NOTE

PRESIDENTIAL OVERSIGHT OF INDEPENDENT AGENCY RULEMAKING: A LITERATURE REVIEW

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Over the course of the last several decades, the role of the President vis-à-vis the administrative state has undergone a profound evolution. Central to this development is President Clinton's Executive Order (EO) 12866, issued in 1993—a landmark directive that modernized and reinvigorated the process by which federal agencies promulgate significant regulations. Like his predecessors, President Clinton declined to extend EO 12866's cost-benefit analysis and centralized review requirements to independent agency rulemakings. This Note provides a literature review of the competing perspectives regarding the legal permissibility and desirability of that choice and the choice of every President since to do the same.

Historically, independent regulatory agencies have enjoyed a certain degree of autonomy from the executive branch, which safeguards their decision-making processes from overt political influences—at least in theory. This insulation, historically justified on the basis of expertise and impartiality, has been a fierce subject of debate, with critics arguing that it shields agencies from democratic accountability and proponents arguing that it promotes stability and predictability in the administrative state.

Extending EO 12866's cost-benefit provisions to independent regulatory agencies raises critical questions about the nature of presidential administration and the evolving role of the President in shaping regulatory policy. As of yet, however, no legal consensus has been reached regarding the President's authority to do so. This Note seeks to illuminate this legal gray area by providing an overview of the competing perspectives in the form of a literature review.

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INTRODUCTION

For nearly a century, independent agencies—the so-called "headless fourth branch" of the federal government[1]—have been the boogeymen of administrative law.[2] While there is no "general, widely accepted definition of an independent agency,"[3] for legal scholars, "structural features, particularly fixed terms with for-cause removal protections . . . define independence."[4] As defined in the Paperwork Reduction Act of 1980, an independent regulatory agency is any one of nineteen enumerated agencies, plus "any other similar agency designated by statute as a Federal independent regulatory agency or commission."[5] The paradigmatic example of an independent agency is one whose administrator (or administrators) is removable by the President only "for cause," rather than at will.[6] Given that the federal bureaucracy is generally divided between administrative agencies inside and outside the President's cabinet, defining independent agencies by this shared trait makes sense.[7] To present them in a more nuanced light, however, it can also be helpful to view them as exhibiting some or all of the following characteristics: (1) *independence*, meaning there are little to no bureaucratic organizations above the agency such that

1 The phrase "headless fourth branch" is often used pejoratively to describe administrative agencies as undermining the tripartite constitutional structure. *See, e.g.*, THE PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 46 (1937); City of Arlington v. FCC, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 6 (D.C. Cir. 2016).

2 *See* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1306–08 (2023) ("Independent agencies are the 'final frontier' in the raging, partisan battle over presidential control of the administrative state . . . . From [the Supreme Court's] 1935 approval of the independent agency design in *Humphrey's Executor* through the Rehnquist Court, the Supreme Court had largely embraced the agency independence model." (footnote omitted) (quoting STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 160 (2021))).

3 JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 42 (2d ed. 2018).

4 *Id.* at 43.

5 Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 3502(10), 94 Stat. 2812, 2814 (codified as amended at 44 U.S.C. § 3502(5) (2018)).

6 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes . . . power . . . to forbid their removal except for cause in the meantime.").

7 *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997, at 44 (2003) ("The bureaucracy can loosely be divided into administrative agencies inside the cabinet and those placed outside of it.").

it is designed to be "immune to the pressures and larger policy goals of executive departments"; (2) *organization into either a board or commission*, which further "insulates new agencies from presidential control by increasing the number of actors who must be influenced to change the direction of an agency"; (3) *fixed terms for administrators*, which are also intended to "insulate[] [the administrators] from presidential control since they cannot be removed without cause"; and finally (4) *specific qualifications for administrators* based upon "political party, occupation, or experience," which further limit the President's ability to select appointees.[8]

To some, independent agencies are the poster child for government overreach run amok: a dangerous, rogue force, the reining in of which ought to be a top priority of the President's domestic agenda.[9] To others, however, independent agencies are a positive innovation in the pursuit of sound governance. They provide politically neutral, expert policy guidance that helps the government to meet the challenges of our increasingly technical and complex world.[10] Especially this past year, as the 2024 presidential primaries and general election were underway, independent agencies found themselves in the crosshairs of political commentators and presidential candidates alike.[11] Despite all of the noise surrounding this topic, both sides agree as to the gravity of what's at stake in the power struggle over independent agencies and

8 *See id.* at 44–49.

9 *See* Russ Vought, *Executive Office of the President of the United States*, *in* MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 43, 43 (Paul Dans & Steven Groves eds., 2023) ("The modern conservative President's task is to limit, control, and direct the executive branch on behalf of the American people. This challenge is created . . . by . . . the pervasive notion of expert 'independence' that protects so-called expert authorities from scrutiny . . . .").

10 *See* Devins & Lewis, *supra* note 2, at 1319–20 ("[New Deal Era] [p]rogressives saw [the independent agency] structure as a way to insulate agencies from partisan politics and thereby facilitate expertise, policy stability, and related legitimacy objectives. . . . The Progressives' concern was apolitical expertise, not the balance of powers."). *But see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 523 (2009) (opinion of Scalia, J.) ("The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.").

11 *See* Alana Goodman, *Ramaswamy Calls for End of 'Administrative State'*, WASH. FREE BEACON (Sep. 13, 2023), https://freebeacon.com/elections/ramaswamy-calls-for-end-of-administrative-state/ [https://perma.cc/SH9Z-LEU5] ("Ramaswamy vowed that he would shut down multiple U.S. agencies, including the FBI and the Department of Education, adding that this 'is just the beginning of the list of federal agencies that we will either shut down or downsize.'"); Jesse Watters Primetime, *DeSantis: Our Bureaucracy Is an Unaccountable, Weaponized Administrative State*, FOX NEWS (May 31, 2023), https://www.foxnews.com/video/6328517909112.

the administrative state generally.[12] This is particularly true in a world where the President has taken on an increasingly active role in agencies' affairs and where the "ubiquity and extent of presidential involvement in agency action can make it seem an almost natural part of American government."[13]

Centralized review of federal regulations emerged in response to growing concerns over the unchecked power of the administrative state, with President Ronald Reagan's reforms in the 1980s marking a pivotal shift toward greater presidential oversight. Over the course of the twentieth century, two challenges have remained consistent: first, the federal bureaucracy is too vast for any President to unilaterally control,[14] and second, Presidents—in particular, modern Presidents—have often expressed frustration with the resistance of entrenched bureaucrats.[15] While President Franklin D. Roosevelt was the first to make a formal attempt at reining in the administrative state in the late 1930s,[16] the most significant shift of the last century came in the 1980s with the election of President Ronald Reagan.[17] A central theme of President Reagan's 1980 presidential campaign was comprehensive regulatory reform, fueled in large part by more a generalized grievance against the size and strength of the federal government.[18] During the

12 *See* Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 18, 2023), https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html [https://perma.cc/TY6W-K79D].

13 Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2149 (2023).

14 *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2273 (2001) ("In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy."); 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.9, at 772 (7th ed. 2024) ("The greatest constraints on presidential power to control agency policymaking are purely practical. It is simply impossible for the President even to be aware of all of the policy decisions agencies make.").

15 *See* Kagan, *supra* note 14, at 2272–81 (discussing the frustrations expressed by Presidents throughout the twentieth century in dealing with the administrative state (e.g., Presidents Roosevelt, Truman, Kennedy, Nixon, Carter), and detailing the early efforts at administrative control which culminated in the executive orders of Presidents Reagan and Clinton).

16 *See infra* notes 40–50 and accompanying text.

17 *See* Kagan, *supra* note 14, at 2277 ("The sea change began with Ronald Reagan's inauguration."); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995) ("Probably the most important development in administrative law in the 1980s came not from federal courts, nor even from Congress, but from Presidents Ronald Reagan and George Bush.").

