

HEINONLINE

Citation: 105 Mich. L. Rev. 47 2006-2007

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu May 24 15:24:15 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0026-2234](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0026-2234)



DiscoverArchive

Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published in
105 Mich. L. Rev. 47 2006-2007

INSIDE THE ADMINISTRATIVE STATE: A CRITICAL LOOK AT THE PRACTICE OF PRESIDENTIAL CONTROL

*Lisa Schultz Bressman**
*Michael P. Vandenbergh***

From the inception of the administrative state, scholars have proposed various models of agency decision-making to render such decision-making accountable and effective, only to see those models falter when confronted by actual practice. Until now, the “presidential control” model has been largely impervious to this pattern. That model, which brings agency decision-making under the direction of the president, has strengthened over time, winning broad scholarly endorsement and bipartisan political support. But it, like prior models, relies on abstractions—for example, that the president represents public preferences and resists parochial pressures—that do not hold up as a factual matter. Although recent empirical analyses purport to validate the model, they fall short because they examine how the White House exercises control without considering how agencies experience control. This Article is the first to study the practice of presidential control from inside the administrative state. We interviewed the top political officials at the Environmental Protection Agency from the George H.W. Bush and William J. Clinton administrations during 1989–2001. Our data, which do not vary substantially between respondents of different presidential administrations, suggest that White House involvement is more complex and less positive than previous accounts acknowledge. But we do not conclude that the presidential control model lacks merit. Indeed, our respondents recognize that the president has a role to play in controlling agency decision-making. We therefore conclude that the presidential control model requires reworking to remain valid in practice as well as in theory. We identify next steps in that direction.

* Professor of Law, Vanderbilt University Law School.

** Professor of Law, Vanderbilt University Law School. We would like to thank Brooke Ackerly, Jim Blumstein, Linda Breggin, Michael Bressman, Mark Cohen, Paul Edelman, Nita Farahany, John Goldberg, Owen Jones, Nancy King, Stephanie Lindquist, Bob Martineau, Richard Nagareda, Erin O’Hara, Suzanna Sherry, and Ken Wallston for helpful comments. We would like to thank participants at the Administrative Law Section’s “Empirical Work in Administrative Law: Policy and Scholarship” panel at the 2006 AALS Annual Conference, and faculty workshop participants at Cornell Law School, Texas Law School, and Vanderbilt Law School. Finally, we would like to thank Stephanie Frazee and Lauren Kearney for excellent research assistance.

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION | 48 |
| I. THE PRESIDENTIAL CONTROL MODEL | 52 |
| A. <i>The Theoretical Debate</i> | 53 |
| B. <i>The White House Experience</i> | 56 |
| 1. <i>OIRA Review</i> | 57 |
| 2. <i>General White House Involvement</i> | 59 |
| 3. <i>Limitations</i> | 61 |
| II. THE AGENCY EXPERIENCE: SURVEY METHODOLOGY | 62 |
| A. <i>The Respondents</i> | 63 |
| B. <i>The Survey Instrument</i> | 64 |
| III. THE AGENCY EXPERIENCE: SURVEY RESULTS AND CONCLUSIONS..... | 65 |
| A. <i>Sources of Presidential Control</i> | 65 |
| B. <i>Regulatory Efficacy</i> | 70 |
| C. <i>Other White House Involvement</i> | 76 |
| D. <i>Political Accountability</i> | 78 |
| E. <i>Faction Resistance</i> | 84 |
| IV. INSTITUTIONAL REFORM | 91 |
| A. <i>Transparency</i> | 92 |
| B. <i>Lines of Responsibility</i> | 93 |
| C. <i>Selectivity</i> | 94 |
| D. <i>Timing of Review</i> | 95 |
| E. <i>Focus on Costs</i> | 96 |
| F. <i>Entrenchment of Career Staff</i> | 98 |
| CONCLUSION | 99 |

INTRODUCTION

Theories of agency decision-making necessarily depend on propositions about how the government works. If the propositions are inaccurate or incomplete, the theory is vulnerable. In this Article, we show that the currently dominant “presidential control” model of agency decision-making suffers from exactly that problem.

The presidential control model posits that the president sets national regulatory policy for agencies to follow.¹ But the presidential control model oversimplifies at the critical juncture, the point at which the agencies receive their directions from the White House. Like previous models, it offers abstractions—for example, that the president represents public preferences and resists parochial pressures—that founder on the facts. Although recent empirical analyses claim to validate aspects of the theory, they largely reproduce the generalities. Those empirical analyses seek to verify the

1. For a description of this conception of agency decision-making, see Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 180–84 (1997).

model by examining White House sources, either the president's advisors or his regulatory review arm, the Office of Information and Regulatory Affairs ("OIRA"). But the studies are influenced by the theory. They consider how the White House exercises the control function without considering how agencies experience that control function.

This Article uses empirical methods to engage the theory in a more satisfactory way. It is the first to investigate the practice of presidential control from inside the administrative state. We interviewed the top political officials at the Environmental Protection Agency ("EPA") from the George H.W. Bush ("Bush I") and William J. Clinton administrations during 1989–2001.² We thus studied the agency with more high-cost rules than any other, across administrations of different political parties.³ From this vantage point, we were able to observe whether the EPA experiences White House intervention in the way that the presidential control model supposes.

Our claim is not that agency insiders have any epistemic advantage in ascertaining whether the presidential control model is correct. Rather, we claim that agency officials are the right people to ask about the messages that they receive from the White House—and more particularly, whether those messages are rational and transparent and responsive and balanced, as proponents of the presidential control model contend. They are experts as to these facts.

EPA respondents suggest that the presidential control model paints too superficial a picture. Such respondents did not view White House involvement in EPA rule-making as working as well as it might. Furthermore, the Bush I and Clinton respondents did not reflect substantial differences in their views, suggesting that our results are not simply the product of one presidential administration or one political party.⁴ In light of our evidence, we suggest that scholars should rethink the conventional wisdom that has prevailed in regulatory circles since the Reagan Era.

At the outset, we demonstrate that scholars may have underestimated the complexity of White House involvement. Presidential control is a "they," not an "it."⁵ But EPA respondents did not merely confirm that both OIRA and other White House offices are involved in EPA rule-making. Rather, they indicated that OIRA is not the primary source of influence on many major rule-makings, as scholars typically assume. OIRA often takes a back seat to other White House offices when both are involved. Although OIRA exerts influence on many day-to-day issues, other White House offices often wield more influence on high-profile or high-stakes matters. EPA respondents also highlighted an ill-appreciated dynamic: White House offices form coalitions

2. For survey methodology, see *infra* Part II.

3. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 872 (2003).

4. For a comparison, see *infra* Part II.

5. Nicholas Bagley & Richard L. Revesz, *OMB and the Centralized Review of Regulation* 45 (NYU, Law and Economics Research Paper No. 05-16, 2005), available at <http://ssrn.com/abstract=786486>; Croley, *supra* note 3, at 873.

for or against the EPA. These coalitions frequently enlist OIRA to batter or shield the EPA rather than to avail themselves of the independent value of its regulatory review.

Conversely, we reveal that scholars may have overestimated the regularity of presidential control. According to EPA respondents, OIRA review and other White House involvement are unsystematic. Furthermore, both appear to be triggered in many cases not just by the need for centralized oversight of particular regulatory matters but also by the interest of the particular officials involved. Such selective intervention is not particularly surprising; realistically, the White House cannot—and perhaps should not—get involved in all regulatory matters. Furthermore, such selective intervention is not all bad. It may comport with political priorities and even facilitate political accountability where it happens to exist. The difficulty is that it may not serve to rationalize agency decision-making in the sense that a *model* of administrative law should.

We next show, contrary to widespread belief, that OIRA review may not achieve regulatory efficacy. OIRA staffers appear to have adequate institutional resources to perform cost-benefit analyses. And OIRA review appears to advance inter-agency coordination somewhat, minimizing overlaps and conflicts between or among the regulations of different federal agencies. But OIRA review does not achieve what might be called “intra-agency coherence,” which includes reducing redundancies, avoiding inconsistencies, and eliminating unintended consequences between or among the regulations of a particular agency.⁶ Thus, OIRA review fails to discharge one of the central purposes for which President Reagan created it and all subsequent presidents have maintained it. Furthermore, OIRA review regularly skews rule-making in a deregulatory direction, even when doing so may be inconsistent with presidential priorities. We conclude that OIRA review is better thought of as serving a regulatory cost-reduction function rather than a more “neutral” role.⁷

We also cast doubt on the extent to which broader White House involvement promotes regulatory effectiveness, at least as to the EPA. EPA respondents confirmed what scholars already knew, that President Clinton issued few official directives to the EPA of the sort that he had issued to other agencies to energize them and induce them to take action. If White House involvement nonetheless prompted EPA respondents to take action, it was often by causing them to better defend existing regulatory proposals rather than to create new ones. Although valuable, this function is not what scholars envision when arguing that White House involvement improves regulatory effectiveness.

Perhaps even more noteworthy, we question whether presidential control facilitates political accountability. EPA respondents believed that they were

6. Cf. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) (contending that OIRA review “encourages policy coordination, greater political accountability, and more balanced regulatory decisions”).

7. See Bagley & Revesz, *supra* note 5, at 19–42.

more transparent and responsive than the White House. When asked to identify the aspects of the EPA process that provided greater public view and representation, respondents emphasized the notice-and-comment rule-making procedures of the Administrative Procedure Act (“APA”),⁸ various stakeholder and regional meetings, and Federal Advisory Committee Act (“FACA”) requirements.⁹ Respondents also indicated that the general media and trade press reported far less often on White House involvement in EPA rule-making. We conclude, somewhat paradoxically, that agencies, though not comprising elected officials, may better promote political accountability than the White House. Of course, political accountability may be defined in a variety of ways. If it turns solely on whether an elected official supervises agency decision-making,¹⁰ then presidential control may fit the bill. But to the extent that political accountability encompasses more than formal or reflexive relationships between the government and the people, the White House may do less than it should.¹¹ If the White House shapes high-level issues, it ought to reveal in what manner and through which office or offices it does so. For now, agencies appear to better represent public preferences and resist parochial pressures—the asserted aims of political accountability.

We end with a possible conundrum, that presidential control may favor narrow interests but nevertheless serve national policy interests. EPA respondents stated that the White House frequently favors business groups and seeks to reduce burdens on such groups. At the same time, respondents reported that the White House frequently advanced national policy interests. How can it be that EPA respondents believe that the White House simultaneously favors special interests and serves national interests?¹² We consider multiple interpretations to reconcile these results. For example, EPA respondents might believe the conventional bad agency story that “health and safety agencies are frequently captured by pro-health and safety constituencies, leading to systematically overzealous and inefficient regulation.”¹³

8. 5 U.S.C. § 553 (2000).

9. 5 U.S.C.A. § 10(a)(3) app. 2 (West 1996) (“Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.”).

10. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994).

11. Cf. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152 (1997); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995) (arguing that the president is accountable because he represents public rather than private interests); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (arguing that the president enhances accountability of agency decision-making by increasing transparency and responsiveness to the public).

12. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 503–15 (2003) (arguing that the president deserves public interest when he tolerates or facilitates factional influence on agency decision-making).

13. Bagley & Revesz, *supra* note 5, at 3 (attributing this story to DeMuth & Ginsburg).

Thus, EPA respondents might view White House involvement as a check on environmental overreaching.¹⁴

In the end, we find most plausible another explanation: respondents viewed the president as serving an important role simply because he is the president, even though he intervened on behalf of regulated entities more often than environmental interests. What this says is that EPA respondents understand their place in our governmental structure, which is encouraging. But their acceptance of presidential control should not obscure the fact that it may operate in ways that fail to enhance agency legitimacy.

We therefore suggest next steps for improving White House involvement in agency decision-making. Some are relatively uncontroversial—for example, the call for increased transparency of White House involvement. Others are more provocative—for example, the call for turnover of OIRA career staff. All are worth serious consideration. White House intervention has become a fixture of the administrative state. Yet high-level officials, from the agency most subject to such intervention, during both Republican and Democratic administrations, have identified substantial shortcomings. The time is now to bring the practice of presidential control in line with its promise.

This Article proceeds in four parts. Part I describes the theoretical debate about the presidential control model and the leading empirical work on the subject. Part II details the methodology for our study. Part III reports and analyzes the results of our study. Part IV offers guidance, in light of our evidence, for retooling the presidential control model to ensure that it achieves in fact what it offers in theory.

I. THE PRESIDENTIAL CONTROL MODEL

The debate about White House involvement in agency decision-making is part of a larger debate about the legitimacy of modern bureaucratic government. The larger debate raises the following questions: How do we ensure that agency officials are answerable to the people for their decisions (the problem of political accountability)? How do we ensure that agency officials make public-regarding decisions rather than narrowly interested ones (the problem of faction resistance)? How do we ensure that agency officials make rational and otherwise effective decisions, when viewed both in isolation and together with other governmental decisions (the problem of regulatory efficacy)?¹⁵ These questions are interrelated. They seek ways to tether the administrative state to the constitutional structure, which commits

14. *But see id.* at 19–42 (arguing that the agency capture story does not find support in political science literature or public choice theory); J.D. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2297 (2005) (“[T]he evidence that agency capture is a widespread phenomenon is thin. To the extent that agencies do reflect the views of their client interest groups, capture is likely to be partial and inconsistent—rarely are groups powerful enough to determine decisionmaking in every case.” (citation omitted)).

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

law-making and law-execution to elected officials.¹⁶ But, more generally, they seek ways to promote good government.

While these questions cut to the core of democracy, the answers often graze the surface. The theories of agency decision-making that have arisen over time rest on oversimplifications about the way the government works. As a result, they have had only limited power to explain and justify the administrative state. The presidential control model has had more force, in part owing to its bipartisan political appeal.¹⁷ But legal scholars also have given it more credence for enhancing agency legitimacy than previous theories. In Section A, we show that the presidential control model suffers from an oversimplification similar to those that have undermined prior models of agency decision-making. In Section B, we demonstrate that empirical studies designed to test the presidential control model have failed to deepen it.

A. *The Theoretical Debate*

Since its inception, the regulatory state has witnessed different theories or “models” of administrative law that purport to answer questions of agency legitimacy. The earliest model was the “transmission belt” model, which understood agencies as merely implementing statutory instructions.¹⁸ If simply obeying statutory instructions, agency officials assumed the virtues of their authors; agency officials were viewed as accountable, faction-proof, and efficacious as was Congress. In the 1930s, another model arose. The “expertise” model understood agencies as committed to an ethic of professionalism and rationality.¹⁹ Because they were disciplined, if not objective, agency officials were better positioned to produce sound regulation and good government than elected officials. By the 1970s, a third model emerged. The “interest group representation” model understood agencies as open to all affected interests.²⁰ In this respect, agency officials were even more accessible and responsive to the public than were elected officials. A fourth model appeared in the 1980s. The “presidential control” model understood agencies as subject to the oversight and management of the chief executive.²¹ For legitimacy purposes, agency officials stood in the shoes of their boss; they were as accountable, faction-resistant, and efficacious as the president.

Until the presidential control model, every model foundered on a disconnection between theory and practice. The transmission belt model,

16. More formally, they seek ways to square the administrative state with a constitutional structure that contains only three branches and not a “headless” fourth. See Calabresi & Prakash, *supra* note 10, at 570–99.

17. See James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 853 (2001).

18. See Stewart, *supra* note 15, at 1675.

19. *Id.* at 1678; see also JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10–17 (1938).

20. Stewart, *supra* note 15, at 1683, 1687.

21. See Farina, *supra* note 1, at 180–84.

though plausible in theory, was unrealistic in practice because agencies rarely received concrete statutory instructions and were left to their own devices under broad statutory delegations.²² The expertise model was vulnerable in practice because agencies made political judgments free from political supervision.²³ The interest group representation model was cumbersome in practice because agencies had to allow and digest so much public input, and they still comprised unelected officials.²⁴

The presidential control model seemed different. With the president at the helm, agencies were no longer “headless.”²⁵ Indeed, they had the best leader possible. Because the president is the one official elected by the entire nation, he is more responsive to and representative of the people than Congress.²⁶ By the same token, he is more resistant to factional influence than Congress.²⁷ The president also is uniquely situated to improve the cost-effectiveness and coordination of agency decision-making.²⁸ Until President Reagan took office, conventional wisdom held that accountability and efficiency could not coexist because congressional oversight and public participation increase regulatory decision-making costs.²⁹ President Reagan demonstrated that political control (and hence accountability) was not inconsistent with regulatory efficacy when exercised through executive oversight. Thus, presidential control could respond to a particular (often conservative) concern about agency decision-making: agencies, driven by health and safety interests, will regulate overzealously and inefficiently.³⁰ At the same time, presidential control could address the opposite (often liberal) worry: agencies, naturally inclined to inertia, will regulate sluggishly and ineffectually.³¹

Yet critics of the presidential control model argue, in essence, that it, too, rests on an oversimplification about the way that government works. As a general matter, scholars have questioned whether the model oversimplifies our democratic structure—that is, whether it adequately respects congress-

22. Stewart, *supra* note 15, at 1676–77.

23. Kagan, *supra* note 11, at 2262.

24. Similar critiques also were true of the procedural and judicial innovations that had occurred in administrative law alongside the models. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 49 (1993) (contending that even the threat of judicial review has overburdened the administrative process); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 71 (1995) (arguing that judicial review allows unaccountable courts to inject their judgment).

