THE YALE LAW JOURNAL

ELOISE PASACHOFF

The President's Budget as a Source of Agency Policy Control

ABSTRACT. A large body of literature in administrative law discusses presidential control of executive agencies through centralized review of regulations in the Office of Information and Regulatory Affairs (OIRA), part of the White House's Office of Management and Budget (OMB). Largely overlooked in this literature is how the President's budget acts as a source of agency policy control—in particular, how the White House exercises control through OMB's authority to prepare the budget, oversee agencies' execution of the budget, and create and implement management initiatives through the budget process. This Article identifies seven levers associated with OMB's work on budget preparation, budget execution, and management and shows how these levers can control agency policymaking. These levers have some salutary aspects, especially in their valuable coordination work throughout the administrative state, but they also raise a series of accountability concerns related to opacity, the extensive discretion afforded to civil servants and lower-level political appointees, and the potential for substantive policy (and political) choices to be obscured by technocratic-sounding work. The Article concludes with a reform agenda, mapping out ways that the President, OMB, Congress, and civil society should respond to these accountability problems. Future analyses of OIRA's authority should incorporate discussion of the complementary power of OMB to use the budget as a source of agency policy control.

AUTHOR. Associate Professor, Georgetown University Law Center. For helpful conversations, comments, and critiques at different stages of this project, I thank Judy Appelbaum, Bob Bullock, Bill Buzbee, Dan Chenok, Martha Coven, Dan Ernst, Nora Gordon, Robert Gordon, Seth Harris, Lisa Heinzerling, John Hudak, Melissa Junge, Sheara Krvaric, Rich Loeb, Tom Lue, Sunil Mansukhani, Katherine McFate, Adam Neufeld, Jennifer Nou, Kathy Peroff, Aaron Saiger, Phil Schrag, Mark Seidenfeld, Miriam Seifter, Jason Snyder, David Super, Michael Vandenbergh, David Vladeck, and Tim Westmoreland. I am also grateful to current and former OMB and agency officials and staff members at civil society organizations who provided me with necessary background and/or reviewed drafts, as well as to several anonymous reviewers for the *Yale Law Journal*, all of whom provided helpful insight and feedback. I also benefitted from exchanges during faculty workshops at the Georgetown University Law Center and the University of Colorado Law School. For helpful research assistance, I thank Amanda McGinn, Georgetown Law '16; Michelle Willauer, Georgetown Law '16; Felycia Itza, Georgetown Law '17; Shanna Holako, Georgetown Law '17; and Morgan Stoddard and her team at the Georgetown Law Library. I also thank Monica Martinez and Angie Villarreal for ongoing administrative support. This Article represents my own views, and any errors remain entirely my own.

ARTICLE CONTENTS

INTRODUCTION 2185

I. THE ROLE OF BUDGET OVERSIGHT IN OMB 2194
- A. The Office of Management and Budget – and Policy 2195
- B. The Resource Management Offices 2199
- C. Comparing Power Centers for Review of Budgets and Regulations 2201

II. OMB'S CONTROL OF AGENCY POLICYMAKING THROUGH THE BUDGET PROCESS 2207
- A. The Mechanisms of Control Through Budget Preparation 2209
  - 1. The Form-and-Content Lever 2209
  - 2. The Approval Lever 2213
    - a. The RMOs' Pyramid Structure 2214
    - b. The Relationship Between Budget Numbers, Budget Language, and Substantive Policy 2218
    - c. Variations in the Approval Lever 2220
  - 3. The Confidentiality Lever 2224
- B. The Mechanisms of Control Through Budget Execution 2227
  - 1. The Specification Lever 2228
    - a. Apportionment 2228
    - b. Transfers and Reprogramming 2231
    - c. Deferral and Rescission 2231
    - d. Government Shutdowns 2232
  - 2. The Monitoring Lever 2235
- C. The Mechanisms of Control Through Management Initiatives 2237
  - 1. The Presidential Management Agenda Lever 2239
  - 2. The Budget-Nexus Lever 2242

III. ASSESSING OMB'S CONTROL OF AGENCY POLICYMAKING THROUGH THE BUDGET PROCESS 2243
- A. Salutary Aspects 2243
  - 1. Legality 2243
  - 2. Coordination 2246

B. Troublesome Aspects 2250
1. The Lack of Transparency 2251
a. Protecting Policy Consistency 2253
b. Protecting the Deliberative Process 2258
c. Disclosing Procedural Aspects of the Budget Process and Post-Deliberative Decisions 2261
2. The Role of Civil Servants and Political Officials 2262
3. The Policy and Political Implications of Technocratic Decisions 2268

IV. RESPONDING TO OMB'S CONTROL OF AGENCY POLICYMAKING THROUGH THE BUDGET PROCESS 2271
A. Inside the Executive Branch 2271
1. The President 2271
a. Transparency of Procedural Aspects of the Budget Process 2273
b. Transparency of Final Budget Execution Decisions 2274
c. Transparency of Predecisional Budget Preparation Information 2275
2. OMB 2278
B. Outside the Executive Branch 2281
1. Congress 2281
2. Civil Society Organizations 2286
C. A Cautionary Note 2287

CONCLUSION 2289

INTRODUCTION

> *One of the secrets only the initiated know is that those who labor here [at the Office of Management and Budget] for long do so because the numbers are the keys to the doors of everything. Spending for the arts, the sciences, foreign policy and defense, health and welfare, education, agriculture, the environment, everything – and revenues from every source – all are reflected, recorded, and battled over – in numbers. And the sums of the numbers produce fiscal and monetary policy. If it matters – there are numbers that define it. And if you are responsible for advising the president about numbers, you are – de facto – in the stream of every policy decision made by the federal government.*
>
> – Paul O'Neill, Former Deputy Director of OMB.[1]

Scholarship on administrative law is replete with analysis of presidential control of executive agencies through centralized review of regulations in the Office of Information and Regulatory Affairs (OIRA), part of the White House's Office of Management and Budget (OMB). While the literature is sharply divided as to whether OIRA's control is salutary or dangerous,[2] the literature largely shares an underlying framework within which the subject matter is discussed: it tends to focus on regulations as the primary policy lever through which OMB affects agencies' policy choices.[3]

---

1. Bernard H. Martin, *Office of Management and Budget*, *in* GETTING IT DONE: A GUIDE FOR GOVERNMENT EXECUTIVES 72 (Mark A. Abramson et al. eds., 2013).

2. For the view that this control promotes efficiency, accountability, and some positive form of the unitary executive, see, for example, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 830 (2003); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081-82 (1986); John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 995-97 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2289 (2001); and Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995). For the view that this control destroys accountability, oversteps the bounds of legality, and delays necessary agency action, see, for example, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 158 (2009); Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 364-69 (2014); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059, 1064-69 (1986); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012); and Peter L. Strauss, *Overseer, or "the Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 732-38 (2007).

3. *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 64 (2006) (limiting

This portrayal of OMB as an institution for asserting presidential control over the administrative state is incomplete. Reviewing regulations is not the only policy lever OMB has to control executive agencies' policy choices. In fact, it may not even be the main one. The budget itself—the core reason for OMB's existence[4]—is a key tool for controlling agencies.[5] Yet the mechanisms of control through the executive budget process remain little discussed and insufficiently understood.

This Article seeks to expand the view of centralized control of the administrative state by describing, categorizing, and analyzing the operations surrounding the President's budget. It maps out the legal documents that govern this work—some statutes, but primarily documents produced by OMB and the White House more generally—as well as the OMB offices and personnel behind this work. These sources help to explain the mechanisms and processes by which OMB uses the budget to get "in the stream of every policy decision made by the federal government."[6]

The Article advances three kinds of arguments: descriptive, normative, and prescriptive. The core descriptive claim is that understanding OMB's budget operations is fundamental to understanding centralized control of agencies' decision making because OMB's work on the budget has important policymaking effects. This insight provides a new perspective on the federal

---

discussion to "the involvement of OIRA and other White House offices in EPA rule-making, as opposed to other types of policy-making"); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131 (2010) (limiting discussion to agency rulemaking); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 4 (1994) (clarifying that in "examin[ing] presidential influence on agency policy . . . the Article focuses almost exclusively on economic, health, and safety regulation").

4. *See* LARRY BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921-1979, at 3-4 (1979) (describing OMB's creation as the Bureau of the Budget in 1921).

5. *See, e.g.*, DONALD F. KETTL, DEFICIT POLITICS: THE SEARCH FOR BALANCE IN AMERICAN POLITICS 169 (2d ed. 2003) ("Leverage over money, of course, has given OMB enormous power over the details of policy."); IRENE S. RUBIN, THE POLITICS OF PUBLIC BUDGETING: GETTING AND SPENDING, BORROWING AND BALANCING 11 (7th ed. 2014) (describing OMB's job as, in part, "trying to accomplish the policy goals of the president through the budget"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 506 (1989) ("[T]he overall policy-shaping effect of the OMB's budgetary power is significant."); Martha Joynt Kumar, *Getting Ready for Day One: Taking Advantage of the Opportunities and Minimizing the Hazards of a Presidential Transition*, PUB. ADMIN. REV., July-Aug. 2008, at 603, 610 ("The budget is the bottom line for presidential policy . . . ."); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 963 (1980) (stating that, even before OIRA came into existence, OMB "exercise[d] control over agency budgets, and frequently over their policies as well").

6. Martin, *supra* note 1, at 72.

budget process. Much writing on the budget process focuses solely on legislative procedures and general fiscal policy, attending very little to the executive's role.[7] When the administrative law literature discusses the budget, it tends to do so through the lens of institutional battles between Congress and the President rather than by examining the budget as a method through which the White House can control agencies' policymaking.[8] When the literature does discuss the intra-executive role of the budget, it tends to focus on blunt tools and discrete moments in time: the President's ability to propose the funding levels and associated policy choices that Congress acts on,[9] to

---

7. *See, e.g.*, RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 101-02, 676 (1966) (discussing the Bureau of Budget, OMB's predecessor, briefly, without exploration of the President's role); FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 454 (Elizabeth Garrett et al. eds., 2008) (discussing OMB on 19 scattered pages and the President not at all); AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS 464, 467 (1988) (discussing OMB, the Bureau of the Budget, and the President in only a few pages). Some exceptions to this overwhelming focus on Congress exist. Allen Schick's extremely useful book on the federal budget contains a chapter titled "The President's Budget." *See* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 84-117 (3d ed. 2007). But while it captures important dynamics, it largely focuses on executive-legislative relations and treats OMB as a single unit without further disaggregating OMB's role. *Id.* An important historical exception to the focus on Congress is LOUIS FISHER, PRESIDENTIAL SPENDING POWER (1975). But Fisher focuses on only one aspect of this power – budget execution (one of three powers related to presidential spending I discuss in this Article) – and requires significant updating forty years later, as a small, emerging body of work in political science is starting to recognize. *See, e.g.*, JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 3 (2014) ("This book challenges the common claims that spending power and the drive for electoral success are predominantly congressional phenomena."); Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 783 (2010) (describing the distributive politics literature's "almost exclusive[]" focus on Congress, rather than the President). The recent political science literature's attempt to broaden the discipline's focus on the budget process to include a more fulsome view of presidential power is valuable. However, it tends to focus on quantitative analysis and abstracts the operation of presidential power. *See, e.g.*, HUDAK, *supra*, at 157-67 (showing that the distribution of federal competitive grants aligns with the President's political interests and presenting anecdotal reports of how OMB might aid in this work); Berry et al., *supra*, at 785-88 (explaining how the President can generally use the budget process to direct the distribution of federal grants). By contrast, this Article elucidates the legal mechanisms and intra-executive structures that effectuate this power.

8. *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 677-85 (11th ed. 2011).

9. *See, e.g.*, MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., R42633, THE EXECUTIVE BUDGET PROCESS: AN OVERVIEW 1 (2012) (describing the budget as "one of the President's most important policy tools" because, although "it is not legally binding, the President's budget initiates the congressional budget process and provides Congress with recommended spending levels for agency programs, projects, and activities funded through the annual appropriations acts").

"recommend budget cuts for agencies that fail to follow administration preferences (and budget increases for those that comply),"[10] and ultimately to veto appropriations legislation not to his liking.[11]

This Article expands this view of the intra-executive budget process, arguing instead that OMB's budget work serves as a regularized and pervasive form of agency control. For each component of the budget process in the executive branch—the preparation of the President's budget, the execution of the budget that Congress eventually passes and the President signs, and the implementation of presidential management initiatives that are embedded in the budget—this Article identifies and names levers that function as a form of policy control. In preparing the budget, OMB uses the *form-and-content lever* to tell agencies what to put in their budget requests to OMB in the first instance, the *approval lever* to require that the substance of agency budget requests passes muster with OMB, and the *confidentiality lever* to direct agencies to remain silent about any policy preference that may differ from what the President's budget ultimately presents to Congress.[12] In executing the budget, OMB uses the *specification lever* to define how agencies may spend their appropriated money and the *monitoring lever* to ensure that agencies' ongoing work is acceptable.[13] And in overseeing management initiatives, OMB uses the *Presidential Management Agenda lever* to develop agency-specific versions of those initiatives, and the *budget-nexus lever* to ensure that the initiatives are realized throughout the budget process.[14] Collectively, these levers reach widely and deeply into agency policy choices.

In identifying and examining these levers, this Article focuses not on the appropriations process but instead on the periods leading up to the annual submission of the President's budget to Congress and following the passage of the budget.[15] This is not to say that the congressional appropriations process is

10. LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 660 (2d ed. 2013); *see also* SHANE, *supra* note 2, at 144 ("An agency's failure to attend respectfully to the President's concerns may elicit punishment in the preparation of the agency's future budget.").

11. *See, e.g.*, Berry et al., *supra* note 7, at 785 ("To the extent that presidents make any appearance whatsoever" in the empirical literature on distributive politics, "they typically are characterized as veto players."); Kagan, *supra* note 2, at 2259 & n.38 (discussing the veto power generally and as used during the Clinton presidency).

12. *See infra* Section II.A.

13. *See infra* Section II.B.

14. *See infra* Section II.C.

15. While in recent years continuing resolutions have largely replaced annual budgets, the widespread use of continuing resolutions does not change the fundamental aspects of OMB's authority. *See infra* notes 195, 213-219 and accompanying text.

irrelevant.[16] Rather, OMB's power is rooted more in the system of executive authority that has developed around the budget cycle than in the ultimate appropriation.

