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A Big Picture Approach to Presidential Influence on Agency Policy-Making

Mark Seidenfeld*

INTRODUCTION

Since President Nixon created the Office of Management and Budget (OMB)\(^1\) and authorized that office to review regulations of the newly created Environmental Protection Agency (EPA),\(^2\) there has been a lively debate about the appropriate level of presidential influence on the agency policy-making function.\(^3\) Even though environmentalists charged that OMB had usurped the EPA's policy-setting role by vetoing EPA proposed rules,\(^4\) some commentators called for a general increase in presidential oversight over agency policy-setting.\(^5\) The debate reached new heights after President Reagan issued Executive Order 12,291,\(^6\) which provided for OMB review of major rules proposed by all executive agencies, ostensibly to ensure that they were cost-justified. Some have heralded this Order, in large part for the political accountability they believed it brought to the agency policy-making process.\(^7\) Others, however, have criticized it, often on

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7. See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, White House Review of
grounds that OMB regulatory review occurs behind closed doors and lacks some of the procedural checks inherent in agency rulemaking. The debate is likely to continue because President Clinton recently modified OMB regulatory review, expanding its scope in some ways and limiting OMB’s prerogatives in others.

As is true of any difficult controversy, there is merit to both sides of the debate. The strongest claims in favor of White House regulatory review stem from agencies’ lack of coordination and direct political accountability. Proponents of greater presidential oversight argue that only the President answers to the entire electorate rather than a particular constituency. Hence, only he can be held responsible for the overall effect of any regulatory policy. Moreover, because of the President’s universal jurisdiction over all regulatory matters, he can provide a generalist’s perspective to counteract parochial views that particular agencies may develop from repeatedly regulating a single type of problem and interacting with a small set of interest groups.

Arguments against increased presidential influence of agency policymaking implicitly reflect a concern about consolidating too much power in

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Agency Rulemaking, 99 Harv. L. Rev. 1075, 1081 (1986); Peter Shane, Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No 12,291, 23 Ariz. L. Rev. 1235, 1263-64 (1981); see also Pierce, supra note 5, at 520-24 (arguing generally for increased presidential influence over agency decision-making as a means of increasing political accountability).


9. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993). The debate is likely to continue because recent Presidents have felt a need to overcome bureaucratic unresponsiveness, political opposition, inadequate knowledge, and time constraints in reaction to public demands that they solve the country’s problems. Because public expectations often exceed the President’s ability to perform, modern Presidents have tried to increase their ability to dictate regulation by creating more politicized and centralized institutions to exert control over bureaucratic decisionmaking. See Terry M. Moe, The Politicalized Presidency, in The Managerial President 135, 156 (James P. Pfiffner ed., 1991); Richard W. Waterman, Presidential Influence and the Administrative State 9-10 (1989); see also Richard P. Nathan, The Administrative Presidency 3-12 (1983) (describing the tendency of all Presidents since Franklin Roosevelt to try to control the administrative state and labeling this approach to governing the "administrative presidency").


12. See Cutler & Johnson, supra note 5, at 1405-06; DeMuth & Ginsburg, supra note 7, at 1081; McGarity, supra note 8, at 452.
PRESIDENTIAL INFLUENCE

a single branch of government. Advocates of limits on presidential control stress that such control may allow the President to undermine Congress's statutory policy. They note that OMB review circumvents the relatively open processes by which agencies make rules under the APA. Thus, they fear presidential influence will translate into back-room deal-making that will undercut the political accountability of agency policy.

Rather than directly entering the fray in the debate on whether more or less presidential influence over agency policy-making is appropriate, this Article approaches the question along another dimension by analyzing the benefits and detriments that are likely to flow from different methods of presidential influence. Ultimately, the Article contends that White House or OMB "micromanagement" of particular agency policies is ineffective and even counterproductive. Although the present administrative state begs for strong presidential guidance, behind-the-scenes interactions between the White House and agencies with respect to particular regulatory actions can exacerbate the problems of special interest influence over regulation. Instead, the President should exert influence by what I term "big picture management"—inculcating an overarching policy vision in administrative decision-makers.

13. See Colin S. Diver, Presidential Powers, 36 Am. U. L. Rev. 519, 520 (1987). The complexity and quick pace of modern society, in practice, have forced Congress to create an administrative state to make and implement regulatory policy. Because the President has greater influence over administrative agencies than over Congress and the courts, this dependence on the administrative state has translated generally into increased presidential power. See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 503 (1989).

14. Such review can allow members of OMB staff to factor their particular values into the regulatory balance along with those Congress intended to underlie the regulatory scheme. See McGarity, supra note 8, at 454, 456; Strauss & Sunstein, supra note 10, at 191-92. Even when the choice is explicitly made by the President, rather than worked out by OMB and the agency, regulatory review overrides Congress's choice that it is the agency that will perform the balancing. Oliver A. Houck, President X and the New (Approved) Decisionmaking, 36 Am. U. L. Rev. 535, 554 (1987). This argument presumes that Congress may vest decision-making authority in subordinate officials and provides that the President may not substitute his judgements for those of the designated subordinate, a proposition that most consider uncontroversial. See Philip J. Harter, Executive Oversight of Rulemaking: The President Is No Stranger, 56 U. L. Rev. 557, 563 & n.34 (1987); McGarity, supra note 8, at 465.

15. See McGarity, supra note 8, at 457; Morrison, supra note 8, at 1064.

16. See McGarity, supra note 8, at 456-57; Morrison, supra note 8, at 1067 & n.28.

17. Others have noted the connection between efficacy of presidential review of agency policy and the distinction between micro and macromanagement. See Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533, 540 (1989) (impugning macromanagement as beyond the President's capability); Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1, 24-26 (condemning both White House and Capitol micromanagement because these institutions lack the expertise of agencies and centralized micromanagement is inflexible).

18. My position is most similar to that of Peter Strauss and Cass Sunstein who concluded that "the proper ambit of the executive orders [is] to embody a general process for shaping agency policy-making, rather than a particularized process for displacing it." Strauss & Sunstein, supra note 10, at 182.
“Micromanagement” refers to White House or, more accurately, OMB review of every major agency rulemaking or policy decision, with the aim of achieving the outcome that reviewers think the President desires in each instance. Such a review process invites OMB to rebalance the factors already weighed by the agency. In contrast, “big picture management” entails presidential definition of broad goals that would influence agency policy-making without directly dictating the outcome of particular decisions. The requirement that agency policies be cost justified (i.e., a preference for economic efficiency) is one possible overarching outlook. Others might include a preference for regulation by market incentives rather than by command and control prescriptions, a call for decentralized “site specific” regulation rather than centralized uniform regulation, or a requirement that agencies place a premium on reducing risks, especially when considering health, safety, or environmental regulations.

Before setting to the analytic task outlined, it is helpful to clarify the scope within which this Article examines presidential influence on agency policy. First, the Article focuses almost exclusively on economic, health, and safety regulation, and does not seriously consider how the arguments apply to regulatory programs that provide social services and explicitly redistribute wealth. Programs within this focus often pit the desires of one discrete interest group against those of another; regulation will necessarily create winners and losers. Congress has proven itself hesitant to regulate directly in such situations. In addition, specification and implementation of health, safety, and economic regulations usually require technical scientific or economic analyses, which in turn demand an expertise that most legislators do not have. Wealth redistributing programs, in contrast, pit a class of intended beneficiaries against the general public fisc. Also, establishment and evaluation of such programs often require less technical scientific or economic analyses. Hence, Congress may be better able to monitor such programs and devise effective means for implementing them than it can for economic, health, and safety regulation.

Second, the Article limits its remarks to agency policy-setting in the context of notice and comment rulemaking, primarily because rulemaking is the avenue of policy-setting on which the White House has explicitly focused its efforts to control agencies. This does not imply that presidential influence on agency policy-making via adjudication, statements of general agency policy, or interpretations of statutes—none of which are

19. See Percival, supra note 2, at 194.

20. These differences between economic, health and safety regulation, and wealth redistribution programs do not necessarily render the big picture approach inappropriate for explicitly wealth redistributing regulation. I simply have not considered the approach as applied to redistributive regulation and hence have reached no conclusion regarding its propriety in the redistributive context.

21. See Exec. Order No. 12,866, § 3(e), 58 Fed. Reg. 51,737-38 (1993) (defining “regulatory action” as “any substantive action by an agency... that promulgates or is expected to lead to the promulgation of a final rule or regulation”).

1994
governed by notice and comment procedures—is any less significant.\textsuperscript{22} But issues such as the need for independence in making factually laden determinations in adjudicatory settings complicate the question of how, if at all, the President should go about influencing adjudicatory decisions.\textsuperscript{23} Also, concerns about presidential influence encouraging policies aimed at appeasing special interest groups increase once the background of a subsequent rulemaking proceeding and judicial review is removed. Thus the absence of these checks raises a host of additional issues that, although interesting, lie beyond the scope of this Article.\textsuperscript{24}

This Article begins by analyzing in greater detail the need for presidential oversight of agency policy-making. It then considers presidential micromanagement as a means of providing such oversight, and explains why such micromanagement is problematic. The Article goes on to argue that a big picture approach to presidential influence provides the needed presidential oversight of agency policy-making in a manner that is likely to minimize the potential detriments of presidential control. Finally, the Article uses the big picture versus micromanagement dimension to evaluate the current presidential regulatory review program and, where appropriate, suggests modifications to that program.

I. THE NEED FOR PRESIDENTIAL OVERSIGHT

A. Failure of Congressional Oversight

The need for presidential oversight of agency policy-making stems from the nature of the modern administrative state and Congress’s inability to monitor effectively such policy-making after the fact. Today the role of government extends beyond mere protection of private property and provision of enforcement mechanisms for private agreements. Most citizens expect the federal government to regulate private markets when they are characterized by imperfections or externalities,\textsuperscript{25} to prohibit activities that threaten public health and welfare,\textsuperscript{26} and generally to create opportunities...

\textsuperscript{22}At least one commentator has noted that some of the arguments regarding the propriety of presidential influence of agency policy apply as well to policy-setting via adjudication. See McGarity, supra note 8, at 448-49 (noting that the coordination of agency policy applies equally well to policy set by adjudication, and therefore does not imply a presidential right to extensive ex parte intervention into particular administrative proceedings).

\textsuperscript{23}Cf. Bruff, supra note 11, at 454 n.11 (contending that the lack of procedural protections for rulemaking compared to formal adjudication calls for greater presidential influence in the rulemaking process).

\textsuperscript{24}Although much of my analysis is relevant to the propriety of presidential influence outside the substantive rulemaking context, in general, concerns about independence of adjudicatory decision-makers and lack of procedural and judicial checks over other methods by which agencies establish policy would lead to a conclusion that greater restrictions on presidential influence are needed outside the rulemaking paradigm.

\textsuperscript{25}For a description of the types of market imperfections that justify government regulation, see Stephen Breyer, Regulation and its Reform 15-35 (1982).

\textsuperscript{26} Statutes that aim to prevent pollution and to ensure safe workplaces, for example, fall...
This expansive federal role entails the government setting policies on many complex regulatory matters and often requires a quick governmental response to regulatory problems. Unfortunately the legislative process is cumbersome and geared toward political deal-making rather than definition of coherent policy. Thus, it may be impossible for Congress to achieve its regulatory goals by enacting detailed statutory prescriptions; Congress may have to delegate broad policy-setting discretion to agencies, which it may not be able to control. Some recent attempts by Congress to control agency discretion by detailed statutory prescription—most notably those directing EPA action—illustrate the potential problems with this approach to legislative control over regulatory policy. Legislators tend to promise to meet the electorate’s aspirations without seriously considering the costs of doing so. Hence, when Congress dictates detailed policy it often promises the impossible and fails to fund adequately the programs it establishes.

within this category of expected federal activities. See, e.g., 42 U.S.C.A. § 7401 (West Supp. 1994) (stating that the primary goal of the Clean Air Act is preventing pollution); 29 U.S.C.A. § 651 (West 1985) (stating the purpose of the Occupational Safety and Health Act).

27. Reducing unemployment, assuring equal opportunity in employment and education, supporting education and research, and funding public works projects are examples of government programs to expand individual opportunities for fulfillment. See Roads to Reform, supra note 5, at 68; DeMuth & Ginsburg, supra note 7, at 1077.

28. Bruff, supra note 17, at 542-43 (arguing that the fragmented and nonhierarchical nature of Congress makes it ill-suited to coordinate policy); DeMuth & Ginsburg, supra note 7, at 1077 (asserting that the legislative process is too cumbersome and inefficient to allow Congress to supervise present day regulatory activities).


31. See William Ruckleshaus, Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad, 15 Envtl. L. 455, 460 (1985) (noting the prescriptive nature of environmental laws). Congress’s approach to control of environmental policy is more the exception than the rule. This exception may reflect several inherent aspects of environmental law; it may reflect as well a distrust of White House attempts to micromanage policy delegated to the EPA under initial environmental legislation. See Lazarus, supra note 29, at 221-26.

32. See Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal
Statutory action-forcing mechanisms meant to coerce agencies to deliver these promises, such as deadlines for adopting regulations and citizen suit provisions, leave agency agendas vulnerable to efforts by particular interest groups that may not have the public interest at heart. Thus the EPA, for example, often finds itself prioritizing its regulatory programs based on pressures from members of Congress, whose constituents may have a peculiar environmental concern, or lawsuits by environmental groups that also have their unique peeves, rather than according to objective assessments of which regulations are likely to provide the greatest benefit. Detailed statutory prescription of policy does not appear to be the panacea for the country’s regulatory woes.

Moreover, even when the legislature means to constrain agency policy-setting tightly by statute, pragmatic considerations may lead Congress to leave the agency significant discretion. Congress frequently does not have sufficient information to prescribe an effective policy when it adopts legislation aimed at alleviating a particular problem. Congress also is unlikely to have the expertise to write statutory provisions governing the details of regulatory policy in the myriad of regulatory contexts that arise. In addition, statutory prescriptions, once enacted, are not easily changed. Hence, detailed statutory provisions may become outdated or a consensus may develop that they are unwise, yet they may remain on the books.

Environmental Law, 54 Law & Contemp. Probs., Autumn 1991, at 311, 313. For a detailed description of the numerous deadlines and requirements placed on the EPA and the dearth of funding with which to meet them, see id. at 323-30.


34. This has led one scholar to conclude that “[i]t is hard to imagine a worse way to apportion agency resources.” R. Shep Melnick, Administrative Law and Bureaucratic Reality, 44 Admin. L. Rev. 245, 250 (1992).

35. Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, The Nation’s Hazardous Waste Management Program at a Crossroads 8-9 (1990); Lazarus, supra note 29, at 230. The ability of interest groups to sue the EPA for failing to meet impossible deadlines has given these groups leverage to negotiate “consent decrees” with the agency and thereby dictate aspects of substantive policy as well as the EPA’s agenda. See Lazarus, supra note 32, at 334.

36. See Shapiro, supra note 17, at 25 & n.178.

37. In terms of agency theory, this is a particular example of a principal realizing that although it “can avoid agency losses by limiting an agent’s discretion, . . . this step can also make it more difficult for the agent to serve the principal’s interest.” Shapiro, supra note 17 at 4. See also Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org., Fall 1987, at 243, 256-57.

38. See Lazarus, supra note 29, at 228 (noting that sufficient information to develop environmental regulation may not exist when Congress first calls for such regulation).

39. As William Eskridge has phrased it: “[G]aps and ambiguities exist in all statutes. . . . As society changes, adapts to the statute, and generates new variations of the problem which
hindering effective regulation. Perhaps for this reason, even when Congress has sought to control regulatory policy explicitly by statute, it frequently has done so by mandating regulatory deadlines or results that the agency must achieve rather than by directly specifying mechanisms to achieve the statutory goals. In choosing such mechanisms, an agency still may have to balance potentially conflicting values that Congress has identified as relevant to the statutory scheme, but for which Congress has given no prescription about how to factor into particular regulatory decisions.4 More disturbingly, in practice, an agency operating under detailed statutory prescriptions may still be forced to import its own value choices into those the statute explicitly makes relevant. For example, regardless of the detail with which statutes prescribe policy, if Congress does not appropriate sufficient funding for full implementation, an agency will have to make trade-offs between the regulatory programs it administers.2

In other words, the size and complexity of the government's regulatory role make it impossible for Congress to set forth sufficiently detailed criteria in statutes that would both dictate regulatory decisions in particular contexts and still be sufficiently flexible to allow wise and efficient regulation.4 Pragmatically, Congress is forced to grant agencies

40. Frustration with the inefficacy of statutory deadlines for regulation and citizen suit enforcement has prompted a novel type of action-forcing mechanism—the hammer provision. A hammer provision does specify detailed regulatory requirements, but these only take effect if the agency does not itself regulate by a prescribed deadline. See Percival, supra note 2, at 152-53; see also Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6921(d)(8) (1988); Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C.A. § 2644 (West Supp. 1994). A hammer provision thus leaves the agency discretion to generate a regulatory scheme in the first instance, but threatens the agency with forfeiture of that discretion should the agency fail to comply with the statutory deadline.

41. See Barksdale, supra note 8, at 285 (providing examples of statutes that require the agency to exercise discretion in balancing statutory "values").

42. For example, chronic under-funding of the EPA has contributed to that agency's inability to implement much of what is already required by environmental statutes. See Percival, supra note 2, at 202. Faced with such under-funding, deadlines for regulations cannot cure the problem; the EPA is simply forced to choose the statutory deadlines with which it will comply. See Lazarus, supra note 29, at 230. Action-forcing mechanisms such as citizen suits may constrain agency discretion, but only by forcing the agency into an entirely reactive posture that discourages the agency from rationally prioritizing its regulatory agenda. Perhaps most importantly for this Article, even action-forcing mechanisms leave the agency broad discretion about how to implement the regulatory schemes it chooses to address.

43. Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369, 395 (1989); see also Glicksman & Schroeder, supra note 30, at 251 (noting that when Congress engages in specifying detailed policy, it tends to enact provisions that essentially codify raw political deals between competing interest groups). For analyses of the deleterious effects of statutory specification of deadlines or detailed solutions in particular regulatory
much policy-setting discretion. Unless there is some constraint other than detailed statutory prescription to keep agency regulations consistent with the values of the polity, such broad delegation of policy-setting functions runs counter to the principle that the government should rely on democratic processes to define fundamental policy.

At the outset, it is helpful to note that judicial review of agency decision-making pursuant to broad statutory delegations is unlikely to provide the needed constraint. To review agency decisions meaningfully, ensuring they comport with the polity's values, judges would have to determine the appropriate balance of values that underlie the statute. But the problem arises precisely when Congress has not indicated how that balance is to be struck. Hence, courts would have to import their own notions of the values that appropriately underlie the statute. This does not solve the problem because the counter-majoritarian courts are shielded from electoral accountability to a greater extent than the agency. Judicial review can at best ensure that the agency thought hard about its decision, reasoned logically, and stayed within the permissive bounds of discretion set by the statute; it cannot legitimately reverse the agency for failing to comport with judges' ideas about the polity's values.

That the judiciary's lack of political accountability renders it unable to provide the necessary constraint suggests that congressional monitoring of agency decisions after the fact might better constrain agency policy. Although Congress cannot write sufficiently detailed yet flexible statutes to constrain agency decision-making \textit{ex-ante}, the legislature has several other means of influencing agency policy. For example, Congress can overrule, \textit{ex-post}, agency policies with which it disagrees. More pragmatically, members of Congress can communicate their views about the meaning of a statute and how it should be implemented in formal congressional hearings and by informal contacts. Congress can also threaten to decrease agency appropriations if an agency persists in implementing a
policy with which enough influential legislators disagree.\textsuperscript{48}

Although congressional monitoring and after-the-fact restraints provide an important check on agency decision-making,\textsuperscript{49} congressional review, like judicial oversight, suffers from some shortcomings.\textsuperscript{50} Such review is especially inadequate if we would like agency regulation to provide a coherent framework aimed at furthering some notion of the public interest rather than merely to accommodate concerns of powerful special interest groups.\textsuperscript{51}

One problem with legislative review after the fact is its inability to generate a coherent policy agenda. Congressional decision-making is extremely fragmented;\textsuperscript{52} Congress addresses many diverse issues that are introduced by legislators with particular goals often not shared by any majority.\textsuperscript{53} Therefore it is not surprising that the legislative process is geared toward building coalitions by structuring compromises and deals often regarding items that are entirely unrelated.\textsuperscript{54} If we desire coherent regulatory policies rather than raw political deals, we should not look to Congress to generate them. Congress is better suited to react to executive proposals, thereby ensuring that such proposals are acceptable to a sufficiently broad cross-section of the electorate.\textsuperscript{55} Only by assuming this

\begin{itemize}
\item \textsuperscript{48} Appropriations committees tend to be more aggressive than committees with substantive assignments in proactively monitoring agency programs. \textit{See} Aberbach, supra note 47, at 94; Leloup, infra note 60, at 109; \textit{see} also Bernard Rosen, Holding Government Bureaucracies Accountable 62-64 (2d ed. 1989)(discussing the appropriations process as a means for oversight generally); 2 Senate Comm. on Government Operations, 2 Study on Federal Regulation: Congressional Oversight of Regulatory Agencies, S. Doc. No. 95-26, 95th Cong., 1st Sess. 42 (1977) (describing the appropriations process as "the most potent form of Congressional oversight").
\item \textsuperscript{49} \textit{See} Seidenfeld, supra note 46 at 1551-73.
\item \textsuperscript{50} \textit{See} Jeremy Rabkin, Micromanaging the Administrative Agencies, 100 Pub. Interest, Summer 1990, at 116, 120; \textit{see} also Aberbach, supra note 47, at 200-01 (concluding that congressional oversight is effective for "correcting errors directly affecting the... organized... citizenry and improving policy at the margins," but is uncoordinated and responsive only to the most vociferous interest groups); Ogul, supra note 47, at 329-30 (blaming shortcomings in congressional oversight on lack of incentives for congress-persons to engage in meaningful oversight).
\item \textsuperscript{51} \textit{See} Lazarus, supra note 29, at 220 (noting the relationship between congressional oversight and demands of special interest groups); id. at 224 (describing how the division of congressional oversight of the EPA between various committees results in inconsistent messages from Congress).
\item \textsuperscript{52} \textit{See} Bruff, supra note 17, at 542-44 (detailing how the rise of the subcommittee system has made it more difficult for Congress to coordinate regulatory policy); Lazarus, supra note 29, at 230.
\item \textsuperscript{53} \textit{See} Aberbach, supra note 47, at 200.
\item \textsuperscript{54} In some cases, Congress may not be able to work out a deal even when there is general consensus that a regulatory response to a problem is needed. Robert Percival has suggested that this is often the case for environmental regulation because Congress simply will not take the heat for the authorizing regulation that harms any significant interest group. Percival, supra note 2, at 194-95.
\item \textsuperscript{55} According to an ABA Report, "the most appropriate and effective role for Congress is to review and, where necessary, to curb unwise presidential intervention [into regulation]."
\end{itemize}
reactive posture will congressional action end up oriented toward the public interest.56

Another pervasive weakness of congressional review arises because Congress is not well structured to monitor and appropriately correct agency policy decisions that implement discretion-granting statutes. Effective monitoring of implementation depends on maintaining day-to-day awareness of regulatory matters, and requires collection and analysis of voluminous quantities of information, much of which is often technical in nature.57 Because Congress as a whole cannot provide sufficient monitoring, it delegates that task to congressional committees and, more frequently, to subcommittees.58

The smaller size and focused interests of congressional committees allows them greater influence over agency policy than can be exercised by Congress as a whole. The influence of committees, however, is limited by their need to resort to action by the entire legislature to enforce any threats they make, and therefore to accommodate a variety of political viewpoints.59 In addition, a particular agency may be subject to oversight by several committees which have competing goals.60 This limits the ability of congressional committees to ensure that agency policies are coherent.

To the extent that committees can influence agency policy, such influence is unlikely to embody any conception of the public interest. Committee influence over agency policy may not reflect the desires of the entire Congress.61 Members of Congress often are assigned to committees

Roads to Reform, supra note 5, at 73.


58. See Aberbach, supra note 47, at 79; Lazarus, supra note 29, at 209; see also Lawrence G. Dodd & Bruce I. Oppenheimer, The House in Transition: Change and Consolidation, in Congress Reconsidered 31, 41-43 (Lawrence Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981) (noting the trend toward greater reliance on subcommittees, especially in the House of Representatives). Henceforth, I use the term "committees" to refer to both committees and subcommittees.

59. See Shapiro, supra note 17, at 14.

60. For example, substantive oversight committees are known for pushing their positive regulatory agendas while appropriation committees play the precise opposite role by pressuring agencies to cut their regulatory budgets. See Lance T. Leloup, The Fiscal Congress: Legislative Control of the Budget 108-09 (1980); Allen Schick, Congress and Money: Budgeting, Spending and Taxing 416 (1980); see also Morris S. Ogul, Congress Oversees the Bureaucracy: Studies in Legislative Supervision 183-85 (1976) (citing several examples in which different oversight committees had conflicting goals on an issue).

61. This problem with committee oversight has been pithily phrased as resulting from Congress "act[ing] through a fraction that may be a faction." Arthur MacMahon, Congressional Oversight of Administration: The Power of the Purse, in Legislative Politics 185, 196 (Theodore Lowi ed., 2d ed. 1965); see also Farina, supra note 13, at 510; Lazarus, supra note 32, at 356-57; Shapiro, supra note 17, at 15.
that they request because their district has some peculiar interest in the
matters with which the committee deals. Hence, committee members are
often motivated by concerns different from, and sometimes even at odds
with, the concerns of the general public. In addition, committees
themselves depend on knowledgeable and dedicated staff members, who in
turn often depend on agencies and representatives of focused interest
groups (e.g., regulated entities) to provide them with information and
analyses. Thus, the committee system biases congressional responses
toward acceding to special interest demands and reaffirming agency policy
choices. In other words, the interdependence between congressional
committees, regulated entities, and regulating agencies undercuts the
ability of Congress as an institution to constrain agency policy to comport
with generally held values.

B. Presidential Oversight as a Cure

The executive does not share the institutional barriers to action that
limit congressional oversight of agency policy. The executive is
hierarchically arranged, which allows more efficient flow of information
and analyses to the ultimate decision-maker. That decision-maker,
whether it be the President or an official to whom he has delegated the
task, can act unilaterally and therefore expeditiously. Thus, if any single
institution is well suited for monitoring overall government policy, it is the
White House.

Unlike the courts and even the agencies themselves, the President is

62. See Kenneth Shepsle, The Giant Jigsaw Puzzle: Democratic Committee Assignments in
the Modern House 231-38 (1978); Ronald M. Levin, Administrative Discretion, Judicial
Review, and the Gloomy World of Judge Smith, 1986 Duke L.J. 258, 272; see also Irwin N.
Gertzog, The Routinization of Committee Assignments in the House of Representatives, 20
Am. J. Pol. Sci. 693, 704 (1976) (noting about two-thirds of freshman representatives in the
89th-91st Congresses were appointed to committees they most preferred, and over 90% got
the committee assignments they desired by their fifth year).

63. See J. Leiper Freeman, The Political Process: Executive Bureau - Legislative Committee
Relations 26-27 (1965); Shepsle, supra note 62, at 259-60.

64. In fact, this has led political scientists to posit the regulatory iron triangle that they
say leads to agency capture with the congressional committees, the regulating agency, and
the regulated industry each making up one leg of the triangle. See Gordon Adams, The Iron
Triangle: The Politics of Defense Contracting 24-26 (1981); Harold Seidman, Politics, Position
and Power: The Dynamics of Federal Organization 41 (2d ed. 1975); Aaron B. Wildavsky, The

65. See Dodd & Oppenheimer, supra note 58, at 49; Harter, supra note 14, at 570;
Seldenfeld, supra note 46, at 1567.

66. See Bruff, supra note 17, at 554 ("Only the executive branch, with its hierarchical
organization, has the capacity to formulate a consistent set of instructions to the bureaucra-
cy.").

67. See McGarity, supra note 8, at 452; see also Cutler & Johnson, supra note 5, at 1411
(reasoning that the President can act more expeditiously than Congress in formulating and
articulating national policy goals).
directly elected and hence politically accountable. Thus, we should expect presidential influence on agency decision-making to constrain agency policy to conform to democratically determined values. Furthermore, the President is the unique official who is answerable to the entire electorate. Consequently, the President stands to pay a price if his policies benefit special interest groups to the detriment of society as a whole.

