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ARTICLE

AGENCY SELF-INSULATION UNDER PRESIDENTIAL REVIEW

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AGENCY SELF-INSULATION UNDER PRESIDENTIAL REVIEW

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Agencies possess enormous regulatory discretion. This discretion allows executive branch agencies in particular to insulate their decisions from presidential review by raising the costs of such review. They can do so, for example, through variations in policymaking form, cost-benefit analysis quality, timing strategies, and institutional coalition-building. This Article seeks to help shift the literature's focus on court-centered agency behavior to consider instead the role of the President under current executive orders. Specifically, the Article marshals public-choice insights to offer an analytic framework for what it calls agency self-insulation under presidential review, illustrates the phenomenon, and assesses some normative implications. The framework generates several empirically testable hypotheses regarding how presidential transitions and policy shifts will influence agency behavior. It also challenges the doctrinal focus on removal restrictions and highlights instead a more functional understanding of agency independence. Finally, these dynamics suggest a role for courts to help enforce separation of powers principles within the executive branch and also, along with Congress, to facilitate political monitoring by encouraging information from sources external to the presidential review process.

INTRODUCTION

Administrative agencies, like trial judges facing appellate review, dislike having their decisions reversed. Reversals are costly. They can upend months, usually years, of work spent gathering data, reaching out to stakeholders, and considering and responding to public comments.[1] This is to say nothing of the efforts required to draft regulatory text, analyses, and preambles with the sustained coordination of policy experts, economists, scientists, and lawyers through multiple stages of the rulemaking process.[2] Moreover, reversals create more

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[1] *See* Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 416 (2007) (reporting an average of 813 days between agenda publication and finalization for Bush Administration rules and 844 days for Clinton Administration rules during corresponding time periods).

[2] *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–41 (2011) (describing the complicated dynamics among internal agency actors).

work for agencies by sending them back to the drawing board in settings where resources are already constrained and budgets consistently threatened. Reversals also thwart the policy preferences of the agency.

That agencies may act strategically to avoid costly reversals, then, is hardly a surprise, nor is it a novel insight. For the most part, however, scholars have explored this premise with respect to the anticipated effects of judicial review.[3] From this outlook, an agency facing the prospect of litigation will behave in order to minimize the risk of judicial reversals. A rational agency, that is, will select its interpretive and policy choices efficiently, taking into account the court's expected reaction.[4] For example, many noted that after *United States v. Mead Corp.*[5] an agency could expect to qualify for greater deference through more elaborate proceedings.[6] Some thus expected to see agencies engage in more notice-and-comment rulemaking relative to less formal mechanisms after *Mead*, and have found tentative empirical support for this hypothesis.[7] As the potential for costly judicial reversals increased, so did concerns about regulatory "ossification."[8]

What this perspective overlooks, however, is the fact that the vast majority of rulemaking agencies — the executive branch agencies —

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[3] *See generally, e.g.*, Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95 (2010); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1437–42 (2004); Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. (forthcoming 2013); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114 (1998); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349 (1999); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 74–75; sources cited *infra* note 4.

[4] These accounts largely predict that agency behavior, and litigation incentives more generally, will shift under "hard look" review in ways that are sensitive to reviewing judges' nominating parties. *See, e.g.*, Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205, 210 (2003); Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 813–14 (2008); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1735 (1997).

[5] 533 U.S. 218 (2001).

[6] *See, e.g.*, Stephenson, *supra* note 3, at 532; *see also Mead*, 533 U.S. at 226–27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking.").

[7] *See, e.g.*, Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932–33 (2008).

[8] *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 164–65 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419 (1992).

face not only the courts' review of their decisions, but also review by the President. The lopsided attention to judicial review in the literature is thus puzzling for multiple reasons. First, presidential review is more systematic than judicial review. Judicial review of an agency action is available only when a litigating party with standing and the necessary resources brings suit.[9] Not only must that party demonstrate that she has come to court at the right time (that is, when the issue is ripe, based on a final agency action, and administratively exhausted),[10] but also that review is neither precluded by statute nor committed to the agency's discretion.[11] Presidential review of rulemaking, by contrast, encompasses all "significant" regulatory actions, which agencies are required to submit directly for review.[12]

Second, even when a party does bring suit, courts are often self-consciously deferential to an agency's interpretive and policy decisions.[13] Presidential review, however, operates under weaker principles of self-restraint. Presidential review is also broader in coverage than judicial review. More rules are reviewed by the executive branch than by the courts — or by the legislature, for that matter.[14] How many and which rules count as "significant" enough for presidential review varies, but in recent years the number has hovered between

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[9] *See* 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (holding that parties failed to demonstrate circumscribed standing requirements). Regarding litigation resources, see Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1746–47 (2012).

[10] *See* 5 U.S.C. § 704; *see also, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938); Reliable Automatic Sprinkler Co. v. CPSC, 324 F.3d 726, 731 (D.C. Cir. 2003).

[11] *See* 5 U.S.C. § 701(a); Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[12] *See* Exec. Order No. 12,866 § 6(a)(3)(B), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[13] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasizing that, despite hard look, the "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency").

[14] Congress, after passing a statute delegating discretion to an administrative agency, can of course always override an agency rule by amending the statute. Otherwise, Congress's main opportunity to review an agency's rule currently arises under the 1996 Congressional Review Act, 5 U.S.C. §§ 801–808 (2006). That Act, among other things, requires agencies to send a copy of every new final rule and its associated analysis to Congress and the Government Accountability Office. *Id.* § 801(a)(1)(A)–(B). Within a sixty-day review period, Congress can use expedited procedures to pass a joint resolution of disapproval overturning the rule. *Id.* § 801(a)(3)(B). To date, however, the statute has been used only once to invalidate a rule. That rule was the Occupational Safety and Health Administration's ergonomics standard in March 2001, "an action that some believe to be unique to the circumstances of its passage." MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING 6 (2008).

about 500 and 700 per year.[15] Only a small fraction of these, however, are litigated and reviewed in court.[16] Even if one argues that the threat of judicial review alone is sufficient to shift agency behavior, the prospect of such review is still attenuated relative to presidential review.

Finally, presidential review precedes even the possibility of judicial oversight for many executive branch regulatory actions. Such review covers agency actions much earlier in the rulemaking process, not only proposed and final rules as the literature commonly (but incorrectly) claims,[17] but also more preliminary notices of inquiry, requests for information, and advance notices of proposed rulemaking.[18] Doctrines such as ripeness and finality, however, preclude judicial review of such actions.[19] The failure to decompose the effects of this sequential review process — presidential, then judicial — may cloud existing empirical efforts to consider the impacts of court oversight.

The relative lack of attention to agency incentives when faced with presidential review, in short, has resulted in an ultimately incomplete account of agency behavior. Extant work has focused on discrete but related issues such as the institutional role of cost-benefit analysis,[20]

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[15] *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 2 (2009); U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 3–4 (2003) [hereinafter GAO, REVIEW & TRANSPARENCY], *available at* http://www.gao.gov/new.items/d03929.pdf.

[16] For example, from 1988 to 1990 only thirteen of the twenty-eight significant hazardous waste rules from the Environmental Protection Agency were challenged and reviewed in court. *See* Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735, 742 (1996). Of the Agency's more than ninety hazardous air pollutant rules, only seven have been litigated to judgment, leaving more than eighty-three to escape judicial decision. *See* Wagner, *supra* note 9, at 1740.

[17] *See, e.g.*, Michael Hissam, Essay, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292, 1295 (2008) (describing Clinton's executive order as requiring "cabinet departments and agencies to submit *proposed and final rules* to the OMB before publication in the *Federal Register*" (emphasis added)).

[18] *See* Exec. Order No. 12,866 § 3(e), 3 C.F.R. 638, 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[19] *See* Pub. Citizen Health Research Grp. v. Comm'r, FDA, 740 F.2d 21, 33–34 (D.C. Cir. 1984) (holding that ripeness and finality doctrines precluded review of FDA advance notice of proposed rulemaking regulation because, among other things, the proposal had yet "to pass under the censorial eye of OMB, whose review might well have prompted revision," *id.* at 34).

[20] *See, e.g.*, Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1367–70 (2002) (discussing how an administrative process using cost-benefit analysis can serve as an "[i]nformation [r]evelation [d]evice," *id.* at 1367); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001); *see also* Michael A. Livermore, Cost-Benefit Analysis and Agency Independence 7–9 (unpublished manuscript) (on file with the Harvard Law School Library) (arguing that agencies can use cost-benefit analysis methodology as a means of resisting presidential review).

the effects of political transitions more broadly,[21] and agency attempts to avoid the review process altogether.[22] Positive political theorists have long considered the strategic interactions between political actors and the bureaucracy, but their models of political control are often Congress-centric, frequently leaving the President to appear simply "as a strategic legislative actor, whose influence over the bureaucracy pales beside that of Congress."[23] Renewed efforts to consider agencies as strategic actors in their own right are still nascent[24] and continue to lack a contextual examination of incentives during the presidential review process as currently conceived and actually practiced.[25]

This Article seeks to help further shift the focus from the judiciary to the executive branch by offering such an analysis, illustrating its applications, and assessing its normative implications. Specifically, the discussion draws upon public choice premises grounded in the straightforward notion that agencies can choose from different regulatory instruments, each of which will impose varying costs on the executive branch to review and reverse. Increasing review costs will effectively insulate various decisions contained within a rule or across a number of rules, since the President will have to spend his limited resources more selectively, reviewing and reversing fewer decisions. These agency self-insulation instruments include the means through

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[21] *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 477–78 (2011); O'Connell, *supra* note 7.

[22] *See* Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011).

[23] Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 19, 38 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); *see also* Terry M. Moe, *The Positive Theory of Public Bureaucracy*, *in* PERSPECTIVES ON PUBLIC CHOICE 455, 473 (Dennis C. Mueller ed., 1997) ("[P]ositive theorists have emphasized the courts' role as backstoppers of Congress . . . . Presidents, who spell trouble for Congress, have been explored less seriously. . . . [T]heir control is either downplayed or viewed as unwarranted.").

[24] *See, e.g.*, GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY 14 (2007); Alex Acs & Charles Cameron, Regulatory Auditing at the Office of Information and Regulatory Affairs (Sept. 13, 2012) (unpublished manuscript) (on file with the Harvard Law School Library); O'Connell, *supra* note 21, at 482–87; O'Connell, *supra* note 7, at 916–22; Note, *supra* note 22. Acs and Cameron model the relationship between OIRA and agencies as an auditing game, where the agencies choose among inaction, a "small" regulation, and an "economically significant" regulation. Acs & Cameron, *supra*, at 9. Their main task, however, is to analyze OIRA's actual targeting decisions, not the incentive effects on the agencies (this Article's focus). For an older work in this Article's tradition, see WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 24–30 (1971), which posits agency behavior in terms of budget maximization. *But see* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005) (questioning Niskanen's model of bureaucratic behavior).

[25] *See* Robert F. Durant & William G. Resh, *Presidential Agendas, Administrative Strategies, and the Bureaucracy*, *in* THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY 577, 582 (George C. Edwards III & William G. Howell eds., 2009) (after surveying relevant political science literature, noting that "there is still a great deal we do not know and that merits future research," including the need for "contextual analyses to improve our understanding of how agencies react strategically to White House centralization efforts").

which agencies can bypass review or raise the political and resource costs during the review itself. The incentive to engage in strategic behavior, in turn, increases the more an agency expects the President to disagree with and thus reverse it.[26] At the same time, decreases in relative resources can also have self-insulating effects. Because agencies are repeat players whose self-insulation attempts earn the President's ire, the agency will selectively deploy the strategy only when it finds it the most valuable.

The full story is, of course, a more subtle one. Presidential review has many benefits that may reduce the incentive to self-insulate, and informal communication avenues preceding formal review may render the prospect of self-insulation infeasible. Self-insulation may thus be most prevalent for the broad set of regulatory actions that are not clearly salient or high profile; actions that are already high profile are likely to come to the attention of the White House through other means.[27] And no doubt, other exogenous actors and oversight mechanisms — most notably from Congress — can cut against and complicate these dynamics, some of which will be briefly discussed. The narrow focus here, however, will be on the relationship between executive branch agencies and the President under formal regulatory review, holding all other factors constant; in this sense, the Article presents a partial equilibrium analysis. One aim is to isolate a robust set of dynamics that can generate compelling (but falsifiable) hypotheses, with a view toward helping to explain potentially systematic behavioral variation.

Exploring these intraexecutive branch dynamics is valuable in part because they temper two traditional tenets of presidential control. First, the most robust accounts of a "unitary" executive celebrate a vision of executive power that is vested in "one, and only one, person," emphasizing the accountability-enhancing features of that singular figurehead.[28] The scope of this vision must be qualified, however, by the reality that Presidents delegate regulatory review to a number of agents, mostly within the Executive Office of the President, who themselves disagree and conflict over what the President desires. Accountability diminishes when these actors publicly blame each other for un-

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[26] The incentive likely persists even when the agency is simply uncertain about those preferences but wants to avoid the potential review costs.

[27] *See infra* section II.C, pp. 1811–13; *see also* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1848–50 (2013) (discussing informal channels through which OIRA and the White House can be alerted to upcoming rules). The most high-profile rules are more likely to come to the attention of the White House through informal means and external fire-alarm oversight, and may also gain the most benefits from review in terms of information, expertise, and political support.

[28] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 3 (2008); *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994).

popular policies from which the President seeks distance.[29] In other words, the more the institutional presidency is perceived as a "they" and not an "it," the more diffuse the blame.[30] As such, while this Article speaks of review by the "President" and "presidential review," the terms are but shorthand for the more complex dynamics of the coordinated, interagency review process within the executive branch; they refer to review by the President not as an individual, but as an institution.

Second, also at stake in these debates is the ability of the President to sanction defiant agency heads. A look through the U.S. case reporters would suggest that, at least as a doctrinal matter, the hallmark of such control lies in the President's removal power. Recently, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[31] for example, the 5–4 majority struck down a "dual for-cause" provision of the Sarbanes-Oxley Act: Congress could not create an entity, the heads of which enjoyed for-cause tenure protections, within another agency, the heads of which were similarly protected.[32] The second layer of removal restrictions unconstitutionally blurred the lines of executive responsibility. By contrast, Justice Breyer's dissent privileged function over form.[33] In his view, the independence of an agency depends on a number of factors, including its separate budgeting and litigating authority and, "above all, a political environment, reflecting tradition and function, that would impose a heavy political cost" upon a President seeking to remove without cause.[34] Independence is a matter of degree that cannot be determined by removal restrictions alone, but rather requires a careful assessment of the likely presidential calculations within particular contexts.

One way to understand the majority and dissent's disagreement is as an empirical one about the actual determinants of successful agency resistance to the President: do removal restrictions trump the myriad other factors that could determine relative bargaining power?[35] If not,

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[29] *See, e.g.*, Gardiner Harris, *White House and the F.D.A. Often at Odds*, N.Y. TIMES, Apr. 3, 2012, at A1 (describing various policy conflicts involving, among others, the Deputy Chief of Staff, the FDA Commissioner, the Secretary of Health and Human Services, and the OIRA Administrator).

[30] *See* JOHN P. BURKE, THE INSTITUTIONAL PRESIDENCY 27–52 (2d ed. 2000) (discussing institutional features of the presidency); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) ("Presidential control is a 'they,' not an 'it.'"); Sunstein, *supra* note 27, at 1840 ("[W]hile the President is ultimately in charge, the White House itself is a 'they,' not an 'it.'").

[31] 130 S. Ct. 3138 (2010).

[32] *Id.* at 3151.

[33] *See id.* at 3169, 3183 (Breyer, J., dissenting).

[34] *Id.* at 3183.

[35] *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010) (listing a number of potential "equalizing factors" (internal quotation marks omitted)); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agen-*

then courts need other tools and more systematic ways to think about the concept. By focusing on a subset of agencies without the traditional hallmarks of independence — the executive branch agencies — this analysis provides one such lens, trained on the ways in which agencies can resist institutionalized forms of presidential influence amidst resource constraints. In addition, it also highlights another locus of independence in the more stable federal bureaucracy: the career civil servants within agencies who may bear many of the potential reversal costs and thus possess significant incentives to avoid them. As such, this discussion hopes to combine insights from studies that attempt to understand how agency officials "assess presidential control" and "how it affect[s] their decision-making processes,"[36] along with more top-down analyses of White House control[37] and more recent efforts to clarify the nature of the presidential review process.[38] This investigation also seeks to engage the literature on cost-benefit analysis not only as a set of numbers such as net benefits, but also as a practice — the ways that agencies, for example, present costs and benefits, and why.[39]

Moreover, this Article will argue that indicia of agency self-insulation can serve as signals of agency resistance to presidential control, the normative desirability of which depends on the nature of the underlying statutory scheme at issue. Under statutes that narrowly constrain policy discretion, self-insulation should be viewed as more likely to be salutary attempts to protect against undue politicization; thus, in these circumstances, courts should be more willing to uphold such efforts under either *Chevron*'s second step[40] or hard look review. By contrast, when statutes authorize broad policy judgments and call for discretionary interest-balancing, then courts should view self-insulation more warily as efforts that evade democratic accountability. Finally, both courts and Congress should facilitate political monitoring

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cies (and Executive Agencies), CORNELL L. REV. (forthcoming 2013) (manuscript at 5–6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125194 (surveying independent and executive agencies for a "broad set of indicia of independence," *id.* (manuscript at 6), and finding no single common feature); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 295 (2006) ("[W]ho is granted express authority under the statute likely influences the relative bargaining positions of the agency and the President."); Adrian Vermeule, *Conventions of Agency Independence*, COLUM. L. REV. (forthcoming 2013) (manuscript at 1–2), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103338 (arguing that agency independence can be explained by reference to conventions).

[36] Bressman & Vandenbergh, *supra* note 30, at 62.

[37] *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 873–76 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2284–90 (2001).

[38] *See, e.g.*, Sunstein, *supra* note 27.

[39] *See generally* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006); Conference, *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, 29 J. LEGAL STUD. 837 (2000).

[40] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1983).

when strategic behavior or resource constraints have reduced the quality of information about a regulatory action's consequences.

Part I introduces an analytic framework focusing on the potential for principal-agent divergence between the President and agencies as well as the resulting decision and reviewing costs. Part II further develops this approach by examining the various regulatory instruments available to a self-insulating agency and the incentives to choose among them. Specifically, these instruments can functionally serve to bypass review, calibrate its scrutiny, or truncate the amount of time available — all of which can be augmented by successful coalition-building attempts. Part III, in turn, examines various responses available to the executive branch, such as directives, spot checks, and timing strategies, as well as the potential implications of agency self-insulation for Congress and the courts.

I. FACING PRESIDENTIAL REVIEW

A. Strategic Agencies

One of administrative law's anxieties is the problem of authority delegated from more politically accountable actors to the unelected ones within administrative agencies. Concerns that Congress, resigned only to "fire-alarm" oversight by interest groups and stymied by collective action problems, has effectively abdicated the monitoring of its initial delegations of power only heighten these worries.[41] If congressional ex post oversight is sporadic and ad hoc, some have argued that political actors could nevertheless control bureaucratic discretion by carefully designing the ex ante structures and processes through which agencies determine policy outcomes.[42] One basic premise of these accounts is that procedures can help promote desired outcomes by, for example, stacking the deck towards preferred interest groups,[43] specifying the timing of agency decisions,[44] or otherwise constraining agency discretion.

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[41] Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

[42] *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–34 (1989).

[43] *See* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 699 (1994); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261 (1987); *see also* Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99–101 (1992).

[44] *See generally* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

1. The Limits of Ex Ante Controls. — With much of the attention on the relationship between Congress and agencies, however, Presidents were, "for all intents and purposes, left out"[45] of many scholarly analyses, primarily characterized as part of the enacting coalition,[46] or else notable only for their indirect influence on legislative calculations, perhaps through later appointments[47] or veto threats.[48] In response, some have sought to bring the President firmly back into the picture as a discrete and autonomous actor with his own institutional objectives and mechanisms of control.[49] In this view, sitting atop the institutions that execute and project his power, the President must delegate tasks to his own agents and ensure their fidelity. These control mechanisms include efforts to politicize the bureaucracy through appointments, along with the related authority to remove insubordinates.[50]

A growing literature, however, has documented some of the pragmatic realities that blunt the impact of both of these strategies. Appointments can often arise from patronage motivations as opposed to close ideological alignment,[51] or can prove less than effective due to the relative institutional inexperience of the appointees[52] or countervailing legislative pressures.[53] Similarly, while the power of the President to remove an agency head at will no doubt bears on the scope of his influence, some have questioned its actual utility and detailed the obstacles to its use.[54] Namely, removals can exact high political costs,

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[45] DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 14 (2003).

[46] *See, e.g.*, MURRAY J. HORN, THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION 9 (1995).

[47] *Id.* at 9–10. *See also* Epstein & O'Halloran, *supra* note 43, at 698.

[48] *See* John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON & ORG. (SPECIAL ISSUE) 1, 12–17 (1990).

[49] *See, e.g.*, Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 13–15.

[50] Political scientists have observed that the percentage of presidential appointees as a share of the federal workforce has more than doubled since mid-century, peaking in 1980 and increasing during unified governments. *See* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 98 fig.4.2, 202–05 (2008); David E. Lewis, *Presidential Appointments and Personnel*, 14 ANN. REV. POL. SCI. 47, 49–50 (2011). Evidence also suggests that efforts to politicize appointments increase when policy disagreement between the President and agencies is expected to be largest, for example when comparing efforts after a party change in the next President against situations without such changes. LEWIS, *supra*, at 89.

[51] *See* Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 346, 352 (2012).

[52] *See* LEWIS, *supra* note 50, at 174–89.

[53] *See* Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413, 413–14 (2004).

[54] *See* Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 480–82 (2010); Richard J. Pierce, Jr., *Saving the Unitary Executive from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive *by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 607 (2010) (describing numerous examples of when "legal obstacles to the use of the President's removal power [we]re insignificant in their effects," while the "political obstacles [we]re often formidable").

especially when they defy norms or conventions about the removed party's perceived need for independence.[55] In light of these limitations, the social science literature has taken a more functional approach to presidential control, as "the degree of actual or effective control exerted over the agency."[56] These accounts have identified other avenues of presidential influence, such as through budgetary decisions coordinated by the Office of Management and Budget (OMB),[57] input in agency legislative programs,[58] and the relative location of the agency within the cabinet hierarchy.[59]

While these structures and processes are important ex ante mechanisms of control, they still allow for significant agency slack and discretion over individual rules and regulatory decisions. As a result, numerous Presidents have opted for more institutionalized and systematic mechanisms of ex post oversight through regulatory review.[60] These agency-cost-reducing procedures are categorically different from ex ante control mechanisms in that they allow the President to evaluate and more surgically influence discrete administrative outputs rather than inputs. While appointments and budgeting, for instance, can help steer the general direction of regulatory policy, review procedures by their very nature allow the President to reassess the individual outcomes of these efforts after the fact and to react under potentially changed circumstances.[61] That is, they allow for more dynamic and responsive presidential influence.[62]

In this manner, presidential review can, like appellate court review, be understood as part of a class of institutional mechanisms that in-

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[55] *See* Pierce, *supra* note 54, at 607; Vermeule, *supra* note 35.

[56] Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 23, at 333, 347.

[57] *See* SHELLEY LYNNE TOMKIN, INSIDE OMB 117–216 (1998); Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 792–94 (2010) (finding evidence that districts and counties receive more federal outlays when representatives are in the President's party).

[58] *See* ANDREW RUDALEVIGE, MANAGING THE PRESIDENT'S PROGRAM 5–8 (2002).

[59] LEWIS, *supra* note 45, at 44–45.

[60] *See* Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 J. POL. 998, 999–1000 (2009).

[61] *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 97 (2008) ("[W]hereas the president lacks the ability to veto selective pieces of legislation, he enjoys a 'line-item veto,' so to speak, of agencies' regulatory initiatives."). Of course, over time, one could also understand personnel and funding efforts as ways of disciplining an agency based on a broad review of its policies or particularly salient ones, but these mechanisms are too blunt and static for this purpose and thus better understood as prospective, rather than retrospective, tools. *See, e.g.*, Daniel F. Spulber & David Besanko, *Delegation, Commitment, and the Regulatory Mandate*, 8 J.L. ECON. & ORG. 126, 127 (1992) ("The appointment of the agency director and senior staff guides the future direction of the agency.").