25. See Calabresi & Prakash, *supra* note 10, at 570–99.

26. See MASHAW, *supra* note 11, at 152; Calabresi, *supra* note 11, at 58–70; Kagan, *supra* note 11, at 2331–37; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

27. See Kagan, *supra* note 11, at 2337; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994).

28. See Kagan, *supra* note 11, at 2339.

29. See *id.* at 2331.

30. See DeMuth & Ginsburg, *supra* note 6, at 1081.

31. See Kagan, *supra* note 11, at 2264, 2344.

sional will or governmental balance.³² The Constitution not only pits power against power but law against politics, so as better to produce sound responses to complex problems. More narrowly, scholars have argued that the platitudes about the president fail to hold up in reality. White House involvement is insufficiently systematic and transparent to generate accountability or defy faction.³³ Very little is known about general White House involvement. It is ad hoc, as it must be, because the president realistically cannot get involved in every agency decision.³⁴ It is ex parte, though it need not be, because the president often fails to disclose his role to the press or the courts.³⁵ If uneven and hidden, White House involvement is susceptible to misuse. It may operate to serve special interests rather than national interests.

According to many, OIRA review is no less problematic. President Reagan introduced OIRA review of agency rule-making³⁶ to downsize bureaucratic government. By executive order, President Reagan established a formalized process authorizing the Office of Management and Budget (“OMB”), or, more particularly, OIRA, to evaluate major rule-making proposals for cost-effectiveness and overall regulatory soundness.³⁷ President George H.W. Bush retained the OIRA review process, creating the Council on Competitiveness in Vice President Dan Quayle’s office to oversee it.³⁸ President Clinton also adopted the OIRA review process, though he abolished the Council on Competitiveness. But President Clinton justified the process in a novel way, as part of an effort to reinvent government rather than to reduce government.³⁹ By the time President George W. Bush arrived, preserving OIRA review was a foregone conclusion.⁴⁰

Scholars have argued that OIRA review in practice does not serve its asserted purpose of improving rationality and coordination but rather imposes

32. See, e.g., Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 520 (1987) (discussing whether presidential control fails to respect the system of divided powers); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 457 (1987) (arguing that presidential control fails to respect congressional assignment of regulatory responsibilities); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967–68 (1997) (arguing that presidential control fails to respect constitutional balance between law and politics).

33. See Bressman, *supra* note 12, at 504–15; Farina, *supra* note 1, at 185.

34. See Croley, *supra* note 3, at 832.

35. See Bressman, *supra* note 12, at 507–10; see also Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 209 (1995).

36. Presidents Ford and Carter played early roles in the development of centralized White House review. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 14 (1995).

37. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000).

38. See Kagan, *supra* note 11, at 2281.

39. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006).

40. Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

“structural and institutional biases against regulation.”⁴¹ Some emphasize that OIRA has neither the staff nor the time to perform review in an adequate manner.⁴² Others also contend that OIRA review occurs too late in the rule-making process to offer meaningful input.⁴³ In addition, some argue that OIRA review is not an open process but a secretive conduit for regulated entities.⁴⁴ Furthermore, critics argue that OIRA gets involved on a partial, skewed basis—only when costs justify less stringent regulation but not when benefits justify more stringent regulation, only when regulations increase restrictions but not when they reduce them, and only in cases of agency action and not in cases of agency inaction.⁴⁵ Thus, critics contend that OIRA review in practice serves as a cost-based veto that merely inhibits or delays regulations.

B. *The White House Experience*

Legal scholars have attempted to evaluate the theoretical debate by measuring the actual effect of White House involvement on agency decision-making. These scholars effectively ask whether White House involvement enhances agency legitimacy, as advocates contend, or fails to provide a sophisticated or workable model of control, as critics fear. Professor Steven Croley performed a quantitative analysis of OIRA review of agency rule-making from 1981 to 2000, focusing particularly on EPA rule-making.⁴⁶ Dean Elena Kagan gathered qualitative responses about broader White House involvement in agency decision-making from her experience in the White House and from high-level officials within the Clinton administration.⁴⁷ These scholars ask the right questions about White House involvement, but, as we show, they do so in limited contexts.

41. Bagley & Revesz, *supra* note 5, at 7 (emphasis omitted); *id.* at 3–5; *see also* E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review under Executive Order 12,291 Works Poorly and What President Clinton Should Do about It*, 57 *LAW & CONTEMP. PROBS.* 167, 175–81 (1994); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 *U. COLO. L. REV.* 335 (2006).

42. *See, e.g.*, Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 *DUKE L.J.* 963, 1006–08 (2001); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 *IOWA L. REV.* 1, 14 (1994).

43. *See, e.g.*, Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 *HARV. L. REV.* 1059, 1064 (1986); Pildes & Sunstein, *supra* note 36, at 16.

44. *See, e.g.*, Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 *AM. U. L. REV.* 535, 551 n.94 (1987); Morrison, *supra* note 43, at 1067; Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rule-making under Executive Order 12,291*, 4 *VA. J. NAT. RESOURCES L.* 1, 28–40 (1984).

45. Bagley & Revesz, *supra* note 5, at 9–17.

46. *See* Croley, *supra* note 3, at 846–70.

47. *See* Kagan, *supra* note 11, at 2289–97.

1. OIRA Review

Croley collected several sources of data on OIRA review from 1981 to 2000.⁴⁸ The Regulatory Information Service Center (“RISC”), an office within the General Services Administration, maintains a computer log of every rule that OIRA reviews. Croley consulted the RISC log primarily to identify which rules changed after OIRA reviewed them.⁴⁹ Croley also examined the “meetings log” that OIRA maintains and makes publicly available, as required by Executive Order 12,866.⁵⁰ Although Croley mainly performed a quantitative analysis of these sources of data, he informed that analysis with conversations with high-level OIRA personnel.⁵¹

Using the OIRA data, Croley substantiated many of the claims favoring the presidential control model. First, Croley concluded that “the White House has the institutional capacity to undertake meaningful review of agency rules.”⁵² OIRA “seems to concentrate on a manageable number of rules.”⁵³ Furthermore, OIRA receives assistance from other White House offices to make up for gaps in available resources.⁵⁴ In addition, OIRA reduces review costs by encouraging specialization among reviewers.⁵⁵

Second, Croley concluded that “White House review appears to be at least partially technocratic and at any rate not ad hoc.”⁵⁶ In performing review, OIRA adheres to principles of cost-benefit analysis.⁵⁷ Although “there is room for the White House to put values on regulatory costs or benefits in such a way as to advance its own political agenda,” the structure of OIRA review constitutes an obstacle to such a result.⁵⁸ The OIRA staff members are the ones who actually conduct cost-benefit analyses. Because they are civil service members, relatively immune to changes in political leadership, they provide a bulwark against political “corruption.”⁵⁹ The OIRA Administrator merely serves as a conduit between the career staff and the White House rather than as “the White House’s political tool who massages

48. In his analysis, Croley focused particularly on the Clinton years because Executive Order 12,866, while maintaining the essential features of Reagan-Bush OIRA review, also increased the transparency of the process. Croley, *supra* note 3, at 840. By better exposing the workings of the process, Executive Order 12,866 created a “best case” for study. *Id.*

49. *Id.* at 843.

50. *Id.* at 844.

51. *Id.* at 845 (acknowledging conversations with “the Branch Chiefs of each of the divisions of OIRA, an Acting Administrator, and especially the Administrator of OIRA during most of the Clinton era, Sally Katzen”).

52. *Id.* at 873.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 874.

59. *Id.*

cost-benefit numbers to advance political ends.”⁶⁰ Nor do political appointees from other White House offices “strong-arm” the OIRA reviewers.⁶¹ Although such officials often are present at OIRA meetings, there is no correlation between their presence at such meetings and changes in agency rules.⁶²

Third, Croley found little evidence that the White House used the review process to deliver regulatory benefits to favored interests.⁶³ Rather, he found that “OIRA will hold meetings to discuss rules under review with any outside party who requests a meeting.”⁶⁴ Moreover, Croley found that “the type of interest group in attendance at an OIRA meeting does not predict whether the rule that is the subject of that meeting will be changed during the review process.”⁶⁵ If the White House used the OIRA review process “as a cover to benefit politically powerful groups,” it would be more likely to change a rule when such groups raised objections in meetings.⁶⁶ But this was not the case. Likewise, it would be more likely to change a rule when it was the kind of rule to which narrow interests raised objections—that is to say an economically significant rule.⁶⁷ But this was not the case, either. Because the White House is no more or less likely to change a rule based on interest-group involvement or economic significance, it does not appear to play favorites.⁶⁸

Finally, while Croley determined that OIRA review does not appear to favor particular groups, he found that it does appear to concentrate on environmental rules.⁶⁹ Thus, OIRA review seems to focus on areas of White House interest or expertise.⁷⁰ Croley concluded that OIRA review does impose a political imprint on agency rule-making. But, he observed, this imprint is not necessarily a negative as long as it is “substantive and even-

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 874–75. Croley made this finding although his data did not include information on the direction of the change that OIRA sought—i.e., whether the change made the regulation more or less burdensome for regulated entities and more or less protective of human health and the environment.

64. *Id.* at 874.

65. *Id.*

66. *Id.* at 875.

67. *Id.*

68. *Id.* Croley acknowledged the possibility that regulatory favoritism might occur outside the OIRA review process, but he discounted it. He noted that OIRA review is the easiest if not the exclusive mechanism for private groups to gain White House access. *Id.* at 880. Even if narrow groups reach other White House offices, they must still persuade those offices to influence OIRA review. *Id.*

69. *Id.* at 875.

70. *Id.*

handed.”⁷¹ OIRA does not “opportunistically eviscerate whichever rules happen to generate opposition among politically important constituencies.”⁷²

Croley concluded that “White House review of agency rule-making probably is a welcome development in administrative governance.”⁷³ Although many of the data are susceptible to differing interpretations, they “go farther to assuage fears about presidential involvement in rule-making than they do to accentuate those fears.”⁷⁴ Croley acknowledged room for improvement in OIRA review, particularly as to transparency.⁷⁵ But he found little reason for alarm in the picture presented.⁷⁶

2. *General White House Involvement*

Unlike Croley, Kagan did not set out to perform a quantitative empirical analysis. Rather, she intended to describe and defend a novel vision of presidential control: “By the close of the Clinton Presidency, a distinctive form of administration and administrative control—call it ‘presidential administration’—had emerged, at the least augmenting, and in significant respects subordinating, other modes of bureaucratic governance.”⁷⁷ To build the case for presidential administration, Kagan relied on her own recollections as Deputy Assistant to the President for Domestic Policy and as Deputy Director of the Domestic Policy Council, as well as interviews with other high-level officials in the Clinton White House, including the OIRA Administrator, the Senior Advisor to the President for Policy and Strategy, and the Assistant to the President for Domestic Policy.⁷⁸ She also interviewed several individuals outside the White House: the Assistant Attorney General for the Criminal Division in the Department of Justice, the Deputy Commissioner of the Food and Drug Administration, and the Deputy Secretary for the Department of Health and Human Services.⁷⁹

71. *Id.* at 883.

72. *Id.* at 875. Although Croley found support in his findings for presidential control, he noted that some of his findings could be marshaled against presidential control. For example, opponents might assert that OIRA review is not transparent but merely “translucent” because only a relatively small number of rules are ever subject to meetings and all other contacts are off the record. *Id.* at 878.

73. *Id.* at 879.

74. *Id.*

75. *Id.*

76. *Id.* at 882 (“[I]n the light of available facts about White House review of agency rule-making during the past two decades, and during the Clinton era most especially, it seems that some of the common criticisms of expanded White House oversight are misguided.”).

77. Kagan, *supra* note 11, at 2250.

78. *Id.* at 2297 n.213 (noting personal participation); *id.* at 2289 n.174 (interview with Sally Katzen, OIRA Administrator); *id.* at 2296 n.208 (interview with Rahm Emanuel, Senior Advisor to the President for Policy and Strategy); *id.* (interview with Bruce N. Reed, Assistant to the President for Domestic Policy).

79. *Id.* at 2294 n.193 (interview with Philip Heymann, Assistant Attorney General for the Criminal Division in the Department of Justice); *id.* at 2297 n.213 (interview with William Schultz,

What she documented were notable innovations. In addition to maintaining OIRA review, President Clinton began issuing pre-regulatory directives in the form of official memoranda to executive branch agency heads concerning the substance of particular regulatory policies.⁸⁰ Kagan found that the use of directives had discernible effects on agency decision-making. First, it altered the substance of agency policies rather than simply “ratify[ing] initiatives that the agencies would have taken independently.”⁸¹ Second, the use of directives was particularly official and overt, and, therefore, likely more effective than the other means that the president possesses for influencing agency action.⁸² Thus, the use of directives made “presidential intervention in regulatory matters ever more routine and agency acceptance of this intervention ever more ready.”⁸³

In addition to the use of directives, President Clinton began issuing post-regulatory statements that announced publicly his personal ownership of agency policies.⁸⁴ Whether or not he previously had ordered the actions, “[i]n event after event, speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions.”⁸⁵ Kagan found that the practice of ownership or “appropriation” had three effects on agency decision-making.⁸⁶ First, it constituted a kind of backstop for actions that were not yet final, ensuring that they would go forward.⁸⁷ Second, it gave White House officials an incentive to “participate actively” in developing administrative policy “to feed the schedule of presidential announcements.”⁸⁸ Finally, it conveyed the message that the agencies themselves belonged to the president: “these were *his* agencies; *he* was responsible for their actions; and *he* was due credit for their successes.”⁸⁹

Kagan concluded that “presidential administration”—which consists of OIRA review, presidential directives, and presidential appropriation—improves the accountability of agency decision-making. Presidential administration enhances accountability by increasing the transparency and responsiveness of agency decision-making.⁹⁰ As for transparency, presidential administration itself is overt, with official memoranda and public

Deputy Commissioner of the Food and Drug Administration); *id.* (interview with Kevin Thurm, Deputy Secretary for the Department of Health and Human Services).

80. *Id.* at 2290–99.

81. *Id.* at 2297.

82. *Id.* at 2299.

83. *Id.*

84. *Id.*

85. *Id.* at 2300.

86. *Id.* at 2301.

87. *Id.* at 2301–02.

88. *Id.* at 2302.

89. *Id.*

90. *Id.* at 2331–32. Kagan acknowledged that presidential administration did not extend to environmental and other regulatory areas. *See id.* at 2308 n.254.

announcements.⁹¹ Furthermore, the president himself is particularly visible in his actions: a single actor, with distinct “personality,” subject to continuous media attention.⁹² As for responsiveness, the president is elected by a national constituency and therefore “is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”⁹³

Kagan further concluded that presidential administration enhances the “effectiveness” of agency decision-making. By effectiveness, Kagan meant that presidential administration facilitated the general “cost-effectiveness, consistency, and rational priority-setting” of agency decision-making—attributes often associated with OIRA review.⁹⁴ Moreover, she meant that presidential administration intensified the vigor with which agencies instituted change.⁹⁵ The need for presidential “expedition, energy, and change” occurs because of the substantial risk otherwise that an “inert bureaucracy encased in an inert political system [would] grind inflexibly, in the face of new opportunities and challenges, toward (at best) irrelevance or (at worst) real harm.”⁹⁶

3. Limitations

Although Croley and Kagan have enriched the debate, they have conducted empirical investigations that are limited in their descriptive contribution and normative force. The reason is that they, in significant respect, have assumed a premise about White House intervention that should be at the heart of the debate. They have assumed that the activities that they studied—OIRA review, presidential directives, and presidential appropriation—reflect an accurate picture of presidential control. But Croley and Kagan have examined the messages that the White House intended to send without considering the messages that the agencies actually received.

To gauge the practice of presidential control, we looked to agency officials, who were on the receiving end of OIRA review and other White House activities. Viewed narrowly, agency officials are positioned to contribute more complete information about the practice of presidential control. Indeed, agency officials are positioned to contribute particularly constructive information, confirming or countering the White House experience. Kagan herself supports this point. She acknowledged that the agency

91. *Id.* at 2333.

92. *Id.* at 2332.

93. *Id.* at 2335.

94. *Id.* at 2339–40 (describing ways in which OIRA review advances the “technocratic values” of eliminating inconsistencies and redundancies, rational priority-setting, and adhering to general regulatory standards).

95. *Id.* at 2339 (arguing that presidential administration spurred in agencies “the capacity and willingness to adopt, modify, or revoke regulations, with a fair degree of expedition, to solve perceived national problems”).

96. *Id.* at 2342, 2344.

officials whom she interviewed offered different assessments of presidential involvement in agency decision-making than did the White House officials.⁹⁷ Even her limited sample suggests that the agency perspective is relevant if not essential to evaluating the theoretical debate about presidential control.

Of course, the agency perspective is relevant only to the extent that it does not reflect inherent bias against presidential control. Because presidential control impedes agency autonomy, agency officials might reject it out of hand—whether or not it promotes the values important to democratic governance. But this concern also applies to White House officials. Because presidential control enhances presidential control, White House officials might embrace it reflexively.⁹⁸ The risk of bias is worth noting—on both sides. It cannot be determinative, however, without foreclosing empirical analysis. As Croley found, even “objective” sources of data, like OIRA documents, require interpretation, for which the views of OIRA personnel are useful.⁹⁹ If empirical analysis is to occur, the accompanying risk of bias is worth tolerating. At the same time, the risk of bias counsels in favor of including the agency perspective, not excluding it. The agency perspective operates as a check on the White House perspective and vice versa.