Finally, because the President’s jurisdiction is universal, he must maintain a generalist’s perspective that allows him to recognize when various agencies’ policies act at cross-purposes. He has the incentive to coordinate the policies of various agencies, each of which may be responding to its unique perspective and peculiar constituency. Moreover, the White House may be the only governmental institution capable of successfully coordinating government policy and creating a coherent agenda because only the President has the political base necessary to pressure Congress and the agencies to follow his lead on a wide variety of issues. In sum, presidential influence is crucial to keeping agency policies politically accountable because the White House is the only institution with the structure, incentives, and power to perform the job with an eye towards the public interest.

II. PROBLEMS WITH THE MICROMANAGEMENT APPROACH TO PRESIDENTIAL INFLUENCE OF AGENCY POLICY

Having concluded that the President has an important role in influencing agency policy-setting, how he should play that role remains an open question. The first tenet of the “big picture” thesis asserts that the President should not try to micromanage agency policy by having the White House substitute its decision for that of the agency regarding specific regulations. As argued in detail below, such micromanagement is unlikely to result in effective implementation of the President’s policy preferences and is instead likely to encourage special-interest-oriented regulation.

68. See Pierce, supra note 5, at 520-21.
69. Strauss & Sunstein, supra note 10, at 190.
70. See Harter, supra note 14, at 566-67; see also James C. Miller III et al., A Note on Centralized Regulatory Reform, 43 Pub. Choice 83, 86 (1984) (arguing that centralized regulatory oversight would decrease the control exercised by concentrated (i.e., special) as opposed to diffuse (i.e., public) interest groups); cf. Strauss & Sunstein, supra note 10, at 190 (noting that only the President, “by virtue of his accountability and capacity for centralization, is able to energize and direct regulatory policy”).
71. See Roads to Reform supra note 5, at 163 (separate statement of Judge Henry Friendly).
72. See Diver, supra note 13, at 521; cf. McGarity, supra note 8, at 448 (noting that the President’s position at the apex of the bureaucratic hierarchy facilitates his coordination of regulatory policy).
A. Problems of Efficacy and the Potential for a Runaway OMB

Although at first glance White House review of every major agency decision would seem to allow the President greater control over agency policy, a closer look at the reality of such review raises some doubts about whether that is true. The President and his close personal aides cannot directly review all or even any significant portion of agency rulemaking decisions. He must delegate that task to low-level staff members whom the President may not know at all, and trust that they will forward to him those few cases that warrant his personal attention. Thus, not surprisingly, every President in the last twenty years has relied on OMB for the first line of agency rulemaking review. Although the President has somewhat more control over the make-up of OMB staff than agency staff, this difference in control does not lead ineluctably to greater control over low-level OMB decisions; other weaknesses in the OMB review process may more than offset any effect from greater control over personnel.

One limit on the potential for OMB review to ensure that agency regulations are consistent with the President's view of the public interest is OMB's lack of expertise regarding the regulatory matters it reviews. The President can exercise greater control over the make-up of OMB staff largely because the staff is much smaller than that of the agencies it tries to constrain. OMB does not have the personnel or resources to develop the knowledge or the data necessary to analyze independently most agency proposed rules. Although some see the reviewers' task merely as asking the questions "that a sophisticated layman would ask," to perform even

73. Even before White House review of agency decisions matured, political scientists had recognized "[t]he problem of a White House staff grown beyond the personal attention of a President." Stephen Hess, Organizing the Presidency 158-59 (1976).
75. See Percival, supra note 2, at 180.
76. See Thomas D. McGarity, Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy 18-22 (1991); Percival, supra note 2, at 128.
77. "In fact, these executive interveners [such as OMB] are themselves part of the administrative bureaucracy and, as such, present the same type of monitoring and control problems (agency cost problems in the vernacular of public choice theory) as the agencies they seek to influence." Robinson, supra note 74, at 102; see also Percival, supra note 2, at 139 (noting that President Ford decreased OMB's practical ability to influence regulations because of concern that OMB was moving into departments at "too low a level").
78. See Bruff, supra note 17, at 557 (noting that the inconsistency of OIRA review is exacerbated by the lack of formal training programs or written directions for low-level reviewers). But cf. Diver, supra note 13 at 531 (asserting that OMB staff "are as close to the President in perspective and preferences as any group of appointed officials is likely to be").
80. See Senate Comm. on Environment and Public Works, OMB Influence on Agency Regulations, 99th Cong., 2d Sess. 19 (1986); Bruff, supra note 17, at 558; Morrison, supra note 8, at 1067.
81. DeMuth & Ginsburg, supra note 7, at 1083-84; see also Bruff, supra note 17, at 557
this task OMB depends on data and analyses from outsiders. Most often OMB obtains these data and analyses either from focused interest groups who monitor the agency or from the agency itself. In the former instance, OMB's influence might exacerbate the problem of special-interest-oriented regulation; in the latter instance, OMB's ability to constrain agency discretion may be compromised. In short, the same shortcomings that result from congressional committees' needs for information also plague OMB review and limit the efficacy of such review.

Without further empirical analyses of the effects of OMB attempts to micromanage agency rulemaking decisions, it is difficult to assess the extent of this information-based limitation. The few anecdotal analyses that have been done, however, indicate that the limitation is significant. For example, out of five examples of regulatory review studied by Professor Tom McGarity, two manifest evidence that OMB's inability to rebut agency-provided analyses limited the effectiveness of its review.

The first example involved the EPA's lead phase-down regulations for gasoline. In 1981, OMB and then Vice President Bush's Task Force on Regulatory Relief pushed the EPA to scale back its proposed regulations for decreasing the amount of lead in gasoline. Using Executive Order 12,291's cost benefit standard as the excuse for regulatory relief, the EPA was asked to revisit its proposed time frame for the lead phase-down. Although the EPA did not prepare a formal regulatory impact statement, its cost-benefit analyses not only supported retention of the original EPA rule, but also suggested that a stricter rule was warranted. “Ultimately, even OMB and the Bush task force acquiesced in a standard that was more
stringent than the standard that the task force had originally wanted to repeal."87

The second example involved the Department of Agriculture’s regulation of mechanically separated meat.88 In 1982 the Department amended regulations that had required meat packers to list the percentage of powdered bone prominently on the front of packages of mechanically separated meat.89 Despite an independent market survey concluding that this information would make a difference to a significant number of consumers, the Regulatory Impact Analysis failed to include this loss of information as a cost of the amendment, and OMB’s Office of Information and Regulatory Affairs (OIRA) analysts failed to spot this omission.90

Even if OMB would not have to rely on outsiders for most of the information it uses in reviewing agency decisions, it might still be ineffective at ensuring that agencies implement the President’s policies. OMB exerts much of its influence via low-level OIRA desk officers who screen proposed agency rules.91 Because the President cannot easily monitor this screening process, he cannot be confident that the input of low-level reviewers reflects his own outlook.92 To the extent that these reviewers add any coherent pressure on government policy,93 such pressure is likely to reflect OIRA’s own institutional biases. Because OIRA sees its job as checking overzealous regulators, its reviewers are apt to discount the benefit of government intervention.94 Overall, one might

87. Id. at 44.
88. For a general description of the Department of Agriculture’s efforts to regulate mechanically separated meat, see McGarity, supra note 76, at 72-88.
89. Standards and Labeling Requirements for Mechanically Separated (Species) and Products in Which It Is Used: Final Rule, 47 Fed. Reg. 28,214, 28,222 (1982).
90. McGarity, supra note 76, at 86-87. Despite the amendment, food processors did not buy mechanically separated meat (MSM) apparently fearing that consumers would hesitate to buy a product that listed MSM anywhere as an ingredient. In 1987, at the prodding of several sausage companies, the Department of Agriculture proposed an additional amendment allowing sale of products containing less than 10% MSM without any indication that they contained MSM (even in the list of ingredients). OMB objected to this second amendment on grounds that it would impose the cost of lost information about the product on consumers, and the Department never proceeded to adopt the amendment. McGarity, supra note 76, at 84-85.
91. See Bruff, supra note 17, at 557.
92. See Margaret Gilhooley, Executive Oversight of Administrative Rulemaking: Disclosing the Impact, 25 Ind. L. Rev. 299, 311 (1991); McGarity, supra note 8, at 451, 455; Percival, supra note 2, at 182; Robinson, supra note 74, at 102.
93. Because of the individual nature of each desk officer’s review, OIRA review may not exert any coherent pressure. See Bruff, supra note 17, at 557 (noting the decentralized nature of OIRA review).
94. See Bruff, supra note 17, at 552-53 (noting that attitudes due to OMB historically being the skeptical reviewer of budget requests probably carry over to OIRA’s supervision of rulemaking); McGarity supra note 76, at 287; Percival, supra note 2, at 181; Strauss & Sunstein, supra note 10, at 191-92; see also George C. Eads & Michael Fix, Relief or Reform? Reagan’s Regulatory Dilemma 49 (1984) (noting that the Nixon OMB “at times press[ed] its own institutional interests (which generally were opposed to the EPA’s”).
thus expect that OMB interference in particular regulatory actions would impose procedural hurdles and delays, and generally would discourage any positive regulatory agenda.

Again, the data needed to evaluate this expectation are limited. It appears that OMB review under President Reagan did not result in more efficient regulation; it merely made adoption of positive regulation more difficult, which is consistent with the posited OMB bias. Unfortunately, although the ostensible goal of regulatory review by the Reagan OMB was efficiency, deregulation was clearly an unstated goal. Thus, while Reagan’s review program failed to achieve its stated objective, it may have been effective nonetheless. Evidence from the Carter administration’s regulatory review program may be more enlightening. Although President Carter’s program was more limited than President Reagan’s and did not appear aimed at deregulation, it too indicates some propensity for OMB review to discourage regulation.

The reactive nature of executive micromanagement of agency policy limits the efficacy of such review in yet another manner: Reactive management by itself cannot ensure coherence of various agencies’

95. See Morrison, supra note 8, at 1064; Percival, supra note 2, at 159. According to the National Academy of Public Administration, the “clearest impact of the regulatory management process has apparently been in slowing down rulemaking activities.” Nat’l Acad. Pub. Admin., Presidential Management of Rulemaking in Regulatory Agencies 7 (1987) [Hereinafter “NAPA Report”].

96. See Percival, supra note 2, at 159; see also id. at 161 (noting that it is not surprising regulatory review has made EPA promulgation of regulations more difficult, but what is surprising is “the dearth of evidence to suggest that regulatory review has resulted in truly significant improvements in EPA regulations”); Strauss & Sunstein, supra note 10, at 192 (arguing that OMB review may lead to an “undue anti-regulatory bias”). I do not mean to imply that the goal of minimizing the costs of regulation is invalid, and its validity suggests to me that there is some place for OMB input in the regulatory process. I do mean to say, however, that one cannot trust OMB reviewers necessarily to share the President’s outlook on a particular regulatory question, and that therefore the means by which OMB input is factored into regulatory decisions must be carefully structured.

97. See Percival, supra note 2, at 161.

98. See id. at 150-54; McGarity, supra note 76, at 282-83, 286-87.

99. See Houck, supra note 14, at 540; Percival, supra note 2, at 150, 184. The same ambiguous conclusions seem to apply to regulatory review under the Bush administration. See id. at 155.

100. That detailed OMB review of agency rules might have effectively implemented President Reagan’s deregulatory agenda does not imply that this micromanagement technique would work for other policy visions. OMB’s bias against regulation together with the added costs imposed by OMB review on positive regulation suggest that the policy goal of deregulation is a special case for which a micromanagement approach might be effective. Nonetheless, Robert Percival has expressed doubt that the program was successful even if viewed as a mechanism for providing regulatory relief to industry. Percival, supra note 2, at 184.

101. See id. at 146-47. There is also evidence that the less comprehensive regulatory review programs of Presidents Nixon and Ford also tended to discourage regulation. See id. at 135 (describing effects of Nixon’s “Quality of Life” (QOL) review program); id. at 141 (same for Ford administration use of QOL review).
regulatory agendas. Agencies plan their agendas without serious consideration of the actions of their sister departments. Hence, the planned regulations of one agency may not dovetail with those of another. The regulatory review programs of several recent presidents have attempted to alleviate this problem and beginning with President Reagan, all presidents have required each executive agency to submit an annual regulatory plan for OMB review. This requirement is meant to enable OMB to flag planned regulations that are at odds with proposed regulations of other agencies or with the administration's overall policies.

This mechanism, however, will encourage coherent regulation only if OIRA reviewers can ascertain how a particular regulation relates to the administration's policy vision. Even then, a coherent policy agenda might emerge only if the President can hold OMB reviewers accountable to that vision. If the President does not announce any overarching policy themes, OMB review of agency annual plans can only prevent agencies from adopting inconsistent regulations, which does not encourage the agencies initially to create their regulatory agendas with any coherent regulatory picture in mind. Thus, OMB review of agency annual plans may be effective at preventing two agencies from imposing conflicting requirements on regulated entities, but regulations whose goals are in tension with the administration's unstated policy outlook are bound to slip through OMB's regulatory sieve.

Finally, there is some evidence that micromanagement of agency decision-making by OMB played a role in Congress's recent attempts to rein in agency policy-setting discretion. Although Congress appears most likely to react adversely to presidential micromanagement when

102. See Exec. Order No. 12,498, § 1, 3 C.F.R. 323 (1985) (governing Presidents Reagan's and Bush's regulatory review programs); Exec. Order No. 12,866, § 4(c), 58 Fed. Reg. 51,738 (1993) (governing President Clinton's regulatory review program; requiring both executive and independent agencies to prepare a "Regulatory Plan").

103. Thus, § 2(b) of Executive Order 12,866 justifies the OMB as "necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency." Regulatory Planning and Review, 58 Fed. Reg. 51,737. See also Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (preamble stating purpose as, among other things, to establish Administration regulatory priorities and avoid duplication and conflict in regulations).

104. Cf. Percival, supra note 2, at 180, 183-84 (criticizing Reagan's regulatory review program as aimed at easing regulation on industry rather than on coordinating regulations of various agencies).

105. See Eads & Fix, supra note 94, at 256-57; Nat'l Acad. Pub. Admin., Congressional Oversight of Regulatory Agencies: The Need to Strike a Balance and Focus on Performance 29-30 (1989); Percival, supra note 2, at 175-76; Shapiro, supra note 17, at 16. Some commentators have expressed the belief, however, that Congress was reacting more to the overall hostility of the Reagan Administration to protection of the environment, regardless of whether that hostility was pursued via micromanagement of the EPA. See, e.g., Glicksman & Schroeder, supra note 30, at 307.
different parties control the White House and the Capitol, some adverse reaction occurred during the Carter Administration, demonstrating that the phenomenon is not limited to times when the federal government is divided. To the extent that executive micromanagement triggers statutory limitations on agency discretion or prompts congressional attempts to micromanage agency policy by committee oversight, it ultimately decreases the President's ability to channel agency regulations towards the outcomes he desires.