[62] *See* William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76, 78 (2005).

volve more flexible and situation-specific monitoring by principals relative to the enforcement of rigid ex ante rules.[63] As regulatory review becomes increasingly institutionalized through promulgated procedures and standards, it also becomes more predictable relative to more ad hoc methods of ex post monitoring. The process is thus more likely to give rise to sustained patterns of strategic behavior on the part of covered actors the longer these procedures are in place.

2. Presidential Review. — The current structure of presidential review has, for the most part, persisted for almost twenty years, since 1993 when President Clinton issued Executive Order 12,866.[64] While these governing procedures are the focus of this Article, some brief historical context may be useful. Presidential oversight efforts date back centuries,[65] though President Reagan was arguably the first to exert more supervisory control "self-consciously and openly"[66] when he issued Executive Order 12,291 in 1981.[67] Among other things, the order required executive agencies to submit proposed and final rules to the OMB,[68] a role delegated thereafter to the then–newly established Office of Information and Regulatory Affairs (OIRA).[69] For a subset of these rules, those deemed "major,"[70] agencies also had to submit a regulatory impact analysis: the agency's description of the rule's antici-

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[63] *See* Jeffrey S. Banks, *Agency Budgets, Cost Information, and Auditing*, 33 AM. J. POL. SCI. 670 (1989); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1454 (2011) (categorizing both appellate review and executive review of rulemaking as examples of "settings [where] the principal can only establish forms of review in which the overseer makes whatever decision is optimal ex post, rather than enforcing a set of rules that would be optimal ex ante").

[64] *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[65] *See, e.g.*, Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1304–06 (2006) (describing various examples, for instance, that "[President] Washington imposed his will through a consistent style of broad consultation, independent judgment, and continuous oversight," *id.* at 1304); Kagan, *supra* note 37, at 2272–77.

[66] Kagan, *supra* note 37, at 2277.

[67] *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (revoked 1993).

[68] *See id.* § 3(c), 3 C.F.R. at 128–29.

[69] Created under the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of 5, 20, 30, 42, and 44 U.S.C.), OIRA is located within the Executive Office of the President (EOP) and, specifically, OMB. *See* 44 U.S.C. § 3503 (2006); *see also* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 17–18.

[70] Specifically, section 1(b) of the order defined a major rule as "any regulation that is likely to result in: (1) [a]n annual effect on the economy of $100 million or more; (2) [a] major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) [s]ignificant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States–based enterprises to compete with foreign-based enterprises in domestic or export markets." Exec. Order No. 12,291 § 1(b), 3 C.F.R. at 127–28.

pated costs and benefits, net benefits, and the potential alternatives considered.[71]

These innovations were reinforced four years later when President Reagan issued Executive Order 12,498, which allowed OMB to exert its influence earlier in the regulatory process in conjunction with agencies' political appointees.[72] The order required executive agencies to submit a "regulatory program" for review each year that covered all of their significant regulatory actions underway or planned.[73] The President now had an opportunity to influence the regulatory process during its planning, proposal, and final stages.

While George H.W. Bush's Administration kept the Reagan executive orders in place, President Clinton issued Executive Order 12,866 in 1993, which contained several noteworthy changes relevant here.[74] First, unlike the previous regime that reviewed all regulations, executive branch agencies now only had to submit those rules that were the most "significant," demarcating a reduced scope of review.[75] The effort was an attempt to make the process more selective "so as to focus resources on the most important" rules.[76]

Second, for those rules that were "economically significant," agencies were required to provide an especially thorough regulatory impact analysis.[77] This requirement effectively heightened the scrutiny of review as well as the amount of information available for it. Third, since agencies and other commentators had accused OIRA of unduly delaying regulations, the order now established a presumptive timeta-

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[71] *Id.* § 3(c)–(d), 3 C.F.R. at 128–29.

[72] *See* Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (revoked 1993); 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, 867 (2001).

[73] Exec. Order No. 12,498 § 1, 3 C.F.R. at 323.

[74] Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[75] *Id.* § (6)(a)(3)(A), 3 C.F.R. at 645. Subsection 3(b), with minor exceptions, covers all agencies except those "considered to be independent regulatory agencies" as defined by 44 U.S.C. § 3502(10), a provision of the Paperwork Reduction Act. *Id.* § 3(b), 3 C.F.R. at 641; *see* Arthur Fraas & Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, 63 ADMIN. L. REV. (SPECIAL EDITION) 213, 214–15 (2011); *cf.* Exec. Order No. 12,866 § 4(b)-(c), 3 C.F.R. at 642–43 (requiring independent regulatory agencies to submit Regulatory Agendas and Plans).

[76] Kagan, *supra* note 37, at 2287; *see also* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. (SPECIAL EDITION) 103, 105 (2011) (noting that the process was "more selective").

[77] *See* Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. at 645–46. *Circular A-4*, in turn, states that "Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by subsection 3(f)(1)." *See* OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 1 (2003) [hereinafter OMB, CIRCULAR A-4], *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf; Sunstein, *supra* note 27, at 1851 (describing "Regulatory Impact Analysis" as "a careful and detailed account of the costs and benefits of economically significant rules").

ble: it expected review to be complete within ninety days, but allowed the OMB Director to extend that period for another thirty days at the request of the agency.[78] Fourth, the order contained a number of dispute-resolution provisions for "disagreements or conflicts between or among agency heads or between OMB and any agency that [could not] be resolved by the [OIRA Administrator]."[79] Specifically, such disputes were to be resolved by the President or the Vice President acting at the President's request.[80]

Finally, the order specified general standards of review. Namely, it called for consistency with the "President's priorities," the prevention of "conflict with the policies or actions taken or planned by another agency," as well as adherence to the "principles set forth in this Executive order."[81] One of the most important principles was that the "benefits of the intended regulation justify its costs,"[82] while another demanded the "best reasonably obtainable scientific, technical, economic, and other information" regarding regulatory consequences.[83] In this manner, the order distinguished between what might be called *political review* (those issues raised as part of the President's agenda and priorities) and *analytical review* (how agencies evaluate the costs and benefits of regulatory options, justify the choices among them, and consider a host of other technical issues).[84]

As an indication of just how entrenched these procedures had become, President George W. Bush left Clinton's executive order virtually unmodified for most of his Administration. In 2002, however, he issued an order that transferred various vice presidential functions to the White House Chief of Staff or OMB Director, but otherwise left

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[78] Exec. Order No. 12,866 § 6(b)(2)(B)–(C), 3 C.F.R. at 647. Review of "notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking" were to be completed "within 10 working days" of submission. *Id.* § 6(b)(2)(A), 3 C.F.R. at 646.

[79] *Id.* § 7, 3 C.F.R. at 648.

[80] *Id.*

[81] *Id.* § 2(b), 3 C.F.R. at 640.

[82] *Id.* § 1(b)(6), 3 C.F.R. at 639. An agency determining whether a regulation's benefits "justify" its costs could consider both "quantifiable" as well as "qualitative" costs and benefits, factors that were "difficult to quantify, but nevertheless essential to consider." *Id.* § 1(a), 3 C.F.R. at 639.

[83] *Id.* § 1(b)(7), 3 C.F.R. at 639.

[84] *See* Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10,433, 10,433–34 (2005) (distinguishing between "OIRA's role as the eyes and ears of the president in overseeing regulatory agencies" and its "analytical mission," *id.* at 10,434). On the one hand, "the review process will ask how and if the rule fits with the law and with presidential commitments, goals, and priorities." Sunstein, *supra* note 27, at 1869. On the other hand, it will also concern issues such as the "accuracy" of costs and benefits, the "avoiding unjustified costs," *id.*, as well as (1) alternatives; (2) the need to seek public comments; (3) logical outgrowth issues; (4) the need for interim final rules; (5) statutory process requirements; and (6) scientific issues, *id.* at 1869–71.

the previous text unchanged.[85] It was not until January 2007, about thirteen years after President Clinton's intervention, that President Bush imposed more substantive amendments.[86] However, on January 30, 2009, President Obama withdrew the Bush amendments and returned to the original and unamended Clinton executive order.[87] In January 2011, he issued Executive Order 13,563, which among other things "reaffirm[ed] the principles, structures, and definitions governing contemporary regulatory review"[88] and modernized many of its provisions.[89] As such, with the exception of about two years under President George W. Bush, the formal procedures first established under President Clinton in 1993 continue to operate today.[90]

B. Resource-Centered Insulation

Given the prospect of presidential review as practiced in its current form for almost two decades, it is reasonable to expect that executive branch agencies, and especially the career staff within them, have learned to manage and adapt to the process in accordance with their own aims. Administrative agencies are bureaucracies as traditionally conceived, and such bureaucracies have long been known to create routines and strategies for dealing with new requirements imposed upon them.[91] As such, it is fruitful to think about agencies' behaviors relative to the President's in terms of their respective resource constraints, and the differential costs and payoffs faced by the actors that initiate review (like agencies) and the actors that review them (like the institutional President). These concepts, originally developed by Pro-

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[85] Exec. Order No. 13,258, 3 C.F.R. 204 (2003) (revoked 2009).

[86] Among the most important, the amendments required agencies to identify "market failure[s]" in writing, specified that Regulatory Policy Officers within agencies had to be political appointees who served as gatekeepers for new rulemakings, and finally, explicitly extended regulatory review to guidance documents. Exec. Order No. 13,422 §§ 1(a), 5(b), 7, 3 C.F.R. 191, 191–93 (2008) (revoked 2009). For a prediction that the "ultimate impact of the Bush amendments" would be "largely symbolic," see Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 85 (2008).

[87] *See* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted as amended in* 5 U.S.C. § 601 app. at 100–01 (2006 & Supp. V 2011).

[88] Exec. Order No. 13,563 § 1(b), 3 C.F.R. 215, 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 102–02.

[89] *See id.* §§ 2–6, 3 C.F.R. at 216–17; *see also* Exec. Order No. 13,579 § 1(b)–(c), 3 C.F.R. 256, 257 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 102 (providing that independent agencies "should" similarly "promote" and "comply with" many of the general principles).

[90] *See generally* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 16–28 (1995) (describing the procedural innovations introduced by President Clinton).

[91] *See* JAMES Q. WILSON, BUREAUCRACY 221–32 (1989) (discussing how bureaucracies adapt to innovations); *see generally* CORNELL G. HOOTON, EXECUTIVE GOVERNANCE 5 (1997) (examining the "patterns of attention and concern among career officials and on the organizational factors that shape the ability of departmental bureaus to adopt new activities").

fessors Emerson Tiller and Pablo Spiller for the purposes of understanding agency interaction with judicial review,[92] yield fresh perspectives when applied to the presidential context.

1. Strategic Self-Insulation. — The basic insight pursued in depth here is that resource-constrained agencies can choose among various regulatory forms and strategies to achieve their desired results while at the same time making it more difficult for the institutional President to review and reverse them. Specifically, they can make such review more difficult by increasing the costs of review, thereby forcing the President to spend his limited resources more selectively such that he reverses fewer decisions and affirms the rest. In this manner, agency instruments that increase reviewing costs effectively serve to insulate discrete decisions within a rule or across rules. Holding other factors constant, agencies will be more likely to self-insulate the greater their perceived preference divergence from the President. In other words, one would expect to observe self-insulation more when the agency expects the President to be an enemy (with different preferences), rather than an ally (with the same preferences); the agency seeks to shield decisions more from the former than the latter.[93] Moreover, because agencies are repeat players that would undoubtedly earn the executive branch's displeasure by recurrent and brazen attempts to self-insulate, they are likely to do so only when most valuable to them — when the probability of reversal is greatest but not certain, when decision costs and resource investment are relatively high, or more generally, when agencies receive the most benefit from doing so.

To help motivate this account, begin by considering a familiar analogy: that of trial judges who seek to avoid reversal upon appellate review. Reversals can impose real resource costs on trial judges in the form of new trials and motions on remand, and they can impose reputational costs as well.[94] Trial judges thus have strong incentives to insulate their decisions and minimize the probability of reversal. A trial judge might do so, for example, by writing an opinion that turns more heavily on a finding of fact than a question of law in order to take advantage of a more favorable standard upon appellate review (say,

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[92] *See* Emerson H. Tiller, Commentary, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1453, 1461–62 (2002); Tiller & Spiller, *supra* note 3, at 352–62.

[93] *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, Essay, *Delegating to Enemies*, 112 COLUM. L. REV. 2193 (2012) (using terminology).

[94] *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77–78 (1994); Stephen J. Choi et al., *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 518–19 (2012); David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 702–03 (2007).

"clearly erroneous" instead of "de novo").[95] Because of the more deferential standard, an appellate judge seeking to reverse this decision would have to use more resources to examine the record and describe her rationale in greater detail. As a result, a resource-constrained appellate judge would have less incentive to reverse this fact-bound decision. In this manner, the trial judge would have insulated her decision.

So too can administrative agencies self-insulate under presidential review. Of course, the analogy is imperfect; for starters, judges have life tenure, a lack of mission orientation, and so on. The nature of judicial reversal is also less iterative and dynamic than in the presidential context, as we shall see.[96] But the analogy is not illusory either: the "basic modalities of [presidential] review" since Reagan's executive order have been "drawn, perhaps unconsciously, from appellate court review of agency rules."[97] Those modalities themselves, in turn, "borrowed from the understandings that govern the relationship between appeals courts and trial courts in civil litigation."[98] In other words, presidential review was designed with the appellate court review model in mind.[99] As in that model, review occurs as a matter of ex post oversight after many of the major substantive and procedural decisions, whether during trials or agency rule-drafting, have already been made. In this sense, both appellate court and presidential review represent opportunities for strategic behavior, "where the ability to manipulate the instruments of decision making, rather than merely selecting policy choices, allows actors to insulate their policy choices from higher level review."[100]

To explore these implications in greater depth, the remaining analysis will largely treat agencies and the President as unitary actors with exogenous preferences, though it will later relax some of these assumptions. These simplifications allow for greater initial analytic traction and are also reasonable as a first approximation: agencies move first when they submit a regulatory action for review in anticipation of what they know (or think they know) about the President's preferences

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[95] *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW 19, 23 (2007); Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion*, 37 J. LEGAL STUD. 1, 3 (2008); *cf.* Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 24–25 (2007) (hypothesizing that sentencing judges pursue policy preferences, in part, by making fact-oriented determinations that garner a deferential standard of review).

[96] *See infra* section I.B.2, pp. 1777–81.

[97] 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*, LAW & CONTEMP. PROBS., Spring 1994, at 167, 170.

[98] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

[99] *See* Elliott, *supra* note 97, at 170.

[100] Tiller & Spiller, *supra* note 3, at 349.

before the review process begins.[101] Even when those predictions may be wrong, the uncertainties about what the agency may discover during a costly review can be incentive enough to engage in self-insulation. As others have noted, the process was mainly "designed as an end-of-the-pipeline check against poorly conceived regulations,"[102] thus "operating as a kind of last-minute barrier to action at a point when cooperation and trust are nearly impossible."[103] In other words, while endogenous preference-shifting by both the agency and the President is possible and undoubtedly occurs,[104] the structure and constraints of the review process can often make the prospect more difficult.

Of course, in reality the "agency" and the "President" are not singular entities; rather, they are institutions. Institutions have multiple actors within them, each playing various roles. Consider the "agency" (we will consider the "President" in more depth too, but much later). Agencies have career staff with tenure protections and no expressed political loyalties,[105] as well as agency heads appointed by the President, subject to typically deferential Senate approval, and removable at will.[106] But if the President appoints executive branch agency

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[101] *See* HUBER, *supra* note 24, at 24 (discussing "notions of bureaucratic anticipation" whereby bureaucrats can "alter the status quo policy over which external political bargaining takes place" by "moving first").

[102] OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 43 (2001), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/costbenefitreport.pdf.

[103] Pildes & Sunstein, *supra* note 90, at 16. In interviews conducted by Professors Lisa Bressman and Michael Vandenbergh:

> Some EPA respondents commented that OIRA review occurs too late in the rulemaking 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."

Bressman & Vandenbergh, *supra* note 30, at 95 (alterations in original).

[104] *See* Sunstein, *supra* note 27, at 1848 (recalling "countless instances in which the process of interagency comment during OIRA review, or the agency's own continuing consideration of the underlying issues, leads the agency to make changes quickly and with enthusiasm"); *id.* at 1856 ("It is possible that technical experts at the rulemaking agency will decide to revise their analysis and even their conclusions in light of insights provided by other technical experts."). Professor Cass Sunstein's account emphasizes the ways in which an agency's views can and do shift during the review process in response to the "dispersed information inside and outside the federal government" aggregated during review. *Id.* at 1874. Future work should accordingly extend this framework to incorporate more fully the endogenous preferences of the agency and the President.

[105] *See* RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 7 (1994) ("[Rank-and-file career employees] have strict tenure guarantees, have no expressed ties to the administration or to Congress, and by law are to be politically neutral.").

[106] Of course, this statement is itself a simplification. As Professors Ronald N. Johnson and Gary D. Libecap explain:

heads and can fire them without cause, why would one ever expect agency and presidential preferences to diverge? The short answer is that the President and his agency heads suffer from familiar principal-agent problems, which can be exacerbated by similar issues between agency heads and their career staff.[107] Indeed, while this story is in part about the potential conflict between the President and his appointees, it is perhaps even more so about the incentives of the quasi-independent federal bureaucracy relative to its multiple overseers.

First, even the most faithful civil servants and loyal agency heads may have divergent preferences due to what they perceive (rightly or wrongly) as more refined information about implementation difficulties or political sensitivities.[108] Because of the transaction costs of briefing and elevating issues, such information may be difficult to convey fully to superiors. The agency head or civil servant may thus resist entreaties due to constraints "of which the Executive is only dimly aware."[109] Moreover, many decisions are necessarily made at the career-staff level and never elevated, despite what could be the contrary wishes of agency heads or the President had they been informed of the issues. This prospect need not be a pernicious one: it can also be a function of limited resources and the need to prioritize among issues worthy of higher-level attention. Alternatively, preference divergence may arise because of the President's own transaction costs in communicating his priorities and having them filter down multiple levels in ways that facilitate informed elevation of an issue.

Moreover, there is the well-known prospect of bureaucratic capture — the notion that both career and political agency actors may become beholden to external special interests, whether the regulated industry or broader public interest groups.[110] The notorious "revolving

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> Distinctions must be made among political appointees, who hold the top positions in most agencies; senior career officials, who hold positions in the Senior Executive Service (SES) or have top management General Schedule positions . . . within the civil service; and the rank-and-file career workforce . . . . These three groups have very different incentives for policy administration and operate under different constraints within the bureaucracy.

Id. at 7. For another, more nuanced discussion of internal agency dynamics, see Magill & Vermeule, *supra* note 2.

107 Much empirical evidence supports the notion that the preferences of career civil servants within an agency diverge from those of political appointees. *See, e.g.*, Clinton et al., *supra* note 51, at 345–46.

108 *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1302–03 (2006).

109 *Id.* at 1303.

110 *See generally, e.g.*, PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981). According to this argument, regulated industries have the resources, incentives, and information necessary to influence agency career staff or political appointees. Similarly, public interest groups are also influential given their ability to marshal publicity and political pressure. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 117–

door" between agencies and industry only reinforces this concern.[111] Alternatively, career staff may have been hired or may have self-selected due to the agency's single-mission orientation, bringing to the job a narrowly focused zeal.[112] They may in turn influence political appointees who may end up "go[ing] native" and supporting the views of their entrenched staff.[113] Finally, the difficulties of the confirmation process, especially under divided government, may also result in appointees whose preferences are not fully aligned with the President's due to compromises struck with Congress.[114] In a similar vein, a host of dynamic, exogenous factors, including pressure from congressional committees and interest groups, will also increase the likelihood of disagreement over individual rules. For any of these reasons, there is the potential for preference divergence between the President and even his most loyal appointed agency heads or faithful career staff. Putting the cover back on the agency, this analysis will assume that agencies as units behave accordingly; opportunities for preference divergence abound.

At the same time, agencies and Presidents — like trial judges and appellate courts — make decisions with limited resources. Thus, understanding the costs each incurs by initiating and reviewing an action is critical to appreciating their respective incentives. Call these *decision costs* for the agency and *reviewing costs* for the President.[115] Both kinds of costs include the resources required to acquire, synthesize, and deliberate over the information necessary to reach a rational conclusion, as well as the costs of communicating that conclusion. Say, for example, that the Environmental Protection Agency (EPA) is required by statute to ensure that cooling-water intake structures reflect the "best technology available for minimizing adverse environmental impact."[116] In considering how to fulfill this statutory mandate for ex-

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21 (1981) (discussing role of industry and public interest groups); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 169 (1990).

111 *See* QUIRK, *supra* note 110, at 143–74.

112 *See* Bagley & Revesz, *supra* note 108, at 1300–02; David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 424 (1997) ("[A]n agency with a well-defined mission will tend to attract bureaucrats whose goals are sympathetic to that mission.").

113 Elliott, *supra* note 97, at 176. These views may be particularly informed by some career staff who have spent decades or even their entire careers at the agency, perhaps becoming heavily invested in the release of internally resource-intensive regulatory actions. *See* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 129–164 (4th ed. 2011) (discussing complex and resource-intensive processes for managing the internal agency development of rules).

114 *See generally* McCarty, *supra* note 53.

115 The term "decision cost" is used by Tiller & Spiller, *supra* note 3, at 351.

116 This hypothetical is based loosely on the situation that faced by the EPA in *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

isting structures, the EPA might engage in outreach through public meetings and might conduct research on how cooling-water intake structures damage the environment. After studying the problem, the EPA might determine that there are various technologies available to reduce the number of fish and other species killed in these structures (such as mesh screens or barrier nets), and that some technologies are more effective than others and should be used accordingly. The costs of arriving at this decision constitute the EPA's decision costs.

After it has decided on an outcome, an agency must also decide what means, or instruments, it will use to pursue and communicate that outcome.[117] As we shall see, these instruments include the literature's familiar catalogue of adjudication, guidance documents, and rulemaking.[118] But the following discussion also considers a broader set of instruments, as well as the instruments' institutional dimensions: for example, how the instruments are characterized by agencies (their significance determinations), the quality of information conveyed by their accompanying cost-benefit analyses, various timing decisions, and the internal coalitions built in support of an agency's action.

Returning to our simple example, once the EPA decides to regulate cooling-water intake structures to reduce environmental harm, it can pursue this approach through discrete permitting decisions, through a guidance document describing various available technologies for facility-specific determinations,[119] or by eventually undertaking a rulemaking to set a standard or to mandate a particular technology.[120] All of these instruments vary in their form and impact, and the discretion to use them can be constrained by statute; such a statute may dictate, for example, the substance, form, and timelines for agency action. Within these bounds, agencies will consider decision costs for themselves, as well as the reviewing costs the chosen instrument imposes on the executive branch. In other words, faced with the prospect of presidential review, agencies can choose among various instruments to advance their regulatory policies, but their choices will depend on the relative effectiveness of those instruments as well as the costs of review they expect those instruments to impose on the President.

To illustrate, say there is a Republican President in power who has campaigned on reducing the number of regulations and blocking costly

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117 Tiller & Spiller, *supra* note 3, at 351.

118 *See, e.g.*, Magill, *supra* note 3, at 1396 (examining the consequences of "administrative adjudication, legislative rulemaking, or the issuance of a guidance document").

119 *See, e.g.*, OFFICE OF WATER ENFORCEMENT PERMITS DIV., EPA, DRAFT GUIDANCE FOR EVALUATING THE ADVERSE IMPACT OF COOLING WATER INTAKE STRUCTURES ON THE AQUATIC ENVIRONMENT: SECTION 316(b) P.L. 92-500 (1977).

120 *See Entergy*, 129 S. Ct. at 1503–04 (describing the EPA's use of permitting decisions, guidance documents, and eventually rulemaking); Brief for the Federal Parties as Respondents Supporting Petitioners at 5–7, *Entergy*, 129 S. Ct. 1498 (Nos. 07-588, 07-589, 07-597).

new ones. The EPA knows that if it decides to pursue a policy through its permitting decisions for cooling-water intake structures, then these adjudicatory decisions will not be subject to presidential review and are thus immune from reversal. If the EPA chooses the guidance document route, however, it knows that the executive branch might review the document, but that it will be more difficult to reverse since the document is not legally binding and so its effects are unclear. For the same reasons, however, the instrument will be less effective in bringing about its desired policy changes. Alternatively, the EPA is also aware that if it undertakes a rulemaking, it will likely be required to prepare a resource-intensive cost-benefit analysis. Because of the Republican President's business-friendly stance, the EPA is concerned that preparing a thorough cost-benefit analysis may make it easier for the rule to be reversed since the analysis could reveal expensive burdens on industry.