In any event, we do not claim that agency officials are experts as to whether the presidential control model serves democratic values—and thus, we did not solicit their opinions on matters of such high theory. Rather, we asked them to describe and assess presidential control in terms of how it occurred and how it affected their decision-making processes. They have provided an account that is informative regardless of any larger implications.

II. THE AGENCY EXPERIENCE: SURVEY METHODOLOGY

This Part introduces a survey of political appointees, those subject to Senate confirmation, at the EPA during the Bush I and Clinton administrations. Because the survey only canvasses officials from one agency, and only the most senior political appointees at that agency, it cannot claim to capture the entire agency perspective. But some agency views are more likely to shed light on presidential control than others. As the agency with the most major rule-makings, the EPA provides the most opportunities for OIRA review and broader White House involvement.¹⁰⁰

97. See *id.* at 2297 n.213.

98. Although White House officials function in close proximity to the president, their decisions may not better reflect presidential preferences than those of top political appointees in agencies, who were selected by the president with knowledge that they would confront difficult policy choices (and face Senate hearings). At a minimum, it is unclear which would better reflect presidential preferences.

99. See Croley, *supra* note 3, at 845.

100. *Id.* at 872.

A. *The Respondents*

The target population for the survey was the group of EPA presidential appointees subject to Senate confirmation (“PASS”) during the Bush I administration (1989–1993) and the Clinton administration (1993–2001). These appointees were the highest political managers in the agency, holding positions including Administrator, Deputy Administrator, General Counsel, and Assistant Administrator.¹⁰¹ The target population included all EPA PASSs with the exception of the Inspector General, who is responsible for oversight rather than policy-making.¹⁰²

To identify the individuals who served as EPA PASSs during the relevant periods, we compiled an initial appointee list from historical materials available from the EPA.¹⁰³ We then verified the list derived from EPA historical materials by comparing it to a second list that we compiled from other government sources.¹⁰⁴ Where written sources did not clarify the status of a particular position or individual, we sought confirmation from survey respondents who held positions that clearly qualified.

This process yielded a list of thirty-five individuals, fourteen from the Bush I administration (although one individual from the Bush I administration is deceased), and twenty-one from the two Clinton administrations. Of the population of thirty-four living PASSs, we conducted interviews with thirty (88% of the total). From the Bush I administration, we interviewed ten of the thirteen living EPA PASSs (77% of the total). From the two Clinton administrations, we interviewed twenty of the twenty-one EPA PASSs (95% of the total).

101. The Assistant Administrators during the Bush I and Clinton administrations included the Assistant Administrator for the Office of Air and Radiation, the Assistant Administrator for the Office of Water, the Assistant Administrator for the Office of Solid Waste and Emergency Response, the Assistant Administrator for the Office of Pesticides and Toxic Substances, and the Assistant Administrator for International Affairs. In addition, the position of Assistant Administrator for the Office of Policy, Planning and Evaluation existed for much of each administration.

102. We also excluded appointees who held over from the prior administration for two months or less (e.g., from the Reagan administration to the Bush I administration) and career appointees who held acting positions.

103. We identified the population of EPA presidential appointees during the Bush I and Clinton administrations by first examining the lists of appointees available on a per-office basis from the EPA history website, <http://www.epa.gov/history/org/index.htm>. From these lists, we compiled the presidential appointees for January 1989 through January 2001.

104. In particular, we compiled a list of EPA positions for Executive Level I–IV presidential appointee positions that require Senate confirmation. The source for this summary was the list of presidential appointees published in the 1992, 1996, 2000, and 2004 editions of U.S. Government Policy and Supporting Positions. See S. COMM. ON GOVERNMENTAL AFFAIRS, 102D CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS (Comm. Print 1992); H.R. COMM. ON GOV'T REFORM & OVERSIGHT, 104TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS (Comm. Print 1996); S. COMM. ON GOVERNMENTAL AFFAIRS, 106TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS (Comm. Print 2000); H.R. COMM. ON GOV'T REFORM & OVERSIGHT, 108TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS (Comm. Print 2004). We then identified the names of the individuals holding these positions by examining the U.S. Government Manual for each year during January 1989 through January 2001. See, e.g., OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., GOV'T PRINTING OFFICE, THE UNITED STATES GOVERNMENT MANUAL 1989/90 (1989).

B. *The Survey Instrument*

We conducted interviews by telephone or in person using a survey instrument.¹⁰⁵ In it, we assured the respondents that their identities would remain anonymous. We also offered the respondents the opportunity to decline to participate or refuse to answer any question. We asked the respondents to answer the questions based on their experience during their tenure as EPA PASs during the relevant administration.¹⁰⁶

The survey instrument contained 107 questions. The questions sought information regarding the involvement of OIRA and other White House offices in EPA rule-making, as opposed to other types of policy-making.¹⁰⁷ More specifically, the questions sought confirmation of the respondents' EPA positions, as well as information regarding a variety of topics, including: (1) the institutional capacity of OIRA to perform regulatory review; (2) the effect of OIRA review; (3) the role of presidential directives and presidential announcements in controlling agency regulatory activity; (4) the effect of other White House involvement in agency rule-making; and (5) the difference between White House involvement and alternative sources for controlling agency decision-making (e.g., Congress and the judiciary). Most questions asked respondents to rate on a several-point scale various statements related to these and other topics.¹⁰⁸ We provided respondents with an opportunity to add narrative responses to these questions, as they chose. Several questions sought only narrative responses.¹⁰⁹

After we completed the interviews, we entered the data. For the quantitative data, we made calculations to enable data analysis, including the calculation of frequencies and weighted means to facilitate data comparison. In addition, we analyzed the data to identify significant differences between responses of the PASs from the Bush I and Clinton administrations—recognizing that officials serving in administrations of different political parties might generate different results.

105. See Presidential Control Survey (on file with authors).

106. See *id.* (requesting that the respondent “respond to each question based on your experience during your tenure at EPA”).

107. The offices identified by EPA respondents were Chief of Staff, Legislative Affairs, Public Liaison, Intergovernmental Liaison, Press Secretary (including Communications), White House Counsel, Domestic Policy Counsel, National Economic Council, Political Affairs, Office of the Vice President (including the Council on Competitiveness in the Bush I administration), Office of Policy Development, Office of Management and Budget (other than OIRA), Council of Economic Advisors, Council on Environmental Quality, Office of the United States Trade Representative, Office of Science and Technology Policy, and the National Security Council. See *id.*

108. See, e.g., *id.* at Question 7 (asking “How often did the involvement of the White House offices other than OIRA make up for gaps in the knowledge or available time of the OIRA staff?” and providing a scale consisting of never, rarely, sometimes, often, always, and other).

109. See *id.* at Question 39 (“If your answer was OIRA, what aspects of the OIRA process made it more representative of the public’s views?”); *id.* at Question 40 (“If your answer was EPA, what aspects of the EPA process made it more representative of the public’s views?”).

III. THE AGENCY EXPERIENCE: SURVEY RESULTS AND CONCLUSIONS

This Part organizes the findings and conclusions of the EPA survey in a manner that speaks to the agency legitimacy debate. Section A addresses a question often skirted in the debate: as between OIRA and other White House offices, which precisely is the source of presidential control? The remaining sections confront the questions at the heart of the debate. Section B concerns the extent to which OIRA review and broader White House involvement improve regulatory efficacy. Section C concerns the extent to which White House involvement enhances political accountability. Finally, Section D discusses the extent to which White House involvement furthers faction resistance.

We note upfront that we found very few differences in the answers of the Bush I and Clinton respondents—a finding that is meaningful in and of itself.¹¹⁰ When we found significant differences, they were of degree rather than of direction: the respondents from one administration felt more or less intensely about a proposition or felt that a particular activity occurred more or less frequently, but the respondents did not occupy opposing ends of the spectrum.¹¹¹ We discuss any differences between the Bush I and Clinton respondents in our review of our findings below.

A. Sources of Presidential Control

Critical to a description and evaluation of presidential control is a threshold question on which scholars rarely focus: Who is the source of presidential control? More precisely, which entities in the executive branch exert influence on agency decision-making? Scholars concentrate primarily on OIRA and less on other White House offices. Moreover, scholars who concentrate on OIRA suppose that it exerts considerable influence on agency rule-making to the benefit (or detriment) of agency legitimacy. But what if non-OIRA White House offices wield more influence in a given case or across the board? In context, OIRA review might have a limited effect on agency rule-making and make only a marginal contribution to agency legitimacy. Scholars also rarely pause to examine whether OIRA and the White House are competitors or complements.

110. To compare the Bush I and Clinton administration responses, independent samples *t*-tests were conducted for each survey response. Of the 107 questions in the survey (plus sub-questions), the Bush I and Clinton respondents offered answers that differed significantly only for fifteen questions: 4, 11, 12.c, 13, 27.d, 30, 45, 56.a, 69, 79, 81, 85, 89, 97, and 99. We discuss the differences *infra* notes 112–190.

111. For example, although both the Bush I and Clinton respondents indicated that White House offices other than OIRA were involved in EPA rule-making, the Bush I officials were slightly less likely to state that other offices were involved. To compare the responses from the Bush I and Clinton administrations to Question 4 (“Were White House offices other than OIRA involved in EPA rulemaking?” with possible answers Yes (1), No (2), and Other), an independent samples *t*-test was conducted. Bush I respondents scored significantly higher ($M = 1.10$, $SD = .32$) than did the Clinton respondents ($M = 1.00$, $SD = .00$) $t(30) = -1.402$, $p < .004$). Presidential Control Survey, *supra* note 105. Only Question 11 resulted in respondents signaling a difference of direction rather than degree in their answers. We note the differences regarding Question 11 *infra* note 116.

We asked questions concerning the relationship between OIRA and the other White House offices. Ninety-three percent of EPA respondents stated that other White House offices were *involved* in agency rule-making, exactly as many as who stated that OIRA was involved.¹¹² When asked about the extent of OIRA involvement as a general matter, 57% of respondents replied that it was either moderate or heavy.¹¹³ When asked the same question about other White House offices, a roughly equivalent 60% said that it was either moderate or heavy.¹¹⁴ Thus, when asked about OIRA and the White House respectively, EPA respondents commented that each had substantial involvement. When asked to compare which had more *influence* in EPA rule-makings as a whole, 61% of respondents chose OIRA, while only 11% chose other White House offices.¹¹⁵ When asked specifically about relative influence in rule-makings as to which both OIRA and other White House offices were involved, respondents split—29% for OIRA and 36% for other White House offices.¹¹⁶

These data support a finding that OIRA and the White House are evenly matched in terms of involvement in EPA rule-making, even when the two

112. Question 4 asked, “Were White House offices other than OIRA involved in EPA rule-making?” with the possible answers: Yes (1), No (2), and Other. The weighted mean of the thirty respondents was 1.03, with 93.3% responding Yes, 3.3% No, and 3.3% Other. In calculating the weighted means for Question 4 and all other questions, we excluded the responses marked “Other.” Presidential Control Survey, *supra* note 105. For a comparison of the Bush I and Clinton responses, see *supra* note 111.

113. Question 3 asked, “As a general matter, how extensive was the involvement of OIRA in EPA rulemaking?” using a four-point scale: No Involvement (1), Only Slight Involvement (2), Moderate Involvement (3), Heavy Involvement (4), and Other. The weighted mean of the twenty-eight respondents was 3.75, with 0.0% responding No Involvement, 0.0% Only Slight Involvement, 14.3% Moderate Involvement, 42.9% Heavy Involvement, and 42.9% Other. Presidential Control Survey, *supra* note 105.

114. Question 9 asked, “As a general matter, how extensive was the involvement of White House offices other than OIRA in EPA rulemaking?” using a four-point scale: No Involvement (1), Only Slight Involvement (2), Moderate Involvement (3), Heavy Involvement (4), and Other. The weighted mean of the twenty-eight respondents was 2.95, with 0.0% responding No Involvement, 21.4% Only Slight Involvement, 42.9% Moderate Involvement, 17.9% Heavy Involvement, and 17.9% Other. *Id.*

115. Question 10 asked, “As to all EPA rulemakings as a whole, which had more influence on EPA regulatory activity?” with the possible answers: OIRA (1), Other White House Offices (2), and Other. The weighted mean of the twenty-eight respondents was 1.15, with 60.7% responding OIRA, 10.7% Other White House Offices, and 28.6% Other. *Id.*

116. Question 11 asked, “As to those rulemakings in which both OIRA and other White House offices were involved, which had the most influence on EPA regulatory activity?” with the possible answers: OIRA (1), Other White House Offices (2), and Other. The weighted mean of the twenty-eight respondents was 1.56, with 28.6% responding OIRA, 35.7% Other White House Offices, and 35.7% Other. Question 11 is the only question for which we found a significant difference between the Bush I and Clinton EPA respondents and for which the difference reflected a different direction in the response of the EPA respondents. To compare the responses from the Bush I and Clinton administrations, an independent samples *t*-test was conducted. Bush I respondents scored significantly higher ($M = 2.00$, $SD = .00$) than did the Clinton respondents ($M = 1.43$, $SD = .51$) ($t(28) = -2.177$, $p < .000$), suggesting that most Bush I respondents believed that other White House offices had the most influence on EPA regulatory activity, whereas most Clinton respondents believed that OIRA had the most influence on regulatory activity. *Id.* This difference may reflect the influence of the Council on Competitiveness during the Bush I administration, but it is not possible to determine the source of the difference from the data.

are involved in the same rule-making, but that OIRA exerts more influence on the whole. And it is possible to conclude that scholars are correct, as a descriptive matter, to focus on OIRA as the main source of presidential control. But such a conclusion fails to explain a strange phenomenon in the data. For several of these questions, a large number of EPA respondents answered “Other.” When asked to rate the extent of OIRA involvement from none to heavy, 43% chose “Other;” when asked to indicate the extent of White House involvement from none to heavy, 18% chose “Other;” when asked which had more influence as between OIRA and other White House offices, 29% chose “Other;” and when asked which on the whole had more influence when both were involved in an EPA rule-making, 36% chose “Other.”¹¹⁷ Respondents expressed considerable hesitation in answering these questions—and the reason is impossible to determine from the quantitative data alone.

But the qualitative responses seem to explain why. Many EPA respondents commented that the extent of OIRA involvement was neither slight nor moderate nor heavy but “sporadic.”¹¹⁸ Thus, one respondent remarked that OIRA was “very involved in the things they got involved in [but] they let most of it go by.”¹¹⁹ Moreover, OIRA “focused on a small number of big rules”¹²⁰—those that “they believed were more significant.”¹²¹ Similarly, many respondents reported that the White House was heavily involved in a small number of big rules: the White House had “heavy involvement in some rulemakings but hardly any or none in plenty of other rulemakings.”¹²² OIRA and the White House did not simply refrain from involvement in low-cost rule-making. Rather, EPA respondents indicated that OIRA and the White House also exhibited selective involvement within the category of major or significant rule-makings (i.e., \$100 million or over), as to which Executive Orders 12,291 and 12,866 authorized regulatory review.¹²³

117. *Supra* notes 113–116.

118. Presidential Control Survey, *supra* note 105, at EPA Respondent C008, response to Question 3; *see also id.* at EPA Respondent B007, response to Question 9 (describing involvement of White House offices other than OIRA as “episodic”).

119. *Id.* at EPA Respondent C008, response to Question 3; *see also id.* EPA Respondent B001, response to Question 9 (“It depended on particular rulemakings. On a qualitative scale—how many rules did [OIRA] weigh in on—then slight [OIRA involvement]. For particular rules they were involved in, then heavy [OIRA involvement].”).

120. *Id.* at EPA Respondent C018, response to Question 3.

121. *Id.* at EPA Respondent B001, response to Question 3 (commenting that “[i]n rulemakings [OIRA] believed were more significant, they’d be much more involved”).

122. *Id.* at EPA Respondent C018, response to Question 9; *see also id.* at EPA Respondent B002, response to Question 3 (observing that OIRA involvement was “[s]ometimes heavy, sometimes none at all”).

123. *Id.* at EPA Respondent C008, response to Question 106 (commenting that the White House was “selective in what they pick on . . . there are 100 different things that [the EPA] does with very little OIRA or [White House] involvement . . . between 6 and 10 times a year, there is inter-agency conflict or [issues that are] beyond-EPA-enough that the White House wants to touch base with other offices . . . OMB involvement in 15 [rulemakings], White House involvement in 1 or 2 [rulemakings], 6–10 times a year.”); *id.* at EPA Respondent B006, response to Question 3 (noting

More noteworthy than the relative frequency of OIRA and White House involvement was the relative effect of such involvement on EPA rule-making. EPA respondents indicated that OIRA and the White House did not exert comparable influence. The White House had more influence on the issues that arguably mattered most. Respondents stated that OIRA had more influence on “day-to-day issues”; other White House offices had more influence on “big picture” issues. “For issues of less political impact, OIRA [had more influence]. But if you crossed a certain threshold . . . other White House offices would get involved It became high level politics.”¹²⁴ To further crystallize the point, one respondent commented, “If asking who kind of mucked around in [rule-making] more, who got into the real details, then OIRA. If asking about big ticket items and who won, the other White House offices.”¹²⁵

EPA respondents also revealed that the White House offices contributed to a climate of internal combat and coalition-building in the development of EPA rules. As many as nineteen White House offices were involved in EPA rule-making.¹²⁶ With respect to particular proposed rules, these offices often were not on the same page. Rather, they competed for influence over the content of those proposed rules, enlisting other offices, the vice president, and even the president himself to mediate the disputes. As one respondent commented, “Normal constituency groups—CEQ [Council on Environmental Quality], the Vice President—were almost always on our side. [Others in the White House] were on the other side; [still others] brokered the disagreement.”¹²⁷ Similarly, another commented that “[Y]ou fight with another agency and hope to get White House offices on your side—CEQ, CEA [Council of Economic Advisors]—against DOE [Department of Energy]. . . then DOE tries as well.”¹²⁸ Finally, one offered that “[t]here was some inter-agency conflict that the White House had to mediate because it got so ugly.”¹²⁹

that OIRA “didn’t get involved at all on rulemakings under \$100 million. They were very involved in some [rulemakings], not involved in others.”).