18 *See* Ronald Reagan, Presidential Nomination Acceptance Speech (July 17, 1980), *in* THE GREATEST SPEECHES OF RONALD REAGAN 69, 76 (2d ed. 2002) ("I will not accept the

initial months of his presidency, against the backdrop of mounting concerns over government overreach, President Reagan issued EO 12291.[19] Famously, EO 12291 instituted a regime of cost-benefit analysis in the administrative state. It instructed that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society" and further clarified that "[r]egulatory objectives shall be chosen to maximize the net benefits to society"; "[a]mong alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen."[20] Critically, EO 12291 provided the Office of Information and Regulatory Affairs (OIRA) with significant oversight authority, mandating that agencies submit draft regulations to OIRA for review before promulgating them.[21] EO 12498, issued four years later, further required each agency to present an annual regulatory plan to the Office of Management and Budget (OMB), outlining the agency's proposed actions for the year.[22] This further extended the President's ability to influence regulatory policy by providing OMB with the chance to get ahead of, and ultimately try to shape, agency regulations.[23]

Issued in September 1993, President Clinton's EO 12866[24] replaced EO 12291 and became the cornerstone for centralized regulatory review moving forward.[25] Building on the framework established by President Reagan, EO 12866 reaffirmed the use of cost-benefit analysis, required agencies to submit major regulations for OMB review, and maintained exemptions for independent regulatory agencies. President Clinton issued EO 12866 with the goal to "reform and make more efficient the regulatory process" as well as "to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-

excuse that the federal government has grown so big and powerful that it is beyond the control of any president, any administration or Congress. . . . The federal government exists to serve the American people . . . .").

19 Exec. Order No. 12291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 822–27 (2018).

20 *Id.* § 2(b)–(d), 3 C.F.R. at 128.

21 Kagan, *supra* note 14, at 2277–78 ("Executive Order 12,291 . . . established the system: the order required executive—but not independent—agencies to submit to OMB's Office of Information and Regulatory Affairs . . . for pre-publication review any proposed major rule, accompanied by a 'regulatory impact analysis' of the rule, including a cost-benefit comparison." (quoting Exec. Order No. 12291 § 3, 3 C.F.R. at 128–30).

22 Exec. Order No. 12498, 3 C.F.R. 323 (1986), *revoked by* Exec. Order No. 12866 § 11, 3 C.F.R. at 649.

23 *See* Kagan, *supra* note 14, at 2278.

24 *See* Exec. Order No. 12866, 3 C.F.R. 638.

25 U.S. GEN. ACCT. OFF., GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEW OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 4 (2003).

making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."[26] Like President Reagan's EOs 12291 and 12498 before it, EO 12866 required federal regulatory agencies to submit significant regulations to the OMB for review,[27] retained cost-benefit analysis as the primary means of evaluating regulatory decisions,[28] and implemented an annual regulatory planning process.[29] Also like President Reagan's EO 12291, President Clinton's EO 12866 exempted "independent regulatory agencies" from its various centralized review provisions.[30]

EO 12866 continues to be an important tool of presidential regulatory oversight, but no President has extended it to include independent agencies.[31] Although recent administrations have argued that doing so would be constitutional,[32] the question of whether to extend regulatory review under EO 12866 to independent regulatory agencies remains the subject of considerable debate. On some level, the argument for extension has intuitive appeal. Elections in a representative democracy should have consequences, and for many Presidents, administrative action has proven to be an effective means of making good on campaign promises and advancing domestic policy agendas.[33] But

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26 *See* Exec. Order No. 12866, 3 C.F.R. at 638.

27 *Id.* §§ 2(b), 6(a), 3 C.F.R. at 640, 644.

28 *Id.* §§ 1(b)(5)–(6), 6(a)(3)(B)(ii)–(C), 3 C.F.R. at 639, 645–46.

29 *Id.* § 4, 3 C.F.R. at 642–45.

30 *Id.* § 3(b), 3 C.F.R. at 641 ("'Agency,' unless otherwise indicated, means any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10)."). Note that EO 12866's definition of "independent regulatory agenc[ies]" is pulled from the Paperwork Reduction Act of 1980. *See supra* note 5 and accompanying text. The language in EO 12866 exempting independent agencies from centralized review closely mirrors the analogous provision of EO 12291. *See* Exec. Order No. 12291 § 1(d), 3 C.F.R. 127 (1982) ("'Agency' means any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10)."), *revoked by* Exec. Order No. 12866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 822–27 (2018).

31 *See* Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. 426, 458 n.171 (2024) ("Every presidential administration up to and including the Biden Administration has continued the practice of reviewing the agencies' significant regulatory actions. . . . Independent agencies have so far remained outside of this structure, although calls to include them have become more persistent over the last decade or so.").

32 Extending Regul. Rev. Under Exec. Ord. 12866 to Indep. Regul. Agencies, 43 Op. O.L.C., slip op. at 13 (Oct. 8, 2019).

33 *See* Rosenblum, *supra* note 13, at 2149 ("Presidential administration has thus become a central tool of modern governance. Every President in recent history has sought to realize central campaign pledges by directing, influencing, or obstructing administrative action. The tactic has become so common, it is no longer reserved for divided government."); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29,

to overemphasize presidential power dynamics can, in some instances, warp our sense of what's happening on the ground,[34] and this in turn may obfuscate what arguably ought to be the goal of the entire administrative enterprise, that is, to "ensur[e] due process and faithful execution in administration."[35] While it is desirable to hold the administrative state democratically accountable, the potential for presidential abuse is self-evident. After all, federal regulatory agencies are creatures of statute—they are Congress's agents, not the President's.

At bottom, the underlying question is whether it is desirable—or even constitutional—for pockets of executive power to exist beyond the direct supervision of the President. To some scholars, the answer on both scores is a resounding *no*. They maintain that the centralization of executive power in the hands of the President is unambiguously required by the Constitution. This is the so-called "unitary executive" theory,[36] and while it remains a controversial thesis, its proponents argue that it is firmly rooted in both the text and history of Article II, particularly in the Founders' choice to centralize executive power in the hands of a single "chief magistrate."[37] Others argue that the

59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." (footnote omitted)).

34 *See* Bremer, *supra* note 31, at 439 ("[A]dministrative law has shifted its perspective up and away from the on-the-ground needs of administration to the more politically salient struggles for power among the highest institutions of the federal government: Congress, the President, and the Supreme Court.").

35 *Id.* at 440.

36 *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) ("The claim made by unitary executivists that the Constitution creates only three branches of government and that the President must be able to control the execution of all federal laws is easily understood and resonates strongly with the very earliest lessons we learn about our constitutional system."); *see also* Morrison v. Olson, 487 U.S. 654, 705, 727 (1988) (Scalia, J., dissenting) ("Article II, § 1, cl. 1, of the Constitution . . . does not mean *some of* the executive power, but *all of* the executive power. . . . The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.").

37 *See* ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 186 (2014) ("The very same principles that had underwritten the patriot campaign to rebalance the imperial constitution in favor of the Crown demanded in 1787 the creation of a strong, independent chief magistrate who would represent the people as a whole and tame the tyrannical proclivities and partialities of the assembly."). While Nelson takes no position on the legal merits of the unitary executive theory, his book is illuminating with respect to how the Founders thought about executive power, particularly the extent to which they modeled the presidency after the British monarch and sought, somewhat surprisingly, to create a more powerful executive office. As noted by some of the sources

Constitution demands no such thing, and that the system as a whole is best served when Congress's desire to carve out a space for impartial, expert administration is respected, and such administrators are insulated from the oscillating priorities of different presidential administrations.[38] While this particular debate is beyond the scope of this Note, it is important to remember that these structural issues are always operating in the background when discussing the President's role with respect to independent agencies. With that in mind, the central question for present purposes remains the same: should EO 12866's centralized review and cost-benefit analysis requirements be applied to independent agency rulemakings?

