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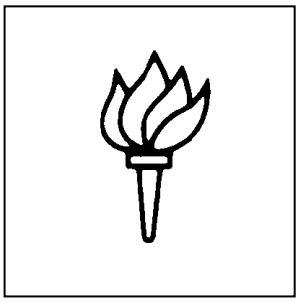

Regulatory Review, Capture, and Agency Inaction

Michael A. Livermore & Richard L. Revesz

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MICHAEL A. LIVERMORE & RICHARD L. REVESZ*

This Article highlights the role of capture in providing a normative foundation for regulatory review of administrative action, which, at the federal level, is conducted by the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget (OMB). It also establishes a reform agenda to help bring the practice of review in line with its anticapture justification. There are two traditional justifications for OIRA review: that centralized review facilitates the exercise of presidential authority over agencies, and that bureaucratic tendencies toward overzealousness require a centralized checking response. Both of these justifications are problematic, however. The normative desirability of maximizing presidential power is subject to debate, and OIRA's contribution to increasing presidential control is controversial. Bureaucratic incentives can lead to both overregulation and underregulation, raising doubts about the need for a systematic check focused solely on the former. An anticapture function for OIRA provides a more promising ground for regulatory review. OIRA has four important features that, in principle, can facilitate an anticapture role: its generalist nature; its coordination function; its use of cost–benefit analysis; and its tradition of independent leadership. There are, however, elements of OIRA review that undermine its anticapture potential, most importantly the near-exclusive focus on the review of agency action. The failure of an agency to act can be just as detrimental to social well-being as overzealousness, and special interests may seek deregulation, delay, and weak regulation as often as overregulation. This Article proposes a specific mechanism for OIRA to engage in review of agency inaction by examining petitions for rulemakings filed with agencies. This procedure cabins OIRA's inaction review powers within a fairly limited field, making the task workable, and takes advantage of information held by parties outside the government.

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* Executive Director, Institute for Policy Integrity and Adjunct Professor, New York University School of Law, and Dean and Lawrence King Professor of Law, New York University School of Law, respectively. This Article benefited from helpful comments from participants at the 2012 Annual Meeting of the American Law and Economics Association (as well as an anonymous reviewer for that meeting) and the 2012 Annual Meeting of the Association of American Law Schools. Participants at two Tobin Project workshops on preventing regulatory capture and authors of PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., forthcoming 2013), *available at* http://www.tobinproject.org/books-papers/preventing-capture, also provided valuable feedback. Rachel Barkow, Michael E. Levine, Mark B. Seidenfeld, and Cass R. Sunstein also provided helpful insights. We would like to thank Akari Atoyama, Scott Blair, and Shaun Werbelow for excellent research assistance and the Filomen D'Agostino and Max Greenberg Research Fund at New York University School of Law for generous financial support.

INTRODUCTION

Executive review of agency rulemaking is one of the most important innovations in contemporary American administrative law. In 1981, building on prac-

tices that had been in place since the presidency of Richard Nixon, President Ronald Reagan issued Executive Order 12,291, requiring most federal agencies to submit new regulations to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) for approval.[1] This executive order has been followed, in its broad outlines, by all of the subsequent four presidents, who have either maintained earlier requirements or adopted their own regulatory review orders.[2] Executive regulatory review stands alongside notice-and-comment rulemaking and judicial doctrines such as *Chevron* deference[3] as a defining feature of administrative law in the United States.

The process of regulatory review adds an additional layer of oversight to administrative agencies. Under the governing executive orders, agencies must conduct cost–benefit analysis of proposed rulemakings and transmit the analysis to OIRA, which has the power to return rules to agencies for reconsideration if they are deemed inadequate. OIRA's review is primarily based on the cost–benefit analysis that is produced by the agency. Once OIRA review has been completed, final rules are published in the Federal Register and, unless successfully challenged in court, take on the force of law. The OIRA oversight process is entirely internal to the executive branch: it was established by executive order (rather than statute) and is not subject to judicial review.

Important innovations are rarely uncontroversial or easily understood, and regulatory review is no exception. The Reagan order was accompanied by sustained criticism from Congress and interest groups; many of those same criticisms are still leveled today. As regulatory review touches on the fields of law, political science, and economics, there is extensive academic commentary on its causes, consequences, legitimacy, and efficacy. In particular, within political science literature, regulatory review has been studied as one of the most important developments in the exercise of presidential power during the latter part of the twentieth century. There is also a well-developed legal literature on OIRA, along a separate and occasionally intersecting track, which focuses on the normative desirability of OIRA review. Prominent defenses of executive review have been written by now-Justice Elena Kagan[4] and current and past OIRA Administrators Cass Sunstein,[5] John Graham,[6] Christopher DeMuth, and Judge Douglas Ginsburg.[7] There is an (at least) equally long list of critics of

1. Exec. Order No. 12,291, 3 C.F.R. 128 (1981), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 640 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

2. *See infra* note 22 and accompanying text.

3. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

4. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2340 (2001).

5. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3–11 (1995).

6. *See* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 450 (2008).

7. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 879 (2010) [hereinafter DeMuth & Ginsburg, *Rationalism*]; Christopher C. DeMuth &

OIRA review, including Professors Lisa Heinzerling,[8] Alan Morrison,[9] Sidney Shapiro,[10] and Rena Steinzor.[11]

There are two traditional justifications for OIRA review: increasing presidential power over the administrative state and checking agency overzealousness. The presidential power argument holds that OIRA fosters control by the President of agency decision making, which promotes democratic accountability and helps facilitate agency responsiveness to electoral demands. The "checking function"[12] justification is based on the claim that agencies have systematic tendencies to overregulate, creating a need for a centralized office to act as a gatekeeper to stop inefficient rulemakings. Both of these justifications, although popular in the legal literature, are subject to compelling criticisms.

The issue of capture, which constitutes the focus of this Article, has sometimes been conflated, erroneously, with the presidential power or checking function arguments. Capture describes situations where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest. For groups that are repeat players before specialized agencies, investments in long-term relationships can have substantial returns in terms of influence, raising capture concerns. The threat of capture has been linked to the need to increase presidential authority, because presidents are claimed to be less subject to capture risk. Capture has also been hypothesized to lead to agency overzealousness. Disaggregating capture from these other issues, which the existing literature has not done, is important in order to pinpoint its independent contribution to the justification for centralized regulatory review—the central project of this Article. Supporters of regulatory review have also often ignored features of OIRA that expose it to capture risk, including inadequate transparency and a participation process that is heavily tilted toward industry interests. Steps should be taken to increase transparency, equalize participation opportunities, emphasize OIRA's coordination function, and improve cost–benefit analysis methodology to more accurately weigh regulatory effects.

Nonetheless, we argue that because regulatory review shifts at least some decision-making authority from specialized institutions (the regulatory agencies) to a generalist institution (OIRA), there is a robust and persistent anticap-

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Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1076 (1986) [hereinafter DeMuth & Ginsburg, *White House*].

8. *See* Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1097 (2006).

9. *See* Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059, 1059 (1986).

10. *See* Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083, 1085 (2007).

11. *See* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 214–15 (2012).

12. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1304 (2006).

ture justification for OIRA review, entirely separate from whether it increases presidential power or whether bureaucracies have systematic tendencies toward overregulation. Generalist institutions are typically harder to capture than issue-specific agencies. Because OIRA's docket includes all federal regulatory issues, the return on the investment of any particular interest group to build a relationship with OIRA is lower than for a specialized agency, reducing capture risks. Additionally, disparate interests and free-rider problems stand in the way of having different groups form coalitions to control OIRA.

The structure of OIRA review also specifically limits the ability of outside interest groups to exert undue influence on the regulatory process. OIRA is charged with facilitating agency coordination on new regulatory proposals. By soliciting input from multiple agencies, the OIRA review process helps ensure that political appointees and career staff from several different backgrounds, and with different institutional perspectives and interests, are included in internal executive deliberations, helping to reduce the influence that any single interest group might have on a particular agency. Moreover, the substantive standard of cost–benefit analysis used by OIRA as the primary mechanism to evaluate policy decisions, with its focus on the comprehensive effects of regulation, facilitates the consideration of a wide range of interests and preferences. Finally, a tradition has developed under which presidents have appointed OIRA administrators with broad knowledge of the regulatory process but few ties to specific interest groups. As a result, it would now be politically costly for a president to depart from this tradition.[13]

But although the capture-reducing properties of regulatory review are compelling in theory, reforms are needed at OIRA for it to reliably serve an anticapture function in practice. Most importantly, the practice of review by OIRA contains a basic flaw that significantly limits its capture-reducing potential: nearly exclusively, OIRA review is focused on agency action, without attention to agency inaction. Capture can have deleterious effects on the regulatory system by promoting unnecessary and inefficient rulemaking and also by impeding efficient regulation that serves the public interest.[14] Balanced anticapture review needs to correct for the wide range of effects that outside pressure can have on agency decision making. Limiting review to agency action places an entrenched bias at the heart of OIRA review, sapping normative force from its anticapture justification.

This Article clarifies the role of capture in providing a normative foundation for regulatory review and establishes a reform agenda to help bring the practice of review in line with its anticapture justification. Part I disaggregates the issue

13. *See infra* section II.D.

14. *See* Daniel Carpenter & David Moss, *Introduction* to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 19 (Daniel Carpenter & David Moss eds., forthcoming 2013), *available at* http://www.tobinproject.org/sites/tobinproject.org/files/assets/Introduction%20%281-16-13%29.pdf (referring to "corrosive capture"); *see also infra* notes 85–87 and accompanying text (discussing capture's prohibitory effects on regulation).

of capture from the standard defenses of OIRA review: presidential power and the checking function. It goes on to examine the ways in which OIRA itself is subject to capture risks and proposes reforms to reduce those risks. Part II examines features of the OIRA review process that have anticapture properties and argues that they provide an independent justification for centralized review. Part III proposes a workable system to review inaction that addresses OIRA's most important current shortcoming as a capture-reducing institution—that it only examines agency action and has no role in overcoming capture that facilitates inefficient lack of regulatory protections.

I. CAPTURE AND OIRA

When President Reagan issued Executive Order 12,291, he reshaped administrative decision making and set off a three-decades-long political and academic debate about the proper role of the President in overseeing administrative agencies. The presidential control and checking function accounts have dominated the legal literature on the subject but have not resulted in a compelling justification for OIRA review. The normative desirability of maximizing presidential control is subject to legitimate objections and, even assuming presidential power is desirable, OIRA review will rarely result in greater presidential oversight. A justification of OIRA review that relies on the assumption that agencies will always exhibit tendencies toward excessive regulatory caution ignores the reality of underregulation and the potential for OIRA to exacerbate undesirable ossification in the regulatory system.

Those favoring strong executive-level review tend to fear agency capture, especially by protection-oriented groups like environmentalists or consumer advocates. Their concerns about capture are often connected to their attraction to presidential power and fear of bureaucratic bias. This Part helps clarify matters by disaggregating agency capture from issues of presidential control and agency bias. It then addresses criticisms that OIRA itself is subject to capture risks and proposes institutional reforms that address the most compelling concerns.

A. DISAGGREGATING CAPTURE FROM THE TRADITIONAL JUSTIFICATIONS FOR REVIEW

The set of concerns related to the influence of well-organized special interests over regulatory decisions have come to be roughly grouped together under the rubric of "capture."[15] Defining capture has been a consistent problem, and in the

15. Gary Becker, Sam Peltzman, Richard Posner, and George Stigler, among others, promoted the idea that government institutions responded primarily to demand for regulation from regulated industries. *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 372 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). That regulators could respond to their own private incentives was recognized by many writers well in advance of Stigler and his contemporaries. *See* Nathaniel O. Keohane et al., *The*

worst cases, the term is "little more than an insult" applied to a policy choice that someone dislikes.[16] But taking a relatively broad view, capture can be understood to occur when organized groups successfully act to vindicate their interests through government policy at the expense of the public interest.[17] In a pluralistic society, where many competing conceptions of the good exist side by side, defining the public interest is a difficult task.[18] This Article leaves the definition of public interest intentionally vague, with the understanding that policies that run counter to the public interest are those that would be difficult to defend to an informed and neutral observer on the grounds of social welfare, efficiency, distributional equity, or the fulfillment of moral duties. Agency capture is a special case, where regulators within the bureaucracy have been influenced by organized special-interest groups to adopt policies that are out of line with the broad public interest.

Well-organized special-interest groups can exert undue influence through several mechanisms. Perhaps the most vivid metaphor for government collusion with private interest is the "iron triangle," in which special-interest groups, congressional committees, and agencies exist in stable, mutually beneficial alliances.[19] Under this formulation, interest groups provide members of Congress with campaign contributions and other forms of support in exchange for favorable legislation and agency oversight. Congressional committees provide

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Choice of Regulatory Instruments in Environmental Policy, 22 HARV. ENVTL. L. REV. 313, 320 n.32 (1998) (noting early recognition of "importance of economic interests among groups pressuring Congress"); Carpenter & Moss, *supra* note 14, at 10–11 (noting example of Ronald Coase making capture-like arguments).

16. Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 178 (2011).

17. *See* Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. 1, 2 (2010) (defining capture as a "shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public"); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 178 (1990) (proposing that capture "is the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs"); Susan Webb Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 3 (Daniel Carpenter & David Moss eds., forthcoming 2013), *available at* http://www.tobinproject.org/sites/tobinproject.org/files/assets/Yackee%20Reconsidering%20Agency%20Capture%2001.16.13.pdf (defining capture as "control of agency policy decision-making by a sub-population of individuals or organizations external to the agency"); Carpenter & Moss, *supra* note 14, at 15 (defining capture as "the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself").

18. For a recent, ambitious attempt to provide and defend a welfarist account of desirable social policy, see MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST–BENEFIT ANALYSIS (2012).

19. GORDON ADAMS, THE POLITICS OF DEFENSE CONTRACTING: THE IRON TRIANGLE (1982). *See generally* LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 103 (1979); B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 18 (1994); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952).

agencies with their authorizing powers and their budgets in exchange for agency responsiveness to policy demands. Agencies provide interest groups with favorable regulatory treatment in exchange for political support in Congress and perks such as postgovernment jobs. In the iron triangle story, the public is uninformed because the issues dealt with are technical and not politically salient, and so congressional leadership does not rein in committees, and presidents fail to adequately supervise agencies. More subtle mechanisms for how interest groups influence agencies have also been discussed, including the control of information, manipulation of how questions are posed to agencies, and thick, interlocking personal and professional networks that include both agency personnel and outsiders.[20]

In the two most prominent justifications given for OIRA review—that it enhances presidential power and provides a needed check against bureaucratic overzealousness—concern about agency capture plays a supporting role. Capture is used to provide a justification for the expansion of presidential authority over agencies and is deployed to help explain why agencies would have a systematic tendency to overregulate. Disaggregating capture concerns from these other issues clarifies that a compelling link has not yet been drawn between OIRA review and a reduction in agency capture risks.

1. Presidential Power

Over the course of the twentieth century, U.S. regulatory agencies gained increasing power over large portions of the American economy while, at the same time, presidents engaged in a series of strenuous efforts to assert control over administrative decision making.[21] Expansion of central review of agency

20. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 16–21 (Daniel Carpenter & David Moss eds., forthcoming 2013), *available at* http://www.tobinproject.org/sites/tobinproject.org/files/assets/Kwak%20Cultural%20Capture%20%281.16.13%29.pdf (discussing subtle influence exerted over regulators' frames of reference); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685–86 (1975) (detailing explanations of industry orientation though control of information); *see also* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 218 (2003) (discussing the "disproportionate and self-serving influence that the relatively powerful tend to exert" through informal control); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 151 (2011) (finding that "at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest"); Bagley & Revesz, *supra* note 12, at 1285 (discussing the possibility that "the more one-sided th[e] information, support, and guidance, the more likely that agencies will act favorably toward the dominant interest group").

21. *See* RICHARD P. NATHAN, THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY 29–45 (1975) (examining efforts by the Nixon administration to centralize regulatory supervision and power in the White House); Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 256 (John E. Chubb & Paul E. Peterson eds., 1985) (discussing growth of OMB and importance of political appointees); NAT'L COMM'N ON PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 18 (2003), *available at* http://ourpublicservice.org/OPS/publications/viewcontentdetails.php?id=92 (discussing political appointees).

rulemaking has generally been seen as part of this larger trend of increased presidential control. The process began with President Nixon, who initiated a requirement of interagency comment for certain types of rules;[22] this was followed by President Gerald Ford's Council on Wage and Price Stability, which exercised increased central control over agency rulemaking.[23] President Jimmy Carter went even further with Executive Order 12,044, which required the newly created Regulatory Analysis Review Group to perform an economic analysis for any significant regulation, defined as one with a likely impact of more than $100 million.[24] President Reagan's Executive Order 12,291[25] took the decisive step, placing centralized review and cost–benefit analysis at the heart of regulatory decision making. The basic architecture of regulatory review by OIRA has since remained in place through five presidents.[26]

Although OIRA's role in facilitating presidential control has been consistently criticized,[27] it has also served as one of the primary justifications for the

22. President Nixon initiated a "Quality of Life Review," which required the Environmental Protection Agency and the Occupational Safety and Health Administration to engage in an interagency consultation process and provide an estimate of the costs of proposed regulation along with a set of alternatives. THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 18 (1991).

23. *See* Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1264 (2006) (describing Executive Order 11,821 and its requirement of an "inflation impact statement" for "major" rules and consultation with the Council on Wage and Price Stability).

24. Exec. Order No. 12,044, 3 C.F.R. 152, 152–54 (1979), *reprinted in* 5 U.S.C. § 553 (1976 & Supp. II 1978), *revoked by* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988).

25. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

26. President George H.W. Bush maintained the Reagan regime and the election of a Democrat to the White House did not change that basic structure. President Bill Clinton issued Executive Order 12,866, which replaced and updated Executive Order 12,291 but maintained OIRA review based on cost–benefit analysis. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000). President George W. Bush kept the Clinton Order in place, with only a few relatively minor modifications near the end of his term. *See* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2513 (2011) (noting that President George W. Bush made only one change to the regulatory review program adopted by President Clinton). The Obama Administration, in keeping with three decades of presidential tradition, maintained a strong practice of regulatory review and cost–benefit analysis and issued its own order on January 18, 2011. Exec. Order No. 13,563, § 1(a), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). *See* Michael A. Livermore & Richard L. Revesz, Retaking Rationality *Two Years Later*, 48 HOUS. L. REV. 1, 12–19 (2011) (arguing that cost–benefit analysis is here to stay).

27. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54 (2007) (arguing that the recent Supreme Court decisions, including *Massachusetts v. EPA*, reflect the unease of the courts with political interference with agency expertise); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 80 (1984) (raising concerns about executive overreach); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 156–68 (1991) (documenting and criticizing influence of the president on EPA rulemaking); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 210–12 (1981) (arguing presidential control hinders public

regulatory review.[28] In their early defense of OIRA review, former OIRA Administrators Christopher DeMuth and Judge Douglas Ginsburg argue that review is needed, in part, to ensure that "rulemakers [are] accountable to the [P]resident before issuing their rules."[29] The peculiar role of the President, as the only representative of a "national constituency," has played a central role in this justification.[30]

It is important not to be too sanguine about the desirability of maximizing presidential oversight. The President's national mandate is not always altogether clear: in recent years, the Electoral College has delivered a President who lost the popular vote,[31] and in the twentieth century alone, five presidents have been elected by garnering only a plurality of votes cast.[32] Presidential elections are subject to a variety of distortions, including the Electoral College, which leads to outsized influence for a handful of swing states;[33] the staggered primary system, which concentrates power in the early primary states;[34] the campaign finance system, which grants donors substantial ability to influence elections;[35]

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participation); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 14–15 (1994) (noting OMB's lack of expertise regarding the regulatory matters it reviews); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967–68 (1997) (arguing that increasing presidential influence threatens objectivity and neutrality in rulemaking); Morrison, *supra* note 9, at 1066–67 (noting that political personnel at OIRA "second-guess technical decisions made by career personnel").

28. *See* Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 221 (1993) (noting the "striking support for the general principle of presidential oversight of rulemaking"). *See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997) (examining presidential power over agencies); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that strong mechanisms of presidential control are necessary given fractured oversight of federal bureaucracies).

