Secretaries who refused to carry out his preferences regarding the National Bank, the Senate passed a resolution censuring him for acting in derogation of the Constitution and the laws. LOUIS FISHER, PRESIDENTIAL SPENDING POWER 16 (1975).

148 *See supra* note 111 and accompanying text.

149 *See supra* Part II.A.

150 *See supra* Part II.A.

151 *See supra* note 114 and accompanying text.

President would still have the ability to remove the agency head if he did not approve of the agency's action.[152] As a result, the agency head would need to make sure that the action as a whole was consistent with the President's policy, and so would likely submit the action for review voluntarily. The agency head would know, however, that given the negative political consequences of firing and the difficulty of confirming a replacement,[153] the President would be unlikely to threaten her job over relatively minor details of the action. Thus the agency head, while still needing to clear the action with the President, would likely retain substantial discretion in determining the particulars of the action and how it would be carried out.

OIRA review fundamentally alters the relative negotiating position of the President and agency officials. Most basically, the review process required by Executive Order 12,866 inserts a dedicated agency into the process of exerting executive influence over administrative actions. The agency head, instead of negotiating with the President, now must negotiate with a separate agency with the power to return an action for reconsideration if it conflicts with the President's priorities.[154] This substitution of OIRA for the President has two major consequences for the relative bargaining positions of the President and the agencies. First, it insulates the President from the political consequences of exerting executive influence over agency action. OIRA review prevents the President from having to directly intervene in the vast majority of agency actions, leaving a little-known office to be the target of objections to executive review while avoiding potentially damaging narratives of White House meddling. When the President does intervene in an agency action, he can do so through OIRA's opaque review process, effectively cloaking what is in fact direct presidential influence over agency action.[155]

Second, OIRA review shifts the President's position in administrative policymaking from review of substance to review of procedure. Under Executive Order 12,866, the agency may not publish a regulatory action subject to review until OIRA waives review, completes review without requests for further consideration, or the deadline for review expires without OIRA having notified the agency that it is re-

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152 *See supra* Part II.B.

153 *See supra* Part II.B.

154 Exec. Order No. 12,866 § 5, 3 C.F.R. 638, 644 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

155 *See supra* Part II.A.

turning the action.[156] When none of these conditions are met—because an agency (at OIRA's suggestion) has requested an extension of the review deadline, or because OIRA has not allowed the action to progress to formal review[157]—agency action is left in regulatory review limbo. An agency head faced with this situation has but two choices: satisfy OIRA (or whichever executive office is the source of the delay) so that the action will be allowed to move forward, or violate the Executive order by publishing the action before OIRA has completed or waived its review.

This choice is distinct from that which the agency head would face absent this review limbo. If OIRA and the agency could not reach an agreement on the agency action, Executive Order 12,866 contemplates that OIRA would return the action to the agency for further consideration and provide a written explanation for the return.[158] At that point, the agency head would have a choice—reconsider the action in light of OIRA's objections or publish the action despite its inconsistency with the President's policy preferences. If OIRA never completed its review by returning the rule, however, publishing it would not only be inconsistent with the President's policy preferences, but also with the Executive order's requirement that an action not be published until OIRA has waived or completed review. In this situation, the President could justify removal of the official based not on policy disagreement, but on the official's failure to follow required procedure.

This shift from substance to procedure further insulates the President from the political repercussions of exercising the removal power. It is far easier to justify firing an official for disobeying procedural instructions than for disagreeing with the President on a policy decision within the official's statutory discretion. A decision to remove an agency official based on policy disagreement would anger the official's own political constituents as well as those who agreed with the official's policy position, risking substantial political backlash and likely sparking a public debate over policy that would carry over into the Senate confirmation process. A decision to fire based on the failure to obey an Executive order, on the other hand, largely avoids these consequences. It raises no question of policy, at least expressly. And even an official's most ardent supporters would have difficulty arguing that the Chief Executive was unjustified in removing an official who

156 Exec. Order No. 12,866 § 8, 3 C.F.R. at 648–49.

157 *See supra* notes 39–43, 61–62 and accompanying text.

158 Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. at 647.

refused to obey procedural orders meant to "enhance planning and coordination," "restore the integrity and legitimacy of regulatory review," and "make the process more accessible and open to the public."[159]

As a result, an agency head subject to OIRA review can no longer rely on the President's reluctance to use the removal power when deciding how closely to adhere to the President's policy preferences. The avoidance or substantial mitigation of the political consequences of removal eliminates a major disincentive to its use. And although the President will still have to win Senate confirmation of a replacement,[160] the procedural justification for (and resulting depoliticization of) the removal will make doing so far easier than if the firing had been expressly based on a policy disagreement. This puts the agency head in a significantly weaker negotiating position—she now must either agree to OIRA's recommendations, even on minor details of the agency action, to move forward or risk removal by a President confident of a quick path to confirming a successor and few negative political consequences.