124. *Id.* at EPA Respondent C009, response to Question 11; *see also id.* at EPA Respondent B007, response to Question 11 (noting that where the president had made “specific commitments” during the campaign, “we were able to override” OIRA).

125. *Id.* at EPA Respondent C022, response to Question 11; *see also id.* at EPA Respondent B002, response to Question 11 (stating that “[w]e used the Competitiveness Council to roll OIRA”).

126. *See supra* note 107.

127. Presidential Control Survey, *supra* note 105, at EPA Respondent C022, response to Question 8; *see also id.* at EPA Respondent B004, response to Question 7 (“We had to fight some battles twice.”).

128. *Id.* at EPA Respondent C008, response to Question 106; *see also id.* at EPA Respondent B007, response to question 7 (stating that White House offices other than OIRA “provided different roles”).

129. *Id.* at EPA Respondent C006, response to Question 106. Presidential directives, to the extent they exist with respect to EPA rule-making, also may play a role in coalition building. As a respondent commented, “EPA helped orchestrate the presidential directive to calm waters with other agencies as well as OIRA.” *Id.* at EPA Respondent C022, response to Question 70.e. Another respondent stated, “A presidential directive was a way to get other agencies to do what we needed them to do, consistent with our priorities.” *Id.* at EPA Respondent C002, response to Question 70.a.

EPA respondents also indicated that OIRA frequently was in the middle of the inter-agency conflict. The EPA used other White House offices to combat OIRA, and other offices and agencies used OIRA to combat the EPA. A respondent commented, “[W]hen you had a big fight with OIRA, that’s when you brought in the other [White House] offices. Then it becomes who wins.”¹³⁰ Similarly, one stated that it was “[n]ot always clear whether OIRA was carrying other offices’ water.”¹³¹ Another remarked that on some occasions OIRA “helped to shield EPA from being battered by other [White House] offices, even though dealing with [OIRA] was excruciating.”¹³²

In light of the qualitative responses, the data appear to support four findings. First, although OIRA was involved in more EPA rule-makings than were other White House offices, OIRA and other White House offices both were involved in EPA rule-making on an uneven or unsystematic basis. Second, the White House offices had at least as much, and perhaps more, influence on EPA rule-makings because they often had more influence on weightier issues. Third, the White House offices routinely disagreed with each other on the substance of proposed rules, creating a complicated bargaining dynamic among interested government players—OIRA, other White House offices, other federal agencies, and the EPA. Finally, White House offices (including OIRA) rather than the president himself were the ones most often involved in agency decision-making.

We offer two conclusions based on these findings. First, presidential control is more complex than scholars generally have acknowledged. White House offices other than OIRA play a substantial role in EPA rule-making, exerting particular influence on high-profile or high-stakes issues. In addition, they may increase the level of antagonism and the need for alliances in rule-making. They also may change the unit of analysis for purposes of assessing agency legitimacy. The issue becomes whether White House officials (including those at OIRA)—not the president himself—are, for example, responsive to the public or resistant to faction.¹³³ Other White House offices aside, OIRA remains important. It exerts substantial influence on day-to-day issues and participates in coalition-building among White House offices and interested agencies. But it is perhaps less important than scholars believe. In any event, scholars must account for the interplay between other White House offices and OIRA to present an accurate description of presidential control.

130. *Id.* at EPA Respondent C008, response to Question 10.

131. *Id.* at EPA Respondent C001, response to Question 11; *see also id.* at EPA Respondent B006, response to Question 4 (“[I]t was not just the White House but other agencies, like the Department of Energy, who would also be at the table and OIRA would serve as chair and it would be empowered to resolve disagreements.”).

132. *Id.* at EPA Respondent C015, response to Question 106; *see also id.* at EPA Respondent B002, response to question 11 (“[The] Competitiveness Council was much more sympathetic to what we wanted to do [than OIRA].”).

133. *But see* Kagan, *supra* note 11, at 2338 (arguing that involvement of White House staff rather than the president himself in controlling agencies does not change the analysis or the conclusion concerning political accountability).

Second, presidential control, as structured, is selective in its focus. EPA respondents reported that OIRA and White House officials took an interest in certain rule-makings more than others. Perhaps OIRA mainly concentrated on rules involving over \$100 million, even when it could have focused on lesser-cost ones. But EPA respondents seemed to suggest that OIRA chose which among those \$100 million-plus rules received sustained attention. This raises a concern about whether White House involvement, whether exercised by OIRA or other offices, is too idiosyncratic to constitute a model of agency legitimacy.¹³⁴ The findings of this study alone cannot determine whether White House involvement is sufficiently systematic or organized for purposes of promoting, for example, political accountability or faction resistance. Nor do advocates of presidential control claim that it reaches every agency action or even every important agency action.¹³⁵ Indeed, there is reason to believe that it cannot or should not. The president simply has too many responsibilities, and OIRA and the other White House offices have too few resources, to reach even every major agency decision, whether or not they possessed the requisite expertise and authority for that purpose.¹³⁶

It nevertheless is reasonable to expect a method to the madness. Beyond the broad standards of the executive orders, EPA respondents only pointed to the professional or political interest of particular OIRA staffers or White House policy advisors as affecting the existence or intensity of OIRA or White House involvement in rule-makings. More may be required to ensure that presidential control attaches to matters of public importance, as well as political or professional salience. It is not a sufficient response to say that the president gets involved in agency decision-making when he wants the public to understand that he is responsible for particular agency policies or rules. Even if such behavior promotes accountability on a limited basis, the concern is that it may not promote rationality in a systematic way, as a model of agency decision-making should.

B. Regulatory Efficacy

Scholars debate whether OIRA review improves the efficacy of agency rule-making. Efficacy means not only whether OIRA review enhances cost-effectiveness but also whether it promotes what might be called intra-agency coherence and inter-agency coordination. Intra-agency coherence includes avoiding inconsistencies, reducing redundancies, and eliminating unintended consequences between or among the regulations of a particular agency. Inter-agency coordination focuses on preventing overlaps or resolving conflicts between or among the regulations of different agencies.

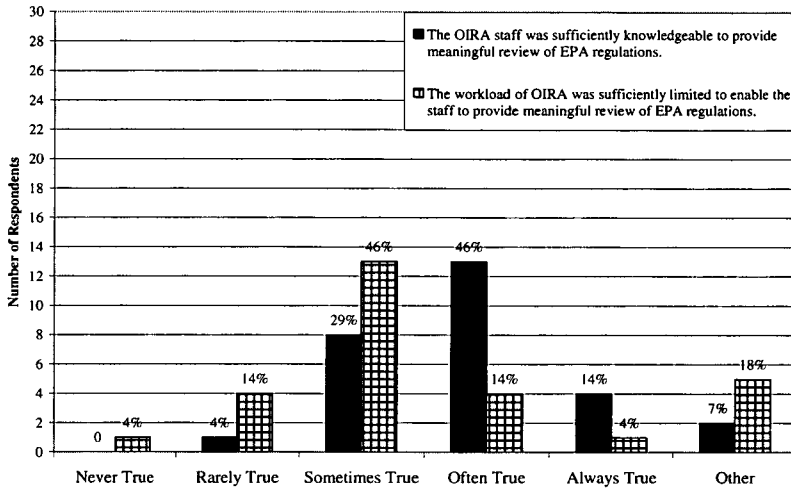
134. See *id.* at 2308 (noting that President Clinton, in exercising his public control techniques, did so “haphazardly” and in accordance with “his substantive interests as well as the structure and organization of the White House”).

135. *E.g., id.* at 2307.

136. For arguments that the president lacks the institutional capacity or expertise to exert systematic control of agency decision-making, see Bressman, *supra* note 12, at 511–15, and Farina, *supra* note 1, at 185.

To test issues of regulatory efficacy, we asked questions about the general functions of OIRA review. As an initial matter, EPA respondents stated that, more often than not, the workload of the OIRA staff was sufficiently limited and the OIRA staff was sufficiently knowledgeable to provide meaningful review of EPA regulations (see Table A).¹³⁷

TABLE A
OIRA INSTITUTIONAL CAPACITY



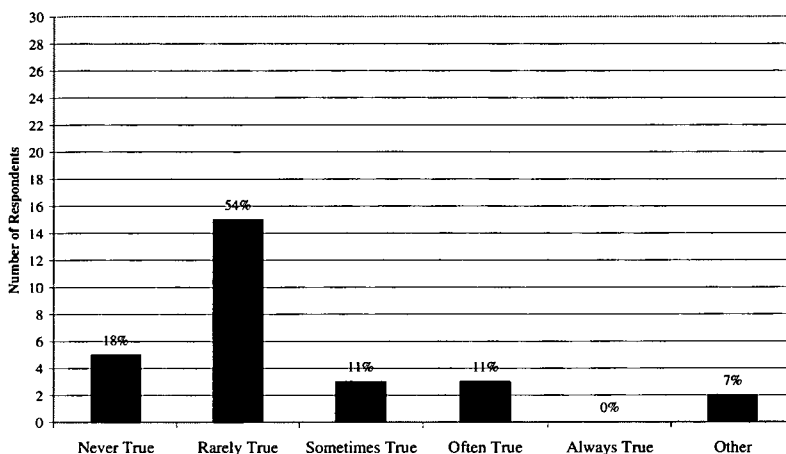
But more than 60% of respondents said that OIRA involvement never or rarely helped to avoid inconsistencies, reduce redundancies, or eliminate unintended consequences between or among EPA regulations (see Table B).¹³⁸ By contrast, more than 60% of respondents stated that OIRA review

137. Question 2.a asked respondents to rate the accuracy of the assertion “[t]he OIRA staff was sufficiently knowledgeable to provide meaningful review of EPA regulations” using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 3.77, with 0% responding Never True, 3.6% Rarely True, 28.6% Sometimes True, 46.4% Often True, 14.3% Always True, and 7.1% Other. Question 2.b asked respondents to rate the accuracy of the assertion “[t]he workload of OIRA was sufficiently limited to enable the staff to provide meaningful review of EPA regulations” using the same five-point scale. The weighted mean of the twenty-eight respondents was 3.0, with 3.6% responding Never True, 14.3% Rarely True, 46.4% Sometimes True, 14.3% Often True, 3.6% Always True, and 17.9% Other. Presidential Control Survey, *supra* note 105.

138. Question 12.a asked respondents to rate the accuracy of the assertion “OIRA involvement helped to avoid inconsistencies between or among EPA regulations” using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 2.1, with 17.9% responding Never True, 53.6% Rarely True, 10.7% Sometimes True, 10.7% Often True, 0.0% Always True, and 7.1% Other. Question 12.b asked respondents to rate the accuracy of the assertion “OIRA involvement helped to reduce redundancies between or among EPA regulations” using the same five-point scale. The weighted mean of the twenty-eight respondents was 1.8, with 35.7% responding Never True, 32.1% Rarely True, 25.0% Sometimes True, 0.0% Often True, 0.0% Always True, and 7.1% Other. Question 12.c asked respondents to rate the accuracy of the assertion “OIRA involvement helped to eliminate unintended consequences of EPA regulations.” The weighted mean of the twenty-eight respondents was 2.3, with 3.6% responding Never True, 64.3% Rarely True, 17.9% Sometimes

frequently helped to coordinate EPA regulations with the regulations of other agencies.¹³⁹

TABLE B
OIRA INVOLVEMENT HELPED TO AVOID INCONSISTENCIES
BETWEEN OR AMONG EPA REGULATIONS



We also posed questions specifically about the cost-benefit aspects of OIRA review. (We include these questions in this discussion of whether OIRA review improves regulatory efficacy although they also pertain to whether OIRA review enhances political accountability and faction resistance.) When asked how often OIRA focused on cost-benefit analysis rather than the substance of regulatory provisions, approximately 70% of EPA respondents stated that OIRA often or always did.¹⁴⁰ When asked what kind of changes OIRA sought after performing cost-benefit analysis, 89% of respondents stated that OIRA never or only rarely sought changes that would

True, 3.6% Often True, 3.3% Always True, and 7.1% Other. Question 12.c was one of the few questions for which there were significant differences between the answers provided by the Bush I and Clinton respondents. To compare the responses from the Bush I and Clinton administrations, an independent samples *t*-test was conducted. The Bush I respondents scored significantly higher ($M = 2.56$, $SD = 1.13$) in response to Question 12.c than did the Clinton respondents ($M = 2.24$, $SD = .562$) ($t(28) = -.974$, $p < .044$). Nevertheless, the “never” and “rarely” answers together comprised more than half of all responses from both the Bush I and Clinton respondents. *Id.*

139. Question 12.d asked respondents to rate the accuracy of the assertion “OIRA involvement helped to coordinate EPA regulations with the regulations of other federal agencies” using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 3.0, with 10.7% responding Never True, 14.3% Rarely True, 39.3% Sometimes True, 21.4% Often True, 7.1% Always True, and 7.1% Other. *Id.*

140. Question 14 asked, “How often did OIRA involvement in EPA rulemaking focus on the adequacy of the cost-benefit analysis of a regulation, as opposed to the provisions of the regulation itself?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 4.1, with 0.0% responding Never, 3.6% Rarely, 7.1% Sometimes, 46.4% Often, 21.4% Always, and 17.9% Other. *Id.*

make a regulation more protective of human health and the environment.¹⁴¹ In addition, 75% said that OIRA often or always sought changes that would make a regulation less protective of human health and the environment. When asked to what extent OIRA sought changes that would make a regulation less burdensome for regulated entities, 89% answered often or always. When asked to what extent OIRA sought changes that would make a regulation more burdensome for regulated entities, 89% answered never or rarely.

We examined not only the types of interests that OIRA advocates but the time horizon that it considers.¹⁴² When asked what factors OIRA examined as part of cost-benefit analysis, 71% of EPA respondents stated that OIRA placed greater emphasis on short-term costs and benefits rather than long-term costs and benefits. By contrast, 75% said that the EPA placed a greater emphasis on long-term costs and benefits, and a comparable number said that OIRA and the EPA often or always disagreed on the weight given short-term costs and benefits as opposed to long-term costs and benefits.

Finally, we asked questions relevant to the OIRA career civil servants who actually performed the regulatory review. All EPA respondents were aware that OIRA staff members below the OIRA Administrator level were civil servants, not political appointees.¹⁴³ When asked how often the OIRA

141. Question 27.a asked respondents to rate the accuracy of the assertion "OIRA sought changes that would make a regulation more protective of human health and the environment" using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 1.4, with 57.1% responding Never True, 32.1% Rarely True, 3.6% Sometimes True, 0.0% Often True, 0.0% Always True, and 7.1% Other. Question 27.b asked respondents to rate the accuracy of the assertion "OIRA sought changes that would make a regulation less protective of human health and the environment" using the same five-point scale. The weighted mean of the twenty-eight respondents was 4.0, with 0.0% responding Never True, 0.0% Rarely True, 17.9% Sometimes True, 53.6% Often True, 21.4% Always True, and 7.1% Other. Question 27.c asked respondents to rate the accuracy of the assertion "OIRA sought changes that would make a regulation less burdensome for regulated entities." The weighted mean of the twenty-eight respondents was 4.4, with 0.0% responding Never True, 0.0% Rarely True, 7.1% Sometimes True, 46.4% Often True, 42.9% Always True, and 3.6% Other. Question 27.d asked respondents to rate the accuracy of the assertion "OIRA sought changes that would make a regulation more burdensome for regulated entities." The weighted mean of the twenty-eight respondents was 1.4, with 67.9% responding Never True, 21.4% Rarely True, 7.1% Sometimes True, 0.0% Often True, 0.0% Always True, and 3.6% Other. Question 27.d was another of the few for which there was a significant difference in the answers between the Bush I and Clinton administration respondents. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly lower ($M = 1.11$, $SD = .33$) in response to Question 27.d than did the Clinton respondents ($(M = 1.50, SD = .71) t(28) = 1.55, p < .003$). *Id.*

142. Question 29 asked, "As between short-term and long-term regulatory costs and benefits, which did OIRA place a greater emphasis on?" with the possible answers: Short-Term (1), Long-Term (2), and Other. The weighted mean of the twenty-eight respondents was 1.1, with 71.4% responding Short-Term, 7.1% Long-Term, and 21.4% Other. Question 30 asked respondents "As between short-term and long-term regulatory costs and benefits, which did EPA place a greater emphasis on?" The weighted mean of the 28 respondents was 1.9, with 3.6% responding Short-Term, 75.0% Long-Term, and 21.4% Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly lower ($M = 1.83$, $SD = .41$) in response to Question 30 than did the Clinton respondents ($(M = 2.00, SD = .00) t(28) = 1.706, p < .000$). *Id.*

143. Question 49 asked, "During your time at EPA, did you know that the OIRA staff below the OIRA Administrator level consisted of career civil servants?" with the possible answers: Yes (1), No (2), and Other. The weighted mean of the twenty-eight respondents was 1.0, with 100.0% responding Yes. *Id.*

career staff exercised independence from the political control of the OIRA Administrator or other White House political appointees, 39% of EPA respondents answered sometimes, 21% answered often, and 11% answered always. By contrast, 18% answered rarely or never.¹⁴⁴

These data support three findings concerning the functions of OIRA review. First, OIRA review did not enhance intra-agency coherence, although it had the institutional capacity to perform this role at least for the rule-makings on which it chose to focus. EPA respondents suggested that OIRA seldom exercised that capacity to reduce inconsistencies, avoid redundancies, or eliminate unintended consequences between or among EPA regulations. OIRA more regularly helped to coordinate EPA regulations with the regulations of other agencies. But even here, the mean score is not overwhelming: according to respondents, only occasionally did OIRA improve inter-agency coordination.