This Note will examine the question of whether EO 12866 should be extended to include independent agencies by considering various scholarly perspectives. Part I will provide the historical background of OMB and OIRA. This Part will examine the origins of these two agencies, the purposes they were created to serve, and the ways their unique capabilities fit within the broader process of setting regulatory policy. This Part will also discuss the various executive orders which empower OMB and OIRA to review agency action. Part II will provide an overview of the legal and policy perspectives regarding the extension of EO 12866 to independent agencies. The Note will then conclude.

I. BACKGROUND

The evolution of federal regulatory oversight in the United States has been shaped by shifting executive strategies and key institutional

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Nelson cites regarding the latter point, the syphoning of power away from the king and into the bureaucracy rendered "the unity of the executive" into a "mere[] ideal." *Id.* at 228 (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. at 316–17 (Philadelphia, William Young Birch & Abraham Small 1803)). The American chief executive, both at the time of the Founding and especially in the modern day, is considerably more powerful than the British king insofar as he "does in reality what the king of Great Britain does only in theory," i.e., he has the constitutional authority to direct the actions of those who administer the law in his name. *Id.*

38 *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) ("We now have independent special counsels, independent agencies, and other such exceptions, commonly thought to be inconsistent with the basic founding commitment to a 'unitary executive.' . . . We think that the view that the framers constitutionalized anything like this vision of the executive is just plain myth."); *see also* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., dissenting in part) ("The text of the Constitution, the history of the country, [and] the precedents of [the] Court . . . bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And [also] . . . give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies . . . .").

developments. This story begins with the creation of the Office of Management and Budget and later the Office of Information and Regulatory Affairs, two agencies housed within the Executive Office of the President. These entities paved the way for transformative changes in regulatory policy, particularly during the administrations of Presidents Reagan and Clinton. To fully grasp the significance of these agencies—and the broader impact of EO 12866—it is essential to explore the reasons behind their establishment and the goals their architects sought to achieve.

A. The Origins of OMB and OIRA

1. The Office of Management and Budget

OMB's predecessor, the Bureau of the Budget, was created by the Budget and Accounting Act of 1921.[39] Originally located in the Treasury Department, the Bureau was established for the purpose of "endowing the President . . . with a fiscal lever over administrative policy."[40] As the federal government grew, however, the need for presidential control grew as well. In the wake of the New Deal, President Franklin Roosevelt concluded that the "expanded government required management tools commensurate to the task,"[41] and took steps toward that end. In 1936, a committee created by President Roosevelt and headed by Louis Brownlow took to the task of devising a plan for reorganizing the executive branch and reigning in the newly expanded federal government.[42] In its final recommendation, the

39 *See* Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

40 *See* Kagan, *supra* note 14, at 2275 ("[T]he Budget and Accounting Act of 1921 provided that the President, assisted by a new Bureau of the Budget (placed in the Treasury Department but understood to have a direct connection to the President), would oversee and coordinate all agencies' budget requests."); *see also* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2195 (2016) ("The [Budget and Accounting Act of 1921] was intended to rationalize the uncoordinated process in which individual federal agencies presented their budget requests seriatim to Congress with no big-picture, national view" and focused power in the hands of the President by "creat[ing] a Director and Assistant Director who reported directly to the President.").

41 LARRY BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921–1979, at 10–11 (1979).

42 *See id.*; *see also* Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 94–95 (2004) ("In order to address these concerns, Roosevelt created a Committee on Administrative Management, commonly known as the Brownlow Committee, to develop a new proposal to reorganize the executive branch . . . . [T]he Brownlow Committee commenced its work in 1936. After nearly a year of intensive analysis and the active input of Roosevelt, the Brownlow Committee issued its recommendations on January 8, 1937." (footnote omitted)).

Brownlow Committee agreed that "[t]he President need[ed] help,"[43] and concluded that the "growing complexity and magnitude"[44] of his office created the urgent need for both personal and institutional assistance.[45] In its recommendations regarding the White House, the Committee proposed the creation of the Executive Office of the President (EOP).[46] The purpose of this new office, according to the Committee, was to ensure that "the President would have reporting to him directly the [Civil Service Administration, the Bureau of the Budget, and the National Resources Board] whose work and activities would affect all of the administrative departments."[47] Congress accepted most of the Committee's proposals.[48] This resulted in part in the expansion of the Bureau of the Budget, its formalization of its "role of providing staff assistance to the President,"[49] and its relocation from within the Treasury Department to the "centerpiece" of the newly created EOP.[50]

The Bureau of the Budget went on to become an essential and dynamic part of the EOP in 1939.[51] Although its initial mandate was centered around the President's budget-making process, the Bureau's influence eventually grew to encompass more generalized regulatory oversight, and in 1970, the Bureau of the Budget was renamed the "Office of Management and Budget."[52] The gradual expansion of OMB's responsibilities mirrored a rising awareness in the twentieth century of the pivotal role agency action played in shaping government operations and regulating the national economy. By the latter half of the

43 PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 5 (1937) [hereinafter BROWNLOW COMMITTEE].

44 *Id.*

45 *See* BERMAN, *supra* note 41, at 11 ("The 'salvation by staff' theme embodied in the Brownlow recommendations was a two-pronged idea: the President would receive both *personal* and *institutional* assistance in the job of being President.").

46 *See* BROWNLOW COMMITTEE, *supra* note 43, at 5–6.

47 *Id.* at 6.

48 Kagan, *supra* note 14, at 2275.

49 Pasachoff, *supra* note 40, at 2195.

50 *See* PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905–1980, at 104 (1986) ("[The White House] section [of the Brownlow Report] proposed a major organizational addition to the presidency, the Executive Office, with the Bureau of the Budget as its centerpiece.").

51 *See* Yoo et al., *supra* note 42, at 107 ("Roosevelt completed the administrative reform process in September 1939, by issuing an executive order forming the Executive Office of the President, which was divided into six departments, including the Bureau of the Budget brought over from the Treasury Department.").

52 Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 45 (2011); William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 53 n.62 (1975).

century, the federal regulatory landscape had become so vast that calls for streamlined oversight grew ever more prominent.

2. The Office of Information and Regulatory Affairs

The Paperwork Reduction Act (PRA) of 1980 was a landmark piece of legislation responding to the need for regulatory efficiency, coordination, and accountability.[53] The Act aimed to streamline the federal government's information collection and management processes by reducing paperwork burdens, maximizing public benefits, and ensuring data quality.[54] It emphasized collaboration with local governments, ensured adherence to privacy, security, and access laws, and promoted the efficient use of technology.[55] The 1995 PRA, which amended the original 1980 Act, further clarified that one of its purposes was to "improve the responsibility and accountability of the Office of Management and Budget and all other Federal agencies to Congress and to the public for implementing the information collection review process, information resources management, and related policies and guidelines."[56] Given that the primary purpose of the PRA and its amendments was to lessen the paperwork burden on the American public, Congress may not have anticipated what ultimately came to be the PRA's most significant impact: the creation of the Office of Information and Regulatory Affairs (OIRA) within the OMB.[57] Ironically, most of OIRA's current operation "is entirely a creature of administrative fiat," and its role in the machinery of presidential administration lacks a clear statutory basis.[58]

The initial purpose of OIRA was to review information collection requests from federal agencies,[59] but one of the first actions taken by President Reagan was to give OMB generally, but OIRA specifically, responsibility for "review[ing] and approv[ing] . . . federal rules from

53 Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. § 3501 (2018)).

54 *Id.* § 3501, 94 Stat. at 2812–13.

55 *Id.*

56 Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163, 164 (1995) (codified as amended at 44 U.S.C. § 3501(11) (2018)).

57 *See* Paperwork Reduction Act of 1980 § 3503(a), 94 Stat. at 2814.