With these various choices, agencies can insulate their decisions from review by increasing the costs of review, which would decrease the probability of reversal due to the President's resource constraints. In our example, the EPA could choose to issue a guidance document instead of a rule to reduce the policy's visibility, but doing so would also bring about the EPA's policy changes less effectively given the nonbinding nature of guidance documents. Alternatively, the EPA could produce a low-quality cost-benefit analysis when submitting a rule. Both of these strategies are examples of self-insulation, since in both cases the President would have to spend greater resources to identify, review, and justify a reversal.

To avoid reversal, then, agencies may trade off their own "institutional efficiency" (the ability to achieve an outcome with the lowest-cost instrument[121]), provided that the selected higher-cost instrument imposes greater reviewing costs on the executive branch.[122] In other words, an agency will pursue a policy as close to its preferences as possible through a strategic instrument choice that takes into account, among other things, the costs imposed upon the reviewer and the corresponding likelihood of presidential reversal.

2. Presidential Reversals. — The power to review implies the ability to examine something again ("*re*-view") as well as the authority to

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[121] Agency adjudication and guidance documents, for example, yield lower impacts given that one proceeds on a case-by-case basis and the other uses legally nonbinding guidance to advance a regulatory policy. By contrast, rulemaking is more effective in implementing a policy, though the absolute degree of that impact will depend on the substance of the rule. *See generally* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

[122] *See* Tiller & Spiller, *supra* note 3, at 351–52.

instruct an agent or subordinate based on that evaluation.[123] Whether that presidential authority is directive or supervisory is a matter of much academic debate,[124] but when viewed against the backdrop of at-will removal, as a practical matter, presidential review shares several structural similarities with judicial review. Namely, OIRA can effectively reverse an agency action on behalf of the President and his interagency reviewers in a number of ways.[125] Just as agencies can choose regulatory instruments, the President has various reversal instruments at his disposal. They are "reversals" in the sense that the interagency review process can result in revisions or changes that the agency does not otherwise prefer, but which it will make due to the threat of delay or return, or because of resource constraints.[126] These reversal instruments can be arrayed in terms of their respective reviewing costs, which increase the more public the reversal and, correspondingly, the more reasoned the explanation required for it.

To begin, OIRA can "return" a rule to an agency "for further consideration of some or all of its provisions."[127] While this procedure is infrequently invoked, the threat is real and has, at times, been vigorously exercised. For each return, the Administrator of OIRA provides

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[123] *See* BLACK'S LAW DICTIONARY 1434 (9th ed. 2009) (defining "review" as the "[c]onsideration, inspection, or reexamination of a subject or thing" as well as the "[p]lenary power to direct and instruct an agent or subordinate, including the right to remand, modify, or vacate any action by the agent or subordinate, or to act directly in place of the agent or subordinate").

[124] *See, e.g.*, Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 462 (1987); Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488–90 (2011); Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697 (2007). Some have argued that the President also possesses what Professors Peter Strauss and Cass Sunstein have called "procedural" supervisory authority over agency heads from whom the President can demand information and engage in consultation. *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986); *see also* U.S. CONST. art. II, § 2, cl. 1 (granting the President the authority to "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"). Indeed, this argument heavily informed the Office of Legal Counsel memorandum authorizing President Reagan's regulatory review executive order. *See* Proposed Exec. Order Entitled "Federal Regulation," 5 Op. O.L.C. 59, 63 (1981). Practically speaking, these reversal mechanisms are also powerfully backed by the "de facto veto" inherent in the President's at-will removal power, as well as the authority accorded by executive order. But this is not to say that such formal authority need be explicitly invoked in order for it to have effect. *See* Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCI. REV. 605, 606 n.5 (2007).

[125] *See* Sunstein, *supra* note 27, at 1846–47.

[126] By implication, this category and analysis do not include those situations where agency preferences are endogenous and shift as a result of the interagency review process, such that the agency accepts the revisions "quickly and with enthusiasm." *See id.* at 1848; *supra* note 104.

[127] Exec. Order No. 12,866 § 6(b)(C)(3), 3 C.F.R. 638, 647 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

"a written explanation for such return,"[128] commonly known as a "return letter." The parallel to judicial reversal and remand is likely clear. Aside from agency-head removal, return letters are the most costly reversal instrument because they require a public rationale. During the first seven years after President Clinton issued Executive Order 12,866, from 1994 to 2000, OIRA returned only a handful of the 500 to 700 rules for which it coordinated review: three rules in 1995, and four in 1997.[129] Under the subsequent Bush Administration, by contrast, OIRA publicly posted forty-two return letters explaining various disagreements with the agencies' rules.[130] To date, the Obama Administration has issued only one.[131] This pattern could suggest that more antiregulatory Presidents incur fewer political costs relative to proregulatory Presidents when issuing public return letters.

At the same time, however, "it is misleading to focus on the number of return letters as a measure of OIRA's impact," since executive branch reviewers may still be "acting aggressively" in their absence.[132] Indeed, as part of the review process, interagency and White House reviewers can also negotiate revisions to a draft rule before agreeing to a version upon which to conclude review. Each time there is another round of comments or edits from reviewers, OIRA compiles and "transmit[s]" them back to the agency.[133] The agency can respond to these comments, make revisions, and circulate a new draft during the review period, if it so chooses and to the extent time permits.[134]

Regulatory submissions have a host of elements, including preambles, new and revised regulatory text, alternatives, effective dates, statutory interpretations, and cost-benefit estimates, among other provisions. The regulatory actions can also take different forms, such as advance notices of proposed rulemaking or interim final rules, and so on. Each of these agency "decisions" within a rule or about the form of a rule can be the subject of comment and possible reversal during the interagency review process. These revisions can be loosely analo-

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[128] *Id.*

[129] *See* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 42 fig.5. There were no return letters in 1994, 1996, 1998, 1999, and 2000. *Id.*

[130] Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1150 (2010).

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

[132] Sunstein, *supra* note 27, at 1846 n.37.

[133] *Id.* at 1858.

[134] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 53–90 (2009) [hereinafter GAO, MONITORING & TRANSPARENCY] (describing sixteen case studies of selected rules and changes due to presidential review).

gized to the multiple reversals and remands with instructions after judicial review in the course of serial litigation.[135] Sometimes these multiple rounds of revision and interagency review can be lengthy, resulting in significant delays.[136]

To put this category of reversals into perspective, even seemingly minor revisions may upend the product of hard-won compromises with agencies and external constituencies (including legislative staff, industry, and interest groups), as well as internal agency stakeholders among career staff and policy officials (including lawyers, economists, scientists, and policy analysts).[137] Agencies, which have often spent sizeable resources throughout the rulemaking process, can be loathe to see these hard-won balances upset and their work overturned. Of course, they may be indifferent to particular revisions when the stakes are low; in other situations, however, the threat of reversal is costly and real.

As for these reversal costs, the effective ability to insist on these revisions will depend on the amount of political capital and resources required. Specifically, these costs will be a function of the resources necessary to communicate the issue to the agency or other interagency reviewers, whether in terms of briefings or meetings, as well as the political capital necessary to elevate the issue to higher-level officials and, ultimately, to refuse to conclude upon the rule in its current form.[138] Evidence from a 2003 Government Accountability Office (GAO) report suggests that presidential reversals, even within a rule, are nontrivial in effect. Specifically, the report finds that the review process resulted in "significant" or "material" changes to fifty-one of the subset of eighty-five rules examined (sixty percent).[139] The report defined these changes as those made at a reviewer's suggestion that "affected the scope, impact, or estimated costs and benefits" of the submitted rules, or "resulted in the addition or deletion of material in the explanatory preamble section of the rule."[140]

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135 *See id.* at 82 (discussing example including resubmission of multiple drafts of FDA rule during review); *cf.* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1722 (2011) (exploring dynamic whereby "courts and agencies carry out a revealing colloquy over the course of successive reviews and remands" during serial litigation).

136 *See* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 46 (quoting President Clinton's OIRA Administrator testifying that "when two or more agencies are at loggerheads over a regulatory issue, it may well take more than 90, or even 120, days to obtain needed data and analyses, to conduct the appropriate evaluation, and to arrange for the policy officials in the interested agencies to come to agreement" (internal quotation marks omitted)).

137 *See* Magill & Vermeule, *supra* note 2, at 1036–41.

138 *See* Sunstein, *supra* note 27, at 1856–58 (discussing "elevation").

139 *See* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 73–75.

140 *See id.* at 73.

In addition to these dispositions, OIRA can also "encourage" an agency to "withdraw" a rule,[141] presumably because the review reveals the likelihood that OIRA, on behalf of executive branch reviewers, would not conclude on the rule in its present form.[142] The costs to the President of these withdrawals will depend on the stage of the rulemaking process. Before an agency proposes a rule, it can quietly withdraw the rule without publishing anything; however, OIRA's public database notes the simple fact of withdrawal.[143] Thus, at this point, the reversal costs are relatively low. After an agency has already publicly proposed a rule, though not yet finalized it, the agency may unilaterally withdraw it without notice-and-comment; however, the agency will have already made public its contemplated course of action.[144] As a result, there will be greater costs to reversing the agency and having it withdraw the rule at this stage, given that the President will feel more pressure from monitoring groups opposed to this action.[145] Finally, the review can also result in no revisions or changes to the rule at all. In such a case, the rule that was submitted to OIRA for review is the same as the rule upon which OIRA concludes review. It has been affirmed.

Which reversal instrument the President ultimately chooses, in turn, will depend on these reviewing costs, his available resources, and how far his preferences diverge from those of the agency.[146] If their preferences are sufficiently close, and the agency has used an instrument rendering reversal a costly enough proposition, then the President will affirm the agency's decision.[147] As the preference divergence grows and as the costs of reversal diminish, the President will be more likely to reverse the agency.[148] At some point, however, the preference divergence can be so great that the President will reverse the agency's decision even if the cost required to do so is significant.

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141 *See* COPELAND, *supra* note 15, at 1; Sunstein, *supra* note 27, at 1846–47.

142 *See* O'Connell, *supra* note 21, at 477–79.

143 *See Historical Reports*, OFFICE INFO. & REG. AFF., http://www.reginfo.gov/public/do/eoHistoricReport (last visited Mar. 30, 2013); *see also* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 30 fig.4 (illustrating OIRA review process including the possibility of withdrawal for draft proposed rules).

144 *See* O'Connell, *supra* note 21, at 477.

145 *See, e.g.*, Kevin Bogardus, *Labor Unions Uneasy as OSHA Withdraws Proposed Rules*, HILL (Jan. 30, 2011, 6:14 PM), http://thehill.com/business-a-lobbying/141121-labor-uneasy-as-osha-withdraws-proposed-rules.

146 *Cf.* Tiller & Spiller, *supra* note 3, at 355–56 (providing a more formal analysis of these dynamics in the context of court-agency interaction).

147 *See id.* at 356.

148 *See id.*

II. AGENCY SELF-INSULATION

A. Self-Insulation Mechanisms

Faced with these reversal prospects, agencies as the first movers can choose from an array of regulatory instruments, each with different expected effects on presidential review. An agency will, in turn, be more likely to use those instruments that will insulate its decisions from review the more it expects presidential preferences to diverge from its own, all else being equal. The agency's equilibrium choice, then, will depend on its decision costs and the points at which it expects to avoid reversal,[149] background conditions for this section's closer examination of the various ways in which agencies can attempt to raise the costs of review and ultimately reversal.[150] These *self-insulation mechanisms* are the institutional means through which agencies can render the process more resource-intensive, thereby increasing the probability of insulation. These mechanisms can be classified in terms of their functional effects: to bypass review, to decrease scrutiny, to truncate the amount of time available, or to facilitate successful internal coalitions. They will each require their own respective decision costs,[151] but they share the ability to help minimize the probability of reversal.

1. Bypass. — Presidential review currently covers "regulatory action[s]" that are "significant."[152] Regulatory actions, in turn, include "any substantive action . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of pro-

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[149] These points would depend on the President's expected instruments and policy choices. *Cf. id.* at 371–73 (discussing equilibrium instruments and policy outcomes in the context of judicial review).

[150] In other words, this section examines the costs of the review process that will necessarily precede each of the President's potential reversal instruments.

[151] Bypass strategies may require higher decision costs relative to nonbypass strategies since they are largely efforts by agencies to switch to policymaking forms that are not or will not lead to legislative rulemakings. Assuming that rules can induce greater policy changes relative to case-by-case adjudication or nonbinding guidance documents, bypass efforts are more internally costly (though an agency may trade these off for their effects on presidential review). *Cf.* Tiller & Spiller, *supra* note 3, at 360–61. Decreasing scrutiny, in turn, yields lower decision costs, because this strategy usually requires less of an investment in the substance and form of cost-benefit analysis. The decision costs of timing strategies are harder to assess, though there is likely an internal cost to submitting a rule late given the need for more justification that must be provided to OIRA. Finally, coalition-building efforts are more costly for the agency, and thus will likely be undertaken for rules with greater policy impacts or of more importance to the agency. Each of these considerations may help to explain when agencies will choose among various self-insulation mechanisms; though this interinstrumental choice is not considered in depth here, it may be an extension worthy of future exploration.

[152] Exec. Order No. 12,866 § 6(a)(3)(B), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

posed rulemaking."[153] These provisions define the scope of regulatory review. Any scope-defining provision of an institutionalized review process, however, begets incentives for agencies to employ instruments that attempt to bypass the costly process entirely, and thus avoid the risk of reversal altogether. This section surveys some of those instruments.

(a) Inaction. — As stated, Executive Order 12,866 requires agencies to submit "significant regulatory *action*[*s*]" to OIRA for presidential review.[154] If an agency does not affirmatively engage in regulatory action, this decision does not undergo presidential review. According to a Congressional Research Service report, "some agencies have indicated that they do not even propose certain regulatory provisions because they believe that OIRA would find them objectionable."[155] An agency may choose not to act because of its own internal resource constraints or because of the threat of presidential review. While the empirical outcome is the same — no new regulatory action — the distinction is still important to keep in mind as an analytic matter.

Relative to the status quo, there are no affirmative impacts of agency inaction (by definition). However, as others have noted, agency inaction can nonetheless have important consequences (for example, the failure to regulate a pollutant can have adverse impacts on public health) — a decision that is not currently subject to presidential review.[156] While the consequences of agency inaction can indeed be significant, the decision facing the agency in the present analysis is whether to depart from the status quo. Relative to this baseline, a decision not to depart — not to act — can be understood as yielding no new, marginal impacts on the state of the world.

(b) Adjudication and Guidance Documents. — Agencies can also bypass presidential review by choosing an instrument other than "any substantive action" that "promulgates or is expected to lead to the promulgation of a final rule or regulation."[157] One such instrument is adjudication. This category of agency action could include benefits determinations and licensing proceedings, among other actions.[158] Be-

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[153] *Id.* § 3(e), 3 C.F.R. at 641. Such rules include any "agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." *Id.* § 3(d), 3 C.F.R. at 641. This category does not include formal rulemaking, rules related to military and foreign affairs, or other enumerated exceptions. *Id.* § 3(d)(1)–(4), 3 C.F.R. at 641.

[154] *Id.* § 6(a)(3)(B), 3 C.F.R. at 645 (emphasis added).

[155] COPELAND, *supra* note 15, at 18.

[156] *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY 155–56 (2008); Michael A. Livermore, *Cause or Cure? Cost-Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENVTL. L.J. 107, 118–19 (2008).

[157] Exec. Order No. 12,866 § 3(e), 3 C.F.R. at 641.

[158] Magill, *supra* note 3, at 1386; *see also* 5 U.S.C. § 551(6) (2006) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in

cause adjudication, unlike rulemaking, proceeds on a case-by-case basis, each adjudication's policy impacts are limited and aggregate policy change is developed only incrementally. As a result, there is relatively little information to review and, in any case, adjudication decisions are not subject to the presidential review process. Case studies of particular agencies — such as the National Highway Traffic and Safety Administration (NHTSA), which shifted from rulemaking to adjudication in the mid-1970s due in part to changes in presidential administrations — provide evidence of this dynamic.[159] As permitted by statute, courts have consistently allowed agencies to choose between these policymaking forms.[160]

Alternatively, an agency could issue a guidance document.[161] Guidance documents are interpretive rules and statements of policy intended to clarify existing regulatory requirements, though they have often been criticized as creating new obligations upon private parties without the traditional requirements imposed on legislative rulemaking.[162] Guidance documents are exempt from the Administrative Procedure Act's notice-and-comment requirements and thus less internally costly for the agency relative to rulemaking.[163] They sometimes enable agencies to obtain voluntary compliance, either because the agencies wield "gatekeeping" power over private parties or because savvy regulatory targets foresee forthcoming policy shifts.[164] However, as a practical matter, guidance documents are not legally binding, and are thus likely to be less effective than rulemaking in bringing about the desired behavioral changes.[165]

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form, of an agency in a matter other than rule making but including licensing"); *id.* § 551(7) (defining "adjudication" as an "agency process for the formulation of an order").

159 *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 10–11 (1990) (describing NHTSA's "retreat[]" from rulemaking to "case-by-case adjudication," *id.* at 11). Professors Jerry Mashaw and David Harfst also observe that while such retreats "have been responsive to general political shifts in regulatory zeal," they are not only retreats "*from* regulation," but "*to* regulation in a different form." *Id.* at 14 (citing also the example of the Consumer Product Safety Commission as an agency that "turned from standard setting to recalls").

160 *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); SEC v. Chenery Corp., 332 U.S. 194 (1947); *see also* Magill, *supra* note 3, at 1385 (describing courts' largely "hands-off" reaction to agencies' choice of policymaking form).

161 Note, of course, that guidance documents that initiate a process culminating in rulemaking would be covered under presidential review. *See* Sunstein, *supra* note 27, at 1853.

162 *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1332–55 (1992).

163 *See* 5 U.S.C. § 553(b) (creating exceptions for "interpretive rules" or "general statements of policy").

164 *See* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 803–04 (2010).

165 *Id.* at 803.

"Significant" guidance documents, defined under a multifactor test including expected economic impacts and policy novelty, are currently subject to presidential review.[166] They garnered much attention in January 2007, when President George W. Bush amended President Clinton's executive order to formally subject such guidance documents to review, though President Obama has since revoked the amendments.[167] Around the time the order was amended, the Office of Management and Budget (OMB) also released its Final Bulletin for Agency Good Guidance Practices, which directed agencies to implement procedures for the approval and use of significant guidance documents by appropriate senior officials, sought to standardize the documents' elements, and established public access and feedback procedures.[168]

Before then, presidential review of such documents was at best sporadic, with one former OIRA Administrator, Sally Katzen, testifying that President Clinton's "'Executive Order . . . was written to apply only where agencies undertook regulatory actions that had the force and effect of law' and that she [had] never reviewed a guidance document during her tenure in the Clinton administration."[169] After President Obama revoked the Bush amendments and returned to the unamended Clinton executive order,[170] however, OMB Director Peter Orszag issued a memorandum to agencies stating that OIRA had previously reviewed "significant policy and guidance documents" and that such documents remained subject to review.[171]

Relative to the review of rules, however, the review of guidance documents is much more limited and unsystematic in practice.[172] This is partly because guidance documents as a class are not required to undergo formal notice-and-comment procedures, so there are fewer

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166 *See* Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads and Acting Heads of Exec. Dep'ts and Agencies (Mar. 4, 2009) [hereinafter Orszag Memorandum], *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

167 *See* Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (revoked 2009); *see also* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted as amended in* 5 U.S.C. § 601 app. at 100–01 (2006 & Supp. V 2011) (revoking amendments).

168 *See* Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue,* 25 YALE J. ON REG. 103, 103 n.1 (2008); *see also* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432–33 (Jan. 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

169 Noe & Graham, *supra* note 168, at 105 (emphasis omitted) (quoting *Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Hearing Before the Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary*, 110th Cong. 54 (2007) (statement of Sally Katzen, Adjunct Professor, University of Michigan School of Law)).

170 *See* Exec. Order No. 13,497, 3 C.F.R. 218.

171 Orszag Memorandum, *supra* note 166.

172 *See* Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 27 n.98 (2008) ("OIRA's analysis of these guidance documents (even 'significant' guidance documents that have an estimated impact of $100 million or more on the economy) is much more limited than its analysis of regulations.").

opportunities for fire-alarm oversight by outside monitoring groups regarding each document's significance, making the agency's own initial significance determination that much more critical.[173] In addition, guidance documents that are not expected to lead to a final regulation are not required by executive order to provide a cost-benefit analysis (CBA), further limiting the information about their potential impacts and therefore their potential significance to the President.[174] Finally, the sheer number of such documents likely constrains the amount of time available to review each one.[175] To be sure, many agencies will be hesitant to "issue important regulatory documents that have not been seen by, or (if appropriate) incorporated the perspectives of, senior officials inside the administration."[176] But when the question of significance is sufficiently close or ambiguous from the agency's perspective, the perceived costs of review may well outweigh the potential benefits to the agency.

(c) Nonsignificant Rules. — Recall again that Executive Order 12,866 requires agencies to submit "significant" regulatory actions to OIRA for presidential review.[177] If choosing rulemaking as a regulatory instrument, agencies can thus prevent review by avoiding a determination that the rule is "significant." To be significant, a regulatory action must meet at least one of four sets of flexible criteria: it must raise potential inconsistencies with other agencies, "materially alter the budgetary impact of" certain programs, invoke "novel legal or policy issues," or be economically significant.[178]

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[173] OMB's good guidance practices do, however, provide that "[e]ach agency shall maintain on its Web site . . . a current list of its significant guidance documents in effect" and "shall establish and clearly advertise on its Web site a means for the public to submit comments electronically on significant guidance documents." Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3440. For "economically significant" guidance documents, the bulletin states that agencies "shall" generally provide notice and invite public comment. *Id.* Many agencies follow these procedures, but note that they rely upon the agency's own assessment of what constitutes a "significant" or "economically significant" guidance document, raising the same issues of significance determinations as for rules. *See infra* section II.A.1.c, pp. 1786–89.

[174] *See* Exec. Order No. 12,866 § 3(e), 3 C.F.R. 638, 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[175] *See* Noe & Graham, *supra* note 168, at 104 ("Each year, agencies issue on the order of 4000 regulations, and the number of guidance documents is orders of magnitude larger." (footnote omitted)).

[176] Sunstein, *supra* note 27, at 1853.

[177] *See* Exec. Order No. 12,866 § 6(a)(3)(B), 3 C.F.R. at 645.

[178] *Id.* § (3)(f), 3 C.F.R. at 641–42. The text in full states:

> "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:
>
> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

Significance determinations rely on agencies to identify such rules "in the first instance, vetted by OIRA."[179] Because the burden is initially on the agencies to highlight significant rules, OIRA must rely on agencies to flag rules as such, or at least to give enough information to enable it to make an independent determination. Rules that an agency does not identify as significant are thus more likely to go unnoticed. Various tools exist to facilitate OIRA's determination, but the information these tools provide is often framed so generally as to limit the ability for meaningful external evaluation. For example, agencies are required by executive order to submit entries semiannually to the Unified Agenda of Federal Regulatory and Deregulatory Actions, a compilation of regulatory activities planned during the next twelve months.[180] These entries include, among other things, a short description of the rule, as well as the agency's priority designations — roughly, whether the agency believes the action to be nonsignificant, significant, or economically significant.[181] In addition, at specified intervals,

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(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Id. OMB's *Circular A-4* states that "Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1)." OMB, CIRCULAR A-4, *supra* note 77, at 1.

[179] FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 223 (William F. Funk et al. eds., 4th ed. 2008); *see also* Memorandum from Rob Portman, Dir., Office of Mgmt. & Budget 8 (Apr. 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-13.pdf (referring to process for agencies to request "significance determinations").