As a central part of describing and analyzing this power, the Article surfaces the role of the Resource Management Offices (RMOs), a critically important but understudied part of OMB. The five RMOs collectively contain more than four times as many staff members as OIRA.[17] Working directly with budget and policy officials in each agency, the RMO staff play a large role in overseeing—indeed, at times in directing—the work of agencies throughout the administrative state because they have primary responsibility for pulling the aforementioned levers associated with budget preparation, budget execution, and management initiatives.[18] Yet despite the broad scope of their

16. Of course, Congress, as the branch with the power of the purse, plays an essential role in determining the federal government's budget. *See* FENNO, *supra* note 7, at xiii; *see also* U.S. CONST. art I, § 9, cl. 7 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law."). That said, "[i]t is easy to exaggerate the power of the purse," given the many complexities around using that power to control agency action. Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance,"* 12 LEGIS. STUD. Q. 475, 486-88 (1987) (observing that "[t]he budget is simply not a very dependable control mechanism" for Congress because "[i]f the [congressional] committee throws money at [a non-compliant agency to get it to change its course], it is essentially rewarding the agency for lack of compliance," but "[i]f the committee slashes the agency's budget as a punishment . . . it is simultaneously denying the agency the very resources it needs to comply with the committee's wishes," and because agencies hold and may not share information Congress needs to target its financial incentives appropriately); *see also* BRESSMAN ET AL., *supra* note 10, at 708-09 (noting that while "agencies are likely to adjust their policies to legislative preferences in response to a threat of a budget cut . . . agencies are free to determine whether the threat is credible"); William N. Eskridge, Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. 1, 2-6 (2012) (discussing generally the many hurdles any legislation must survive to become law); Kagan, *supra* note 2, at 2259 n.38 (noting the difficulty of getting the "authorizing and appropriations committees of both houses to discover and agree on an effective budgetary sanction" for noncompliant agencies). Given these complexities, understanding the control functions of the intra-executive budget process is all the more important.

17. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2016 BUDGET 11 (2015), http://www.whitehouse.gov/sites/default/files/omb/assets/organization/fy2016_omb_budget.pdf [http://perma.cc/EW76-DTR8].

18. *See infra* Part II. Extensive as these levers are, they do not capture the full scope of the RMOs' authority because these offices also play a role beyond the budget process in managing agencies' interactions with Congress through legislative coordination and clearance. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, LEGISLATIVE COORDINATION AND CLEARANCE (1979) [hereinafter OMB CIRCULAR NO. A-19], http://www.whitehouse.gov/omb/circulars_a019 [http://perma.cc/QE4L-6697]; SHELLEY LYNNE TOMKIN, INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET OFFICE 18-22 (1998). While this Article is devoted to the RMOs' work through the budget process, future work should expand upon this other role.

authority, a recent search of Westlaw's database of law reviews and journals identified only seven references to the RMOs,[19] in contrast to over a thousand articles discussing OIRA during that same time period.[20] Given the omnipresence of the RMOs in agency oversight and direction, the inattention

19. WESTLAW, http://www.westlaw.com [http://perma.cc/YC75-76A8] (follow "Secondary Sources" hyperlink; follow "Law Reviews & Journals" hyperlink; then search for "Resource Management Offices;" using the facet labeled "Date," click on "Date Range" and insert "01/01/1995" and "12/31/2015") (last visited Feb. 11, 2016). *See* Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 101 & n.1, 120 (2006) (mentioning consultation between OIRA and RMOs); Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 276 (2015) (referencing RMOs as part of a description of OMB); Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 406 (2010) (mentioning RMOs in passing); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1178, 1200 (2012) (mentioning RMOs as a tool for presidential coordination); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1799-1800 (2013) (referencing RMOs as part of a broader discussion of civil servants in OIRA); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845 (2013) (discussing OIRA's collaboration with the RMOs on regulations that affect the budget). January 1, 1995 is a sensible start date for such a search because President Clinton's OMB Director reorganized the RMOs and gave them that name in 1994. *See* Memorandum from Leon E. Panetta, Dir., Office of Mgmt. & Budget, Exec. Office of the President, & Alice M. Rivlin, Deputy Dir., Office of Mgmt. & Budget, Exec. Office of the President, to All OMB Staff, No. 94-16, Making OMB More Effective in Serving the Presidency: Changes in OMB as a Result of the OMB 2000 Review 2, 4-5 (Mar. 1, 1994), http://clinton.presidentiallibraries.us/files/original/6caf30fc81de86be3746e386c1997e84.pdf [http://perma.cc/SEU2-BAZ3].

20. WESTLAW, http://www.westlaw.com [http://perma.cc/YC75-76A8] (follow "Secondary Sources" hyperlink; follow "Law Reviews & Journals" hyperlink; then search for "Office of Information and Regulatory Affairs;" using the facet labeled "Date," click on "Date Range" and insert "01/01/1995" and "12/31/2015") (last visited Feb. 11, 2016). Records identifying the first 1,000 articles are on file with the author.

in the literature to the RMOs is remarkable.[21] OIRA is important, but that does not mean that the rest of OMB is not worthy of study.[22]

Three key points about centralized executive control emerge from this study of the RMOs. First, the RMOs provide a direct line into agencies. Each agency has identifiable RMO staff responsible for its work and a regular mode of communication with that staff.[23] The RMOs therefore can serve as a conduit for policy and political direction from the President, the White House policy councils and other White House political advisors, and the OMB Director. If there is a message to be conveyed to agencies, the RMOs are a good way to convey it. The RMOs therefore work to ensure conformity with the President's policy program and political interests.[24] In this sense, the RMOs' work through the budget process reflects presidential, or at least White House, control of the administrative state.

Second, the RMOs are not simply a conduit of information from the top down. They also serve as a source of deep and valuable knowledge of agency programs and practices, and busy senior political officials can accept their judgment calls as final.[25] Thus, the RMOs' work also reflects the power of the RMO staff members to play a large role in determining what presidential control of the administrative state will look like.

---

21. The lack of attention to the RMOs in the legal literature is particularly striking in light of the consideration that political scientists have given to the broader OMB beyond OIRA. *See generally, e.g.*, BERMAN, *supra* note 4; FREDERICK C. MOSHER, A TALE OF TWO AGENCIES: A COMPARATIVE ANALYSIS OF THE GENERAL ACCOUNTING OFFICE AND THE OFFICE OF MANAGEMENT AND BUDGET (1984); TOMKIN, *supra* note 18; Hugh Heclo, *OMB and Neutral Competence*, *in* THE MANAGERIAL PRESIDENCY 131 (James P. Pfiffner ed., 1999); Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985). I draw on these accounts and others in my analysis. Still, none of these studies identifies or analyzes how OMB's budget work systematically operates as a form of agency policy control. The contribution of this Article, then, is to detail, categorize, and frame OMB's budget work as a system of agency policy control; to put this work in conversation with the analysis of OIRA that has preoccupied the field; and to assess this work in the context of administrative law values.

22. *See, e.g.*, Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1498 (2007) (urging, as a former administrator of OIRA, that scholarship attend to other aspects of OMB's work in order to fully understand presidential control); *see also* TOMKIN, *supra* note 18, at 95 (noting that in the 1980s, "OIRA and its surrounding controversies sometimes became equated with [all of OMB] in the public mind").

23. *See infra* notes 63-71, 247 and accompanying text.

24. *See infra* notes 390-394 and accompanying text.

25. *See, e.g.*, Jeffrey Mervis, *An Invisible Hand Behind Plan To Realign U.S. Science Education*, 341 SCIENCE 338, 339-40 (2013) (describing an RMO official as "a good example of how a career civil servant can help shape policy at the White House" and quoting an advocate saying "we should be glad that she uses her powers for good, and not evil").

Third, the RMOs reach many decisions about agency action on their own, since much agency oversight does not require elevation.[26] This does not mean that RMO staff members advance their own political preferences; the staff prides itself on being apolitical and working as hard for one administration as it does for the next.[27] Given the extremely high caliber of the RMO staff,[28] decisions the RMOs make with and for agencies may be "better," at least against some metrics, than decisions the agencies would reach on their own. At the same time, it is clear that a subset of RMO decisions have policy import;[29] that institutional and interpersonal dynamics mean that agencies will not always elevate these decisions outside the RMOs;[30] and that RMO staff may not always be aware that they are making policy-inflected decisions, rather than neutral and technocratic ones.[31]

In this sense, whether the RMOs' work is a form of presidential control is less clear. At times, the RMOs' work may instead reflect OMB control, or RMO-intuited versions of presidential control as applied to particular situations, with case-specific value judgments obscured. Accordingly, this Article is titled "The President's Budget as a Source of Agency Policy Control," without further identifying the actor with the ultimate control.

My portrayal of the RMOs' work necessarily paints with a broad brush. I offer a sketch of how OMB's policy levers generally secure agency compliance, even if, as in any human institution, the dynamics will not hold true in every instance.[32] While this account leaves much open for future work, it provides an analytic framework for understanding the policy control OMB can exercise through the budget process.

---

26. *See infra* notes 142-149, 252-261 and accompanying text.

27. *See, e.g.*, Robin Bravender & Emily Yehle, *Wonks in Embattled Regulatory Office Are Mysterious—but 'Not Nefarious,'* GREENWIRE (Feb. 18, 2014) http://www.eenews.net/stories/1059994711 [http://perma.cc/G7C2-RHVP] (describing "an oft-told joke" within OMB to illustrate the office's goal to serve the institution of the presidency rather than any one President or political party: "Aliens invade Earth, everyone has fled the Capitol and the White House is a wasteland. But by the time the alien's spaceship lands, three people with a clipboard approach. 'We're from OMB,' they say, 'and we're here to help with the transition.'").

28. *See infra* notes 72, 325-326 and accompanying text.

29. *See infra* notes 74, 140-149 and accompanying text; *cf.* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 97 (1985) (noting that every statutory specification intended to constrain administrators' policy discretion nonetheless requires other discretionary choices that continue to reflect administrators' policy determinations).

30. *See infra* notes 146-149, 253-255 and accompanying text.

31. *See infra* notes 142-145, 257-258, 428-429 and accompanying text.

32. *See infra* notes 107-108 and accompanying text.

Parts I and II elaborate on this descriptive argument. Part I places the RMOs in the context of the larger OMB and explains how the RMOs' work is integrally related to agency policymaking. This Part also compares the scope of the RMOs' authority with OIRA's, showing that, in some ways, the RMOs extend more deeply and broadly throughout the administrative state than OIRA does. Part II then details how OMB's budget process puts the office "in the stream of every policy decision made by the federal government,"[33] by describing how each lever operates in practice.

Part III turns to the Article's normative argument. This Part evaluates OMB's levers and, more generally, the role of the RMOs in the budget process, concluding that they have both benefits and drawbacks. One benefit is that the RMOs' work, unlike OIRA's, is undoubtedly legal. Indeed, the questions about the legality of OIRA's work that have dogged that office may explain why much more attention has been paid to OIRA than the RMOs.[34] There is also little doubt that the RMOs play an important role in coordinating the sprawling administrative state. In doing so, the RMOs further core administrative law values of efficiency, effectiveness, and to some extent, accountability.

On the negative side, however, three aspects of the RMOs' work collectively weaken their accountability. First, the RMOs' work is far too opaque. The lack of transparency surrounding the RMOs' interactions with agencies and third parties makes it difficult for the public and for Congress to monitor their actions. Second, the structure of the RMOs' work empowers OMB's civil servants relative to politically appointed agency officials and obscures ultimate responsibility for agency decisions. Third, because the RMOs' work seems dry and technical from the outside—the kind of work associated with the bean-counter, green-eyeshade stereotype of budget bureaucrats—its substantive nature and potential for partisan politicization are ignored.

Part IV sets forth my prescriptive argument, although my suggestions are meant to start a conversation rather than to present a perfect package of solutions. I first consider how actors inside the executive branch, namely the President and OMB itself, should respond to the RMOs' weak accountability. I argue that Presidents should issue executive orders governing the RMOs' work, thereby claiming ownership of it, just as they issue executive orders governing OIRA's work, thereby setting forth their regulatory philosophies. I propose a variety of transparency requirements that could be embedded in such

33. Martin, *supra* note 1, at 72.

34. *See infra* note 296 and accompanying text.

an executive order and assess their pros and cons. Additionally, I suggest ways that OMB could make its own work more transparent and participatory.

I then turn to actors outside the executive branch, namely Congress and civil society organizations. I consider how Congress could attempt to increase the RMOs' accountability through additional oversight. I also consider ways that civil society organizations could increase their monitoring of the RMOs' work and expand their efforts to influence its work.

The Article concludes with a cautionary note for OIRA's critics, who have sometimes suggested that OIRA's role in regulatory review ought to be eliminated. Because OIRA's work could be accomplished through the RMOs, which are less transparent and accountable, reform – not elimination – is the better option. More generally, future analysis of OIRA's interactions with agencies should include consideration of the RMOs' complementary power.

I. THE ROLE OF BUDGET OVERSIGHT IN OMB

As recent shutdowns dramatically illustrate,[35] the federal budget is indispensable to the government's work. The budget also serves as a statement of national priorities. OMB plays a critical role in developing this statement and overseeing its implementation through three related activities: preparing the budget, executing the budget, and working on management initiatives tied to the budget.

This Part explains the importance of OMB's budget work, laying the groundwork for the more detailed analysis in Part II of the budgetary levers OMB can use to influence agency policymaking. Section I.A maps out OMB's basic structure, showing that management and budget are integrally related to policy choices. Section I.B introduces the RMOs as central to OMB's control of agencies' policy choices through the budget process. This Section explains in broad strokes the work of these offices and their policymaking effect. Section I.C situates OMB's work in the context of executive branch oversight. It compares these OMB offices to OIRA because OIRA's power is much better understood in the literature. Drawing on this descriptive work, I argue that the scope of the RMOs' work is in some ways even greater than OIRA's.

35. *See infra* note 232 and accompanying text.

A. The Office of Management and Budget—and Policy

OMB dates back to the Budget and Accounting Act of 1921, which created OMB's predecessor, the Bureau of the Budget.[36] The Act was intended to rationalize the uncoordinated process in which individual federal agencies presented their budget requests seriatim to Congress with no big-picture, national view.[37] The Act located the Bureau, colloquially known as the BOB, in the Treasury Department but created a Director and Assistant Director who reported directly to the President.[38] Originally these positions were simply the President's own confidential appointees; only later would they come to require Senate confirmation.[39]

In 1939, during President Franklin D. Roosevelt's Administration, the BOB's role of providing staff assistance to the President was formalized when the BOB was moved out of the Treasury Department and into the newly created Executive Office of the President (EOP).[40] Although the BOB focused on the national budget at a macro-level and on reducing government waste on a micro-level,[41] its work soon expanded to providing broader policy advice to the President on all sorts of matters.[42] In 1970, as part of a reorganization plan put forth by President Nixon, the BOB's name was changed to the Office of Management and Budget.[43]

Today's OMB is an office of around 435 full-time employees,[44] making it the largest unit in the EOP.[45] More than ninety percent of OMB's employees are career civil servants,[46] further distinguishing it from most other EOP

36. *See* Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

37. *See* BERMAN, *supra* note 4, at 3-4.