58 Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1183 (2014) ("It is anomalous that such an important feature of the regulatory state has no statutory basis. Congress might want to consider providing a statutory framework for OIRA's role . . . . In the real world of administrative law, the White House is the main player. Presidents will therefore presumably be loath to give up power, but they may, at least under pressure, be willing to make some changes.").

59 Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839 (2013).

executive agencies, with careful consideration of costs and benefits."[60] OIRA's new purpose, then, was to ensure that federal regulations aligned with the President's policy goals, "to the extent permitted by law,"[61] and that they were economically justified.[62] Under this new regime, "OMB had authority to determine the adequacy of an impact analysis and to prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process."[63] All told, the combined effect of the Paperwork Reduction Act and EO 12291 was to centralize review of agency action in the EOP, and underscore the President's role in shaping regulatory policy.

B. Presidential Oversight of Agency Rulemaking

Presidential involvement in federal agency rulemaking has been one of the most significant developments in administrative law of the last few decades.[64] Presidential review is primarily exercised through OIRA and is the combined result of the PRA and numerous executive orders.[65]

When President Clinton took office in 1993, he inherited President Reagan's regulatory review framework but had his own vision of governance. Whereas President Reagan and subsequent Republican Presidents mobilized OIRA to advance a predominantly deregulatory policy agenda, President Clinton was able to utilize the tools of presidential oversight to effectively "jolt [bureaucrats] into action."[66]

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60 *Id.*; *see also supra* notes 18–23 and accompanying text.

61 Exec. Order No. 12291 § 2, 3 C.F.R. 127, 128 (1982), *revoked by* Exec. Order No. 12866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 822–27 (2018).

62 *See* Kagan, *supra* note 14, at 2278 ("Although the order and the legal opinion supporting it explicitly disclaimed any right on the part of OMB, or the President himself, to dictate or displace agency decisions, the order effectively gave OMB a form of substantive control over rulemaking . . . ." (footnote omitted)).

63 *Id.*

64 JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 16 (5th ed. 2012).

65 *See, e.g.*, Exec. Order No. 12291, 3 C.F.R. 127; Exec. Order No. 12498, 3 C.F.R. 323 (1986), *revoked by* Exec. Order No. 12866 § 11, 3 C.F.R. at 649; Exec. Order No. 12606, 3 C.F.R. 241 (1988), *revoked by* Exec. Order No. 13045 § 7, 3 C.F.R. 198 (1998), *reprinted as amended in* 42 U.S.C. § 4321 at 470–73 (2018); Exec. Order No. 12612, 3 C.F.R. 252 (1988), *revoked by* Exec. Order No. 13132 § 10, 3 C.F.R. 206 (2000), *reprinted as amended in* 5 U.S.C. § 601 at 828–30 (2018); Exec. Order No. 12630, 3 C.F.R. 554 (1989), *reprinted as amended in* 5 U.S.C. § 601 at 820–22; Exec. Order No. 12866, 3 C.F.R. 638; Exec. Order No. 13563, 3 C.F.R. 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 at 836–37 (2018). *See generally* Tozzi, *supra* note 52 (providing a detailed overview of the historical context which led to the development of centralized regulatory review).

66 Kagan, *supra* note 14, at 2249 ("[I]f Reagan and Bush showed that presidential supervision could thwart regulators intent on regulating no matter what the cost, Clinton showed that presidential supervision could jolt into action bureaucrats suffering from bureaucratic inertia in the face of unmet needs and challenges."); *see also* Sally Katzen, *OIRA*

President Clinton's EO 12866 retained the essential core of President Reagan's plan but reflected an entirely different vision of the regulatory state and of the President's role within the administrative scheme.[67] It retained cost-benefit analysis, but it emphasized the qualitative benefits of regulations, acknowledging that not all regulatory benefits could be quantified.[68] Additionally, EO 12866 expressly sought to "reaffirm the primacy of Federal agencies in the regulatory decision-making process" and further clarified that "the regulatory process shall be conducted . . . with due regard to the discretion that has been entrusted to the Federal agencies."[69]

So while EO 12866 exempted independent agencies from its review processes just as EO 12291 had done in 1981, this exemption apparently always had more to do with deference to political norms than with a sense that such exemption was constitutionally mandated.[70] Because no President has attempted to extend EO 12866 to independent agencies, the legality of such a move would today be, at best, ambiguous.[71]

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at Thirty: Reflections and Recommendations, 63 ADMIN. L. REV. 103, 104 (2011) (arguing that we should be skeptical of "sweeping statements . . . about the 'consistency' of OIRA over the years, with the implication that OIRA has always subscribed to the same substantive principles (e.g., relief, restraint, emphasis on costs) . . . and always had the same orientation or objectives" (footnote omitted)).

67 *See supra* notes 24–25, 66 and accompanying text.

68 *See* Exec. Order No. 12866 § 1(a), 3 C.F.R. at 639.

69 *See id.* pmbl., 3 C.F.R. at 638.

70 *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 202 (1986) ("This decision was based largely on fear of the congressional reaction to any such effort rather than on a judgment that the President lacked the necessary constitutional power."); Kagan, *supra* note 14, at 2278 n.124 ("The Reagan Administration almost certainly exempted the independent agencies because it feared provoking a Democratic Congress, rather than because it believed the law, as properly interpreted, required this course of action."); C. Boyden Gray, The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking 7 (May 31, 2017) (unpublished manuscript) (on file with the Mercatus Center at George Mason University) ("[N]either the Reagan administration that issued Executive Order 12,291, nor the Clinton administration that issued Executive Order 12,866, nor any of the administrations that have since maintained it ever suggested that the exemption for independent agencies was legally required."); Extending Regul. Rev. Under Exec. Ord. 12866 to Indep. Regul. Agencies, 43 Op. O.L.C., slip op. at 6 (Oct. 8, 2019) ("Ultimately . . . the Reagan Administration determined, for 'policy reasons,' not to include independent agencies, even though the Administration believed the President had the constitutional power to do so." (quoting *Role of OMB in Regulation: Hearing Before the H. Subcomm. on Oversight & Investigations of the H. Comm. on Energy and Com.*, 97th Cong. 94 (1981) (statement of C. Boyden Gray, Counsel to the Vice President, White House))).

71 CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 20 (2013) ("Although scholars have long debated the limits of presidential authority in rulemaking, it is unclear whether the President currently has the constitutional or statutory authority to unilaterally direct independent regulatory agencies to prepare cost-

II. MANDATING CENTRALIZED REVIEW OF INDEPENDENT AGENCY RULEMAKING

The potential extension of EO 12866 to independent agencies would compel them to submit their proposed major rules for centralized review with OIRA. Proponents argue that such a move would mark a significant shift in the balance of power, embolden the President to coordinate agency policies, and avoid conflicts between agencies with overlapping jurisdiction.[72] Additionally, requiring independent agencies to conduct a cost-benefit analysis for certain major rules would introduce a layer of economic rationality to their decision-making process, ensuring that regulations not only align with presidential policy objectives, but are also able to stand up to stringent empirical scrutiny. All in all, proponents argue that extension would be an effective means of introducing uniformity, transparency, and accountability across the regulatory state, ensuring that all significant rules, irrespective of their source, pass through a consistent vetting process.

Critics argue that it would undermine the "independence" Congress intended for these agencies to have, and that regulatory policy should be guided by both qualitative and quantitative considerations in more or less equal measure. Some of these critics also question whether this move would even achieve all of its proponents' stated goals and argue (somewhat ironically) that the costs of centralized review do not outweigh its purported benefits.

A. The President's Constitutional Prerogative

For some scholars and commentators, the question begins and ends with the Constitution. The threshold question is "whether and to what extent the President may supervise decisionmaking by subordinate officials within the executive branch."[73] Commentators have argued that the President's supervisory authority "is firmly rooted in the text and structure of the Constitution" and that "[t]he president's

benefit or other types of economic analyses before issuing certain rules." (footnote omitted)); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31–32 (2010) (noting that "[i]t is an open constitutional question whether the President could require traditional independent agencies . . . to submit cost-benefit analyses of proposed regulations to OIRA for review, or if Congress has the power to prevent such review"); *see also id.* at 32 n.81 (citing several sources to support this assertion).