B. Problems of Interest Group Politics and Insider Influence on Regulatory Policy

Although the President is directly accountable to the entire electorate, imperfections in the political process and voter psychology may permit the President to reap rewards by dictating particular regulatory outcomes to benefit special interest groups. Public choice theorists' accounts of collective action suggest that political action may be biased in favor of smaller groups with more focused interest on a particular issue.

Frequently, it is a great burden to educate a dispersed set of voters about how a particular regulatory decision harms them. This is especially true when the ramifications of such a decision are delayed and not directly attributable to the isolated decision, as is the case for many regulatory decisions. For example, directly tracing the harm imposed by acid rain from power plants is difficult because these plants emit pollutants that disperse widely and whose effects occur slowly over a long period of time. Hence, although it was possible to convince Congress to pass general legislation addressing the acid rain problem, it has proven more difficult to garner the support necessary for the EPA to adopt effective particular regulations, which if adopted would immediately impose significant costs on the electrical power industry.

107. See Percival, supra note 2, at 173.
108. For an analysis of the deleterious effects of the contest between recent Presidents and Congresses to micromanage agency policy, see Shapiro, supra note 17, at 24-26.
110. The electrical power industry channelled much of its effort to delay and weaken the acid rain provisions of the 1990 Amendments to the Clean Air Act through White House influence on EPA rulemaking. See Rudy Abramson, EPA Introduces New Rules for Clean Air, L.A. Times, June 26, 1992, at A4; Daniel P. Jones, The Long Reach of the Clean Air Act, Hartford Courant, Nov. 17, 1992, at A1; Michael Kranish, Democrats Cry Foul on Clean Air
Even if voters could educate themselves about the impacts of particular regulatory decisions without too much effort, presidential influence on such decisions is not likely to protect the interest of the general public unless voters organize to react to such decisions at the ballot box. Again, the costs of such organization tend to be great, especially if the adversely affected group is geographically, culturally, and ideologically diverse. In most cases, the effect of any particular regulatory policy on those with a diffuse interest in the regulatory outcome will not be sufficiently great to justify individuals learning about the problem and participating in an organized fashion to demand its rectification.

Moreover, the general ideology of a candidate seems to have a greater bearing on presidential voting than does the candidate's detailed economic and regulatory proposals. To the extent that voters focus on economics, they care more about the welfare of the national economy generally than they do about their own financial state at the time of an election, let alone about any particular decision made by an incumbent administration. Thus, presidential elections tend to turn more on the perceived state of the economy in an election year and the individual candidates' abilities to inspire confidence about the future state of the nation than on perceptions gleaned from particular regulatory stances taken by a candidate or the incumbent administration.

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112. Individuals who share a desire for a particular outcome have an incentive to "free ride" on the efforts of others in the group, which magnifies the barriers to education and organization of large groups with diffuse interests. See Olson, supra note 110, at 15-16.

113. This conclusion is consistent with empirical evidence that individuals do not vote for presidential candidates because of their policy positions or previous policy decisions. See infra notes 114-16 and accompanying text.


115. See Michael S. Lewis-Beck, Economics and Elections: The Major Western Democracies 155-57 (1988). In presidential elections, voters seem to take into account expectations about their own future economic prospects, but only to a very limited extent and even in these elections individuals do not vote based on their past personal economic well-being. Id. Past economic performance is factored into elections only according to how well the country has performed on the whole. Id. Only issues such as prolonged unemployment, runaway inflation, or sudden tax increases appear capable of stimulating most voters to attend to politics. Nelson W. Polsby & Aaron Wildavsky, Presidential Elections: Contemporary Strategies of American Electoral Politics 2 (8th ed. 1991).

116. See Wattenberg, supra note 114, at 152; Ray C. Fair, The Effect of Economic Events on Votes for President, 60 Rev. Econ. & Stat. 159, 171 (1978) (concluding that presidential
Putting the insights of public choice theory together with the political science of presidential elections suggests that groups with discretely focused interests have an advantage any time politics comes to bear on particular regulatory decisions. Even the President, for whom every of-age citizen in the country may vote, can reap political gains by dispensing regulatory largess to groups with focused interests at the expense of the general electorate. For example, although the nation as whole would incur unnecessary costs from rebuilding Homestead Air Force Base, this did not stop President Bush from promising to do so in a thinly veiled attempt to garner increased voter support in Florida during the 1992 presidential campaign.

The processes OMB uses to review agency proposed rules also increase the likelihood that micromanagement of agency decisions would cater to special interest groups. Unlike informal agency rulemaking, OMB review is not governed by standards that encourage equal access to its decision-making process. Presumably those in the President’s circle of political friends and supporters will have greater access to OMB than will outsiders. Although it may be possible to limit such selective access and require OMB to reveal communications with interest group representatives, this will not facilitate access by representatives of diffuse interests and other

117. As Glen Robinson has explained, the President is likely to obtain credit for sustained involvement in routine bureaucratic actions only from important political constituencies, which is “just the kind of involvement that is most difficult to justify in terms of the president’s wider obligations to the public.” Robinson, supra note 74, at 104. But see DeMuth & Ginsburg, supra note 7, at 1081 (asserting that “[a]lthough presidents and legislatures are themselves vulnerable to pressure from politically influential groups, the rulemaking process—operating in relative obscurity from public view but lavishly attended by interest groups—is even more vulnerable”). The influence of interest groups over presidential elections, and hence over presidential policy, may have increased recently due to the decline in the power of party insiders to dictate presidential nominations. See Ervin C. Hargrove & Michael Nelson, Presidents, Politics, and Policy 162 (1984).

118. See Eric Pianin, Hill Votes $11 Billion for Hurricane Relief, Wash. Post, Sept. 29, 1992, at A3. In fact, the Bush campaign quite blatantly sought to identify and deliver public works projects and regulatory decisions important to voters in states that he felt were key to his reelection without any apparent consideration of the overall impact of these projects and decisions on the nation as a whole. See William E. Clayton, Jr., Collider Bill OK'd by Bush; Signing May Help Campaign Chances, Houston Chron., Oct. 3, 1992, at A7 (reporting political motivations for Bush’s signing of bill appropriating funds for the super collider in Texas); Thomas H. Friedman, Selling Arms to Sell Jobs: The Signals It Sends Abroad, N.Y. Times, Sept. 20, 1992, § 4, at 4 (reporting promise of a contract of F15s to gain electoral support in Missouri); Frank Luntz, Editorial: Learning From Failure, Wash. Post, Nov. 5, 1992, at A23 (noting Bush’s reliance on pork barrel politics in his bid to be reelected President).

119. See McGarity, supra note 8, at 459; Percival, supra note 2, at 168-70.

120. See Bruff, supra note 17, at 554; Shapiro, supra note 17, at 21. For example, public interest lawyers regularly charged the Reagan OMB with providing a conduit for off-the-record communications from regulated industries to agency decisionmakers. See, e.g., Houck, supra note 14, at 542.
interest groups that have not developed a close relationship with the White House. In the abstract, disclosure may encourage political accountability for any preferential access OMB grants to well-connected representatives, but in reality, unless every aspect of the OMB review process is thrown open to public scrutiny, secret channels for influencing OMB’s review will remain. For example, interest group representatives who know key players on the White House staff may be able to channel input to OMB through such staff members. In short, any program of regulatory review that involves the White House and OMB will give “insiders” an advantage, and such insiders usually represent focused interest groups rather than the interests of the general public.

One might argue that concerns about secret conduits and insider influence are overstated because all interest groups will get an opportunity to make their views known and provide supporting data and analyses during the subsequent notice and comment rulemaking proceeding. Unfortunately, once a rule that reflects insider input is proposed, the likelihood of the rulemaking proceeding allowing for true deliberation about what best furthers statutory purposes is greatly decreased.

121. For discussions of the relation between secret White House communications and lack of accountability for regulatory policy, see McGarity, supra note 8, at 457; Shapiro, supra note 17, at 22-23.

122. There are good reasons not to force OMB to make public all of its decision-making processes, as that could discourage deliberation within the OMB, between OMB and the White House, and ultimately within the White House itself. See Gilhooley, supra note 92, at 336-40 (discussing the potential for disclosure of certain communications between OMB and the reviewing agency to intrude on the executive deliberative process). Thus, even commentators who advocate opening OMB review via some sort of sunshine laws focus primarily on access to communications between OMB and the regulating agency; they would allow communications between OMB and the White House, and within the White House itself to remain in the shadows lest deliberative discussion within the executive be chilled. See Bruff, supra note 74, at 516 (stating that executive privilege, grounded on the need for open executive deliberation, does not justify prohibiting Congress to require disclosure of OMB-agency communications); McGarity, supra note 8, at 487-88 (despite concerns about executive privilege, accountability warrants Congress demanding disclosure of presidential communications with agencies regarding ongoing proceedings); Morrison, supra note 8, at 1071, 1072 (suggesting that Congress restrict all OMB involvement in agency rulemakings to on the record comments); see also Gilhooley, supra note 92, at 322 (limiting disclosure even of OMB-agency communications “to allow free discussion and ‘consultative privacy’ in formulating policy”).

123. See Houck, supra note 14, at 542 n.42 (detailing numerous examples of OMB acting as a conduit for industry information and noting that disclosure of industry contacts with OMB have not cured the problem). There is also a possibility that OMB will simply ignore policies limiting access to its staff members and requiring disclosure of outside communications, as apparently occurred under OMB director David Stockman early in the Reagan administration. See Percival, supra note 2, at 151.

124. See 5 U.S.C. § 553 (1988) (providing for notice and comment rulemaking). If the agency makes policy outside of a notice and comment rulemaking, concerns about use of the White House as a conduit for interest group information and influence become heightened.

125. OMB’s potential interference with the deliberative structure of agency decision-making is even more egregious when OMB effectively prevents the agency from proposing a
Interest groups excluded from the preliminary phase at which the proposed rule is developed often will assume an antagonistic attitude toward the entire agency proceeding. Moreover, once the agency proposes a rule that reflects some deal struck between OMB and powerful presidential supporters, the agency is less likely to consider modifying the rule. Modification in response to outsider comments would upset bargains already struck. In addition, the natural tendency of an agency that has proposed a rule is to treat those who disagree with it as adversaries. All told, exclusion of interested entities from the process of OMB influence on proposed rules poses a serious risk of undermining the deliberative aspects of notice and comment proceedings.

In addition, OMB regulatory review, unlike agency decision-making, is not subject to judicial review. Because judicial review helps check against the government striking pure political deals aimed at generating monopoly rents, one might surmise that the lack of judicial review would increase the propensity for OMB review to foster rent seeking. At one level this conclusion does not follow. To pass judicial muster, the agency must justify its decision as a reasonable exercise of discretion in light of the facts in the record, the legal standards governing the issue and 

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1. See Seidenfeld, supra note 46, at 1560. Robert Reich has posited that much antagonism stems from lawyers for interest groups taking sides once a rule is proposed in order to preserve their positions and informational advantages in subsequent proceedings. See Robert B. Reich, Regulation by Confrontation or Negotiation, 59 Harv. Bus. Rev., May-June 1981, at 82, 85-91.

2. See Seidenfeld, supra note 46, at 1558 n.235 (noting that agency intransigence regarding rules proposed after negotiated rulemaking might deprive interest groups excluded from the negotiations of an equal opportunity to influence the agency decision).


4. Executive Orders authorizing OMB review have stated that such review is intended merely to improve internal management of the executive branch, and for this reason have clarified that the review program does not create any right to judicial review of agency rules. See, e.g., Exec. Order No. 12,866, § 10, 58 Fed. Reg. 51,744 (1993); Exec. Order No. 12,291, § 9, 3 C.F.R. 135-84 (1982).

5. See Bruff, supra note 74, at 517 n.120; Jonathan R. Macey, Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 251-56 (1986); Seidenfeld, supra note 46, at 1547; Cass R. Sunstein, Deregulation and the Hard Look Doctrine, 1983 Sup. Ct. Rev. 177, 211.

6. The term "monopoly rents" refers to undeserved benefits that the government can bestow because of its monopoly on coercive regulation. The meaning is a generalization of the term's original reference to the excess profits that entities in economic markets can earn because the government has legally restricted or biased the workings of these markets. See James M. Buchanan, Rent Seeking and Profit Seeking, in Toward a Theory of the Rent-Seeking Society 3, 8-11 (James M. Buchanan et al. eds., 1980); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 3 (1971).
the agency's previous related decisions. A reviewing court, however, can consider only the agency's publicly proffered bases for its final decision and cannot probe the actual mental processes that led the decision-maker to act. Thus, whether an agency reaches a decision because OMB imposed a political bargain on the agency will not affect judicial review; the reviewing court will uphold the decision as long as the agency can justify it after the fact. Said another way, OMB's influence is subject to judicial review in the same way and to the same extent as any other part of the agency decision-making process; if the decision OMB seeks cannot be justified based both on the record and on acknowledged statutory goals, the reviewing court will prevent OMB from imposing that decision.

At another level, however, judicial review has more subtle effects on agencies that may not extend to an outside participant in the decision-making process such as OMB. There is some evidence that agencies take seriously judicial pronouncements that they are to act deliberatively and consider all relevant factors in making their decisions. Especially at the professional level, agency staff members often attempt in good faith to comply with judicial pronouncements and to pursue the best means of achieving their understanding of statutory goals. Judicial review may encourage deliberative decision-making aimed at the public interest by delineating statutory goals in terms of some public-regarding purposes and by instilling in agency staff an ethic of considering all factors relevant to an evaluation of how best to achieve these goals. In these ways judicial

136. See Pederson, supra note 134, at 60 (stating that the effects of rigorous judicial review "serve as a precedent for future rule-writers and give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not"). Richard Pierce has criticized aggressive judicial review because agency staffs trying in good faith to follow judicial prescriptions will become demoralized by the contradictory signals they receive from a decentralized judiciary. See Richard J. Pierce, Jr., The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s, 43 Admin. L. Rev. 7, 23-27 (1991). Pierce's prediction that aggressive judicial review would cause FERC to abandon its efforts to subject electric power generation to a competitive
review helps limit the propensity of agencies to succumb to interest group pressure.137

OMB, however, is not held directly responsible for a decision that is later overturned; when a court reverses an agency decision it does not directly tell OMB that it did not perform its job adequately. Moreover, OMB staff members tend to be chosen more for their political ideology than any professional expertise.138 Hence, they are less likely to be influenced by judicial pronouncements meant to reinforce a detailed reasoning process in agency decision-making. The bottom line may be that OMB review is structured to encourage rent-producing political deals worked out behind closed doors and is not subject to the same subtle influences of judicial review that mollify agency tendencies to adopt such deals.