38. *See* Budget and Accounting Act of 1921 § 207.

39. *See* BERMAN, *supra* note 4, at 4.

40. *See id.* at 13.

41. *See id.* at 7-8.

42. *See id.* at 23-104.

43. *See id.* at 112.

44. OFFICE OF MGMT. & BUDGET, *supra* note 17, at 11.

45. DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 25-26 tbl.1, 27-28 (2012) [hereinafter ACUS 2012 SOURCEBOOK].

46. Office of Mgmt. & Budget, Exec. Office of the President, *The Staff of the Office of Management and Budget*, WHITE HOUSE, http://www.whitehouse.gov/omb/OMBstaff [http://perma.cc/6XD8-ULQZ].

offices, which tend to be staffed more heavily by political appointees.[47] Of the approximately forty political appointees in OMB, very few are Senate-confirmed: only the Director, Deputy Director, Deputy Director for Management, Administrator of OIRA, and heads of two other offices.[48]

OMB is often said to be divided into an "M" side (for management) and a "B" side (for budget).[49] In principle, the "M" side consists of several offices created by statute that oversee matters such as federal financial management, procurement, e-government, and information technology.[50] OIRA is one of these offices.[51] The "M" side also includes a non-statutory office overseeing performance and personnel management in the agencies.[52] In principle, the "B" side consists of five RMOs, organized by agency and program area, which oversee budget development and execution for the agencies under their purview. It also includes a separate Budget Review Division, which coordinates the President's budget as a whole and analyzes budget policy and trends at an aggregate level.[53] The organizational chart below maps out this world, where the "M" units are the Statutory Offices (on the right), along with the Performance and Personnel Management unit (one of the OMB-wide support offices on the left), and the "B" units are the RMOs (at the bottom) along with the Budget Review Division (one of the OMB-Wide Support Offices on the left).

47. *See* ACUS 2012 SOURCEBOOK, *supra* note 45, at 23.

48. *See* CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 13, 36 (2013).

49. *See, e.g.*, DONALD F. KETTL, THE NEXT GOVERNMENT OF THE UNITED STATES: WHY OUR INSTITUTIONS FAIL US AND HOW TO FIX THEM 88 (2009); TOMKIN, *supra* note 18, at 199-200.

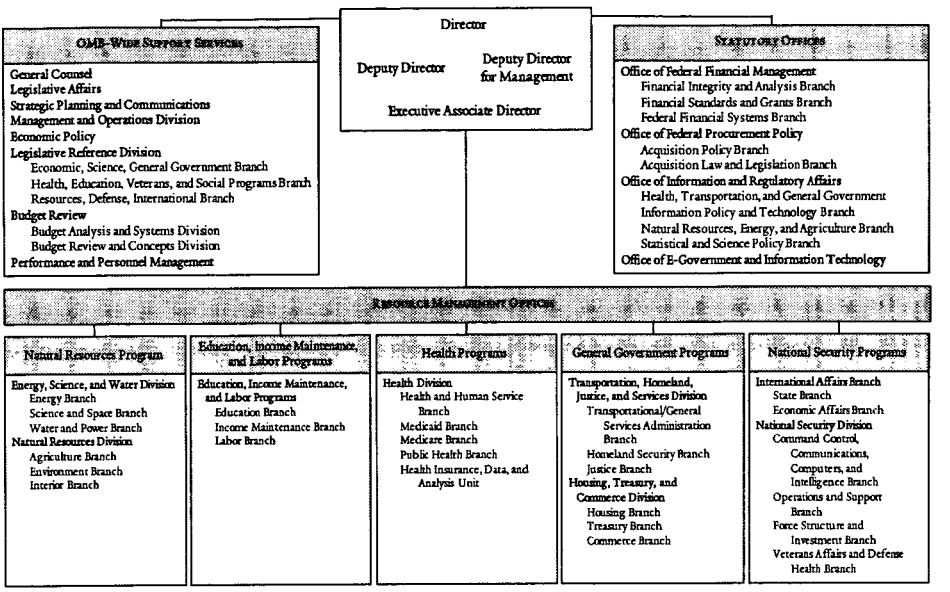
50. *See* TOMKIN, *supra* note 18, at 20-21; Office of Mgmt. & Budget, Exec. Office of the President, *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission [http://perma.cc/RQX4-PRRP].

51. *See* TOMKIN, *supra* note 18, at 20-21; Office of Mgmt. & Budget, *supra* note 50.

52. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Management*, WHITE HOUSE, http://www.whitehouse.gov/omb/management [http://perma.cc/EPW2-WQ5G].

53. *See* TOMKIN, *supra* note 18, at 12-17; Office of Mgmt. & Budget, *supra* note 50.

Figure 1.
OMB ORGANIZATION[54]



In reality, however, the story is more complicated. OIRA's work on regulatory and information policy cannot fairly be described as management-related. Rather, these are policy functions. The current White House seems to acknowledge this by presenting OIRA's work in a distinct tab on OMB's website, separate from the two tabs on management and budget.[55] In addition, another important aspect of OMB's job is to centralize agencies' views on

54. Office of Management and Budget Organizational Chart, U.S. GOV'T MANUAL, http://www.usgovernmentmanual.gov/ReadLibraryItem.ashx?SFN=UeeDO8j6eoeadNiQ3w5Y+pYlBtyDAtV4&SF=PAmu4nDRyaoCugTKvsXyXx/6G6ZqqOY1fk7ZHZboqk4= [http://perma.cc/YWL6-LBT9].

55. *See* Office of Mgmt. & Budget, *supra* note 52 (explaining that "[t]he management side of OMB oversees and coordinates the Federal procurement policy, performance and personnel management, information technology (e-Government) and financial management" and leaving OIRA off the list of "OMB's Management Offices"); Office of Mgmt. & Budget, Exec. Office of the President, *Office of Information and Regulatory Affairs*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira [http://perma.cc/EMQ7-NEKJ] (describing OIRA's work as involving "the review of Executive Branch regulations" and "coordination of federal privacy policy," among other matters).

legislation and their interactions with Congress; the current website again provides a separate tab for this policy-laden task.[56]

For their part, the RMOs deal with far more than the agency budgets they oversee. As the rest of this Article demonstrates, their authority over budget preparation, budget execution, and related management initiatives gives them a wide purchase over agency policy decisions.[57] Dividing OMB into a management side and a budget side thus obscures the role of policy in the office.[58]

In some ways, the process of obscuring the role of policy in OMB began with President Nixon's 1970 reorganization plan. In renaming the BOB the Office of Management and Budget, President Nixon also created what became the Domestic Policy Council, explaining that "the Domestic Council will be primarily concerned with what we do; the Office of Management and Budget will be primarily concerned with how we do it and how well we do it."[59] This plan to keep policy out of OMB was impossible from the start.[60] But while it is generally understood that the job of the White House policy councils is to coordinate the President's policy,[61] it is less widely discussed that this, too, is the task of the budget side of OMB. To the extent that it is understood at an abstract level,[62] the mechanisms by which OMB's budget side does this work remain underexplored. Accordingly, the rest of this Article turns to demonstrating how OMB's budget side does this work.

---

56. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Legislative Information*, WHITE HOUSE, http://www.whitehouse.gov/omb/legislative-affairs [http://perma.cc/6PCN-NQ6W] (describing OMB's role in "coordinat[ing]" the administration's work with Congress "to ensure consistency"); *see also* OMB CIRCULAR NO. A-19, *supra* note 18, at ¶ 3 (explaining that OMB's work on "legislative coordination and clearance" is designed in part to develop and present a unified "Administration[] position on legislation").

57. *See infra* Part II.

58. *See* Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 4-5 (noting that the RMOs would "integrate OMB's 'M' and 'B' so we can perform both responsibilities more effectively," and stating that new hires for the new RMOs would be "policy analysts").

59. BERMAN, *supra* note 4, at 108.

60. *See id.* at 5 (calling "the policy-administration dichotomy naive"); *id.* at 113 (explaining that almost no one inside OMB after the reorganization thought that policy could be kept separate from budget and management).

61. *See, e.g.*, Paul Weinstein, Jr., *White House Policy Councils*, *in* GETTING IT DONE, *supra* note 1, at 58, 60 (explaining that three White House policy councils – the National Security Council (NSC), the National Economic Council, and the Domestic Policy Council – are "the principal units responsible for the coordination of presidential-level policy development").

62. *See* sources cited *supra* note 5.

B. The Resource Management Offices

As Figure 1 indicates, the RMOs are central to OMB's operation. In 1994, the RMOs were introduced in their current form as part of an internal OMB reorganization.[63] The RMOs grew out of longstanding budget-focused "program divisions," which even in their narrower focus were "the 'heart and soul' of the institution" dating back at least to the World War II era.[64] Together, the RMOs oversee the entire administrative state – cabinet departments, other executive agencies, and independent agencies – in five groups organized by subject matter: Natural Resource Programs; Education, Income Maintenance, and Labor Programs; Health Programs; General Government Programs; and National Security Programs.[65]

Almost half of OMB's 435 employees work in the RMOs.[66] At the helm of each RMO is a political appointee called a Program Associate Director or PAD.[67] But unlike the heads of OIRA, the Office of Federal Financial Management, and the Office of Federal Procurement Policy, the PADs are not Senate-confirmed.[68] The RMOs are further organized into distinct divisions, each run by a career member of the Senior Executive Service, called a Deputy Associate Director, or DAD.[69] Each division is then split into branches run by a career official called a branch chief.[70] The remainder of the staff members within each branch are program examiners, with primary oversight

---

63. *See* Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 2.

64. TOMKIN, *supra* note 18, at 12; *see also* SELDEN BIGGS & LELIA B. HELMS, THE PRACTICE OF AMERICAN PUBLIC POLICYMAKING 341 (2006) ("The Resource Management Offices (RMOs) lie at the heart of OMB's role in budgeting and policy production.").

65. *See supra* Figure 1. Previous administrations have organized these categories slightly differently. President George W. Bush's OMB combined the RMO for Education, Income Maintenance, and Labor Programs with the RMO for Health Programs to form the RMO for Human Resource Programs, leaving four RMOs in total. *See* OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., U.S. GOVERNMENT MANUAL 88, 97 (2002). President Clinton's OMB had five RMOs but combined health programs with personnel-related programs to have one RMO called Health and Personnel, leaving education, income-maintenance, and labor programs in their own RMO called Human Resources. *See* OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., U.S. GOVERNMENT MANUAL 91, 98 (1995). These differences in organization did not change the basic structure of the RMOs' work.

66. *See* OFFICE OF MGMT. & BUDGET, *supra* note 17, at 11.

67. *See* TOMKIN, *supra* note 18, at 12.

68. *See* DAVIS & MANSFIELD, *supra* note 48, at 13.

69. *See* TOMKIN, *supra* note 18, at 12-13.

70. *See id.* at 13.

responsibility over part of a large agency, several smaller agencies, or some combination thereof.[71] In keeping with the high expectations for RMO staff in general, program examiners tend to be highly credentialed.[72] They are also often (although not always) relatively junior in their careers.[73]

The RMOs have broad authority over the agencies they oversee. As the Director and Deputy Director of OMB explained in describing the 1994 transformation of the program divisions into the RMOs, the RMOs would "better integrate our budget analysis, management review and policy development roles," assessing how well agency programs work and making program and policy plans for the future.[74] This open-ended portfolio covers almost anything agencies could conceivably want to do.

The core of the RMOs' work tracks three distinct parts of the budget process: *budget preparation*, during which the RMOs work with the agencies under their authority to guide the development of their budget proposals; *budget execution*, during which the RMOs ensure that agencies implement the budget in accordance with legislative requirements and the President's priorities; and *management implementation*, which requires the RMOs to ensure that agencies implement various management requirements as the new budget is prepared and the previous budget is executed.[75] These three aspects of the budget process structure the relationship between the RMOs and agencies and give the RMOs a great deal of authority over agency action.

A recent publication providing advice for new political appointees underscores the importance of the RMOs: "There is one certainty in Washington: You will be dealing with the Office of Management and Budget throughout your tenure as an agency head. Nearly every major issue you will face will pass through OMB."[76] While "[y]ou will have to work with OMB in a variety of areas," including regulatory review, "the budget process is the main arena of engagement," and "[y]our lead OMB policy official for most budget and program policy matters will be the program associate director (PAD) with

71. *See id.*

72. *See* Gordon Adams, *The Office of Management and Budget: The President's Policy Tool*, *in* THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH 55, 61 (Roger Z. George & Harvey Rishikof eds., 2011).

73. *See* TOMKIN, *supra* note 18, at 13, 23-24.

74. Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 2, 4-5; *see also* Office of Mgmt. & Budget, Exec. Office of the President, *Program Examiner: Resource Management Offices*, WHITE HOUSE, http://www.whitehouse.gov/omb/program_examiner [http://perma.cc/56G4-5KAX] (describing expansive work under the program examiners' purview).

75. *See* Office of Mgmt. & Budget, *supra* note 50. *See generally infra* Part II.

76. Martin, *supra* note 1, at 70.

jurisdiction over your agency."[77] And as one former PAD explains, "You sit at the pure epicenter of policy. You're in a position to make a difference. And eventually, everything will come across your desk."[78] Given the importance of the RMOs to agency decision making, their work requires more attention.

C. *Comparing Power Centers for Review of Budgets and Regulations*

Before turning to the levers the RMOs use to control agency policymaking through the budget process, it is worth underscoring the influence of those offices as compared to OIRA, which provides a more familiar frame of reference.

As is well known in the academic literature and to Washington insiders, OIRA's role in regulatory review gives it significant authority over agency policymaking.[79] Every President since Reagan has required executive agencies to submit significant regulatory actions to OIRA for approval and to conform those regulations to various cost-benefit principles as justified in a Regulatory Impact Statement.[80] Because OIRA ultimately determines whether a regulatory action is significant, in practice OIRA at least initially investigates a large portion of regulatory actions.[81] OIRA's review can result in a regulation being significantly delayed, never being published at all, or being published in a

77. *Id.* at 70-71.