29. DeMuth & Ginsburg, *White House*, *supra* note 7, at 1081.

30. *See* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 446 (2010) (noting that the President is "the only federal official elected by and accountable to a national constituency"); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 769 (2004) ("The President and Vice President are the only federal officials that must appeal to a national constituency . . . ."); *cf.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (noting that "[w]hile agencies are not directly accountable to the people, the Chief Executive is").

31. *E.g.*, *2000 Presidential Popular Vote Summary*, FED. ELEC. COMM'N, http://www.fec.gov/pubrec/fe2000/prespop.htm (last updated Dec. 2001) (stating Al Gore received 48.38% of the popular vote and George W. Bush received 47.87%).

32. Wilson (1912 & 1916), Truman (1948), Kennedy (1960), Nixon (1968), and Clinton (1992 & 1996). *See Presidential Election Mandates*, AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/mandates.php.

33. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1248 (2006) (arguing that the electoral college gives the President "an incentive to exhibit a parochial preference in his policies that exceeds that of the median member of Congress").

34. *See* WILLIAM G. MAYER & ANDREW E. BUSCH, THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS 3 (2004) (explaining that such a system "deprives . . . late primary voters of any meaningful choice").

35. *See* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308–13 (1989) (describing how interest groups use campaign contributions to influence public policy).

and the relatively small number of issues that are important to voters, which makes the connection between specific regulatory policies and elections tenuous.[36]

Nor does the history of White House control over regulatory outcomes always inspire confidence.[37] Vice President Dan Quayle played an important regulatory role as leader of the White House Council on Competitiveness, undermining regulatory initiatives while providing special access to Republican party donors, making "[t]he implication that the Council parlayed deregulatory initiatives in exchange for campaign contributions . . . difficult to avoid."[38] Vice President Dick Cheney similarly played "a decisive role to undercut long-standing environmental regulations for the benefit of business"[39] while holding secret meetings with an industry-dominated Energy Task Force.[40]

There is also an important descriptive question of whether and how OIRA review actually increases the President's power over the federal agencies because "OIRA is not the President."[41] Although the (still operative) Clinton Order grants the President final say in cases of conflict between OIRA and the agency over a proposed rule,[42] this provision is infrequently used.[43] Even outside the formal process, time pressures faced by presidents and the senior-most political appointees (such as the Chief of Staff) ensure that only rarely will presidential control be facilitated by the personal exercise of authority.

And there are reasons to doubt that OIRA is always the best proxy for presidential preferences. Examining the early years of the Reagan administration, Professor Terry Moe described two strategies used by presidents to achieve responsiveness to their political needs: "centralization," in which authority is

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36. *See* D. SUNSHINE HILLYGUS & TODD G. SHIELDS, THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS 13–14 (2008) ("Elections have always been a blunt instrument for expressing the policy preferences of the public, but the multiplicity of campaign messages [due to microtargeting of voters] makes it even more difficult to evaluate whether elected representatives are following the will of the people."); MICHAEL S. LEWIS-BECK ET AL., THE AMERICAN VOTER REVISITED 365–93 (2008) (finding that perceptions of individual and national economic conditions affect voter behavior); Oksana Malanchuk et al., *Schematic Assessments of Presidential Candidates*, 80 AM. POL. SCI. REV. 521, 521–22 (1986) (studying voting in presidential elections from 1952 to 1984 and finding that candidate perceptions are based more on personality characteristics than party identification or policy positions).

37. *See* Bagley & Revesz, *supra* note 12, at 1311 (examining how such control can lead to deregulation).

38. *Id.*

39. *See* Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, http://blog.washingtonpost.com/cheney/chapters/leaving_no_tracks/.

40. *See* Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST, July 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987.html; Dana Milbank & Justin Blum, *Document Says Oil Chiefs Met with Cheney Task Force*, WASH. POST, Nov. 16, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501842.html.

41. *See* Bagley & Revesz, *supra* note 12, at 1307.

42. Kagan characterizes this language as "a striking assertion of executive authority" over agency decision making. *See* Kagan, *supra* note 4, at 2289.

43. Kagan cites an interview with Sally Katzen noting only one time in Katzen's term under Clinton when the provision was invoked. *See id.* at 2289 n.174.

accumulated directly in White House offices rather than federal agencies; and "politicization," in which the appointment power is used to fill positions throughout the bureaucracy "on the basis of loyalty, ideology, or programmatic support."[44] Although many have viewed centralization and politicization as mutually reinforcing strategies for presidents seeking to exercise control over the bureaucracy, they act more as substitutes than complements.[45] If centralization successfully "reins in" the bureaucracy, "having loyalists in those departments is rather beside the point."[46] The inverse also holds: if the political appointees holding the levers of power at administrative agencies are loyal to the President's agenda, there is no need to "remov[e] their responsibilities to the White House."[47] If the appointment power has been used successfully to populate the positions within agencies with loyalists,[48] it is not clear that the overseers at OIRA (many of whom are career staff) will always, or even more often, be truer to presidential preferences than the political appointees at agencies.[49]

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44. *See* Moe, *supra* note 21, at 245.

45. *See* Andrew Rudalevige & David E. Lewis, Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control 1 (Sept. 1, 2005) (unpublished manuscript), *available at* http://www.allacademic.com/meta/p41000_index.html (finding that centralization and politicization are substitutes rather than complements).

46. *See id.* at 7.

47. *See id.* at 6–7. Rudalevige and Lewis test this hypothesis based on data on political appointments and centralization across agencies, finding "important evidence that presidents use centralization and politicization as substitute strategies." *Id.* at 21; *see also* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645–48 (2010) (noting that the "strongest possible control" that a president can exercise over an agency is to "plac[e] a clone in the position of agency head" and arguing that the difference between presidential oversight of the regulatory process and ultimate decision-making authority is murky at best).

48. *See* Donald P. Moynihan & Alasdair S. Roberts, *The Triumph of Loyalty Over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572, 576–77 (2010) (arguing that excessive politicization went so far as to undermine competence of senior bureaucratic officials during the George W. Bush administration). Bureaucrats may also be responsive to presidential demand even without increasing the number of presidential appointees. *See* WOOD WATERMAN, *supra* note 19, at 141–54 (examining how government bureaucracies are responsive to democratic demands).

49. *See* Kagan, *supra* note 4, at 2338 (recognizing that the presidential control model assumes that EOP staff are faithful representatives of the President, stating, "when I refer to 'the President' in this Article, I am really speaking of a more nearly institutional actor—the President *and* his immediate policy advisors in OMB and the White House"); *cf.* Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 882–83 (1988) (arguing that "heightened politicization results directly from heightened centralization," but only in the sense that "to increase the power of the president and his agents" increases "the degree of access" to "core elements of the coalition that elected him"). Ryan Bubb and Patrick Warren have developed a formal model that predicts that presidents may choose to appoint relatively more proregulatory agency personnel to combat the risk of work-effort shirking, relying on a reviewer with more moderate preferences to reduce the risk of overregulation. *See* Ryan Bubb & Patrick Warren, *Optimal Agency Bias and Regulatory Review* (New York University School of Law, Public Law Research Paper No. 12-69, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201042. This is an interesting hypothesis and would provide a distinct rationale for regulatory review that is not present in the literature: that it is part of a broader presidential strategy to reduce agency *inaction*. Their model is necessarily stylized, but the conclusions are worth noting as a useful basis for future research. In the version of the model that accounts for the existing stock of regulation,

In a recent review of our book, *Retaking Rationality: How Cost–Benefit Analysis Can Better Protect the Environment and Our Health*, DeMuth and Ginsburg make the most sustained arguments for why the staff at OIRA will be a more effective stand-in for the President than political appointees at agencies. They first argue that the concentration of regulatory authority facilitates presidential oversight.[50] This is a useful, but limited, point. Though it may be easier for the President to oversee a single OIRA administrator than multiple agency heads, the marginal benefits of centralization are swamped by the extremely limited time the President can devote to regulatory matters in the first place.[51]

Nevertheless, OIRA review may help maximize the usefulness of the President's limited time by identifying particular issues where guidance is most needed.[52] Although most OIRA–agency disagreements are resolved by compromise and with little difficulty,[53] some conflicts will reveal more intractable disputes between political appointees with deeply ingrained, opposing viewpoints on issues of political or policy importance. Such conflicts can signal the need for guidance from the President or other high-level political appointees. In these cases, OIRA facilitates presidential control not by simply trumping the judgments of the political appointees at agencies, but also by spurring deliberation by a broader group of executive staff at agencies and the White House.[54] However, for the vast majority of OIRA's work—the bulk of the regulatory iceberg that is submerged far below the gaze of the President or other senior political officials—the presidential power justification for OIRA review is mostly irrelevant.

DeMuth and Ginsburg's second argument contrasts OIRA's proximity to the

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presidents must balance the need to identify new regulatory opportunities with the need to identifying deregulatory opportunities, meaning that the overall ideological bias in agency personnel depends on the relative importance of these two tasks. Capture is not accounted for in this model.

50. DeMuth & Ginsburg, *Rationalism*, *supra* note 7, at 903 ("[W]ith centralized review[,] [the President] has to control only one rather than many agency heads."); *see also* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 10 (2008).

51. *See* Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 398 (2010) ("[T]he President attempting to manage regulatory government looks out over a vast enterprise comprising a huge portfolio of economic, health, safety, and social issues . . . ."); Seidenfeld, *supra* note 27, at 38 ("A President has a limited amount of political capital he can use to press for a legislative agenda, and precious little time to get his agenda enacted.").

52. *See* DeMuth & Ginsburg, *White House*, *supra* note 7, at 1082 ("OMB review . . . ensures that serious policy disagreements between a president's appointees (one with and the other without programmatic responsibilities in the area in question) will be brought to his attention.").

53. *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 16–17 (1994) (describing political appointees within a presidential administration as a "team," where "opportunism and conflict of interest are greatly reduced" but which still require institutional tools "to mitigate the problems faced by teams").

54. *Cf.* Samuel Estricher & Richard L. Revesz, *Nonaquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 737 (1989) (arguing that inter-circuit stare decisis would undermine an important method for the Supreme Court to identify important issues for certiorari).

President[55] with agencies' exposure to pressures from Congress, career staff, and the media—diverse influences that "may conflict not only with each other but with the policies of the president."[56] It is impossible to reject the potential importance of physical proximity, in part because of the difficulty outsiders face in observing the internal workings of a presidential administration, but especially in an age of advanced communications technology, the closeness of the relative personal relationships between senior officials (which will shift during an administration and between administrations) is likely to play a more important role.

DeMuth and Ginsburg also do not acknowledge the ways in which OIRA may be more subject to capture than agencies,[57] and their argument ultimately relies on the claim that presidents are less subject to capture by special-interest influence than administrative agencies, which, as shown above, is contestable.

The presidential power argument for OIRA review, then, has important limitations. The normative desirability of maximizing presidential power is questionable. Even putting aside these concerns, although OIRA review may enhance presidential power in a limited set of circumstances by identifying issues requiring high-level guidance or increasing the influence of players with physical proximity to the President, it is not clear that OIRA holds a privileged place over agencies as a representative of the President in the administrative process. DeMuth and Ginsburg have claimed that OIRA is a better proxy for the President because it is less subject to capture, but they have not provided a compelling institutional account for why OIRA would be less influenced by powerful special-interest organizations.

2. Bureaucratic Tendencies

At the same time that presidents sought to assert greater control over administrative agencies, long-standing ideas about the appropriate role of expert bureaucrats in a democratic government were breaking down.[58] In particular, fears of

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55. *See* DeMuth & Ginsburg, *Rationalism*, *supra* note 7, at 903–04 (noting that OIRA, within the EOP, "is charged primarily with implementing the president's policies in a way that the heads of the program agencies cannot be counted upon to do," and is under the supervision of the director of OMB, who has a "closer working relationship with the president than has the head of any regulatory agency"); *see also* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 191 (1986) ("[T]he relative proximity of those in OMB—their institutional position close to the President—may justify the conclusion that they are, in a special sense, his agents for purposes of supervising the regulatory process.").

56. DeMuth & Ginsburg, *Rationalism*, *supra* note 7, at 905; *see also id.* at 903 (stating that "OIRA is relatively insulated against special-interest pressures").

57. *See infra* section I.B.

58. Under what Professor Richard Stewart characterized as the "traditional model," the bureaucracy operates as a "transmission belt" implementing the democratic will as expressed through the legislature. *See* Stewart, *supra* note 20, at 1675–76. This model was based on a strong "politics/administration dichotomy," James P. Pfiffner, *Political Appointees and Career Executives: The Democracy–Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 59 (1987), which has origins in the work of Woodrow Wilson and Max Weber, and on the broader "quest for neutral competence" in

overzealous regulators motivated many early defenders of OIRA: for them, agency bias towards overzealousness was obvious,[59] and regulatory review to provide a "checking function" was a much-needed corrective.[60] Several lines of scholarship argue that agencies will be biased toward overzealousness. Bagley and Revesz examine the three most influential claims: that agencies exhibit tendencies toward self-aggrandizement, that regulators tend to be excessively cautious concerning risks within their purview, and that bureaucratic personnel are overly committed to their agency's mission.[61] These arguments, in general, fail to take account of the wide range of factors that can influence bureaucratic behavior.

The agency self-aggrandizement hypothesis is most closely associated with William Niskanen. Under his line of thinking, agency officials, like other economic actors, seek to maximize their own utility and, as a consequence, seek to increase their "salary, perquisites of the office, public reputation, power, patronage, [and the] output of the bureau" by increasing agency budgets.[62] This argument has been widely influential, "spawn[ing] a cottage industry of public-choice analyses of bureaucracy"[63] and has been used to defend OIRA review.[64] But there are a number of good reasons to believe that, at best, the self-aggrandizement hypothesis is overstated.[65] As Professor Daryl Levinson has persuasively argued, the "relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous."[66] In any

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public administration, Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060 (1956).

59. *See* DeMuth & Ginsburg, *White House*, *supra* note 7, at 1081 ("We all know that a government agency charged with the responsibility of defending the nation or constructing highways or promoting trade will invariably wish to spend 'too much' on its goals.").

60. *See* Bagley & Revesz, *supra* note 12, at 1261 (describing the checking function as one of two justifications given by proponents for centralized regulatory review).

61. The following examination of claims of agency bias toward overregulation are given more detailed treatment in Bagley & Revesz, *supra* note 12, at 1292–1303.

62. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38 (1971); *see also* William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293–94 (1968) (discussing maximizing bureaucratic utility).

63. *See* Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523, 1530 n.41 (2006) (citing TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 57–58 (2d. ed. 2001)). Barton applies Niskanen's logic to the bureaucracies depicted in J.K. Rowling's *Harry Potter* series. *See generally* ALBERT BRETON & RONALD WINTROBE, THE LOGIC OF BUREAUCRATIC CONDUCT (1982) (discussing bureaucratic incentives and inefficiencies); WILLIAM T. GORMLEY, JR., TAMING THE BUREAUCRACY (1989) (discussing criticisms of bureaucracy and possible solutions).

64. *See* Bagley & Revesz, *supra* note 12, at 1292–96.

65. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 922–23 (2005) (arguing that fears of agency self-aggrandizement are overblown).

66. *Id.* at 932 n.58 (citing JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 118–19 (1989)); *see* Julie Dolan, *The Budget-Minimizing Bureaucrat? Empirical Evidence from the Senior Executive Service*, 62 PUB. ADMIN. REV. 42, 42 (2002) (finding that "[c]ontrary to the popular portrayal of the budget-maximizing bureaucrat," federal administrators may actually prefer lower levels of government spending than the public); *see also* Paul Gary Wyckoff, *The Simple Analytics of Slack-Maximizing Bureaucracy*, 67 PUB. CHOICE 35, 35 (1990) (arguing that incentive to

case, it is far from clear that there is a positive relationship between any kind of agency budget and regulatory stringency.[67]

The presence of overly cautious bureaucrats seeking to avoid potential crises is another explanation for why agencies may be biased toward too much regulation.[68] Possible grounds for this fear include a concern that agencies may operate on a strong version of the "precautionary principle" when dealing with scientific uncertainty,[69] that agencies are risk averse concerning negative publicity or congressional scrutiny of high-profile failures to regulate,[70] that agency choices track public misperceptions of risk,[71] or that agencies are myopic with respect to countervailing risks created by regulation.[72] All of these concerns are at least facially plausible and, in some cases, may lead to inefficiently high levels of regulatory caution. The problem is that, like Karl Llewellyn's argument on statutory interpretation, for each claim there is a "counter-cannon" that weighs in the opposite direction.[73] Scientific uncertainty has been used as an excuse to disregard risks as well as regulate them.[74] Agencies may also be more averse to negative publicity or congressional pressure concerning the costs of regulation than to failures to regulate: costs are often immediate and felt by an identifiable and concentrated group, whereas the benefits of regulating often address latent, long-term risks experienced by a diffuse population.[75] Heuristics and other cognitive biases have been shown to operate in both directions for risk

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maximize discretionary (rather than total) budgets is more plausible, and consistent with social welfare).

67. *See* Bagley & Revesz, *supra* note 12, at 1295–96 (noting that the increased budget of the National Highway Traffic Safety Association in the 1970's correlated with less stringent regulations and less stringent enforcement).

68. *See id.* at 1299 (noting that "agencies, responding to public paranoia, will zealously work to avert certain highly prominent risks").

69. Cass R. Sunstein, *The Paralyzing Principle*, 25 REGULATION 32, 32 (2002).

70. *See* Bagley & Revesz, *supra* note 12, at 1298 (discussing this explanation for excessive regulation).

71. *See* Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 98–100 (2002) (providing historical examples). *See generally* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) (analyzing bureaucratic response to public opinion); CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005) (discussing the role of fear in governmental decision making).

72. *See* John D. Graham & Jonathan B. Weiner, *Confronting Risk Tradeoffs*, *in* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 19–22 (John D. Graham & Jonathan Baert Wiener eds., 1995) (explaining that countervailing risks are often ignored).

73. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Cannons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

74. *See* Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 934 (2004); Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 64–67 (2003).

75. *See* Bagley & Revesz, *supra* note 12, at 1298–99 (noting "unlike the delayed adverse consequences of overly lax regulation, a regulation's economic cost is clear and immediate"); *Cf.* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (2d. ed. 1971) (examining the relationship between collective action and public goods).

perception, leading, for example, to underperception for nonsalient risks like radon.[76] And agencies may fail to recognize and appropriately account for ancillary benefits just as easily as countervailing risks.[77] There are as many reasons to believe bureaucrats will not regulate important risks as there are to predict they will go too far. Likely, both biases are present and manifest themselves in different cases.

The final argument is that agencies will tend to hire from a particular pool of applicants who are attracted to the agency's mission, such that "ardent environmentalists will apply to work at [the Environmental Protection Agency (EPA), and] labor supporters will go to [the Occupational Safety and Health Administration (OSHA)]."[78] Again, the idea is facially plausible. Employees at administrative agencies are self-selected, and at least in some cases they may gain psychological benefits from working in a position associated with work that is consistent with their broader outlook on the world.[79] But the self-selected nature of civil servants does not always point in the direction of overregulation. Different agencies, departments, or positions may attract employees with different political preferences.[80] Individuals may be drawn to the public sector for reasons entirely unrelated to ideology, such as a preference for the "quiet life." To the extent that this is so, the more likely result is underactive, rather than overzealous, agencies.[81] Individuals may also seek to build friendly relationships with industry during their term of government service in order to facilitate a transition to more remunerative private-sector work.[82]

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76. *See* Bagley & Revesz, *supra* note 12, at 1299 (explaining "heuristics also serve to dampen fears about risks that perhaps ought to be regulated more stringently").

77. *See* Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1766 (2002) (examining the "inattention to ancillary benefits" in risk tradeoff analysis).

78. Bagley & Revesz, *supra* note 12, at 1300; *see* David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 424 (1997) ("[A]n agency with a well-defined mission will tend to attract bureaucrats whose goals are sympathetic to that mission."); *see also* Ackerman, *supra* note 28, at 700–01 (describing worries that career staff will "succumb to the pressures of the entrenched ideologues to sustain the preexisting mission of the agency even when it deviates from the 'administration's agenda'"); *cf.* E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167, 176 (1994) (discussing possibility that political appointees "'go[ ] native' and adopt[ ] the characteristic values of their agencies").