Second, OIRA review focused almost exclusively on the cost side of cost-benefit analysis. As one respondent explained, OIRA was “single-minded in their focus on monetizing the benefits of our rules and minimizing the costs.”¹⁴⁵ As a result, OIRA disregarded substantive agency positions. Indeed, one Clinton-era respondent noted that OIRA was so single-minded in its regulatory cost reductions that it also “pushed positions on rules [that were] not in keeping with the President’s views.”¹⁴⁶ Another Clinton-era respondent remarked that “the civil servants in OIRA, who had been there largely since the Reagan Administration . . . were more conservative and suspicious of EPA regulations than the political appointees,”¹⁴⁷ and one Bush-era respondent stated that the “entrenched career people [] wouldn’t listen to their political bosses.”¹⁴⁸

Third, OIRA review tilted regulations in a particular direction. OIRA routinely sought to reduce regulatory burdens, and it only infrequently sought to strengthen environmental protections. Furthermore, OIRA not only focused on costs and benefits but certain costs and benefits. That is, OIRA routinely focused on the short-term costs and benefits of EPA regulations rather than the long-term costs and benefits. This focus favors regulated entities to the extent that they bear costs in the short term and

144. Question 50 asked, “How often did the OIRA career staff exercise independence from the political control of the OIRA Administrator or other White House appointees?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 3.2, with 10.7% responding Never, 7.1% Rarely, 39.3% Sometimes, 21.4% Often, 10.7% Always, and 10.7% Other. *Id.*

145. *Id.* at EPA Respondent C002, response to Question 51; *see also id.* at EPA Respondent B009, response to Question 40 (commenting that EPA “took the benefits of the regulation more seriously than the White House, [which was] more focused on the costs”).

146. *Id.* at EPA Respondent C024, response to Question 51.

147. *Id.* at EPA Respondent C023, response to Question 106.

148. *Id.* at EPA Respondent B002, response to Question 106; *see also id.* at EPA Respondent B006, response to Question 51 (stating that “90% of the decisions were made by career staff not by political appointees” and that “a lot of deference [was] given to recommendations and views of the career staff”). These findings are also relevant to whether White House involvement facilitates political accountability. *See infra* Section III.D.

environmental benefits accrue in the long term. EPA respondents made the point more directly: OIRA consistently sought changes that relaxed burdens on regulated entities.

We conclude that OIRA review may not be achieving its purported function of promoting regulatory efficacy. As critics warn, OIRA review may not advance intra-agency coherence and inter-agency coordination at all or well enough.¹⁴⁹ Furthermore, OIRA may be approaching cost-benefit analysis in a particular way. Executive Orders 12,291 and 12,866 direct OIRA to consider cost-benefit analysis in reviewing proposed agency rules.¹⁵⁰ But the best use of cost-benefit analysis—that is, the use that appeals to both Democrats and Republicans—is as an articulated and rational metric for checking agency regulation. OIRA instead may be using cost-benefit analysis to impose its own normative preference for deregulation. In the words of one EPA respondent, OIRA may be “focused on narrowing our authority to regulate.”¹⁵¹ Alternatively, OIRA may be focused on altering the mix of areas in which agencies impose regulatory costs (for example, between or among food quality, worker safety, environmental protection and other concerns) rather than reducing regulatory costs across the board. That is, OIRA may be focused on broader governmental priority or agenda setting. The difficulty with this positive explanation is that the inter-agency coordination marks do not strongly support it.

We further conclude that the independence of the OIRA career staff may be problematic. EPA respondents tended to confirm that the OIRA career staff exercise judgment apart from that of the OIRA Administrator and the president. Proponents of OIRA review believe that the OIRA career staff use their independence as a safeguard against political corruption of otherwise rational regulation. Many EPA respondents appear to believe that the OIRA career staff use that room to substitute their own institutional biases against regulation.¹⁵² If so, opponents of OIRA review are right to caution that the career staff may not enhance regulatory efficacy (defined as more than simply deregulation).¹⁵³ At the same time, the staff may eliminate a principal justification for OIRA career staff independence.

149. *E.g.*, Bagley & Revesz, *supra* note 5, at 3–5; Elliott, *supra* note 41, at 175–81.

150. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006).

151. Presidential Control Survey, *supra* note 105, at EPA Respondent C002, response to Question 51; *see also id.* at EPA Respondent B014, response to Question 34(a) (noting that OIRA was “pursuing a national policy of deregulation” and of “minimum costs of regulation”).

152. *E.g.*, *id.* at EPA Respondent C023, response to Question 106 (“It did seem that the civil servants in OIRA, who had been there largely since the Reagan Administration and Bush I, were more conservative and suspicious of EPA regulations than the political appointees.”); *id.* at EPA Respondent C006, response to Question 51 (“They were holdovers from the Reagan Administrations, for crying out loud . . . they did what they thought they were supposed to be doing for the regulation instead of what the political managers wanted.”); *id.* at EPA Respondent B002, response to question 106 (stating that with OIRA, “[We were dealing with] entrenched career people who wouldn’t listen to their political bosses.”).

153. *See* Bagley & Revesz, *supra* note 5, at 3–5; Morrison, *supra* note 43, at 1065.

We note, however, that our findings are consistent with a more “neutral” account. OIRA may perform cost-benefit analysis as it does to counteract instances of agency capture or regulatory excess. The idea is that agencies favor pro-regulatory constituencies and pro-regulatory policies. Thus, OIRA emphasizes costs not for their own sake but because EPA prioritizes environmental groups and environmental gains. Although we cannot disprove this account, we observe that few scholars have substantiated the agency capture story as a theoretical or empirical matter.¹⁵⁴ To the extent that our data pique renewed interest in the story, we believe that certain changes are necessary. Scholars should commit to perform sustained study of agency behavior, and they should include analysis of White House offices in the mix. Only then will scholars be well-positioned to defend the particular way in which OIRA approaches its mission.

C. Other White House Involvement

We asked questions concerning the extent to which White House involvement in agency rule-making other than OIRA review promotes regulatory efficacy. For example, President Clinton established a practice of issuing official directives to agency heads prescribing new regulatory policies and announcing existing regulatory policies as his own. We investigated the claim that presidential directives and announcements improved regulatory efficacy by energizing agencies and inducing them to be more active. But only 28%, or eight EPA respondents, stated that they ever were involved with a directive or announcement.¹⁵⁵ Of these, respondents split on the extent to which directives or announcements energized the agency and induced it to be more active.¹⁵⁶ Nonetheless, 50% stated that White House involvement sometimes energized the agency and induced it to be more active, and 29%

154. See Bagley & Revesz, *supra* note 5, at 19–42; DeShazo & Freeman, *supra* note 14, at 2297.

155. Question 69 asked, “Were you involved in a regulatory matter that was the subject of a presidential directive issued in the form of a public memorandum to the EPA Administrator?” with the possible answers: Yes (1), No (2), and Other. The weighted mean of the twenty-nine respondents was 1.7, with 27.6% responding Yes, 65.5% No, and 6.8% Other. The results of an independent samples *t*-test indicate that Bush-era EPA respondents scored significantly higher ($M = 1.89$, $SD = .33$) in response to Question 69 than did the Clinton-era EPA respondents ($(M = 1.61$, $SD = .50)$ $t(29) = -1.497$, $p < .001$). Presidential Control Survey, *supra* note 105.

156. Question 70.e asked respondents to rate the accuracy of the assertion “A presidential directive spurred an EPA regulatory or other action that would not have taken place without the directive” using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the eight respondents was 2.4, with 25.0% responding Never True, 25.0% Rarely True, 12.5% Sometimes True, 25.0% Often True, 0.0% Always True, and 12.5% Other. Question 79 asked respondents, “How often did the prospect of a presidential announcement prompt White House staff to instigate an EPA regulatory activity that would not have occurred absent White House involvement?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the fifteen respondents was 1.5, with 60.0% responding Never, 20.0% Rarely, 13.3% Sometimes, 0.0% Often, 0.0% Always, and 6.7% Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly higher ($M = 3.00$, $SD = .00$) in response to Question 79 than did the Clinton respondents ($(M = 1.25$, $SD = .45)$ $t(15) = -5.292$, $p < .043$). *Id.*

said it often did.¹⁵⁷ Furthermore, 61% said that White House involvement sometimes or often induced the agency to change its regulatory priorities, though 29% said rarely and 11% said never.¹⁵⁸

These results suggest that White House involvement frequently energized the agency and induced it to be active, though not in the way that scholars envision. First, presidential directives or announcements did not meaningfully contribute to EPA invigoration. Only a small portion of EPA respondents had experienced a directive or announcement. Moreover, those respondents who had encountered a directive or announcement split on the extent to which that directive or announcement induced the agency to be more active. Second, White House involvement did not spur the EPA to undertake new regulatory activity. Rather, it caused the EPA to reinforce the basis for existing regulatory proposals. As one respondent remarked, the EPA staff “tended to get energized to clarify or gain support for their position.”¹⁵⁹ Another commented, “[Y]ou had to sharpen the arguments, which meant you mustered both the scientific and the value arguments.”¹⁶⁰ Finally, White House involvement seldom induced the agency to change its regulatory policies.

We conclude that White House involvement may not enhance regulatory efficacy defined as stimulating regulatory change. White House involvement may induce agencies to fortify the basis for their regulatory proposals, which is not without value. But it may not serve the particular energizing role that scholars envision. EPA respondents provided little or no indication that White House involvement spurred the agency to undertake new regulatory activity and only weak indication that it spurred the agency to alter its regulatory priorities.

Perhaps White House involvement would have induced regulatory change if it had included more formalized actions than it did with respect to EPA regulatory activity.¹⁶¹ For example, presidential directives and announcements

157. Question 67 asked, “How often would you say that White House involvement in EPA regulatory activity energized the Agency and induced it to be more active?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 3.1, with 7.1% responding Never, 10.7% Rarely, 50.0% Sometimes, 28.6% Often, 3.6% Always, and 0.0% Other. *Id.*

158. Question 68 asked, “How often would you say that White House involvement in EPA regulatory activity induced the Agency [to] change its regulatory priorities?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 2.5, with 10.7% responding Never, 28.6% Rarely, 57.1% Sometimes, 3.6% Often, 0.0% Always, and 0.0% Other. *Id.*

159. *Id.* at EPA Respondent B001, response to Question 67.

160. *Id.* at EPA Respondent B012, response to Question 26; *see also id.* at EPA Respondent C003, response to Question 26 (“[W]henver White House offices got involved, you went back and double-checked . . . that [your] scientific or technical basis was as good as it could be . . . [T]hat didn’t mean you do anything differently . . .”); *id.* at EPA Respondent B004, response to Question 12.a (“In some cases, OIRA and the threat of OIRA strengthened our economic analysis, which ultimately helped us in court.”); *id.* at EPA Respondent B014, response to Question 26 (stating that White House involvement spurred EPA “[s]imply to build an effective defense”).

161. Kagan acknowledged that President Clinton did not take an interest in issuing directives concerning EPA regulatory activity. *See Kagan, supra* note 11, at 2308 & n.254.

may provoke agencies to make progress in a way that less formalized contacts do not. And executive orders—not just of the cost-benefit variety—also may have similar effect.¹⁶² Of course, such formalized actions must appear with some degree of regularity to do so. It is of some concern that President Clinton issued very few with respect to EPA regulatory activity, even though such regulatory activity is more pervasive than that of any other agency. Indeed, scholars worry that widespread use of formalized actions is infeasible and undesirable given the vast responsibilities of the chief executive.¹⁶³ Nevertheless, it is possible that increased use of such actions might generate agency activism and thereby promote regulatory efficacy.¹⁶⁴

D. Political Accountability

The extent to which presidential control facilitates political accountability depends on the extent to which it is transparent to public view and responsive to public preferences. The two concepts are related to each other—only if an action is visible may the public ensure that it reflects their preferences. Furthermore, the two often are tied to faction resistance—only if an action is visible may the public ensure that it reflects their preferences and not narrow interests. We asked EPA respondents questions that measure transparency and responsiveness in an absolute sense (i.e., the extent to which White House involvement is transparent or responsive) as well as a relative sense (i.e., the extent to which White House involvement is *more* transparent and responsive than the actions of the EPA). We also asked questions about OIRA review specifically and about White House involvement generally, including OIRA review. Because the data on OIRA review were consistently less favorable than the data on White House involvement generally, we do not focus on the former data. Rather, we stick to the best case for political accountability.

Beginning with transparency in an absolute sense, 97% of EPA respondents stated that White House involvement was either not visible to the public or only somewhat visible to the public (see Table C).¹⁶⁵

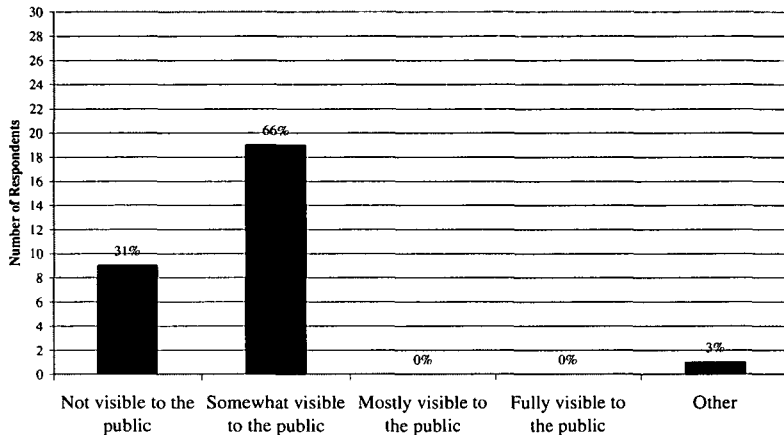
162. See, e.g., Exec. Order 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) (directing federal actions to address environmental justice in minority and low-income populations).

163. See Bressman, *supra* note 12, at 511; Farina, *supra* note 1, at 185.

164. We do not take a position on whether presidential directives are constitutionally or statutorily permissible. See Kagan, *supra* note 11, at 2250 & n.8.

165. Question 95 asked, "Which of the following would you say best characterizes White House involvement in EPA rulemaking?" using a four-point scale: Not visible to the public (1), Somewhat visible to the public (2), Mostly visible to the public (3), Fully visible to the public (4), and Other. The weighted mean of the twenty-nine respondents was 1.7, with 31.0% responding Not visible to the public, 65.5% Somewhat visible to the public, 0.0% Mostly visible to the public, 0.0% Fully visible to the public, and 3.4% Other. Presidential Control Survey, *supra* note 105.

TABLE C
WHICH OF THE FOLLOWING WOULD YOU SAY BEST CHARACTERIZES
WHITE HOUSE INVOLVEMENT IN EPA RULE-MAKING?



In addition, 90% said that the general media reported on White House involvement rarely or sometimes.¹⁶⁶ The trade press was better, reporting on White House involvement sometimes or often according to 90% of respondents.¹⁶⁷

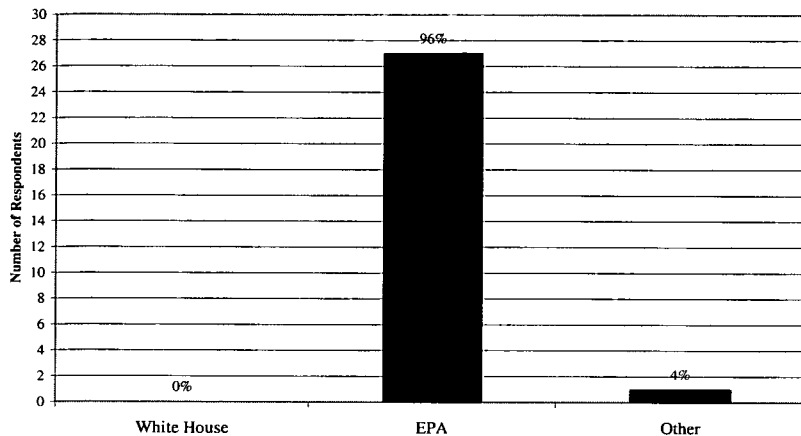
As between the White House and the EPA, 96% of EPA respondents stated that the EPA provided the public with greater opportunities to identify and evaluate how regulatory decisions were made (see Table D).¹⁶⁸

166. Question 92 asked respondents, "How often did the general media report on White House involvement in EPA rulemaking?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-nine respondents was 2.5, with 0.0% responding Never, 58.6% Rarely, 31.0% Sometimes, 6.9% Often, 0.0% Always, and 3.4% Other. *Id.*

167. Question 91 asked, "How often did the trade press report on White House involvement in EPA rulemaking?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-nine respondents was 3.3, with 3.4% responding Never, 3.4% Rarely, 55.2% Sometimes, 34.5% Often, 0.0% Always, and 3.4% Other. *Id.*

168. Question 59 asked, "As between the White House and EPA, which provided the public with greater opportunities to identify and evaluate how regulatory decisions were made?" with the possible answers: White House (1), EPA (2), and Other. The weighted mean of the twenty-eight respondents was 2.0, with 0.0% responding White House, 96.4% responding EPA, and 3.6% responding Other. *Id.*

TABLE D
AS BETWEEN THE WHITE HOUSE AND EPA, WHICH PROVIDED THE
PUBLIC WITH GREATER OPPORTUNITIES TO IDENTIFY AND EVALUATE
HOW REGULATORY DECISIONS WERE MADE?