72 In the absence of such coordination, private parties can sometimes get caught in the crosshairs of agencies with "overlapping responsibilities." *See, e.g.*, Arcadia v. Ohio Power Co., 498 U.S. 73, 75 (1990) (characterizing the issue in the case as concerning the "overlapping responsibilities" of the Securities and Exchange Commission and the Federal Energy Regulatory Commission).

73 Strauss & Sunstein, *supra* note 70, at 197.

supervisory power over independent agencies has been confirmed by congressional legislation, executive branch legal opinions, and the courts."[74] Recent opinions from the Office of Legal Counsel have echoed this view.[75]

To the extent the President has the constitutional authority to supervise his subordinates, some argue, the inclusion of independent agencies within EO 12866's reach is perfectly lawful. Arguments espousing this view tend to rely primarily on one provision of Article II in particular: the Opinion Clause.[76] The Opinion Clause provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[77] While the "apparent implication of this provision" is that the "actual determination of administrative matters . . . lies with the official to whom it is delegated by law, not the President or his staff," "consultation is proper, and is expected to occur in advance of that decision."[78] Professor Peter Strauss argues that "[u]nder a strictly legal analysis, the 'Opinions, in writing' clause extends to the head of any agency made responsible for carrying out federal law and, since the independent commissions meet this definition, this regime could be applied to them."[79] Under the Opinion Clause, "the administrative agencies [are] required to report to the President. The duty to report is meaningful only if the President retains a measure of substantive authority over the doings of the agency."[80]

In addition to the Opinion Clause, Professor Michael McConnell has argued that, to the extent that the President's domestic power has any meaningful constitutional source, it must come from a substantive grant of power nested in the first sentence of Article II,[81] as well as the

74 Gray, *supra* note 70, at 5.

75 *See* Extending Regul. Rev. Under Exec. Ord. 12866 to Indep. Regul. Agencies, 43 Op. O.L.C., slip op. at 8–9 (Oct. 8, 2019) ("In providing for presidential control over the Executive Branch, the Constitution ensures not only that executive officers remain accountable to the President, but also that the President remains accountable to the Nation.").

76 U.S. CONST. art. II, § 2, cl. 1.

77 *Id.*

78 PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 101 (2d ed. 2002).

79 *Id.* at 105.

80 Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 62.

81 MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 241 (2020) ("In the domestic sphere, there is a no less glaring gap in the enumerated powers of the President. Article II Section 2 gives the President the important power to demand information from executive officers regarding 'any subject' relating to their duties, and Article II Section 3 gives the President the reactive power to monitor their actions and 'take care' that they are faithfully executing the laws. . . .

Take Care Clause.[82] Professor McConnell frames the President's constitutional prerogative to direct agencies in light of Article II's structure and of the President's "Proclamation Power":

> The Vesting and Take Care Clauses make clear that all discretion imparted to executive branch officers is ultimately subject to the control of the centralized office of the President. It was this power . . . that President Reagan exercised when he directed that all regulations conform to cost-benefit analysis to the extent that the underlying statute permitted. . . . The Proclamation Power—the power to issue executive orders—is therefore *not* the power to make new law. Rather, it is nothing more than the President's power to direct executive officers to exercise power they already have, by virtue of statutes, in a particular way.[83]

Other scholars have made similar arguments by critiquing the Court's landmark holding in *Humphrey's Executor v. United States*,[84] arguing that it has no bearing on the President's authority to order centralized review of independent agency action. There is a wealth of literature parsing, analyzing, and lamenting the holding of *Humphrey's Executor*. It will suffice here to focus on a few key points. First, many scholars and commentators have criticized the *Humphrey's Executor* Court's distinction between independent and executive agencies. Professor Richard L. Revesz & Kirti Datla argue that "[i]f . . . the *Humphrey's Executor* dicta is wrong because it relies on a flawed binary understanding of the administrative state, then the constitutional argument against including independent agencies in the regulatory review requirements also fails."[85] Professor Revesz summarized the argument in a later article as follows: "[A]gencies exhibit different indicia of independence beyond for-cause removal, including specified tenure, multimember status, partisan balance requirements, independent litigation authority, authority to bypass OMB's budget process, and adjudication authority. Many Executive Branch agencies have some indicia of independence, and many independent agencies lack others."[86] Professor Revesz's point is ultimately that "it is inappropriate to imply constraints on presidential control over an agency beyond those specified in the agency's enabling statute," and "that one indicia of

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This is the heart of executive power, but it is not vested in the President unless the first sentence is substantive in nature.").

82 U.S. CONST. art. II, § 3 (instructing that the President must "take Care that the Laws be faithfully executed").

83 MCCONNELL, *supra* note 81, at 114.

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

85 Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 838 (2013).

86 Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REGUL. 545, 585 (2017).

independence should not be used to imply indicia that Congress did not provide."[87]

Echoing this point, Professors Cass Sunstein and Robert Hahn have argued that "[n]othing in the Court's opinion resolves the question of whether the President has supervisory authority over the independent agencies."[88] Professors Sunstein and Hahn's broader point is that whether EO 12866 should be extended to cover independent agencies depends on law, not policy: "If the goal is to ensure more rationality in regulation, and to devote resources to areas where they would do the most good, the independent agencies deserve inclusion no less than others. *The real question is one of law, not of policy.*"[89] Professors Sunstein and Hahn also note in their article that the official position of the American Bar Association is that regulatory review and cost-benefit requirements should extend to independent agencies,[90] and on their telling, there is no serious doubt as to the President's lawful authority to do so.

Some scholars, including Professors Richard Pildes and Cass Sunstein, have also pointed to the Supreme Court's language in *Bowsher v. Synar*[91] to argue that "the modest and partial inclusion of the independent agencies within Executive Order 12866 is entirely lawful."[92] They argue that the *Bowsher* Court's holding stands for the proposition that "those who execute the law must not be subject to the policy-making authority of Congress except insofar as legislative instructions are embodied in substantive law."[93] It is important to bear in mind,

87 *Id.; see also* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 487 (1979) ("[I]t would be simple to announce that the President cannot interfere with the operations of independent agencies except with such explicit authority as the appointments power. This view, however, depends on the false assumption that independent agencies and executive agencies can always be distinguished.").

88 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, 1534 (2002).

89 *Id.* at 1532 (emphasis added).

90 *Id.* at 1534 ("Does the President have the legal authority to [order independent agencies to prepare cost-benefit analyses]? Though no president has tested the question, both the Department of Justice and the American Bar Association have concluded that he does." (footnote omitted)); *id.* at 1534 n.160; MAEVE P. CAREY & MICHELLE D. CHRISTENSEN, CONG. RSCH. SERV., R42821, INDEPENDENT REGULATORY AGENCIES, COST-BENEFIT ANALYSIS, AND PRESIDENTIAL REVIEW OF REGULATIONS 19 (2012) ("The American Bar Association (ABA) has also endorsed extending presidential review to [independent agencies]."); Letter from H. Russell Frisby, Chair, Section of Admin. L. & Regul. Prac. of the ABA, to Mabel Echols, OIRA 1 (Mar. 16, 2009), http://thecre.com/pdf/20090326_ABANET_comments.pdf [https://perma.cc/984K-VW2N] ("The ABA has long welcomed centralized oversight of rulemaking as an essential element of effective government functioning." (footnote omitted)).