79. *See* HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR 161 (1967) (examining how the Forest Service attracts employees who share the mission of the Agency).

80. *See, e.g.*, Spence, *supra* note 78 (comparing the EPA's Office of Water, which "tends to attract people who place a high value on protecting water quality," with the Federal Energy Regulatory Commission's (FERC) Office of Hydropower Licensing, which "tends to attract people who place a high value on encouraging the development of hydroelectric power").

81. *See* Levinson, *supra* note 65, at 927 n.37 (quoting KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 354 (1997)).

82. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010) (describing the revolving-door phenomenon, where "heads of agencies often anticipate entering or returning to employment with the regulated industry once their government service terminates").

Fears about bureaucratic overzealousness should also be tempered by the tendency for procedural impediments to lead to inertia.[83] Because the rulemaking process is subject to multiple levels of probing review by courts and the political branches, agencies must devote substantial time and effort to the rule-preparation process so that they can adequately defend their proposals.[84] According to this argument, OIRA review contributes to a system that imposes costly burdens on agencies, causing "paralysis by analysis"[85] and "ossification."[86] Instead of being justified by fears of overzealous regulation, OIRA review is seen as helping to generate moribund agencies that fail to address important social problems in a timely fashion.[87]

Capture risks have also figured into the checking justification for OIRA. For Professor George Stigler and his contemporaries, industry sought regulation to

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83. *See* Kagan, *supra* note 4, at 2344 (arguing that the "proliferation of procedural requirements" facing agencies have helped make "torpor a defining feature of administrative agencies"). For Kagan, active presidential engagement is needed to avoid this torpor. *Id.* at 2384 (claiming presidential engagement "furthers regulatory effectiveness"); *see also* Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 353 (2007) ("Agencies have no choice but to comply with the procedural and analytic requirements that are placed on them . . . .").

84. Based on a sample of eighty-five analyses, the average cost of regulatory impact assessment for a rule was $840,000, with a range of $20,000 to more than $8.8 million per analysis and a median value of $400,000. *See* CONG. BUDGET OFFICE, REGULATORY IMPACT ANALYSIS: COSTS AT SELECTED AGENCIES AND IMPLICATIONS FOR THE LEGISLATIVE PROCESS 8 (1997), *available at* http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf (dollar figures updated from 1995 to 2011 dollars using Bureau of Labor Statistics CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm).

85. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 447 (2003) ("OMB regulatory analysis and other forms of regulatory impact review have also contributed to 'paralysis by analysis.'"); *see* Thomas O. McGarity, *A Cost–Benefit State*, 50 ADMIN. L. REV. 7, 50 (1998) (noting resource and time intensity of conducting detailed cost–benefit analysis and stating "[r]egulatory paralysis may have been the ulterior goal of some of the regulatory reformers, who were not so concerned with achieving efficient regulation as with throwing sand into the regulatory gears"). *But see* Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 89–93 (2008) (stating that the phrase "'[p]aralysis by analysis' has become a cliché in regulatory circles today" and seems inconsistent with the growth in regulatory output experienced over the course of the twentieth century).

86. *See* Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 613 (2011) (noting that "most analysts still point to reporting requirements as a source of rulemaking ossification"); *see also* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–97 (1992) (examining evidence of ossification in informal rulemaking). *But see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012) (finding that "evidence that ossification is either a serious or widespread problem is mixed and relatively weak"); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1503 (2012) (arguing that "ossification is a real and serious problem measured with reference to any plausible normative baseline").

87. *See* Steinzor, *supra* note 11, at 214–15 ("Centralized review shoves policymaking behind closed doors, wastes increasingly limited government resources, confuses agency priorities, demoralizes civil servants, and, worst of all, costs the nation dearly in lost lives, avoidable illness and injury, and destruction of irreplaceable natural resources.").

protect itself from competition.[88] During the late 1970s and early 1980s, groups representing broad, diffuse interests—like environmental preservation and consumer protection—came to be seen as threats as well.[89] The apogee of the public-interest-group-capture theory is perhaps the "Bootleggers and Baptists" coalition,[90] in which protection-oriented groups and regulated industry team up against consumers and new market entrants by erecting regulatory barriers.

Capture and overzealousness, however, are uneasy partners. Industry may often use its influence to avoid regulation; Professors Daniel Carpenter and David Moss refer to this possibility as "corrosive capture."[91] The public-interest-group-capture story, in which diffuse interest groups—such as environmentalists or consumers—are able to effectively organize to overwhelm the influence of regulated industry, inverts the traditional capture account and is incompatible with traditional public choice theory.[92] Although it is possible that special-interest influence may sometimes lead to overregulation, it is at least as likely that too little regulation will be the result.

Ultimately, the justification for OIRA review as a needed checking function to correct for agency tendencies toward overzealousness is not strong. There is no compelling argument that agencies will be more inclined to overreach than underperform, and multiple layers of review (as well as the analytic burdens they impose) make rulemaking a costly, time-consuming, and risky proposition.[93] Although agency incentives may not be perfectly aligned with the public interest, further impeding agency action through a one-sided checking function does not clearly improve the situation. Agencies do not always make ideal choices, but they can be nonideal decision-making bodies in many different ways, with consequences in multiple directions. Even if a checking function were justified, it would not be on anticapture grounds because special-interest influence could just as easily lead to underregulation as overzealousness.

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88. *See supra* note 15.

89. *See* Murray L. Weidenbaum, *The High Cost of Government Regulation*, 22 CHALLENGE 32, 39 (1979) (crystallizing view in which "the villain . . . has become a self-styled representative of the Public Interest, who has succeeded so frequently in identifying his or her personal prejudices with the national well-being").

90. Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, 7 REGULATION 12 (1983); Bruce Yandle, *Bootleggers and Baptists in Retrospect: The Marriage of High-Flown Values and Narrow Interests Continues To Thrive*, 22 REGULATION 5 (1999). *See generally* 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 27 (1981) (discussing the "bizarre coalition" of environmentalists and high-sulfur dirty-coal producers and their influence on the New Source Performance Standards for coal-burning power plants).

91. Carpenter & Moss, *supra* note 14, at 19.

92. *See* OLSON, *supra* note 75 (discussing traditional collective-action problems facing diffuse interests); Bagley & Revesz, *supra* note 12 at 1286–87.

93. *See* CONG. BUDGET OFFICE, *supra* note 84 (documenting resources necessary to conduct regulatory impact assessment, itself only part of the larger costs of rule development).

B. OIRA'S RISK OF CAPTURE

Capture also figures prominently in many of the criticisms raised by opponents of regulatory review, who worry that OIRA itself is more open to special-interest pressure than administrative agencies.[94] There are four common bases for criticism of OIRA on capture grounds: first, that OIRA has been slow to adopt transparency measures to open the review process to public scrutiny; second, that interactions with OIRA tend to be dominated by the regulated community; third, that regulatory review increases the influence of special-interest groups that have captured the political process; and fourth, by the terms of the governing executive order, OIRA's role is not subjected to judicial review, eliminating the power-balancing role of the federal courts. Some steps have already been taken to address these concerns, especially through increased transparency, but there is still room for OIRA to improve its practices. Especially as OIRA works to address these shortcomings, they are not sufficient to undermine the capture-reducing effects of review discussed in Part II.

1. Transparency

Because efforts at agency capture are thought to be most effective when they take place outside the public eye, transparency is often considered to be an important ward against undue special-interest influence.[95] From the beginning, OIRA has been haunted by concerns about a lack of transparency.[96] Over the course of the past several decades, administrations of both parties have responded to this criticism by improving the transparency of the regulatory review process.[97] Nevertheless, transparency at OIRA is far from complete, and

94. *See, e.g.*, Bagley & Revesz, *supra* note 12, at 1309 (noting that "[t]he absence of judicial review makes it more difficult for aggrieved groups with disproportionately little influence over political or regulatory processes to challenge OIRA's actions"); Barkow, *supra* note 82, at 35 (noting that "OIRA review is likely to add to the problem of capture by industry" and that it is "much easier for industry groups to influence OIRA without being checked"); Olson, *supra* note 27, at 57 (describing OMB as a "conduit" for industry influence).

95. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 293 (2008) (arguing that an essential element of a rigorous regulatory system is "increased transparency and participation"); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 59 (1998) (explaining that "transparency serves to limit the opportunities for agency capture and self-dealing").

96. Soon after the Reagan order placed reviewing authority in OIRA, critics had begun to "specifically question[] whether OIRA had become a clandestine conduit for outside influence in the rulemaking process." Copeland, *supra* note 23, at 1267. Even by the late 1980s, bodies like the National Academy of Public Administration and the Administrative Conference of the United States were still recommending basic transparency measures. *Id.* at 1268–69 (quoting and citing reports from the National Academy of Public Administration and Administrative Conference of the United States).

97. In a 2003 report on OIRA review, the Government Accountability Office (GAO), previously known as the General Accounting Office, praised Administrator John Graham for making "several notable improvements in the transparency of the office's regulatory reviews." U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 113 (2003), *available at* http://www.gao.gov/new.items/d03929.pdf.

improvements should be made.[98] In its most recent analysis, the Government Accountability Office (GAO) notes that OIRA had not implemented the majority of its 2003 recommendations for improving transparency.[99] GAO continues to recommend that OIRA extend transparency requirements to informal review; extend disclosure requirements to include documents exchanged between agency staff and OIRA desk officers; better explain why rules are withdrawn from OIRA review; and take several steps to better document changes to rules made at OIRA's request.[100]

In evaluating whether reforms at OIRA have gone far enough and whether more can and should be done, it is important to keep in mind that transparency carries both costs and benefits. In a democracy, opening government proceedings to public scrutiny is an intrinsic goal, and it also facilitates broader public deliberation on policy issues, leading to more informed and participatory decisions.[101] But public processes can also turn into little more than theater, where officials are forced by political considerations to toe the party line, recite bromides rather than engage in constructive debate, and give no sign of willingness to compromise. Because of the downsides of transparency, large portions of agency decision making are not subject to outside scrutiny.[102]

The recommendations of the GAO provide a sound starting place in striking the right balance. The GAO has called for "better identification of when

98. *See* Bagley & Revesz, *supra* note 12, at 1310 ("It is frankly difficult to understand how an agency committed to operating in the shadows could be well positioned to minimize public choice pathologies.").

99. U.S. GEN. ACCOUNTING 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 35 (2009), *available at* http://www.gao.gov/new.items/d09205.pdf [hereinafter GAO REPORT 2009].

100. *Id.* at 35–36.

101. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 101 (2004) (noting that "[p]articipation is a crucial democratic value"); Walter A. Rosenbaum, *Public Involvement as Reform and Ritual: The Development of Federal Participation Programs*, *in* CITIZEN PARTICIPATION IN AMERICA 81, 86 (Stuart Langton ed., 1978) (noting that "the public interest is most likely to emerge from the interplay and conflict between a multitude of interests"); Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 267–68 (1999) ("Widespread participation exposes decisionmakers to a healthy mix of perspectives, which is believed to improve the decisionmaking process."). *See generally* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1983) (discussing the general benefits of political participation); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970) (same).

102. Agency personnel can and do engage in ex parte communication with outside organizations. An ex parte communication is an "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given," and allows for political influence that can go unnoticed. Administrative Procedure Act, 5 U.S.C. § 551(14) (2006); *see also* Action For Children's Television v. F.C.C., 564 F.2d 458, 477 (D.C. Cir. 1977) (allowing ex parte communications between the FCC and industry groups); Kagan, *supra* note 4, at 2280 n.142 (noting that "[t]he APA contains no prohibitions on ex parte contacts between agency personnel and outside persons in notice-and-comment rulemaking"). Intra-agency deliberations occur with no record and are generally not available via the Freedom of Information Act. 5 U.S.C. § 552(b)(5) (2006). Furthermore, consultation with other agencies is not typically documented.

agencies made substantive changes to their rules as a result of the OIRA review process, attributing the sources of changes made during the review period, and clarifying the definition of substantive changes."[103] To achieve this goal, the GAO recommended defining "the types of 'substantive' changes during the OIRA review process that agencies should disclose as including not only changes made to the regulatory text but also other, noneditorial changes that could ultimately affect the rules' application" and instructing "agencies to put information about changes made in a rule after submission for OIRA's review and those made at OIRA's suggestion or recommendation in the agencies' public rulemaking dockets."[104] If OIRA chooses not to implement these recommendations, it should provide a compelling explanation for why not.

2. Public Participation

A second capture concern facing OIRA is that "the available evidence supports the view that the mix of participants active in the OIRA review process heavily favors industry."[105] The most comprehensive evidence comes in the form of meeting records kept by OIRA. Empirical assessment of those records demonstrates that industry groups meet with OIRA officials much more frequently than protection-oriented groups like environmental organizations or labor unions, a fact that is true for both Democratic and Republican administrations.[106] Rules that generated the most meetings were also the ones most likely to be changed during the OIRA review process.[107] The imbalance of participation raises at least the appearance that OIRA is more solicitous to the concerns of industry than to diffuse interests—the classic capture story.

Although the skewed participation in OIRA's meetings is relevant, it does not demonstrate a systematic bias.[108] Notably, OIRA has in recent years maintained an "open door" policy, taking any meeting on pending regulation that is requested.[109] The imbalance in the number of meetings, then, says less about

103. GAO REPORT 2009, *supra* note 99, at 36.

104. *Id.*. In total, the GAO made seven specific recommendations. *Id.*

105. Bagley & Revesz, *supra* note 12, at 1306.

106. *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 8 (2011) (finding that "industry groups participating in the meeting process outnumber the public interest groups by a ratio of 4.5 to 1"); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 876 (2003) (noting that "narrow interest groups outnumber all other types during the OIRA meeting process").

107. *See* STEINZOR ET AL., *supra* note 106, at 13 (finding that reviews in which OIRA met with outside parties were "29 percent more likely to be changed" than those with no meetings); Croley, *supra* note 106 (stating that "rules that are the subject of meetings are more likely to be changed").

108. It may tell us something further about the presidential power justification for OIRA review, however. *See* Bagley & Revesz, *supra* note 12, at 1307 ("[T]he replication of lopsided interest group participation at OIRA suggests that OIRA's proximity to the President does not by itself smooth public choice imbalances in the regulatory process.").

109. *See* STEINZOR ET AL., *supra* note 106, at 15; *see also Frequently Asked Questions*, REGINFO.GOV, http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Aug. 19, 2012) ("OIRA's policy is to meet with any party interested in discussing issues on a rule under review . . . .").

OIRA's preferred meeting partners than the relative ability to participate in the process of industry compared to protection-oriented groups. Given the spending advantages held by industry—no surprise in light of classic collective action theory—the same imbalance in participation that plagues other governmental forums, including Congress and administrative agencies, is replicated at OIRA.[110] This pattern does not mean that OIRA is more or less subject to capture risks, but it is also not comforting.

Solving this problem is not easy, but useful steps can be taken. The obvious answers of limiting participation by industry groups or refusing meetings altogether[111] have serious downsides. Requiring OIRA to limit its contacts with industry, while maintaining them with protection-oriented groups, is both politically implausible and normatively troubling. If shut out from OIRA, industry will simply channel its efforts into more amenable forums, notably Congress. From a normative standpoint, regulated industry may often have legitimate concerns with pending regulations that deserve a fair hearing. Eliminating contact with all outside groups denies OIRA information that it may find useful. A more promising option would be for OIRA to engage in outreach efforts to expand the participation of protection-oriented groups, including, if funding were made available, through technical-assistance grants to facilitate hiring of outside expert consultants.[112]

3. Obscuring Political Control

The third concern is that by facilitating the exercise of presidential power, OIRA may help special-interest groups that have captured the political process.[113] Although much of OIRA's work is outside of the President's purview, the President must resolve some differences between OIRA and agencies. When the President plays this role, there will be "greater freedom to play to parochial interests"[114] if political intervention is disguised as technocratic review by OIRA.[115]

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110. *See* Bagley & Revesz, *supra* note 12, at 1285–90 (discussing the logic of collective action).

111. *E.g.*, STEINZOR ET AL., *supra* note 106, at 17 (arguing that "OIRA should stop meeting with outside parties during its consideration of a proposed or final rule").

112. The EPA currently utilizes a Technical Assistance Grant program to provide grants of up to $50,000 to community organizations for interpreting and participating in decision making at federal Superfund sites. 40 C.F.R. §§ 35.4000–35.4275 (2011); *see Technical Assistance Grants (TAGs)*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/community/tag/ (last updated Feb. 1, 2012) (discussing such grants). Similarly, the Department of Justice also provides funding for research, training, and technical assistance to enhance legal assistance and related services for historically underserved populations. *See Grant Information*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atj/grant-info.html (last updated Aug. 2012) (discussing such funding).

113. *See* Barkow, *supra* note 82, at 34–36 (explaining that "OIRA review is likely to add to the problem of capture by industry").

114. Kagan, *supra* note 4, at 2337.

115. *Cf.* Stuart Shapiro, *Unequal Partners: Cost–Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10433 (2005) (raising concerns that, by conducting both technocratic and political review of regulations, OIRA may undermine both perception and reality of impartial analysis).

Greater transparency can help remedy this problem. Professor Nina A. Mendelson recommends that agencies more fully disclose the political reasons for their decisions and, in particular, how executive oversight influenced regulatory outcomes.[116] For example, the President's involvement in resolving differences between an agency and OIRA was highlighted during the EPA's recent reconsideration of air quality standards for ozone. That rule, which would have tightened emissions limits, was met by substantial industry opposition. When OIRA returned the rule to the EPA, Administrator Sunstein sent a letter specifically noting the President's involvement and reasoning: "The President has instructed me to return this rule to you for reconsideration. He has made it clear that he does not support finalizing the rule at this time."[117] From the face of the return letter, the President's involvement is abundantly clear. Of course, that does not mean the decision was wise or free from capture. Nevertheless, although it does not necessarily embody public-interested decision making,[118] the ozone decision provides a model for how presidents can communicate their influence over the rulemaking process, in the relatively rare cases where that occurs.

4. Judicial Review

The final capture concern that has been raised against OIRA deals with judicial review. OIRA review is not covered by the Administrative Procedure Act (APA).[119] Review by OIRA amounts to an element of intrabranch deliberation prior to an agency action, and it is the final action, not the deliberative steps in advance, that are subject to scrutiny by courts. In addition, the executive orders governing regulatory review have always explicitly disclaimed any role for judicial oversight of that process.

Because judicial review is open to all affected parties, it can operate as a counterweight to the influence of organized special-interest groups in political and regulatory processes. Although financial strength is certainly an asset in litigation, marginal returns for expenditures in administrative law litigation—which do not involve discovery or other high-expense procedural steps—likely diminish quickly once a basic competency threshold is reached.[120] Certainly, it is often less expensive to participate in litigation than to influence congressional

116. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (arguing for greater transparency).

117. Letter from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Lisa P. Jackson, Adm'r, Envtl. Prot. Agency (Sept. 2, 2011), *available at* http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf.

118. *See* Richard Revesz, *An Imperfect Test of Support for EPA*, ENERGY EXPERTS BLOG (Sept. 12, 2011, 10:06 AM), http://energy.nationaljournal.com/2011/09/sizing-up-obamas-ozone-standar.php#2065734 (examining President Obama's decision).

119. 5 U.S.C. §§ 551–559 (2006); *see* Bagley & Revesz, *supra* note 12, at 1268 (noting "OIRA's exemption from the constraints of the Administrative Procedure Act").

120. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 567–68 (2001) (discussing threshold concept for costs associated with effective participation in the regulatory process).

opinion through campaign contributions, and the procedures established by courts under the APA at least arguably facilitate broad pluralistic participation in the regulatory process.[121]

The lack of APA judicial review of OIRA's activities is a genuine problem and augments its capture risk.[122] The appropriate solution, however, is far from clear. Subjecting OIRA review to court oversight carries real and important costs of its own. Certainly, such a move would empower status-quo-favoring groups with another tool to slow down the rulemaking process, because OIRA's role would become an additional subject for litigation. Probing scrutiny by courts would necessitate that OIRA compile a defensive and substantial administrative record (much as agencies already do), increasing already substantial burdens faced by overtaxed government officials. To the extent ossification is a concern, judicial review of OIRA could exacerbate the problem.[123] The benefits of judicial scrutiny of OIRA may be limited because interested parties already can subject the substance and process of agency decision making to independent scrutiny by courts.