When asked to identify the source of these opportunities, EPA respondents named the notice-and-comment rule-making process, other public hearings, the requirements of the Federal Advisory Committee Act, and various stakeholder and regional meetings.¹⁶⁹ Seventy-two percent of respondents said that their actions were visible to the public more so or far more so than those of the White House.¹⁷⁰ Furthermore, 90% answered that the White House was more able than the EPA to shield its actions from public view.¹⁷¹ Respondents also indicated that the media reported far less often

169. See, e.g., *id.* at EPA Respondent C007, response to Question 37; *id.* at EPA Respondent C009, response to Question 37; *id.* at EPA Respondent B004, response to Question 37; *id.* at EPA Respondent B012, response to Question 37.

170. Question 96 asked, “To what extent were your actions visible to the public as compared to those of the White House staff involved in EPA rulemaking?” using a five-point scale: Far less visible to the public (1), Somewhat less visible to the public (2), Equally visible to the public (3), More visible to the public (4), Far more visible to the public (5), and Other. The weighted mean of the twenty-nine respondents was 3.9, with 10.3% responding Far less visible to the public, 6.9% Somewhat less visible to the public, 3.4% Equally visible to the public, 27.6% More visible to the public, 44.8% Far more visible to the public, and 6.9% Other. *Id.*

171. Question 98 asked, “As between the White House and EPA, which was more able to shield its actions regarding EPA rulemaking from public view?” with the possible answers: White House (1), EPA (2), and Other. The weighted mean of the twenty-nine respondents was 1.0, with 89.7% responding White House, 3.4% responding EPA, and 6.9% responding Other. The answers to Question 98 are consistent with the answers to Question 90, which asked “How often was the influence of the White House on EPA rulemaking open to public view?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-nine respondents was 2.2, with 17.2% responding Never, 41.4% Rarely, 31.0% Sometimes, 3.4% Often, 0.0% Always, and 6.9% Other. In addition, Question 81 asked the same question regarding OIRA using the same five-point scale. The weighted mean of the twenty-eight respondents was 2.1, with 7.1% responding Never, 75.0% Rarely, 3.6% Sometimes, 7.1% Often, 0.0% Always, and 7.1% Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly higher ($M = 2.29$, $SD = .95$) in response to Question 81 than did the Clinton respondents ($M = 2.06$, $SD = .54$) ($t(28) = -.769$, $p < .050$). *Id.*

on White House involvement in EPA rule-making. Thus, 76% said that the EPA was more subject to media coverage than the White House regarding an EPA regulation undergoing White House review.¹⁷²

Respondents offered similar answers to a question directed at whether White House influence was apparent in the administrative record available to reviewing courts.¹⁷³ According to 63% of EPA respondents, only rarely or sometimes were changes arising from White House involvement apparent in the record. This number actually understates the issue because a full 30% indicated that they had no knowledge of the contents of the record. Of the respondents who had awareness of the contents of the record, 90% stated that the record either rarely or sometimes did not contain evidence of White House involvement; the remaining 10% said it never did.¹⁷⁴

Respondents also addressed questions on whether presidential directives and announcements augmented transparency. As discussed above, only 28% of EPA respondents said that they were involved in a regulatory matter that was the subject of a presidential directive issued in the form of a public

172. Question 97 asked, "As between the White House and EPA, which was subject to more media coverage regarding an EPA regulation undergoing White House regulatory review?" with the possible answers: White House (1), EPA (2), and Other. The weighted mean of the twenty-nine respondents was 1.9, with 10.3% responding White House, 75.9% responding EPA, and 13.8% responding Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly lower ($M = 1.75$, $SD = .46$) in response to Question 97 than did the Clinton respondents ($M = 1.94$, $SD = .24$) $t(29) = 1.369$, $p < .010$). The responses regarding the White House as a whole are consistent with those regarding OIRA. For example, Question 85 asked respondents, "How often were the names of the OIRA staff involved in EPA rulemakings included in general media reports about the rulemakings?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 1.3, with 67.9% responding Never, 25.0% Rarely, 3.6% Sometimes, 0.0% Often, 0.0% Always, and 3.6% Other. The results of an independent samples *t*-test indicate that the Bush I respondents scored significantly higher ($M = 1.56$, $SD = .73$) in response to Question 85 than did the Clinton respondents ($M = 1.22$, $SD = .43$) $t(28) = -1.508$, $p < .019$). *Id.*

173. Question 103 asked, "How often were changes in EPA regulations that arose from White House involvement apparent in the administrative record available to reviewing courts?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the thirty respondents was 2.4, with 6.7% responding Never, 26.7% Rarely, 36.7% Sometimes, 0.0% Often, 0.0% Always, and 30.0% Other. In addition, Question 99 inquired about the transparency effects of Executive Order 12,866, which was issued during the Clinton administration, after the Bush EPA respondents had left the EPA. Interestingly, the Bush respondents, who could only speculate about the transparency effects of Executive Order 12,866, were more sanguine about its effects than were the Clinton respondents who functioned under the Executive Order. Question 99 asked, "Did Executive Order 12,866 increase the transparency of White House oversight of EPA rulemaking?" with the possible responses Yes (1), No (2), and Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly lower ($M = 1.00$, $SD = .00$) than did the Clinton respondents ($M = 1.46$, $SD = .52$) $t(16) = 1.500$, $p < .000$). At the same time, some responses suggest that the Clinton OIRA reforms more generally had a positive effect. Question 13 asked, "How often did OIRA involvement in EPA rulemaking lead to improvements in EPA regulations?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 2.9, with 3.6% responding Never, 14.3% Rarely, 67.9% Sometimes, 3.6% Often, 3.6% Always, and 7.1% Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly lower ($M = 2.62$, $SD = 1.2$) in response to Question 13 than did the Clinton respondents ($M = 3.00$, $SD = .34$) $t(28) = 1.255$, $p < .001$). *Id.*

174. *Id.*

memorandum to the EPA Administrator.¹⁷⁵ Of that group, 75% said that information about the directive was substantially open to public view, and that the media reported adequately on the directive.¹⁷⁶ A larger number, 50% of all respondents, were aware of occasions on which the president took the lead in announcing an EPA regulatory action.¹⁷⁷ But, in cases when the president took the lead in announcing a regulatory action, 60% stated that information about the White House involvement in the regulation was rarely or never open to public view.¹⁷⁸

On questions concerning responsiveness, respondents rated the White House relatively low. They stated that the EPA more often represented the public's views on particular regulatory matters than did the White House.¹⁷⁹ While 68% said that the EPA represented the public's views more often than the White House, only 11% said the opposite. When asked what aspects of the EPA process made the agency more representative of the public's view, respondents again highlighted the notice-and-comment rule-making process and various stakeholder and regional meetings.

These data support three findings concerning White House involvement in EPA regulatory activity. First, White House involvement seldom was transparent to the public, either in an absolute sense or compared to the actions of the EPA. A large majority of EPA respondents scored White House involvement relatively low on all measures of transparency, including visibility to the public, opportunities for public view, media coverage, and availability of information in the administrative record.

Second, the president (and most notably, President Clinton) demonstrated little official involvement in EPA rule-makings. Although President

175. See *supra* note 155 (discussing results for Question 69).

176. Question 72 asked, "Was information about the presidential directive substantially open to public view?" with the possible answers: Yes (1), No (2), and Other. The weighted mean of the eight respondents was 1.3, with 75.0% responding Yes, 25.0% responding No, and 0.0% responding Other. Presidential Control Survey, *supra* note 105.

177. Question 75 asked, "Are you aware of occasions on which the President, as opposed to EPA, took the lead in announcing an EPA regulatory action?" with the possible answers: Yes (1), No (2), and Other. The weighted mean of the thirty respondents was 1.5, with 50.0% responding Yes and 43.3% responding No, and 6.7% responding Other. In contrast, Question 89 asked "How often did the President, Vice President or others at the White House publicly disclaim responsibility for an EPA regulatory action?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-nine respondents was 1.6, with 48.3% responding Never, 37.9% Rarely, 6.9% Sometimes, 0.0% Often, 0.0% Always, and 6.9% Other. The results of an independent samples *t*-test indicate that the Bush I respondents scored significantly higher ($M = 1.75$, $SD = .89$) in response to Question 89 than did the Clinton respondents ($M = 1.47$, $SD = .51$) $t(29) = -1.025$, $p < .007$). *Id.*

178. Question 80 asked, "When the White House was involved in the formulation or timing of a regulation because of a presidential announcement, how often was information about the White House involvement open to public view?" using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the fifteen respondents was 2.2, with 26.7% responding Never, 33.3% Rarely, 13.3% Sometimes, 6.7% Often, 6.7% Always, and 13.3% Other. *Id.*

179. Question 62 asked, "As between the White House and EPA, which more often represented the public's views on particular regulatory matters?" with the possible answers: White House (1), EPA (2), and Other. The weighted mean of the twenty-eight respondents was 1.9, with 10.7% responding White House, 67.9% responding EPA, and 21.4% responding Other. *Id.*

Clinton issued directives and announcements governing the regulatory actions of other agencies, he issued few concerning EPA regulatory actions. Thus, he did not use these mechanisms to make his role in EPA regulatory actions visible to the public.

Finally, White House involvement in EPA regulatory activity was not as responsive to the public as were the actions of the EPA. By a considerable margin, EPA respondents viewed themselves as more responsive by virtue of the notice-and-comment rule-making process as well as other procedures, including stakeholder and regional meetings. As a respondent described those meetings, EPA regional officials would “go out and interact with the public so the Agency would know what the impact of a regulation might be.”¹⁸⁰ These contacts occurred on “a day-to-day basis” in addition to the “formal processes of informal rulemaking.”¹⁸¹

We conclude that White House involvement in regulatory activity may not sufficiently enhance political accountability. White House involvement brings some regulatory activity under the control of the president, and it therefore delivers some political accountability in a formal sense. (Of course, White House involvement actually brings regulatory activity under the control of the president only via White House staff, who in many cases may be no more likely to reflect presidential views than do agency political appointees.) But White House involvement may not promote much political accountability in a functional sense—that is, with the aim of ensuring that regulatory activity reflects public preferences and resists narrow influences.

By “public preferences,” we intend nothing more or less specific than do advocates of presidential control. Furthermore, we do not purport to know exactly what EPA respondents mean by the phrase. In general, public preferences might be understood as ones that reflect the majority will and extend beyond the parochial interests of narrow groups. They might emanate from a range of groups including voters, regulatory beneficiaries, stakeholders, and participants in the notice-and-comment rule-making process.

Even if White House involvement somewhat reflects public preferences, the actions of the EPA may more so. The reason is that EPA officials are bound by administrative procedures and subject to media attention in a way that White House involvement is not. Thus, EPA officials are not more responsive and transparent simply because they say so. Rather, they gather more public input and receive more public scrutiny, both of which tend to ensure that they will better assess public preferences and resist parochial pressures. Of course, agency officials are not susceptible to direct electoral reprisal if they fail in these respects. But they are subject at least to judicial

180. *Id.* at EPA Respondent C003, response to Question 64; *see also id.* at EPA Respondent B004, response to Question 37 (highlighting “ANPR [advanced notice of proposed rulemaking], workshops, other types of outreach to get information from the regulated community and environmental groups, [and] meetings with people after the proposal to get their input on the docket”).

181. *Id.* at EPA Respondent C008, response to Question 61; *see also id.* at EPA Respondent B012, response to Question 61 (commenting that, in addition to the notice-and-comment process, “the continuing consultation process” and “regional administrators” were “important source[s] of input to the regulatory process”).

review. The upshot is that the Administrative Procedure Act may be surprisingly successful—perhaps more so than executive orders or OIRA review—at promoting the values for which political accountability stands.¹⁸²

It is possible to offer a more modest point: White House offices are insufficiently transparent for accountability purposes, given the responsibility they assert. To the extent that White House offices other than OIRA are the ones handling the high-level issues, we have a particular need to know much more about how they perform this function to ensure that they perform it well. We currently know very little about the precise nature of White House contacts.¹⁸³ Indeed, those contacts are difficult if not impossible to catalogue unless the White House offices themselves commit to help. Even advocates of presidential control recognize the need for increased transparency of the White House's activities.¹⁸⁴ Our study intensifies the demand.

In this respect, it is again worth acknowledging that the president might increase his comparative advantage by stepping up the use of formalized control mechanisms such as public directives and public announcements. Because directives and announcements are uniquely transparent forms of presidential control, they might maximize political accountability. But, as mentioned before, there is reason to doubt or resist the increased use of such mechanisms as a means of improving transparency.¹⁸⁵ Rather, we should focus on exposing the workings of the White House offices themselves, as well as the relationship among them and with the president, OIRA, and other federal agencies.

E. Faction Resistance

The extent to which presidential control improves the faction resistance of agency decision-making turns on the extent to which presidential control itself is impervious to parochial pressures. Advocates of presidential control claim that the president is likely to resist factional influence because he is beholden to a national constituency.¹⁸⁶ Thus, the president is likely to repre-

182. See, e.g., Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) (finding that as the number of comments from business groups increases, so does the influence of such groups on resulting rules). But see Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175, 192–95 (1992); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 259–64 (1998); David C. Nixon et al., *With Friends Like These: Rule-making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59 (2002) (concluding that the notice-and-comment process does not systematically favor business interests).

183. Although Clinton's Executive Order 12,866 improved the transparency of OIRA review over that of previous administrations by adding disclosure requirements, those requirements only extend to outside contacts with OIRA staff, not other White House officials, during the formal OIRA review process. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in 5 U.S.C.A. § 601* (West Supp. 2006).

184. See Kagan, *supra* note 11, at 2331–39.

185. See Bressman, *supra* note 12, at 511; Farina, *supra* note 1, at 185.

186. See, e.g., Kagan, *supra* note 11, at 2337; Lessig & Sunstein, *supra* note 27, at 105–06.

sent the public interest on policy issues in the first instance, and is subject to an electoral check if he does not. Others worry that the president often is beholden to narrow interests and will seek to ensure that agency decision-making favors such interests, often in ways that are not transparent to the public.¹⁸⁷

We tested these competing claims by asking which groups influenced White House involvement in EPA rule-making (which might be called “factional inputs”) and which interests benefited from such involvement (which might be called “factional outputs”) either because the White House sought changes that advantaged certain interests more than others or because the final regulation served certain interests more than others. As with political accountability, we asked questions concerning White House involvement collectively and OIRA review independently. We focus on the data concerning White House involvement because it was consistently more favorable.¹⁸⁸

EPA respondents answered several questions measuring factional inputs. According to 57% of EPA respondents, interest groups were sometimes able to persuade the White House to seek changes in EPA rule-makings, and 29% said often.¹⁸⁹ White House involvement was somewhat more influenced by business groups and trade associations than environmental groups.¹⁹⁰ Although 86% stated that White House involvement sometimes or often was influenced by business groups and trade associations, 64% said it sometimes or often was influenced by environmental groups. Similarly, 86% indicated that White House involvement was influenced often or sometimes by state

187. See, e.g., Bressman, *supra* note 12, at 503–11; Morrison, *supra* note 43, at 1067; Shane, *supra* note 35, at 209.

188. We previously addressed some of the questions related to OIRA in connection with OIRA regulatory review. See *supra* Section III.B.

189. Question 55 asked, “How often were interest groups able to persuade the White House to seek changes in EPA rulemakings?” using a five-point scale: Never (1), Rarely (2), Sometimes (3), Often (4), Always (5), and Other. The weighted mean of the twenty-eight respondents was 3.2, with 0.0% responding Never, 7.1% Rarely, 57.1% Sometimes, 28.6% Often, 0.0% Always, and 7.1% Other. Presidential Control Survey, *supra* note 105.

190. Question 56.a asked respondents to rate the accuracy of the assertion “Business firms or trade associations significantly influenced White House review of an EPA regulation” using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 3.3, with 0.0% responding Never True, 7.1% Rarely True, 53.6% Sometimes True, 35.7% Often True, 0.0% Always True, and 3.6% Other. The results of an independent samples *t*-test indicate that Bush I respondents scored significantly lower ($M = 3.13$, $SD = .35$) in response to Question 56.a than did the Clinton respondents ($M = 3.37$, $SD = .68$) $t(28) = .947$, $p < .005$). Question 56.b asked respondents to rate the accuracy of the assertion “Environmental groups significantly influenced White House review of an EPA regulation” using the same five-point scale. The weighted mean of the twenty-eight respondents was 2.7, with 10.7% responding Never True, 21.4% Rarely True, 50.0% Sometimes True, 14.3% Often True, 0.0% Always True, and 3.6% Other. Question 56.c asked respondents to rate the accuracy of the assertion “State or local groups significantly influenced White House review of an EPA regulation” using the same five-point scale. The weighted mean of the twenty-eight respondents was 3.2, with 3.6% responding Never True, 10.7% Rarely True, 50.0% Sometimes True, 35.7% Often True, 0.0% Always True, and 0.0% Other. Question 56.d asked respondents to rate the accuracy of the assertion “Other federal agencies significantly influenced White House review of an EPA regulation” using the same five-point scale. The weighted mean of the twenty-eight respondents was 3.6, with 0.0% responding Never True, 0.0% Rarely True, 46.4% Sometimes True, 46.4% Often True, 7.1% Always True, and 0.0% Other. *Id.*

and local groups. Finally, White House involvement was most influenced by other federal agencies: 93% said sometimes or often.