91 Bowsher v. Synar, 478 U.S. 714 (1986).

92 Pildes & Sunstein, *supra* note 17, at 32.

93 *Id.* at 30–31.

however, that the only legal gray area is with respect to the President's authority to extend EO 12866 to *independent* agencies; the President's legal authority to order centralized review of executive agency action is well established.[94]

In sum, scholars and commentators have long debated the extent of the President's constitutional authority to supervise decisionmaking within the executive branch, particularly as it pertains to independent agencies. Many argue that Article II provides a clear foundation for this authority, most notably through the Opinion Clause, which suggests that the President holds oversight authority over all agencies responsible for executing federal law. Others emphasize the Vesting and Take Care Clauses, contending that executive power ultimately resides with the President, who has the right to direct agency actions as permitted by statute. Critics of *Humphrey's Executor* argue that its rigid distinction between executive and independent agencies does not limit presidential authority, and that agency independence is far from a binary concept. Instead, they assert, the President's control should be constrained only by the agency's enabling statute, not by the agency's independent status. Furthermore, there is substantial support for the notion that regulatory review, including cost-benefit analysis requirements, should apply across all agencies to ensure more rational and effective regulation.

B. Promoting Regulatory Coordination, Efficacy, and Transparency

Writing before the implementation of EO 12866, Professors Peter Strauss and Cass Sunstein argued "that greater presidential control over the regulatory process is desirable."[95] They argued that "the President is in a good position to centralize and coordinate the regulatory process,"[96] is "electorally accountable,"[97] and "by virtue of his accountability and capacity for centralization, is able to energize and direct regulatory policy in a way that would be impossible if that policy were to be set exclusively by administrative officials."[98]

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94 *See* Tozzi, *supra* note 52, at 61 ("A large number of legal scholars, the Administrative Conference of the United States, the Office of Legal Counsel, and other groups addressed the matter; virtually all of them concluded on legal grounds that the President has the authority to review agency regulations before they are proposed." (footnotes omitted)); Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 454 (2014) ("The presidential use of centralized regulatory review, through OIRA, for managing executive-branch agencies is now well established.").

95 Strauss & Sunstein, *supra* note 70, at 189.

96 *Id.*

97 *Id.* at 190.

98 *Id.*

Others, like Professor Daniel Deacon, have generally praised the benefits of centralized review as a means of reining in agency decisionmaking: "[R]eview of agency rules by officials closer to the President can be seen as a way of monitoring agency behavior and mitigating any number of pathologies that could lead agencies to act in undesirable ways."[99] Echoing this view, Professor Sally Katzen stated in 2011 that she believes extending EO 12866 to include independent agencies would lead to "better coordinated and coherent regulatory actions, and ultimately better decisionmaking."[100] Professors Sunstein and Pildes have similarly argued that "including the independents within some degree of presidential authority" is desirable both for purposes of "ensur[ing] a degree of coherence and consistency" across the federal bureaucracy, and also because "much of the independent agencies' work lies squarely within any administration's highest priorities."[101]

Apparently anticipating these arguments, Professor Peter Shane wrote in the wake of EO 12291's promulgation that "[a]s the nation's problems grow more complex and the difficulties in achieving effective government action seem more profound, pressure will surely increase for Presidential coordination of administrative policymaking. Such pressure will inevitably raise questions concerning not only the executive agencies, but the so-called 'independent agencies' as well."[102]

Professors Christopher Walker and Paul Rose have also written generally in praise of cost-benefit analysis as a tool of good governance. They have argued that it helps ensure regulations have "a net positive effect on society" by requiring agencies to consider the economic impacts of regulations and their alternatives, including the option of not regulating at all.[103] Cost-benefit analysis also minimizes the risk of unintended consequences by making agencies assess all costs and benefits

99 Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1593 (2016); *cf.* Catherine M. Sharkey, State Farm *"With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1637 (2014) (noting similar concerns with respect to checking the decision-making processes of independent agencies, but going further to argue that "in addition to considering bolstering executive oversight, it is worth considering stepped-up judicial review in the absence of meaningful executive oversight").

100 Katzen, *supra* note 66, at 110; *see also* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REGUL. 289, 295–96 (2013) ("[C]ost-benefit analysis . . . seeks to quantify the trade-offs involved, and ideally rationally frames the policy debate, offering common ground as a starting point for both proponents and detractors of the rule to comment.").

101 Pildes & Sunstein, *supra* note 17, at 28.

102 Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1265 (1981).

103 *See* Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 STAN. L. REV. ONLINE 9, 11 (2013).

and explore various regulatory alternatives,[104] and pushes agencies to look beyond preventing future catastrophes to consider all possible outcomes of a regulation—which they argue helps in quantifying risks and mitigating the influence of cognitive biases on regulatory decisionmaking.[105] Moreover, they argue that it compels regulators to use resources efficiently, encouraging them to choose options that yield the highest net benefit or the lowest net cost to society and the agency itself.[106] They argue that by mandating that anticipated costs and benefits be accounted for, cost-benefit analysis ensures that regulations are more likely to be comprehensive, effective, and resource efficient.[107]

Skeptical of applying economic analysis across the board, some scholars, like Professors Lisa Schultz Bressman and Michael Vandenbergh, have questioned whether OIRA possesses the necessary expertise to adequately review agencies' scientific determinations.[108] What these views have in common, though, is a recognition of the reality that agencies have finite resources at their disposal, and preparing cost-benefit analyses can be time-consuming, expensive, and possibly counterproductive.[109]

Moreover, Professors Rose and Walker also highlight the positive externalities that can result from combining cost-benefit analysis with notice-and-comment procedures: "If interest group pressure has distorted the agency's calculations of costs and benefits, the analysis is likely to reflect such influence and provide Congress, the President, the courts, and the public at large with an opportunity to demand course correction."[110] They argue that "such transparency raises the cost of attempts at undue influence, as regulators should be less willing

104 *Id.*

105 *Id.* at 11–12.

106 *Id.* at 12.

107 *Id.*

108 *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 97–98 (2006) ("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." *Id.* at 97.).

109 *See* Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1304 (1987) (reporting that regulatory analyses of major rules during the Reagan administration, in the first years of implementing EO 12291, were estimated by the Congressional Budget Office to cost $100,000 on average); Sharkey, *supra* note 99, at 1600 ("Cost-benefit analysis is an inherently expensive process. Due to the cost, agencies will often not invest enough in analysis to ensure that the rules they promulgate are optimally effective and value maximizing." (footnotes omitted)).

110 Rose & Walker, *supra* note 103, at 15.

to adopt less efficient positions if they know that the origin of those positions will be revealed."[111]

In sum, the benefits of centralized regulatory review, particularly through cost-benefit analysis, have been widely praised by scholars and commentators for promoting coherence, efficiency, and accountability within the federal regulatory framework. Advocates argue that presidential oversight enables a unified direction in regulatory policy, with the President's electoral accountability serving as a crucial check on administrative action. Cost-benefit analysis, by requiring agencies to quantify and weigh economic impacts and alternatives, ensures that regulations are designed with a net positive societal impact in mind, minimizes unintended consequences, and helps allocate resources effectively. While some scholars question the practicality and expertise of centralized reviewers in assessing complex scientific regulations, others contend that the transparency facilitated by cost-benefit analysis and notice-and-comment procedures mitigates undue influence and aligns agency actions. Thus, centralized review, if carefully implemented, has the potential to enhance regulatory decisionmaking across the executive branch.

C. Statutory Limits on Presidential Review

Congress also has a considerable role to play in limiting the President's power to control independent agency action.[112] Congress has the power to statutorily assign "decisionmaking to some officer other than the President,"[113] incorporate "substantive standards . . . in statutes delegating authority to an agency,"[114] and impose various "procedural constraints on the President's ability to influence agency policymaking."[115]

According to some scholars, Congress's statutory authority remains the ultimate check on the President's ability to influence regulatory outcomes. As Professor Robert Percival has persuasively argued, despite many attempts by Presidents to influence agency regulatory actions, "the White House cannot legally dictate a particular regulatory outcome without the agency first considering evidence submitted during a notice-and-comment procedure,"[116] lest the agency risk running afoul of the Administrative Procedure Act's (APA) various procedural

111 *Id.*

112 *See* 1 HICKMAN & PIERCE, *supra* note 14, at 771.