The lack of APA review, then, may simply be a limit on the anticapture potential for regulatory review. Given that political processes are imperfect but indispensable for democratic accountability, it should come as no surprise that there is no perfect anticapture institution. The need to justify their decisions to impartial courts, where even the politically powerless can call them to account, grants agencies a special protection from capture that OIRA does not, and likely should not, share. As will be discussed in Part II, OIRA does have important characteristics of its own that, nevertheless, establish a useful place for regulatory review as a feature in a broader institutional structure designed to limit capture risks.

II. THE ANTICAPTURE POTENTIAL OF REGULATORY REVIEW

From a capture perspective, although OIRA review has some liabilities, it also has important strengths, which will be the subject of this Part. First, because OIRA is structured as a generalist body, capturing it is more difficult and is, therefore, less likely to occur than it is for single-mission agencies. Second, the process of OIRA review typically involves coordinating the interests of multiple agencies, each with different perspectives; this coordination can blunt the capture-induced bias of a particular agency. Third, OIRA review

121. *See* Croley, *supra* note 106, at 881 (explaining that rulemaking under the APA "is largely though imperfectly open and accessible"); Stewart, *supra* note 20, at 1748–52 (discussing the ability of affected interests to participate in agency proceedings).

122. *See, e.g.*, Bagley & Revesz, *supra* note 12, at 1309 ("OIRA's exemption from the APA suggests it is poorly designed to correct for public choice imbalances.").

123. *But see* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 253 (2009) (arguing that judicial review may not pose ossification problems because it helps counterbalance internal influences that bias agency decision making toward action that is not socially beneficial).

focuses on the use of cost–benefit analysis, which requires the weighing of all relevant competing considerations, thereby providing some check against the possibility that particular considerations would be left out of an agency's decision-making process as a result of capture. Fourth, a tradition has developed of appointing OIRA Administrators from a pool of individuals who do not have strong ties to particular interest groups. This tradition would be costly to reverse, and it helps insulate OIRA from outside influence.

Although these factors indicate that OIRA can serve a useful anticapture function in the rulemaking process, this claim should not be overinterpreted. OIRA's involvement does not scrub all political considerations from the administrative state, and even if such an outcome were possible, it would be of questionable desirability in a democratic system. Many factors are likely to bear on ultimate regulatory outcomes: some are technocratic, some are driven by interest-group bargaining, and some arise from accountability to the broad electoral public. OIRA's anticapture function cannot be expected to elevate all decision making to a plane of pure rationality. Instead, properly understood and reformed, OIRA's role should be understood to be pushing regulatory decision making in a more public-interested, and less capture-driven, direction.

A. THE ROLE OF OIRA AS A GENERALIST INSTITUTION

One of the core features of OIRA is that, as compared to the various regulatory agencies, it is a generalist institution. The benefits of capturing a generalist institution are comparatively less than those of capturing a specialized institution because they are diluted by the wide range of matters that are of no concern to a particular special-interest group.[124] Furthermore, just as any one group will be interested only in a small portion of OIRA's portfolio, there will be many other groups seeking OIRA's attention.[125] Because of the broad array of issues that OIRA must deal with, attempts to influence the institution will be spread among many different interests. Whereas repeat players will participate in many rulemakings before a single mission agency, the regulatory review process will involve a different set of actors each time. Groups that are repeat players when acting before an agency are thrown in with a larger number of other repeat players during the regulatory review process. They, therefore, lack

124. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 76 (1989) (describing that capture is only likely to occur when "most or all of the benefits of a program go to some single, reasonably small interest"); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1150 (noting that capture is less likely when an entity reviews a wide range of issues). *See generally* Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1718 (1998) (noting that the more interests, the larger the transaction costs); Levine & Forrence, *supra* note 17, at 183–84 (discussing the regulatory environment when potential benefits are spread thinly over a large group).

125. *See* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99 (1992) ("The interest group that is regulated by a single regulatory agency will be able to influence that agency to a far greater extent than the interest groups that must 'share' their agency with a variety of other interest groups.").

the ability to exert the same kind of sustained and continual pressure that they can before issue-specific agencies, and that is associated with the highest risk of capture.

The incentives to influence OIRA, then, are diffuse and diluted. Although for any particular rule there may be powerful and concentrated interests before an agency, any incentive to capture OIRA in general will be shared among many different interests, leading to familiar collective action problems.[126] Interest groups will also withhold resources and energy assuming that they can "free ride" on the efforts of others.[127] Because OIRA deals with such varying issues, each individual interest group will have an incentive to shift the costs of capture to other groups.[128] Disparate interests and free-rider problems stand in the way of having different groups form coalitions to control OIRA. And, because OIRA must deal with a large range of interests over time, each of which at any given moment might want to influence it, any attempt to capture the institution would be diluted with many similar attempts coming from other directions at different times.[129]

Although this phenomenon may also exist at agencies (when, for example, the EPA regulates entirely different industries under its air quality program and its toxic-site cleanup program) the scale of the problem at OIRA is substantially enlarged. Although there is some specialization even within OIRA—with each desk officer dealing with only a handful of agencies—capture of even the specialized personnel in OIRA is relatively more costly. The benefits of generalization are even clearer for the OIRA Administrator. Although a broad group of interests may share deregulatory (or proregulatory) ends and may wish to influence OIRA in that general direction, free-rider problems will drive them to underinvest in cultivating influence at OIRA compared to specialist agencies.

There is some similarity in these incentives to the situation presented by generalist as opposed to specialized courts. Most federal courts are generalist, hearing cases on a wide range of issues, spanning state common law claims (in diversity jurisdiction), review of state and federal laws under the U.S. Constitution, complex commercial litigation, federal criminal law cases, class action lawsuits, and challenges to administrative actions. Their purview covers cases of nearly every imaginable scale and complexity. The incentives to attempt to capture such a court by, for example, influencing the appointments process, are

126. Rational actors will not devote significant time and resources attempting to influence OIRA when there is a strong probability that their efforts will be futile or that they can benefit from the efforts of other interest groups. For an overview of the collective action problem, see OLSON, *supra* note 75, at 2, 48, 53.

127. *Id*. at 2, 11, 165 (describing that individuals will have incentives to "free ride" on the efforts of others when the group is seeking public influence).

128. *Id.*

129. When the potential benefits are shared or uncertain to result, rational actors will often be better off not expending resources. *See* Revesz, *supra* note 120, at 561 (citing OLSON, *supra* note 75).

quite diffuse.[130]

The risk of capture is greater for specialized courts such as the U.S. Court of Appeals for the Federal Circuit, the jurisdiction of which extends only over specific subject matter, including claims arising from the patent laws. Indeed, the process that is used by bar associations for evaluating judicial nominees for specialized courts is different than the process used for generalist courts, with the specialized nominees being evaluated by the bar committees with "responsibility over the principal jurisdiction of those courts," rather than general committees on the judiciary.[131] This process, where judicial evaluations are made by "a narrow segment of the legal profession," creates opportunities for special-interest capture that would not exist for the generalist courts.[132] The same basic dynamic holds for agencies and OIRA: for any particular agency, there is a specific set of groups that will have repeat business, leading to more extensive and specialized pressure over time; but because all interest groups have business before OIRA, there is less incentive for any particular interest group to invest in capture.

The most obvious way in which a generalist regulatory review agency can help reduce capture risks is by identifying cases where proposed rules favor a specific interest group at the expense of the public. Because rulemaking takes place in the shadow of review, flagrant attempts to promote private interests through rulemaking may also simply be avoided altogether as a result of the prospect that such attempts would be identified as such during the review process. Especially over a large number of rules, a reviewing body that is not captured should be able to identify agency tendencies to favor particular interest groups, and it can focus its reviewing efforts to help rebalance the rulemaking process.

Broad jurisdiction is not necessarily a panacea. When agencies are given several different goals, they can sometimes skew too heavily in favor of one or another—a risk that is especially grave if there are concentrated and well-organized interests promoting particular priorities but not others.[133] Congress sometimes gives agencies mandates that are seemingly contradictory.[134] When

130. *See* Revesz, *supra* note 124, at 1149–51 ("[C]apture by a single group of the nomination process for a specialized court is more likely than that for a generalized court because in addition to being less costly, it has the potential to yield greater benefits.").

131. *Id.* at 1148.

132. *Id.* at 1148–49.

133. *See generally* 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 the dynamic at the Forest Service between goals of promoting timber production, maintaining recreational opportunities, and conservation); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2220 (2005) ("Agencies frequently resolve . . . interstatutory conflicts by prioritizing their primary mission and letting their secondary obligations fall by the wayside.").

134. *See* Biber, *supra* note 133, at 8 ("Congress has not limited the imposition of multiple goals to organic acts that establish single agencies with multiple goals. Congress has also imposed goals on all agencies in the federal government, which may complement or conflict with the primary goals the agencies face."); *see, e.g.*, *What We Do*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/aboutfda/

agencies are required to carry out specific tasks—such as both promoting an activity while also issuing safety regulations—there may be a tendency to "prioritize one task at the expense of the other,"[135] especially when there is consistent pressure to produce results in one area.[136]

These concerns may not be overly troublesome for OIRA. Its priority should be clear: maximizing the net benefits of regulation. Given the deadlines it faces under governing executive orders and the political pressure to conduct review in a timely fashion, OIRA has relatively little discretion to shift resources away from review if it wishes to conduct more than perfunctory oversight.[137] OIRA is a generalist because of its broad jurisdiction over many subjects, not because multiple missions have been combined into a single agency.

Generalization also has "complicated" effects on expertise.[138] As discussed above, critics of OIRA have consistently complained that staff in the White House lack the expertise necessary to evaluate the sophisticated regulatory proposals developed within administrative agencies.[139] This criticism focuses primarily on the role of science in setting agency policy and the relative advantages agency officials hold in interpreting complex empirical information.[140] Others have made the opposite claim: that the staff at OIRA can become "expert[s] in the field of regulation itself,"[141] and that review can help correct for cognitive biases that may influence agency decisions.[142] The technocratic virtues of developing a "cadre" of experts with experience in multiple agencies in addition to Congress and OMB formed the heart of now-Justice Breyer's influential proposal to help inject rationality into agency decision making.[143]

Some have even gone so far as to recommend that regulatory review be

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whatwedo/default.htm (last updated June 19, 2012) (stating FDA must both protect public health by ensuring drugs on the market are safe and promote public health by advancing the speedy introduction of new drugs—mandates that can often conflict).

135. Bagley, *supra* note 17, at 10.

136. *See* Biber, *supra* note 133, at 11–12 (discussing the tendency of agencies to fulfill easily quantifiable goals over more difficult to measure subjective goals).

137. Under Executive Order 12,866, OIRA is generally required to complete its review within ninety days after an agency formally submits a draft regulation. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2000).

138. *See* Barkow, *supra* note 82, at 34 (explaining that "[t]he relationship between expertise and OIRA is thus a complicated one").

139. *See* MCGARITY, *supra* note 22, at 281 (noting that "OMB analysts lack sufficient expertise to understand highly technical questions that often arise in agency rulemaking"); RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 132 (2010) (discussing the lack of White House expertise).

140. *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 97 (2006) (noting criticisms that OIRA may lack the expertise to effectively review agencies' scientific decisions).

141. Croley, *supra* note 106, at 830 (citing DeMuth & Ginsburg, *White House*, *supra* note 7, at 1084).

142. *See* Pildes & Sunstein, *supra* note 5, at 62–63 (1995) (examining the effect of cognitive errors).

143. BREYER, *supra* note 71, at 70–72.

removed entirely from the political process to maximize its technocratic value.[144] Such a proposal would move beyond the anticapture characteristics of a generalist body and would seek to insulate review from outside influence, presumably through the traditional hallmarks of independence, such as limits on presidential removal, potentially augmented by additional "equalizing factors" such as limits on postgovernment service.[145] Such proposals are also responsive to concerns that the failure to clearly distinguish between presidential oversight and substantive regulatory review also creates confusion concerning OIRA's role.[146]

The prospect of an entirely independent reviewer is in some ways attractive because technocratic review could then take place without the criticism of politicization, but such an institution risks being undermined by the reality of presidential administration. A body of this sort would substantially limit the role of political appointees in setting the direction of regulatory policy. In essence, the entire carefully crafted apparatus of political control that has been painstakingly put in place by administrations of both parties would be subject to an entirely independent system of review, attempting a radical return to the "neutral competence" model of administration.[147] Unless the incentives that have pushed presidents toward the exercise of greater control suddenly reverse, the prospects of this happening are shaky at best. Even assuming that a President would allow such a body to be created in the first place, it could not be a trusted member of the "team."[148] Unless granted expansive formal powers and made truly independent from any presidential oversight, it would likely find its role within an administration marginalized.[149]

An independent body that was tasked with a purely information and advisory role is more plausible—something along the lines of an expanded version of the Administrative Conference of the United States. Only so much can be expected of such an entity, however: its outsider status would limit its persuasive capacity within an administration, and the limited political salience of many regulatory issues would mean that public engagement would have only sporadic importance. That said, an independent body could provide an unbiased perspective on proposed regulation, and even conduct retrospective analysis of rules in place,

144. *See, e.g.*, Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, *in* NEW PERSPECTIVES ON REGULATION 111, 119–21 (David Moss & John Cisternino eds., 2009) (proposing the creation of an independent regulatory review board that has the authority to assess the effectiveness of regulations).

145. *See* Barkow, *supra* note 82, at 15 (identifying five such factors).

146. *See* Cooper & West, *supra* note 49, at 884 (discussing the tension between presidential control and the administrative review process); Shapiro, *supra* note 115, at 10437 (examining the controversy surrounding role of the president in regulatory review).

147. *See* Moe, *supra* note 21, at 239 (examining arguments against presidential regulatory review based on the perceived value of "neutral competence"); *see also* Kaufman, *supra* note 58, at 1060–62 (detailing history of neutral competence in public-administration theory).

148. Moe & Wilson, *supra* note 53.

149. *Cf.* Donald R. Arbuckle, *The Role of Analysis on the 17 Most Political Acres on the Face of the Earth*, 31 RISK ANALYSIS 884 (2011) (discussing working relationship between OIRA career staff and White House political appointees).

with the goal of informing the public and Congress of the efficiency of the regulatory system.

A generalist regulatory review body that is integrated into the broader landscape of the presidential administration may have particular advantages for, perhaps paradoxically, insulating agency decisions from antiregulatory capture risk. There are several documented cases of OIRA Administrators defending agency action against substantial resistance from organized interest groups applying pressure to the President.[150] Because the leadership of OIRA is politicized, its ability to persuade is substantially enhanced, and its role as a generalist helps signal that the agency is not acting pursuant to an idiosyncratic agenda or capture by a specific interest group. OIRA is an especially well-placed defender for regulatory proposals that are subject to efforts to shift administration policy by influencing political actors in the White House. Certainly an agency is much better off with OIRA in its corner.

B. COORDINATION AS AN ANTICAPTURE DEVICE

OIRA review typically involves coordinating the interests of multiple agencies. As part of its review process, OIRA circulates proposed rules and the accompanying regulatory impact statements to other agencies and solicits their feedback on regulatory proposals.[151] This practice provides an important opportunity for each agency to weigh in and express concerns about the regulatory actions being contemplated by other agencies.[152] Agency coordination, in addition,[153] can have a significant capture-related benefit. Because these agencies each have different perspectives and likely favor differing interests, parties that otherwise might have been excluded will now have the opportunity to weigh in during the rulemaking process. Coordination can thus blunt the capture-induced bias of any one particular agency.

The reduction in capture risk that results from agency coordination can be sizeable. Professors J.R. DeShazo and Jody Freeman have proposed that "at least some agencies, some of the time," can act as "lobbyists" for the public interest in interagency processes, with the potential to "give voice to a set of

150. *See, e.g.*, Graham, *supra* note 6, at 465–74 (discussing instances where OIRA helped promote EPA regulations). Although OIRA is well-positioned to defend agency actions, this role appears to be rare.

151. *Federal Rulemaking and the Regulatory Process: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 111–43 (2010), *available at* http://judiciary.house.gov/hearings/printers/111th/111-143_57672.pdf (testimony of Cass Sunstein).

152. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 128 HARV. L. REV. 1131, 1180 (2012) ("Regulatory review therefore serves as a high-level forum for federal agencies to raise concerns about regulatory actions being contemplated by their sister agencies, often resulting in delicate internal negotiations about modifications to the rules.").

153. The need for greater coordination is sometimes given as an independent justification for OIRA review and the assertion of presidential authority more generally. *See* Strauss & Sunstein, *supra* note 55, at 189–90 (explaining the case for greater presidential control over regulatory process). Coordination is certainly important in its own right and would likely justify the existence of some centralized body, although not necessarily one with the broad regulatory review mandate given to OIRA.

interests that might balance or neutralize the influence of private—and usually well-financed and industry-dominated—groups."[154] Professor Rachel Barkow also notes that a "monitoring role" for an agency that "is more responsive to the public interest than the monitored agency that has been captured" can be beneficial in reducing the impact of special-interest influence.[155]

Of course, the arrow can point in the other direction as well. The effects of inter-agency coordination "are likely to cut against the public interest if a politically sensitive agency is charged with monitoring one with equalizing insulators that help promote the public interest."[156] DeShazo and Freeman acknowledge the possibility that when agencies pressure each other, "it merely enhances the power of one set of narrow interests . . . at the expense of others."[157] If an agency that was perfectly structured to avoid capture was opened to the influence of any actor that is more subject to capture risk—including other agencies—then, by definition, it reduces the ability of that agency to engage in public-interested regulation.

If, as a general matter, there is no agency that can avoid entirely some degree of capture, however, the coordinating process, which expands the range of interests that are potentially involved in a regulatory process, should have beneficial effects on capture risks. This dynamic works in a similar fashion to generalization: because different agencies work on a large range of subject matters, it would be difficult for any one interest group to capture all of the agencies that might wish to weigh in on a rule.[158] To the extent that most major interest groups will have some agency to which they can express concern over a proposed rule, this coordinating function will reduce the influence of any particular interest group. Although some may be concerned that environmentalists have captured the EPA, any rules proposed by the EPA also will be examined by the Department of Energy, the Department of Transportation, and the Small Business Administration—agencies with which environmentalists are not thought to have overly close connections. Similarly, a regulator like the Federal Energy Regulatory Commission (FERC), with its "propower culture," can be shifted in a more environmentally friendly direction when influenced by agencies like the EPA.[159] The result of coordination often should be some degree of "policy mediation in which agencies introduce to other agencies a set of interests that they may otherwise ignore, or treat only lightly."[160] A recent example of coordination helping to expand the range of influences brought to

154. DeShazo & Freeman, *supra* note 133, at 2231.

155. Barkow, *supra* note 82, at 51–52.

156. *Id.* at 52.

157. DeShazo & Freeman, *supra* note 133, at 2297.

158. *See* Freeman & Rossi, *supra* note 152, at 1142–43 ("By fragmenting authority among multiple agencies, Congress requires interest groups to diversify their lobbying efforts, thus making it more costly for those that seek to capture the regulator.").

159. DeShazo & Freeman, *supra* note 133, at 2239.

160. *Id.* at 2299.

bear on a regulatory decision was in a recent process put in place by the Obama Administration to set a social cost of carbon for use in cost–benefit analysis of regulations with greenhouse-gas-emission effects.[161]

To be sure, OIRA's coordination role is not as developed as it could be. OIRA can use, and at times has used, its coordinating role to centralize power rather than to rationalize policies across agencies. Sometimes, goals like checking agency action and reducing regulatory burdens have trumped goals like harmonization or standardization.[162] Experience with several different administrations suggests that the strength of the coordination function of OIRA is dependent on how strongly the political leadership in the White House values that function.