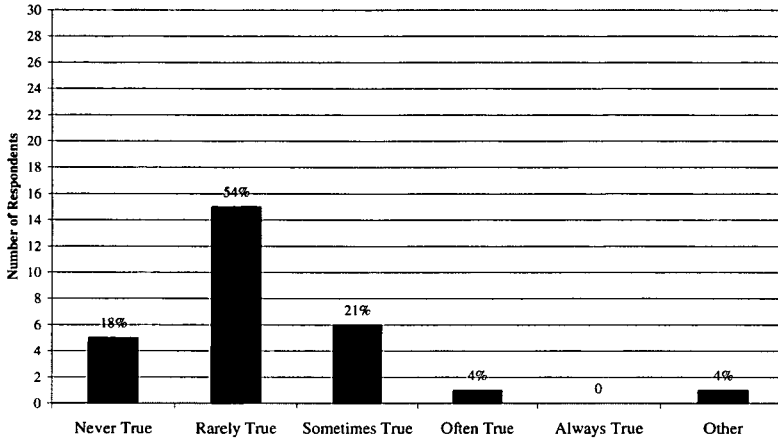
As compared to the EPA, EPA respondents indicated that the White House is more likely to be captured by an interest group.¹⁹¹ Sixty-one percent of EPA respondents selected the White House and 18% selected the EPA. However, 21% chose "Other." Given the bifurcated nature of the question, the answer "Other" might mean that neither is likely to be captured by an interest group or both are equally likely to be captured. Even if "Other" is allocated to EPA, the White House still is more likely to be captured by an interest group.

EPA respondents answered several questions that measure factional outputs.¹⁹² Seventy-one percent stated that the White House never or rarely sought changes that would make a regulation more protective of human health and the environment; 21% said the White House sometimes sought pro-health and environment changes (see Table E). At the same time, 61% said that the White House sometimes sought changes that would make a regulation less protective of human health and the environment, and 32% said the White House often sought these changes. Sixty-one percent said that the White House often sought changes that would make a regulation less burdensome on regulated entities, and 36% said sometimes. Conversely, 86% said that the White House either never or rarely sought changes that would make a regulation more burdensome for regulated entities. Finally, 54% said that the White House sometimes sought changes that would affect which parties or geographic regions would bear a regulatory burden or gain a regulatory benefit, although 29% said that the White House rarely sought region-specific changes.

191. Question 65 asked, "As between the White House and EPA, which was more likely to be captured by an interest group?" with the possible answers: White House (1), EPA (2), and Other. The weighted mean of the twenty-eight respondents was 1.2, with 60.7% responding White House, 17.9% responding EPA, and 21.4% responding Other. *Id.*

192. Question 52.a asked respondents to rate the accuracy of the assertion "The White House sought changes that would make a regulation more protective of human health and the environment" using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 2.1, with 17.9% responding Never True, 53.6% Rarely True, 21.4% Sometimes True, 3.6% Often True, 0.0% Always True, and 3.6% Other. Question 52.b asked respondents to rate the accuracy of the assertion "The White House sought changes that would make a regulation less protective of human health and the environment" using the same five-point scale. The weighted mean of the twenty-eight respondents was 3.2, with 0.0% responding Never True, 3.6% Rarely True, 60.7% Sometimes True, 32.1% Often True, 0.0% Always True, and 3.6% Other. Question 52.c asked respondents to rate the accuracy of the assertion "The White House sought changes that would make a regulation less burdensome for regulated entities" using the same five-point scale. The weighted mean of the twenty-eight respondents was 3.7, with 0.0% responding Never True, 0.0% Rarely True, 35.7% Sometimes True, 60.7% Often True, 3.6% Always True, and 0.0% Other. Question 52.d asked respondents to rate the accuracy of the assertion "The White House sought changes that would make a regulation more burdensome for regulated entities." The weighted mean of the twenty-eight respondents was 1.8, with 39.3% responding Never True, 46.4% Rarely True, 14.3% Sometimes True, 0.0% Often True, 0.0% Always True, and 0.0% Other. Question 52.e asked respondents to rate the accuracy of the assertion "The White House sought changes that would affect which parties or geographic regions would bear a regulatory burden or gain a regulatory benefit" using the same five-point scale. The weighted mean of the twenty-eight respondents was 2.7, with 3.6% responding Never True, 28.6% Rarely True, 53.6% Sometimes True, 10.7% Often True, 0.0% Always True, and 3.6% Other. *Id.*

TABLE E
 THE WHITE HOUSE SOUGHT CHANGES THAT WOULD
 MAKE A REGULATION MORE PROTECTIVE OF HUMAN
 HEALTH AND THE ENVIRONMENT



Of separate note, EPA respondents answered questions that measure national outputs. Half (52%) stated that the White House sometimes sought changes that would advance national interests over the positions of interest groups, while 29% said only sometimes and only 18% said rarely.¹⁹³ Similarly, 61% of EPA respondents stated that White House involvement in EPA rule-making often served national policy interests, while 25% said sometimes and 7% said rarely. No respondent said never in response to either question.¹⁹⁴

These data suggest three findings. First, according to EPA respondents, business groups exerted somewhat more influence on White House involvement in EPA rule-making than environmental groups did. Federal agencies exerted the most influence of all. Thus, the inputs were slightly skewed toward business interests and even more so toward the interests of governmental agencies. Environmental interests got the short end of the stick.

Second, the outputs favored narrow interests. EPA respondents indicated that the White House readily sought changes that would reduce burdens on regulated entities, and veered from those that would increase such burdens. Yet EPA respondents suggested that the White House did not hesitate to

193. Question 52.f asked respondents to rate the accuracy of the assertion "The White House sought changes that would advance national interests over the positions of interest groups." The weighted mean of the twenty-eight respondents was 3.1, with 0.0% responding Never True, 17.9% Rarely True, 50.0% Sometimes True, 28.6% Often True, 0.0% Always True, and 3.6% Other. *Id.*

194. Question 58.a asked respondents to rate "the following sets of interests as to how often those interests were served by the White House's involvement in EPA rulemaking: National policy interests" using a five-point scale: Never True (1), Rarely True (2), Sometimes True (3), Often True (4), Always True (5), and Other. The weighted mean of the twenty-eight respondents was 3.6, with 0.0% responding Never True, 7.1% Rarely True, 25.0% Sometimes True, 60.7% Often True, 3.6% Always True, and 3.6% Other. *Id.*

seek changes that reduced protections for human health and the environment, and routinely eschewed changes with a positive effect. It also frequently sought changes that reflected a regional preference or focus. In short, even if the inputs of White House involvement in EPA rule-makings favored business interests only to a limited extent, the outputs favored them to a much greater extent. Alternatively, looking back at the inputs, federal agencies often may have pressed for changes that favored business interests, suggesting that both inputs and outputs favored such interests.

Finally, the White House, for the most part, served a nationalizing role. Seventy-nine percent of EPA respondents said that the White House sometimes or often sought changes that would further national interests in comparison to the positions of interests groups, and the number increased slightly (to 86%) when asked whether White House involvement served national policy interests in the abstract.¹⁹⁵ At the same time, a non-trivial number said that the White House rarely acted in ways that supported national interests. Not one respondent said that the White House never furthered national interests. Thus, respondents believe that the White House, on balance, advanced national interests.

Interpreting the data in this light, we conclude with a potential puzzle. Although the White House sought parochial results, it nevertheless served a nationalizing role. How can EPA respondents believe that the White House simultaneously favors special interests and furthers national interests? Perhaps respondents believe that the impulse to favor special interests is entirely compatible with the inclination to further national interests. Put differently, respondents might believe the common tale about agency behavior: "health and safety agencies are frequently captured by pro-health and safety constituencies, leading systematically to overzealous and inefficient regulation."¹⁹⁶ On this account, the White House furnishes a check on environmental overreaching—a check that EPA officials may appreciate, even if against self-interest. Two respondents offered comments consistent with this story, remarking that "reducing burdens was in the national interest"¹⁹⁷ and that "[m]any people would say EPA was insufficiently sensitive to the need to preserve the nation's industrial base."¹⁹⁸

To the extent that EPA respondents believe in the occurrence of agency capture, we again note that scholars have some catching up to do. First, scholars may have to start taking seriously the possibility of agency capture. As previously mentioned, many scholars largely have discounted this theory

195. See *supra* notes 193–194.

196. See Bagley & Revesz, *supra* note 5, at 3.

197. Presidential Control Survey, *supra* note 105, at EPA Respondent C001, response to Question 27.f; *cf. id.* at EPA Respondent B007, response to Question 27.a (noting that OIRA could "use their authority to carve out things that don't add value overall").

198. *Id.* at EPA Respondent C009, response to Question 27.f; *cf. id.* at EPA Respondent B006, response to Question 19 ("EPA gave extremely little weight to economic judgments.").

as lacking evidence and theoretical basis.¹⁹⁹ They might have to look again, and they may need to account for the role of the various White House offices in this story. Second, scholars may have to begin approaching the issue of presidential control more precisely, not as generally enhancing agency legitimacy but as specifically combating agency capture or reducing regulatory excess. The Clinton-era advocates, for one, do not demonstrate such a focus.²⁰⁰

But we are skeptical that most respondents regarded the White House as curbing agency excesses in a way that so easily reconciles the impulse to favor special interests with the inclination to further national interests. Other respondents offered other views. For example, some valued the White House for providing occasional political cover for otherwise unpopular EPA regulations.²⁰¹ But many more saw the White House as conveying a broader perspective on rule-making than the EPA alone. As one respondent observed, “the Office of the President can inject broader public interest considerations than might be implemented by EPA,”²⁰² and “White House involvement is healthy on issues of public interest. It is a healthy constraint on EPA’s exercise of judgment, which can be based too narrowly on environmental interests.”²⁰³ Another stated that “[i]t was the president who understood this stuff . . . the political system. [We need] people who understand [the EPA regulatory process] at 35,000 feet.”²⁰⁴ More explicitly, another remarked that “the White House staff sees its job as protecting the president . . . and there are tradeoffs. Protecting the environment is not the only priority The staff at EPA could be ‘obtuse’ at the political effects of their decisions or how they were conveyed There is a limit to what you can get away with in a democracy.”²⁰⁵ We think that these respondents reflected the prevailing sentiment. They indicated that the White House

199. See Bagley & Revesz, *supra* note 5, at 19–41; DeShazo & Freeman, *supra* note 14, at 2297.

200. See, e.g., Kagan, *supra* note 11, at 2248 (asserting that President Clinton understood his control activities as “generally sympathetic to regulatory efforts”).

201. See, e.g., Presidential Control Survey, *supra* note 105, at EPA Respondent C009, response to Question 22 (“The White House sees its job as protecting the President The staff at EPA could be ‘obtuse’ at the political effects of their decisions or how they were conveyed.”); *id.* at EPA Respondent B007, response to Question 107 (“It was the President who understood this stuff . . . the political system.”).

202. Presidential Control Survey, *supra* note 105, at EPA Respondent C016, response to Question 62; see also *id.* at EPA Respondent B002, response to Question 107 (“There is a legitimate role for the White House. The President is elected and gets to make some of the major decisions . . .”).

203. *Id.* at EPA Respondent C016, response to Question 107.

204. *Id.* at EPA Respondent B007, response to Question 107.

205. *Id.* at EPA Respondent C009, response to Question 22; see also *id.* at EPA Respondent B006, response to Question 63 (stating that the White House “was responding to a large number of political constituencies” and that “a decision might be great from the perspective of the environment but not politically salient”); *id.* at EPA Respondent B007, response to Question 19 (remarking that “it’s not like EPA was pristine . . . [the agency] often was reflecting God-knows-what There was a worry about . . . splintering accountability and no one doing a good job OIRA has no meaning but what the President gives it [W]e hold the President accountable.”).

conveys a perspective otherwise missing from EPA rule-making, rather than curbing regulatory excess or providing political cover. They, like many advocates of presidential control, emphasize that the president plays a democratizing role by balancing broad interests—public and political as well as environmental.²⁰⁶

Yet it is this view that gives rise to the puzzle: in what sense does the White House play this role if it systematically tilts regulation toward regulated entities? Of course, business interests may trump environmental interests without raising red flags. In regulatory decision-making, often one set of interests must prevail to the exclusion of others—for example, the interests of regulated entities (or their workers or consumers) over the interests of regulatory beneficiaries. The difficulty is distinguishing legitimate interest balancing from impermissible interest skewing. EPA respondents indicate that business interests consistently dominate, raising reason for concern as to whether or how often the White House actually balances national interests.

Even if they believe that the White House too often skews regulation, EPA respondents convey a degree of optimism about presidential control that bears exploring. Perhaps they believe that the president deserves a role in agency decision-making, for good or for bad, simply because he is the president. Or perhaps they believe that the White House *could* engraft a national perspective, despite experience to the contrary. On this view, EPA respondents can be understood to signal an aspiration for presidential control. They can be seen to recognize that White House involvement has broad potential in theory, even if it has fallen short in operation. This is quite the opposite of the bad agency story. Rather than pursuing their missions overzealously, respondents recognize the need to yield to higher authority, even though that authority has exercised power in worrisome ways.

In the end, we conclude that EPA respondents tended to confirm the fears of critics that the White House frequently favors special interests when it gets involved in agency decision-making, but they still shared the hopes of advocates that the White House often nationalizes such decision-making. Although the White House is only somewhat more influenced by business groups than environmental groups (and is most influenced by other federal agencies), the White House regularly seeks changes that serve regulated entities. It bears repeating that this is the best case for presidential control—the data concerning OIRA review reflected far more special interest favoritism.²⁰⁷ That said, EPA respondents were not hostile to presidential control. None said that the White House did not belong in agency rule-making. And many said that the White House serves a legitimate role, placing agency rule-making in a national context. Respondents demonstrate respect for democratic government, notwithstanding its shortcomings.

But make no mistake: those shortcomings require attention. At bottom, we underscore a need to fortify White House involvement, whether in terms

206. E.g., Lessig & Sunstein, *supra* note 27, at 105–06.

207. See *supra* notes 141–143.

of faction resistance or political accountability or regulatory efficacy. Faction resistance, for example, may depend on transparency. A decision that is visible to the public is less likely to favor private interests in the first instance, and is subject to reprisal after the fact. If White House involvement is insufficiently transparent to promote political accountability, it also may be insufficiently transparent to inhibit factional influence. The next Part turns to suggestions for improving, or even reworking, the practice of presidential control.

IV. INSTITUTIONAL REFORM

We set out to examine the effect of White House involvement from the agency side and revealed a picture far less affirmative than previous empirical analyses. That picture is not conclusive; it too reflects a single perspective on a practice involving many players. But it is different from previous descriptions because it does not validate what has become, in relatively short order, the prevailing view of the administrative state. As a result, it furnishes an opportunity to reconsider the operation of presidential control.

Note that the picture of White House involvement from the agency side does not provide so strong an occasion to rethink the *propriety* or *legality* of presidential control. EPA respondents generally did not question whether the president has a valid role to play in agency decision-making. On this fundamental point, they demonstrated substantial agreement with White House and OIRA political officials. What EPA respondents primarily disputed was whether the president or the White House offices (including OIRA) did their jobs in a fashion that enhanced agency legitimacy—the ostensible purpose of the presidential control model, or any model of administrative law.

This Part highlights six areas for improvement that emerge from the agency experience with presidential control. Three apply to both OIRA and other White House Offices: transparency, lines of responsibility, and selectivity. Three concern OIRA alone: focus on costs, timing of review, and entrenchment of career staff. In this Part, we do not endorse specific changes. Rather, we focus attention on possible weaknesses. At a minimum, we believe that these weaknesses suggest an agenda for further empirical investigation. Scholars should attempt to verify whether these vulnerabilities actually exist by studying OIRA, other White House offices, and other agencies—and within each of those entities, both the political appointees and career staffers. Scholars also might look to other sources of information, including the trade press and the general media. If the weaknesses also prompt interest at the theoretical level, scholars might turn their efforts to determining how best to remedy them.

A. Transparency

Few would dispute that White House involvement in agency decision-making should be more visible to the public.²⁰⁸ As one EPA respondent remarked, “What you want, ideally, is for White House involvement to be on the record.”²⁰⁹ Another observed, “It lacks transparency. The tradeoff among competing interests is less clear with presidential oversight than agency decisionmaking or even congressional oversight Public oversight is dampened and [EPA’s] credibility is damaged.”²¹⁰

While the importance of transparency is uncontested, the means for increasing it vary. President Clinton used official directives and announcements to proclaim ownership of agency policies, but he did not do so with any regularity for all issues or agencies, including the EPA. EPA respondents had other recommendations for improving the transparency of White House involvement. One suggested that the White House have an opportunity “to comment formally with the timing of the comment process, the same as any other agency.”²¹¹ Another remarked that “[t]here is a strong public benefit to more accurate docketing of White House contacts and changes on substantive . . . issues,”²¹² suggesting the possibility of a more complete meetings log than the one that OIRA maintains. These proposals are not without negatives. Restricting the White House to submit comments in the rule-making process may prevent the president from early intervention in agency policy-making. It may cause the White House to issue boilerplate comments, masking actual influence. Or it may inhibit truly beneficial guidance that, for benign reasons, requires confidentiality. Insisting on a public docket allows the president to maintain early intervention, though it may dampen participation. In any event, it may require a central record-keeper other than OIRA, one that can gather information from as many as nineteen other White House offices.