78. Adams, *supra* note 72, at 58.

79. OIRA also has other roles, but the literature tends to focus on "regulatory oversight and cost-benefit analysis" and "virtually never discuss[es]" OIRA's other responsibilities. Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. 135, 146 (2011). *But see, e.g.*, Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447, 485-89 (2014) (discussing an emerging body of scholarship on OIRA's review of guidance documents). For a discussion of some of OIRA's other roles in relation to its limited oversight over independent agencies, see *infra* note 94.

80. *See* Exec. Order No. 12,291, 3 C.F.R. § 127 (1982). Versions of cost-benefit analysis and centralized regulatory review date back to President Johnson, before OIRA was created, but the scope of OIRA's review under President Reagan was unprecedented. *See* Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 39-62 (2011) (detailing the scope of regulatory review under Presidents Johnson, Nixon, Ford, and Carter).

81. *See* Sunstein, *supra* note 19, at 1850-53.

dramatically different form.[82] For this reason, OIRA is routinely referred to as "the most important government office you've never heard of."[83]

The RMOs, even less well known, are equally deserving of this superlative. Indeed, in some ways, the RMOs are more influential than OIRA: (1) they penetrate deeper into agency practice; and (2) they have broader purview over the executive establishment. This influence is a function of both their institutional attributes and the nature of their work.

The RMOs are able to push deeper into agency practice for two reasons. First, they have more staff with which to do so. OIRA is an office of around forty-five people,[84] divided, like the RMOs, into different branches that each oversees a subset of agencies.[85] The RMOs collectively have more than four times as many staff members, and three of the RMOs are each larger than OIRA itself.[86] With a greater number of staff members assigned to each agency, the RMOs have more capacity to engage with agency work.[87]

---

82. *See, e.g.*, Heinzerling, *supra* note 2, at 349 ("It is a matter of some consequence . . . when OIRA does not allow such rules to issue, or requires substantial changes before they issue."); Steinzor, *supra* note 2, at 268-73 (providing an example of when OIRA delayed a proposed EPA rule because it required the EPA to "undertake an elaborate cost-benefit analysis to justify [the rule]").

83. Robert R.M. Verchick, *Politics and Progress: Will the White House Stall Its Own Climate Change Plans?*, HILL: CONGRESS BLOG (July 25, 2013, 6:00 PM), http://thehill.com/blogs/congress-blog/energy-a-environment/313513-politics-and-progress-will-the-white-house-stall-its-own-climate-change-plans [http://perma.cc/UUY3-VS3F]; *see also* Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 994 (2011) ("The Office of Information and Regulatory Affairs (OIRA) is the most powerful federal agency that most people have never heard of."); Jim Abrams, *House Balks at Bush Order for New Powers*, WASH. POST (July 3, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/03/AR2007070301245.html [http://perma.cc/CJ36-7PBX] (calling OIRA an "obscure White House office" that "has quietly grown into the most powerful regulatory agency in Washington"); *OIRA 101: The Most Powerful Government Office You've Never Heard Of*, CTR. FOR PROGRESSIVE REFORM (2013), http://www.progressivereform.org/oira101.cfm [http://perma.cc/VF7X-366Q] (stating that OIRA is "one of the most important offices in the entire federal government, and at the same time, largely unknown"); John Walke, *Monitoring Abuses by White House Office*, NAT'L RESOURCES DEF. COUNCIL: SWITCHBOARD (June 11, 2013), http://switchboard.nrdc.org/blogs/jwalke/this_week_the_senate_committee.html [http://perma.cc/7Z2M-TB25] (calling the OIRA Administrator "one of the most important White House positions you've never heard of").

84. *See* OFFICE OF MGMT. & BUDGET, *supra* note 17, at 11; Sunstein, *supra* note 19, at 1845.

85. *See* Sunstein, *supra* note 19, at 1845 (describing OIRA's organizational structure, in which each division is overseen by a career branch chief and staffed primarily by civil servants called "desk officers" who specialize in different areas).

86. *See* OFFICE OF MGMT. & BUDGET, *supra* note 17, at 11 (showing that in FY 2014, the RMO for National Security Programs had fifty-one full-time equivalent positions; the RMO for General Government Programs had forty-eight; the RMO for Natural Resource Programs

Second, the RMOs are more deeply involved because the core of their work is proactive, rather than reactive. OIRA largely responds to what agencies bring to it.[88] Although President George W. Bush's OIRA Administrator introduced the practice of prompting agencies to consider promulgating a particular regulation, OIRA rarely uses this tool.[89] In contrast, the RMOs are proactive by, for example, telling agencies the kinds of policy choices they expect to see in agencies' budget submissions, in keeping with OMB Directors' budget instructions,[90] and detailing how agencies may spend the money allocated to them.[91] By instigating agency action rather than merely responding to it, the RMOs have the capacity to affect a greater variety of agency work.

Relatedly, the RMOs extend oversight more broadly throughout the executive establishment than OIRA does. Most importantly, while independent agencies need not submit their regulations to OIRA for review,[92]

---

had forty-six; the RMO for Health Programs had forty; and the RMO for Education, Income Maintenance, and Labor Programs had twenty-seven).

87. *Compare* John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POL'Y: FEDERALIST 30, 35-36, 49-50 (2014) (lamenting OIRA's limited staffing and heavy workload), *with infra* Section II.B.2 (describing regular, ongoing monitoring work of RMOs).

88. *See* Graham & Broughel, *supra* note 87, at 49-50 (suggesting that OIRA's engagement of agencies earlier in the policy development process would be useful but is "unrealistic" in light of its limited capacity); Nou, *supra* note 19, at 1817 (noting that OIRA has "likely shifted resources toward transactional, back-end regulatory review, and away from other early-stage coordination mechanisms"); Steinzor, *supra* note 2, at 279 (noting that OIRA "does not recognize as legitimate" the proactive work of "finding lasting policy solutions to cross-cutting regulatory problems").

89. *See, e.g.*, Copeland, *supra* note 19, at 131-32 (identifying thirteen "prompt letters" sent by OIRA between 2001 and 2003, but noting a sharp decline by 2005 and suggesting that OIRA may have reverted back to its traditional role as a "reactive force in the rulemaking process").

90. *See infra* Section II.A.1 (describing budget instructions to agencies).

91. *See infra* note 150 (describing how the RMOs define agency action through "passback" of OMB's budget decisions); *infra* notes 195-219 (describing how the RMOs must "apportion" the money that Congress has appropriated before agencies can spend it).

92. *See* Exec. Order No. 12,866 §§ 3(b), 6, 3 C.F.R. 638 (1994) (excluding "independent regulatory agencies" from the obligation to submit proposed regulations to OIRA); *see also* Exec. Order No. 13,579 §§ 1(a)-(b), 3 C.F.R. 256 (2012) (suggesting that "independent regulatory agencies" generally "should promote [the] goal" of creating "a regulatory system that protects 'public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation'"); Sunstein, *supra* note 19, at 1839 n.3 (noting that "[t]he so-called independent agencies are not subject to OIRA review"). In this context, the term "independent regulatory agency" refers to the statutory definition in the Paperwork Review Act, which defines the term with reference to a number of such agencies, such as the Federal Communications Commission and the Securities and

they must participate in the annual budget cycle under RMO oversight.[93] The absence of authority over independent agencies through regulatory review poses an important constraint on OIRA, so important that some commentators have called "being or becoming an 'independent' agency" a potential "tactic" for agencies to use in order to avoid OIRA oversight.[94] Conversely, independent agencies are subject to RMO oversight[95] (although there are some variations in how independent agency budgets are constructed and submitted[96]). The RMOs thus provide a powerful tool for presidential control over independent agencies that OIRA does not offer.[97]

The RMOs may also hold particular sway over a subset of traditional executive agencies over which OIRA has less control: those agencies that do more of their work through spending programs than through regulation.

Exchange Commission, "and any other similar agency designated by statute as a Federal independent regulatory agency or commission." 44 U.S.C. § 3502(5) (2012).

93. *See, e.g.*, Farina, *supra* note 5, at 506 n.231 (noting that "no blanket exemption for the independents thus far exists" with respect to OMB's budget oversight); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 588 & n.60 (1984) (discussing previous congressional decisions to include independent agencies generally in the Budget and Accounting Act's requirement to submit to the President's budget control).

94. Mendelson & Wiener, *supra* note 79, at 505-07. To be sure, independent agencies come under OIRA's purview in several other ways. For example, they are not exempt from the general requirements to submit an annual plan outlining the regulations they anticipate issuing that year, *see* Exec. Order No. 12,866, *supra* note 92, § 4(c), and to review periodically their existing regulations to determine which, if any, are no longer needed, *see* Exec. Order No. 13,579, *supra* note 92, § 2. But neither of these gives OIRA a significant hook over independent agencies' regulatory policymaking. *See* Graham & Broughel, *supra* note 87, at 52 (noting that independent agencies "have a clear way around OIRA review"). Independent agencies also fall within the general obligation to submit requests for OIRA to approve efforts to collect information from the public under the Paperwork Reduction Act. *See* 44 U.S.C. § 3502(1) (2012). But there are multiple avenues for all agencies, independent and executive branch alike, to obtain information from the public without going through this review. *See* Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep'ts & Agencies & Indep. Regulatory Agencies, Information Collection Under the Paperwork Reduction Act 2-3 (Apr. 7, 2010), http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf [http://perma.cc/HQ3V-WHXG] (describing ways agencies can collect information that would not trigger the requirement to submit a request to OIRA).

95. *See supra* note 93 and accompanying text.

96. *See infra* notes 162-173 and accompanying text (discussing budget bypass authority and self-funded agencies).

97. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42-43 (2010) ("If agencies must rely on OMB for budget requests, the President has a huge lever of power over the agency, whether or not the head of the agency is removable at will.").

While regulatory programs "employ regulatory action to achieve program and agency goals,"[98] spending programs use federal money to achieve their goals. Pervasive throughout the administrative state, spending programs include competitive grant programs, block or formula grant programs, capital assets and service acquisition programs, credit programs, direct federal programs, and research and development programs.[99] At least some agencies that primarily operate spending programs tend to regulate less frequently[100] and under less expansive statutory authority,[101] giving OIRA fewer opportunities to

98. BERYL A. RADIN, CHALLENGING THE PERFORMANCE MOVEMENT: ACCOUNTABILITY, COMPLEXITY, AND DEMOCRATIC VALUES 46 (2006).

99. These six categories are delineated by OMB, which classified all federal programs into one of seven categories during the George W. Bush Administration. The seventh category, without any more fine-grained distinctions, was regulatory. *Id.* at 45-46.

100. For example, the Department of Education (ED) and the Department of Housing and Urban Development (HUD) largely manage spending rather than regulatory programs. These agencies command $97 billion and $43 billion in FY 2015 budgetary authority, respectively. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2016 ANALYTICAL PERSPECTIVES OF THE U.S. GOVERNMENT: TABLE 29-1—FEDERAL BUDGET BY AGENCY AND ACCOUNT 122, 199 [hereinafter FY16 BUDGET], http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/29_1.pdf [http://perma.cc/89KD-W2BH]. However, ED's work fills only four volumes of the Code of Federal Regulations, *see* 34 C.F.R. vols. 1-4 (2014), and HUD's work fills only five volumes, *see* 24 C.F.R. vols. 1-5 (2014). Further, according to OIRA's statistics, OIRA reviewed only twenty-nine ED regulations and twenty HUD regulations in 2013 and 2014, and as of June 29, 2015, only one ED regulation and six HUD regulations were pending review. *See Historical Reports*, OFFICE OF INFO. & REGULATORY AFFAIRS., http://www.reginfo.gov/public/do/eoHistoricReport [http://perma.cc/JUT8-TGLM]. In contrast, the EPA does more of its work through regulation than through spending programs, with FY15 budget authority of only $8 billion. *See* FY16 BUDGET, *supra*, at 336 tbl.29-1. However, EPA's work fills thirty-three volumes in the Code of Federal Regulations. *See* 40 C.F.R. vols. 1-33 (2014). OIRA reviewed ninety-three EPA regulations in 2013 and 2014, and as of June 29 2015, fourteen regulations were pending review, *see Historical Reports*, *supra*.

101. For example, instead of the open-ended authority given to the EPA under the Clean Air Act to promulgate national primary ambient air quality standards that are "requisite to protect the public health," 42 U.S.C. § 7409(b)(1) (2012), or to the FDA under the Food, Drug, and Cosmetic Act to define and set standards for food "[w]henever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers," 21 U.S.C. § 341 (2012), the spending programs run by ED operate under specific statutory directions that circumscribe agencies' choices, *see, e.g.*, 20 U.S.C. § 1406(a) (2012) (permitting ED to regulate under the Individuals with Disabilities Education Act "only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements" of the Act). *See also* Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 678 (2015) (contrasting the broad delegation in environmental and food-safety laws with the narrower delegation in federal education laws).

engage with their policymaking. When agencies do regulate under spending programs, OIRA tends to review their analysis less stringently, separating its analysis of so-called "transfer regulations" from traditional regulations,[102] reserving its deepest review for the latter.[103] For agencies primarily operating spending programs, then, the RMOs are a comparatively greater source of centralized control than OIRA is.

But even as to those agencies for which OIRA's oversight is strongest—traditional executive branch regulatory agencies such as the EPA and the FDA—the RMOs play a powerful complementary role. Presidents have long used budget cuts as a deregulatory strategy to limit the capacity of these agencies to act,[104] thereby empowering the RMOs that work closely with these

---

In addition, the Administrative Procedure Act exempts from notice-and-comment rulemaking matters relating to "public property, loans, grants, benefits, or contracts," the very mechanisms by which spending programs and agencies do their work. 5 U.S.C. § 553(a)(2) (2012). To be sure, Congress has required the use of notice-and-comment rulemaking for specific budget programs, *see* Jeffrey S. Lubbers, *Approaches to Regulatory Reform in the United States: A Response to the Remarks of Professors Levin and Freeman*, 83 WASH. U. L.Q. 1893, 1895 (2005) (giving examples), and many agencies have voluntarily waived the APA exemption, following a 1969 recommendation from the Administrative Conference of the United States, *see* Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8), 38 Fed. Reg. 19,782, 19,784 (July 23, 1973). But not all have done so. *See* Lubbers, *supra*, at 1895. Those that have waived have done so to different degrees. *Compare, e.g.*, Public Participation in Rulemaking, 37 Fed. Reg. 3552 (Feb. 17, 1972) (listing exceptions to waiver for the Department of Veterans Affairs), *with, e.g.*, 24 C.F.R. § 10.1 (2015) (providing no exceptions to waiver for the Department of Housing and Urban Development). And some that once waived their exemption have revoked their initial waiver. *See, e.g.*, Revocation of Statement of Policy on Public Participation in Rulemaking, 78 Fed. Reg. 64,194 (Oct. 28, 2013). The upshot is that some agency activities in the realm of spending programs that might ordinarily have resulted in notice-and-comment rulemaking do not do so in practice, thus depriving OIRA of the opportunity to influence such regulations.