There are also other substantive areas in which OIRA could play a role in harmonizing agency policy but has failed to so.[163] Examples include the methodologies for incorporating distributional considerations into regulatory impact analysis and for valuing the benefits of mortality risk reduction.[164] Since the Clinton Order, there has been specific presidential authorization for agencies to examine the distributional effects of rulemakings, but agency efforts to do so have been scattered and ad hoc, and OIRA has offered scant guidance on the question. Similarly, agencies have several different estimates of the "value of statistical life," a measure of the value to individuals of mortality-risk reduction.[165] Although potentially politically fraught, such an effort could help decrease the appearance of regulatory inconsistency among agencies and allow for comparison of the risk reduction achieved by regulation across agencies.

Despite its inevitable shortcomings, agency coordination during the OIRA review process provides a meaningful opportunity to involve parties and interests that otherwise may have been excluded. As demonstrated by the task force on the social cost of carbon, bringing together different agencies with different perspectives can minimize the disproportionate influence of any one interest group. When performed in this manner, coordination can have a significant role in minimizing the potential for capture in the rulemaking process.

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161. INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (2010), *available at* http://www.epa.gov/otaq/climate/regulations/scc-tsd.pdf; *see also* Livermore & Revesz, *supra* note 26, at 23–25 (examining the social cost of carbon reform efforts).

162. *See* Bagley & Revesz, *supra* note 12, at 1264–65 (noting occurrence during the Reagan Administration).

163. *See* Letter from Michael A. Livermore et al., Inst. for Policy Integrity, N.Y. Univ. Sch. of Law, to Cass Sunstein, Adm'r, Office of Info. & Regulatory Affairs (May 11, 2012), *available at* http://policyintegrity.org/documents/IPI_Letter_on_Interagency_Coordination.pdf (providing recommendations to promote interagency coordination).

164. *Id*. at 6–10.

165. *Id.* at 6.

C. COST–BENEFIT ANALYSIS WIDENS THE RANGE OF INTERESTS CONSIDERED BY AGENCIES

At the heart of OIRA's review of agency decision making is the cost–benefit standard, which requires, to the extent possible, that agencies identify and quantify the benefits and costs of proposed rulemakings. This methodology has three important features that have the potential to reduce agency capture: it is comprehensive, requiring the examination of a wide range of regulatory effects; it is standardized and supported by a set of professional norms; and it improves transparency, by publishing for public scrutiny agency estimates of regulatory effects. OIRA facilitates the potential for the cost–benefit analysis requirement to reduce the threat of agency capture by ensuring that agencies comply with the requirement, by establishing and enforcing uniform and rigorous methodological standards and by helping to ensure basic transparency in the process of review.

The idea of cost–benefit analysis is simple: the promulgating agency must identify the problem, identify alternative policies for addressing the problem, assess the costs and benefits of each alternative, and select the policy that best achieves its goals.[166] Cost–benefit analysis is meant to be comprehensive, examining the wide range of impacts from a rule on individual well-being, and measuring the value of those impacts based on the preferences of the affected parties.[167] In theory, no regulatory effects are excluded from the calculus. In practice, although resource constraints mean that the analysis only extends so far, at least the largest effects should be considered.[168]

Although some agencies may be inclined to carry out this analysis, others may not. By itself, an executive order is not necessarily sufficient to force agencies to undergo analytic exercises that they are disinclined to carry out. A stark example is Executive Order 13,132 on federalism, signed by President Bill Clinton, which requires agencies to conduct a rigorous consultation process with states for all regulations that "that have federalism implications."[169] This

166. *See* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost–Benefit Analysis*, 150 U. PA. L. REV. 1489, 1498–99 (2002) (noting that "cost-benefit analysis requires a full accounting of the consequences of an action, in both quantitative and qualitative terms" and that regulators "should be prepared to explain either how the benefits exceed the costs, or if they do not, why it is nonetheless worthwhile to go forward").

167. *See generally* U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2010), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf (providing guidelines on analyzing the benefits, costs, and economic impacts of EPA regulations and policies).

168. Debates exist on whether all preferences are equally legitimate and should be valued in a cost–benefit analysis. *Compare* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST–BENEFIT ANALYSIS 36 (2006) (arguing for need to "launder" certain types of preferences), *with* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) (arguing that preferences should be taken as they are).

169. Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

order has been, for the most part, "blithely ignored,"[170] in part because there was no White House office ensuring that agencies complied.[171]

OIRA's role in regulatory review ensures that the agencies take the cost–benefit analysis requirement seriously. The process of review set out in the Reagan Order, and carried through in each successive Executive Order, creates a clear role for OIRA prior to the publication of proposed rules. OIRA review ensures that agencies must take the cost–benefit analysis directive seriously or risk having their regulations delayed during the process of review. As comparison with the federalism order illustrates, OIRA's role in simply ensuring agency compliance with the cost–benefit analysis requirement likely has been extremely important.

The methodology developed to carry out the cost–benefit analysis directive is, given the detail and scale of many agency rulemakings, quite complex. Agencies employ a large array of experts in a range of fields—including toxicology, risk analysis, engineering, and economics—each with its own set of professional norms, to carry out this analysis. As the practice of cost–benefit analysis has developed over the decades, it has become relatively standardized, with a common set of methodologies and approaches that are relied on, and the analysis changes only slowly through the gradual accumulation of evidence or theoretical innovation. The standardization of the practice of cost–benefit analysis, although far from complete, constrains agencies in the types of analytic choices—in terms of data, models, or assumptions—that can go into the analysis. Although agencies may have some incentives to tweak the analysis in order to arrive at favorable results, there is limited scope for them to do so while using a methodology with relatively clear and well-known parameters.[172]

OIRA has played an important role in helping to facilitate standardization, especially within the practice of federal agencies. In 2003, it issued its most important guidance for agencies conducting cost–benefit analyses, Circular A-4,[173] which serves as a touchstone for agency cost–benefit analysis on a range of methodological questions ranging from appropriate discount rates to treatment of uncertainty. During the process of review, the OIRA staff, composed of regulatory generalists and specialists in cost–benefit analysis, also has the opportunity to spot and push back against analytic choices that are outside professional

170. Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2164 (2009).

171. *See id.* at 2177 (suggesting OIRA review as a potential mechanism to ensure compliance with federalism order).

172. *See* Michael A. Livermore, Cost–Benefit Analysis and Agency Independence (unpublished manuscript) (on file with author) (arguing that agencies have played substantial role in developing methodology of cost–benefit analysis but are subject to accountability by the community of professional economists).

173. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (Sept. 17, 2003), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

norms, which may be motivated by political goals.[174]

Cost–benefit analysis is also a relatively transparent process. Although the practice has come under some criticism for its technical nature, which some commentators see as excluding average citizens from decision-making processes, the regulatory impact analyses produced by agencies in support of rulemakings are part of the public record and freely available for any citizen to access. Although there may be only a limited number of people with the expertise to fully digest these documents, interested parties, civil society actors, media outlets, and other institutional actors outside of the government all have the opportunity to examine, comment on, and criticize how well agencies counted costs and benefits. As with other information disclosure requirements—such as the environmental-impact-statement requirement of the National Environmental Policy Act—there is always the risk that too much disclosure will trigger information overload.[175] But at the very least the cost–benefit analysis places information in the public domain, where it can be subjected to some degree of scrutiny.

Critics of OIRA have argued that there are distortions in the cost–benefit analysis that result in antiregulatory bias,[176] which could empower special interests that seek to avoid regulation. Traditional cost–benefit analysis has a tendency to overstate costs and understate benefits, in part because over the past thirty years the methodology was often promoted for antiregulatory, agency-checking purposes.[177] Proregulatory groups often shunned the use of cost–benefit analysis, "which had the unintended effect of leaving antiregulatory interests free to shape the use of the technique toward their purposes."[178] For example, when the EPA initiated a process to create guidelines for how cost–benefit analysis would be used within the Agency, environmentalists avoided the meetings, squandering the chance to have an impact on the process.[179] But, these flaws are not inherent in cost–benefit analysis and can be corrected so that

174. *See* MCGARITY, *supra* note 22, at 156 ("[R]egulatory analysis can have the virtue of restraining, or at least of exposing, inappropriate political considerations . . . .").

175. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1393 (2010) (arguing that "analytical requirements," such as cost–benefit analysis and environmental impact statements, "are quite appealing from an information-processing perspective, but they have not lived up to their potential in practice and seem to suffer from filter failure as well").

176. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2004) (arguing "cost-benefit analysis promotes a deregulatory agenda under the cover of scientific objectivity"); *see also* RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, A RETURN TO COMMON SENSE: PROTECTING HEALTH, SAFETY, AND THE ENVIRONMENT THROUGH 'PRAGMATIC REGULATORY IMPACT ANALYSIS' 2–3 (2009), *available at* http://www.progressivereform.org/articles/PRIA_909.pdf (advocating that cost–benefit analysis by OIRA be replaced by Pragmatic Regulatory Impact Analysis by agencies, with OIRA relegated to coordinating role).

177. *See* REVESZ & LIVERMORE, *supra* note 50, at 10 ("Starting in the early 1980s, conservatives used cost-benefit analysis to squelch economic regulation.").

178. *Id.*

179. *Id.*

the technique becomes more neutral.[180] Improving cost–benefit analysis to more accurately estimate regulatory effects should be a continuing reform priority for OIRA, administrative agencies, and the academic community.

An additional capture-related criticism of cost–benefit analysis is that, because it is a highly technical exercise carried out by experts and laden with complex jargon and sophisticated methodology, it obscures the value choices made by agencies in an aura of scientific certainty that is both inaccurate and an impediment to broad-based inclusion in the regulatory process.[181] According to this argument, regulatory impact statements that can easily run hundreds of pages may do more to alienate the public than to facilitate participation.

Information overload is certainly a valid concern, but this critique of cost–benefit analysis can easily be overdrawn, and the appropriate remedy is to improve communication of results rather than scale back the analysis. Agencies must communicate with many different audiences—Congress, interest groups, and affected individuals—often through intermediary institutions such as trade associations, advocacy organizations, and the media. Certainly, complex cost–benefit analysis is not the optimal communications medium for all of these audiences. Agencies should include easily understood distillations of results in impact analyses and should continue developing techniques to better communicate regulatory decisions in a way that can be broadly understood.

D. THE APPOINTMENT OF RELATIVELY INDEPENDENT OIRA ADMINISTRATORS

Since Congress created the position of OIRA Administrator in 1980, presidents have tended to nominate to this position relatively independent figures, rather than individuals with close ties to interest groups. The generalist nature of the position makes it difficult for any one interest group to exert strong influence on the nomination process, and the requirement for someone with broad knowledge of the regulatory system tends to exclude the kinds of specialized appointments that are often associated with interest groups.

This tradition presumably would be costly to depart from now, especially because the Administrator position is subject to Senate confirmation.[182] If a new President appointed, for example, the head of a trade association representing polluters, or the head of an ideological group, there might well be serious political fallout. Critics of the President would have an easy target, as the tradition of appointing independent figures has spanned for several decades and been adopted by both Democratic and Republican administrations. Al-

180. *Id.* ("Although cost-benefit analysis, as currently practiced, is indeed biased against regulation, those biases are not inherent to the methodology. If those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis.").

181. *See* Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost–Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV 433, 436 (2008) (noting that administrators are unable to use the "complex, dense, and highly technical reams of analysis").

182. *Cf.* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (forthcoming 2013) (discussing role that traditions have in structuring agency accountability mechanisms).

though there is no formal, legally binding requirement of independence, settled expectations have developed among political elites about the type of appointment that is appropriate for this position. And given the often contentious nature of OIRA appointments, departure from those expectations would carry political risks. This appointment practice, which developed over three decades, helps, at least to some degree, to insulate OIRA from interest group influence.

Since 1980, there have been eleven OIRA Administrators.[183] By and large these Administrators share an educational background in law, economics, or policy[184] and careers in academia or generalized administrative law practices prior to joining OIRA.[185] Most former Administrators have entered or reentered academia or not-for-profit think tanks after leaving OIRA,[186] and two former

183. James C. Miller III (1981), Christopher C. DeMuth (1981–1984), Douglas H. Ginsburg (1984–1985), Wendy Lee Gramm (1985–1988), and S. Jay Plager (1988–1989) served under President Reagan. James B. MacRae, Jr. (Acting Administrator, 1989–1992) served under President George H.W. Bush. Sally Katzen (1993–1998) and John Spotila (1999–2000) served under President Clinton. John Graham (2001–2006) and Susan Dudley (2007–2009) served under President George W. Bush. Cass Sunstein (2009–present) was appointed by President Obama. *See OMB Regulatory Officials: By Administration*, CTR. FOR REGULATORY EFFECTIVENESS, http://thecre.com/ombpapers/OMB_Officials.htm (last visited Feb. 20, 2013).

184. Of the eleven OIRA Administrators, five were trained in economics or public policy: James C. Miller III (Ph.D. in Economics from the University of Virginia); Wendy Lee Gramm (Ph.D. in Economics from Northwestern University); James B. MacRae, Jr. (Masters in Sociology from Duke University and a Masters in Public Policy from Harvard University); John Graham (Masters in Public Policy from Duke University and Ph.D. in Urban and Public Affairs from the Heinz School at Carnegie-Mellon University); and Susan Dudley (Masters from the MIT Sloan School of Management). Six were trained as lawyers: Christopher C. DeMuth and Douglas H. Ginsburg received J.D. degrees from the University of Chicago Law School; S. Jay Plager received his J.D. from the University of Florida College of Law and an L.L.M. from Columbia Law School; Sally Katzen received a J.D. from the University of Michigan Law School; John Spotila received a J.D. from Yale Law School; and Cass Sunstein holds a J.D. from Harvard Law School.

185. James C. Miller III was a scholar and codirector of the Center for the Study of Government Regulation at the American Enterprise Institute. Douglas H. Ginsburg was a professor at Harvard Law School. Wendy Lee Gramm taught economics at Texas A&M University. S. Jay Plager taught law at the University of Florida and the University of Illinois College of Law and was Dean of the Indiana University Maurer School of Law. John Graham was a Professor of Policy and Decision Sciences at the Harvard School of Public Health. Cass Sunstein is one of the most important legal academics of his generation, with a distinguished career at the University of Chicago School of Law and Harvard Law School. Administrators who began their careers in the private sector have had careers focused on administrative law and regulation generally, rather than on a particular area or industry. Christopher C. DeMuth worked at Sidley Austin, a law firm based in Chicago, and at Harvard's Kennedy School of Government. During the twelve years before he joined OIRA, DeMuth did spend one year as Associate General Counsel for the Consolidated Rail Corporation. Sally Katzen was a partner at what is now WilmerHale, a D.C. law firm, where she had a general administrative law practice. Two Administrators served in government prior to joining OIRA: John Spotila served in the Small Business Administration, and Susan Dudley served in career positions at several government agencies before leaving to teach at George Mason University and direct the Regulatory Studies Program at its Mercatus Center.

186. James C. Miller III eventually ran the Office of Management and Budget before leaving government. Since then he has served as a fellow at the Citizens for a Sound Economy, the Center for Study of Public Choice at George Mason University, and the Hoover Institution. He also has served as an advisor to several companies, government bodies, and law firms. Christopher C. DeMuth joined the American Enterprise Institute after leaving OIRA, retiring as its President in 2007. James B. MacRae III served in the U.S. Department of Health and Human Services for over a decade after serving as

Administrators have been appointed to the federal judiciary.[187] This trend, which stands in stark contrast to the revolving door between industry and heads of related agencies,[188] bolsters the claim that OIRA Administrators tend to be independent.

A contrast perhaps can be made with the National Labor Relations Board (NLRB). Students of presidential control over bureaucratic agencies have used the NLRB as the quintessential case where the appointment power is used to influence agency outcomes, finding that there is a "remarkable degree of harmony with the predictions" based on a bargaining model where the Senate and President come to agreement on an appointment that best allows them to project their joint preferences into agency decision making.[189] Because the interest groups in the NLRB setting consist of repeat players—labor unions and management—they have an extremely strong interest in ensuring appointments that can be counted on to forward their goals. This effect, and its influence on the appointments process, can be seen when presidents use their power of recess appointments because the ability of opposing voices in Congress to object is at a nadir.[190] The first appointments in the current and past administration paint a clear picture. In January 2002, on the last day of a congressional recess, President George W. Bush appointed two new members to the NLRB: Michael J. Barlett and William B. Cowan.[191] Barlett was an employer-side labor attorney who had spent time as the director of Labor Law Policy at the U.S. Chamber of Commerce. Cowan was the founder of Institutional Labor Advisors, LLC, a firm that until 2003 represented companies in reducing labor costs before

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Acting Administrator. Sally Katzen held other positions at the Office of Management and Budget before joining academia as a visiting professor at numerous law schools. John Graham was Dean of the RAND Graduate School in California and is now Dean of the Indiana University School of Public and Environmental Affairs. Susan Dudley is a Professor at the George Washington University Trachtenberg School of Public Policy and Public Administration. Wendy Lee Gramm and John Spotila are exceptions to this general rule because both spent significant time in the private sector after leaving OIRA. Gramm headed the Commodity Futures Trading Commission and then served on the Enron Board of Directors during its collapse before joining George Mason University's Mercatus Center as a senior scholar. Spotila served as the President and COO of GTSI Corp., an information technology provider, and is now the CEO of R3I Solutions, a government-contracting firm.

187. Douglas H. Ginsburg was appointed to a seat on the U.S. Court of Appeals for the District of Columbia after serving as OIRA Administrator. S. Jay Plager was appointed to a seat on the U.S. Court of Appeals for the Federal Circuit.

188. *See, e.g.*, PROJECT ON GOV'T OVERSIGHT, REVOLVING REGULATORS: SEC FACES ETHICS CHALLENGES WITH REVOLVING DOOR 2 (2011), *available at* http://pogoarchive.pub30.convio.net/pogo-files/reports/financial-oversight/revolving-regulators/fo-fra-20110513.html (examining the revolving door at the Securities and Exchange Commission (SEC)).

189. Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J. L. ECON. & ORG. 269, 273 (2000).

190. *Cf.* Canning v. NLRB, 705 F.3d 490, 513–14 (D.C. Cir. 2013) (holding that President Obama's appointments to the NLRB violated the Recess Appointments clause).

191. Press Release, AFL-CIO, Statement by AFL-CIO President John J. Sweeney on the NLRB Recess Appointments of Michael J. Bartlett and William B. Cowen (Jan. 23, 2002), http://www.aflcio.org/Press-Room/Press-Releases/Statement-by-AFL-CIO-President-John-J.-Sweeney-on95.

merging with a major D.C. lobbying firm.[192] In April 2010, President Barack Obama moved forward with his first two appointments to the NLRB, also during a congressional recess: Craig Becker, who served as associate general counsel to both the Service Employees International Union and the American Federation of Labor and Congress of Industrial Organizations (AFL/CIO); and Mark G. Pearce, founding partner of a union-side labor law firm in Buffalo, New York.[193]

Of course, it is not surprising that presidential appointments to the NLRB would represent different sides of union–management disputes, but the contrast with the OIRA Administrator appointments of the same presidents, made around the same time, is striking. Both John Graham and Cass Sunstein are respected academics, with no persistent connections to regulated industry or any particular interest group. Their knowledge of the administrative and regulatory system prior to their appointments came from their scholarship[194]—they both had published important works in the area—and, to some degree, as public intellectuals making their views known during congressional testimony and in other public venues.[195] They did not have extensive direct, firsthand experience with agency rulemakings. And their views were general, having to do with the broad structure of the administrative system, rather than specific policy positions on contested issues. The NLRB appointees are essentially the opposite, with long track records and relationships with interest groups related to the NLRB, and, presumably, deep personal familiarity with and well-established views on the range of labor issues likely to come before the board. Rather than appointing OIRA Administrators with strong connections to the regulated parties or other interest groups, presidents have by and large chosen individuals from the academic arena, who have based their careers on scholarship and general expertise on the regulatory system.

This, of course, does not mean that OIRA Administrators are mere technocrats, free of political views or policy commitments, or that presidents do not seek to appoint Administrators with similar views of the regulatory process. Many OIRA Administrators do have well-established views that can be gleaned from their writing and public statements.[196] In addition, interest groups may be

192. Press Release, Venable LLP, Prominent Labor Relations Group Joins Venable (July 7, 2003), http://www.venable.com/NEP/pressreleases/NewsDetail.aspx?news=a23a21af-d27a-4932-a420-5e2a5c343d65.