III. ANALYSIS OF A BIG PICTURE APPROACH TO INFLUENCE OF AGENCY POLICY

The second tenet of the “big picture” thesis asserts that a President can effectively control agency policy and that resulting regulation is more likely to further public purposes if the President uses a big picture approach to influence agency decision-making rather than trying to micromanage the agency. Commonly held perceptions regarding the administrations of Franklin Roosevelt and Ronald Reagan suggest the efficacy of the big picture approach. Each administration was known for implementing an overarching policy perspective: For Roosevelt it was the New Deal and its reliance on bureaucracy to correct injustices and imperfections in economic markets;139 for Reagan it was getting

market, however, appears overstated. See generally Jim Rossi, Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry, 1994 Wisc. L. Rev. 763, 793-806 (demonstrating the inaccuracy of Pierce’s thesis that the hard look doctrine resulted in “regulatory paralysis at FERC”). One major problem with Pierce’s analysis is its failure to analyze separately the effects of remands on the grounds that FERC failed to meet statutory requirements, which agencies cannot circumvent on remand. In other words, the problems that have slowed FERC’s movement to a market based system may be more attributable to Congress’s failure to amend outdated statutes than to the institutional failings of judicial review. See Rossi, supra, at 786-87.

137. Although the role of agency staff is merely advisory, their control of information within the agency, coupled with the need for agency heads to avoid alienating staff, allow the staff to influence greatly final agency decisions. This is true to such an extent that often the White House fears that agency heads are “captured” by agency staffs. See J. Clarence Davies, Environmental Institutions and the Reagan Administration, in Environmental Policy in the 1980s: Reagan’s New Agenda 144 (Norman J. Vig & Michael E. Kraft eds., 1984) (reporting Reagan’s mistrust of agency career civil servants exceeded that of previous presidents); James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 50 (1989) (noting Nixon’s fears that liberal bureaucrats hired by Democratic administrations would undermine his conservative policies); Maureen Dowd, Who’s Environment Czar, EPA’s Chief or Sununu?, N.Y. Times, Feb. 15, 1990, at Al.

138. See Bruff, supra note 17, at 445, 557 (noting separately the political nature of OMB appointees and the lack of experience of OIRA desk officers).

government off the backs of business and restoring faith in markets as superior to government regulators. Although observers strongly disagree about the wisdom of each of these very different policy visions, few would contest that both men were among the most effective presidents at implementing their policies. They stand in sharp contrast, for instance, to President Carter, who was known for getting involved in the nitty-gritty of regulatory decisions and, not coincidentally, for the inability of his administration to put its policies into practice. The more rigorous analysis below adds credence to this big picture hypothesis.

A. The Advantages of the Big Picture Approach

Thus far this Article has argued that the President must exert a strong influence on administrative policy if federal regulation is to be somewhat coherent and aimed at furthering the interests of the general public. But, allowing OMB to dictate the outcome of every major agency policy decision is unlikely to achieve consistency with either the values of the President or the polity that elected him. To maximize the benefits that derive from the President’s universal electoral accountability, the President should identify some broad regulatory goals and consistently rely on them to guide his regulatory actions. The use of such overarching goals will help alleviate the President’s cost of monitoring and policing agencies as well as the public’s costs of monitoring to prevent special interest regulation.


140. See Hugh Hedo, One Executive Branch or Many?, in Both Ends of the Avenue 26, 43 (Anthony King ed., 1983).

141. See Paul C. Light, The President’s Agenda: Domestic Policy Choice from Kennedy to Reagan 221 (rev. ed. 1991) (noting President Carter’s misplaced penchant for the details of policy); Nathan, supra note 9, at 87; see also Hargrove & Nelson, supra note 117, at 117 (criticizing Carter for trying to solve all problems at once instead of setting priorities). Although it is difficult to measure the extent to which a President involves the White House in regulatory detail, Paul Light has noted that Carter issued many more executive orders than his predecessors, in part because of his tendency to engage in “administrative tinkering.” Light, supra, at 116.

142. See Light, supra note 141, at 221 (criticizing President Carter’s focus on policy details for leaving “the domestic agenda without broad guidance”).

143. See Hedo, supra note 140, at 35 (arguing that a president must impose a “grand simplification” if he is to effectuate his personal policy vision); see also Hess, supra note 73, at 10-11 (1976) (arguing that because the demands of running the executive exceed the capabilities of any one person to manage, the President should restrict his role to “chief political officer,” which entails making “a relatively small number of highly significant political decisions”); Robinson, supra note 74, at 106 (noting that the power of the president as “chief political officer” is exercised “by setting general policy ideals and goals that loyal aides transmit successively through the executive establishment”).
1. Defining Overarching Goals as a Means of Decreasing the President's Monitoring Costs

The use of overarching goals would decrease the President's monitoring costs in several ways. First, it would help the President structure executive review of agency action in a manner that would constrain OMB staff members from injecting their idiosyncratic values into the policy-setting process. Second, it would guide the President in choosing agency heads likely to agree with him on the outcome of major decisions. Third, it would aid the President in establishing a successful legislative agenda regarding regulatory matters. Finally, it would increase the likelihood that courts reviewing agency policy decisions would act consistently with the President's regulatory values.

As already noted, a major difficulty with OMB review of agency policy is the slack that OIRA desk officers who perform the initial review necessarily enjoy. Unless the President or personally close advisors carefully monitor the interaction of desk officers with agency personnel, there is no way to ensure that these officers advocate the President's regulatory goals. Even a well-meaning desk officer may have difficulty internalizing these goals unless the administration clearly spells out its policy priorities. The statement of broad policy goals would thus help guide OMB reviewers in performing their jobs.

In addition, such a statement would facilitate ultimate presidential oversight of the influence OIRA staff exercises in discussing a proposed regulation with the promulgating agency. For example, when an agency proposes a regulation, the Director of OMB might require each initial reviewer to explain in writing her concerns in terms of the administration's announced policy goals. This would enable higher level OMB monitors

144. See supra notes 91-96 and accompanying text.
145. As one White House staff member explained: "Since I never knew what decision the president would make, or would have made if an issue ever got to him, I had no choice but to pursue my own vision of what was good." Marc K. Landy, et al., The Environmental Protection Agency: Asking the Wrong Questions 67 (1990); cf. Hugh Heclo, A Government of Strangers 64 (1977) (noting that fragmentation of executive policy decision-making makes it "vastly more difficult to arrive at mutual understandings and to agree on courses of action [that implement the President's perspective]").
147. Such a written explanation will have the effect of encouraging desk officers to think hard about how their objections match up with presidential priorities and will deter objections that cannot be justified in terms of those priorities. Cf. Shapiro, supra note 17, at 28-29 & n.193 (proposing a requirement that the White House issue a written justification when it returns a proposed rule to an agency as a means of ensuring accountability); Bruff, supra note 17, at 586 (noting that a paper trail of OMB's interaction with an agency may sacrifice some
to understand how the initial reviewer perceived the President's regulatory goals and to flag OIRA staff input to the promulgating agency that might not comport with the President's regulatory vision. Moreover, communicating to the agency an OIRA reviewer's concerns, stated in terms of announced presidential goals, gives the agency a chance to rebut the OMB statement. Such a focused OMB/agency dialogue would encourage the agency to directly seek to achieve the President's regulatory vision, and help to identify those regulations that warrant attention by the President himself at an early stage of the agency's regulatory action.

In addition to helping structure the executive review process, using a big picture approach may aid the President in appointing agency heads in a manner that minimizes the need for OMB review of agency decisions. Appointment of high-level agency officials who share the President's overarching goals, or at least those relevant to the decisions of the particular agency, will help reduce monitoring costs. If the President is successful in finding individuals who share his basic values to staff the top positions in an agency, he need not monitor every agency decision. He can trust that in most cases the agency will decide the matter as he would have. In essence, he will have spread the costs of monitoring agency staff among those in high-level agency positions, thereby dividing the monitoring task into manageable workloads. Moreover, because the monitoring is done by those inside the agency, it is less likely to engender resentment and resistance by agency staff.

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148. "Stating directives [to subordinates] in terms of [superiors’] primary goals” may be “one technique that can be used to generate a countervailing dynamic [to the subordinates’ predispositions] . . . that tends toward the achievement of the real goal.” Rubin supra note 43, at 413 (discussing how stating statutory goals might help Congress control agency implementation of statutes that grant policy-making discretion). Stated more abstractly, elevating a set of particular constraints on decision-making to goals changes the outcome chosen from the feasible set of outcomes to emphasize that set of constraints. See Herbert A. Simon, On the Concept of Organizational Goal, 9 Admin. Sci. Q. 1, 8-9 (1964).


150. The Reagan Administration applied a big picture approach to many of its appointments, choosing its agency heads on the basis of their beliefs in regulatory relief rather than their expertise. See Shapiro, supra note 17, at 5; Waterman, supra note 9, at 171, 173; see also Walter Williams, Mismanaging America: The Rise of the Anti-Analytic Presidency 84 (1990) (acknowledging but criticizing this approach to appointments because it lead to incompetent and inflexible high-level agency officials).

151. This leaves the possibility that the agency head will be “captured” by his staff, which can control the flow of information and the analyses that reach the agency head to bias her decisionmaking. See Shapiro, supra note 17, at 6; see also DeMuth and Ginsburg, supra note 7, at 1085 (detailing how agency mechanisms may commit the agency to a proposed rule before
agency heads to make the right decisions, rather than on direct oversight, sacrifices the President's ability to decide every major policy issue in the manner he would like. In practice, however, the President forfeits little because pragmatically the President cannot dictate every, or even many, of the major policy choices made by agencies.\textsuperscript{152}

There remain, however, the monitoring costs to ensure that political appointees at the top levels of agencies share the President's broad goals. Again, the big picture approach reduces these costs. The President's overarching theme provides a coherent philosophy that facilitates an evaluation of whether an appointee will be loyal to the President.\textsuperscript{155} In addition, monitoring of appointees need occur only at the time of appointment, which is relatively infrequent. Moreover, such monitoring requires a background check of the appointee instead of the vast technical inquiry needed to review an agency policy decision directly. Hence the President has greater capability to participate personally in the appointment process than in directly overseeing agency policy. Thus, the costs of monitoring appointments are not likely to be as great as those of monitoring agency decisions directly.

A big picture approach to regulatory policy might also aid the President in persuading Congress to adopt his regulatory legislative agenda. An announced overarching theme that carries over from the presidential campaign signals the President's legislative priorities to Congress.\textsuperscript{154} To the extent that overarching policy themes are salient to voters, a President who introduces such themes in his campaign can also claim an electoral mandate to pursue them.\textsuperscript{155} This would allow a President to increase pressure on Congress to enact legislative changes consistent with the President's overall policy goals.

A big picture approach may also influence courts to construe statutes consistently with the President's announced policy goals and generally to uphold agency policy decisions that further those goals. If, as noted above, the President can obtain legislation purporting to further such goals, the agency head is even aware of it. But, "capture" of reviewers outside the agency can occur for the same reasons if the reviewers too depend on information and analyses provided by agency staff. See supra notes 79-83 and accompanying text.

\textsuperscript{152} As one leading scholar of presidential control of the federal bureaucracy has phrased it, "no president can cope with more than a tiny fraction of the decisionmaking in government." Heclo, supra note 145, at 2.

\textsuperscript{153} See Heclo, supra note 140, at 45.

\textsuperscript{154} Big picture approach thereby aids the President in meeting two of the most important criteria for ensuring a successful legislative agenda: acting quickly to propose an agenda, and setting definite legislative priorities. See Light, supra note 141, at 218-19, 230-31.

\textsuperscript{155} The perception of an electoral mandate is one component of a President's capital. See Light, supra note 141, at 28-29 (discussing the effects of public approval and electoral margin on presidential capital). Whether elections actually reflect any policy mandates remains a controversial question. See George C. Edwards III & Stephen J. Wayne, Presidential Leadership: Politics and Policy Making 83-84, 95-96 (1985); Wattenberg, supra note 114, at 128-29.
reviewing courts are more likely to interpret statutory provisions that
govern agency action consistently with the President’s regulatory values.\textsuperscript{156} Even if an agency decision is challenged on grounds other than that it violates the agency’s authorizing statute, a court is more likely to uphold it if the agency has tied that decision to the pursuit of the President’s announced overarching policy vision. In reviewing agency action, courts look for logical reasoning and consistency,\textsuperscript{157} and they are more apt to find these traits in a set of decisions which are analytically based on a coherent regulatory perspective.

2. A Big Picture Approach as a Means of Decreasing the Likelihood of Special-Interest-Oriented Regulation

Because a big picture approach to presidential influence of agency policy-setting may be more politically salient, it might also help check against the President using his influence to hand out regulatory plums in return for political support from powerful special interest groups. When voting for President, individuals are more likely to consider broad policy themes than to consider particular regulatory policy decisions.\textsuperscript{166} Although the electorate is unlikely to vote out a President who engages in piecemeal distribution of largess to various special interest groups, it may refuse to elect a candidate whose entire domestic program is seen as favoring particular special interest groups. Of course, the big picture approach will not eliminate special-interest-oriented regulation; no administrable regulatory system could guarantee that. But at least the big picture approach maximizes the likelihood of political accountability discouraging such regulation.

\textsuperscript{156} Traditionally, courts have interpreted statutes to further the purposes underlying them. \textit{See} William N. Eskridge \& Philip P. Frickey, \textit{Cases and Materials on Legislation: Statutes and the Creation of Public Policy} 571 (1988); \textit{see also} Henry Hart \& Albert Sachs, \textit{The Legal Process: Basic Problems in the Making and Application of Law} 1144-47 (tent. ed. 1958) (advocating this approach to interpretation). The recent trend of some judges to limit their considerations solely to statutory text—the so called “New Textualism”—would limit the effect of legislative history tying the statutory purpose to the President’s policy vision. \textit{See} William N. Eskridge, \textit{The New Textualism}, 37 UCLA L. Rev. 621, 624 (1990); Philip P. Frickey, \textit{From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation}, 77 Minn. L. Rev. 241, 256 (1992). The New Textualism, however, is not the universal or even dominant mode of judicial statutory Interpretation. \textit{See} Eskridge, \textit{supra}, at 621 (asserting that the new textualism is a challenge to the predominate traditional mode of judicial interpretation); Frickey, \textit{supra}, at 256 (claiming that with respect to mode of statutory interpretation, “[T]he Supreme Court remains up for grabs.”)