Nevertheless, the point is taken: White House involvement should be more transparent. Such transparency may depend, more than anything, on the willingness of the president to insist that non-OIRA White House offices voluntarily document their interactions with the EPA and with interest groups regarding EPA rule-makings. Even OIRA, which currently maintains

208. See Kagan, *supra* note 11, at 2331–39.

209. Presidential Control Survey, *supra* note 105, at EPA Respondent C003, response to Question 107; see also *id.* at EPA Respondent B004, response to Question 107 (recommending that White House involvement in EPA rule-making be “much more transparent”); *id.* at EPA Respondent B006, response to question 106 (recommending that OIRA increase “transparency and the record”); *id.* at EPA Respondent B012, response to Question 107 (recommending that the White House “open up the process—[make it] open and accessible”).

210. *Id.* at EPA Respondent C012, response to Question 107.

211. *Id.* at EPA Respondent C003, response to Question 107.

212. *Id.* at EPA Respondent C011, response to Question 107; *id.* at EPA Respondent B009, response to Question 40 (“EPA had to keep records of who it spoke to, OIRA did not. EPA was much more open.”).

a meetings log, does not record contacts as extensively as it might.²¹³ Similarly, transparency may depend on whether White House policy advisors are willing or can be directed by the president to submit to more media coverage. White House policy advisors, and not the president directly, are usually the ones exerting the actual influence on agency decision-making.²¹⁴ Yet EPA respondents report that the names of White House staff rarely appear in either the trade press or the general media, far less often than the names of EPA staff.

B. Lines of Responsibility

Advocates of presidential control argue that the president, because he is a single official, is uniquely visible and accountable.²¹⁵ As EPA respondents recount the experience, presidential control was not a unified enterprise but coalitions of different offices competing for influence over EPA rule-making. OIRA often was in the middle, brokering regulatory bargains in some cases and used by certain White House offices to combat other White House offices in other cases, rather than just for the independent value of its review. Furthermore, EPA respondents recalled that little of this was reported regularly in the trade press or the general media—neither disputes between OIRA and the EPA or other White House offices and the EPA, nor the names of particular OIRA or White House staff.

This dynamic has two effects. First, the agency faces many managers rather than one. As a result, the agency has difficulty assessing and following administration policy. Thus, one EPA respondent stated, “There was overlap and confusion in people’s roles with respect to the environment, [which was] inevitable given [that this is] an area of great interest. Everyone thought they had ownership of these environmental decisions, even though you had an EPA with responsibility for these decisions A lot of people who wanted to claim credit, take the lead.”²¹⁶ The multiplicity of voices through which presidential control speaks inhibits it from speaking authoritatively or effectively. A degree of internal coordination would benefit the rule-making process by reducing the number of cooks, or head chefs, in the kitchen. In the words of a respondent, “I would look for more clarity about

213. Although Executive Order 12,866 requires OIRA to disclose outside contacts and maintain a meetings log, these requirements apply to the period of formal OIRA review. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C.A. § 601 (West Supp. 2006); Bagley & Revesz, *supra* note 5, at 18.

214. See Kagan, *supra* note 11, at 2337–38.

215. See, e.g., MASHAW, *supra* note 11, at 152; Calabresi, *supra* note 11, at 58–70.

216. Presidential Control Survey, *supra* note 105, at EPA Respondent C017, response to Question 107; see also *id.* at EPA Respondent B002, response to Question 107 (noting that the roles of OIRA and other White House offices differ); *id.* at EPA Respondent B012, response to Question 106 (“[T]he process was much less predictable than it looks on paper.”).

how the White House makes decisions and who in the White House is the principal overseer of EPA."²¹⁷

Second, the public has difficulty determining which office or offices are responsible for agency rule-making. While it is possible to credit (or blame) the White House as a whole, a great advantage of presidential control is that it promises more specific lines of responsibility. This, for example, is the promise underlying presidential use of public directives and public announcements.²¹⁸ In any event, transparency and responsiveness should be understood to anticipate more than superficial awareness that the president is in charge. They instead should be considered to demand concrete knowledge of how the White House controls agency decision-making. Put differently, transparency and responsiveness should be taken as entitling voters to understand the actual basis for agency decision-making and to evaluate whether such decision-making represents their interests. Thus, the public should have knowledge of precisely who among those clamoring for credit (including the agency) are responsible for particular policies. They also should have the information necessary to understand how the White House offices relate to each other as well as to the president, OIRA, and other federal agencies.

C. Selectivity

EPA respondents indicated that White House involvement, whether through OIRA or other offices, is uneven and unsystematic. For White House involvement to enhance agency legitimacy, it must reach agency decision-making in a less haphazard way. And simply making transparent whatever occasional interactions currently exist will not do the trick. Unless White House involvement is reasonably methodical, it does not really constitute a *model* of control at all.

Of course, the president cannot manage all decisions, even all major decisions, in the administrative state. The president has broad constitutional duties that prevent the diversion of his efforts in this way. If White House involvement is to be meaningful, the issue must be one of reasonableness. White House involvement must be logical and orderly enough that it reliably reaches matters of public importance as well as political interest.

White House involvement in EPA rule-makings during the Bush I and Clinton administrations frequently did not qualify. White House offices often did not set overall regulatory policy. Presidential directives and announcements, important tools of presidential control, were rare. Perhaps the EPA was an outlier—a claim subject to empirical testing. The difficulty is that it should not have been. The EPA generates the most rule-makings with the most costs, and therefore should be the subject of presidential con-

217. *Id.* at EPA Respondent C021, response to Question 107; *id.* at EPA Respondent B004, response to Question 7 (“It was difficult to tell where comments were coming from . . .”).

218. *See* Kagan, *supra* note 11, at 2250.

trol at least as often as other agencies. The presidential control model must account for oversight of the EPA and other regulatory agencies.

Moreover, the very selectivity of White House intervention during this time raises potential concerns. Although the White House expressly limited regulatory review to high-cost rule-makings, it may have gotten involved in the issues among those rules that it deemed most important, leaving others to the EPA. Self-selection of this sort does not ensure that even all significant rule-makings receive high-level political attention of the sort that renders them more accountable and faction-proof. Rather, it ensures presidential supervision only of those rule-makings that already have political salience because they concern particular subjects or groups. But presidential control, as a model of agency legitimacy, is not simply a means for involving politics in chosen decision-making; it stakes a broader claim to rationalize and check agency decision-making. More specifically, it aims to ensure that agency decision-making, in the absence of an electoral check, is not ad hoc or irrational or driven by factional influences. Many seeking such assurance may find it lacking.

Nevertheless, it is tempting to view some White House intervention as better than none. The difficulty is that some intervention may lead to a skewing of the administrative process. White House scrutiny may attach to rules that are excessively burdensome on regulated entities but not those that are insufficiently protective of human health and the environment. Perhaps it is hard to imagine the need for White House involvement on this side because the EPA does a good job of pressing for health and environmental protections. But if White House involvement is to serve an energizing role, it might prompt the EPA to take more aggressive action than even the agency thought politically feasible. Thus, White House involvement might seek to avoid under-regulation as well as over-regulation. In any event, the presidential control model envisions White House supervision not simply in the service of regulated entities or cost considerations but rather national interests and public benefits. A “one-way ratchet” does not suffice.²¹⁹

D. *Timing of Review*

Some EPA respondents commented that OIRA review occurs too late in the rule-making process. OIRA “is a reactive organization. It receives rules over the transom that agencies have already prepared. [OIRA has] ninety days to review [the rules and] on the eighty-ninth day, they say ‘we don’t like it, do over.’ Early interaction would be helpful so that we don’t waste each other’s time.”²²⁰ Similarly, one respondent recommended “[e]arlier discussions of the rules [S]ome rules were in the process for five, ten,

219. See Bagley & Revesz, *supra* note 5, at 8.

220. Presidential Control Survey, *supra* note 105, at EPA Respondent C006, response to Question 107; see also *id.* at EPA Respondent B013, response to Question 107 (recommending that White House involvement in EPA rule-making occur “earlier in the process”); *id.* (recommending that fundamental questions be “vetted sooner”).

fifteen years. [The late intervention] happens because there's supposed to be such a division, a separation. But when the rubber hits the road, it's tough."²²¹ EPA respondents echo what scholars have long been saying: "Too often OIRA has become involved at very late stages, operating as a kind of last-minute barrier to action at a point when cooperation and trust are nearly impossible."²²²

It may be that pre-proposal involvement is preferable to end-stage review. Early OIRA involvement would waste less agency time and breed less agency frustration, if not improve overall regulatory efficacy. The problem, however, is that it is even more difficult to ensure transparency for pre-proposal White House influence than for post-proposal influence, now ostensibly subject to the disclosure requirements of Executive Order 12,866.²²³ Early intervention without firm steps to ensure greater transparency might exacerbate accountability and faction concerns. One option might be to extend the current disclosure requirements from post-proposal OIRA review to pre-proposal OIRA intervention, as well as to require that OIRA docket contacts not only with outsiders but with other White House offices and federal agencies.

In any event, proposals for fixing the timing of OIRA review are secondary to those for fixing the focus of OIRA review. EPA respondents most faulted OIRA review for skewing the administrative process in a deregulatory direction because of its excessive focus on costs, especially in the short-term. That issue is next.

E. Focus on Costs

EPA respondents criticized OIRA for concentrating almost exclusively on costs, and recommended that OIRA expand its focus on benefits: "I used to say to the OIRA Administrator, 'I want to see the people you have working help me find more benefits than the costs.' I would ask, 'who is working on the benefits?'"²²⁴ Cost-benefit analysis conveys "important information but I'd probably want to . . . change it to something which looked at benefits to the public."²²⁵ These respondents did not recommend jettisoning cost-benefit analysis, but requested that OIRA fairly analyze both components rather than just one.

221. *Id.* at EPA Respondent C010, response to Question 107; *see also id.* at EPA Respondent B014, response to Question 107 (remarking that OIRA "engaged in late intervention," which was "demoralizing" and hard to defend as "anything other than a naked effort to preserve their prerogative").

222. Pildes & Sunstein, *supra* note 36, at 16 (citation omitted).

223. Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006).

224. Presidential Control Survey, *supra* note 105, at EPA Respondent C001, response to Question 107.

225. *Id.* at EPA Respondent C002, response to Question 107; *see also id.* at EPA Respondent B009, response to Question 40 (commenting that EPA "took the benefits of the regulation more seriously than the White House, [which was] more focused on the costs").

Some EPA respondents also criticized OIRA for asserting positions on issues far beyond its economic expertise. For example, OIRA on occasion questioned whether the science really supported the results that the EPA had claimed. Whether or not OIRA actually had the authority to challenge agency scientific judgments, these respondents believed that it lacked the competence. One EPA respondent recalled asking an OIRA staffer, “[W]hen did [you] get a PhD in epidemiology? I must’ve missed that.”²²⁶ These respondents suggested that OIRA challenged the science as a means to avoid regulation and reduce costs.

Again, it is possible to offer the conventional account of agency overreaching in OIRA’s defense. Specifically, OIRA seeks to counteract the regulatory excesses that result when agencies pursue the interests of health and safety constituencies, irrespective of costs or any other considerations.²²⁷ But, again, this assumes that OIRA is not battling a bogey. Scholars have found little evidence that agencies are captured by the interests that they regulate or protect.²²⁸ Furthermore, scholars have demonstrated that neither the political science literature nor the public choice literature predicts that agencies will behave in this narrow-minded fashion.²²⁹ Our data do not address this point, but they may suggest the need for further study of the agency capture story. Absent further study, it remains unclear whether OIRA has any basis, except its own institutional bias in favor of business interests, for prioritizing costs to such an extent.²³⁰

At any rate, it is entirely reasonable to expect that OIRA fully evaluate benefits as well as costs.²³¹ Furthermore, it is worth asking which costs and benefits should count. According to EPA respondents, OIRA typically focused more on short-term costs and benefits, while the EPA typically focuses on long-term costs and benefits. A focus on short-term costs and benefits may tend to favor business interests because regulatory costs often are immediate and environmental benefits often are latent. Focus on long-term costs and benefits may tend to favor environmental interests for precisely the same reason.

In addition to expanding its focus on benefits, OIRA should avoid issues that outstrip its institutional competence. While economists may be adept at quantifying costs and benefits, they are not well-equipped to re-evaluate agency scientific determinations—even if those scientific determinations inevitably bear on the cost-benefit analysis. As regulatory review currently stands, OIRA should credit the science rather than undermine it. If regulatory

226. *Id.* at EPA Respondent C006, response to Question 17; *see also id.* at EPA Respondent B007, response to Question 14 (stating that OIRA would give “policy advice in legal clothing”).

227. *See* DeMuth & Ginsburg, *supra* note 6, at 1080–82.

228. *See* DeShazo & Freeman, *supra* note 14, at 2297.

229. *See* Bagley & Revesz, *supra* note 5, at 19–41.

230. *See id.*

231. *See* Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489 (2002).

review is extended to include scientific review, OIRA (or other White House offices) should acquire additional scientific expertise.

OIRA reform might involve simply repairing the cost-benefit analysis, or it might extend beyond narrow fixes. For example, we might seek to replace cost-benefit analysis with a different or broader standard for evaluating regulatory policy.²³² Or we might seek to improve the structure of OIRA in ways that reinforce its coherence and coordination functions.²³³ Alternatively, we might seek to abolish OIRA entirely as a tool of presidential control. Although our study does not indicate whether modest or more fundamental reform is appropriate, it does suggest that some reform is necessary.

F. Entrenchment of Career Staff

The entrenchment of OIRA career staff may stand as an impediment to reform, even of the most modest variety. While scholars look to career staff to provide continuity and consistency in the face of factional pressure,²³⁴ EPA respondents suggested a different picture. From their perspective, careerism diminished political responsiveness and converted OIRA into a virtual government unto itself. These respondents remarked that many OIRA career staffers had been there “since Reagan” and often took positions adverse to those of political officials, including the president.²³⁵ If career staffers are so wedded to their approach, then they may not respond to positive instruction. The solution is “more turn-over in the career staff at OIRA.”²³⁶

This suggestion, even more than others, would benefit from further investigation. Few theoretical scholars have focused on the particular composition of OIRA as a contributor to the strengths and weaknesses of White House regulatory review. Few empirical scholars have interviewed OIRA career staffers. At a minimum, it would be worth pursuing answers to

232. See, e.g., Bagley & Revesz, *supra* note 5, at 50; Edward Rubin, *It's Time to Make the Administrative Procedure Act Procedural*, 89 CORNELL L. REV. 95, 157–62 (2003); cf. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 186 (2000) (urging that cost-benefit analysis separate efficiency from distributional issues, and expressing doubt that agencies can succeed in addressing distributional issues).

233. See, e.g., BREYER, *supra* note 24, at 59–72.

234. See Croley, *supra* note 3, at 873–74.

235. Presidential Control Survey, *supra* note 105, at EPA Respondent C023, response to Question 106 (“It did seem that the civil servants in OIRA, who had been there largely since the Reagan Administration and Bush I, were more conservative and suspicious of EPA regulations than the political appointees. But they had such power because of their knowledge and day-to-day involvement that they had such great influence.”); *id.* at EPA Respondent C006, response to Question 51 (“They were holdovers from the Reagan Administrations, for crying out loud . . . they did what they thought they were supposed to be doing for the regulation instead of what the political managers wanted.”); *id.* at EPA Respondent B002, response to question 106 (“There is a legitimate role for OIRA looking across the government because EPA ‘stovepipes.’ But I’m not sure they fulfilled it very well. The Competitiveness Council was much more aligned with what we wanted to do than OIRA. [With OIRA, we were dealing with] entrenched career people who wouldn’t listen to their political bosses.”).

236. *Id.* at EPA Respondent C022, response to Question 107.

questions such as the following: Did OIRA staffers press certain results even when adverse to the positions of the political leadership? Did the OIRA career staff perceive differences in their mission under Bush I (who embraced, at least in part, the Reagan Era deregulatory agenda) and Clinton (who took a less deregulatory view)? Can OIRA staffers identify examples when independence operated as a restraint on factional influence? Did OIRA career staffers perceive their role as reducing regulatory burdens or ensuring that costs and benefits were accurately estimated? These questions seek to determine whether OIRA career staffers served to minimize politicization of the regulatory review process or skewed that process and the resultant agency decision-making in a deregulatory direction.

CONCLUSION

This Article is the first to consider the practice of presidential control from inside the agency. By looking inside the agency, we do not simply examine the ways in which the White House sets regulatory policy. Rather, we move forward to investigate the ways in which agencies experience such policy. Our empirical study presents data and conclusions from a survey of high-level EPA officials, nominated by the president and confirmed by the Senate, during the Bush I and Clinton administrations. Unlike prior empirical analyses, our study concludes that the presidential control model may not entirely succeed in enhancing agency legitimacy. We do not suggest that the model lacks merit, however. We contend that it requires reworking to remain valid. Scholars can no longer rest satisfied with generalities about political accountability, faction resistance, and regulatory effectiveness. They must take steps to improve the presidential control model so that it better delivers these goods in practice as well as in theory. We aim to begin that process.