193. *NLRB Posts to Union Attorneys*, INDUS. RELATIONS CTR., UNIVERSITY OF HAWAII AT MANOA, http://manoa.hawaii.edu/irc/Apr%202009%2021.pdf.

194. *See, e.g.*, RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan Baert Wiener eds., 1995); CASS R. SUNSTEIN, THE COST–BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002).

195. *See, e.g.*, *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the S. Comm. on the Judiciary*, 108TH CONG. 108-763 (2004), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-108shrg98156/pdf/CHRG-108shrg98156.pdf (testimony of Cass Sunstein, opposing amendment); *Revised Federal Rule-Making Procedures: Hearing Before the S. Comm. on Governmental Affairs*, 105TH CONG. 1997 WL 582949 (1997) (written testimony of John D. Graham).

196. *See supra* notes 194–95.

able to assert pressure in the general direction of a more proregulatory or antiregulatory Administrator. Certainly, although Administrators of Republican and Democratic administrations share some characteristics, there are important differences in their degree of receptiveness to agency action. The tradition of appointing relatively independent voices to the position of OIRA Administrator is not a panacea for the problem of interest group capture, creating an unbreakable wall of independence around the office. But past Administrators' relationships to particular interests groups have, at least to date, been relatively attenuated, reducing the risks of capture, especially compared to specialized agencies.

This tradition of independence discussed in this section is not inviolable: the President has the formal power to appoint (subject to Senate confirmation) someone with close personal ties to an interest group and no general expertise. But such a move would be a departure from past practice that would run the risk of carrying substantial political costs. To date, no President has tested the extent of those costs.

III. OVERCOMING CAPTURE-INDUCED AGENCY INACTION

Given the barriers that agencies face when they pursue rulemaking and the bureaucratic incentives that can lead to inertia as easily as overzealousness, concerns about agency overreach should be tempered by concerns about agency failure. Certainly there are numerous examples where critics have faulted agencies for the failure to regulate. For example, many have argued that lax oversight of the financial industry by the Securities and Exchange Commission (SEC) and other financial regulatory agencies was a major contributor to the financial collapse in 2008.[197] Even if only partially true, agency inaction would have helped cause an event that had massive negative consequences that were felt for many years around the globe.[198] Along similar lines, the National Commission of the BP Deepwater Horizon Oil Spill and Offshore Drilling found that "decades of inadequate regulation" were at least partially responsible

197. A bipartisan commission that investigated the cause of the crisis found that "[t]he crisis was the result of human action and inaction, not of Mother Nature or computer models gone haywire," and that "widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets." FIN. CRISIS INQUIRY COMM., THE FINANCIAL CRISIS INQUIRY REPORT xvii–xviii (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; *see also* STAFF OF S. PERM. SUBCOMM. ON INVESTIG., COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 1, 4–5 (2011), *available at* http://www.nytimes.com/interactive/2011/04/14/business/14crisis-docviewer.html (examining the role of regulatory failure in the financial crisis).

198. *See* Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 HARV. L. & POL'Y REV. 231, 231–32 (2011) ("As the report recently issued by the FCIC documents, decades of deregulation and failure to regulate newly emerging financial markets, firms, and products led to a financial system that was extremely fragile and vulnerable to a full-blown crisis when the U.S. housing bubble collapsed."); Ross Levine, *The Governance of Financial Regulation: Reform Lessons from the Recent Crisis*, 12 INT'L REV. FIN. 39, 39 (2012) (arguing that regulatory inaction helped trigger the crisis).

for the largest oil spill in U.S. history.[199] In a recent article, Professor Rena Steinzor lays out a laundry list of agency "dysfunction and failure" on issues ranging from nuclear plant maintenance and refinery explosions to tainted food and dangerous imports.[200] Although there may not be universal agreement on any instance of agency failure,[201] certainly a reasonable argument can be made for specific cases where agencies have engaged an inefficiently low level of regulatory activity.

Even the EPA, thought by some to be atypically inclined toward over-activity,[202] has moved slowly, or not at all, on important risks. Regulation of harmful chemicals under the Toxic Substances Control Act has stalled to such a degree that even industry recognizes that EPA inaction has undermined the purposes of the statute.[203] The failure of the EPA to adequately regulate under the Safe Drinking Water Act of 1974 caused Congress, in its reauthorizing statute, to impose a number of deadlines on the Agency to force action.[204] Regulation of hazardous air pollutants under the Clean Air Act took the EPA decades, even after Congress included several action-forcing provisions in the 1990 amendments to that statute.[205] The risks associated with greenhouse gases were well-known within the scientific community for decades before the EPA took regulatory action, which occurred only after it was petitioned by an environmental group and had its denial of that petition overturned by the Supreme Court in *Massachusetts v. EPA*.[206] Even after the Court's decision, it took several years for proposed regulations to be forthcoming, and many of

199. NAT'L COMM. OF THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 56–57 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf.

200. *See* Steinzor, *supra* note 11, at 217–30.

201. *See, e.g.*, David Barker, *Is Deregulation to Blame for the Financial Crisis?*, THOMSON REUTERS NEWS & INSIGHT (July 2, 2012), http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/07_-_July/Is_deregulation_to_blame_for_the_financial_crisis_/ (arguing that deregulation did not cause the financial crisis).

202. *See, e.g.*, Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1499 (2007) (noting that the EPA is "an atypical agency in almost every relevant respect," including its opportunities for developing new regulations).

203. *See generally* Dialogue, *Toxic Substance Control Act Reform: Chemical Prioritization*, 42 ENVTL. L. REP. 10313 (2002) (panel discussion, including industry representatives, examining reforms to the statute).

204. *See* Mary Tiemann, *Safe Drinking Water Act: Implementation and Issues*, *in* SAFE DRINKING WATER ACT AND ITS INTERPRETATION 4 (Thomas W. Carter ed., 2006) (discussing the 1996 Amendments to the Safe Drinking Water Act).

205. *See* Jim Morris & Corbin Hiar, *Why Americans Still Breathe Known Hazards Decades After 'Clean Air' Law*, CTR. FOR PUB. INTEGRITY (Nov. 16, 2011, 5:02 AM), http://www.publicintegrity.org/2011/11/16/7406/why-americans-still-breathe-known-hazards-decades-after-clean-air-law/ (examining delay of EPA regulations); Elizabeth Shogren, *Secret 'Watch List' Reveals Failure to Curb Toxic Air*, NPR (Nov. 7, 2011), http://www.npr.org/2011/11/07/142035420/secret-watch-list-reveals-failure-to-curb-toxic-air ("The system Congress set up 21 years ago to clean up toxic air pollution still leaves many communities exposed to risky concentrations of benzene, formaldehyde, mercury and many other hazardous chemicals.").

206. 549 U.S. 497 (2007).

those were associated with settlement agreements with groups threatening litigation for the Agency's failure to act.[207]

Because capture can cause agencies to veer from the public interest just as easily through torpor as hyperactivity, an anticapture role for OIRA is incomplete without a balanced process that examines both action and inaction. Although there are other mechanisms to spur agencies to action, both internal to the White House (such as the Domestic Policy Council and similar offices) and external (such as congressional or media pressure), OIRA cannot fulfill its promise as an anticapture counterweight if it limits its review to agency action only.[208]

Complete review of agency inaction is implausible—there are far too many actions that an agency might engage in but decides not to. As a result, the full universe of potential options cannot be made the subject of regulatory review. Fortunately, however, the process of petitions for rulemakings provides one potential pathway to structure OIRA review of inaction so that it does not overly intrude on agency agenda-setting prerogatives but provides some means of prodding agencies forward when they fail to act on pressing social problems. This Part will discuss the issue of agency inaction and describe a system of review of petitions for rulemaking that would give OIRA greater authority over inaction. It also examines the recent history of petitions at the EPA and shows that potential arguments against this procedure are not well-founded.

A. CHALLENGES OF INACTION REVIEW

The problem of agency inaction, and the difficulty of finding an appropriate remedy for this pathology, is well-established.[209] The goals of many statutes

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207. *See, e.g.*, *Settlement Agreements to Address Greenhouse Gas Emissions from Electric Generating Units and Refineries: Fact Sheet*, U.S. ENVTL. PROT. AGENCY, http://epa.gov/carbonpollutionstandard/pdfs/settlementfactsheet.pdf (last visited Aug. 3, 2012) (EPA settlement agreement); *see also* Kelly McTigue & Aleas R. Koos, *EPA Proposes Greenhouse Gas Emissions Standard for New Power*, O'MELVENY & MYERS LLP (Mar. 27, 2012), http://www.omm.com/epa-proposes-greenhouse-gas-emission-standard-for-new-power-03-27-2012/ (discussing such settlement agreements).

208. On May 1, 2012, President Obama issued Executive Order 13,609, establishing a more robust process, overseen by OIRA, to identify areas where regulatory harmonization can facilitate international trade. *See* Exec. Order No. 13,609, 77 Fed. Reg. 26413 (May 4, 2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf. This initiative can be understood as a tool to identify areas where agency action is needed. If OIRA plays an action-inducing role in the harmonization context, it would be consistent with the expansion of OIRA's authority to review of petitions for rulemaking discussed in this Article. Our thanks to Paul Heald for this point.

209. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1657 (2004) (contending that "the current law governing judicial review of agency inaction . . . is inconsistent with the founding principles of the administrative state"); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 372 (2009) (noting "even the proponents of meaningful judicial review of agency inaction acknowledge the serious practical difficulties such review would present" and that "non-enforcement decisions and other forms of regulatory inaction remain a serious problem"); *see also* Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1742 (2008) (proposing "positive metrics" intended

cannot be achieved without administrative action to implement and enforce their provisions[210]—especially in areas where Congress has delegated broad authority to administrative agencies to promote public health and safety or to protect the environment, regulatory inaction can have potentially significant consequences.[211]

In some cases, inaction is closely related to capture. Many of the most significant examples of regulatory failure over the past decade depart from the kind that Stigler and Professor Samuel Huntington were concerned with in the middle twentieth century.[212] Instead of industry seeking regulation to protect itself from competition, "corrosive capture," a form of deregulation, is associated with the weak application (or nonapplication) of regulatory tools to genuine social problems.[213] Statutory goals—such as protecting public health or protecting the environment—can be hampered by inaction and deregulation that result from agency capture by regulated industries.[214] The BP oil spill and the 2008 financial crisis are prime examples.[215] Some scholars have argued that agency inaction and industry capture are oversimplified or incomplete rationales for these events.[216] Nevertheless, there is evidence that these catastrophes, as well as some of the other most challenging problems facing society, "could

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to notify the public when agencies fail to achieve their missions); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 654 (1985) (exploring agency inaction and attempting "to develop a set of guidelines for resolving claims of unlawful administrative inaction").

210. Staszewski, *supra* note 209, at 373 ("The goals of modern regulatory statutes simply cannot be achieved without administrative action to implement and enforce their provisions."); *see also* Heckler v. Chaney, 470 U.S. 821, 851 (1985) (Marshall, J., concurring) ("[G]overnmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.").

211. *See* Staszewski, *supra* note 209, at 374 (providing examples from the EPA and the SEC).

212. Carpenter & Moss, *supra* note 14, at 28–29.

213. *Id*.

214. *See generally* Dion Casey, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y 142 (1998) (discussing the role of the meat and poultry industries in delaying and ultimately weakening regulation of food safety); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 452 (1987) (noting that "statutes may be undone by inaction and deregulation").

215. *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL, DEEPWATER: THE GULF OIL SPILL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 249–92 (2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf (examining the various causes of the BP Deepwater Horizon oil spill); Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 647, 647 (2010) ("[A] growing number of respected commentators now argue that regulatory capture of public agencies and public policy by leading banks was one of the main causal factors behind the financial crisis of 2007–2009."); Richard J. McLaughlin, *A Review of Coastal Governance*, 16 OCEAN & COASTAL L.J. 539, 543 (2011) (noting the "problem of regulatory agency capture became readily apparent in the aftermath of the BP *Deepwater Horizon* oil spill"); Arthur E. Wilmarth, Jr., *The Dodd–Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 908 (2011) (describing regulatory capture "which caused federal agencies to subordinate consumer protection and other public interests to the overriding policy goal of increasing the profits of major financial institutions").

216. *See, e.g.*, Carpenter & Moss, *supra* note 14, at 4 (finding capture is "very commonly misdiagnosed and mistreated"); Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Prelimi-*

potentially have been alleviated or avoided if agencies had exercised their existing legal authority in a more proactive fashion."[217]

Currently, OIRA has little responsibility for promoting agency action. The most extensive foray into this territory was made by Administrator John Graham, who instituted a limited practice of issuing "prompt letters" to agencies concerning areas where additional rules could be useful.[218] These prompt letters represented an important innovation in regulatory review: it was the first time that OIRA took any public role in prodding agencies forward.[219] Perhaps the most important step was the simple recognition that agency inaction could also be inefficient, and warrant OIRA scrutiny. But the practice of prompt letters was always ad hoc[220] and has not been continued by the Obama Administration.[221]

There are important challenges in structuring review of inaction. Agencies face a wide range of pressing priorities and limited resources. Often, agency officials will be in the best position to allocate budget and personnel to the most significant issues. The difficulty of second-guessing agency prioritization decisions is one of the primary reasons that courts have shied away from reviewing certain types of agency inaction. Federal courts rarely conduct meaningful judicial review of agency inaction,[222] and the Supreme Court has held that agency inaction associated with a failure to enforce statutory prohibition is presumed immune from judicial review under the APA.[223]

A related challenge in structuring review is that there is a potentially limitless number of "inactions" that could be the subject of review. Many agencies have broad statutory mandates that could encompass a wide range of potential rules.[224] In addition, all existing rules could be changed: stringency could be increased or decreased, changes in regulatory design or instrument could be made, enforcement mechanisms or record-keeping requirements could be altered, or a rule could be abandoned altogether. Especially given its own relatively limited budget and staff, OIRA is not well-positioned to canvass the entire universe of potential regulations that could be issued by agencies.

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nary Analysis and Critique—Part I, 128 BANKING L.J. 771, 772 (2011) (arguing "it would be too facile an argument to suggest that regulatory failure was the principal cause of the financial crisis").

217. Staszewski, *supra* note 209, at 374.

218. *See* Graham, *supra* note 6, at 460 (examining the use of prompt letters).

219. *See* Bagley & Revesz, *supra* note 12, at, at 1277–80 (discussing the use of prompt letters under John Graham and the limitations of the practice).

220. Under the Bush Administration, OIRA issued twelve "prompt letters on subjects ranging from the transfat content of foods to pollution from diesel engines." *Office of Information and Regulatory Affairs (OIRA) Q&A's*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/OIRA_QsandAs (last visited Aug. 20, 2012).

221. No explanation has been given by the Obama Administration for its decision not to use the prompt letter procedure.

222. *See* Staszewski, *supra* note 209, at 370.

223. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (concluding "that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)").

224. *See, e.g.*, 21 U.S.C. § 393(b)(1) (2006) (requiring the Food and Drug Administration to "promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner").

Any mechanism for OIRA to review agency inaction, then, should be mindful of these two design issues: maintaining appropriate scope for agency prioritization and channeling review toward the most important issues. The following section develops a proposal for meaningful OIRA review that is attentive to these factors.

B. THE MECHANISM: PETITIONS FOR RULEMAKING

OIRA can perform a limited but important role in examining agency inaction through the review of petitions for rulemaking. Under the APA, "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule,"[225] and all agencies have some process whereby individuals or groups can petition that agency for a rulemaking, although these processes vary.[226] Under the APA, agencies are required to respond to these petitions, and there must be some reasoned explanation if the petition is denied.[227]

However, judicial review of an agency's denial of petition for rulemaking is "extremely limited [and] highly deferential,"[228] and courts overturn an agency denial or petition for rulemaking only in rare and compelling circumstances.[229] Perhaps the most famous example is *Massachusetts v. EPA*, in which the Supreme Court found that the EPA had not provided appropriate justification for its decision not to regulate greenhouse gas emission from motor vehicles under the Clean Air Act.[230] Similarly successful cases are rare.

Each year in an annual report to Congress, OIRA compiles a list of the regulations that were adopted in the past year, aggregates costs and benefits, and makes recommendations to agencies regarding improvements in their process of regulatory decision making.[231] OIRA should expand this practice by also

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225. Administrative Procedure Act, 5 U.S.C. § 553(e) (2006).

226. *See, e.g.*, 10 C.F.R. § 2.802 (detailing the petition process for the Nuclear Regulatory Commission); *Petition for Exemption or Rulemaking*, FED. AVIATION ADMIN., http://www.faa.gov/regulations_policies/rulemaking/petition/#rulemaking (last visited Aug. 20, 2012) (detailing petition process for Federal Aviation Administration); *Petitions for Rulemaking Submitted to the SEC*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/rules/petitions.shtml (last visited Aug. 20, 2012) (detailing petition process for SEC).

227. Under the APA, a federal agency must "conclude a matter" presented to it "within a reasonable time." 5 U.S.C. § 555(b) (2006). Furthermore, a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (2006); *see In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418–19 (D.C. Cir. 2004) (holding that, under APA, federal agency must respond to petition for rulemaking); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10 (4th ed. 2002) ("At a minimum, the right to petition for rulemaking entitles a petitioning party to a response to the merits of the petition.").

228. Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96–97 (D.C. Cir. 1989).

229. *See* Michael A. Livermore, *Cause or Cure? Cost–Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENVTL. L.J. 107, 121 (2008) (internal citation omitted).

230. Massachusetts v. EPA, 549 U.S. 497 (2007).

231. These reports are mandatory under Executive Order 12,866. *See, e.g.*, *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, REGINFO.GOV, http://www.reginfo.gov/public/do/eAgendaMain (last visited Aug. 21, 2012).

collecting information about petitions that are currently pending before agencies and, where appropriate, examining petitions that are either languishing or that have been denied without adequate justification. Through this review mechanism, OIRA can use information generated by private actors to identify areas where action is needed but where agencies have failed to move forward. In this way, some OIRA review of agency inaction will help balance the existing structure of regulatory review, which currently focuses almost exclusively on agency action.

Limiting the scope of OIRA's inaction jurisdiction to the review of petitions for rulemaking helps to cabin what would otherwise be a nearly unlimited grant of oversight authority. The process would also help focus OIRA's review efforts on areas that petitioners have identified as important, helping to take advantage of information that is held by parties that are outside the government, including advocacy organizations and the regulated community. Limiting inaction review to the universe of petitions achieves a reasonable balance between meeting the need for executive review and maintaining a relatively clear boundary for OIRA's authority.

There are several potential criticisms of such an expansion of OIRA's mandate. First, critics might argue that there are too many petitions for OIRA to review effectively. OIRA has a limited staff and is already burdened by the effort of reviewing the large number of rules promulgated by federal agencies. The full-time staff at OIRA has decreased from ninety employees in 1981 to just fifty today.[232] Nevertheless, OIRA must complete about 500 regulatory reviews each year.[233]

A second potential criticism is that petitions could be frivolous and unworthy of OIRA review. There is no guarantee that the petitions submitted to agencies would merit close scrutiny by the agencies themselves, let alone a second round of review by OIRA. Petitions could be submitted for a range of reasons, including to satisfy ideological preferences or to divert agency attention. It may be the case that diverting greater attention to petitions for rulemakings could be a waste of time.

A third argument against expanded OIRA review is that it would empower industry groups to use petitions to capture their regulating agencies. As discussed in section I.B, there is already an imbalance in participation before OIRA that favors regulated industry. If the petition process is similarly dominated by powerful special-interest groups, it could accentuate, rather than reduce, capture risks.

A final argument is that agencies are already adequately responding to petitions in a timely manner, and therefore there is nothing useful for OIRA to

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232. Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 184 (2009); *Office of Information and Regulatory Affairs (OIRA) Q&A's*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/OIRA_QsandAs (last visited Aug. 21, 2012).

233. *See OIRA Q&A's*, *supra* note 232. ("OIRA completes about 500 regulatory reviews each year.").

do. Agencies are likely aware of their legal responsibilities under the APA, and although courts have some patience for agency tardiness, "unreasonable delay" will not be tolerated.[234] Given that petitions are subject to judicial review, agencies may be accompanying denials of petitions with sufficiently well-reasoned analysis that additional OIRA review is unnecessary.