\textsuperscript{157} \textit{See} supra note 132 and accompanying text.

\textsuperscript{158} \textit{See} Polsby \& Wildavsky, \textit{supra} note 115, at 7 (stating that most voters consider only major issues, and even those only in a rudimentary way). It may be that voters consider only their beliefs about a candidate’s performance and do not consider policy at all. \textit{See} Wattenberg, \textit{supra} note 114, at 154-55. Nonetheless, even Wattenberg concedes that during the 1980s the public’s policy preferences included a desire for less federal regulation, id. at 103-04, which President Reagan made a centerpiece of his presidential campaigns. \textit{See} Heclo, \textit{supra} note 140, at 43; Light, \textit{supra} note 141, at 243.
B. Potential Objections to a Big Picture Approach

Opponents of increased presidential control of agency policy might object to a big picture approach on several grounds. First they might argue that the big picture approach permits the President to abrogate Congress’s lawmaking supremacy. Although the Constitution’s choice of a unitary executive and its assignment of responsibility to the President to see that the laws are faithfully executed implies that the President must have significant means to influence agency policy, the implication need not include the authority to specify regulatory philosophies and priorities that bind the agency in the same way as statutory prescriptions. Critics might contend that formal specifications would essentially permit the President to amend statutes unilaterally, thereby undermining the policy choices Congress made when it adopted the statute.

Whether the President micromanages agency policy or uses a big picture approach, the legislative supremacy of Congress binds agencies to comply with statutes that govern their authority to regulate. Usually, this still leaves agencies broad discretion in actually fashioning rules because in a particular situation statutory directives often do not determine the regulatory outcome; statutes leave gaps for the agency to fill. In filling these gaps, the agency itself will have to bring extra-statutory judgment to bear—judgment such as how to balance the factors that Congress explicitly made relevant, or what additional factors to consider when those Congress specified do not permit a reasonable resolution of the issue. As long as the President limits his influence to the agencies’ gap-filling judgment and does not cause the agency to countermand valid statutory directives, he does not usurp Congress’s lawmaking supremacy. Congress remains free to overrule the President’s influence by

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159. Cf. McGarity, supra note 8, at 454-56 (criticizing OMB review as it has historically been practiced for allowing the President and OMB “to steer an agency away from its congressional mandate”).

160. See Gilhooley, supra note 92, at 309; Strauss, supra note 149, at 597; Paul Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943, 957 (1984).

161. The history of OMB review, especially under Presidents Reagan and Bush, has led critics to level this very criticism at the Reagan regulatory review program. See Morrison, supra note 8, at 1052-63.

162. Thus even the highly controversial Executive Order 12,291, which imposed a cost-benefit requirement, recognized that it could not thereby overrule statutory constraints on agency rulemaking; the Order explicitly limited this requirement to the extent permitted by law. Exec. Order No. 12,291, § 2, 3 C.F.R. 128 (1982).


164. See supra notes 41-42 and accompanying text.

165. See Percival, supra note 2, at 199; see also McGarity, supra note 8, at 454-55 (noting that agencies have broad discretion under statutes and that because the President can push
statutorily filling the gap. Therefore, any criticism that the big picture approach violates the vesting of legislative power in Congress has validity only to the extent that this approach, more than micromanagement, invites the President improperly to encourage agencies to overstep their role and undermine Congress's statutory mandates. In fact, the opposite is true.

Under the big picture approach, when an agency considers a regulation to address some perceived problem, the agency is still responsible for applying the statute and the President's stated priorities to the particular problem. In contrast, when the White House engages in micromanagement, it can both specify the nonstatutory factors that it believes to be relevant and second-guess the agency's application of these factors. Because of the professional rather than political ethic of the agency staff and the relative openness of its decision-making process, the agency is less likely than OMB surreptitiously to inflate the importance of the President's priorities to such an extent that these priorities overrule statutory prescriptions. Hence, once one acknowledges the need for some presidential oversight of agency policy, concerns about presidential undermining of statutory objectives suggest that a big picture approach is preferable.

A second, related objection asserts that the President exceeds his constitutional authority by specifying binding criteria to guide agency policy because he displaces the agency as the body that Congress authorized to issue the final rule. Congress undoubtedly can authorize officers other than the President to promulgate enforceable regulations; the President does not have the authority to override such regulatory decisions directly. Presidential specification, however, of a general outlook and a set of priorities to guide such officers in exercising their regulatory discretion is not the same as having the President determine the final regulation. The President's criteria for regulation must be evaluated in the context of a particular set of circumstances before they have a

166. As Harold Bruff has noted: "All executive [review] has the potential for straying beyond legal limits. . . . The question concerning [any particular review program] is whether [it places] an undue strain on fidelity to statutory requirements." Bruff, supra note 17, at 562.

167. See Seldenfeld, supra note 46, at 1555, 1559-60.

168. See Houck, supra note 14, at 554.

169. See supra note 14. If the decision is made by the head of an executive agency the President can threaten to remove the decision-maker with the intent of replacing her with one who will do as the President desires. But the authority to replace the decision-maker is quite different from the authority to make the decision. There are significant costs involved in replacing an agency head: The President may like the job the agency head is doing with respect to other matters, the President may not be able to get Senate approval for a replacement who will do his bidding, and removal of an agency head is a high-profile event that may cost the President significant popular support. See Strauss, supra note 149, at 590-91; Strauss & Sunstein, supra note 10, at 200-01. In addition, as the law presently stands, for decisions by independent regulatory agencies, the President does not even have the authority to remove the decision-makers. See Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
bearing on decisions regarding whether and how to regulate. As long as the agency still has the responsibility for assessing how the specified priorities apply to a particular proposed regulation, the President is not dictating to the agency precisely how to fashion its rules.\textsuperscript{170}

Nonetheless, specification of a binding regulatory philosophy will constrain the agency from structuring regulations as it otherwise might have. Indeed, that is the very reason for the President issuing the specification. The big picture approach clearly envisions the President substituting his judgment for that of the agency with respect to some of the component decisions that must be made when an agency promulgates regulations. Thus, the question raised by this objection is whether the President encroaches on the legitimate constitutional prerogatives of Congress when he substitutes his judgment about regulatory philosophy and priorities for that of the agency head whom the statute has authorized to promulgate the regulations.

The original justification for allowing Congress to isolate agency discretion from presidential influence was a belief that the expertise of agencies would enable them to find the best solutions to the problems their regulations addressed.\textsuperscript{171} Along with this optimism about the capabilities of technical knowledge to solve regulatory problems came a concern that political pressure would divert the expert agency from focusing on what is technically best to focusing on what would appease elected legislators and officials to whom an agency head may feel beholden.\textsuperscript{172} This expertise rationale justified a broad prohibition on political influence of agency policy.

By the early 1970s, the expertise foundation for the administrative state had crumbled.\textsuperscript{173} Students of the bureaucracy recognized that the professionalism of agency staffs was not sufficient to keep them from delivering benefits to special interest groups.\textsuperscript{174} It is not that expertise is irrelevant. For many agency decisions, however, expertise merely clarifies the regulatory options available and their potential ramifications.\textsuperscript{175} The

\begin{footnotes}
\item 170. \textit{Cf.} Strauss & Sunstein, supra note 10, at 201 (arguing that due to the breadth of agency discretion in applying the requirement that regulations be cost-beneficial under Executive Order 12,291, that order does not give the President ultimate power to dictate regulations).
\item 172. \textit{See} Strauss & Sunstein, supra note 10, at 183.
\end{footnotes}
ultimate choice of particular regulations requires value judgments that cannot be made by application of expertise but rather are more suited to resolution by political processes.\textsuperscript{76}

The rejection of the expertise model does not necessarily mean that regulatory decisions should be subject to direct political oversight, as would occur if the President could micromanage agency decisions to promulgate particular regulations. According to some accounts, in addition to agencies' expertise, their place within the federal government, their structure, and their decision-making processes make them institutions capable of resolving regulatory disputes by deliberation aimed at seeking consensus about regulatory options.\textsuperscript{77} This rationale justifies Congress vesting ultimate decision-making authority in agencies, but it does not justify the strict prohibitions on political influence that follow from the expertise model. The agency must be held accountable to the desires of the electorate, especially for agency decisions that hinge on value judgments.\textsuperscript{78} Mechanisms that increase this accountability should be welcomed as long as they do not interfere with the deliberative processes by which the agency reaches its decision, or other measures that ensure the agency acts within statutory bounds.

The big picture approach to influencing agency policy meets these criteria. An overarching regulatory theme tends to reflect a philosophy of government which in turn derives from a value choice rather than a technical assessment of the effects of particular proposed regulations. The nature of overarching themes thus makes them the components of agency policy-setting most appropriately subject to political control.\textsuperscript{79} Moreover,

\textsuperscript{76} See James O. Freedman, Expertise and the Administrative Process, 28 Admin. L Rev. 363, 372-73 (1976); Strauss & Sunstein, supra note 10, at 183; Werhan, supra note 173, at 583-84.

\textsuperscript{77} See Seidenfeld, supra note 46, at 1542; see also Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 63-64 (1985) (arguing that doctrines of administrative law can best be understood as facilitating a deliberative role for agencies). The rejection of the expertise model of agencies does not necessarily lead one to subscribe to the view that I espouse here, which sees agencies' role as facilitating deliberative democratic decision-making. One could instead adopt a pluralistic outlook that views agencies' role as the facilitation of pure political deals between interest groups. See generally Stewart, supra note 174 (describing and critiquing judicial attempts to create a theory of interest group representation as a means of legitimating agency action). Under the pluralist model of the administrative state, presidential control serves to discourage political deals that are inefficient and to coordinate such deals so they do not impose conflicting obligations on entities subject to the resulting regulations. Hence, I would expect one who subscribes to this theory to support stronger presidential control over agency policy such as the control that results in theory from presidential micromanagement. See, e.g., DeMuth & Ginsburg, supra note 7, at 1080-82. Elsewhere I have described some of the weaknesses of the pluralistic view and explained why I prefer to subscribe to the model premised on deliberative democracy. Seidenfeld, supra note 46, at 1525-27, 1533-36.

\textsuperscript{78} See Strauss & Sunstein, supra note 10, at 184; see also Shapiro, supra note 17, at 20 ("Oversight by generalists is more likely to improve the rationality of regulatory policy when it supplies the general preferences or values that an agency should follow.").

\textsuperscript{79} See Strauss & Sunstein, supra note 10, at 184 (identifying resolution of issues of value
unlike micromanagement, the big picture approach need not short-circuit the deliberative discussions that might occur as part of the agency proceedings. Because the agency gets to make the final decision, it must still be allowed to conduct its rulemaking proceedings and it must still explain how its final decision follows reasonably from the governing statutes and the record before it. Finally, as discussed earlier, by encouraging regulatory policy to be set in accordance with the President's publicly announced regulatory vision, the big picture approach increases the saliency of presidential influence and may thereby increase the accountability of the "value choice" component of agency policy-setting. In short, once the political nature of agency policy-setting is conceded, viewing agencies as a means of fostering deliberative democracy would seem to authorize the President to coordinate and control the regulatory philosophy underlying agency policies, but not to evaluate the circumstances surrounding particular proposed regulations or to make the ultimate policy decision.

One legal scholar, Harold Bruff, has raised another objection that goes more to the heart of the big picture approach. Bruff has expressed concern about presidential "macromanagement" because "[t]he information necessary to make coherent centralized decisions about society as a whole simply does not exist, as the Soviets so consistently demonstrate." Bruff seems generally to prefer micromanagement, which he defines as addressing regulation on a case by case basis. With respect to macromanagement of regulatory policy, he asserts that most questions "can be settled only by Congress, through legislation, and even then quite imperfectly."

Much of Bruff's concern about the limited abilities of centralized decision-making is legitimate, but his analysis of the limits on such abilities applies with greater force to centralized micromanagement and overstates the case against a big picture approach. Centralized decision-making poses several problems. The lack of information about particular situations makes it impossible for central decision-makers to take into account unique factors that distinguish one situation that warrants a regulatory response from another. Changing centrally defined criteria also takes significant as one of three central components of "reasoned decisionmaking").

180. For an agency to survive a challenge that its decision was arbitrary and capricious, see 5 U.S.C. § 706(A) (1992), the agency must meet the "hard look" test as adopted by the Supreme Court in Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). This test essentially requires an agency to explain in detail how the means it has chosen relate to statutorily prescribed ends in order to flush out impermissible bases for regulatory action. See Sunstein, supra note 177, at 61.
181. See supra note 158 and accompanying text.
182. Bruff, supra note 17, at 540.
183. Id. at 540-42.
184. Id. at 542.
185. See Thomas Sowell, Knowledge & Decisions 26 (1980) (noting that informal decisions can be applied "in a more specific or 'fine tuned' fashion" because they tend to be
time and energy. Thus, centrally made decisions tend to lack the substantive and temporal fluidity that are needed for efficient regulation. Decentralized decision-making, however, poses problems as well. Government decision-makers do not operate under the guidance of the invisible hand of a competitive market, and monitoring decentralized decision-making for abuse is very costly. In addition, decentralized decision-making can result in uncoordinated and even conflicting regulation. Efficient regulation thus requires balancing the inflexibility of central decision-making against the costs of monitoring and lack of coordination imposed by decentralized decision-making.

This balancing explains why big picture goals should be made by an accountable central institution, such as the President, and less encompassing decisions about how best to structure particular regulations by the less centrally organized agencies, which have better access to information and expertise. The costs due to inflexibility of central decision-making pose a significant threat when broad policy perspectives are applied to particular problems whose parameters might vary from one another, that is, when specific regulations are designed. The setting of broad perspectives is not as sensitive to the critique of inflexibility because particular circumstances can be taken into account when the broad perspectives are applied and specific regulations adopted. In contrast, the benefits of central decision-making—better coordination and easier monitoring—are more important for decisions that cut broadly across the regulatory horizon than for decisions regarding design of particular regulations. Therefore, although the problem of insufficient information for flexible central

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186. See Sowell, supra note 185, at 23 (noting that informal decisions can be made with less devotion of resources).