113 *Id.*

114 *Id.*

115 *Id.* at 772.

116 Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2540 (2011).

requirements.[117] As Professor Percival notes, "Agency heads ultimately may refuse to promulgate initiatives that would be contrary to the agency's statutory responsibility or else risk having them invalidated in court. As a practical matter . . . Presidents must persuade agency heads when they want to influence regulatory decisions entrusted by law to them."[118] Even so, "[t]here remains the problem of the potentially directory character of E.O. 12,866. Viewed simply as a requirement for use of specified analytic tools, it fits comfortably in the established tradition and the Constitution's 'Opinion, in writing' language."[119] But, as Professor Peter Strauss notes, that line is easily crossed: "[T]he structure of the process . . . gives OMB, and through it the President, substantial control over the particular outcomes of proceedings. . . . [T]he agency's application of judgment may be subverted if, under the cover of a requirement of analyses, OMB is actually dictating particular outcomes."[120]

There are also strong policy reasons why Presidents have historically been reluctant to take such a dramatic step. As some scholars have noted, "Presidential reluctance to assert any formal power to influence policymaking by independent agencies is based at least in part on concern that such a move would increase friction between the two politically accountable branches."[121] Moreover, the President can

117 *Id.* at 2535 ("If the President were able to direct a decision for political reasons that would require an agency to manufacture a new administrative record, it would undermine the purposes of conducting an informal notice-and-comment rulemaking pursuant to the requirements of the APA."). While this Note is focused on agency rulemaking and not adjudication, it is worth noting that virtually all commentators agree that there is no basis upon which the President could step in to influence the outcome of an agency adjudication. *Id.* at 2536 & n.395 (listing various sources that support the proposition that the President has no such authority with respect to agency adjudications); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1546 (9th Cir. 1993) ("There is no presidential prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying."); 1 HICKMAN & PIERCE, *supra* note 14, at 771 ("Presidential ability to influence agency decisionmaking is constrained by the Due Process Clause. When an agency adjudicates a dispute in which it is exercising the power to deprive an individual of 'life, liberty, or property,' the agency is constitutionally obligated to provide . . . a neutral decisionmaker.").

118 Percival, *supra* note 116, at 2540; *cf.* Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 541 (1988) ("Congress, as an equal branch, may legislate to restrict the president's discretion in executing the laws, but, until Congress does so, the president is authorized to direct the actions of agencies involved in rulemaking to implement statutes.").

119 STRAUSS, *supra* note 78, at 108.

120 *Id.*

121 1 HICKMAN & PIERCE, *supra* note 14, at 770; STRAUSS, *supra* note 78, at 105–06 ("Extending [EO 12866's] reach to [independent agencies] . . . could create a political storm in Congress, however justified the legal position. Perhaps understanding that these agencies rarely initiate rulemaking reaching the most important economic threshold of the

more easily convey his or her policy preferences to independent agency heads through "less formal, less systematic means"[122] that don't risk invoking the ire of Congress.[123]

For better or worse, Congress "traditionally views the [independent agencies] as 'its' agencies, not the President's."[124] Accordingly, some scholars view the question of presidential review entirely in terms of Congress's prerogative, and orient their analysis according to "the goals of [agency] insulation."[125] Framed as such, the question can cut in a few different ways: "[I]f the goal of insulation is to limit presidential control, OIRA review should be avoided. If the goal of insulation is to enable decisions to be made on expert information, the analysis is more complicated . . . ."[126] Like some of the scholars discussed above, Professor Barkow acknowledges that centralized review could enable the President to coordinate policy across the executive branch, while lamenting the fact that it also has the potential to dilute the subject-matter expertise of some agencies.[127]

Partly in response to some of the problems laid out above, some scholars have argued for the wholesale codification of EO 12866's requirements for independent agencies,[128] and in 2012 Senator Rob Portman introduced into the Senate a bill that would have done just that.[129] Professor Coglianese argues that "[l]egislatively imposing those requirements on independent agencies would cure an anomaly in the law, providing independent agencies with the same institutional structures and incentives for producing quality prospective analysis as executive agencies."[130]

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executive order, no President to date has believed the possible gains of such a step outweigh its costs.").

122 1 HICKMAN & PIERCE, *supra* note 14, at 770.

123 *See id.* ("Congress jealously guards the putative independence of some major agencies from presidential control . . . .").

124 Katzen, *supra* note 66, at 109; *see also* Charles W. Vernon III, Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 AM. U. L. REV. 1138, 1153 (1977) ("[T]raditionally [independent agencies] have been considered agents of the legislative rather than executive branch . . . ."); Pildes & Sunstein, *supra* note 17, at 28 ("The Democratic Congress, skeptical of the executive orders in general, might well have been outraged by an assertion of presidential authority [by President Reagan] over the independent agencies, which Congress often considers 'its own.'").

125 Barkow, *supra* note 71, at 33.

126 *Id.*

127 *See id.* at 33–34.

128 *See* Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733, 746–49 (2018).

129 *See* Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. § 3(c) (as introduced by Sen. Robert Portman, Aug. 1, 2012).

130 *See* Coglianese, *supra* note 128, at 746.

In sum, while Congress provides agencies with their independence via statute, procedural requirements like those of the APA reinforce this autonomy by mandating evidence-based, transparent decisionmaking, which serves as a buffer against direct presidential influence—a buffer that, absent Congressional action, cannot be altered by executive order. These procedural safeguards ensure that agency heads retain discretion in fulfilling their statutory duties. However, subtler executive controls, such as OMB's analytic review requirements, can pressure agencies to align with broader executive priorities, subtly shaping regulatory outcomes and potentially compromising agency independence. Proposals to codify oversight mechanisms for independent agencies reflect an appreciation for the benefits of centralized guidance, yet they underscore a critical tension: whether increased coordination with the executive branch might dilute the specialized expertise and autonomy that Congress intends for these agencies to maintain.

D. The Challenge of Implementation

Regardless of where one lands with respect to the legality or desirability of extending EO 12866 to independent agencies, some have argued that the conversation as a whole should take into account the particularized needs and practices of the several independent agencies. For example, Professor Bridget Dooling highlights the fact that "regulatory review under EO 12,866 [used to be] considered . . . a one-size-fits-all set of procedures, but new agreements negotiated by OIRA show that it is not" and argues instead for a model that allows "independent regulatory agencies to negotiate with OIRA towards regulatory review terms that are mutually beneficial."[131] Similarly, when it confronted this issue in 2013, the Administrative Conference of the United States declined to recommend a "one-size-fits-all approach to regulatory analysis, and recognize[d] that each agency must tailor the analyses it conducts to accord with relevant statutory requirements, its own regulatory priorities, and the potential impact of the analysis on regulatory decisionmaking to ensure proper use of limited agency resources."[132]

Furthermore, as Professor Jonathan Gould has noted in his treatment of the issue, there is the problem of politics.[133] Professor Gould

131 Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673, 721 (2020).

132 Administrative Conference Recommendation 2013-2: Benefit-Cost Analysis at Independent Regulatory Agencies, 78 Fed. Reg. 41355, 41356 (July 10, 2013).