[180] *Unified Agenda of Federal Regulatory and Deregulatory Actions*, U.S. GEN. SERVICES ADMIN., http://www.gsa.gov/portal/content/101114 (last visited Mar. 30, 2013); *see also* Exec. Order No. 12,866 § 4(c), 3 C.F.R. at 642.

[181] More specifically, agencies can prioritize the rule as:

(1) Economically Significant

. . . .

(2) Other Significant

. . . This category includes rules that the agency anticipates will be reviewed under Executive Order 12866 or rules that are a priority of the agency head. . . .

(3) Substantive, Nonsignificant

A rulemaking that has substantive impacts but is neither Significant, nor Routine and Frequent, nor Informational/Administrative/Other.

(4) Routine and Frequent

A rulemaking that is a specific case of a multiple recurring application of a regulatory program in the Code of Federal Regulations and that does not alter the body of the regulation.

(5) Informational/Administrative/Other

A rulemaking that is primarily informational . . . but that the agency places in the Unified Agenda to inform the public of the activity.

Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 76 Fed. Reg. 39,992, 39,994–95 (July 1, 2011).

agencies provide OIRA with simple lists of planned regulations indicating which ones they believe are significant.[182] Actions that do not appear on either of these are more prone to slip through the cracks.

Moreover, many of the criteria for significance determinations, including the question of novelty, are "hardly self-defining,"[183] and agencies may have good faith but nevertheless ill-informed reasons for excluding some rules and designating them as nonsignificant. Even if an agency has initially classified a regulatory action as nonsignificant, the executive order gives OIRA just ten days to determine otherwise,[184] a narrow window of time in which to resolve staff-level disagreements and elevate them if necessary. In this manner, by choosing a nonsignificant rulemaking form, agencies can limit the amount of information for review, as well as make such review less likely.[185]

Take, for example, a recent U.S. Department of Agriculture (USDA) direct final rule (DFR) that would require all USDA contractors to certify that they, their subcontractors, and suppliers are "in compliance with all applicable labor laws," subjecting the contractor to liability under the False Claims Act if its certification is incorrect.[186] DFRs are promulgated without prior notice and comment and become effective at some point after publication in the Federal Register unless "adverse" comments are received.[187] In this case, the Federal Register reported that USDA's DFR was designated as "not significant according to Executive Order 12866 and therefore the rule has not been reviewed by OMB."[188] Commenters raised numerous objections, including claims that the provisions were too vague or burdensome, and highly controversial.[189] One commenter asserted that "USDA's han-

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[182] *See* Exec. Order No. 12,866 § 6(a)(3)(A), 3 C.F.R. at 645. Shortly after the implementation of the Clinton order, OIRA Administrator Sally Katzen reported: "We believe that, so far, the listing system that has been implemented contains both discipline and flexibility. Both OIRA staff and agency staff have worked to accommodate each other's needs." Report on Executive Order No. 12866, Regulatory Planning and Review, 59 Fed. Reg. 24,276, 24,286 (May 10, 1994).

[183] Sunstein, *supra* note 27, at 1852.

[184] Exec. Order No. 12,866 § 4(c)(3), 3 C.F.R. at 642.

[185] A report on the implementation of President Clinton's executive order relayed that the definition of "significance" had been the subject of great discussion and delay. "Some of the differences," the report hypothesized, "may be attributable to the difference in the natural inclinations of rule writers, who might prefer not to have another review layer to go through . . . ." Report on Executive Order No. 12866, Regulatory Planning and Review, 59 Fed. Reg. at 24,277.

[186] Agriculture Acquisition Regulation, Labor Law Violations, 76 Fed. Reg. 74,722, 74,723 (Dec. 1, 2011) (to be codified at 48 C.F.R. pt. 422) (direct final rule); 76 Fed. Reg. 74,755, 74,756 (Dec. 1, 2011) (proposed rule).

[187] *See* Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 ALB. L. REV. 79, 81 (2009).

[188] Agriculture Acquisition Regulation, Labor Law Violations, 76 Fed. Reg. at 74,723, 74,756.

[189] Letter from Randel K. Johnson, Senior Vice President, U.S. Chamber of Commerce, to Lisa M. Wilusz, Dir., Office of Procurement and Prop. Mgmt. 14 (Jan. 24, 2012), *available at* http://www.uschamber.com/sites/default/files/comments/120124usdablistcommentsDFR.pdf.

dling of this regulation as a DFR suggests that in seeking OMB's clearance, the Department characterized this [as] a minor language change and noncontroversial[,] . . . suggest[ing] that the agency was being disingenuous in its submission to OMB."[190] The accuracy or inaccuracy of this charge aside, given the substance of the rule and the resulting reactions, there is certainly a plausible argument that the rule was "significant" as a novel legal or policy issue, and thus should have been subject to presidential review. Even if OIRA had this information and disagreed, the example would still illustrate how self-identified nonsignificant rules can render presidential review more difficult.

* * *

To summarize, agencies can choose between simple inaction, adjudication, guidance documents, or nonsignificant rules as instruments that are more likely as a class to bypass presidential review. These instruments vary in terms of their policy impacts and thus effectiveness. For a resource-constrained agency, adjudication may be less effective than guidance documents, which are themselves less effective than nonsignificant rules. At the same time, all of these instruments may still be attractive to the agency because they are exempt from review altogether or contain limited amounts of information to review, thus making them more difficult to reverse. Others have certainly recognized that agencies may strategically choose less costly instruments, such as guidance documents over rulemaking, but they have done so largely in the context of courts[191] or Congress.[192] This discussion seeks

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[190] *Id.* at 15 (arguing that the rule raised "novel legal and policy issues," could "adversely affect in a material way the sector of the economy defined by companies that contract with the USDA," and thus should have been reviewed by OIRA); *see also* Letter from Jeffrey A. Norris, President, Equal Emp't Advisory Council to the Office of Procurement and Prop. Mgmt., U.S. Dep't of Agric. (Jan. 24, 2012), *available at* http://www.eeac.org/public/12-022a.pdf (raising similar concerns).

[191] *See* sources cited *supra* note 3.

[192] *See, e.g.*, James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, LAW & CONTEMP. PROBS., Spring 1994, at 111, 112–13. While Professors James Hamilton and Christopher Schroeder recognize that "[i]nformality . . . offers a means for regulators to evade both the constraints imposed by Congress and the courts *and the executive branch oversight exercised by OMB*," *id.* at 147 (emphasis added), their discussion continuously emphasizes only the legislature and the judiciary. For example, their next sentences provide:

> We do not claim that these informal rules go unnoticed by the legislative and judicial branches, just as slack does not go unnoticed in general principal-agent relationships. Rather, courts and Congress must weigh the costs of monitoring and punishing agencies against the costs posed by agency discretion embodied in informal rules.

Id. at 147–48.

to bring the President more firmly back into the picture in light of actors' respective budget constraints.[193]

2. Scrutiny Calibration. — Even if an agency is unable to bypass review, it can also attempt to calibrate the level of scrutiny the regulatory action receives during the review process. The term "scrutiny" here is a conscious one: just as heightened levels of judicial scrutiny imply that an appellate judge will afford less deference to the court below, so too in the context of presidential review. Agencies that successfully lower the scrutiny of review essentially raise the costs of potential reversal, as the President would have to use greater resources to identify and target those regulatory decisions with which he disagrees.

Economically significant rules are more likely than (merely) significant ones to garner scrutiny because higher-cost or -benefit rules are more likely to be politically salient. Economically significant rules are thus among those rules most likely to gain the President's attention. Moreover, public logs reveal that such rules are more likely to become the subject of meetings between OIRA staff and nongovernmental parties, suggesting heightened public scrutiny as well.[194] Economically significant rules must also be accompanied by a more rigorous and transparent CBA.[195] As a result, "[t]he level of scrutiny" of presidential review is "strongly influenced by the agency's informed and presumptively good-faith initial designation of a regulation as . . . 'significant,' or 'economically significant.'"[196] The more likely an agency is to designate a rule as economically significant and to provide a more transparent CBA, the higher the likelihood of presidential scrutiny.

For a rule to qualify as economically significant, the main criterion is that it must be expected to result in "an annual effect on the economy of $100 million or more."[197] This threshold currently applies to the impact of regulatory actions "in any one year and it [also] includes benefits, costs, *or* transfers" — that is, "$100 million in annual benefits,

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[193] *See, e.g.*, Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 404–08 (arguing that agency internal budget constraints influence the choice of guidance documents).

[194] *See* Croley, *supra* note 37, at 844, 871–72.

[195] *See* Exec. Order No. 12,866 § 6(a)(3)(C), 3 C.F.R. 638, 645–46 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[196] Declaration of Richard B. Belzer, Ph.D. at 9, Tafas v. Dudas, 541 F. Supp. 2d 805 (E.D. Va. 2008) (No. 1:07cv846), 2007 WL 5061620, *available at* http://www.rbbelzer.com/uploads/7/1/7/4/7174353/tafas_ex-21-belzer-declaration.pdf (describing experience as career civil service economist at OIRA from November 1988 until September 1998).

[197] Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. at 641. Alternatively, the action could "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." *Id.* These criteria are less relevant to the analysis here, though similar insights would hold. Thus, for the sake of simplicity, this Article focuses only on the $100 million threshold.

or costs, *or* transfers" would be sufficient, while "$50 million in benefits and $49 million in costs" would not be.[198] In light of this threshold, accounts sometimes incorrectly state that OIRA staff members conduct CBA in the first instance, as if to suggest that OIRA actually calculates the expected costs and benefits of a regulation.[199] In fact, however, *agencies* first prepare the analyses and send the supporting documents to OIRA, which then coordinates a review with various other executive branch entities. This distinction is important because of the incentives that exist for the agency during the CBA preparation stage in anticipation of that review.

CBA means many things to different people,[200] yet attempts to provide a coherent theoretical basis[201] belie the highly variable ways in which agencies conduct it in practice. Some agencies prepare what could be best described as a back-of-the-envelope estimation of regulatory impacts[202] — a rough accounting of the pros and cons of a rule — while others undertake (or more commonly, contract out) expensive and sophisticated efforts to collect data from market behavior or consumer-willingness-to-pay studies about a rule's monetized costs and benefits.[203] Agencies also vary in terms of how they discount these effects, the extent to which they describe costs and benefits qualitatively

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198 OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: FREQUENTLY ASKED QUESTIONS (FAQS) 1 (2011) (emphasis omitted) [hereinafter OIRA, FAQS], *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf.

199 *See, e.g.*, Bressman & Vandenbergh, *supra* note 30, at 57 ("OIRA staff members are the ones who actually conduct cost-benefit analyses."); Scott Harshbarger & Goutam U. Jois, *Turning the Page on the Global Financial Crisis: Civic Capitalism and a Blueprint for the Future*, 24 EMORY INT'L L. REV. 15, 47 (2010) ("OIRA's task is essentially to evaluate all proposed regulation that comes out of executive branch agencies, generally by conducting a cost-benefit analysis of the proposed regulation."); *see also* Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. (SPECIAL EDITION) 135, 139 (2011) (A "common error is assuming that cost-benefit analyses are conducted by OIRA, not the agencies.").

200 *See* Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153 (2000) ("The term 'cost-benefit analysis' has a variety of meanings and uses.").

201 *See generally* ADLER & POSNER, *supra* note 39, at 9–24; EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 134–58 (1978).

202 *See, e.g.*, Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 Fed. Reg. 60,452, 60,466–78 (Oct. 24, 2007) (codified as amended at 29 C.F.R. § 2550.404c-5 (2012)) (regulatory impact analysis).

203 *See, e.g.*, OFFICE OF AIR QUALITY PLANNING & STANDARDS, EPA, REGULATORY IMPACT ANALYSIS: PROPOSED NEW SOURCE PERFORMANCE STANDARDS AND AMENDMENTS TO THE NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR THE OIL AND NATURAL GAS INDUSTRY (2011), *available at* http://www.epa.gov/ttnecas1/regdata/RIAs/oilnaturalgasfinalria.pdf. *See generally* Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2000) (empirically demonstrating wide variation across agencies in CBA practices for economically significant rules).

as opposed to quantitatively, and the number of alternatives they explicitly consider, among numerous other factors.[204]

Given their discretion in selecting from this wide array of practices, agencies can attempt to insulate their regulatory decisions through CBA preparation in multiple ways. First, they can work to avoid the designation of economic significance altogether and thus decrease the amount of presidential scrutiny. Reports from former OIRA officials, for example, suggest that agencies may avoid determinations of economic significance by splitting rules into parts, each of which falls beneath the $100 million threshold.[205] So, for example, an economically significant rule with an expected impact of $150 million in a given year could be split into two separate rules, each of which is expected to cost $75 million in that year. Neither of these rules would now be designated as economically significant, thus effectively lowering the scrutiny of review. Similarly, agencies could choose discount rates that decrease the rule's expected costs or benefits or place greater weight on particular cost-benefit studies in the literature that predict minimal economic impacts, all in an attempt to remain under the threshold.

Alternatively, even if efforts to avoid a determination of economic significance are unsuccessful, agencies can make choices regarding the substance and form of a CBA that have self-insulating effects.[206] As understood here, the substance of a CBA refers to the strength of the data supporting the analysis and the conclusions drawn from it, while its form goes to how an expert agency communicates the results of its analysis to a more generalist audience. The two dimensions are certainly related, but they can be isolated. When preparing a CBA, an agency faces separate resource decisions regarding how much to invest in expertise when reaching its decisions, as well as how to present its CBA at the point of presidential submission before the rule is publicly released. Stated differently, it can make distinct choices regarding its own private information and the information it presents to presidential reviewers, subject, of course, to any exogenous data limitations.

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[204] *See* Hahn et al., *supra* note 203, at 865–77.

[205] *See* DONALD R. ARBUCKLE, OIRA AND PRESIDENTIAL REGULATORY REVIEW 15 (2008) ("In some cases, agency officials divided potential major rules into two or more non-major components, and in other cases they might argue that the estimated costs or benefits were under the $100 million threshold . . . ."); Declaration of Richard B. Belzer, Ph.D., *supra* note 196, at 9 ("During my tenure in OIRA, I often observed agencies attempt to split draft regulations into smaller parts so as to avoid exceeding the $100 million threshold for a 'major' or 'economically significant' regulation, presumably in hopes of avoiding the requirements to prepare a Regulatory Impact Analysis."); *see also* Note, *supra* note 22, at 1002.

[206] Even if, as argued by Sunstein, *supra* note 27, at 1869, costs and benefits may not often be "the key issue" during the review process, many of the claims here would also apply to the substance and presentation of other issues germane to review.

Regarding the agency's own investment in research and expertise,[207] the more an agency invests in such research, the more costly it becomes for the President to contest the agency's decision. Competing expertise from experts within the executive branch would now be necessary in order to engage the agency on its terms.[208] In other words, the stronger the technical substance of the CBA, the more resource-intensive the review process required to engage with and dispute the agency's findings. Reversal costs are also raised if the President decides instead to politicize the data by exerting pressure on the agency head to alter or suppress the analysis. Not only does this require more political capital by the President, but it also raises the risk that the agency will informally release (or credibly threaten to release) its underlying data to oversight bodies that can more readily check the President. In this manner, an agency can effectively insulate through expertise.[209]

Even when an agency possesses the internal expertise to justify and arrive at its regulatory decision, however, it still faces a distinct choice regarding how to communicate and present this decision to nonspecialists like the President — a process of translation from unstated assumptions to clearly stated ones, from jargon to plain English, from the use of complex appendices to executive summaries, and so on. That is, agencies can choose to initially submit an economically significant rule accompanied by a *poorly translated* CBA, which requires higher reviewing costs, or a *well-translated* CBA, which requires less. A well-translated CBA, as defined here, refers to analysis that adheres to the best practices outlined in recent executive orders and OIRA guidance documents, which generally promote principles of clarity, consistency, and analytic rigor.[210] In particular, OMB's 2003 *Circular A-4* provides that, in order to be a "good analysis," a CBA must be a "transparent" one that states "what assumptions were used, such as the time horizon for the analysis and the discount rates applied to future benefits and costs," along with "a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensi-

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[207] For a more detailed and nuanced discussion of this topic, see generally Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007); Stephenson, *supra* note 63, at 1453–61.

[208] *See* Sunstein, *supra* note 27, at 1854–56.

[209] *See* Jed Stiglitz, Choice of Policymaking Form: Judicial Competence and Agency Obfuscation 8–10 (Oct. 19, 2012) (unpublished manuscript) (on file with the Harvard Law School Library) (exploring notion of insulation through expertise in the context of an independent agency, the FCC, relative to judicial review).

[210] *See* Robert W. Hahn & Patrick M. Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?*, 1 REV. ENVTL. ECON. & POL'Y 192, 195–96 (2007) (discussing various methods for assessing the quality of regulatory analyses and concluding that scoring against criteria from executive orders and guidance documents was the best method).

tive to plausible changes in the main assumptions and numeric inputs."[211] Producing a well-translated CBA, which lucidly presents the analysis upon submission to the President, generally requires greater investments of agency resources.[212]

Rules with a well-translated CBA impose lower reviewing costs because they provide a greater amount of readily useable information upon which to debate a policy decision within the executive branch. More of the review time can be spent discussing the appropriate regulatory alternatives based on the information gained through CBA, rather than attempting to clarify assumptions or extract data sources from the agency through costly phone calls, meetings, and so on. Indeed, one important function of presidential review, as discussed, is analytic: to convert poorly translated CBAs to well-translated ones, to provide better information not only to the President, but also to other political monitors in anticipation of the notice-and-comment process. In this manner, agencies can effectively force more of the review to be spent contesting the form rather than the substance of the CBA and, in doing so, reduce the likelihood that the decision will be reversed on the merits.[213]

To illustrate, consider this account from a former OIRA official:

> On the first level, we use common sense. If a reasonably intelligent lay person is reading through the supporting documentation for the rule, could he reach the same result? Is there a reasonably clear documentation of the major effects? If we can't tell what is going on, we send it back. We look for objectives, alternatives, costs, and benefits.
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> . . . .
>
> Occasionally, we have the luxury of getting into sophisticated issues, such as calculating the discount rate and how sensitive the predictions are to the discount rates. *Unfortunately, we do not always have time for this*.[214]

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[211] OMB, CIRCULAR A-4, *supra* note 77, at 3.

[212] *See* ADLER & POSNER, *supra* note 39, at 80–88 (describing a CBA's average decision costs and noting that direct costs of an analysis hover around $1 to 2 million). These decision costs can include the "wages for agency staff involved in the preparation or review of such analyses, the cost of information or computational resources used in analyses, overhead costs, [and the] fees for analyses prepared by independent contractors." *Id.* at 80.

[213] Of course, a CBA's form and substance can be related, as in the case when an agency's failure to discuss its rationale for choosing a regulatory option (weak form) results in a vulnerable conclusion (weak substance); however, one can roughly distinguish between how costs and benefits are presented and the ultimate outcome chosen based on those costs and benefits.

[214] THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 273–74 (1991) (emphasis added) (quoting a former OIRA official, Thomas Hopkins). While this account predates President Clinton's executive order, there is little reason to believe that the same dynamic does not hold afterwards, if not even more so given the new ninety-day time limit.

For these reasons, the extent to which a poorly translated CBA can be improved will be a function of the resources and time (usually ninety days) available to engage in the iterative process of (1) interagency review; (2) comments, suggestions, and questions arising from that review and sent back to the agency; (3) further review of the resulting revisions, if any; (4) further comments; and so on. A poorly translated CBA will frequently result in the rule being sent back to the agency, often more than once, with questions and comments designed to clarify and sometimes contest the analytic basis.

As a result, agencies will often have an incentive to choose a poorly translated CBA instead of a well-translated one at the point of presidential submission (though it may expect eventually to improve the CBA by the time the review process is complete), since doing so will be more likely to insulate the rule by increasing review costs. One Environmental Protection Agency (EPA) official, for example, has "candidly observed" that "EPA has written many rules [the way that it has] because of a desire . . . to *obfuscate* in order to get the rules through the regulatory and [OMB] approval process."[215]

At the same time, the net effect of a poorly translated CBA on the probability of reversal may well be ambiguous if the form of the CBA also serves as a negative signal regarding the underlying substance.[216] Reviewers could interpret a confusing CBA as an indication that the substance of the rule is also poor, thus becoming more likely to reverse it. One might similarly argue that when agencies have rules that are substantively strong on the merits, they would have a cross-cutting incentive to submit a well-translated CBA to signal the rule's strength. Both are compelling possibilities, but note that for reviewers even to reach a conclusion on the merits, they would still have to spend time and resources engaging with the agency in order to clarify the underlying CBA substance before contesting it. This epistemic disadvantage results in higher resource costs at the margin and can thus yield insulating effects.[217] Regardless, because of these cross-cutting potential dynamics, identifying which effects would ultimately dominate is ambiguous in theory and must thus be tested against available data.[218]

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[215] Joel A. Mintz, *"Neither the Best of Times nor the Worst of Times": EPA Enforcement During the Clinton Administration,* 35 ENVTL. L. REP. 10,390, 10,395 (2005) (first alteration in original) (emphasis added).

[216] *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 766 (2006).

[217] At the same time, agencies with substantively strong rules can still publicly release rules with well-translated CBAs at the conclusion of the review process and would indeed have an incentive to do so for the sake of monitors and judicial review. Nevertheless, they would still benefit by making a different self-insulating choice at the initial point of presidential submission.

[218] For a discussion of data sources and empirical investigation involving CBA quality, see *infra* section II.B.2, pp. 1806–10.

This concept of poorly translated CBA as a self-insulation mechanism builds upon the work of others that have considered CBA as a strategic means of acquiring information about a project's net value,[219] but now broadens the institutional lens to consider how a CBA's form can also facilitate or hinder the review process itself. In doing so, it distinguishes the more well-known incentives for agencies to augment net benefits in order to increase a regulatory action's perceived value, and turns instead to the ways in which a CBA's presentation at the point of submission can impose higher or lower reviewing costs.

3. Timing Strategies. — In addition to choosing regulatory instruments designed to bypass review and calibrate its scrutiny, agencies can also effectively truncate the time available for review, such that the President will be able to review and reverse fewer decisions either within or across rules. Recall that in response to criticism during previous administrations that "delay was OIRA's tactic of choice for stifling costly new regulations,"[220] President Clinton's executive order imposed a ninety-day cap subject to a thirty-day extension on the amount of time available for review,[221] which itself could be extended for "whatever length [the agency] deems appropriate."[222] While the Clinton Administration appears not to have enforced the deadlines vigorously, accounts suggest that they were more strictly enforced beginning with President George W. Bush's OIRA Administrator, who specifically instructed his staff "that no rule will stay longer than 90 days at OMB without my personal authorization."[223]

The best way to understand this initial ninety-day clock is as a timing default rule: a presumption that review should be complete within that period after which there are increased political costs for extending the review. Those costs can be in the form of greater scrutiny from outside interest groups,[224] as well as congressional oversight hearings

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219 *See, e.g.*, Posner, *supra* note 20, at 1154–62; Stephenson, *supra* note 207, at 471–83.

220 Bagley & Revesz, *supra* note 108, at 1280.

221 Exec. Order No. 12,866 § 6(b)(2)(B)–(C), 3 C.F.R. 638, 647 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

222 Sunstein, *supra* note 27, at 1847. Sunstein quotes the provision of the order providing that "[t]he review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head," *id.* at 1847 n.39 (quoting Exec. Order No. 12,866 § 6(b)(2)(C), 3 C.F.R. 638 at 647) (internal quotation marks omitted), and notes that it "might be taken to be ambiguous because of the use of the word 'and,'" *id.* However, he states that "it has long been understood that the agency head may request an extension of any length, including an indefinite one." *Id.*

223 GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 47 (internal quotation mark omitted). The number of review periods lasting more than ninety days dropped significantly in the year of this instruction, suggesting that it had noticeable effect. *See id.* at 46 fig.7.

224 *See, e.g.*, *White House Delays Whale Protection Rule*, CENTER FOR EFFECTIVE GOV'T (July 24, 2007), http://www.foreffectivegov.org/node/3366 (citing delay and related concerns that "the Bush administration is giving special access to business interests and overemphasizing economic considerations in its review of the rule").

or letters.[225] As a result, agencies can insulate themselves from political control by attempting to truncate the amount of time effectively available for review. Managing that amount of time reduces the number of issues that can be raised and resolved during the process and thereby increases the pressure for reviewers to prioritize some issues and ignore others that might have otherwise been subject to reversal.