The absence of these checks renders the President's control over administrative policymaking through OIRA review functionally indistinguishable from general directive power. Although the President in theory must still remove an agency official and win Senate confirmation of a nominee in order to carry out his policy preference, OIRA review tips the balance of power between the agencies and the President so heavily in the President's favor that in practice, he never has to. The opacity of OIRA review allows the White House to influence agency rulemakings through the review process while avoiding accountability for its actions, allowing it to demand changes without fear of political repercussions for its policy decisions. If an agency official is disinclined to follow the President's instructions (as articulated by OIRA), the White House can keep the action in a regulatory review limbo that forces the official to either publish the rule in violation of an Executive order or agree to the President's demands—all while avoiding accountability for the delay. The lack of accountability in the review process and the procedural basis for removal would likely make the official's decision to take a stand futile—having avoided the political consequences of removal, the President would likely win easy confirmation of his replacement by the Senate. Knowing all of this, an agency official is unlikely to exercise her independent statutory discre-

159 *Id.* pmbl., 3 C.F.R. at 638.

160 *See* U.S. CONST. art. II, § 2.

tion at all. As a result, the President is able to effectively direct agency decisionmaking, based not on the removal power, but instead on the ability of OIRA review to neutralize the structural and political constraints on its use.

III. Proper Limits on Presidential Influence Through OIRA Review

Concerns over the use of OIRA review as a surreptitious vehicle for presidential influence grew over the course of the George W. Bush Administration,[161] and President Obama appeared to recognize the need for reform early in his first term. On January 30, 2009, President Obama issued a memorandum directing OMB, in consultation with the regulatory agencies, to produce a set of recommendations for a new Executive order offering suggestions on a variety of issues related to OIRA review, including disclosure and transparency, undue delay caused by regulatory review, and encouraging public participation in agency processes.[162] Despite a 100-day deadline, OMB issued no recommendations and did not publish the agencies' comments.[163] When President Obama did finally issue Executive Order 13,563 in 2011, it retained OIRA review as set out in Executive Order 12,866 and was largely unresponsive to the issues set out in the President's January 30 memorandum.[164]

This failure to follow through with reform of the regulatory review process was, perhaps fittingly for a process known for its opacity, left unexplained by the Obama Administration. Given the Obama Administration's own innovations in the review process—particularly the unofficial requirement that agencies receive permission from OIRA before submitting rules for formal review[165]—OIRA review is arguably even more in need of reform now than it was in 2009. The following discussion proposes changes in OIRA's review practices to ensure compliance with substantive statutes, consistency with the val-

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161 *See, e.g.*, Percival, *supra* note 4, at 2513–28.

162 Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977, 5977 (Feb. 3, 2009); *see also* Heinzerling, *supra* note 13, at 339–40; *OIRA's Role in the Obama Administration Examined*, Center for Effective Gov't (June 16, 2009), http://www.foreffectivegov.org/node/10115.

163 Heinzerling, *supra* note 13, at 340; Gabriel Nelson, *Obama Overhaul of Regulatory Reviews Now Seen as Unlikely*, N.Y. Times, July 14, 2010, http://www.nytimes.com/gwire/2010/07/14/14greenwire-obama-overhaul-of-regulatory-reviews-now-seen-45978.html.

164 Heinzerling, *supra* note 13, at 340–41.

165 *See supra* note 61 and accompanying text.

ues underlying the APA, and proper limits on the President's influence over agency decisionmaking.

A. Transparency in the Review Process

Transparency in the review process is essential to hold executive officials accountable for the policy decisions made during review and to ensure the consistency of review with the good governance principles underlying the APA. The absence of effective disclosure—of communications between OIRA and the agencies, the changes to agency action requested by OIRA, the reasons for withdrawal or delay of a rule, the content of communications with outside parties, and the role of the White House and other executive officials in the process—frustrates both of these values.[166]

The first step needed to increase the transparency of OIRA review is to eliminate informal review of agency rulemakings. The use of informal review to make significant, substantive changes to agency actions while avoiding Executive Order 12,866's disclosure requirements prevents the public from knowing what changes were made during review and who requested them, effectively avoiding accountability for the effects of the review process on agency action.[167] Indeed, at least two agencies have already stopped agreeing to informal review due to its lack of transparency.[168] Once substantive review of agency action by OIRA begins—whether initiated by the agency through submission of the action or by OIRA prior to submission—the disclosure requirements of Executive Order 12,866 should apply.