To examine whether these concerns are well-founded, the following section discusses the results of an examination of the recent history of petitions for EPA rulemaking.

C. CASE STUDY: EPA PETITIONS

As an example to illustrate the plausibility of this proposal, it is useful to examine petitions for review at the EPA. The EPA is not a typical agency for purposes of OIRA review—its regulations make up a substantial portion of the rules that are given significant scrutiny by OIRA in any given year.[235] EPA rulemakings also tend to take longer,[236] have a uniquely large economic impact,[237] and involve significant public participation.[238]

This case study examines petitions submitted to the EPA between 1999 and 2011.[239] The petitions that were found from this search can be divided into two distinct categories. The first category is general petitions for rulemaking. General petitions for rulemaking request that the EPA issue, amend, or repeal a rule. The majority of these petitions are submitted by environmental nongovernmental organizations (ENGO's) or states, although a limited number are submitted

234. *See* Staszewski, *supra* note 209, at 373 n.12.

235. Of the 154 regulatory actions under review at OIRA as of August 2012, 31 were from the EPA. *See Agencies With the Most Regulatory Actions Currently Under Review*, REGINFO.GOV, http://www.reginfo.gov/public/ (last visited Aug. 22, 2012). According to OIRA's website, the EPA accounted for twenty-one of the 138 significant rules reviewed in 2010, second only to the Department of Health and Human Services. *See Review Counts*, REGINFO.GOV, http://www.reginfo.gov/public/do/eoCounts SearchInit?action=init (last visited Aug. 21, 2012).

236. The average rulemaking for all federal agencies between the fall of 1983 and the spring of 2010 took 462.79 days to complete. Rulemakings from the EPA, however, took an average of 602.34 days per rulemaking to complete, compared with only 223.71 by the Department of Commerce. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 513 (2011).

237. According to a study released by the Economic Policy Institute, the net benefits from the EPA Cross-State Air Pollution Rule alone exceed $100 billion a year. *See* ISAAC SHAPIRO, ECON. POLICY INST, THE COMBINED EFFECT OF THE OBAMA EPA RULES 1 (2011), *available at* http://www.epi.org/files/2011/BriefingPaper327.pdf.

238. 2.1 million comments were recently submitted to the EPA during a ten-week period in support of its proposed Carbon Pollution Standards for new power plants, the largest number of comments ever submitted for any federal regulation. Press Release, Clean Air Council, More Than 2 Million Comments Supporting EPA Protections Against Carbon Pollution and Climate Change Collected (June 21, 2012), http://www.cleanair.org/program/global_warming/federal_legislation/more_2_million_comments_supporting_epa_protections_agains.

239. The petitions analyzed in this case study were collected from a variety of sources, including: the Federal Register, the Federal Digital System of the U.S. Government Printing Office, the EPA website, LexisNexis and Westlaw, and other Internet publications. Unfortunately, there is no available public repository containing all petitions submitted to the EPA. Therefore, there is a possibility that some petitions were not included in this case study, especially if they were never published.

by industry groups. The second category contains a number of individualized petitions for rulemaking. For example, the EPA receives numerous petitions for reconsideration and petitions for objection to Title V permits under the Clean Air Act, which are more specific and do not have the same potential impact as general petitions for rulemaking.[240] Petitions for reconsideration request that the EPA reconsider its issuance of a particular final determination or rule. These petitions are mostly denied and are often filed together with legal actions challenging the EPA initial determination or rule. Petitions for objection to Title V permits are filed by environmental groups and object to the issuance of operating permits issued under Title V of the Clean Air Act.[241]

The general petitions for rulemaking are the most important and have a greater potential impact on inaction review. These petitions request that the EPA take action in a wide range of areas and are not merely procedural objections or requests for reconsideration of existing rules. Petitions in this category are also frequently litigated, and even when the EPA does not accept a petition and begin rulemaking, it is often forced to defend its decision in court. The following discussion focuses on these general petitions.

This case study has some limitations that should be acknowledged. First, it examines the state of affairs in the status quo, where OIRA does not review petitions. It is possible that the introduction of OIRA review will substantially alter the incentives of petitioners, in which case the results reported below would not be an accurate prediction of the number and quality of petitions or the balance of participation between regulated industries and public interest organizations. This possibility cannot be rejected in principle, and one could generate numerous hypotheses for how the OIRA review process could affect petitioners' behavior. Nevertheless, although the past is not always a perfect guide to the future, at the very least, it provides a useful baseline for intuitive judgments about the potential effects of OIRA review on the petitioning process.

Second, petitions before the EPA are likely not a representative sample of the process throughout the federal government. The EPA is a high-profile agency, and its work touches on a broad number of industries, while being supported by a relatively well-funded and well-organized public interest community. Although environmental benefits are diffuse, environmental organizations have, to some extent, overcome collective action costs and are relatively well-represented in the regulatory process, especially compared to civil society actors in other issue areas, such as consumer protection regulation. The EPA's experience may, then, overrepresent the participation of public interest groups in the petitioning process. Nevertheless, the EPA is both important in its own right,

240. Title V requires that major sources of air pollution receive permits that establish emissions limitations and pollution control requirements. Federal Clean Air Act, 42 U.S.C. §§ 7661–7661f (2006).

241. Title V permits are legally enforceable documents issued by state and local permitting authorities to air pollution sources and include pollution-control requirements. *See id.*

because of the size and scope of its regulatory reach, and provides at least some insight into the petitioning process of other agencies.

Appendix A is a chart with basic information on the petitions collected.

1. Number of Petitions

Critics might argue that, due to its limited staff and need to review the already large number of rules promulgated by federal agencies, OIRA does not have the additional capacity to review petitions before they are handled by individual agencies.[242] The number of general rulemaking petitions has in fact been limited.[243] Furthermore, OIRA can limit its review to those petitions for rulemaking that would have a large economic footprint, just as full cost–benefit analysis is only required of potential rules that will have large economic effects.[244]

During the period of our study, the EPA received thirty-eight general rulemaking petitions, most of which were filed pursuant to the Clean Air Act, Clean Water Act, or Toxic Substance Control Act; a smaller number were filed under the Federal Insecticide, Fungicide, and Rodenticide Act. These petitions deal with a variety of topics. Environmental groups filed several petitions urging the EPA to revise or repeal existing rules to expand regulation. Examples include a petition seeking to repeal then-existing exemptions of ballast water discharges from the National Pollution Discharge Elimination System permit scheme,[245] a petition to revise the existing method used to calculate the fuel economy information on car window stickers,[246] and two petitions requesting additional

242. Agencies like the Consumer Product Safety Commission, the FDA, and the EPA received scores of petitions each year in the 1970s and 1980s. *See* William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1986 ADMIN. CONF. U.S. REP. 493, 519–20 (finding that administrative agencies were receiving a large number of petitions for rulemaking each year, with the Food and Drug Administration and the EPA topping the list); Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 47 (1982) (reporting that CPSC received over two hundred petitions in its first three years). However, many of the petitions that the EPA received during this period were from pesticide manufacturers seeking changes to the regulations for registered pesticides. *See* Luneburg, *supra*, at 551.

243. There have only been twenty-seven notices published in the Federal Register announcing denials of rulemaking petitions in the two years following *Massachusetts v. EPA*. *See* Jeffrey A. Rosen, *A Chance for a Second Look: Judicial Review of Rulemaking Petition Denials*, 35 ADMIN. & REG. L. NEWS 7, 7–9 (2009).

244. *Cf.* Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1994), *reprinted in* 5 U.S.C. § 601, 639 (2000) (limiting OIRA review to "significant regulatory actions" which "[h]ave an annual effect on the economy of $100 million or more").

245. Nw. Envtl. Advocates et al., Petition for Rulemaking to Repeal Exemption Rules Related to Ballast Water (Jan. 13, 1999), *available at* http://water.epa.gov/type/oceb/habitat/upload/2007_07_02_invasive_species_ball_water_pet-2.pdf.

246. Bluewater Network, Petition for Rulemaking to Amend Testing and Calculation Procedures and/or Correction Factors for Fuel Economy Information Purposes (June 7, 2002), *available at* http://www.docstoc.com/docs/580293/Letter-from-Bluewater-Network-to-EPA-and-NHTSA.

disclosure of hazardous inert ingredients in pesticide labels.[247] Other petitions request that the EPA engage in completely new rulemakings. Examples of these include a petition to control CO2 and other greenhouse gas emissions from cars,[248] a petition for a cap-and-trade system for greenhouse gas emissions from mobile sources,[249] and a petition to control the amount of black carbon found on sea ice and glaciers.[250]

Based on the data collected, an average of 2.9 general petitions for rulemaking were filed per year between 1999 and 2011. The number of petitions filed increased somewhat over that time frame from an average of 1.9 petitions per year from 1999–2005, to 4.2 petitions per year from 2006–2011. With the exception of 2011, there have been at least three petitions filed every year since 2006, and the most petitions, seven, were received in 2010.

2. Substantive Merit

Critics might also argue that petitions for rulemaking are frivolous and do not warrant the time and resources that it would cost agencies and OIRA to subject them to careful review.[251] Both NGOs and industry groups might submit petitions for a variety of reasons, including satisfying ideological preferences, creating publicity, or diverting agency attention. Devoting greater resources to such petitions would be wasteful.[252]

In this study, petitions do not appear to be frivolous. Petitions have induced substantial regulatory actions ranging from changes in fuel-economy labeling requirements[253] to the endangerment finding on greenhouse gases.[254] Of the thirty-eight identified petitions filed between 1999 and 2011, the EPA has

247. Attorney General, Petition for Rulemaking (Aug. 1, 2006) *available at* http://www.epa.gov/opprd001/inerts/petition_states.pdf; Nw. Coal. for Alternatives to Pesticides et al., Petition for Rulemaking (Aug. 1, 2006), *available at* http://www.epa.gov/opprd001/inerts/petition_ncap.pdf.

248. Int'l Ctr. for Tech. Assessment et al., Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act (Oct. 20, 1999), *available at* http://209.200.74.155/doc/ghgpet2.pdf.

249. Inst. for Pol'y Integrity, Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act to Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels (July 29, 2009), *available at* http://policyintegrity.org/documents/7.29.09IPIPetitiontoEPA.pdf.

250. Ctr. for Biological Diversity, Petition for Rulemaking (Feb. 22, 2010), *available at* http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_what_how_why/black_carbon/pdfs/EPA_CWA_Black_Carbon_Petition_2-22-10.pdf.

251. *See* Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 323–24 (2010) (noting that "the little scholarly commentary on petitions has been strongly negative, focused on the idea that petitions divert agencies from pursuing the most serious problems that deserve regulatory attention").

252. *Id.*

253. 71 Fed. Reg. 77,872 (Dec. 27, 2006) (responding to the Petition to Amend Fuel Economy Testing and Calculation Procedures by the Bluewater Network).

254. 74 Fed. Reg. 66,496 (Dec. 15, 2009) (responding to rulemaking petitions by several interest groups as well as the Supreme Court ruling in *Massachusetts v. EPA*).

granted nineteen,[255] denied twelve, and not yet taken any public action on seven. That is, fifty percent of rulemaking petitions resulted in the EPA engaging in rulemaking processes as petitioned, although thirty-two percent were ultimately denied. This finding is inconsistent with the claim that petitions are frivolous.

3. Balance of Participation

Given the relative difficulty for large and diffuse interest groups to organize and participate before OIRA, there is some concern that having OIRA review petitions for rulemaking would further empower industry groups to capture their regulating agencies. If powerful special-interest groups were able to influence the petition process in such a manner, it would defeat the goal of having OIRA review petitions to reduce capture risks.

In the past, industry has not dominated the petition process. Industry groups have filed five petitions in the past decade, all of which requested the EPA's affirmative action to engage in rulemaking. So far, only two of these petitions have resulted in agency action, and in only one instance did the EPA comply with industry demands. In January 2003, the American Mosquito Control Association petitioned the EPA for rulemaking that would exclude mosquito larvicide and adulticide from regulation under the Clean Water Act.[256] In July 2003, the EPA issued an interim statement that in effect did exactly what the petition had requested, although the statement did not itself refer to the petition.[257] In February 2002, the Cement Kiln Recycling Coalition (CKRC) petitioned the EPA to repeal the existing site-specific risk assessment policy and technical guidance for hazardous waste combustors or to engage in rulemaking if it continued to believe that site-specific assessment was necessary.[258] In October 2005, the EPA did codify its risk assessment policy, although it did not repeal or make any significant changes as CKRC had requested.[259] Two other petitions requested that the EPA engage in rulemaking to establish new procedures for pesticide regulations under the Endangered Species Act, but the EPA

255. These include petitions that were initially denied but later granted due to settlement or judgment decrees (three) and petitions based on which the EPA has begun, but has not completed, rulemaking processes (eleven).

256. Am. Mosquito Control Assoc., Petition For Rulemaking Under The Clean Water Act (Jan. 16, 2003), *available at* www.prep-gov.net/2003/WDC99_705584_2.DOC.

257. U.S. Envtl. Prot. Agency, Memorandum to Regional Administrators, Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA (July 11, 2003), *available at* http://www.deq.state.or.us/wq/pubs/epa/aquapestapplmemo.pdf.

258. *See* National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 70 Fed. Reg. 59,402, 59,504 (Oct. 12, 2005) (discussing petition).

259. National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 70 Fed. Reg. 59,402, 59,504 (Oct. 12, 2005) (codified at 40 C.F.R. § 9, 63, 260, 264, 265, 266, 270, 271).

has not taken any further action on these petitions.[260] Overwhelmingly, petitions have thus far been filed by nongovernmental organizations or states. Industry groups do not appear to have successfully used petitions as a means of increasing their influence over regulating agencies.

4. Delay and Justification

The petition process is slow. With regard to the six petitions that have already resulted in final rule promulgation, it took the EPA forty-seven months on average to generate a final rule. When the EPA affirmatively denied a petition, it still took an average of fourteen months to do so.[261] In other cases, the EPA simply did not take any action, and it is not uncommon for an interest group to file suit when the EPA fails to respond or simply requests comments and then does not accept or deny a petition.[262]

One of the challenges facing agencies is to identify those petitions that are most worthy of in-depth scrutiny. If a petitioner merely calls attention to an existing problem, and potentially the statutory authority to respond to it, the responsibility for examining the policy implications of a new rulemaking falls to an agency. It may be difficult to know, from the face of the petition, whether it is worth agency resources to examine the petition in timely fashion. Including even rudimentary cost–benefit analyses within petitions could help direct agency efforts to the most worthy requests. This is not the standard practice today: of the thirty-eight petitions identified in the relevant time period, only four of them

260. Dow Agrosciences et al., Petition For Rulemaking to Establish Procedures For the Creation and Amendment of Endangered Species Protection Bulletins, Docket No. ID: EPA-HQ-OPP-2010-0474 (Jan. 19, 2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2010-0474-0002; Growers for ESA Transparency, Petition for Rulemaking to Establish Procedures Consistent with Section 1010 of the 1988 Amendments to the Endangered Species Act, Docket No. ID: EPA-HQ-OPP-2010-0854 (Sept. 16, 2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2010-0854-0002.

261. When the EPA has issued a formal denial of a petition for rulemaking, the extent of the substantive justification given for such denial has varied. In some instances, even while acknowledging the existence of a problem, the EPA has simply responded that they "do not believe that the comprehensive use of federal rulemaking authority is the most effective or practical means of addressing these concerns at this time." *See, e.g.*, Letter from Michael H. Shapiro, U.S. Envtl. Prot. Agency, to Kevin Reuther & Albert Ettinger (July 29, 2011), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/Response-to-Mississippi-River-Petition-07-29-11.pdf. In other instances, despite technically denying the petition for rulemaking, the EPA has nonetheless released detailed findings and has even agreed to take alternative action. For example, in response to the petition for rulemaking from the Chesapeake Bay Foundation to Address Nutrient Pollution in the Chesapeake Bay Watershed, the EPA declined to write rules requiring numeric nutrient limits in treatment plant permits but instead entered into an agreement with all six of the Bay states requiring them to place numeric nutrient limits in wastewater treatment plant permits *See* U.S. Envtl. Prot. Agency, EPA Decision on Chesapeake Bay Foundation's Petition, *available at* http://www.cleanmywater.com/dmdocuments/General%20Information/petition.pdf.

262. *See, e.g.*, Letter from Ctr. for Biological Diversity to EPA, Sixty-Day Notice of Intent to Sue for Violation of the Clean Water Act and Administrative Procedure Act for Failure to Develop Water Quality Criteria for Black Carbon on Sea Ice and Glaciers (June 22, 2011), *available at* http://biologicaldiversity.org/programs/climate_law_institute/pdfs/BlackCarbonCWAPetition_non-response_6-22-2011.pdf.

contained even rudimentary cost–benefit discussion.[263] Because agencies would have to justify their disposition of petitions to OIRA using some form of cost–benefit reasoning, it appears reasonable to expect agencies to be more responsive to petitions that have done the legwork for them. And, if OIRA review were instituted, we believe more petitioners would prepare cost-benefit analyses.

CONCLUSION

This Article defines capture broadly, as organized groups successfully acting to vindicate their interests through government policy at the expense of the public interest. The administrative process, with its extensive transparency requirements, procedural protections for affected interests, and exposure to judicial review, can help mitigate capture risks. Private interests nonetheless expend large sums of money to influence the regulatory process, and that behavior is inconsistent with an account in which agencies act purely in the public interest free from organized special-interest pressure. Although agency capture may be overstated, it remains an important factor to be accounted for in institutional design.

The relationship between regulatory review, OIRA, and capture is a complex one. In the bureaucratic overzealousness and presidential power justification for OIRA review, capture concerns are an important undercurrent. As discussed in Part I, both of these justifications are problematic. The normative desirability of maximizing presidential control is subject to debate, and that the senior leadership at agencies is composed of political appointees means that OIRA facilitates the exercise of presidential control only occasionally. Bureaucratic tendencies may lead to both overregulation and underregulation, undermining the claim that a checking function is needed.

It is possible to disaggregate the question of capture from the traditional justifications for OIRA review to examine its independent contribution. Based on several of the institutional features of OIRA, regulatory review can help to reduce the risk of agency capture, at least in principle. OIRA's generalist nature, coordination function, use of cost–benefit analysis, and tradition of independent leadership all help promote an anticapture role. At the same time, certain features of OIRA's history and makeup undermine its anticapture potential, and

263. FOE, Petition for Rulemaking to Update the Regulation of Sewage Discharges from Large Vessels (§ 312 of the Clean Water Act), Docket No. ID: EPA-HQ-OW-2010-0126 (discussing per unit costs and comparing them to benefits); Inst. for Policy Integrity, Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act to Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels (July 29, 2009) (efficiency comparison of market-based mechanisms with traditional command-and-control regulation); Int'l Ctr. for Tech. Assessment, Petition for Rulemaking Requesting EPA Regulate Nano-Silver Products as Pesticides, Docket No. ID: EPA-HQ-OPP-2008-0650 (May 1, 2008) (mentioning requirement that agency balance risks); Wildearth Guardians et al., Petition for Rulemaking Under the Clean Air Act to List Coal Mines as a Source Category and to Regulate Methane and Other Harmful Air Emissions from Coal Mining Facilities Under Section 111 (June 16, 2010) (discussing cost-effectiveness and economic impacts).

can both expose OIRA itself to capture risk and allow regulatory review to obscure cases where the President exercises authority on behalf of parochial interests. Most importantly, by focusing nearly exclusively on agency action, OIRA carries out an ill-justified checking function, without a counterbalancing effort to stem instances of socially undesirable regulatory inaction.

To fulfill its anticapture promise, OIRA should take on a greater role in scrutinizing agency inaction. A failure to act in the face of a pressing social problem can be as costly to society as overzealous regulation: the BP Oil Spill and 2008 financial crash are stark examples of the consequences of agency inaction. Special-interest groups are just as likely—perhaps more likely—to seek deregulation, delay, and weak regulation as they are to use access to regulators to erect barriers to entry and protect themselves from competition. There is, therefore, just as much need for anticapture review of inaction as action. There are a number of difficulties associated with inaction review, but this Article proposes a relatively straightforward mechanisms—review of petitions for rulemaking—that cabins review within a relatively narrow world while leveraging information held by outside parties. An analysis of the recent petitioning practice before the EPA indicates that such review would be useful, without placing unreasonable demands on OIRA or agencies.