This dynamic is strongest in the context of rules with judicial and statutory deadlines, though it also applies to other internal administration deadlines, such as announcements or high-profile events. Both courts and Congress can impose deadlines on agency action, including ones to commence or complete an action by a specified date.[226] The Hazardous and Solid Waste Amendments of 1984,[227] for example, contained more than sixty statutory deadlines for the issuance of specific regulations regarding the land disposal of hazardous waste.[228] As another example, the Defenders of Wildlife and the National Audubon Society sued the Department of the Interior's Fish and Wildlife Service in 2007, alleging the department's failure to implement an adequate plan governing off-road vehicle use.[229] In April 2008, the plaintiffs agreed to a consent decree, which established a judicial deadline of April 1, 2011, for the final rule.[230] While agencies are able to comply with only a fraction of these deadlines in practice,[231] such deadlines can nonetheless be powerful motivations for expedited behavior.

A number of courts, in turn, have held that the presidential review process cannot delay the promulgation of regulations subject to such

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[225] *See, e.g.*, Letter from Sens. Frank R. Lautenberg & Sheldon Whitehouse to Cass Sunstein, Adm'r, Office of Info. & Regulatory Affairs 1 (Sept. 9, 2011), *available at* http://www.whitehouse.senate.gov/imo/media/doc/Lautenberg-Whitehouse%20Letter%20to%20Sunstein%20%289-9-11%29.pdf (asking OIRA Administrator to conclude review given that EPA's "proposed rule listing chemicals of concern" was sent to OIRA "nearly 500 days ago and well beyond the 90 days authorized for OIRA review").

[226] *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 925 (2008).

[227] Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended in scattered sections of 42 U.S.C.).

[228] 42 U.S.C. § 6901 (2006); *see also* Alden F. Abbott & Gordon L. Brady, *The Political Economy of Statutory Deadlines*, 10 CATO J. 703, 704 n.1 (1991).

[229] *See* Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore, 77 Fed. Reg. 3123, 3124 (Jan. 23, 2012) (codified at 36 C.F.R. § 7.58 (2012)) (discussing lawsuit and judicial deadline).

[230] *Id.* Numerous other examples of judicial deadlines abound. *See, e.g.*, Pub. Citizen Health Research Grp. v. Auchter, 702 F.2d 1150, 1158–59 (D.C. Cir. 1983) (per curiam) (holding that the Occupational Safety and Health Administration must propose a rule by April 15, 1983).

[231] *See* Richard J. Pierce, Jr., Response, *Presidential Control Is Better than the Alternatives*, 88 TEX. L. REV. SEE ALSO 113, 117 (2010), http://www.texaslrev.com/wp-content/uploads/Pierce-88-TLRSA-113.pdf ("[T]he EPA complies with only fifteen to twenty percent of the statutory provisions that require it to issue legislative rules within statutorily specified time periods.").

deadlines.[232] In *Environmental Defense Fund v. Thomas*,[233] for example, the district court ruled that "OMB has no authority to use its regulatory review . . . to delay promulgation . . . beyond the date of a statutory deadline."[234] Similarly, the D.C. Circuit found an Occupational Safety and Health Administration (OSHA) rule to be lawful despite the fact that OMB still had objections at the time the final rule was issued under a judicial deadline.[235] As a result, statutory and judicial deadlines potentially "let the agencies 'game' OMB by holding rules and analyses until the last minute" and, in effect, truncate the amount of available review time.[236] In other words, agencies can wait to submit rules to OIRA less than ninety days before the applicable deadline, thereby insulating various aspects of the rule.

Even in the absence of statutory or judicial deadlines, agencies have other means with which to reduce effectively the amount of review time devoted to a given rule. For example, they could submit a number of lengthy, economically significant rules all at once to the same desk officer, thereby reducing the amount of time the desk officer can devote to each rule. Some observers of the presidential review process also describe a practice involving the addition of provisions to draft rules as bargaining chips that "would be available" for agencies "to give away" or negotiate during presidential (or later, judicial) review in order to protect what they perceive as the most important provisions of a rule.[237] If common or widespread, this practice would allow agencies to spend significant amounts of time during the review negotiating provisions that distract from others that are, in reality, more important to them.

4. Coalition Building. — Even if an agency is unable to bypass review, calibrate its scrutiny, or truncate the amount of time available, it can still insulate its decisions by building coalitions with the multiple

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[232] Indeed, President Clinton's executive order explicitly states that "[n]othing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law." Exec. Order No. 12,866 § 9, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[233] 627 F. Supp. 566 (D.D.C. 1986).

[234] *Id.* at 571.

[235] *See* Pub. Citizen Health Research Grp. v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986); *see also In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 551 (D.C. Cir. 1999) ("[T]he President is without authority to set aside congressional legislation by executive order, and the 1993 executive order does not purport to do so.").

[236] James C. Miller III, *The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future*, 63 ADMIN. L. REV. (SPECIAL EDITION) 93, 99 (2011); *see also* Arthur Fraas, *Observations on OIRA's Policies and Procedures*, 63 ADMIN. L. REV. (SPECIAL EDITION) 79, 86–87 (2011) (discussing examples of rules that "flowed through OIRA 'lickety-split' quickly," *id.* at 86, due to judicial or policy-directed deadlines).

[237] *E.g.*, Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 693 (2007).

actors involved in the review process — career civil servants, other executive branch agencies, or the various entities within the Executive Office of the President (EOP). This overall strategy would amount to increasing the costs of review and reversal given that more resources would need to be spent "mediating" the disagreements between more actors or "elevating" the disagreements to increasingly higher levels of decisionmakers.[238] Concretely, these resource costs could include the staff time required to brief relevant policy officials, as well as the efforts required to plan, schedule, and attend meetings. At the same time, of course, this strategy would also raise the agency's own decision and transaction costs and so will likely be engaged only when most valuable.[239] Accordingly, this section now relaxes the assumption that the "President" is a singular entity to give way to a more nuanced consideration of the President and his multiple agents.[240]

The EOP manifests the "institutional response" to the President's need for various monitors to gather information about a vast bureaucracy.[241] First established by executive order in 1939, the original Executive Office consisted of the White House Office, OMB, the National Resources Planning Board, the Office of Government Reports, and "such office for emergency management as the President shall determine."[242] The number and nature of entities within the EOP has evolved over the years, but some of the most enduring include: the White House Office (containing, for example, the Domestic Policy Council[243] and the National Economic Council[244]); OMB; the Council of Economic Advisers; the National Security Council; the Council on Environmental Quality; and the Office of the U.S. Trade Representative.[245]

(a) Career Staff. — Of these entities, the largest is OMB, which consists of a number of offices, including OIRA, several "resource management offices" that evaluate and review budget requests, and

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[238] *See* Sunstein, *supra* note 27, at 1856–58.

[239] *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1181–83 (2012).

[240] *See* Kagan, *supra* note 37, at 2338–39; Moe & Wilson, *supra* note 49, at 14.

[241] *See* MATTHEW J. DICKINSON, BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH 117 (1997); HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-606 GOV, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW 1 (2008).

[242] Exec. Order No. 8248, 3 C.F.R. 576 (1938–1943).

[243] *See* Exec. Order No. 12,859, 3 C.F.R. 628 (1994) (establishing Domestic Policy Council).

[244] *See* Exec. Order No. 12,835, 3 C.F.R. 586 (1994) (establishing National Economic Council).

[245] *See* RELYEA, *supra* note 241, at 9–10; Freeman & Rossi, *supra* note 239, at 1176–78. For a more complete list of current EOP offices with brief descriptions, see *Executive Office of the President*, WHITE HOUSE, http://www.whitehouse.gov/administration/eop (last visited Mar. 30, 2013) (describing EOP components).

others as well.[246] OMB differs from most other units within the EOP in that it has a staff consisting primarily of career civil servants.[247] As such, it can offer assistance and advice to the President from expertise gained through institutional memory and experience. Within OIRA, the Administrator is appointed by the President and confirmed by the Senate, and in addition to other possible members of its political leadership, there are also about forty to fifty career staff, as well as a Deputy Administrator, who serves as the senior career manager.[248] Of this already small staff, only about twenty to thirty consistently engage in regulatory review. They include "desk officer[s]" and their supervisors, "branch chief[s]" who oversee portfolios of agencies and substantive policy areas.[249]

Many desk officers have been at OIRA for many years, though some depart after only a few. Some of the more senior career staff, including the branch chiefs, are also veterans of several administrations and thus possess institutional knowledge and experience.[250] The same is true of the resource management offices with whom OIRA "may work closely."[251] As a result, many of the career staff have developed productive and longstanding professional relationships with other career staff at the rulemaking agencies. These relationships are likely mutually beneficial for facilitating their repeated transactions and for amicably resolving difficult and often technical issues.[252] Because of these relationships and longer time horizons, however, there is an incentive for agency career staff to insulate their decisions by resolving issues with other career staff (whether at other agencies involved in interagency review or at OMB), rather than allowing the issues to be

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246 *See* Freeman & Rossi, *supra* note 239, at 1178; *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission (last visited Mar. 30, 2013).

247 *See* ARBUCKLE, *supra* note 205, at 25; TOMKIN, *supra* note 57, at 3.

248 *See* ARBUCKLE, *supra* note 205, at 9 n.23; Sunstein, *supra* note 27, at 1845. The titles and composition of OIRA's political leadership can vary from administration to administration. *Compare* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 19 fig.2 (displaying OIRA organizational chart for one point during the George W. Bush Administration), *with* Sunstein, *supra* note 27, at 1845 (discussing OIRA political leadership during the Obama Administration).

249 ARBUCKLE, *supra* note 205, at 22; Sunstein, *supra* note 27, at 1845.

250 *See* West, *supra* note 62, at 84 ("Although a significant percentage of the desk officers who initially review rules leave after a few years . . . , most of the senior civil servants who are the keepers of OIRA's professional norms and sense of mission are veterans of several presidencies.").

251 Sunstein, *supra* note 27, at 1845.

252 *See id.* at 1847 ("Sometimes, of course, OIRA will have significant suggestions of its own, stemming in the first instance from OIRA staff, and will convey its views to the agency. . . . [Changes] are often highly technical or procedural ones, and made without any involvement on the part of OIRA's political leadership.").

subject to the political, and thus more uncertain, scrutiny of high-level decisionmakers.[253]

The decision whether to elevate an issue to higher-level decisionmakers will likely depend on the respective staff members' senses of the political dynamics and whether their arguments might prevail during the resulting negotiations. In the words of one OIRA desk officer: "It's embarrassing to raise something up and to get knocked down . . . . So people specifically think about that question, and try to anticipate whether they're going to get [political] support or not. And if you don't think you are, you don't waste the person's time a lot of the times."[254]

Because they have been working together for longer periods of time, agency career staff may prefer to resolve issues with other staff members they know, and whose viewpoints may thus be more familiar. The threat of elevation can in this manner serve as a stick. While the potential for preference divergence between civil servants and political appointees is well known,[255] even when preferences are aligned, agencies still save resources by resolving issues at the staff level. Of course, when an agency thinks it is more likely to get support from a higher-level decisionmaker, this incentive is reduced and elevation is preferable, despite the greater resource costs.

(b) White House Offices and Other Executive Agencies. — The literature is rife with misleading references to "OIRA review," as if to suggest that OIRA is the only office engaging in the review process.[256] But presidential review is not bilateral; rather, it involves multiple actors and reviewers of which OIRA is but one, though it does serve a central, coordinating function — what Professor and former OIRA Administrator Cass Sunstein refers to as that of a "convener" or "facilitator."[257] After an agency submits a rule for review, "the relevant

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[253] *See* MCGARITY, *supra* note 214, at 280 (reporting that, in the past, "the regulatory analysts in the Office of Policy Analysis of EPA have used OMB review as an opportunity to wage anew battles that they lost internally" and that "OMB analysts frequently telephone the lead analysts in EPA for a different view of EPA regulations, and they can use the insights gained from those conversations in OMB's future discussions with EPA program office staff and with upper-level decisionmakers").

[254] David Lazer, *Regulatory Review: Presidential Control Through Selective Communication and Institutional Conflict* 122 (Ctr. for Pub. Leadership Working Paper Series, No. 03-04, 2003) (first alteration in original), *available at* http://hdl.handle.net/1721.1/55802 (reporting on and analyzing interviews with OIRA staff).

[255] *See, e.g.*, Clinton et al., *supra* note 51, at 352 ("[O]ur estimates confirm that the preferences of career professionals differ from political appointees."). *See generally* ROBERT MARANTO, BEYOND A GOVERNMENT OF STRANGERS (2005).

[256] *See, e.g.*, Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1424 (2011) ("[T]hrough the OIRA review process, the President has a powerful tool for identifying and addressing unreasonable delays in agency actions.").

[257] Sunstein, *supra* note 27, at 1856.

OIRA desk officer . . . will generally circulate the rule to a wide range of offices and departments, both within the Executive Office of the President and outside of it."[258] The decision regarding which offices should see the rule will likely depend on a number of factors, including whether the office is perceived to have relevant information and expertise[259] or has otherwise expressed an interest in the rule. These EOP entities often include "the Council of Economic Advisers, the Council on Environmental Quality, the Domestic Policy Council, the National Economic Council, the National Security Council, the Office of Legislative Affairs, the [OMB], the Office of Science and Technology Policy, the Office of the Vice President, the U.S. Trade Representative, and the White House Counsel."[260]

In this manner, any number of other agencies and EOP entities, from only a few to many, could be involved in the review of a rule, depending on the political visibility and substance of the regulation at stake. As they receive comments and questions back from these reviewers, OIRA staff will often add their own before transmitting the comments back to the agency.[261] OIRA then coordinates a process whereby it attempts to help refine and resolve arising issues through multiple rounds of comments and questions, followed by possible revisions and responses by the agency. During this process, the more the rulemaking agency has successfully built coalitions with other commenting entities, the more likely it is to insulate its decisions from reversal as the issue is discussed or elevated since the review costs are now higher (there must be more meetings, briefings, and coordination among a now greater number of actors).[262]

To illustrate, consider Professors Lisa Bressman and Michael Vandenbergh's empirical study relying on interviews with EPA senior political officials. They report that during the George H.W. Bush and Clinton Administrations, "[a]s many as nineteen White House offices were involved in EPA rule-making."[263] Often, these White House offices fostered a "climate of internal combat and coalition-building" and

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[258] *Id.* at 1854; *see also* GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 34.

[259] Sunstein, *supra* note 27, at 1854–57 (listing frequent rule recipients).

[260] *Id.* at 1855.

[261] *Id.* at 1856. For a more detailed overview of the process, see *id.* at 1854–59.

[262] The normative value of self-insulation through coalition building is ambiguous in that it will depend on the nature of the particular coalition. On the one hand, coalition building with other informed and expert entities within the executive branch is likely to be constructive and will result in a better-informed decision, and thus a stronger rule. On the other hand, if agencies manage to build coalitions with entities that do not necessarily have better expertise, or that simply have higher status in the decisional EOP hierarchy, then self-insulation in these circumstances is less clear and may depend on the nature of the authorizing statute. For a more general discussion of the normative tradeoffs, see Freeman & Rossi, *supra* note 239, at 1181–91. *See also infra* section III.B, pp. 1822–34.

[263] Bressman & Vandenbergh, *supra* note 30, at 68.

"competed for influence over the content of . . . proposed rules, enlisting other offices, the vice president, and even the president himself to mediate the disputes."[264] EPA survey respondents reported that they sometimes turned to other White House offices to bolster opposition to OIRA, and other offices and agencies made use of OIRA to combat the EPA.[265] At other times, OIRA and the EPA could be allies against other offices and agencies.[266] One commentator noted that "[n]ormal constituency groups" such as the Council on Environmental Quality and the Vice President often took the EPA's side when disagreements arose with other agencies, such as the Department of Energy.[267]

Should disagreement among reviewers persist, Executive Order 12,866's conflict-resolution mechanism provides that "disagreements or conflicts between or among agency heads or between OMB and any agency . . . shall be resolved by the President, or by the Vice President acting at the request of the President."[268] In practice, however, most disagreements are resolved well before the issue is elevated to the presidential level.[269] In this manner, the self-insulating agency can work during the review process to garner support for a policy decision from particular reviewers that might hold sway in the White House. When successful, such coalition-building efforts will raise the cost of review by increasing the amount of capital necessary to reverse the agency, as well as the time and resources necessary to resolve disputes.[270]

B. Applications

While agencies can choose among regulatory instruments that vary in terms of their policy impacts and the amount of information available for review, the question of *whether* to self-insulate in the first place will itself depend on a number of factors.[271] As presented here, an im-

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[264] *Id.*

[265] *Id.* at 69.

[266] *See id.*

[267] *Id.* at 68 (internal quotation mark omitted).

[268] Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[269] *See* Sunstein, *supra* note 27, at 1857 ("In relatively rare cases, discussion at the Assistant Secretary level does not resolve the issue . . . ."); *see also* John Spotila, Presidential Oversight: A Panel Discussion with Regulatory "Czars" from Reagan to Bush 14 (Dec. 6, 2006) (transcript available at https://www.law.upenn.edu/institutes/regulation/conferences/OIRAPanelTranscript.pdf) ("During my tenure [as OIRA Administrator from 1999 to 2000], in many of the issues that went higher it was really the Chief of Staff that ultimately brokered the decision process — and, to the extent necessary, spoke to the President about it.").

[270] *Cf.* Freeman & Rossi, *supra* note 239, at 1181–82 (discussing how "costs tend to rise with the burdensomeness of [review]," especially where "extensive negotiations" and "significant staff time and resources" are involved, *id.* at 1182).

[271] The agency's decision costs and the President's choice of reversal instrument will also be relevant; regarding the latter, in practice return letters are infrequent, and the most common reversals are probably changes made within rules, or else agency withdrawal.

portant factor is the probability of the potential preference divergence between the agency and the President. That is, holding resources constant, agencies will be more likely to self-insulate the greater the chance that the President will have different preferences, thus resulting in likely reversal. By contrast, if it expects the President to agree with its decisions, then the agency will be less likely to self-insulate. In technical terms, an agency will be more likely to choose an instrument likely to raise reviewing costs the greater the distance between the agency and the President's expected ideal points.[272]

With these dynamics in mind, this section now considers some potential applications of the framework developed. Generally speaking, the theory bears on the agency's choices at the point at which it submits a regulatory action for review, as a function of changes in expected preference divergence and decision costs.[273] Insofar as this discussion marshals the decidedly mixed existing evidence, it does so only to illustrate the plausibility of the hypotheses generated. Further empirical work would be necessary to test whether the theory of self-insulation can explain systematically the variations in agency behavior. The modest hope here is to point in some potentially fruitful directions, as further data become available. Note that such future work could, for example, use the independent regulatory agencies as a control group, given that they are not subject to the formal presidential review process.[274] It might also consider how to account for the potentially offsetting effects of greater politicization through appointments, and other related efforts to counter agency slack.[275]

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[272] *See* Tiller & Spiller, *supra* note 3, at 361; *see also* Posner, *supra* note 20, at 1150–58.

[273] More specifically, the main dependent variables for agency self-insulation might include counts of various policymaking forms, scorecard measures of CBA quality, and variations in rule submission dates relative to statutory and judicial deadlines. Coalition-building efforts may be more difficult to analyze on a large-scale empirical level, particularly given the lack of access to executive branch deliberations; in this context, in-depth case studies and first-person accounts may prove more useful to better understanding this dynamic. The main independent variables, in turn, might include party affiliation of the administration or various policy-preference measures of individual agencies. *See, e.g.*, Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, 16 POL. ANALYSIS 3, 4 (2008) (proposing method for measuring agency preferences based on expert surveys and a "multirater item response model to jointly analyze the responses and objective information about agency characteristics").

[274] *See* Exec. Order No. 13,563 § 7(a), 3 C.F.R. 215, 217 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 101–02 (2006 & Supp. V 2011); Exec. Order No. 12,866 § 3(b), 3 C.F.R. 638, 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (defining "agency" for purposes of presidential review as that provided for in 44 U.S.C. § 3502(1), and excluding "independent regulatory agencies" as defined in 44 U.S.C. § 3502(10), both provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3502–3520 (2006)).

[275] *See* Moe & Wilson, *supra* note 49, at 18–19. Note that, dynamically speaking, changes in appointments and personnel are often much slower to occur relative to changes in the various policy decisions contained in rules. For this reason, while specific review efforts and politicization through appointments could be substitutes, they will ultimately be imperfect substitutes such that one would still expect the self-insulation effect to be observable. Aggregate data also suggest that,

1. Midnight Rulemaking. — One scenario in which agencies are better able to predict presidential preferences, relative to the status quo, is after the next President has been elected, a situation ripe for "midnight rulemaking." Midnight rulemaking is the frenetic promulgation of regulations during the last ninety days of a presidential administration and is particularly common when the incoming President is from a different party.[276] In these circumstances, executive agencies can expect more preference alignment during review from the current administration relative to the next one; thus, one would expect to see less self-insulation in these situations.

Some empirical findings support this prediction. One study, for example, analyzes agency regulatory activity during midnight periods from February 1981 through January 2009.[277] First, it finds a statistically significant increase in the total number of economically significant regulations submitted to OIRA during midnight periods relative to non-midnight periods. Specifically, the average monthly number of economically significant rules rose by about six, roughly a fifty percent increase from the average monthly quantity during the entire period.[278] Other studies also show that agencies issue rules with the most "highly visible" costs during midnight periods.[279] These results are consistent with the notion that agencies will choose to submit more economically significant rules over other instruments, such as nonsignificant rules, under conditions of expected preference alignment. That is, agencies will be less likely to self-insulate through instrument choice as the risks of presidential reversal decrease relative to the next administration.[280]

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since 1980, the number of political appointees has remained fairly constant as a percentage of federal government appointees, which may further help to mitigate the potential confounding effects of variations in political appointments. *See* LEWIS, *supra* note 50, at 98–100.

276 *See* O'Connell, *supra* note 7, at 891–92, 894 n.11; *see also* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, MICH. J. ENVTL. & ADMIN. L. (forthcoming 2013) (manuscript at 4), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=2121796 (defining "Midnight Rules as agency rules promulgated in the last 90 days of an administration").

277 *See* Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 PUB. CHOICE 395, 398 (2011).

278 *Id.* at 405.

279 *E.g.*, Stuart Shapiro & John F. Morrall III, *The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience*, 6 REG. & GOVERNANCE 189, 198 (2012) ("Non-midnight regulations do have higher benefits and lower costs, which supports the point often made, that administrations wait until the last minute to get out the rules most likely to have potential negative electoral consequences (rules with highly visible costs).").

280 Of course, in addition to the agency's supply of rules, one must also take into account the President's demand for them; during these periods, that is, it is also highly likely that outgoing EOP entities will be attempting to spur certain kinds of regulatory action in anticipation of their departure. *See* Beermann, *supra* note 276, at 6 (noting the argument that midnight rulemaking could reflect an "outgoing administration" that is "projecting its agenda into the future"). For a discussion of how EOP offices can "prompt" regulatory actions, see Sunstein, *supra* note 27, at 1849–50.

This choice not to self-insulate is likely aided by a White House eager to release the rules or otherwise "burrow" its policies before the change in power.[281]

One would also expect this dynamic to hold with respect to an agency's choice between significant rules and guidance documents. When the current President is perceived as more of an ally than the incoming one, an agency will shift away from self-insulation as a strategy by choosing rulemaking over guidance documents, which are more difficult to review. One empirical investigation examines the ratio of the number of guidance documents to the number of legislative rules issued from 1996 to 2006 for five representative agencies: the EPA, the Food and Drug Administration (FDA), the Federal Communications Commission (FCC), OSHA, and the Internal Revenue Service.[282] While a more precise test of self-insulation would compare the number of guidance documents to the number of submitted (rather than issued) rules,[283] this analysis finds that agencies increase the frequency with which they issue guidance documents relative to rules during the first three years of a presidential administration, with the ratio decreasing afterwards.[284] This finding could be consistent with the self-insulation hypothesis, since closer and more certain preference alignment with the current administration (relative to the next) should decrease the incentive to insulate through guidance documents versus rules. At the same time, however, the study's data are limited and the author concludes that nonstrategic factors, such as the agency's desire to reduce compliance costs through greater clarity, may better explain the agency's choice.[285] For these reasons, future work should extend this dataset and continue to build upon these valuable empirical efforts.