133 *See* Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695, 696 (2023) ("This dynamic helps explain partisan divisions over which rules are subject to cost-benefit requirements, who counts for purposes of cost-benefit analysis, how to discount

observes that "proposed legislation that would have required independent agencies to conduct cost-benefit analysis has divided the parties, with Republicans generally in support and Democrats generally opposed."[134] Professor Gould emphasizes that, because "more analytic requirements . . . [lead to] reduced agency capacity," it is not surprising that "Republican administrations and members of Congress have sought to extend [the reach of cost-benefit analysis]" and that, conversely, Democrats "have largely pushed back on these efforts to expand the footprint of cost-benefit analysis and, in at least one instance, have sought to reduce the number of rules subject to formal cost-benefit analysis."[135]

And even if the President were able to exercise a meaningful supervisory role over agency rulemakings, some scholars like Professor Aziz Huq have questioned whether, in light of the many procedural and statutory limitations discussed above, such oversight power would actually usher in the benefits that proponents of extending EO 12866 espouse: "[P]residential control is necessarily exercised in a complex institutional environment. Its interactions with other democratic mechanisms can generate both static and intertemporal interaction effects that undermine any tight nexus between White House control and democratic accountability."[136] While Professor Huq's comments here come from an article of his specifically criticizing the Supreme Court's holding in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[137] his critique of the logic underlying the "democratic accountability" argument—which, as mentioned above, is often raised in support of extending EO 12866[138]—are directly relevant here.[139]

Still other scholars have opined that the expansion of EO 12866 seems likely, especially given the actions of recent administrations. Arguing that this is the case and pushing for EO 12866's expansion to independent agencies, Professors Nina Mendelson and Jonathan Wiener point out that the scope of regulatory review by OIRA has expanded over time.[140] They point to the fact that recent Presidents have

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future impacts of regulation, and whether and how to account for the distributional consequences of regulation.").

134 *Id.* at 762.

135 *Id.* at 761.

136 Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 63 (2013).

137 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010).

138 *See supra* notes 95–111 and accompanying text.

139 *See* Huq, *supra* note 136, at 70 ("First, interaction effects undermine the purported control-accountability link. Second, the causal nexus between presidential control and public preferences is weaker than the Supreme Court [in *Free Enterprise Fund*] assumes. And third, studies of accountability suggest the Court's identification of a single accountability-eliciting mechanism is incomplete.").

140 Mendelson & Wiener, *supra* note 94, at 459.

ordered OMB and OIRA review of certain independent agency actions which are not considered "rules" for the purposes of the APA.[141] For example, President George W. Bush's EO 13422 required agencies to "submit significant guidance documents" for review; President Obama revoked this order but maintained OIRA's review authority.[142] President Obama's EO 13579 recommended that independent agencies voluntarily comply with certain regulatory review principles, "including requirements for public participation, science, regulatory analysis, and retrospective internal review of existing regulations."[143] Ultimately, Mendelson and Wiener argue that "[f]ull-blown regulatory review for independent agencies is on the horizon, though its arrival will depend on several factors, including legal reasoning, presidential elections, presidential relations with Congress, and the perceived burden of regulations issued by the independent agencies."[144]

In sum, calls to extend EO 12866 often raise issues around tailoring regulatory review to each agency's statutory mandates, avoiding a rigid, universal framework. Some advocate for an adaptable model where agencies and OIRA negotiate review standards that balance efficiency with agency-specific needs. Political divides also influence these discussions, as Republicans often support expanded cost-benefit analyses, while Democrats caution that these requirements can strain agency capacity and hinder agility in decisionmaking. Additionally, scholars question whether expanded presidential oversight would genuinely enhance accountability, given the complexities of procedural and statutory constraints that may dilute executive influence. The expansive trajectory of OIRA's power suggests that full regulatory review for independent agencies may be forthcoming, yet its realization depends on evolving political, legal, and practical considerations that affect both agency autonomy and the executive's coordinating role.

CONCLUSION

The question of whether EO 12866's cost-benefit requirements should be extended to independent agencies reflects an enduring tension within our constitutional structure. At its core, the issue is not simply about the practical benefits or drawbacks of centralized review; it is about the boundaries of presidential power in relation to entities that, while located within the executive branch, remain creatures of statute—agents of Congress, designed to operate with a degree of autonomy that ostensibly insulates them from direct political influence.

141 *Id.*
142 *Id.*
143 *Id.* at 460.
144 *Id.* at 460–61.

This tension between congressional intent and presidential oversight underscores a perennial challenge in upholding the separation of powers.

The potential benefits of expanding EO 12866 are clear: uniformity, transparency, and the promise of greater efficiency through economic rationality in the rulemaking process. Independent agencies wield significant regulatory authority, and subjecting their decisions to cost-benefit analysis under the oversight of OIRA could, in theory, bring coherence to an ever-expanding administrative state. The President, as the singularly accountable actor in the executive branch, has a vested interest in ensuring that agency actions align with broader national policies, especially in an era when regulatory power frequently serves as a surrogate for legislative action and a conduit for executive excess.[145]

Yet, this potential expansion also raises critical constitutional and policy concerns. Independent agencies were deliberately structured to operate outside the reach of day-to-day executive influence. Their fixed terms, bipartisan leadership, and for-cause removal protections reflect Congress's intent to create a buffer that fosters expert, nonpartisan decisionmaking shielded from the shifting whims of electoral politics. If these agencies were subjected to the same centralized review mechanisms as traditional executive agencies, would this not undermine the very purpose for which they were established? More fundamentally, does the President, by virtue of his constitutional authority, possess the power to compel independent agencies to submit to such oversight, or does this move risk encroaching upon the legislative prerogatives that created and defined their independence?

The legal ambiguity here is striking. While the President's authority over executive agencies is well established, the application of that authority to independent agencies remains contested. Scholars have long debated the implications of such constitutional provisions as the Take Care Clause, the Opinion Clause, and broader notions of executive power, yet the courts have left many of these questions unanswered. If the President's constitutional duty is to ensure the faithful execution of the laws, does that duty extend to supervising entities that are, by statutory design, intended to operate independently of the

145 Two such excesses were recently reined in by the Supreme Court. *See* Nat'l Fed'n of Indep. Bus. v. OSHA., 142 S. Ct. 661, 663 (2022) (granting a stay of OSHA's emergency rule requiring large employers to mandate COVID-19 vaccination or weekly testing for 84 million workers, and holding that Congress hadn't clearly authorized such a sweeping public health mandate under OSHA's workplace safety powers); Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) (holding that the Secretary of Education lacked authority under the HEROES Act to implement a student loan forgiveness program canceling $430 billion in debt, because the Act does not permit such broad financial relief for nearly all borrowers).

President's direct control? At the same time, independent agencies, as part of the executive branch, cannot be entirely detached from the broader, democratic machinery of governance.

Additionally, the practicalities of implementation remain murky. Even assuming such a move would be lawful, would centralized review achieve its intended goals without diminishing the unique expertise and mission-driven focus of independent agencies? The application of cost-benefit analysis—while a valuable tool in some regulatory contexts—may not always suit the complex, often qualitative considerations that drive decisions in areas like public health, financial regulation, or environmental protection. Independent agencies address issues that often resist easy quantification. Imposing uniform standards for review, then, risks homogenizing decision-making processes that have long relied on diverse perspectives and multidisciplinary approaches. To dedicated technocrats, such qualitative decisionmaking is best left to the experts. Critics, however, argue that entrusting such decisions solely to experts undermines democratic accountability and risks disconnecting regulatory actions from the will of the people, for whose benefit they are ultimately made.

Moving forward, several open questions remain. Should the constitutional architecture allow for pockets of autonomy within the executive branch, or must all executive power be ultimately centralized under the President's authority? Can regulatory uniformity coexist with the independence Congress has carefully crafted? And to what extent does the pursuit of regulatory efficiency and accountability justify the potential erosion of agency expertise and impartiality? These are not simply academic musings; the answers we settle on will determine the balance of power between Congress and the President.

In the end, while the debate over extending EO 12866 to independent agencies is often framed in terms of policy efficacy, it is inseparable from the larger constitutional questions about the scope of executive power. The unresolved nature of this tension offers no easy answers but instead invites continued scrutiny. The ongoing development of the administrative state—and the President's role within it—will hinge on how these tensions are ultimately addressed. For now, these questions remain unanswered, awaiting resolution in the halls of Congress, in the courts, and ultimately, at the President's desk.