102. Transfer regulations "distribute money and other resources to firms or individuals," while traditional regulations, such as "rules that restrict factory emissions, mandate safe workplaces, and require testing before drugs are marketed," "place restrictions on behavior." Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067, 1073 (2003).

103. *See, e.g.*, 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. 179, 181-82 (2011) (reporting the results of a study finding that OIRA spends less time reviewing transfer regulations than it does traditional regulations); Sunstein, *supra* note 19, at 1868-69 (explaining that because transfer regulations "do not require the kind of cost-benefit analysis, and the kind of justification, that is typically mandatory for rules that impose high regulatory costs on the private sector," OIRA's role is more "limited" when reviewing them).

104. *See, e.g.*, ANDREW RUDALEVIDGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 173 (2005) (linking "denying bureaus the funds for regulatory

agencies throughout the budget process to make decisions about how to prioritize their resources. Presidents also use existing budget amounts to reallocate priorities within agencies, thereby changing policy directions within agencies.[105] In addition, as Part II shows in more depth, the entire budget process empowers the RMOs to shape agency policy choices regardless of the eventual appropriations decisions by Congress. Because budgets are critical to the work of traditional executive branch regulatory agencies, the RMOs play a significant role in shaping their policy choices, just as OIRA does.

This comparison between OIRA and the RMOs is not intended to downplay the importance of OIRA's control or to suggest that OIRA is unworthy of the vast amount of attention it receives. Rather, the goal is to illustrate the important and underappreciated role that the RMOs play in the administrative state. Their role needs to be better understood. The next Part begins this task.

II. OMB'S CONTROL OF AGENCY POLICYMAKING THROUGH THE BUDGET PROCESS

This Part argues that OMB's budget and management authority provides the opportunity for significant control over agency policymaking. OMB's role in budget preparation (Section II.A) and budget execution (Section II.B) affects how agencies prioritize, justify, and make decisions about the policies under their purview. So, too, does OMB's related power to develop agency-specific versions of management initiatives (Section II.C). Collectively, these aspects of the budget process provide OMB with seven levers to control agency action. Rooted variously in statutes, OMB circulars,[106] memoranda, or simply

---

research" to the strategy of centralized review of rulemaking in OIRA, and calling the former "a more direct route" to "limit[ing] the number of new regulations published"); Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1756-59 (2008) (describing how the Reagan, Bush I, Clinton, and Bush II Administrations all promoted budget cuts to agencies such as the EPA and the FDA to support the Presidents' belief that "[t]he era of big government is over").

105. *See, e.g.*, JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 141 (rev. ed. 2012) (discussing the Bush II Administration's proposed shift of enforcement funds from the federal government to the states); *see also* Adams, *supra* note 72, at 59 (describing White House efforts to promote initiatives relating to technology and research and development beyond what the relevant agencies themselves wanted); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 81 & n.19 (2009) (describing how the Bush II Administration reallocated resources within the Department of Justice's Civil Rights Division to change the focus of civil rights enforcement).

106. An OMB circular is used "to communicate various instructions and information to the executive departments and establishments . . . when the nature of the subject matter is of

practice, these levers influence and achieve particular outcomes in agency policy choices.

The fact that these levers provide OMB the opportunity to control agency policymaking through the budget process does not mean that OMB always uses this opportunity to the full extent of its authority or that when it does, its actions are taken only at its own behest. As to the first caveat, the use of these levers varies by personnel in agencies and OMB.[107] The interaction between agencies and OMB is sometimes combative (if OMB supersedes what agencies wish to do), but at other times collaborative (if agencies and OMB work together to reach consensus about the best way forward) or even collusive (if agencies ask OMB to give it a particular direction that it would have a hard time implementing if the instruction did not seem to come from the top).[108] As to the second caveat, the levers available to OMB are embedded in a broader set of interactions between OMB and other parts of the EOP as well as between other parts of the EOP and agencies. Accordingly, not everything OMB conveys to agencies is a product of OMB's own decision, and agencies may at times hear directly from other White House offices rather than OMB itself.[109] This Part acknowledges these nuances while providing a general map of how the levers operate to strengthen OMB's control. It leaves the task of refining and building on this initial sketch to future work.

---

continuing effect," as opposed to when "the subject matter requires single or one-time action by the departments or establishments or is of a transitory nature." BUREAU OF THE BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-1 REVISED, BUREAU OF THE BUDGET'S SYSTEM OF CIRCULARS AND BULLETINS TO EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS (1952), http://www.whitehouse.gov/omb/circulars_a001 [http://perma.cc/9ZG2-HYZ4].

107. *See, e.g.*, TOMKIN, *supra* note 18, at 15 ("The RMOs and program divisions have varied in their internal cultures, norms, and in some of the procedures they follow."); *id.* at. 128 ("[C]areer staff influence has always varied with the strength, experience, or political clout of particular PADs, departmental secretaries, other EOP units, or the OMB Directors who happen to be in office at the time. The less the influence of these top officials, the greater the potential role for OMB staff.").

108. *See, e.g.*, *id.* at 239 (discussing the variation at different times of OMB-agency relationships, from "'team-oriented' and 'consensual'" to OMB's use of its "authoritative clout to demand" certain things from agencies, as well as the value to agencies of using OMB as "protective cover").

109. *See* Martin, *supra* note 1, at 70 (describing OMB's "constant communication" with White House policy councils); Weinstein, *supra* note 61, at 64, 68 (describing ways for agencies to work with White House policy councils to accomplish agencies' missions).

A. The Mechanisms of Control Through Budget Preparation

The Congressional Budget Act of 1974 requires the President to submit a detailed budget proposal for the following fiscal year[110] to Congress annually "on or after the first Monday in January but not later than the first Monday in February."[111] OMB does the bulk of this work on behalf of the President.[112] In anticipation of the statutory deadline, agencies submit their budget requests to OMB in early fall.[113] OMB then spends the next few months considering these requests, asking agencies to justify them, and often ultimately modifying them as OMB consolidates a budget proposal for the whole federal government.[114]

OMB has three levers that affect agency policymaking during the budget-preparation process, regardless of Congress's subsequent action on the budget: (1) a *form-and-content lever*, under which OMB sets *ex ante* requirements for the budget and policy proposals that agencies must submit for OMB's review; (2) an *approval lever*, under which OMB must consent to those budget and policy requests *ex post*; and (3) a *confidentiality lever*, under which OMB restricts what agencies may disclose about this process.

1. The Form-and-Content Lever

The first lever that OMB can use to control agency policymaking through budget preparation is the ability to tell agencies what they should put in their budget requests in the first place (the content) and how they should convey this information (the form).[115]

OMB operationalizes its form-and-content lever through two sets of documents. The first is OMB Circular A-11, titled *The Preparation, Submission,*

---

110. *See* 31 U.S.C. § 1102 (2012) (defining the "fiscal year of the Treasury").

111. *Id.* § 1105(a).

112. *See, e.g.*, SCHICK, *supra* note 7, at 97 ("Even an active president, such as Bill Clinton, cannot master all of the details [of the budgeting process]. Every president must focus on the relatively small number of issues that matter most to him and leave the rest to the affected agencies or OMB staff.").

113. *See id.* at 99.

114. *See id.* (describing the stages of OMB review, including "staff review, during which OMB examiners review the requests, consult with agency officials, and prepare recommendations" (emphasis omitted)).

115. *See* 31 U.S.C. § 1108(b)(1) (2012) (instructing agencies to submit their budget requests "prepared and submitted in the form prescribed by the President" and instructing agencies to develop "appropriation requests . . . from cost-based budgets in the way and at times prescribed by the President").

and Execution of the Budget.[116] This 900-page document is issued each summer to federal agencies to guide their budget requests,[117] although the circular does not change dramatically from year to year. Large parts of it are technical and do not play a substantial role in controlling agency policymaking.[118] Two parts of Circular A-11, however, do have a major effect on agency policymaking. One part requires agencies to keep the substance of the budget process confidential. As I discuss below, this confidentiality lever means that "[i]t is not uncommon for someone to find himself publicly saying the opposite of what he thinks because he lost a battle with OMB."[119] A second part is the requirement to embed the administration's various management initiatives in agency budget requests.[120] As I explain later, many management initiatives are actually substantive policy choices without being denoted as such. The requirement to tie these initiatives to the budget gives OMB an enormous lever to shape how agencies dedicate their resources.[121]

The other set of documents through which OMB uses the form-and-content lever are memoranda issued by the OMB Director to provide more specific guidance to agencies on what their budget submissions should include.[122] These memoranda can play a significant role in shaping agency policymaking.

One way in which these memoranda guide agency action involves the budgeting method selected to develop the President's budget. In the 1970s, for example, President Carter's OMB Director required that agencies use Zero-

---

116. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2014), http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2014.pdf [http://perma.cc/M3QW-7M5N] [hereinafter OMB CIRCULAR NO. A-11].

117. *See id.* § 10.5, at 4.

118. *See, e.g.*, *id.* § 25.5 (discussing the data required to support requests for vehicles, information-technology infrastructure, and formula grants to state and local governments); *id.* §§ 25.6, 79 (discussing how to enter information into the online budget submission system); *id.* § 32.3 (discussing how to account for retirement costs); *id.* § 51.1-.4 (discussing how to prepare documentation to support budget requests).

119. John Walsh & Barbara Culliton, *Office of Management and Budget: Skeptical View of Scientific Advice*, *in* SCIENCE, TECHNOLOGY, AND NATIONAL POLICY 274, 294 (Thomas J. Kuehn & Alan L. Porter eds., 1981); *see infra* Section II.A.4.

120. *See* OMB CIRCULAR NO. A-11, *supra* note 116, §§ 31.8, 51.1, 51.7, 51.9.

121. *See infra* Section II.C.

122. *See* SCHICK, *supra* note 7, at 96; *see also, e.g.*, Memorandum from Sylvia M. Burwell, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-13-14, Fiscal Year 2015 Budget Guidance (May 29, 2013), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-14.pdf [http://perma.cc/3FTA-JXEB] (providing annual guidance, in this instance for FY 2015).

Based Budgeting to prepare their budget requests—that is, to prepare each year's request as if it were starting at zero.[123] More recent budget memoranda have instead required Incremental Budgeting,[124] a budget method that assumes that last year's budget is the starting point for incremental adjustments up or down.[125] It is not difficult to see how these distinct approaches affect agencies differently. Budget scholars have connected Incremental Budgeting to more gradual and modest change within agencies, while Zero-Based Budgeting encourages more radical rethinking about agency priorities.[126]

Directors' budget memoranda can also instruct agencies to justify their programs in light of particular presidential priorities. The memoranda indicate that agencies are more likely to be successful in their budget requests to the extent the agencies can shape their priorities to match those of the President. This guidance therefore tells agencies where to direct their internal efforts. Not surprisingly, these initiatives vary significantly according to the preferences of the current President. President George W. Bush's OMB Director focused on Bush's priorities after September 11, including homeland defense and national

123. *See* Jimmy Carter, *Zero-Base Budgeting in the Executive Branch Memorandum for the Heads of Executive Departments and Agencies*, AM. PRESIDENCY PROJECT (Apr. 27, 1977), http://www.presidency.ucsb.edu/ws/?pid=7407 [http://perma.cc/22NR-RJWK] (stating that "[a]t my request, the Director of the Office of Management and Budget has issued guidelines about the use of zero-based budgeting in the Executive Branch," and directing agencies "to rely on OMB for information about this system" because "members of the program and budget staff [currently the RMOs]" will be designated "as zero-based budgeting representatives" who "will give you the information you need about establishing the process and using it effectively"); *see also* CAROL GURVITZ, CONG. RESEARCH SERV., 77-121 E, ZERO-BASE BUDGETING (ZBB): SOME IMPLICATIONS FOR THE FEDERAL BUDGET 25-29, 32-50 (1977) (discussing Carter's use of Zero-Based Budgeting as the governor of Georgia and evaluating the potential use of the method for the federal government).

124. *See, e.g.*, Memorandum from Brian C. Deese, Deputy Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-14-07, Fiscal Year 2016 Budget Guidance (May 5, 2014), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2014/m-14-07.pdf [http://perma.cc/65UC-QPAS].

125. *See* SCHICK, *supra* note 7, at 95.

126. *See id.* That having been said, all budgeting remains rooted in political realities; as a *Wall Street Journal* editorial noted after then-Governor Carter instituted Zero-Based Budgeting in Georgia, "If the political leadership is determined enough, the federal budget could be cut even with existing procedures; and if the White House didn't really care, ZBB would be just another way of shuffling paper." Editorial, *Governor Carter's Experiment*, WALL STREET J., Oct. 12, 1976, at 26. Perhaps for this reason, the occasional congressional effort to require OMB to use Zero-Based Budgeting in preparing the President's Budget has not been successful. *See, e.g.*, Zero-Based Budgeting Ensures Responsible Oversight (ZERO) Act of 2015, H.R. 1591, 114th Cong.; Zero-Based Budgeting Ensures Responsible Oversight (ZERO) Act of 2013, H.R. 239, 113th Cong.

security,[127] while President Obama's OMB Director has focused on priorities that Obama established in the wake of the financial crash and the Great Recession, including domestic matters such as health, education, energy reform, and fiscal discipline.[128]

Directors' memoranda, sometimes co-signed with other officials in the White House, can also address a narrower set of agencies to instruct them to emphasize new presidential priorities in their budget submissions. One recent example instructed the Departments of State, Defense, Justice, Agriculture, Commerce, and others on preparing budget submissions for particular programs designed to counter biological threats.[129] Another instructed a similar but smaller set of agencies on preparing budget submissions for programs designed to combat antibiotic resistant bacteria.[130] Each memorandum

127. *See* Memorandum from Mitchell E. Daniels, Jr., Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Exec. Dep'ts & Agencies, No. M-03-10, Planning for the President's Fiscal Year 2005 Budget Request (Apr. 25, 2003), http://www.whitehouse.gov/sites/default/files/omb/memoranda/m03-10.html [http://perma.cc/MYH2-B5RF]; Memorandum from Clay Johnson III, Acting Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-06-14, Planning for the President's Fiscal Year 2008 Budget Request (Apr. 25, 2006), http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2006/m06-14.pdf [http://perma.cc/6HME-Z95V].