2. Variations in Cost-Benefit Analysis Quality. — As expected presidential preferences vary across different administrations, one would also expect to see variations in the quality and form of submitted CBAs. A simple theory would be that, for a President with an antiregulatory stance, an agency would have a greater incentive to provide a poorly translated CBA, since doing so would increase the costs

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[281] *See generally* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

[282] *See* Raso, *supra* note 164. Of course, the FCC, as an independent regulatory agency, is not subject to presidential review — but the data here are presented in the aggregate, and the FCC alone is unlikely to change the direction of the empirical findings, though future work could separate it out from the rest of the dataset.

[283] The number of rules actually issued by the agency would be an imperfect proxy for agency efforts to self-insulate, since self-insulation implicates agency behavior at the point of presidential submission. Furthermore, counting the number of issued rules would also reflect the President's decisions about which rules to allow to be released, though the number could serve as a rough indicator of agency choice between policymaking forms.

[284] Raso, *supra* note 164, at 821–22.

[285] *See id.* at 802.

of review and facilitate self-insulation through obfuscation.[286] Conversely, under a proregulatory administration, a higher-quality CBA might become a more attractive instrument, since the probability of reversal would generally be lower, leading the executive agency to worry less about presidential review than about judicial review (an exogenous factor that would encourage the submission of better CBAs, as later discussed).[287]

Shedding possible light upon this prediction, Robert Hahn and Patrick Dudley's study scores the CBA quality of seventy-four economically significant EPA rules published from 1982 to 1999: twenty-seven from the Reagan Administration, twenty-four from the George H.W. Bush Administration, and twenty-three from the Clinton Administration.[288] More specifically, Hahn and Dudley examine various indicia of quality, such as whether the analysis includes estimates of monetized costs and benefits and a consideration of alternatives, along with the overall clarity of presentation and the specification of analytical assumptions.[289] While their general conclusion is that there is "no clear trend in the quality of benefit-cost analysis across administrations,"[290] a look at some of the disaggregated factors may help to reveal more specific avenues of self-insulation.

For example, Hahn and Dudley examine whether the analyses contain a point estimate or a range for total expected costs.[291] A point estimate is presented as a single number, while a range estimate includes two points bounding a significant portion of the confidence interval. Both sets of data give political principals important information about key components of the expected impacts of a regulation.[292] The authors find that, under the Reagan Administration, fifteen percent of the CBAs provided neither a point estimate nor a range for total costs.[293] This figure was seventeen percent during the Bush Administration, dropping down to four percent under President Clinton.[294] In other words, the EPA was more likely to provide a CBA that contained less useful information about costs during a Republican administration than during a Democratic administration. Given that the traditionally proregulatory EPA's preferences were likely to diverge

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[286] For a discussion of the complex potential relationship between CBA quality and reversal probability, see *supra* section II.A.3, pp. 1796–98.

[287] For a discussion about judicial review's potential effects on CBA quality, see *infra* section II.C, pp. 1811–13.

[288] *See* Hahn & Dudley, *supra* note 210, at 197.

[289] *Id.* at 198, 204–05.

[290] *Id.* at 206.

[291] *See id.* at 199.

[292] *See id.*

[293] *Id.*

[294] *Id.*

from those of the more antiregulatory Republican Presidents, one hypothesis is that the EPA was more likely to engage in self-insulation by decreasing CBA quality. Conversely, when there was more expected preference alignment under President Clinton, this self-insulating behavior was less likely to occur, resulting in higher-quality CBAs.[295]

In a more recent paper, Professor Stuart Shapiro and John Morrall examine a database of 109 economically significant rules issued between 2000 and 2009. They construct a six-point quality index for the accompanying CBA based on a number of factors related to the analyses' "thoroughness."[296] Upon comparing the quality scores with the net benefits of the rules, they observe that "rules that most barely clear the net benefit threshold had the least useful analyses supporting them."[297] Shapiro and Morrall hypothesize that one explanation for this result could be that "for rules that are close to this threshold, agencies may be under pressure to make sure the analysis shows positive net benefits. This pressure may result in a less thorough . . . analysis."[298] In other words, "having low net benefits leads to analysis that omits critical factors."[299] Assuming that Presidents would be more likely to reject rules with small net benefits, this finding would be consistent with the notion that agencies attempt to self-insulate by decreasing the quality of CBAs for rules with low net benefits.

However, Shapiro and Morrall also find that average CBA quality was greater for rules with negative net benefits than for rules with positive net benefits below $1 billion.[300] This finding would not support the self-insulation hypothesis since agencies would presumably seek to shield those rules. More research would thus be necessary to determine whether other explanatory factors, such as exogenous statu-

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[295] Of course, this hypothesis should not be overstated; there are other possible explanations for this divergence between administrations, such as an agency's greater experience with, and thus improvement in, preparing CBAs. The study also finds that point estimates of total costs were more common than ranges during the Reagan and Clinton administrations. By contrast, point estimates were just as common as ranges during the Bush administration, while few analyses provided both a point estimate and range during any administration. *Id.* Though the usefulness of point estimates versus ranges is likely to vary depending on the issue, the underlying uncertainties, and the magnitude of the range, these findings suggest that, at a minimum, further research in this area could be valuable.

[296] *See* Shapiro & Morrall, *supra* note 279, at 195–96.

[297] *Id.* at 197.

[298] *Id.* at 197–98.

[299] *Id.* at 198. The authors call this notion "problematic," *id.*, because one of their hypotheses is that CBA quality "may generate regulations that produce greater net benefits," *id.* at 190. The theory of self-insulation, however, provides a contrary account.

[300] *See id.* at 197 tbl.2. More specifically, they find that rules with negative net benefits had an average quality score of 3.95 out of a possible 6; rules with net benefits between $0 and $100 million had a score of 3.03; rules with net benefits between $100 million and $1 billion had a score of 3.79; and finally, rules with net benefits over $1 billion had an average score of 4.04. *Id.*

tory constraints[301] or a higher likelihood of litigation for negative net-benefit rules, may have created a cross-cutting incentive to improve CBA quality in anticipation of judicial review.[302] If not, then this finding would counsel in favor of rejecting the self-insulation theory, or at least concluding that it is not the dominant effect.

Note that one difficulty with this line of research in general is that simply scoring an agency's published CBA does not allow one to disentangle how much of its quality reflects agency self-insulation at the point of submission and how much reflects presidential reviewers' differential efforts to spend resources in an attempt to improve its quality. In other words, while agency self-insulation refers to the supply of CBAs, there may be important countervailing considerations on the demand side as well, which will be reflected in the ultimately published analysis.[303] To illustrate, consider another recent study, which scores the CBA of economically significant regulations in 2008, 2009, and 2010. The authors find, among other things, that "conservative agencies" had higher-quality CBAs under the first Obama Administration, while more "liberal agencies" exhibited the same tendency under President George W. Bush.[304]

While the study uses only three years of data, thus limiting the generality of its conclusions, these findings on their face contradict the notion that self-insulation by itself explains the relevant variation, since one would expect exactly the opposite dynamic. The authors explain their results by reference to the differential demands likely during presidential review. In their words:

> This pattern is consistent with the hypothesis that an administration demands less thorough analysis from agencies whose underlying policy views are more congruent with the administration's. Conversely, an agency whose policy preferences differ from the administration's must produce better analysis to get its regulations through.[305]

This dynamic is indeed a critical one, though it is important to remember that agencies often have more control over CBA quality as the first mover, given the limited time and resources available for review.

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[301] *See* Sunstein, *supra* note 27, at 1865 & n.94 (citing the "'positive train control' rule, which requires certain technology to be placed on trains" and explaining that "even if the rule does not have net benefits, . . . agencies may have plausible explanations," such as that "the law requires them to proceed even if the monetized benefits are lower than the monetized costs").

[302] *See infra* section II.C, pp. 1811–13.

[303] *See* Acs & Cameron, *supra* note 24, at 22–28.

[304] *See* Jerry Ellig, Patrick A. McLaughlin & John F. Morrall III, *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across US Administrations*, REG. & GOVERNANCE (forthcoming 2013) (manuscript at 14), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2012.01149.x/abstract.

[305] *Id.*

In any case, because of these potential demand-side dynamics, the best measure for testing the self-insulation theory would be the CBA quality when the analyses were submitted to OIRA, as opposed to after they had undergone presidential review and been published. This evaluation would be possible if agencies released their submission drafts or specified the changes made as a result of presidential review, as required by current executive orders; however, this is not frequently done as a matter of practice.[306] Confronted with this paucity of data, one could plausibly assume (if resources were relatively fixed throughout the relevant period) that the substance of the review remained fairly systematic and that the overall quality of the published CBA could thus serve as a rough proxy for agency effort. But this assumption may ultimately prove heroic, perhaps further supporting arguments for changes in agency disclosure practices.

3. Strategic Timing. — Finally, as expected presidential preferences vary across different administrations, one would also expect to see variations in the degree to which agencies exploit statutory or judicial deadlines in attempts to truncate the amount of review time. Specifically, as agencies expect a greater probability of reversal, they would be more likely to submit rules closer to external deadlines, effectively allowing less review time than the default ninety days provided by executive order. Recent empirical work provides some support for these predicted dynamics. One such study, for instance, examines all economically significant regulations proposed in 2008 and finds that statutory deadlines led to considerably shorter presidential review times.[307] The magnitude of diminished review was substantial, ranging from thirty-eight percent to ninety percent less review time.[308] In line with these findings, the paper also reports that statutory deadlines result in lower-quality CBAs. After scoring such analyses, the authors find that regulations with statutory deadlines had a mean quality value of 22.1 points versus 27.3 points for the entire sample.[309]

On the one hand, these findings suggest that agencies faced with statutory deadlines are likely to allow less time for review based on when they submit their rules to OIRA. They also suggest that the quality of the CBAs suffers as a result. Even if a deadline extends beyond the review window, it reduces the threat that OIRA could return the regulation because the agency is legislatively or judicially mandated to issue it. In this manner, "statutory deadlines could undermine

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[306] *See infra* notes 372–373 and accompanying text.

[307] *See* Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. (SPECIAL EDITION) 179, 191–96 (2011).

[308] *Id.* at 196.

[309] *Id.* at 197.

the prospects for effective OIRA review."[310] On the other hand, a competing explanation could be that agencies operating under tight deadlines are working as fast as possible and submit their rules without allowing the full ninety days for review out of necessity, rather than strategically. The answer is ultimately an empirical question with the expected incentive to self-insulate becoming greater as the prospect of preference divergence becomes more likely.[311]

C. Mitigating Factors

Agency self-insulation consists of agencies' strategic choices amidst resource constraints to raise reviewing costs in the face of expected preference divergence. Identifying and exploring this phenomenon has been the main task of this Article. To provide a more complete account, however, this section now considers some potential mitigating factors, that is, some dynamics that may cut against the observable effects of self-insulation.[312] In other words, what other variables are likely to influence agency behavior that may reduce the incentive to self-insulate?

First, while the review process itself is costly and threatens costly reversals, agencies may also perceive benefits from it that will decrease their insulation incentive. Such benefits could include obtaining greater information and expertise from other executive branch entities,[313] as well as political support from a White House eager to "showcase and advance presidential policies."[314] Indeed, one way to think about presidential review is as a kind of ninety-day executive branch notice-and-comment process. As previously discussed, once an agency submits a draft rule to OIRA, the OIRA desk officer circulates the draft to other agencies and White House offices that she perceives may have a stake in or expertise related to the rule. OIRA then compiles the comments that it receives from these reviewers for the agency's consideration and response. The agency's response is then sent back to the reviewers, and after several rounds (or however many rounds time allows for) the

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[310] Gersen & O'Connell, *supra* note 226, at 968.

[311] One way to evaluate these rival explanations would be to examine when the statutes with deadlines were passed (thus giving the agency notice of the deadlines), how long the statute then granted the agency to act, and what proportion of this time period was allowed for presidential review before the deadline, based on the agency's submission. The lower the proportion of review time to the amount of time the agency had to prepare the rule, the higher the likelihood of strategic behavior.

[312] These factors could appear in the error term of models exploring the relationship between the variables identified here. *See generally* Damien Fennell, *The Error Term and Its Interpretation in Structural Models in Econometrics*, *in* CAUSALITY IN THE SCIENCES 361 (Phyllis McKay Illari et al. eds., 2011).

[313] *See* Sunstein, *supra* note 27, at 1840–41, 1855–57.

[314] Kagan, *supra* note 37, at 2248.

issues are slowly resolved and whittled down through some combination of calls, memos, and meetings.

In this sense, the process helps to foster an "interagency dialogue" and to identify those issues potentially worthy of elevation to higher-level officials.[315] Accordingly, it can serve as a useful information-forcing mechanism for agencies from various executive branch vantage points on a variety of substantive issues; it can also help agencies anticipate the procedural and legal issues likely to arise during a proposed rule's notice-and-comment process or in litigation over a final rule.[316] The process can also provide agencies with "cover" for their initiatives in the form of White House support for dealing with their constituencies and critics. Undergoing review can similarly help agencies consider various political sensitivities and prepare for reactions from outside groups.[317]

Furthermore, the review process can be valuable for improving the quality of an agency's CBA either through technical assistance or by helping to consider various alternatives. Indeed, President Clinton's executive order explicitly characterizes OIRA as a "repository of expertise concerning regulatory issues"[318] and charges it with providing "meaningful guidance and oversight."[319] Numerous judicial developments have likely augmented the incentive for agencies to raise the quality of their CBAs, the most important of which is the D.C. Circuit's formulation of "hard look" review, which was eventually adopted by the Supreme Court in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*[320] According to the *State Farm* Court, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[321] Though rulemakings survive hard look review more often than not,[322] courts have sometimes found agency CBAs lacking under the standard.[323]

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315 *See* Pildes & Sunstein, *supra* note 90, at 14.

316 Shapiro, *supra* note 84, at 10,442–44; Sunstein, *supra* note 27, at 1840 (describing OIRA as, "in large part, an information-aggregator").

317 *See* Kagan, *supra* note 37, at 2249 (describing how President Clinton "personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own").

318 Exec. Order No. 12,866 § 2(b), 3 C.F.R 638, 640 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

319 *Id.* § 6(b), 3 C.F.R. at 646.

320 463 U.S. 29, 43 (1983).

321 *Id.* (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

322 *See* William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396 (2000).

323 In the well-known case *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1230 (5th Cir. 1991), for example, the Fifth Circuit vacated an EPA rule banning the manufacture and distribution of

The judicial development of "cost-benefit default principles" has only reinforced these dynamics.[324] These analyses can be improved and vetted through a robust presidential-review process, thereby potentially decreasing the incentives for self-insulation, particularly for those rules that the agency expects to be challenged in court.

A final factor likely to inform the agency's decision whether to self-insulate will be the amount of discretion available under the statute to engage in the regulatory action in the first place. Rules can result from statutory requirements that impose affirmative duties on agencies to enact a regulation, or they can arise from other sources, such as "issues identified through external sources (for example, public hearings or petitions from the regulated community) or internal sources (for example, management agendas)."[325] That is, rules can be required or simply authorized by relevant legislation; they can be nondiscretionary or discretionary. Nondiscretionary regulatory actions present situations in which the agency's preferences will be more closely aligned with those of the President for the simple reason that both actors are constrained by statute. Under these circumstances, an agency's incentives to self-insulate will be lower. On the other hand, discretionary regulations are much more likely to face resistance from the President if preferences diverge; thus, the incentive to insulate is higher.

III. IMPLICATIONS

A. President

From the President's perspective, agency self-insulation is disconcerting because many of the strategies, such as preventing significance determinations or obfuscating costs, serve only to exacerbate the information asymmetries that presidential review seeks to mitigate in the

asbestos products, citing a deficient CBA. The panel found that the EPA had failed to adequately consider alternatives to its ban and also expressed "concern[] about some of the methodology employed by the EPA," *id.* at 1218, including its insufficient attention to discounting, unquantified benefits, and exposure estimates, *id.* at 1218–19. The court further characterized the EPA's consideration of the costs of its proposed regulation as "cavalier" and its consideration of potential negative side effects as "cursory." *Id.* at 1223–24. Some have argued that the court required more than the statute demanded. *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1682 (2001). Nevertheless, such developments have created a greater incentive for agencies to produce a thorough rulemaking record with a high-quality CBA. More recently, the D.C. Circuit has exhibited a greater willingness to strike down rules based on their CBAs. *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (striking down a rule based on its CBA, albeit for an independent agency not currently subject to presidential review).

[324] *See* Sunstein, *supra* note 323, at 1654 ("[T]hese principles (1) allow de minimis exceptions to regulatory requirements; (2) authorize agencies to permit 'acceptable' risks, departing from a requirement of 'absolute' safety; (3) permit agencies to take account of both costs and feasibility; and (4) allow agencies to balance costs against benefits.").

[325] GAO, MONITORING AND TRANSPARENCY, *supra* note 134, at 12.

first place. Self-insulation also undermines the potential for robust interagency deliberation about the technical effects of a rule.[326] Moreover, instruments to bypass review can impose consequences that conflict with the presidential agenda. Instruments to calibrate scrutiny can undermine the public legitimacy of cost-benefit analysis. Timing strategies and coalition-building attempts only exacerbate the potential for adversarial antagonism. Accordingly, this section now briefly turns to the other half of the game, so to speak, and considers some of the possible presidential responses and strategies to deal with the phenomenon.

Specifically, it focuses as a prescriptive matter on some of the institutional ways that Presidents might attempt to reduce agency self-insulation, many of which already occur in practice as the need arises. This perspective continues the broader historical dynamic between the impulses of agency self-insulation and executive branch control. As agencies have learned to adapt and manage each new development to serve their own aims, Presidents have adopted incremental innovations in response — for example, through efforts to increase the scope of review,[327] to bundle rules together to prevent rule-splitting,[328] or to require information earlier in the review process.[329] Executive orders and other forms of oversight are followed by agency adaptation, which then spurs novel presidential responses, giving way yet again to new executive orders and guidance documents, and so on.

At the same time, note that the President's interest in minimizing self-insulation is itself constrained. Even with full information, the President will not always seek to maximize control at all times and, indeed, may sometimes find it beneficial not to do so.[330] Because the

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[326] *See* Sunstein, *supra* note 27, at 1843 (noting the value of consultation with technical experts).

[327] *Compare* Exec. Order No. 12,866 §§ 3(f), 6, 3 C.F.R. 638, 641, 645 (1994) (establishing review of regulatory actions likely to result in a rule), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011), *with* Exec. Order No. 13,422 § 7, 3 C.F.R. 191, 193 (2008) (revoked 2009) (expanding review to "significant guidance documents").

[328] A former OIRA branch chief, Arthur Fraas, reports that through parts of President Clinton's and President George W. Bush's Administrations, the EPA and OIRA had an informal agreement that the EPA would submit for review rules that cost over $25 million per year. One of the agreement's intended purposes was to prevent rule-splitting. *See* Email from Arthur Fraas, former chief, Natural Res., Energy, and Agric. Branch, Office of Info. & Regulatory Affairs, to author (May 10, 2012, 10:58 AM EDT) (on file with the Harvard Law School Library) (cited with author's permission).

[329] *Compare* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (revoked 1993) (no review of planned regulatory actions), *with* Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (revoked 1993) (review of planned significant regulatory actions).

[330] *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 601 (2010) (noting that the "President does not always have a political interest in seeking maximum control of regulatory policy"); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3169 (2010) (Breyer, J., dissenting) ("As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens' song, sometimes it is necessary to disable oneself in order to achieve a broader objective.").

review process is costly and his resources constrained, the President must be selective about which regulations to review and how much time to spend reviewing them.[331] His limited interest may arise from a judgment that spending resources reviewing a particular rule would be wasteful given clear signals that reversal would be highly unlikely. Or it may be due to a desire to seek distance from rules that are politically unpopular but are nevertheless required by statute. Finally, a credible promise to engage in limited review can be a valuable carrot when bargaining over some policy choice, either for current or future regulatory actions.

1. Minimizing Self-Insulation Incentives. — In situations where agency slack is undesirable and arises from imperfect information, however, the President could work to reduce the incentives to self-insulate in the first place. Because agencies' incentives to self-insulate increase (1) as their perceived preferences diverge from the President's and (2) as the independent benefits of review decrease, it is useful to think of both situations in turn.

First, the discussion so far has largely assumed that agencies have some access to information about presidential reviewers and can thus predict the likelihood of agreement. Indeed, they may rely on a number of proxies such as party affiliation, campaign promises, and information gleaned from their own informal contacts to predict likely review outcomes. That said, the current structure of presidential review can also generate a fair amount of uncertainty until the review process formally begins, particularly for those rules that are not high profile enough to merit informal discussion.[332] Because agencies can spend months or years conducting research and outreach before drafting a proposed rule, they can sometimes be caught flat-footed during review, hearing then for the first time concerns raised by the White House and other agencies.[333]

Even in cases where their preferences may not actually diverge, uncertainty can increase the incentive for agencies to self-insulate from presidential review. The higher the decision costs, the more costly a possible reversal, so insulation will increasingly become the safer strat-

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[331] For one positive theory and analysis, see Acs & Cameron, *supra* note 24, at 22–28, which models the President's targeting decision as an auditing game.

[332] *See* Sunstein, *supra* note 27, at 1850 ("For relatively less important rules, and those that do not implicate the interests or concerns of other parts of the government, agencies might engage in no interagency consultation in advance of the OIRA process.").

[333] *See, e.g.*, Elliott, *supra* note 97, at 171–74 (discussing hypothetical but realistic EPA Phlogiston rule and observing that in the eighteen months before EPA submitted the draft to OMB, "[t]here had been no contact between the EPA staff responsible for drafting the rule and the OMB staff responsible for reviewing it," *id.* at 173).

egy.[334] When insulation occurs under these circumstances, the outcome is inefficient in the sense that both parties might have chosen other outcomes had full information been available. While mechanisms to increase the amount of earlier information already exist by executive order, they are not used robustly in current practice. For example, President Clinton's executive order establishes a Regulatory Working Group, consisting of "representatives of the heads of each agency" that has "significant domestic regulatory responsibility, the Advisors, and the Vice President."[335] Its intended purpose was to "serve as a forum to assist agencies in identifying and analyzing important regulatory issues," and it was directed to meet "at least quarterly."[336] By the administration of President George W. Bush, however, the group was "no longer a functioning entity,"[337] and it currently meets only sporadically.

Similarly, the executive order provides for various early planning mechanisms such as "agencies' policy meeting[s]" held by the Vice President with the "Advisors and the heads of agencies to seek a common understanding of priorities," as well as the Unified Regulatory Agenda and Plan.[338] But the mechanisms' practical utility for the purposes of increasing the amount of available information has been, by all accounts, limited,[339] with one former OIRA Administrator opining that the regulatory agenda "process itself has become more of a paper exercise than an analytical tool. This is not new; before, during, and after my tenure at OIRA the focus was on the transactions."[340]

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[334] Conversely, when decision costs are low, agencies may be less likely to self-insulate given the potential benefits of review.

[335] Exec. Order No. 12,866 § 4(d), 3 C.F.R. 638, 643 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[336] *Id.*

[337] Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 997 (2008) ("[I]t appears that in the Bush Administration the Regulatory Working Group is no longer a functioning entity, despite its retention in the Order."). A recent executive order on international regulatory cooperation, however, calls for a great deal of coordination to be conducted through the Regulatory Working Group, which may revive the institution. *See* Exec. Order No. 13,609 § 2, 77 Fed. Reg. 26,413, 26,413–14 (May 4, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/05/01/executive-order-promoting-international-regulatory-cooperation.

[338] Exec. Order No. 12,866 § 4(a)–(c), 3 C.F.R. at 642.

[339] *See, e.g.*, Freeman & Rossi, *supra* note 239, at 1179 ("This planning process affords OIRA several opportunities to identify regulations that might implicate the jurisdiction or interests of other agencies, and to intervene to help ensure that such actions are consistent and coordinated. It is not clear, however, whether in practice OIRA spends significant resources on such tasks." (footnote omitted)).

[340] Katzen, *supra* note 76, at 111; *see also* William F. West, *Presidential Leadership and Administrative Coordination: Examining the Theory of a Unified Executive*, 36 PRESIDENTIAL STUD. Q. 433, 445–46 (2006).