APPENDIX: EPA PETITIONS**

Citation	Petition Title	Petitioner	Disposition	Timeline
Pac. Envtl. Advocacy Ctr., Petition for Repeal of 40 C.F.R. § 122.3(a) (Jan. 13, 1999).	Petition for Rulemaking to Repeal Exemption Rules Related to Ballast Water	Northwest Environmental Advocates et al. (represented by Pacific Environmental Advocacy Center)	The Petition was initially denied and the petitioner subsequently filed suit. The parties reached a settlement mandating the EPA amend its prior regulation.	Jan. 1999: Petition filed Sept. 2003: Petition denied, suit filed Sept. 2006: District court rules for petitioner July 2008: Court of Appeals upholds decision Mar. 2011: Settlement reached
Int'l Ctr. for Tech. Assessment et al., Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act (Oct. 20, 1999).	Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act	International Center for Technology Assessment et al.	The Petition was initially denied and the petitioner subsequently filed suit. The case went up to the Supreme Court as *Massachusetts v. EPA*. The case resulted in the EPA finding that greenhouse gas emissions threaten public health and the environment and that emissions from new cars contribute to this threat.	Oct. 1999: Petition filed Sept. 2001: Petition denied July 2005: Court of Appeals upholds EPA decision in *Massachusetts v. EPA* Apr. 2007: Supreme Court overturns Dec. 2009: EPA releases new findings
State of N.Y. et al., Petition for Rulemaking Under 42 U.S.C. § 7409(b)(2) (Oct. 26, 1999).	Petition to Revise Secondary National Ambient Air Quality Standards	States of NY, MA, NH, CT, RI, ME, and VT	Rulemaking currently in progress.	July 1999: Petition filed Aug. 2000: Notice of Receipt July 2011: EPA issued Proposed Rule
Bluewater Network, Petition to Identify and Take Regulatory Action on Measures to Address Pollution by Cruise Ships (Mar. 17, 2000).	Petition to Identify and Take Regulatory Action on Measures to Address Pollution by Cruise Ships	The Bluewater Network (on behalf of 53 organizations)	The EPA was sued for unreasonable delay/inaction and subsequently settled. They later issued the requested Cruise Ship Discharge Report as part of the settlement.	Mar. 2000: Petition filed Aug. 2000: EPA issued white paper as partial response May 2007: EPA sued for unreasonable delay/inaction Dec. 2008: EPA issued Report as part of settlement

**Internet addresses for petitions can be located in the PDF version of this document as embedded links, available at http://www.georgetownlawjournal.org/articles/regulatory-review-capture-and-agency-inaction/.

Citation	Petition Title	Petitioner	Disposition	Timeline
Cement Kiln Recycling Coal., Petition Under RCRA Sec. 7004(a) for (1) Repeal of Regulations Issued Without Proper Legal Process and (2) Promulgation of Regulations If Necessary With Proper Legal Process (Feb. 28, 2002).	Petition Under RCRA Sec. 7004(a) for (1) Repeal of Regulations Issued Without Proper Legal Process and (2) Promulgation of Regulations If Necessary With Proper Legal Process	The Cement Kiln Recycling Coalition	The EPA issued a final rule but largely disagreed with the contents of the Petition. Petitioners subsequently filed suit which was dismissed.	Feb. 2002: Petitions filed Apr. 2004: Tentative decision released Oct. 2005: Final Rule promulgated July. 2007: Challenge suit dismissed
Bluewater Network, Petition for Rulemaking To Amend Testing and Calculation Procedures and/or Correction Factors for Fuel Economy Information Purposes (June 7, 2002).	Petition for Rulemaking To Amend Testing and Calculation Procedures and/or Correction Factors for Fuel Economy Information Purposes	The Bluewater Network	The Petition resulted in the EPA revising its existing Rule.	June 2002: Petition filed Feb 2006: Notice of Proposed Rulemaking Dec. 2006: EPA revision of Rule
Am. Mosquito Control Assoc., Petition For Rulemaking Under the Clean Water Act To Provide that the Use of a Registered Mosquito Larvicide or Adulticide Does Not Constitute the Discharge of a Pollutant from a Point Source to Waters of the United States Within the Meaning of the Clean Water Act and thus Does Not Require an NPDES Permit (Jan. 16, 2003).	Petition For Rule-making Under the Clean Water Act To Provide that the Use of a Registered Mosquito Larvicide or Adulticide Does Not Constitute the Discharge of a Pollutant from a Point Source to Waters of the United States Within the Meaning of the Clean Water Act and thus Does Not Require an NPDES Permit	American Mosquito Control Association	The EPA issued an interim statement that largely satisfied what the Petition requested.	Jan. 2003: Petition filed July. 2003: Interim Statement issued
Ctr. for Food Safety et al., Petition Seeking an Emergency Moratorium on the Land Application of Sewage Sludge (Oct. 7, 2003).	Petition Seeking an Emergency Moratorium on the Land Application of Sewage Sludge	Center for Food Safety et al.	The Petition was denied.	Oct. 2003: Petition filed Dec. 2003: Petition denied
EPA, Response to Petition from Chesapeake Bay Found. (June 13, 2005).	Petition To Amend, Issue, or Repeal Rules or Take Action To Address Nutrient Pollution from Significant Point Sources in the Chesapeake Bay Watershed	Chesapeake Bay Foundation	The Petition was denied.	Dec. 2003: Petition filed June 2005: Petition denied
Ecology Ctr. et al., Citizen Petition under TSCA To Prohibit the Production and Use of *Lead Wheel Weights* in the United States (May 13, 2005).	Petition under TSCA To Prohibit the Production and Use of Lead Wheel Weights in the United States	Ecology Center et al.	The Petition was denied.	May 2005: Petition filed Aug. 2005: Petition denied

Citation	Petition Title	Petitioner	Disposition	Timeline
State of N.Y., Office of the Attorney General, Petition for Rulemaking Under 42 U.S.C. § 7411(b)(1) Regarding Outdoor Wood Boilers (Aug. 11, 2005).	Petition for Rulemaking Under 42 U.S.C. § 7411(b)(1) Regarding Outdoor Wood Boilers	States of NY, CT, MD, MA, MI, NJ, and VT	The EPA subsequently launched a voluntary program.	Aug. 2005: Petition filed
Sierra Club, Citizen Petition to CPSC and EPA Regarding Lead in Consumer Products, Especially Toy Jewelry (Apr. 17, 2006).	Petition to CPSC and EPA Regarding Lead in Consumer Products, Especially Toy Jewelry	Sierra Club	The Petition was denied.	Apr. 2006: Petition filed July 2006: Petition denied
Nw. Coal. for Alternatives to Pesticides, Petition to Require Disclosure of Hazardous Inert Ingredients on Pesticide Product Labels (Aug. 1, 2006); Attorneys General, Petition Requesting that the United States Environmental Protection Agency Amend Its Rules Governing the Disclosure of "Inert" Ingredients on Pesticide Product Labels To Require the Disclosure of Ingredients for Which Federal Determinations of Hazard Have Already Been Made (Aug. 1, 2006).	Petition to Require Disclosure of Hazardous Inert Ingredients on Pesticide Product Labels; Petition Requesting that the United States Environmental Protection Agency Amend Its Rules Governing the Disclosure of "Inert" Ingredients on Pesticide Product Labels To Require the Disclosure of Ingredients for Which Federal Determinations of Hazard Have Already Been Made	Northwest Coalition for Alternatives to Pesticides, et al.; 15 U.S. States and Territories	The EPA issued a partial grant of the petitions and issued an Advanced Notice of Proposed Rulemaking.	May, Aug. 2006: Petitions filed Sept. 2009: Partial grant of petitions Dec. 2009: Advanced Notice of Proposed Rulemaking
FOE, Petition for Rulemaking Seeking the Regulation of Lead Emissions from General Aviation Aircraft Under § 231 of the Clean Air Act (Oct. 3, 2006).	Petition for Rulemaking Seeking the Regulation of Lead Emissions from General Aviation Aircraft Under § 231 of the Clean Air Act	Friends of the Earth	The EPA issued an Advanced Notice of Proposed Rulemaking and Friends of the Earth has filed suit for unreasonable delay.	Oct. 2006: Petition filed Apr. 2010: Advanced Notice of Proposed Rulemaking May 2011: Suit filed for unreasonable delay
Sierra Club et al., Citizen Petition to EPA Regarding Nonylphenol and Nonylphenol Ethoxylates (June 5, 2007).	Petition to EPA Regarding Nonylphenol and Nonylphenol Ethoxylates	Sierra Club et al.	The Petition was denied.	June 2007: Petition filed Sept. 2007: Suit filed June 2009: Notice of Proposed Rule
Sierra Club et al., Citizen Petition to EPA and CPSC Regarding Air Fresheners (Sept. 19, 2007).	Petition to EPA and CPSC Regarding Air Fresheners	Sierra Club et al.	The Petition was denied.	Sept. 2007: Petition filed Dec. 2007: Petition denied

Citation	Petition Title	Petitioner	Disposition	Timeline
Earthjustice et al., Petition for Rulemaking Under the Clean Air Act To Reduce the Emission of Air Pollutants from Marine Shipping Vessels that Contribute to Global Climate Change (Oct. 3, 2007); California, Petition for Rule Making Seeking the Regulation of Greenhouse Gas Emissions from Ocean-Going Vessels (Oct 3, 2007); California, et al., Petition for Rule Making Seeking the Regulation of Greenhouse Gas Emissions from Aircraft (Dec. 4, 2007); California et al., Petition for Rulemaking Seeking the Regulation of Greenhouse Emissions from Nonroad Vehicles and Engines (Dec. 4, 2007); Earthjustice et al., Petition for Rulemaking Under the Clean Air Act To Reduce the Emission of Air Pollutants from Aircraft (Dec. 31, 2007); Int'l Ctr. For Technological Assessment et al., Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Nonroad Vehicles and Engines (Jan. 29, 2008); S. Coast Air Quality Mgmt. Dist., Petition for Rulemaking Under the Clean Air Act to Reduce Global Warming Pollutants from Ships (Jan. 10, 2008).	Petitions for Rulemaking Under the Clean Air Act To Reduce the Emission of Pollutants that Contribute to Global Climate Change	Oceana, Friends of the Earth, Center for Biological Diversity, Earthjustice, People of the State of California, Connecticut, Massachusetts, New Jersey, Oregon, and the Commonwealth of Pennsylvania, The South Coast Air Quality Management District, International Center for Technology Assessment, and The Center for Food Safety	These petitions were submitted after the *Massachusetts v. EPA* ruling and were assigned one docket number by the EPA. The EPA released its findings and ultimately denied the petition.	Oct. 2007–Jan. 2008: Petitions filed July 2008: Advanced Notice of Proposed Rulemaking Dec. 2009: EPA findings released July 2011: Petitions denied
NRDC, Petition for Rulemaking Under the Clean Water Act: Secondary Treatment Standards for Nutrient Removal (Nov. 27, 2007).	Petition for Rulemaking Under the Clean Water Act: Secondary Treatment for Standards for Nutrient Removal	Natural Resource Defense Council	The EPA has not taken any action on the Petition.	Nov. 2007: Petition filed
Michael J. Dochniak, Citizen Petition under TSCA To Prohibit the Use of Hevea-Brasiliensis Natural Rubber Latex Adhesives in the United States, Wherein Said Adhesives Have a Protein Content Greater than 200 Micrograms Per Dry Weight of Latex (Feb. 26, 2008).	Petition under TSCA To Prohibit the Use of Hevea-Brasiliensis Natural Rubber Latex Adhesives in the United States, Wherein Said Adhesives Have a Protein Content Greater than 200 Micrograms Per Dry Weight of Latex	Michael J. Dochniak	The Petition was denied.	Feb. 2008: Petition filed June 2008: Petition denied
Int'l Ctr. For Technological Assessment, Petition for Rulemaking Requesting EPA Regulate Nano-Silver Products as Pesticides (May 1, 2008).	Petition for Rulemaking Requesting EPA Regulate Nano-Silver Products as Pesticides	International Center for Technology Assessment et al.	The EPA has issued a Proposed Rule.	May 2008: Petition filed June 2011: Proposed Rule published

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Minn. Ctr. for Envtl. Advocacy, Request for Response to Petition for Rulemaking Under the Clean Water Act for Numeric Water Quality Standards for Nitrogen and Phosphorus and TMDLs for the Mississippi River and Gulf of Mexico (Apr. 11, 2011).	Petition for Rulemaking Under the Clean Water Act for Numeric Water Quality Standards for Nitrogen and Phosphorus and TMDLs for the Mississippi River and Gulf of Mexico	Minnesota Center for Environmental Advocacy	The Petition was denied.	June 2008: Petition filed July 2011: Petition denied
Robert Wagner, Petition for Rulemaking Under the Clean Air Act To Monitor and Reduce the Atmospheric Discoloration of the Night Sky (Oct. 9, 2008).	Petition for Rulemaking Under the Clean Air Act Act To Monitor and Reduce the Atmospheric Discoloration of the Night Sky	International Dark-Sky Association	The Petition was denied.	Oct. 2008: Petition filed May 2011: Petition denied
Sierra Club et al., Citizen Petition to EPA Regarding Formaldehyde in Wood Products (Mar. 20, 2008).	Petition to EPA Regarding Formaldehyde in Wood Products	Sierra Club et al.	The EPA issued a Final Rule.	Dec. 2008: Advanced Notice of Proposed Rulemaking July 2010: Final Rule issued
FOE, Petition for Rulemaking To Update the Regulation of Sewage Discharges from Large Vessels (§ 312 of the Clean Water Act) (Apr. 28, 2009).	Petition for Rulemaking to Update the Regulation of Sewage Discharges from Large Vessels (§ 312 of the Clean Water Act)	Friends of the Earth	The EPA has requested stakeholder input but no further action has been taken.	Apr. 2009: Petition filed July 2010: Notice seeking stakeholder input
Ecology Ctr. et al., Citizen Petition under TSCA To Prohibit the Production and Use of *Lead Wheel Weights* in the United States (May 28, 2009).	Petition under TSCA To Prohibit the Production and Use of *Lead Wheel Weights* in the United States	Ecology Center et al.	The EPA granted the Petition but has not issued a Rule.	May 2009: Petition filed Aug. 2009: Petition granted
Inst. for Policy Integrity, Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act To Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels (July 29, 2009).	Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act To Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels	Institute for Policy Integrity	The EPA has not taken any action on this Petition.	July 2009: Petition filed
Nat'l Ctr. For Healthy Hous. et al., Citizen Petition to EPA Regarding the Paint and Dust Lead Standards (Aug. 10, 2009).	Petition to EPA Regarding the Paint and Dust Lead Standards	National Center for Healthy Housing et al.	Rulemaking currently in progress.	Aug. 2009: Petition filed Oct. 2009: Notice of Availability and Request for Comments
Ctr. for Biological Diversity, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (Dec. 2, 2009).	Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act	Center for Biological Diversity and 350.org	The EPA has not taken any action on this Petition.	Dec. 2009: Petition filed

Citation	Petition Title	Petitioner	Disposition	Timeline
Migrant Clinicians Network, Requiring that Pesticide Labels Be Available in Spanish (Dec. 15, 2009).	Petition to Require Pesticide Products to Be Labeled in English and Spanish	Migrant Clinicians Network et al.	The EPA is currently seeking comments on this Petition.	Dec. 2009: Petition filed Jan. 2010: Response Letter sent Mar. 2011: Receipt of Petition and Request for Comments
Dow Agrosciences et al., Petition For Rulemaking To Establish Procedures for the Creation and Amendment of Endangered Species Protection Bulletins (Jan. 19, 2010).	Petition for Rulemaking to Establish Procedures for the Creation and Amendment of Endangered Species Protection Bulletins	Dow AgroSciences, LLC et al.	The EPA has requested comments but no further action has been taken.	Jan. 2010: Petition filed July 2010: Notice of Availability and Request for Comments
Ctr. For Biological Diversity, Petition for Water Quality Criteria for Black Carbon on Sea Ice and Glaciers Under Section 304 of the Clean Water Act, 33 U.S.C. § 1314 (Feb. 22, 2010).	Petition for Water Quality Criteria for Black Carbon on Sea Ice and Glaciers Under Section 304 of the Clean Water Act, 33 U.S.C. § 1314	Center for Biological Diversity	The EPA has not taken any action on this Petition and the petitioner has filed a Notice of Intent To Sue.	Feb. 2010: Petition filed July 2011: Notice of Intent To Sue
Empire State Consumer Project et al., Citizen Petition to CPSC and EPA Regarding Cadmium in Consumer Products, Especially Toy Metal Jewelry (May 28, 2010).	Petition to CPSC and EPA Regarding Cadmium in Consumer Products, Especially Toy Metal Jewelry	Empire State Consumer Project et al.	The EPA has issued an Advanced Notice of Proposed Rulemaking.	May 2010: Petition filed Aug. 2010: Advanced Notice of Proposed Rulemaking
WildEarth Guardians et al., Petition for Rulemaking Under the Clean Air Act To List Coal Mines as a Source Category and To Regulate Methane and Other Harmful Air Emissions from Coal Mining Facilities Under Section 111 (June 16, 2010).	Petition for Rulemaking Under the Clean Air Act To List Coal Mines as a Source Category and To Regulate Methane and Other Harmful Air Emissions from Coal Mining Facilities Under Section 111	WildEarth Guardians et al.	The EPA has not taken any action on this petition.	June 2010: Petition filed
Int'l Ctr. for Tech. Assessment, Petition for Rulemaking Under the Clean Air Act To Reduce Greenhouse Gas and Black Carbon Emissions from Locomotives (Sept. 21, 2010).	Petition for Rulemaking Under the Clean Air Act To Reduce Greenhouse Gas and Black Carbon Emissions from Locomotives	International Center for Technology Assessment	The EPA has not taken any action on this petition.	Sep. 2010: Petition filed
Growers for ESA Transparency, Petition for Rulemaking To Establish Procedures Consistent with Section 1010 of the 1988 Amendments to the Endangered Species Act (Sep. 16, 2010).	Petition for Rulemaking To Establish Procedures Consistent with Section 1010 of the 1988 Amendments to the Endangered Species Act	Growers for ESA Transparency	The EPA has requested comments but no further action has been taken.	Sept. 2010: Petition filed Dec. 2010: Notice of Availability and Request for Comments

Citation	Petition Title	Petitioner	Disposition	Timeline
Ass'n of Global Automakers et al., Petition for Rulemaking Under the Clean Air Act To Require the Continued Availability of Gasoline Blends of Less than or Equal to 10% Ethanol (Mar. 23, 2011).	Petition for Rulemaking Under the Clean Air Act To Require the Continued Availability of Gasoline Blends of Less than or Equal to 10% Ethanol	Association of Global Automakers et al.	The Petition was denied.	Mar. 2011: Petition filed June 2011: Petition denied
Am. Bird Conservancy et al., Petition To Adopt Regulations Prohibiting the Manufacture, Processing, and Distribution in Commerce of Lead Shot, Lead Bullets, Lead Fishing Sinkers, and Other Lead-Containing Fishing Gear, Pursuant to TSCA (15 U.S.C. § 2605(a)(2)(A)(i)) (Aug. 3, 2010).	Petition To Adopt Regulations Prohibiting the Manufacture, Processing, and Distribution in Commerce of Lead Shot, Lead Bullets, Lead Fishing Sinkers, and Other Lead-Containing Fishing Gear, Pursuant to TSCA (15 U.S.C. § 2605(a)(2)(A)(i))	American Bird Conservatory et al.	The Petition was denied.	Aug. 2010: Petition filed Aug. 2010: Petition denied
Earthjustice et al., Citizen Petition Under Toxic Substances Control Act Regarding the Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production (Aug. 4, 2011).	Petition Under Toxic Substances Control Act Regarding the Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production	Earthjustice et al.	Rulemaking currently in progress.	Aug. 2011: Petition filed Nov: 2011: Notice seeking stakeholder input