128. *See* Memorandum from Jacob J. Lew, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-11-30, Fiscal Year 2013 Budget Guidance (Aug. 17, 2011), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-30.pdf [http://perma.cc/2XKP-AGDD]; Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-10-19, Fiscal Year 2012 Budget Guidance (June 8, 2010), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-19.pdf [http://perma.cc/XJ88-HBJZ]; Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-09-20, Planning for the President's Fiscal Year 2011 Budget and Performance Plans (June 11, 2009) http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-20.pdf [http://perma.cc/6GQU-M2NS] [hereinafter Orszag, Planning for the President's Fiscal Year 2011 Budget and Performance Plans].

129. *See, e.g.*, Memorandum from Brian Deese, Acting Dir., Office of Mgmt. & Budget, Exec. Office of the President, & Lisa O. Monaco, Assistant to the President for Homeland Sec. & Counterterrorism, to Deputy Sec'y of State et al., No. M-14-14, Fiscal Year 2016 Budget Guidance for Countering Biological Threats Resource Priorities (July 18, 2014), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2014/m-14-14.pdf [http://perma.cc/ZM46-5F3Q].

130. *See* Memorandum from Brian Deese, Acting Dir., Office of Mgmt. & Budget, Exec. Office of the President, et al. to Deputy Sec'y of State et al., No. M-14-13, Fiscal Year 2016 Budget Guidance for Combating Antibiotic Resistant Bacteria Resource Priorities (July 18, 2014), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2014/M-14-13.pdf [http://perma.cc/74P4-KP5A].

included approximately five single-spaced pages of factual findings and instructions on exactly what kinds of substantive budget proposals to offer.[131]

Budget memoranda can further instruct agencies about the administration's priorities in the management of their internal affairs. For example, recent memoranda have directed agencies to catalogue and take specific steps toward expanding their employee health and wellness programs and to reform their hiring practices.[132] These instructions involve inward-focused rather than outward-focused policymaking but can nonetheless be significant with respect to opportunity costs (as money and time focused on these initiatives means less money and time focused elsewhere), the number of people affected by the policies (as by some estimates, 2.85 million civilians work in federal agencies[133]), and potential ripple effects (as internal federal efforts have sometimes been harbingers of broader social change[134]).

In sum, OMB's form-and-content lever helps shape where and how agencies focus their efforts before any money is even requested.

2. *The Approval Lever*

The form-and-content lever derives its strength from the fact that OMB must ultimately approve the agencies' budget requests. The approval lever is thus an *ex post* complement to the *ex ante* instructions OMB issues in Circular A-11 and the Directors' budget memoranda. In other words, under the form-and-content lever, OMB tells agencies what to include in their budget requests before agencies draft them, while under the approval lever, OMB tells agencies how those initial drafts must be modified before they can be transmitted to Congress. The approval lever functions both at a broad level, securing overall

131. *See id.* at Tab A; Memorandum from Brian Deese & Lisa O. Monaco to Deputy Sec'y of State et al., *supra* note 129, at Tab A.

132. *See, e.g.*, Memorandum from Peter R. Orszag to the Heads of Dep'ts & Agencies, *supra* note 128.

133. *See* ACUS 2012 SOURCEBOOK, *supra* note 45, at 12.

134. *See, e.g.*, Exec. Order No. 9981, 3 C.F.R. § 722 (1943-1948) (abolishing racial segregation in the military); Ian Urbina, *The Shopping List as Policy Tool*, N.Y. TIMES (Jan. 25, 2014), http://www.nytimes.com/2014/01/26/sunday-review/the-shopping-list-as-policy-tool.html [http://perma.cc/8LHW-BJ7F] (discussing "the power of procurement policy to drive social change").

agency compliance with the President's general policy preferences,[135] and at a narrow level, governing budget and policy choices in discrete line items.[136]

The approval lever is central to OMB's power over agencies. This Section first describes the way the structure of the RMOs affects the way the approval lever is operationalized and therefore the relationship between OMB and agencies; second, it explains how budget numbers work with budget language to set forth substantive policy; and finally, it discusses variations in the way the approval lever operates for several subsets of agencies.

a. The RMOs' Pyramid Structure

The pyramid structure of the RMOs affects how the approval lever operates in practice. The Program Associate Director (PAD), a political appointee, oversees one or more divisions, each run by a Deputy Associate Director (DAD) who, in turn, oversees several branches.[137] Each branch is run by a branch chief who, in turn, oversees a group of program examiners.[138] This structure gives a lot of authority to the program examiners, who provide the first review of the agency's budget submission, hold hearings on or otherwise request additional information about the agency's submission, and reach preliminary conclusions about what should be funded and at what amount.[139]

---

135. *See, e.g.*, Berry et al., *supra* note 7, at 785 (explaining that "[t]he end product . . . is a proposed budget that closely adheres to the president's policy agenda").

136. *See, e.g.*, BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 102-03 (1997) (discussing presidential use of the budget to change the Department's enforcement priorities); Berry et al., *supra* note 7, at 786 (describing how President George W. Bush "propos[ed] major changes to existing grants and the creation of altogether new ones" to support his "Faith-Based Initiative"); ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., JUSTIFICATIONS OF ESTIMATES FOR APPROPRIATIONS COMMITTEES: FISCAL YEAR 2016, at 27-28, 53, 83-86, 229-30, 279, 345, 379, 407 (2015), http://www.acf.hhs.gov/sites/default/files/olab/2016_acf_cj.PDF [http://perma.cc/YEK3-PVU8] (providing specific program-by-program appropriations language).

137. *See supra* notes 67-73 and accompanying text.

138. *See id.*

139. *See* CHRISTENSEN, *supra* note 9, at 3 (explaining that program examiners provide the first review and may ask for additional information from agencies, whether informally or through formal hearings, before making recommendations to senior officials within OMB); TOMKIN, *supra* note 18, at 120-25; Jennifer M. Forshey, *Game. Set. Budget.*, 24 J. POL'Y ANALYSIS & MGMT. 428, 429-30 (2005) (explaining that "the budget examiner is often the person asking questions of the agency head about funding priorities and program performance" and suggesting that "[b]y its very nature, the examiner's relationship with the agency is adversarial"); Office of Mgmt. & Budget, *supra* note 74 (explaining that the program examiner "[r]eviews budget submissions; acts as chair of budget hearings; and

Although a pyramid, it is fairly flat as hierarchies go, with program examiners typically providing key briefings to senior career and political staff. Program examiners' knowledge of the programs in question and assessments of the policy options are thus important to the decision-making process.[140] Program examiners can also influence agencies' budget and policy proposals even before the budget justification is submitted, as agencies may shape their proposals in anticipation of their program examiner's expectations.[141]

This is not to say that program examiners routinely impose their own policy preferences on agencies through the budget process; professional norms and examiners' on-the-job training work against this possibility.[142] The pyramid structure with its tiers of review and collaboration among all levels of the hierarchy also militates against the imposition of personal policy priorities.[143] At the same time, program examiners must use their discretion in interpreting how to implement what they perceive to be the President's program,[144] and their role as gatekeepers makes them influential.[145]

---

presents recommendations thereon to the Deputy Associate Directors and other members of the Director's Review").

140. *See* Adams, *supra* note 72, at 58 (stating that OMB "has a very flat culture," and "[w]hen information, a briefing table, an options paper, or the pricing of a presidential initiative is needed . . . [t]he director and associate directors at the top can reach quickly to the examiner level for the answers"; that "[t]ypically" DADs "will call branch chiefs and examiners together in a conference room for a quick review of papers, requests, or options, reaching a conclusion on the spot"; that PADs "will frequently participate in these meetings, speeding the decision process"; and that "[w]hen the director needs a brief on a particular topic, all layers of the organization may appear in his or her office with the necessary information, examiners (the lowest layer) frequently providing the briefing"); Forshey, *supra* note 139, at 429 (describing, from a program examiner's perspective, the "flat hierarchy and the responsibility that comes from solely managing an agency budget").

141. *See* HUDAK, *supra* note 7, at 171 (discussing agency perception of the importance of "get[ting] to know OMB staff and understand[ing] their priorities"); SCHICK, *supra* note 7, at 99 ("As agencies formulate their budgets, they maintain contact with the OMB examiners assigned to them. These contacts provide agencies with procedural and policy guidance in preparing their requests and inform the examiners of agency priorities and concerns."); Lynn Ross, *Can the Federal Budget Be Democratic? OMB's Invisible Hand*, *in* IS THIS ANY WAY TO RUN A DEMOCRATIC GOVERNMENT? 125, 129 (Stephen J. Wayne ed., 2004) (discussing variation in program examiners' "attitudes toward spending on programs they personally supported").

142. *See* Adams, *supra* note 72, at 61 (describing the professional ethos and training of OMB civil servants); Forshey, *supra* note 139, at 429 (describing program examiners' commitment to the rule of law and to the office of the Presidency).

143. *See supra* note 140 and accompanying text.

144. *See, e.g.*, Walsh & Culliton, *supra* note 119, at 287 ("[Policy] is not handed down on tablets. It's very fuzzy. We're told, for instance, that the President wants to hold down civilian employment. You rarely get signals directly.").

To be sure, the OMB Director makes the ultimate decision about what to recommend to the President about each agency's budget request.[146] The White House policy councils and other White House offices may also get involved in specific budget decisions related to high-profile policy issues.[147] However, the number of issues open for discussion and debate shrinks as the agency's budget request moves up the chain of command from the RMOs to the Director.[148] Even fewer issues reach the President for decision.[149]

---

145. *See* Adams, *supra* note 72, at 61 (explaining that because OMB program examiners are "skeptical" about agency proposals and willing "to dig in hard, raise tough questions, and demand more information" from the agencies they oversee, their "organizational default position is seen [throughout the government] as 'No'").

146. The OMB Director considers each agency's budget request at a Director's Review meeting, where program examiners present their recommendations. *See* TOMKIN, *supra* note 18, at 127-33 (describing the back-and-forth between RMO staff and the OMB Director during this process); Adams, *supra* note 72, at 64-65 (describing how, in the context of national defense and the Department of Defense, a Director's Review meeting is based on information gleaned from earlier budget hearings held by examiners); Forshey, *supra* note 139, at 430 (describing the Director's Review from a program examiner's perspective as an event in which the examiner must "confidently and concisely communicate the crux of the issue" and "[m]onths of work culminate in a two-hour decision-making session at which policy objectives are approved, denied, or shelved"); Office of Mgmt. & Budget, *supra* note 74 (explaining that the program examiner "presents recommendations [on agency budget requests] to the Deputy Associate Directors and other members of the Director's Review").

147. *See* SCHICK, *supra* note 7, at 99 (noting that after agencies submit their budget requests, "OMB staff and, *on important issues, presidential aides* review the requests" (emphasis added)). Some OMB Directors invite policy council officials to attend Director's Review meetings, while others do not. *See* Adams, *supra* note 72, at 64 & n.14 (stating that a Director's Review is "a closed meeting between the career OMB staff and senior OMB policy officials that generally does not include other White House or agency officials" but noting that "[a]dministrations differ in this regard"). For example, during the Clinton Administration, OMB occasionally invited senior officials in the NSC to attend the Director's Review on national security agency budgets. *See id.* Regardless of who is in attendance at the Director's Review, the views of the relevant policy council are part of the background against which budget decisions are made, as are those of other White House officials, including the Vice President and other units in the EOP. *See id.* at 59, 67-69 (noting that OMB and the NSC "interact constantly on resource issues" even though "[t]he NSC does not have a formal role in the OMB budget process" because "virtually every decision made in the NSC framework has resource implications," but explaining that the process for OMB-NSC engagement varies across different administrations, and even by different officials in the same administration, because there is no "consistent, institutionalized relationship between the two organizations").

148. *See* TOMKIN, *supra* note 18, at 128 ("The less politically visible a program area, the more discretion afforded to program division staff. Highly complex or technical questions sometimes would not interest political appointees in OMB, so that lower-level staff had a greater opportunity to exercise discretion in such subject-matter areas."); John H. Kessel, *The Political Environment of the White House*, *in* THE WHITE HOUSE WORLD: TRANSITIONS, ORGANIZATION, AND OFFICE OPERATIONS 72 (Martha Joynt Kumar & Terry Sullivan eds.,

After "passback" – the formal process by which OMB, typically through the RMOs, informs the agency about the budget and associated policy choices that OMB has approved for that agency[150] – agency officials may appeal to the Director or even the President for more or differently allocated money.[151] Under some administrations and in some economic circumstances, appeals tend to be "serious matters and often involve millions or billions of dollars and major policy choices,"[152] while at other times appeals are more routine.[153]

2003) ("Every fall, experienced budget examiners go over each request with the agencies, and if they approve add it to the budget. By the time the budget reaches the director and the president, almost all the decisions have been made, although controversial calls are still open to appeal."); Ross, *supra* note 141, at 131 ("Not every issue or program is presented during the director's review. Traditionally, less politically visible programs or highly complex or technical questions may be decided at the branch or division level, with the PAD providing tacit approval. Thus, there are still opportunities for examiners to play a central role in decisions that may affect an agency's budget[] in significant ways."); *see also* OMB CIRCULAR NO. A-11, *supra* note 116, § 10.5, at 4 (describing, generally, the process of how a budget request moves from OMB staff to the OMB Director and the President).

149. *See* SCHICK, *supra* note 7, at 97-98, 110 (explaining that "political and career staff" in OMB "handle[] almost all the paperwork, make[] most presidential budget decisions, and put[] together the budget submitted to Congress," and noting that Presidents are often more interested in total amounts or large-scale policy issues in the budget than in smaller policy or operational issues); TOMKIN, *supra* note 18, at 131 ("Following Director's Review, OMB Directors generally reach preliminary decisions and determine which issues need to be transmitted to the White House for presidential decisions."); Adams, *supra* note 72, at 64; Kessel, *supra* note 148, at 72 (describing how few budget decisions reach the President).

150. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 10.5, at 4 (describing passback); Forshey, *supra* note 139, at 430-31 (noting that the program examiner "is responsible for drafting the passback text"); Ross, *supra* note 141, at 132 (noting that passback can be "as formal as a written letter from the director to a department secretary detailing account-by-account funding levels and specific policy instructions[,] . . . a phone call (usually from a policy official) providing an overall funding level for the entire agency (a 'top line')[,] or . . . almost anything in between").