Despite their authorization by executive order, what might explain the decline in the use of such mechanisms that, on their face, could provide a rich source of information to principals and agencies alike? The analysis thus far suggests a few answers. The simplest (but perhaps the least interesting) are that agencies lack the resources to devote to front-end planning and coordination, that OIRA lacks the resources to enforce them, or both. On this account, as the resources of agencies decrease, they will have a greater incentive to self-insulate since their decision costs are now effectively higher. Similarly, as OIRA resources decrease, agencies will be more successful in insulating since OIRA's reviewing costs are now effectively higher. Indeed, the trend over the last fifty years has been a steady increase in regulatory agency resources, alongside a decline in those of OIRA.[341] As a result, OIRA has likely shifted resources toward transactional, back-end regulatory review, and away from other early-stage coordination mechanisms.

Another possibility is that none of these planning mechanisms provides the fine-grained kind of information necessary to serve as an effective tool of presidential control given the potential diversity of issues in any single rule. As a result, the President has seen no reason to enforce and use these planning mechanisms, exploring instead innovations designed to increase the amount of review time for specific rules in response to strategic timing, as well as to enhance the benefits of review (and thus decrease the incentive for self-insulation). In support of this hypothesis is the development of a practice known as "informal review."[342] Informal review simply means that agencies share preliminary drafts of rules or cost-benefit analyses informally with OIRA in order to receive early input and feedback; sometimes this early review can be initiated by a White House policy office.[343] According to a 2001 annual OIRA congressional report: "This practice is useful for agencies since they have the opportunity to educate OIRA desk officers in a more patient way, before the formal 90-day review clock at OIRA begins to tick."[344] It is "also useful for OIRA analysts" and other interagency reviewers "because they have an opportunity to flag se-

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[341] *See* SUSAN DUDLEY & MELINDA WARREN, WEIDENBAUM CTR. ON THE ECON., GOV'T & PUB. POLICY & THE GEORGE WASH. UNIV. REGULATORY STUDIES CTR., GROWTH IN REGULATORS' BUDGET SLOWED BY FISCAL STALEMATE: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2012 AND 2013, at 9–12 (2012); GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 60 fig.8 (showing general trend in twenty-year decline in OIRA staffing resources from ninety full-time staff in 1981 to fifty-five in 2003, though showing a small increase from forty-seven staffers in 2000); Andrew Zajac, *As Number of Regulators Rise, Their Overseer's Staff Shrinks*, WASH. POST, June 24, 2012, at A14, *available at* http://www.washingtonpost.com/business/economy/regulators-surge-in-numbers-while-overseers-shrink/2012/06/24/gJQArWvDoV_story.html.

[342] GAO, REVIEW & TRANSPARENCY, *supra* note 15, at 36–38.

[343] Sunstein, *supra* note 27, at 1849–50.

[344] OFFICE OF INFO. & REGULATORY AFFAIRS, *supra* note 102, at 43.

rious problems early enough to facilitate correction before the agency's position is irreversible."[345]

In light of this Article's analysis, one would expect that the rules that are most attractive to the agency for informal review are those where the benefits of review are high (say, due to the need for interagency coordination and information sharing, political sensitivities, or a particularly complicated cost-benefit analysis), the expectations of reversal are lower, divergent preferences are uncertain but can be narrowed through earlier engagement, or some combination of the three. One example of such a rule comes from the Clinton Administration, under which the Food and Drug Administration (FDA) asked to brief OIRA informally on a proposed seafood safety regulation that was likely to be economically significant. As the then–OIRA Administrator recalls the events:

> As the meeting went on (and on), the OIRA staff became increasingly skeptical of the approach being pursued and began suggesting alternative ways to achieve the FDA's objectives. The FDA staff left without any commitments to follow up, but then they did. They worked with the OIRA staff, and when the final seafood Hazard Analysis Critical Control Point rule ultimately emerged, it was praised by all the stakeholders and an official at FDA called to read me the headline from an editorial in a newspaper from the Northwest calling it a "sensible regulation."[346]

Along similar lines, a Congressional Research Service study reports that informal review is "most common . . . when the rule is extremely large and requires discussion with not only OMB but also other federal agencies."[347]

Of course, the executive branch cannot informally review each of the hundreds of significant proposed and final rules submitted to OIRA each year, but the value of informal review to all parties may be another reason to suggest the need for Congress to consider increasing OIRA resources. Alternatively, OIRA might consider more formally acknowledging and encouraging informal review for those rules that the agency already knows will be costly or politically sensitive, something that OIRA seems to have considered in the past.[348]

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[345] *Id.*

[346] Katzen, *supra* note 76, at 107 (footnote omitted). The regulation in question was codified at 21 C.F.R. pt. 123, § 1240.3, and § 1240.60.

[347] COPELAND, *supra* note 15, at 15.

[348] In early 2002, for example, then–OIRA Administrator John Graham said that OIRA was trying "to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us — well, in a sense, they're rolling the dice." Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, 60 CQ WKLY. 520, 520 (2002) (internal quotation mark omitted).

2. Decreasing Preference Divergence. — In addition to reducing uncertainty through earlier engagement, the President can minimize self-insulation by decreasing known preference divergence before the formal review process begins. One way to do so is to expand the use of "innovative techniques" that Presidents have used in the past to "impress [their] own regulatory views on the administrative agencies."[349] While these tools have often been characterized as mechanisms of control, another way to conceive of them is as tools to increase certainty about areas of potential preference alignment. These techniques include the issuance of presidential directives, statements, and memoranda to executive branch agency heads "instructing them to take specified action within the scope of the discretionary power delegated to them by Congress."[350] These kinds of directives allow the President to communicate his preferences up front and to instigate agency actions rather than merely to review them.

In light of agencies' incentives to self-insulate by avoiding significance determinations, another mechanism the President could use in response would be to perform randomized spot checks. As discussed, agencies initially signal such determinations in their regulatory agendas or during listing exercises.[351] OIRA could select for closer review a random sample from all rules not designated as "significant" or "economically significant" and request further information as warranted. These spot checks would require that the agency provide some initial estimates of the costs and benefits, to the extent feasible, as well as a reasoned explanation of why the rule does not meet any of the significance criteria.[352]

To illustrate, take the story of the former OIRA Administrator who first learned from the pages of the *Washington Post* about a proposed rule to require labeling of particular kinds of meat and poultry. It was clear from the newspaper account that the regulation was likely to have an economic impact of far greater than $100 million. A dispute ensued in which OIRA informed the Department of Agriculture that it could either withdraw the rule or send a draft for review. The Department promptly chose to send a draft to OIRA.[353] This example illustrates what effectively amounted to a spot check, which may have

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[349] Kagan, *supra* note 37, at 2290.

[350] *Id.*

[351] *See supra* notes 180–182 and accompanying text.

[352] *See* RICHARD B. BELZER, PRESIDENTIAL REGULATORY REVIEW: SUGGESTIONS FOR REFORM 49 (2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/Regulatory_Checkbook_Comments_-_Belzer.pdf (suggesting a similar mechanism requiring that agencies be directed to assemble an executive summary of the plausible benefits and costs of a regulatory action to help inform the initial draft rule's classification).

[353] *See* Note, *supra* note 22, at 1005 (citing Carole Sugarman, *Meat Labels to Carry Safety Instructions*, WASH. POST, May 6, 1993, at A1).

helped to catch the rule before it was proposed, assuming that it had been listed elsewhere.

The likely objection from agencies, however, would be that they have neither sufficient information to provide to OIRA at the agenda or listing stages nor the necessary resources to gather it. As such, a more effective but also more costly strategy would be for OIRA to invite external spot checks on the regulatory agenda as a whole and to have a regular process for reviewing them. OIRA could specifically request that commenters contest any of the priority designations and that they provide any available data pertaining to the potential rule's impacts. Of course, this effort would depend on the expansion of OIRA's already limited resources.

3. Reducing Internal Review Costs. — In the absence of additional resources, another set of presidential strategies would entail effectively reducing reviewing costs by providing agencies with guidance designed to facilitate review, particularly for non-OIRA presidential reviewers such as other agencies or White House offices. The issuance in 2003 of *Circular A-4*, which "provides . . . guidance to Federal agencies on the development of regulatory analysis,"[354] may be understood in this light. So too may OIRA's recent issuance of a checklist, primer, and frequently asked questions for regulatory impact analysis, effectively a suite of tools to lower reviewing costs.[355] Indeed, Sunstein writes that "[a]ll of these documents are designed to promote simplicity and clarity for agencies and the public alike."[356] The same intuition would apply to presidential reviewers as well.

A similar rationale would also hold for OIRA's recent guidance document stating that "regulatory preambles for lengthy or complex rules (both proposed and final) should include straightforward executive summaries" that "separately describe major provisions and policy choices."[357] These changes, if implemented, would help reduce the amount of time spent during review attempting to clarify various provisions with the agency, thus allowing more resources to be devoted to resolving any underlying policy disagreements.

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[354] OMB, CIRCULAR A-4, *supra* note 77, at 1.

[355] OFFICE OF INFO. & REGULATORY AFFAIRS, AGENCY CHECKLIST: REGULATORY IMPACT ANALYSIS (2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf; *see also* OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf; OIRA, FAQs, *supra* note 198.

[356] Cass R. Sunstein, Essay, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1388–89 (2011).

[357] Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Clarifying Regulatory Requirements: Executive Summaries 1 (Jan. 4, 2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements_executive-summaries.pdf.

4. Timing Regulation Strategies. — Finally, from the perspective of the President, strategic timing by agencies changes the cost structure for reviewers, disrupting other forces and procedures that exist to help prioritize the attention given to a regulation. In other words, "strategic timing is a form of subterfuge that reduces the otherwise existing forces that calibrate the extent of monitoring to the importance of the decision."[358] One strategy to mitigate this possibility would be to adopt formally what Professors Jacob Gersen and Anne O'Connell have called a "coordination rule," the purpose of which would be to give agencies and reviewers alike notice about the need to shift priorities ex ante to the most salient forthcoming regulatory actions in order to allow sufficient time for review.[359] This type of coordination device could prescribe, for example, a specific time period for review, set and agreed upon by both parties in advance — for example, as soon as the legal or statutory deadline was promulgated.

This strategy could be implemented simply as a matter of practice and mutual agreement between particular agencies and OIRA. A more formal adoption may require revision to the existing executive orders, which require agencies to notify OIRA of any statutory or judicial deadlines and, "*to the extent practicable*, [to] schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review as set forth" in the order — that is, the ninety-day default rule.[360] One blunt way to attempt to enforce this ninety-day coordination rule better would be simply to delete the language, "to the extent practicable." However, to address the likely and legitimate agency response that many deadlines do not allow sufficient time to prepare and submit a rule ninety days before the deadline, a more realistic strategy may be a tailored one: to adopt mutually for particular rules an early-review period during which OIRA could begin to review parts of the rule (for example, the regulatory impact analysis) as they become available, a practice that already occurs under informal review. Some have also suggested a more formal early-review process for rules with expected annual benefits or costs of over $1 billion.[361] More generally, an agency and OIRA could also agree on other review-period lengths that are fixed ex ante, calibrated either to the perceived importance of

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[358] Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1206 (2009).

[359] *Id.* at 1204.

[360] Exec. Order No. 12,866 § 6(a)(3)(D), 3 C.F.R 638, 646 (1994) (emphasis added), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011).

[361] *See* SUSAN DUDLEY & ARTHUR FRAAS, THE FUTURE OF REGULATORY OVERSIGHT AND ANALYSIS 3 (Mercatus Ctr., Mercatus on Policy No. 51, 2009), *available at* http://mercatus.org/sites/default/files/publication/MOP51_OIRAweb.pdf.

the rule or to the length of time that Congress has granted the agency to promulgate the rule.

B. Courts

In light of the incentives for agency self-insulation and the available presidential responses for minimizing them, what are some implications of these dynamics, if any, for the courts? As an initial matter, how one answers this question will likely track what one thinks about the general merits of presidential control, a question underlying many of the constitutional and statutory debates about its proper scope.[362] On the one hand, if one believes that the presidential control model has been a valuable, even necessary, development for legitimizing the administrative state, then agency self-insulation is cause for concern, and courts should act to minimize it. Here, supporters often cite the President's electoral accountability and national constituency as reasons to check agency overzealousness and capture.[363] Only the President, they argue, has the bird's-eye view necessary to coordinate and harmonize agency efforts; he is also the best situated to respond dynamically to changed circumstances.[364]

On the other hand, if one believes that presidential review is illegitimate, then self-insulation is cause for celebration and courts should seek to encourage it. In this view, that executive branch agencies can fend for themselves helps to alleviate an otherwise worrisome state of affairs. The risk of capture, these critics argue, is equally likely for Executive Office of the President (EOP) entities and presidential review is unduly shrouded in secrecy.[365] Agencies are more expert relative to the White House at fulfilling their statutory missions,[366] particularly for issues with longer time horizons.[367]

There is, however, a likely and necessary middle ground between these two camps at their most extreme — that is, between those who believe that presidential involvement is always legitimate, even necessary, and those who believe it is never so except in the narrowest of circumstances. As a practical matter, Presidents have sought to influence their agency heads through ad hoc and informal means for centuries, with interventions only becoming increasingly institutionalized

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[362] *See, e.g.*, Kagan, *supra* note 37, at 2376–77; Stack, *supra* note 35; Strauss, *supra* note 124.

[363] *See* Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080–81 (1986); Kagan, *supra* note 37, at 2331–38.

[364] *See* Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006); *see also* Pierce, *supra* note 231, at 113.

[365] *See* RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE 34 (2011); Bagley & Revesz, *supra* note 108, at 1308–10.

[366] *See* Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1116 (2006).

[367] *See* Bressman & Thompson, *supra* note 330, at 613–14.

through formal review in the last three decades.[368] Against this backdrop, one relevant question is how and when such involvement can be made legitimately transparent such that other institutions like courts and Congress can serve as effective checks when necessary.[369] To the extent that transparency provides some common ground, such a position recognizes that presidential review is often constructive and valuable — allowing for greater information sharing, the benefit of interagency expertise,[370] and oversight to prevent unnecessarily conflicting policies.[371] At other times, however, it may be unambiguously inappropriate, for example if a President directs an agency head to conceal or fabricate scientific data in support of some outcome.

Between these poles are a host of possible interventions, whose legitimacy will depend on their specific nature and the features of the underlying authorizing statutes. Normative determinations about presidential review (and by extension, agency self-insulation from it) must thus necessarily be made case by case, evaluated against specific statutory and factual circumstances. In some situations, under particular administrations, such interventions will be substantively constructive and beneficial, while in others, they will be less so. Accordingly, the soundest prescriptions should ask, as an initial step, how to reveal presidential involvement in order to facilitate individual judgments that are assessed against Congress's demands.

1. Self-Insulation as Undue Politicization Signal. — Despite provisions under current executive orders for agencies and OIRA to disclose the changes made as a result of the presidential review process,[372]

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368 *See* Mashaw, *supra* note 65, at 1304–06 (illustrating, with historical reference to President George Washington and his successors, how "[s]upervisory control of executive action at the very top — that is, any matter involving the head of a department — was both informal and powerful," *id.* at 1304).

369 Of course, such disclosure should be balanced against the competing importance of executive deliberative privilege. *See* 5 U.S.C. § 552(b)(5) (2006) (incorporating executive privilege through exemption from disclosure under the Freedom of Information Act). For examples of some disclosure-related proposals, see Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009), and Mendelson, *supra* note 130, at 1159. Professor Kathryn Watts argues that agencies should be allowed to justify their actions with political reasons "so long as the political influences are openly and transparently disclosed in the agency's rulemaking record." Watts, *supra*, at 8. Beyond its role in facilitating transparency and accountability, greater disclosure could also often raise reversal costs for the President since he (or other executive branch officials) would now likely have to provide a public explanation.

370 *See* Sunstein, *supra* note 27, at 1856 ("The resulting discussions typically produce stronger rules."); *id.* at 1858 ("[OIRA's] goal is to find a reasonable and mutually agreeable resolution.").

371 *See* Bagley & Revesz, *supra* note 108.

372 Under current executive orders, after a regulatory action has been published in the *Federal Register* or otherwise issued to the public, agencies are directed to "[m]ake available to the public" information such as the text of the draft regulatory action and the CBA; to "[i]dentify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced"; and to "[i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of

such disclosures are not regularly made in practice, leading some to suggest more forceful statutory disclosure requirements.[373] Until such changes occur, courts will have to rely on various second-best signals or heuristics, like indicia of agency self-insulation, to evaluate the nature of presidential involvement. Thus, for example, when courts observe signs of self-insulation, such as abrupt shifts in policymaking form, poor-quality cost-benefit analysis (CBA), or truncated presidential review time, then such efforts, taken together, could reflect signs of resistance or "danger signals"[374] that invite greater judicial scrutiny under hard look or *Chevron*'s Step Two reasonableness review.[375] Such signals would, of course, need to be understood within their broader context, an inquiry that would benefit from future empirical work as to whether agencies systematically self-insulate and the conditions under which they are most likely to do so.

Whether agency self-insulation is a salutary or subversive phenomenon, in turn, will ultimately depend on the particular reason for the agency's expected preference divergence from the President, and whether that reason is sanctioned by statute. For example, in cases that reflect an agency's efforts to protect from interference technical judgments grounded in a statute narrowly constraining policy discre-

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OIRA." Exec. Order No. 12,866 § 6(a)(3)(E), 3 C.F.R. 638, 646 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011). The orders also, among other things, direct OIRA to forward all written communications between OIRA and external sources to the agency, to publicly disclose them, and eventually to "make available to the public all documents exchanged between OIRA and the agency during the review." *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.

373 *See* Mendelson, *supra* note 130, at 1148–54, 1164.

374 Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (Leventhal, J.) (arguing the court should "intervene" under arbitrary and capricious review when it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making" (footnote omitted) (quoting WAIT Radio v. FCC, 418 F.2d 1153, 1156 n.8 (D.C. Cir. 1969) (internal quotation mark omitted))).

375 *Chevron*, of course, provides that judges must defer to an agency's reasonable construction of a statutory ambiguity when the statute itself evinces a legislative intent to delegate that interpretive authority. Its two-part test is a familiar one: First, the judge must ask "whether Congress has directly spoken to the precise question at issue." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). If Congress's intent is "clear," then that intention governs; but if the statute is ambiguous or silent, then in Step Two, courts ask whether the agency's interpretation is "permissible" and, if so, defer accordingly. *Id.* at 842–43. Some lower courts have also incorporated elements of arbitrary and capricious review and inquire as to whether an agency engaged in reasoned decisionmaking. *See, e.g.*, Sierra Club v. Leavitt, 368 F.3d 1300, 1304 (11th Cir. 2004); Consumer Fed'n of Am. v. U.S. Dep't of Health & Human Servs., 83 F.3d 1497, 1506–07 (D.C. Cir. 1996); *see also* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2105 (1990) (noting that *Chevron*'s "reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is 'arbitrary' or 'capricious' within the meaning of the APA").

tion, indicia of self-insulation could serve as signals of undue politicization meriting greater scrutiny.[376] Indeed, familiar administrative law principles provide that agencies can act only under legislative delegations of authority, must remain within the confines of that authority, and may take into account only those factors set out by Congress. Under hard look review, for example, the *State Farm* Court provided that agencies must consider "relevant factors" but not those "factors which Congress has not intended it to consider."[377] As for *Chevron*'s second step, one way to understand the analogous question is whether statutory ambiguity on a decisional factor permits an interpretation allowing consideration of that factor.[378]

Under either doctrinal inquiry, courts should inquire whether the statute evinces a legislative intent to restrict certain forms of policy discretion of the kind more likely to be elevated to higher-level policy officials during presidential review, including questions of flexibility, timing, and cost-benefit tradeoffs.[379] One way to understand this task would be to consider to which actors within an agency or the executive branch — whether career staff, experts, White House policy officials, and so on — Congress would have wanted to allocate the decisionmaking power under particular statutory schemes, and to evaluate the likelihood that those actors were afforded that power given signals of agency self-insulation.[380] When the relevant statute can be interpreted to narrowly limit as the basis of decisionmaking discretionary factors more likely to be associated with raw presidential preferences, then self-insulation is more likely to be a meritorious agency attempt to pro-

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376 "Politicization," as the term is used here, refers to the influence of nonexpert actors whose authority stems largely, if not solely, from their connection to an elected official. Despite its sometimes pejorative connotation, politicization as understood here need not be pernicious, but can rather be legitimizing; thus, the adjective "undue" is important in this context. *See* BYRON W. DAYNES & GLEN SUSSMAN, WHITE HOUSE POLITICS AND THE ENVIRONMENT 199, 236 (2010) (describing how vice presidents can "make a difference," *id.* at 236, in regulatory policy and providing the example of Vice President Cheney under the George W. Bush Administration); Sunstein, *supra* note 27, at 1873 (noting that "political issues might be taken into account by other offices," including the White House Office of Legislative Affairs and the Chief of Staff's Office).

377 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

378 *See Chevron*, 467 U.S. at 865; Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 68–69 (discussing parallel analysis under *State Farm* and *Chevron*).

379 *See* Sunstein, *supra* note 27, at 1872 (describing "significant questions of policy, including the kind that might be 'elevated'" to involve, for example, discussions of flexibility, delayed compliance dates, and "public health or safety" goals); *see also id.* at 1873 (describing how particular White House offices may be charged with the consideration of "political issues" and the "President's overall priorities, goals, agenda, and schedule").

380 *Cf.* Magill & Vermeule, *supra* note 2 (examining how legal doctrines allocate power to various actors within agencies).

tect its relative expertise.[381] In this manner, courts can serve a narrow, boundary-enforcing role against the possibility of executive overreach, and indicia of self-insulation would be but signals to alert the need for this inquiry.[382]

Conversely, when the underlying statute allows for broad discretionary factors of the kind likely to be considered during presidential review, self-insulation is more likely to be inappropriate, for it now constitutes an unjustifiable effort to avoid the interest balancing that underlies presidential accountability. In this manner, courts should first determine the extent to which the statute at issue attempts to prohibit or allows for discretionary policy judgments, and then treat agency self-insulation accordingly. While this analysis is unlikely to admit of bright lines given the diversity of statutory schemes and the potential for overlap between the categories of expert and political judgments, the analytic distinctions may nevertheless be useful as courts apply them case by case. These judgments may well draw upon familiar tools of statutory construction, the identity of the statutory delegate, or the structure of the agency at issue,[383] but as a general matter, this functional approach would seek to facilitate separation of powers principles within the executive branch.[384]

To illustrate, consider some statutory provisions that courts have interpreted to prohibit the consideration of certain policy factors, such as economic costs, which are particularly likely to be salient to the President. For example, the Court in *Tennessee Valley Authority v. Hill*[385] examined a statute requiring federal agencies "'to insure that

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[381] This is not to say that self-insulation under such statutes is always warranted, or that such statutes should be understood to preclude presidential review: the review process can also yield valuable and relevant expertise and opportunities for deliberation. Rather, the concern here arises when the determinative influence is not of the expert character called for by a particular statutory scheme, and is therefore *undue* under that statute. In this manner, the interpretive analysis should focus on the kinds of factors the agencies should consider under the statute, and the likely and legitimate sources of influence regarding those factors.

[382] *See* Richard H. Pildes, Free Enterprise Fund*, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y (SPECIAL ISSUE) 1 (2010).