The disclosure requirements should also be supplemented to provide accountability for the changes made during review. The requirement that OIRA disclose communications between it and the agency during review should apply to the substantive communications of all OIRA officers, not only to those involving OIRA officials at the branch chief level or above. Further disclosure of OIRA's contacts with entities not within the executive branch is also needed. OIRA does not provide any specific information on what was discussed in meetings with interested parties, making it difficult to determine what effect outside input had on OIRA's review and denying those with opposing views an opportunity to rebut the arguments presented.[169] The minimal information provided is insufficient to allow for account-

166 *See supra* Part I.A.2.

167 *See supra* Part I.A.2–3.

168 *See* COPELAND, *supra* note 28, at 36–37.

169 *See supra* notes 104–06 and accompanying text.

ability in the review process and is inconsistent with the values underlying the APA.[170] OIRA should therefore supplement this information with a summary of the particular issues discussed and the parties' positions, as is often done by agencies meeting with interested parties during the rulemaking process.[171]

Although requiring additional disclosure for meetings with officials within the executive branch would also further the accountability of the review process, the benefits of such disclosure are likely outweighed by the need for confidential communications within the executive branch to allow for candid discussion.[172] Other tools are available, however, to facilitate the accountability of the White House and other executive branch officials in the review process. In particular, the practice of requiring OIRA approval before submitting actions for review—allowing the White House to indefinitely stall agency rulemakings without disclosing the reasons for holding up the rule, the party responsible for the delay, or even that a rule exists and is ready for review—should be prohibited. Perhaps more than any other feature of OIRA review as currently practiced, this unofficial requirement provides the White House with immense control over agency actions with nearly no accountability.[173]

Finally, further disclosure is needed to ensure the proper resolution of OIRA's review of agency actions. To prevent OIRA from using agency withdrawal of a rule to avoid having to provide the explanation required when OIRA returns a rule to an agency, agencies should be required to explain the reasons for withdrawing an action from review. If the withdrawal were at the request of OIRA or another executive official, this requirement would provide a way for the agency to disclose that information, enhancing the accountability of the process. Without the availability of withdrawal to quietly dispose of an action on which OIRA and the agency cannot agree, OIRA would have no incentive to avoid the procedures provided for under the Executive order: either requesting resolution of the dispute by the President under Section 7 or returning the action to the agency for

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170 The GAO stated that "OIRA's practice of providing minimal information to the public about its meetings with outside parties stands in contrast to the more formal, APA-driven practices of certain agencies that we reviewed." GAO 2003, *supra* note 37, at 55. GAO provided the example of the Department of Transportation's practice of providing the names and affiliations of those present as well as a description of the positions taken by the various parties. *Id.* at 55–56.

171 *See supra* note 170.

172 *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 406–07 (D.C. Cir. 1981).

173 *See generally* COPELAND, *supra* note 28, at 38–40; Heinzerling, *supra* note 13.

further consideration under Section 6(b)(3), providing a "written explanation" and "setting forth the pertinent provision of [the] Executive order on which OIRA is relying."[174]

OIRA's compliance with these disclosure requirements would be best secured by codifying the requirements by statute and including a provision allowing them to be judicially enforced. The current practice of OIRA review makes clear that OIRA and the White House have strong incentives to avoid disclosure during the regulatory review process, and agencies have no power to compel OIRA's compliance with disclosure requirements.[175] Interested parties are also unable to enforce compliance because Executive Order 12,866 expressly states that it "does not create any right or benefit, substantive or procedural, enforceable at law or equity."[176] To incentivize compliance and ensure effective enforcement, these disclosure requirements should be codified and made subject to judicial enforcement.

B. Effectively Limiting the Time for Review

The timing of review also implicates the accountability of OIRA and the White House in the regulatory review process. OIRA's ability to indefinitely delay rules, either through informal review or by asking that an agency request an extension of the review period, keeps agency action locked in review without disclosing either the reason for the delay or who is responsible for it.[177] The issue of timing also directly implicates the ability of an agency official to exercise her ultimate discretion in a decision committed to the agency by statute. If OIRA never waives or completes its review of an agency action, an agency official cannot decide to act against the President's policy priorities without also violating the Executive order, providing the President with an independent procedural basis for removing the official that depoliticizes the removal and paves the way for confirmation of a replacement.[178] Leaving an agency action in this regulatory review limbo thus constrains an agency official's statutory discretion by forcing the official to violate the President's procedural mandate in order to exercise her discretion at all.[179]

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174 Exec. Order No. 12,866 § 6(b)(3), 3 C.F.R. 638, 647 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

175 *See supra* Part I.A.2.