151. *See* SCHICK, *supra* note 7, at 99; TOMKIN, *supra* note 18, at 131; Adams, *supra* note 72, at 64; Leon E. Panetta, *Politics of the Federal Budget Process*, *in* RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 213 (James A. Thurber ed., 3d ed. 2006) (describing the tradeoff between "accept[ing] the recommendations of the OMB director to gain his support on future budget battles" and "challeng[ing] the OMB position by going directly to the president and risk[ing] the possibility of both denial and future antagonism at the highest levels"); Ross, *supra* note 141, at 132 ("Agencies with less political clout usually are less likely to appeal OMB passback than agencies with considerable political backing . . . .").

152. Martin, *supra* note 1, at 73; *see also* MOSHER, *supra* note 21, at 119 ("Although the role of BoB/OMB was officially one of advice and not authority, it did, from the very beginning, make decisions on budgetary and program matters, most of which were in effect final. In theory, unhappy agency heads could appeal to the president, but in practice such appeals were usually limited to the most basic disagreements on matters that could be properly regarded as presidential. During some periods, even these were effectively blocked by the White House 'guards.' This meant, among other things, that a great many decisions on

Disagreements about passback are commonly negotiated at the staff level, although more senior OMB officials may get involved with particular agencies, on particular issues or at different stages.[154]

The pyramid structure encourages agency officials to choose their budget battles carefully on the way to obtaining OMB approval. Not everything can be elevated, and even things that are elevated may not be resolved in the agency's favor, leaving the agency under the day-to-day oversight of the OMB staff whose views may have prevailed.

b. The Relationship Between Budget Numbers, Budget Language, and Substantive Policy

The approval lever affects substantive policy choices because OMB's approval is not simply about an overall funding amount for each agency or even each program or function within an agency. Instead, OMB's approval is linked to policy decisions about executive branch priorities.

---

lesser matters were in effect delegated down the line within BoB/OMB because they were not of enough import to be appealed to higher echelons within that organization or within the aggrieved departments."); Irene Rubin, *Budgeting During the Bush Administration*, 29 PUB. BUDGETING & FIN. 1, 7 (2009) (explaining that, during the Bush presidency, the OMB Director and the President's other economic advisors "were so persuasive that no cabinet secretary complained to the president" about his or her agency's budget (quoting Nicholas Thompson, *Meet OMB Director Mitch Daniels: The Most Powerful Man in the Bush Administration You Have Never Heard Of*, WASH. MONTHLY, July/Aug. 2001)); Weinstein, *supra* note 61, at 64 ("If you want to appeal a budget decision by OMB, you will need a policy council on your side.").

153. *See* TOMKIN, *supra* note 18, at 132–35 (describing variations in the appeals process during the Reagan and Bush I Administrations); Forshey, *supra* note 139, at 431 ("Most often, agencies do not agree with the policy and funding decisions and, therefore, choose to appeal the passback."); Ed O'Keefe, *"Passback Day" Is a Key Date in the Federal Budget Process*, WASH. POST (Nov. 27, 2011), http://www.washingtonpost.com/politics/passback-day-is-a-key-date-in-the-federal-budget-process/2011/11/22/glQAuwWx1N_story.html [http://perma.cc/FT55-QMB2] (stating that during the Clinton Administration, "two or three Cabinet secretaries might meet with the president to make a final plea for more money," and quoting Obama's OMB Director Jacob Lew as saying that "agencies shouldn't expect such flexibility this year").

154. *See* TOMKIN, *supra* note 18, at 131 ("As with many other procedures and points of communication within OMB, passback has varied from area to area. One variant might be for a formal passback from the OMB Director and PAD to the departmental secretary with the division and branch chiefs filling in details with lower-level staff. In many other cases an examiner might passback to an assistant secretary."); Forshey, *supra* note 139, at 431 (noting that the "examiner has to work closely with the agency to understand the nature of the passback appeal and then summarize it for the [OMB] leadership, who may elect to revise the passback").

These policy decisions are first reflected in passback, "which includes the policy decisions and corresponding appropriations language."[155] When passback directs spending cuts, OMB can give greater or lesser degrees of policy flexibility to agencies in allocating the cuts depending on how much the administration favors their work.[156] Where passback is furthering presidential priorities, passback language setting forth the administration's policy preferences can be quite detailed.[157]

---

155. Forshey, *supra* note 139, at 430; *see also* CHRISTENSEN, *supra* note 9, at 3 (noting that in addition to budget numbers, "passback decisions may also include program policy changes or personnel ceilings"); TOMKIN, *supra* note 18, at 131 ("The passback papers include policy guidance in the form of instructions to the agencies as well as general information without any specific directives for action."). An OMB official recently suggested that passback was more technical than substantive, telling a reporter, "We usually target passback for more technical guidance for the budget. For more substantial policy changes, we use more traditional means of communication, such as policy guidance and memos." Jason Miller, *OMB's IT Passback Loses Its Luster, Changes Its Goals*, FED. NEWS RADIO (Jan. 31, 2014, 3:30 PM), http://federalnewsradio.com/management/2014/01/ombs-it-passback-loses-its-luster-changes-its-goals [http://perma.cc/HX7C-L2QF]. The reporter noted that

> [t]his comment elicited a lot of surprise by former OMB folks. One former official said the comment was 'weird' because passback is part of the governance process and communicates policy decisions made as part of the annual budget process when all major policy decisions are made. 'What a strange and non-statutory view of how government works,' the former official said.

Id.

156. BIGGS & HELMS, *supra* note 64, at 345 ("Generally, OMB lets agencies and programs favored by an administration retain discretion over how any cutbacks will be apportioned. For those less favored, passbacks often come with detailed instructions about what may be included in the final budget.").

157. TOMKIN, *supra* note 18, at 239 (explaining that during the Clinton Administration, passback provided flexibility to agencies except as to "presidential priority areas where the agencies were 'directed' to 'invest' the funding"); Jason Miller, *IT Budget Guidance Muddies OMB's Shared-Service Plans*, FED. NEWS RADIO (Dec. 13, 2011, 5:27 PM), http://federalnewsradio.com/in-depth/2011/12/exclusive-it-budget-guidancemuddies-ombs-shared-service-plans [http://perma.cc/P8PH-9EBB] (describing the "five IT policy areas OMB highlighted in the IT budget passback"); Jason Miller, *OMB Gives Agencies Deadline To Set Up Digital Services Teams*, FED. NEWS RADIO (Jan. 19, 2015, 2:06 PM), http://federalnewsradio.com/budget/2015/01/omb-gives-agencies-deadline-to-set-up-digital-services-teams [http://perma.cc/7WYP-X547] [hereinafter Miller, *OMB Gives Agencies Deadline To Set Up Digital Services Teams*] (discussing "one significant policy decision" in the passback to agencies on their information technology (IT) budgets, while noting that the IT passback has (unusually) not "introduce[d] new policy priorities" for several years). As in all other predecisional budget discussions between OMB and the agencies, passback is confidential. *See infra* notes 174-194 and accompanying text. I discuss the passback relevant to agencies' IT spending here because reporter Jason Miller's "goal for the past decade has been to scrounge and rummage around the IT community for details on technology policy changes that will be part of the President's budget request coming in a few weeks" as set forth in the passback. Miller, *OMB Gives Agencies Deadline To Set Up Digital Services Teams*,

The policy decisions are further reflected, after any post-passback appeals, in the proposed appropriations language in the President's budget that is ultimately submitted to Congress. This language typically builds on the previous year's appropriations language but can include additional proposed substantive limitations on or uses of funds that reflect the administration's policy goals.[158]

The approval lever thus extends not just to monetary amounts but also to the specific policies tied to the amounts because budget language supports the underlying budget numbers at a fine-grained level. These are the policy choices that the administration – including agency officials themselves – will advocate for during the subsequent congressional budget process.[159]

c. Variations in the Approval Lever

There are some formal variations in how the approval lever functions for different agencies. For example, program examiners work alongside officials in the Department of Defense to develop that agency's budget proposals much more collaboratively and much earlier in the process than with any other agency.[160] This variation in the budget process does not obviously weaken OMB's approval lever. After all, even a cooperative process depends on ultimate OMB approval. Moreover, the early integration of program examiners

supra. These articles provide a window into how passback works more generally to announce new policy choices or to continue old ones.

158. *See, e.g.*, SCHICK, *supra* note 7, at 102 (demonstrating the policy choices reflected in appropriations language in the President's budget for the "salaries and expenses" account for the Immigration and Customs Enforcement in the Department of Homeland Security); OFFICE MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2016, at 359 (2015), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/appendix.pdf [http://perma.cc/PYX5-LKXB] (demonstrating policy choices reflected in appropriations language in the President's budget for the special education program in the Office of Special Education and Rehabilitation Services in ED); OMB CIRCULAR NO. A-11, *supra* note 116, § 95.5, at 5 (instructing agencies as follows: "If you propose new provisions or changes to enacted language (other than changes in amounts) for individual accounts or administrative and general provisions, include an explanation and justification either with the budget submission to OMB or separately to your RMO if the proposal occurs after that time").

159. SCHICK, *supra* note 7, at 108 ("[A]gency officials justify the president's budget, even when it diverges from their real preferences."); *see also infra* notes 174-194 and accompanying text (describing how the confidentiality lever works to further OMB's control over agencies' policy choices).

160. MARY T. TYSZKIEWICZ & STEPHEN DAGGETT, CONG. RESEARCH SERV., RL30002, A DEFENSE BUDGET PRIMER 28 n.60 (1998) (explaining that "OMB staff work directly at the Pentagon" to develop the budget, and noting that "[t]he defense budget is unique in the extent to which OMB is directly involved throughout the budgeting process").

presents another avenue to ensure that White House priorities are baked into the budget request, while information that program examiners have gleaned during the internal deliberations can influence what OMB subsequently approves.[161]

Another variation in the operation of the approval lever exists for the subset of agencies that have "budget bypass authority," either because they can submit their budget request to Congress at the same time they submit it to the President[162] or because the President must present their original proposal to Congress unchanged.[163] The ability to have a direct line to Congress without

---

161. *See* Adams, *supra* note 72, at 64-65 (noting that OMB's earlier and deeper engagement with the internal Department of Defense budget process "makes it possible for the White House at an early stage to insert key programs, views, and policies that DOD might not rank highly into the DOD budget process" and that "OMB can continue to raise alternative budget options . . . which can lead to pass-back decisions that are based on OMB's knowledge of options that DOD might have rejected in its internal process").

162. *See* Memorandum from Jim Jukes, Assistant Dir. for Legislative Reference, Office of Mgmt. & Budget, Exec. Office of the President, to OMB Policy Officers & DADs, Agencies with Legislative & Budget "Bypass" Authorities 7, 9-14 (Feb. 20, 2001), http://www.citizen.org/documents/OMBDocument1.pdf [http://perma.cc/8GM6-GE3Z] (identifying the sixteen agencies that fall into this category as the Advisory Council on Historic Preservation, Chemical Safety and Hazard Investigation Board, Commodity Futures Trading Commission, Consumer Product Safety Commission, Court of Appeals for Veterans Claims, Federal Aviation Administration (within the Department of Transportation), Federal Election Commission, Federal Retirement Thrift Investment Board, International Trade Commission, Legal Services Corporation, Merit Systems Protection Board, National Transportation Safety Board, Railroad Retirement Board, State Justice Institute, Surface Transportation Board (within the Department of Transportation), and United States Institute of Peace); *see also* ACUS 2012 SOURCEBOOK, *supra* note 45, at 114 (summarizing list).

163. *See* Memorandum from Jim Jukes to OMB Policy Officers & DADs, *supra* note 162, at 7 (identifying the five agencies that fall into this category as the United States Postal Service, Social Security Administration, Internal Revenue Service Oversight Board, District of Columbia Courts, Air Traffic Services Subcommittee of the Aviation Management Advisory Council (with respect to the Federal Aviation Administration's air traffic control system budget)); *see also* ACUS 2012 SOURCEBOOK, *supra* note 162, at 114 (summarizing list).

There is no systematic way to describe the agencies in this or the previous category. This list includes some, but by no means all, of the independent regulatory agencies; some entities inside executive branch departments; and other kinds of entities, such as an Article I court and a nonprofit corporation. *See, e.g.*, 38 U.S.C. § 7251 (2012) ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims."); 42 U.S.C. § 2996b(a) (2012) ("There is established in the District of Columbia a private nonmembership nonprofit corporation, which shall be known as the Legal Services Corporation . . . ."); ACUS 2012 SOURCEBOOK, *supra* note 162, at 6, 48-49 (identifying 81 independent agencies and excluding from this category bureaus inside an executive agency headed by an administrator with a fixed term, such as the Federal Aviation Administration).

first obtaining White House approval somewhat weakens the force of the approval lever,[164] but not entirely. The President can still submit his own proposals for these budget bypass agencies.[165] OMB even instructs such agencies that "OMB may provide you additional materials supporting the President's Budget request *that you will forward to the Congress with the agency testimony*" and directs agency witnesses to be able to "explain . . . the request in the President's Budget" along with their own.[166] Moreover, having the White House's support in a budget request can be valuable.[167]

A third variation in the approval lever may exist for agencies that run programs rooted in "mandatory spending" authority, rather than discretionary spending that goes through the annual appropriations process.[168] In principle, the approval lever might be weaker for agencies running programs that are not subject to the annual appropriations process. OMB, however, still retains significant oversight of these agencies and programs. The discretionary part of the agency's budget is still subject to OMB approval, so priority setting (for example, in the allocation of staff among activities and divisions) continues to

164. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 806 (2013) (noting that bypass procedures "decrease presidential control over the agencies' agendas by decreasing the information asymmetry between Congress and the President").

165. *See id.*; *see also* Memorandum from Jim Jukes to OMB Policy Officers & DADs, *supra* note 162, at 3-4.

166. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.2, at 2 (emphasis added).

167. *See, e.g.*, WILDAVSKY, *supra* note 7, at 94-95 ("Agency people agree that Budget Bureau support is worth having if you can get it without sacrificing too much in Congress" because "[g]iven the congressional propensity to cut, what the Budget Bureau proposes for an agency is likely to be the upper limit" and because "there are multitudes of small items that Congress would not ordinarily investigate but that might have trouble getting funded if Bureau approval were lacking."); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 632-33 (2010) (noting that all agencies, including those with independent sources of funding, have an interest in presidential support in budget battles with Congress); Datla & Revesz, *supra* note 164, at 806 (noting that presidential support "is a determinant of success in the budget process"); Joseph White, *Presidents, Congress, and Budget Decisions*, *in* RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONSHIPS 190 (James A. Thurber ed., 5th ed. 2013) (discussing congressional appropriations staff's view that OMB's input is valuable because a bypass agency's request "is just too expensive" and "[n]o one can use it").