188. Cf. Sowell, supra note 185, at 30-31 (noting that informal decision-making imposes risk costs when individuals affected by a decision cannot trust the decision-maker to take their interests into account). I am assuming here that Bruff's objection to macromanagement is not merely a statement about the relative benefits of markets versus government regulation. If a competitive market exists to control the allocation of resources and there is no concern about the fairness of the resulting allocation, there is no need for regulation. But often markets are plagued by externalities and information cost problems that justify regulation. My response to Bruff assumes that we are considering a situation in which regulation is warranted and the issue is how (not whether) to regulate.

189. This is one of the strongest arguments for presidential influence over agency policy-setting in the first place. See McGarity, supra note 8, at 447-48; supra notes 71-72 and accompanying text; Strauss & Sunstein, supra note 10, at 189-90.

190. Cf. Simon, supra note 148, at 17-18 (broad goals are usually made at higher, more centralized levels of an organization, and centralized goals provide a tolerable constraint because subsidiary decisions are constantly being made at lower levels to take into account particular circumstances).
regulation is real, it is much more significant for the micromanagement of particular regulations than it is for the choice of an overarching regulatory vision.

Bruff's analogy to the procrustean central decision-making apparatus of the former Soviet Union supports this analysis. The ineffectiveness of the Soviet system stemmed less from its reliance on central decision-makers to set national priorities than from its refusal to rely on markets to direct economic production and allocation, and its insistence on a detailed central prescription to implement those priorities.\(^{191}\) In other words, the Soviet system was plagued by central micromanagement. This is not to suggest that the Soviets had a good system for choosing broad national goals. Certainly the choice to make the USSR into a military superpower at the expense of satisfying consumer demand, in the long run, proved unwise.\(^{192}\) Such big picture choices, however, were unacceptable because the Soviet government was not responsive to the desires of the populous, not because these choices were centrally made. The big picture approach advocated here, in contrast, would make central decisions more salient and, given the democratic structure of our government, more accountable. Although the President too could err by choosing a regulatory philosophy that was not supported by the electorate, given the political accountability built into the American system of government, it is doubtful that the errors would be as egregious or long-lived as those of the Soviet government.

IV. EVALUATION OF CURRENT EXECUTIVE REGULATORY REVIEW

Thus far, this Article has discussed the big picture approach to presidential oversight in abstract and general terms. It has glossed over many of the details of how a President might structure his influence of agency policy to comport with this approach. The Article has done so with good reason because the approach outlined is not so well developed that it dictates a particular mechanism for presidential influence. Nonetheless, it does imply certain constraints on such mechanisms, and an exploration of these constraints will help to flesh out the meaning of the big picture approach.

As a means for discussing the detailed implications of the big picture approach, this Article will use the approach to analyze the current program for presidential influence over agency policy. The task of applying the approach to evaluate the current regulatory-review program is


\(^{192}\) See F.N. Klotzwog, Anatomy of the Crisis, 3 Current Pol. & Econ. of Russia 1, 2 (1992).
particularly timely because President Clinton recently modified the program that Presidents Reagan and Bush had instituted.\textsuperscript{195} In large part, Clinton's changes respond to severe criticism of the Reagan-Bush program by public interest groups and many in Congress.\textsuperscript{194} What remains to be seen is whether Clinton's program will provide the benefits of presidential oversight of agency policy without generating the detriments attributable to executive micromanagement of such policy.

\textbf{A. The Need for OMB Regulatory Review}

Although President Clinton significantly modified OMB regulatory review, he retained the central concept of having OMB preview particular agency decisions and communicate its concerns to the agency outside of notice and comment proceedings.\textsuperscript{195} Given the problems of interference with particular agency decisions, the first question raised by the big picture approach is whether any such OMB review program is justified.

The big picture approach recognizes that the President must not only define overarching policy themes, but also that he must have a mechanism for monitoring agency compliance with those themes. Nonetheless, the preferred mechanisms for implementing the big picture approach are through a coherent legislative agenda and the appointment of agency heads who share the President's regulatory vision. Unfortunately, these mechanisms by themselves may not be up to the task of constraining "runaway" bureaucracies within agencies.

The cumbersome process of enacting legislation interferes with the President's ability to get his legislative agenda through Congress much as it hinders direct congressional control of agency policy-setting.\textsuperscript{196} 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.\textsuperscript{197} These constraints prevent the President from marshalling through Congress all but a handful of statutory provisions reflecting his policy

\textsuperscript{193.} \textit{See Exec. Order No. 12,866, 58 Fed Reg. 51,735.}


\textsuperscript{195.} \textit{See Exec. Order No. 12,866, § 6(b), 58 Fed. Reg. 51,742.}

\textsuperscript{196.} \textit{See Light, supra note 141, at 53-54.}

\textsuperscript{197.} \textit{See id. at 33-34, 36.}
vision. Although such provisions, if carefully crafted, can significantly alter the perspectives with which agencies and courts view regulation, such judicial and administrative reaction is not likely to occur quickly. Even after such reaction occurs, a substantial legacy of existing regulatory policy will still be intact.

In addition, the propensity of congressional committees to engage in special-interest-oriented oversight might seriously undercut presidential efforts to implement regulatory reform through legislation.\textsuperscript{198} On any proposed regulatory measure, the President could face opposition from powerful committee members whose ability to modify and kill legislation is well-documented.\textsuperscript{199} This is not meant to deny that the President has significant power that he can use to bring aspects of his legislative agenda to fruition. The President's ability to focus media attention on an issue, his power to bestow benefits on the constituents of members of Congress who support his agenda, and his potential to deliver votes in congressional elections increase the likelihood of legislative success for particular programs.\textsuperscript{200} Repeated use of such tactics, however, will impose economic costs on society and concomitantly consume the President's political capital.\textsuperscript{201} At some point the price to the President for pushing legislation through Congress exceeds the benefit he derives from doing so. Thus, a President would be unwise to rely too heavily on legislative changes to implement his policy vision.

As for legislative enactments, there are pragmatic limitations on the extent to which the President can rely on appointments of agency officials to guarantee compliance with his overarching policies. The need for Senate approval of appointments is one obvious constraint on such reliance.\textsuperscript{202} Although this has not been a great obstacle to appointments by most modern Presidents,\textsuperscript{203} adverse publicity during Senate confirmations is a serious obstacle to some appointments.

\textsuperscript{198} See Maass, supra note 56, at 41-42.

\textsuperscript{199} See Farber & Frickey, supra note 110, at 56; David E. Price, Congressional Committees in the Policy Process, in Congress Reconsidered 156, 156-58 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); Seidman, supra note 66, at 45; see also R. Douglas Arnold, The Logic of Congressional Action 108 (1990) (discussing the need for one outside the legislature who seeks adoption of a particular policy, such as the President, to find committee chairs willing to back his proposals).

\textsuperscript{200} See Edwards & Wayne, supra note 155, at 130, 327, 335-38 (discussing the President's ability to stage a media event, to get legislators elected on his coattails, and to grant benefits to legislators and their constituents as means of influencing public opinion and Congress).

\textsuperscript{201} See Edwards & Wayne, supra note 155, at 336 (noting that because capital is scarce, a President cannot squander it by striking frequent bargains with members of Congress).

\textsuperscript{202} See U.S. Const. art. II, § 2.

\textsuperscript{203} Members of Congress ordinarily believe that the President is entitled to appoint whomever he wants, and Senate confirmation of appointees is usually routine. But when an appointment affects the "electoral or policy concerns" of congresspersons, then Senators may withhold their confirmation vote. Until very recently, however, the most the Senate could do was to delay regulatory appointments or to bargain for concessions on future appointments in return for confirmation. See Christopher H. Foreman, Jr., Signals from the Hill: Congressional Oversight and the Challenge of Social Regulation 77-79 (1986); see also Jonathan R. Macey,
tion hearings recently seems to have given the Senate significant influence over some presidential appointments. In addition, the President may not be able to appoint agency heads who share his regulatory agenda because he may need those appointments to serve other purposes. "Because politics has to do... with fashioning compromises and repaying debts, a president or department head may not be able to come within hailing distance of his first choice for a political appointment." Rewards for political support from powerful interest groups often will override ideology as a basis for an agency appointment.

Another constraint on the appointment process stems from the need for high-level agency officials to know something about the programs they head and about the means of getting results in Washington. Loyal but incompetent appointees cannot effectively press a President's regulatory agenda. In addition, high-level agency officials who fail to gain the respect of their staffs and Congress may find themselves forced to comply with detailed and inflexible policy prescriptions written into statutes, or to regulate without the cooperation of staff, upon whom they must rely to provide the analytic support for their decisions. For example, President Reagan's appointment of an EPA administrator who knew little and cared less about the environment may have been a significant factor prompting more detailed congressional oversight of the EPA, which in the long run has made the agency's regulatory task more difficult.


205. Heclo, supra note 145, at 98; cf. Robinson, supra note 74, at 107 (criticizing the use of appointments for political patronage because it interferes with attracting "the right people"). In extreme cases political pressure from unpopular actions by regulators may force the President to appoint an official because the official does not share his ideology. For example, after attacks on Anne Gorsuch's management of the EPA, President Reagan appointed William Ruckelshaus as Administrator, whose reputation for independence in that position under President Nixon "was essential to restoring the administration's credibility on environmental issues." Philip B. Heymann, The Politics of Public Management 81 (1987). In such a situation, however, the goal of democratic accountability suggests that the President should not be able to appoint an official who shares his policy perspective.

206. See Rosen, supra note 48, at 18-20 (arguing that incompetence of appointed officials, rather than lack of political control of the bureaucracy, often is the barrier to implementation of the President's agenda).

207. See Lazarus, supra note 32, at 344-46 (describing the effects of Congress's distrust of the EPA under Administrator Anne Gorsuch Burford).
PRESIDENTIAL INFLUENCE

When all is said and done, the big picture approach merely suggests that proposal of a legislative agenda aimed at a coherent regulatory vision and appointment of officials who share that vision are methods that Presidents have not used to the fullest extent to facilitate their influence of agency policy. This approach does not promise, however, that increased use of these mechanisms alone will maximize agency allegiance to the President's policies. Nor does the approach limit presidential influence to these mechanisms. Even under the big picture approach there may be room for some form of executive regulatory review to monitor and constrain agency policy-setting. The question remains, however, how to structure that review to avoid the problems of micromanagement.

B. Evaluation of Executive Order 12,866

The current regulatory review program is governed by Executive Order 12,866. This Order expands the substantive guidelines for regulation beyond the simplistic maximization of net economic benefits that President Reagan had commanded. Executive Order 12,866 instead includes a page-and-a-half "Statement of Regulatory Philosophy and Principles," which describes a host of factors that agencies should consider when issuing regulations. In its section on OMB review, the Order calls for the Administrator of OIRA to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order." Beyond this, the Order also expands the procedural requirement that agencies file regulatory agendas and annual plans with OMB to apply to independent regulatory agencies as well as executive agencies.

In most other respects, Executive Order 12,866 constrains the review prerogatives that OMB enjoyed under the Reagan-Bush program. At the outset, it restricts OIRA review to significant regulatory actions. The

208. See Robinson, supra note 74, at 107; cf. Hess, supra note 73, at 179-81 (contending that recent Presidents have been slow to take advantage of lessened traditional constraints on selecting the Cabinet).
211. Id. § 6(b).
212. Id. § 4(b)-(c). Commentators have debated whether the President has the constitutional power to apply binding substantive provisions specified as part of OMB review to independent agencies—agencies whose heads the President cannot remove at will. See Shane, supra note 7, at 1258-59 & nn.107-08. No President has yet applied such provisions to independent agencies, perhaps out of fear of a congressional backlash. Accountability and coherence arguments for presidential influence on agency policy, however, suggest that some presidential influence on policies of independent agencies is appropriate as long as the President cannot specify the outcome of any particular decision. In other words, application of the big picture approach to independent agencies is appropriate, and probably would engender less congressional hostility than would presidential micromanagement of such agencies.
order limits access to OIRA by those outside the executive for discussion of matters under review; it also provides for broad disclosure of OMB meetings with outsiders and, after the agency publishes a regulatory action, of OMB’s communications with the agency. In addition, the Order strictly limits the time OIRA has to complete its review of an agency regulatory action. The Clinton program, however, retains one core feature that, in the past, OMB has attempted to use to control agency policy decisions: Executive Order 12,866 still provides that an agency may not proceed with a regulatory action that OIRA has determined requires further consideration.

1. The Substantive Provisions of Executive Order 12,866 and the Lack of a Big Picture

The Clinton campaign promised solutions to particular problems rather than a defined philosophy of government regulation. Clinton promised to move towards a balanced budget, to stimulate job creation in the economy, and to provide health insurance reform that would stop excessive increases in health care costs and provide universal coverage, all without imposing additional taxes on the middle class. Since his election, President Clinton has continued to pick out particular problems rather than sketch out a big picture approach. He has, for example, added crime and the threat it poses to the security of the average American as a problem he intends to tackle.

The lack of a big picture approach is evident in Executive Order 12,866. Its “Statement of Regulatory Philosophy and Principles” purports to retain the cost-benefit requirement of Reagan's Executive Order 12,291. Even that cost-benefit requirement was necessarily fuzzy,
allowing OMB to disagree with agencies’ Regulatory Impact Analyses (RIAs) because of fundamental differences in how OMB reviewers and agency staff valued particular costs and benefits. The Clinton order makes the standard even fuzzier, however, by allowing agencies to promulgate rules based on reasoned determinations that benefits exceed costs without having to quantify those benefits and costs. Executive Order 12,866 further clouds the standard by requiring that agencies consider “incentives for innovation, consistency, predictability, the costs of enforcement and compliance, . . . flexibility, distributive impacts and equity” in designing “the most cost-effective” regulations. It also demands that “each agency . . . consider, to the extent reasonable, the degree and nature of the risks posed by various substances of activities within its jurisdiction.” Many of these considerations will work in opposite directions when applied to a particular regulatory decision, and the agency will have to prioritize them before evaluating any particular regulation. The Executive Order gives no basis for performing this prioritization.