[383] The analysis suggested here would be most applicable to cases involving executive agencies subject to presidential review, since self-insulation signals would reflect attempts to avoid such review. Some current Justices appear willing to recognize the distinction between executive and independent agencies as a basis for variations in judicial review. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1829 (2009) (Breyer, J., dissenting) (noting that the FCC commissioners "have fixed terms of office; they are not directly responsible to the voters; and they enjoy an independence expressly designed to insulate them, to a degree, from 'the exercise of political oversight'" (quoting Freytag v. Comm'r, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

[384] Thanks to Dean Robert Post for this suggestion. *See also* Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

[385] 437 U.S. 153 (1978).

actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species."[386] It held that the provision prohibits flexibility, or what it called "fine utilitarian calculations,"[387] and thereby halted the completion of a dam in which millions of dollars had already been invested.[388] Similarly, in *Whitman v. American Trucking Ass'ns*,[389] the Court held that a provision requiring air pollution standards to be set at a level "requisite to protect the public health" with an "adequate margin of safety"[390] did not allow costs to be taken into account when setting the standards; the Court therefore rejected a contrary EPA interpretation under *Chevron*'s second step.[391] Courts would likely also prohibit the consideration of costs under statutes that call for, say, mandating "practicable" standards "permitting no discharge of pollutants,"[392] or decisions based on the "best science" or otherwise specifying more resolutely technical and expertise-based decisional criteria.[393]

By contrast, in *Entergy Corp. v. Riverkeeper, Inc.*,[394] the Court held that a Clean Water Act[395] provision calling on the EPA to require the use of the "best technology available for minimizing adverse environmental impact"[396] allows the EPA to balance costs and benefits when determining how to interpret the statute.[397] Here, the majority read Congress's silence about the propriety of considering "cost," relative to other statutory provisions in the Act, to mean that the EPA could consider it as a decisional factor, and therefore upheld the Agency action under *Chevron*'s reasonableness inquiry.[398] Read broadly, this approach resonates with a number of D.C. Circuit cases applying hard look review and holding that when Congress is silent with respect to a logically relevant factor, then that silence should be read to permit the agency to consider the factor.[399] More narrowly, this presumption op-

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386 *Id.* at 173 (emphasis omitted) (quoting 16 U.S.C. § 1536 (1976)).

387 *Id.* at 187.

388 *Id.* at 174.

389 531 U.S. 457 (2001).

390 *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2006)) (internal quotation marks omitted).

391 *Id.* at 481.

392 33 U.S.C. § 1316(a)(1) (2006); *see also* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1506 (2009) (suggesting that the Court would likely reach this conclusion).

393 *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); *see also* Watts, *supra* note 369, at 45–47.

394 129 S. Ct. 1498.

395 33 U.S.C. §§ 1251–1387 (2006 & Supp. V 2011).

396 *Id.* § 1326(b) (2006).

397 *Entergy Corp.*, 129 S. Ct. at 1510.

398 *Id.* at 1508.

399 Pierce, *supra* note 378, at 73–75 (citing, for example, *Allied Local & Regional Manufacturers Caucus v. EPA*, 215 F.3d 61, 77–78 (D.C. Cir. 2000), and *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000), in a discussion of the D.C. Circuit's jurisprudence on interpreting congressional silence).

erated in the specific context of the text and structure of the Clean Water Act and was thus an ordinary exercise in statutory interpretation, as opposed to a broader cost-benefit default rule. Before assessing self-insulation signals, courts should continue to examine the extent, if any, to which specific statutes allow agencies to consider particular policy factors.

As for how courts would evaluate agency self-insulation after undertaking such an inquiry, *Massachusetts v. EPA*[400] may help to illustrate. There, a bare majority held that the EPA had failed to provide an adequate rationale for its denial of a rulemaking petition filed by a number of states and private plaintiffs to regulate greenhouse gas emissions from new motor vehicles.[401] Under *Chevron*, the interpretive question was whether Congress intended carbon dioxide and other greenhouse gases to be "air pollutant[s]" under the statute.[402] Finding the text "unambiguous" at *Chevron* Step One, the majority held that the EPA indeed possesses the statutory authority to regulate them.[403] More relevantly for our purposes, the Agency's alternative argument was that even if it did possess the requisite authority, it could still lawfully exercise its discretion by declining to regulate for policy-related reasons commonly considered during presidential review, such as the executive branch's desire to coordinate its programs, to avoid a "piecemeal approach" to climate change, and to give the President the necessary flexibility with which to negotiate with "key developing nations."[404]

Rejecting these arguments, the Court under hard look review held that such reasoning was "divorced from the statutory text."[405] Specifically, it found that while the statute ties such discretion to the EPA's "judgment,"[406] that judgment has to be grounded in whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare."[407] In other words, the Clean Air Act[408] cabined the amount of policy discretion available such that the EPA could decline to take further action only upon a technical, expert determination that greenhouse gases did not contribute to climate change, or by providing another reasoned expla-

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400 549 U.S. 497 (2007).

401 *See id.* at 534–35.

402 *Id.* at 528 (internal quotation marks omitted).

403 *Id.* at 529.

404 *Id.* at 533–34.

405 *Id.* at 532; *see also id.* at 534 (holding that EPA action was "arbitrary, capricious, . . . or otherwise not in accordance with law" (alteration in original) (quoting 42 U.S.C. § 7607(d)(9)(A) (2006)) (internal quotation marks omitted)).

406 *Id.* at 532 (quoting 42 U.S.C. § 7521(a)(1)) (internal quotation marks omitted).

407 *Id.* at 532–33 (quoting 42 U.S.C. § 7521(a)(1)).

408 42 U.S.C. §§ 7401–7671q (2006 & Supp. V 2011).

nation for why it could not or would not exercise its judgment.[409] After finding that the EPA had "offered no reasoned explanation for its refusal to decide," the Court found the EPA's action to be arbitrary and capricious and remanded accordingly.[410]

Shortly after the decision, some argued that the case represented an effort by the Court to privilege expertise over politics, and referred to the "political, cultural, and legal context" as a cue that something was amiss within the EPA.[411] Using the lens of agency self-insulation, one could also understand the EPA's petition denial as yet another sign of its attempt to avoid what it knew would be a costly reversal by the Bush Administration, which had made its views on climate change clear. By choosing inaction instead of proceeding with a rule, the EPA was engaging in a form of self-insulation. Indeed, according to various accounts, the Bush "administration had been altering scientific reports, silencing its own experts, and suppressing scientific information" suggesting "a significant rise in global temperatures and linking the rise to human activity."[412] Thus, the Agency had every reason to believe that its efforts to initiate a rulemaking would be rebuffed by the President.

Indeed, these fears of reversal were well-founded, as further borne out by events following the Court's decision. After the EPA prepared what was apparently a proposed rule concluding that greenhouse gases endangered public welfare, reports circulated that "OMB officials [had] told the EPA that its email containing the document would not be opened," later leading the EPA to issue only a weak advance notice of proposed rulemaking that offered no endangerment conclusion.[413] This choice of policymaking form was arguably another act of self-insulation, an abrupt shift from a would-be proposed rule to a more tentative advance notice that offered little information. The document revealed, in an unusually visible manner, the disagreement between the EPA's political leadership and its career staff about the ability to regulate greenhouse gases under existing statutory authorities.[414] While the advance notice itself discussed all the ways in which the EPA could successfully do so, it was prefaced by an uncommon state-

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[409] While this Article locates the doctrinal inquiry at *Chevron* Step Two, the Court's inquiry here under Step One took a similar form in that it asked whether Congress's silence (and thus ambiguity) about policy-related factors allowed for the Court to interpret the statute to permit their consideration. *See Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting). *See generally* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing for collapsing the distinction between *Chevron* Step One and Step Two).

[410] *Massachusetts*, 549 U.S. at 534–35.

[411] Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 61.

[412] *Id.* at 55.

[413] Mendelson, *supra* note 130, at 1153.

[414] *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1).

ment signed by the Administrator stating that such efforts would "inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations" that would "largely pre-empt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy."[415]

Amid the Bush Administration's "censorious posture," the EPA simply sat "on a trove of materials — a proposed endangerment finding, a proposal to regulate greenhouse gas emissions from motor vehicles, a proposed reporting rule for greenhouse gases, [and] a proposal on renewable fuel standards."[416] After spending considerable resources preparing them, the EPA had decided that near-certain presidential reversal would be more costly, and thus chose instead to insulate its rules. In this manner, such behavior can signal attempts to resist political influences that are invisible during other administrative procedures that begin *after* a rule has been presidentially reviewed, such as notice and comment.

Of course, not all instances when an agency chooses a guidance document rather than a rule, for example, or submits a rule close to a statutory deadline or with a weak CBA, represent attempts to self-insulate. Sometimes these patterns of behavior are not in fact choices at all, but reflect instead top-down directions from the White House after a rule has been submitted; however, these situations too are informative when viewed in the context of statutes that demand regulatory action or a reasoned explanation for failing to undertake it. Alternatively, the preference divergence could be the result of industry capture of the agency head; this possibility would need to be evaluated with reference to the industry in question and the regulating agency.[417] Finally, self-insulation could also be motivated by resource constraints and divorced from substantive policy judgments. Evaluating why self-insulation occurs in a particular case will thus necessarily involve a context-specific and case-by-case inquiry, but indicia of self-insulation should, at a minimum, prompt courts to undertake such an inquiry.

2. Monitoring Facilitation. — At the same time, recall that presidential review serves as both a kind of political review of issues that the President has judged salient to his agenda as well as a form of analytical review of the ways in which agencies evaluate costs and benefits, choose among potential alternatives, and consider technical issues,

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[415] *Id.* at 44,355.

[416] Lisa Heinzerling, *Climate Change at EPA*, 64 FLA. L. REV. 1, 6 (2012).

[417] *See, e.g.*, Barkow, *supra* note 35, at 71 (describing the Consumer Product Safety Commission as one of the most captured agencies).

as appropriate.[418] While these categories can be interrelated and difficult to disentangle, they are nevertheless analytically distinct and can help serve as orienting poles. When agencies attempt to insulate themselves from analytical review, then another important role for the courts, likely to appeal to both sides of the presidentialist debate, would be for courts to understand themselves as *monitoring facilitators*.[419] In this role, the courts would help to ensure that external political monitors, such as interest groups or Congress, have the requisite high-quality information about potential regulatory consequences in order to facilitate fire-alarm oversight and the resolution of competing interests through overtly political processes. One way to do so would be to encourage the availability of information sources external to the presidential review process, that is, cost-benefit figures or substantive data about regulatory impacts that are neither agency-provided nor presidentially reviewed.

As long as one agrees that agents, such as administrative agencies, should implement the goals of their principals — the President, Congress, or society more broadly — the dynamics of self-insulation sure to be the most troubling are those that mask the effects of agency action.[420] Indeed, this Article has proposed a conception of agencies as actors that choose regulatory instruments with distinct bundles of characteristics, some of which make presidential review more difficult by limiting the amount and quality of information about potential im-

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[418] *See* Shapiro, *supra* note 84; Sunstein, *supra* note 27, at 1868–74.

[419] This Article's concept of monitoring facilitation bears a close family resemblance to Professor Eric Posner's "signal refinement theory," which understands the cost-benefit signal's value as sorting efficient projects from inefficient ones. *See* Posner, *supra* note 20, at 1191 ("Courts should try to raise the difference between the cost of issuing a plausible cost-benefit analysis of an efficient project and the cost of issuing a plausible cost-benefit analysis of an inefficient project."). The same is true of Professor Matthew Stephenson's notion of "costly signaling" under "hard look review," which posits that the "quality of the agency's defense of its regulatory decision provides a signal of the benefits the agency expects to receive if the court upholds the regulation." Stephenson, *supra* note 216, at 766. The monitoring facilitation role differs from these conceptions insofar as it sees the purpose of increasing information quality not as a means for evaluating the efficiency or agency net benefits of a project, but rather as a way to increase information about a regulation's perceived consequences (whether in quantitative or qualitative terms) in order to allow for more robust political contestation about them. Stated differently, this view does not see courts as attempting to facilitate the use of cost-benefit analysis as a decision rule, but rather as a means of helping to ensure that external political monitors, such as interest groups or Congress, have the requisite high-quality information about potential regulatory consequences to facilitate the resolution of competing interests through overtly political processes.

[420] The various ways that courts have policed agencies' strategic use of adjudication or guidance documents instead of rulemaking in efforts to "achieve [their] goal[s] only (or mainly) because of the form [they] chose," Magill, *supra* note 3, at 1446, have been adequately and ably discussed elsewhere, *see id.* at 1437–42. To summarize Professor Elizabeth Magill's analysis, courts can calibrate their standards of review or otherwise adjudge guidance documents and other agency action as ripe for review, all in an attempt to police agencies' choices of form when they offend the courts' notions of procedural fairness or sound policy development. *Id.* at 1438.

pacts (such as the avoidance of rulemaking or the manipulation of significance determinations and cost-benefit analyses), and some of which simply raise the resource and political costs of presidential reversal (for example, timing strategies or coalition building with career staff or other executive branch entities).

At root, these instruments succeed by blunting the signals that principals ordinarily rely upon to assess an action's potential salience to their agendas and priorities. For example, when agencies flag regulatory actions as nonsignificant, significant, or economically significant, these significance determinations should indicate the action's potential priority for the President. Agency assessments of costs and benefits serve a similar function by identifying potential regulatory consequences that may be salient to various groups or constituencies. This is true whether the costs and benefits are fully quantified or described qualitatively. Attempts at strategic self-insulation are, for the most part, efforts to reduce information quality.[421]

Accordingly, doctrinal developments post-*Chevron* granting more deference when agencies engage in notice-and-comment rulemaking should be understood as constructive efforts to encourage the development of external sources of information for the rulemaking record. In *United States v. Mead Corp.*, for example, the Court considered whether to grant *Chevron* deference to a tariff classification ruling by the U.S. Customs Service. It held that the ruling was not eligible for such deference because *Chevron* applies when Congress has delegated authority "to make rules carrying the force of law" and the agency has acted pursuant to that authority when interpreting the statute.[422] The Court noted that when Congress provides for a "relatively formal administrative procedure" that fosters "fairness and deliberation," such as notice-and-comment rulemaking or formal adjudication, it is reasonable to presume such legislative intent.[423] In the absence of such information-forcing processes, *Barnhart v. Walton*[424] later provided that deference is only potentially due upon a consideration of a number of factors, including the nature of the legal question and the agency's relevant expertise and experience.[425] By giving agencies an incentive to

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421 Of course, this premise should not be overstated; there are many other reasons, besides conveying information about consequences, that explain agency behavior, such as the choice of form. Agencies often choose to pursue adjudication over rulemaking, for example, when they are uncertain about which policy to pursue, *see id.* at 1396–97; alternatively, Congress may have dictated the form of regulatory instrument for agencies to use or otherwise minimized the discretion available for agency action.

422 United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

423 *Id.* at 230.

424 535 U.S. 212 (2002).

425 *See id.* at 221–22. In *Barnhart*, the Court considered the Social Security Administration's interpretation of the Social Security Act, first through a series of informal means, and then

garner information from the public or through adversarial procedures, courts have helped to ameliorate the effects of strategic information provision under presidential review by soliciting data from independent sources.

Similarly, when the quality of an agency's CBA is poor as a result of an attempt to reduce the scrutiny of presidential review, a harder look under arbitrary and capricious review may be judicially appropriate since there was less initial information for public comment or oversight. Moreover, courts could not only examine the agency's proffered responses to public input, but also consider as one factor the *source* of the comments, taking favorable notice when those sources are pluralistic or from more neutral, expert bodies such as the National Academy of Sciences. Giving weight to such factors is more likely to increase the accuracy of the information through robust contestation.

Of course, courts cannot require agencies to undertake any additional procedures other than those required by statute.[426] Rather, here they would simply give agencies an incentive to invite external evaluations of their own work. For example, some courts have taken notice when there are independent evaluations of costs and benefits in the record before upholding environmental impact statements as reasonable under the National Environmental Policy Act.[427] In a related vein, courts have also critically viewed agency rejections of expert advisory committee opinions, especially when those opinions are required

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through notice-and-comment rulemaking. In holding that *Chevron* applied, the Court explained that deference was due depending on "the interpretive method used and the nature of the question at issue." *Id.* at 222. As applied to the case at hand, the inquiry could include a number of factors:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id. *Barnhart* and *Mead* clarified that *Chevron* deference applies to interpretations with the force of law or promulgated pursuant to formal procedures such as formal adjudication or notice-and-comment rulemaking, but that other expertise-based factors could warrant deference as well — approaches that have been followed, in varying degrees, by the lower courts. *See, e.g.*, Mylan Labs., Inc. v. Thompson, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004); *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457–74 (2005) (discussing in detail how lower courts have applied *Mead* and *Barnhart*).

426 *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) (holding that section 4 of the Administrative Procedure Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures").

427 *See, e.g.*, Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1143 (9th Cir. 2006) (taking note of "an independent technical review of the benefits and costs analysis in the draft [environmental impact assessment, which] stated that the assumptions and overall conclusions of the benefits analysis were 'reasonable' and that 'data were generally used properly in the overall analysis'").

by statute,[428] and conversely have regarded careful consideration of concerns raised by such committees favorably.[429] Similar approaches could further aid the hard look inquiry.

C. Congress

To facilitate these doctrinal refinements, Congress could and should also play an important role in fostering independent evaluations of CBAs and improving such analyses' quality as signals of regulatory impact. The Truth in Regulating Act of 2000,[430] for example, temporarily required the GAO to provide its own external evaluations of agencies' CBAs for final rules.[431] However, the implementation of the provision depended on an additional $5.2 million in the GAO's annual appropriations. The funds were never granted.[432] Alternatively, as Professor Susan Rose-Ackerman suggests, an independent body (which she would call the Office for the Review of Policy Analytic Techniques) could also be placed within the GAO, the National Science Foundation, or the National Academy of Sciences.[433] By creating and funding such a body, Congress could play an important role in helping to improve the quality of agency informational signals, thereby helping to counter the structural incentives for strategic behavior and agency self-insulation.

Ultimately, supplying this kind of information would improve the ability of external actors to monitor agency behavior and would also reduce the risk that such information might be simply dismissed as "cheap talk" and discounted.[434] Indeed, when agents act strategically amidst information asymmetries, the private incentives for information aggregation and revelation are likely to depart from what is desirable to facilitate adequate monitoring by principals (again, whether the President, Congress, or society more broadly).[435] Independent evalua-

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[428] *See, e.g.*, Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 521 (D.C. Cir. 2009) ("The EPA failed adequately to explain its reason for not accepting the [Clean Air Scientific Advisory Committee]'s recommendations . . . .").

[429] Coal. of Battery Recyclers Ass'n v. EPA, 604 F.3d 613, 619 (D.C. Cir. 2010) (favorably noting that the EPA had considered some of the Clean Air Scientific Advisory Committee's concerns, despite not following its precise recommendations).

[430] 5 U.S.C. § 801 note at 107–08 (2006).

[431] *Id.* While it is true that the GAO also responds to congressional research requests, its head is appointed for a lengthy term and is removable only for cause. *See* 31 U.S.C. § 703 (2006).

[432] *See* Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. (SPECIAL EDITION) 113, 128 (2011).

[433] *See* Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335, 353–54 (2011).

[434] *See* Stephenson, *supra* note 63, at 1457–58.

[435] *See* Posner, *supra* note 20, at 1154–63 (analyzing incentives for agents to produce CBAs under conditions of full and incomplete information); Stephenson, *supra* note 63, at 1438–61 (summarizing research incentives for agents under various monitoring scenarios). Whether such stra-

tions of the information produced could help to provide the necessary counterweight to such dynamics.

The prospective dynamics of agency self-insulation also highlight a number of avenues through which Congress could more effectively insulate agencies from the President beyond the formal removal restrictions at issue in *Free Enterprise Fund*, and in recognition of the more functional nature of agency independence.[436] Recall that, ever since President Reagan's Executive Order 12,291, presidential review covers any "agency" as defined by the Paperwork Reduction Act of 1980[437] (PRA) and expressly excludes those defined as "independent regulatory agencies" under that Act.[438] Since 1981, Congress has thus had the ability to circumscribe the coverage of presidential review through statutory amendments to the PRA.[439] Recent provisions contained in the Dodd-Frank Act[440] — placing the Consumer Financial Protection Bureau and the Office of the Comptroller of the Currency on the PRA's list of "independent regulatory agencies" — reflect this strategy.[441]

In addition, Congress could dictate specific policymaking forms that are more likely, as a class, to bypass presidential review; for example, prohibiting rulemaking would channel policymaking to other forms such as guidance documents.[442] Congress could also use statutory deadlines to help empower executive agencies against the President,

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tegically produced information produces rational or socially optimal results is a separate question not addressed here; all that is important for present purposes is that the principal has some ideal point, however arrived at, and requires information about whether regulatory action will achieve that result.

436 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3169 (2010) (Breyer, J., dissenting). For discussion of the case, see *supra* pp. 1762–63.

437 Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of 5, 20, 30, 42, and 44 U.S.C.).

438 *See* Exec. Order No. 12,291 § 1(d), 3 C.F.R. 127, 128 (1982) (revoked 1993) (defining an "agency" as per 44 U.S.C. § 3502(1) and excluding those agencies specified in 44 U.S.C. § 3502(10)); Exec. Order No. 12,866 § 3(b), 3 C.F.R. 638, 641 (1994) (same), *reprinted as amended in* 5 U.S.C. § 601 app. at 86–91 (2006 & Supp. V 2011). Note that the Paperwork Reduction Act excludes from the definition of "agency" the GAO and the Federal Election Commission. 44 U.S.C. § 3502(1) (2006).

439 *See* Barkow, *supra* note 35, at 33 (noting that Congress can "list an agency among the independent regulatory agencies in the Paperwork Reduction Act to exempt it from OIRA review").

440 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

441 *See* Pub. L. No. 111-203, § 315, 124 Stat. 1376, 1524 (2010) (inserting "Office of the Comptroller of the Currency" in 44 U.S.C. § 3502(5)); *id.* § 1100D(a), 124 Stat. at 2111 (inserting, in the same provision, "the Bureau of Consumer Financial Protection" and "the Office of Financial Research").

442 *See, e.g.*, 20 U.S.C. § 1015b(i) (2006 & Supp. V 2011) ("The Secretary shall not promulgate regulations with respect to this section."); Memorandum from Daniel T. Madzelan, Acting Assistant Sec'y for Postsecondary Educ., U.S. Dep't of Educ. (June 8, 2010), *available at* http://ifap.ed.gov/dpcletters/GEN1009FinalTextbookGuidance.html (interpreting that provision, 20 U.S.C. § 1015b(i), through guidance document).

or provide for overlapping agency jurisdictions or joint rulemakings that would create and foster coalitions among agencies that together could provide greater resistance to the President.[443] Finally, because self-insulation is ultimately a resource-centered strategy, Congress's budgeting decisions for OIRA, the Executive Office of the President, and various other executive agencies would also help to determine the relative bargaining power within the executive branch.

CONCLUSION

This Article has argued that the literature has given insufficient attention to the incentives created by presidential review relative to judicial review and has sought to help remedy that imbalance. The discussion has provided a conceptual framework and vocabulary for thinking about strategic agency behavior in the context of presidential review, illustrated its dynamics, and assessed its normative implications. The analysis yields multiple hypotheses for future empirical work. Are there, for example, observable patterns of self-insulation that differ for certain groups of agencies, such as those agencies with costlier or more contentious rules? How do these patterns shift under different political configurations, when different parties are in power, or during periods of divided or unified government? Other potentially fruitful research avenues include further attention to the President's game-theoretic responses; the ways in which historical evolutions in executive orders may reflect the self-insulation dynamic; and the similarities or differences between an agency's expectations regarding presidential review, on the one hand, and judicial review, on the other. It is worth concluding by briefly reflecting upon a potential reason that agency behavior under presidential review has not received sustained attention until now. One explanation may be the tendency of courts and scholars to frame the question of insulation narrowly as one of agency institutional design.[444] They identify a host of institutional "design features" such as personnel hiring requirements and location outside the cabinet hierarchy as potential indicia of insulation from presidential influence.[445] To shield agencies is to structure them the right way.

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[443] *Cf.* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 207–11; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 104–08 (1992).

[444] *See, e.g.*, LEWIS, *supra* note 45, at 3 ("A study of agency design tells us something fundamental about who will create and implement public policy, about power and who will exercise it.").

[445] *See, e.g.*, *id.* at 45 ("Congress purposefully chooses to place new agencies outside of the Executive Office of the President (EOP) or cabinet as a way of shielding the agencies from presidential influence."); Barkow, *supra* note 35, at 45–49 (discussing hiring restrictions).

By contrast, this Article has argued that while agency institutional design choices can indeed help determine the degree of presidential control, executive branch agencies too can engage in autonomous and selective self-insulation from such influence even within these bounds. The question of insulation, that is, can be both exogenous and endogenous: a function of rules as well as the resulting realities. Agencies possess self-help tools, in a sense, through which to insulate their decisions. Future accounts of agency independence and insulation would be remiss to ignore them.