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

177 *See supra* Part II.A.

178 *See supra* Part III.D.

179 *See supra* Part III.D.

It is thus essential that OIRA review be time-limited. The proposed abolition of informal review, discussed above, is also important in the context of these time limits. Once OIRA begins substantive review of a rule, the clock should start on the review period regardless of whether the agency submitted the rule for review or OIRA requested review prior to the agency's submission. OIRA already draws this line with regard to when it begins disclosing meetings with outside parties,[180] and starting the review period from this point will eliminate OIRA's ability to extend the review period by informally reviewing actions that have not yet been submitted by the agency.

Two other reforms are also critical to avoiding the review limbo that allows OIRA to hold rules indefinitely. First, and also relevant in the transparency context, is prohibiting the practice of requiring OIRA approval before allowing agencies to submit rules for review. This unofficial requirement prevents the clock from ever starting on the review process, indefinitely delaying agency action without OIRA having to either waive review or complete its review within the order's time limits. Second, agency requests to extend review should be limited to thirty days and should be accompanied by an explanation for the request. Overruling OIRA's interpretation of agency requests for review as carrying no time limit will prevent OIRA from obtaining an indefinite review period by asking the agency to request an extension. The requirement that the agency justify its extension request will allow it to identify the reasons for (and source of) the request.

These proposals would restore the Executive order's time limits for review to all actions substantively reviewed by OIRA. Still remaining, however, is the question of what happens if OIRA does not complete its review by the 90- or 120-day deadlines. The basic principle underlying time limits on OIRA review is that, to allow the agency official to exercise her statutory discretion, OIRA review must end—whether in an agreement with the agency and the completion of review, return of the action to the agency, or elevation of the disagreement to the President.[181] It is possible, however, that certain rules may require more than 120 days for OIRA and the agencies to reach

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180 *See* GAO 2003, *supra* note 37, at 53–54.

181 *See id.* The review may also end in withdrawal of the action by the agency. With the proposed requirement that the agency explain the withdrawal, however, it is less likely that withdrawal would be used to resolve disagreements between OIRA and the agency. An agency may still wish to withdraw an action rather than have OIRA return it to give itself the opportunity to explain the disagreement with OIRA on its own terms. With the proposed limits on the timing of OIRA review, however, the agency would never need to use withdrawal to extricate an action from indefinite OIRA review limbo, and with the agency required to explain withdrawal, OIRA

agreement.[182] To address this situation, OIRA should be allowed to ask the agency, subject to the agency's approval, for a limited period of additional time for review. To ensure OIRA is accountable for the delay, the request would be required to set out the need for the extension and be disclosed to the public. If the agency refused, OIRA could return the action to the agency for reconsideration or elevate the matter to the President. If OIRA does none of these things, however, it should be deemed to have waived review under the current language of Section 8,[183] leaving the agency head free to publish the action.

Unlike the proposed disclosure requirements, these provisions for the timing of review—including the prohibition on requiring OIRA's approval before agencies may submit an action for review—would not require statutory codification. An Executive order setting out these timing provisions would be largely self-enforcing. Deprived of its avenues around the order's time limits and knowing that failure to complete review within them will result in waiving its review altogether, OIRA would have to conclude its review in a timely manner, whether by completing review without requests for further consideration or by returning the action to the agency. The agencies would be able to enforce this requirement by publishing rules whose review time has expired without action by OIRA. Although the agencies would still have strong incentives to cooperate with OIRA, and thus would be disposed to grant its extension requests, the extension and the reasons for it would be transparent and OIRA would be accountable for the delay.

CONCLUSION

OIRA review as currently practiced cannot continue. Authorized by an Executive order meant "to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public,"[184] regulatory review in practice requires OIRA approval before agencies may even submit actions for review, disregards time limits for review of contro-

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would have no incentive to request withdrawal to avoid the public explanation required in a return letter.

182 *See* COPELAND, *supra* note 28, at 54.

183 Exec. Order No. 12,866 § 8, 3 C.F.R. 638, 648–49 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

184 *Id.* pmbl., 3 C.F.R. at 638.

versial actions, and effects significant changes in agency decisionmaking while avoiding disclosure of OIRA's role in the process.[185] Pervasive delays in review frequently result in the violation of statutory deadlines for agency action, and the lack of transparency frustrates the values of openness and public participation underlying the APA.[186] Taken as a whole, the review process acts to effectively give the President affirmative directive power over decisions committed to agency officials by statute by removing the structural and political constraints on the use of removal power.[187]

185 *See supra* Part II.A.

186 *See supra* Part II.B.

187 *See supra* Part III.