The Statement is not objectionable if viewed as a precatory list of factors that each agency should consider before taking a regulatory action. Each factor in the Statement is important and an agency would be remiss if it failed to consider any of them before making its decision. But the Statement, as it stands, does not greatly limit agency decision-making discretion because it leaves the agency free to balance these factors as it sees fit in light of its statutory mandate. In other words, such a broad list of considerations does little to inform the agency as to what the President may desire concerning any particular regulation.

The lack of direction provided by the Statement would not be of great concern were it merely a guideline for agency rulemaking; agencies are better structured than OMB to make such discretionary decisions, and the President has other means of influencing agency policy-setting. The Statement poses a much greater problem, however, as a guideline for
OIRA review of agency policy. Its lack of direction then translates into authorization for OIRA desk officers and analysts to rebalance all the factors in the Statement without any direction about the weight to accord each factor.\textsuperscript{226}

The problem is heightened by Executive Order 12,866's authorization of OIRA to object to an agency regulatory action on the grounds that it is inconsistent with unstated priorities of the President. The Order does contain one provision that may ameliorate this problem: It provides for an annual planning meeting at which the Vice President, agency heads, and presidential advisors (including the Administrator of OIRA and the director of OMB) "seek a common understanding of priorities . . . to be accomplished in the upcoming year."\textsuperscript{227} The annual meeting, however, does little to ensure political accountability of the administration's priorities, and it remains unclear whether any "understanding" reached at the meeting will provide sufficient direction to OIRA desk officers to guarantee that their objections to agency regulatory actions comport with the policy vision of the President. If the Order provides any such guarantee, it derives from the procedural constraints the Order imposes on OMB rather than from the use of a substantive big picture to constrain OMB review.

2. The Procedural Provisions of Executive Order 12,866 as a Constraint
   on OMB Discretion

The procedural constraints that Executive Order 12,866 imposes on OIRA are more significant than its substantive constraints. Nonetheless, these provisions ensure neither that OIRA's influence will conform to the President's policy preferences nor that such influence will foster achievement of public-oriented statutory goals rather than private-interest political deals.

OMB's influence may deviate from the President's priorities because Executive Order 12,866 still effectively allows OMB to veto agency regulatory actions. Unlike under the Reagan program, OIRA must respond to an agency submission within strict time limits; OIRA cannot "pocket veto" a proposed rule by simply delaying review of it.\textsuperscript{228} Once OIRA responds by requesting further consideration of the proposed agency action, however, the agency may not proceed.

Technically, an agency can seek an override of an OIRA objection by

\textsuperscript{226} Even the more focused cost-benefit directive of Executive Order 12,291 was sufficiently imprecise in practice to allow OMB to object to any rule it found politically objectionable. See Comments of Frank White, Agency Diplomacy: Relations with Congress and the White House, and Ethics in the Administrative Process, 4 Admin. L.J. 3, 25 (1990) (describing how OMB used the imprecision of cost-benefit review to force its position on OSHA).


\textsuperscript{228} See Percival, supra note 2, at 162. But cf. Bruff, supra note 74, at 540-41 (noting that OMB has in fact delayed proposals).
the agency head requesting a resolution of the conflict from the Vice President or President. But the President and Vice President are too busy to resolve all but the most severe conflicts between OMB and the agency. In fact, agency heads and the Director of OMB are probably sufficiently busy that even they will hesitate to get involved in the resolution of most conflicts. As a result there will be great pressure on agency and OIRA staff members to work out conflicts among themselves. In proposing a regulation, however, it is the agency staff that seeks to alter the status quo, and because OIRA staff has the authority to stop the regulatory action, it can force the agency staff member to seek higher level review. In other words, because the review process is set up to allow OIRA presumptively to stop agency action, low-level OIRA reviewers will retain a significant ability independently to pressure the agency to change its position. Thus, the procedural constraints merely ensure that the agency can force the President or his close advisors to monitor OMB's changes to agency proposed rules in high profile cases. In most cases, however, no such monitoring will occur.

The Executive Order's procedural constraints address more directly the possibility of OMB's special interest bias. The Order limits communications of those outside the executive branch with OIRA staff members: Once a matter is under review at OIRA an outsider may only "initiate" such a communication orally to the Administrator of OIRA or in writing. OIRA must disclose to the public the initiation of any such outside communication and, once the agency publishes the regulatory action under review, the substance of such communications. Also, after the agency publishes the regulatory action, OIRA must make available to the public all documents it exchanged with the agency as part of its review. In addition, the agency must identify any changes it made at the
suggestion of OIRA. In essence, Executive Order 12,866 tries to hold OIRA accountable by public disclosure of OIRA’s communications and influence on an agency decision.

Although such public disclosure goes a long way toward discouraging blatant attempts by OIRA to favor unpopular special interest groups, Executive Order 12,866 still leaves some loopholes for special interest input. Astute special interest representatives can make their positions known to OIRA before a pending agency action is formally under OIRA review. Also, interest group representatives can use contacts in the White House to channel their input to OIRA. A more fundamental problem with the Order is that disclosure usually will not prompt sufficient political reaction to discourage OIRA from advocating special interest positions. As already noted, it is hard to get the general electorate to react at the polls to any particular regulatory decision. Moreover, OIRA frequently can frame an interest group’s position in terms of more public-minded goals, which helps to hide OIRA’s true motives. This further increases the costs of educating and organizing large groups whose members share diffused interests in opposition to OIRA’s actions.

There is yet one additional shortcoming of the procedural constraints imposed by Executive Order 12,866. The Order retains OIRA’s prerogative to preview agency regulatory actions before they are published. As a result, OIRA input occurs before the agency engages in any discussion and exchange with entities who might be affected by the action. This may discourage the agency from responding open-mindedly to input during its subsequent rulemaking proceeding and thereby undercut any effect such a proceeding may have in encouraging the agency to engage in deliberative decision-making. For example, OIRA gets to review any rule the agency is considering proposing before the agency publishes notice of the proposed rule. If OIRA decides the rule warrants further consideration, the proposed rule may never get published, which precludes any subsequent proceeding altogether. In such a case communications between OMB and the agency remain confidential. Even if a proposed rule does get published, it will already reflect a resolution between OIRA and agency staff that the agency may be hesitant to upset in response to public comments. As a result, OIRA’s preview of the proposed rule could encourage the agency and entities filing comments to become intransigent and to assume adversarial roles, which in turn would interfere with any attempt to structure regulations to respond to the concerns of all interested parties.

Executive Order 12,866 seems to have envisioned this problem, as it explicitly requires each agency to encourage involvement of those affected

235. Id. § 6(a)(5)(E)(ii).

236. See supra note 116 and accompanying text.

237. Cf. Seidenfeld, supra note 46, at 1552 (making a similar point about reliance on challenges to agency statements of policy when they are applied as a means of fostering deliberation about the wisdom of the policies).
by regulations prior to publishing a notice of proposed rulemaking, and to explore consensual mechanisms for developing regulations, such as negotiated rulemaking.\footnote{Exec. Order 12,866, § 6(a)(1), 58 Fed. Reg. 51,740 (1993).} Unfortunately, negotiated rulemaking, which relies on prenotice conferences to secure consensual regulation, is not the norm.\footnote{As of June 30, 1989, only eight agencies had used negotiated rulemaking in a total of nineteen proposed regulations. See Admin. Conference of the United States, Office of the Chairman 1990, Negotiated Rulemaking Sourcebook 327-43 (1990). The frequency with which agencies utilize negotiated rulemaking presumably will increase now that Congress has statutorily authorized this mechanism in the Negotiated Rulemaking Act of 1990, 5 U.S.C.A. §§ 561-570 (West Supp. 1994).} Moreover, the very decision to convene a negotiated rulemaking conference is a regulatory action subject to review before the fact by OIRA. Hence, despite the Order’s seeming sensitivity to the potential for agencies to foster deliberative democratic processes, by giving OIRA a first bite at the apple it potentially discourages consensual regulatory mechanisms.

3. Some Recommendations for Changes to the Current Regulatory Review Program

Although the Clinton reform of OMB regulatory review has alleviated much of the concern generated by the Reagan-Bush review program, the above analysis indicates that such review still poses a threat of OMB micromanagement of agency policies.\footnote{The only other academic analysis of Executive Order 12,866 reached a consistent conclusion that the extent to which the Order will reduce secrecy at and micromanagement by OIRA “depend[s] on how the order is implemented.” Shapiro, supra note 17, at 36.} To reduce this threat further reforms are in order.

The most significant step the Clinton administration could take would be to amend Executive Order 12,866 to provide some overarching themes that might help guide OIRA reviewers. This might be difficult because Clinton did not define such themes as part of his presidential campaign. Nonetheless, many of the particular programs he advocated share some common thread that might constitute a coherent regulatory philosophy. His concern for economic growth and job creation, and his plan for a national health care system both address the fears of working Americans about the possibility of losing their jobs and the effects of such loss. Hence, one overarching theme could require agencies to design regulations to minimize disruptions in employment and generally to maintain present jobs or encourage job growth. This might require, for example, that agencies make provisions for job retraining or development of alternative industries when regulations would otherwise discourage the maintenance of an industry in a particular geographical region.\footnote{Prohibitions on logging in old growth forests in the Northwest immediately come to mind as a regulation that would warrant special efforts to minimize the effects of job loss and employment dislocations. See John H. Cushman, Jr., Owl Issue Tests Reliance on Consensus in Environmentalism, N.Y. Times, Mar. 5, 1994, at 28 (discussing difficulties with Clinton Administration’s plans to resolve disputes about managing old growth forests by seeking}
administration's recent concerns about crime, perhaps one could justify a broader theme requiring agencies to place greater value on the reduction of economic, health, and safety risks when preparing regulatory impact analyses. At the very least, Executive Order 12,866 should be modified to give reviewers some indication of the relative priorities the President places on the multitude of factors the Order requires an agency to consider.

In addition to the substantive definition of overarching policy themes, some procedural modifications would also help constrain runaway OMB review and make the process of presidential influence over agency rulemaking more meaningfully accountable. First and foremost, Executive Order 12,866 should be modified to eliminate the effective veto power of low-level OIRA staff. This could be done by altering the presumptive effect of a disagreement between the agency and OIRA so that the agency can continue with a rulemaking despite the objections of OIRA staff. To avoid eviscerating presidential influence, the President or a designated close advisor in the White House should still be allowed to prevent the agency from proceeding to issue a final rule by personally objecting to the agency head.

The agency should be required to place in the rulemaking docket any written communications and a summary of oral communications with OIRA desk officers and analysts. This requirement would still permit OIRA and the agency to engage in deliberative informal discussions that are crucial to effective OIRA input. At the same time, docketing these communications would allow higher-level managers in OIRA to monitor low-level staff interaction with agencies to prevent OIRA reviewers from introducing their idiosyncratic policy perspectives into a rulemaking process. In addition, placing the substance of OIRA's communications in the record will allow others to comment on OIRA's concerns, which would improve the deliberative function of notice and comment proceedings.

The docketing requirement may stifle some discussion by OIRA and agency staff. But the lower level OIRA staff members to which the requirement would apply have less overtly political agendas; their opinions would be more objectively grounded and hence less embarrassing if publicly disclosed. Therefore, the docketing requirement's chilling effect on deliberative discussion is not likely to be great. The impact of docketing communications in reducing the likelihood that low-level staff members might introduce idiosyncratic concerns into OIRA's influence on rulemaking outweighs docketing's potential chilling effect on OIRA/agency communications.242

242. Whether docketing of OIRA-agency communications would have a net beneficial effect is a difficult question, and various commentators have drawn the lines of required disclosure for such communications in different places. See, e.g., Recommendations of the Admin. Conference of the United States, 54 Fed. Reg. 5207, 5208 (1989) (same); Bruff supra note 17, at 588 (calling for docketing of written but not oral communications); Gilhooley, supra note 92, at 320-21 (calling for identification of portions of rules changed as a result of consensus between environmentalists and the logging industry).
These procedural modifications of the regulatory review mechanism would ensure that low-level OIRA staff members could not leverage objections into influence of the agency decision without agreement by the President or at least a high-level OMB official or White House advisor. Thus, the President would have less need to monitor OIRA staff interactions with the agency. Moreover, since interactions of OIRA desk officers and analysts with the agency would be public, interest groups involved in the proceeding could monitor these interactions for the President and sound an alarm if OIRA's input appeared unacceptable. Finally, if the President's decision to halt agency action were permitted only after comments to a proposed rule were already filed, the President and the agency would have the benefit of the public deliberation that would occur during the notice and comment proceeding. So structured, executive regulatory review would not directly undercut the use of the agency proceeding to formulate policy that furthers the general public's interest.

CONCLUSION

The past two decades have seen a raging debate about the proper extent of presidential influence over agency policy-setting. The controversy was fueled during the Reagan and Bush administrations by competition between the Democratic Congress and Republican Presidents for control of the federal bureaucracy. President Clinton's continued reliance on a program of substantive executive review of agency rulemaking, despite Democratic control of Congress, suggests that the debate will continue regardless of whether one party controls both Capitol Hill and the White House.

Rather than directly enter the fray in this debate over the appropriate extent of presidential influence, this Article has focused instead on the question of how the President should go about influencing agency policymaking. It has analyzed this question along the dimension of micromanagement versus macromanagement of agency policy. As the normative measures for this evaluation, the Article investigated the extent to which each approach would, first, help the President implement his policy choices and, second, discourage policies geared towards appeasing special interests at the expense of the public good.

Using this framework for evaluation, this Article concludes that the

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OIRA agency negotiation); NAPA Report, supra note 95, at 35 ( recommending disclosure of oral communications).

243. This is an example of what political scientists have termed "fire alarm" rather than "police patrol" oversight. See Matthew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165, 166 (1984). Generally, fire alarms are cheaper for the political "principal" (i.e. Congress or the President) to administer, although they may increase the principals' costs of monitoring agencies. See Arthur Lupia & Matthew D. McCubbins, Learning from Oversight: Fire Alarms and Police Patrols Reconstructed, 10 J.L. Econ. & Org. 96, 111 (1994).
President should avoid micro-managing agency policy decisions. Instead, he should adopt a big picture approach to influencing agency policy—attempting to inculcate in administrative agencies an overarching policy vision that will guide them toward outcomes consistent with his policy preferences. By doing so, the President minimizes the costs of monitoring the ultimate policy maker, whether it be the agency head or the Office of Management and Budget staff. At the same time, the big picture approach encourages a deliberative policy-making process that better furthers the public interest. Only in this manner can the President retain control over the federal bureaucracy in a manner that ensures that regulatory policy is consistent with the values of the American electorate.