168. Mandatory spending includes such programs as Social Security (run by the Social Security Administration), Medicare (run by the Centers for Medicare and Medicaid Services in the Department of Health and Human Services), the Supplemental Nutrition Assistance Program (run by the Food and Nutrition Service in the Department of Agriculture), and others. *See* MINDY R. LEVIT ET AL., CONG. RESEARCH SERV., RL33074, MANDATORY SPENDING SINCE 1962, at 1 (2015) (explaining that "[m]andatory spending is composed of budget outlays controlled by laws other than appropriation acts").

be part of the annual appropriations process.[169] Moreover, the President's budget may propose changes to mandatory spending, proposals that OMB has by definition approved.[170] At least in the current and previous administrations, OMB has required agencies to submit, as part of their annual budget requests, a description of any effort to take discretionary action that would increase mandatory spending, and has strictly limited its approval of these efforts.[171]

Only a small subset of agencies are not affected by OMB's approval lever: those that are largely self-funded and obtain their budgets from non-governmental sources rather than the annual appropriations process.[172] But these agencies are exceptions rather than the norm.[173] The approval lever is generally applicable to and influential in both independent and executive agencies.

---

169. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2016, at 273, 351, 377 tbl.29-1 (2015), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/29_1.pdf [http://perma.cc/U52U-KE7J] (showing the budgets for Food and Nutrition Service, Centers for Medicare and Medicaid, and Social Security Administration).

170. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 20, at 4 (defining, as an important budget term, "CHIMP" as "an acronym for a 'CHange (either a cost or a savings) In a Mandatory Program' that is proposed or enacted in an appropriations bill rather than in authorizing legislation"); *see also* Memorandum from Brian C. Deese to the Heads of Dep'ts & Agencies, *supra* note 124, at 2 (stating that "[a]gencies should review their mandatory spending with the same rigor as their discretionary spending" and "should give close consideration to mandatory proposals that seek to improve their job training and employment programs").

171. *See* CLINTON T. BRASS & JIM MONKE, CONG. RESEARCH SERV., R41375, OMB CONTROLS ON AGENCY MANDATORY SPENDING PROGRAMS: "ADMINISTRATIVE PAYGO" AND RELATED ISSUES FOR CONGRESS 3-7 (2010) (discussing President George W. Bush's OMB Director's 2005 memorandum, affirmed by President Obama's OMB Director in 2009, setting forth these requirements, noting that an OMB official indicated that "similar activities had occurred before," and explaining that the RMOs have oversight over these agency requests).

172. *See* ACUS 2012 SOURCEBOOK, *supra* note 162, at 120 tbl.15 (listing the eleven agencies that are "completely exempt from appropriations" as the Farm Credit Administration, Farm Credit System Insurance Corporation, Federal Deposit Insurance Corporation, Federal Home Loan Mortgage Corporation, Federal Housing Finance Agency, Federal Reserve System, Federal Prison Industries, Inc. (in the Department of Justice), National Credit Union Administration, Public Company Accounting Oversight Board (in the Securities and Exchange Commission), Comptroller of the Currency (in the Department of the Treasury), and Bureau of Engraving and Printing (in the Department of the Treasury)); *see also* Memorandum from Jim Jukes to OMB Policy Officers & DADs, *supra* note 162, at 5 (describing this category as "mainly regulators of financial institutions").

173. There is no shared definition of what constitutes an agency. By any definition and associated list, however, the number of agencies with budget bypass authority and self-funding status are in the minority. *See* ACUS 2012 SOURCEBOOK, *supra* note 162, at 14-15 (discussing estimates for the total number of agencies, ranging from approximately 250 to over 400).

3. *The Confidentiality Lever*

A third lever OMB uses to control agency policymaking through the budget preparation process is the confidentiality lever: the requirement that agency officials silence their own differing preferences and, if those preferences become known, distance themselves from them.[174] The confidentiality lever seeks first to promote open, vigorous internal debate and then ultimately to ensure that the administration speaks publicly with one voice.[175] As a result, the confidentiality lever limits agencies' ability to state publicly their own views of alternative budget and policy priorities.

The confidentiality lever overlaps with a more general set of clearance requirements OMB uses for all agency communication with Congress.[176] But the confidentiality lever is broader because it applies to agency disclosures to anyone outside the executive branch,[177] including the media, interest groups, academics, and others. The confidentiality lever also overlaps with the President's constitutional appointment and removal powers because administrators' relationships with the President and interests in keeping their jobs also limit disclosure of policy preferences at odds with the President's program.[178] But again, the confidentiality lever is broader because it applies to independent agency officials[179] and to civil servants,[180] who are not subject to presidential removal.

---

174. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 22, at 1 (providing that agency-OMB budget deliberations must remain confidential and limiting what may be disclosed about the budget process "to anyone outside the Executive Branch"). This requirement is more stringent than the Budget Act's limitation on agency interactions with Congress, which provides that, with very limited exception, agencies may communicate with Congress about their budget interests "only when requested by either House of Congress." 31 U.S.C. § 1108(e) (2012).

175. JUDY SCHNEIDER ET AL., CONGRESSIONAL DESKBOOK: THE PRACTICAL AND COMPREHENSIVE GUIDE TO CONGRESS § 4.180, at 159 (6th ed. 2012); *see also infra* notes 334-336 and accompanying text.

176. OMB CIRCULAR NO. A-19, *supra* note 18 (requiring agencies to clear testimony before Congress, among other things, with OMB); *see also* Sean Reilly, *Former Social Security Chief Happy To Reclaim Free Speech Rights from OMB*, FED. TIMES: FEDLINE (Feb. 26, 2013), http://fedline.federaltimes.com/2013/02/26/former-social-security-chief-happy-to-reclaim-first-amendment-rights-from-omb [http://perma.cc/7VQ7-RTLK] (quoting a former Social Security Administration Commissioner stating that "I don't miss having everything I say being cleared by a 28-year-old at OMB").

177. *See supra* note 174 and accompanying text.

178. *See, e.g.*, BRESSMAN ET AL., *supra* note 10, at 66-74 (observing that political appointees tend to either modify their views to conform to presidential expectations or resign).

179. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 22, at 1-4 (making no exception for independent agency officials).

When agency officials testify before Congress after the President's budget has been submitted, Circular A-11 instructs that "[w]itnesses will give frank and complete answers to all questions," "avoid volunteering personal opinions that reflect positions inconsistent with the President's program or appropriation request," and "will not provide the agency's request to OMB or plans for the use of appropriations that exceed the President's request."[181] Agency officials may speak only in support of the President's budget, even if they strenuously argued for different sums of money or different policy priorities up until the time the President's budget became final.[182] RMO staff listen to agency officials testifying before Congress about the budget,[183] and efforts to circumvent the confidentiality requirement may have negative consequences for both officials and their agencies.[184]

The confidentiality requirement applies to written material submitted to Congress as well as to testimony; the circular requires that agencies submit all "budget-related materials to OMB for clearance prior to transmittal to congressional committees, individual Members of the Congress or their staff,

---

180. *See, e.g.*, Chambers v. Dep't of Interior, 602 F.3d 1370, 1373 (Fed. Cir. 2010) (sustaining, in part, the decision of the Merit Systems Protection Board to remove the chief of the United States Park Police on the grounds that she had improperly spoken to a House staffer and the *Washington Post* about her dissatisfaction with OMB's budget request for her agency and remanding the case to the Board to determine whether removal remained a proper penalty).

181. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.2, at 2.

182. *See* SCHICK, *supra* note 7, at 108, 236. Of course, sometimes agency officials speak off the record about items in the budget with which they disagree. *See, e.g.*, Panetta, *supra* note 151, at 214. But sometimes that disagreement is supported by OMB officials as a way "to begin a drumbeat of interest in the final details of the budget." *Id.*; *cf.* Adams, *supra* note 72, at 60 (noting as to OMB staff's own disclosure of budget information, "when budget details are dispensed ahead of official release times, it is generally a result of a policy decision at the most senior level in the White House to obtain early or favorable coverage of their policies, not the result of an intentional disclosure in lower levels of the organization").

183. *See* Forshey, *supra* note 139, at 431 (stating that after "ensuring that all agency testimony and other policy materials are consistent with the Administration's agenda . . . OMB examiners attend congressional hearings [on the budget] to ensure the agency's message is clear").

184. *See, e.g.*, Steinzor, *supra* note 2, at 233 ("Agency heads . . . appear unwilling to admit that their agencies labor under the constraints of scant funding. Whining about money and its effect on their performance would almost certainly earn the enmity of White House staffs . . . ."); Lisa Caruso, *OMB Director Blistered Army Corps Chief in Memo Before Firing*, GOV'T EXECUTIVE (Mar. 8, 2002), http://www.govexec.com/federal-news/2002/03/omb-director-blistered-army-corps-chief-in-memo-before-firing/11204 [http://perma.cc/4XLZ-4RT9] (describing a memo sent by OMB Director to the White House Chief of Staff, Deputy Chief of Staff, and a senior political advisor complaining about the congressional testimony given by the head of the Army Corps of Engineers – stating that the presidential budget would force the agency to cut 45,000 jobs and cancel existing contracts – and explaining that the head of the agency was fired shortly thereafter).

or the media."[185] This rule limits even informal communication between congressional staff and agency staff.[186] Further, although the circular requires agencies to post on their websites all of the material underlying their part of the budget request to Congress,[187] it prevents agencies from posting any material that they originally submitted to OMB.[188]

There are exceptions to the general rule of confidentiality. For example, the Inspector General Reform Act of 2008 provides that the President must include in his budget "any comments" from an Inspector General who concludes that the budget proposal "would substantially inhibit the Inspector General from performing the duties of the office."[189] More generally, the Whistleblower Protection Act limits adverse employment actions against civil servants who disclose information that they "reasonably believe[] evidences . . . a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[190] In addition, by practice although not by statute, members of the House and Senate Armed Services committees have typically asked the top military officials in the Department of Defense for their "unfunded priority lists"—that is, a list of desired items that did not make it into the President's final budget.[191]

But these are exceptions that prove the rule,[192] and even these exceptions can be limited in scope.[193] In general, agency officials are reluctant to try to

185. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.3, at 2.

186. *See* HUDAK, *supra* note 7, at 172 (describing interviews with career agency officials who explained that OMB handles all communication with Congress); SCHICK, *supra* note 7, at 108, 236.

187. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.6(c), at 4.

188. *Id.* § 22.1, at 1.

189. 5 U.S.C. app. § 6(f)(3) (2012).

190. 5 U.S.C.A. § 2302(b)(8) (West 2015).

191. *See* John T. Bennett, *'Unfunded' Lists Reveal Fissures Between HASC Leaders*, DEF. NEWS (Feb. 18, 2014, 7:16 PM), http://archive.defensenews.com/article/20140218/DEFREG02/302180023/-Unfunded-Lists-Reveal-Fissures-Between-HASC-Leaders [http://perma.cc/9MX5-EDC9].

192. For a vivid illustration of an RMO threat to punish an agency official for violating the confidentiality requirement that went too far, see Robert Brodsky, *OMB Staffer To Be Disciplined for Threats to IG*, GOV'T EXECUTIVE (Mar. 9, 2010), http://www.govexec.com/oversight/2010/03/omb-staffer-to-be-disciplined-for-threats-to-ig/31014 [http://perma.cc/WEQ6-4PWS] (describing a program examiner who threatened to "make life miserable" in the event the agency in question complained to Congress about its proposed budget). The problem was that the agency in question was an Inspector General's office, which has a statutory exception from the confidentiality requirement. *See supra* note 189 and accompanying text; Brodsky, *supra* (quoting the OMB Director as saying that the program examiner's threat, "regardless of its underlying motive or rationale, could reasonably have been perceived as intending to inhibit the . . . inspector general *from invoking his statutory*

circumvent the confidentiality lever, even in back channels, for fear of adverse consequences from OMB.[194]

B. The Mechanisms of Control Through Budget Execution

OMB's role in the budget process does not end when Congress passes and the President signs the annual appropriations bills (or, in more recent years, the continuing resolutions to provide funding for a limited period of time after the fiscal year until the appropriations bills are agreed upon).[195] OMB is intimately involved in budget execution – the way federal agencies carry out their work under the budgetary authority they have been granted.[196] OMB

---

authority," and stating that OMB would "increase its training for OMB program examiners *on the 2008 IG Reform Act requirements.*" (emphases added)). The program examiner's threats would, outside this specific statutory context, apparently not face the same disapprobation.

193. For example, it can be very difficult to establish that disclosure of a budget dispute falls within the exception provided under the Whistleblower Protection Act. *See* Chambers v. Dep't of Interior, 602 F.3d 1370, 1377-78 (Fed. Cir. 2010) (concluding that the Chief of the United States Park Police did not satisfy this standard when she made public her belief that the agency's budget was insufficient). As for the Unfunded Priorities List, some Defense Secretaries have objected to or banned the practice completely. *See* Bennett, *supra* note 191 (describing rejection of the practice by a former Defense Secretary in the Obama administration); Megan R. Wilson, *K St. Swarms on Pentagon's "Wish Lists,"* HILL (Apr. 16, 2015), http://thehill.com/business-a-lobbying/business-a-lobbying/239029-k-st-swarms-on-pentagons-wish-lists [http://perma.cc/B3A4-9K5P] (describing rejection of or distaste for the practice by former Defense Secretaries in the Bush II and Obama Administrations). Moreover, even in supplying these lists to their congressional appropriators, the Armed Services can be careful to indicate their support for the President's budget and to note that they would support these priorities only if the priorities in the President's budget are funded first. *See, e.g.*, *Document: U.S. Military Fiscal Year 2016 Unfunded Priorities List*, USNI NEWS (Mar. 31, 2015, 2:22 PM), http://news.usni.org/2015/03/31/document-u-s-military-fiscal-year-2016-unfunded-priorities-list [http://perma.cc/E9QH-EMM2].

194. KETTL, *supra* note 5, at 139 (discussing potential for agency officials to try to be more honest with congressional committees about the effects of the President's budget proposal with which the officials disagree, while noting that "Presidents and their budget officials, of course, are always on the lookout for such end runs," and that "[t]hose who try it can be punished in the next budget cycle").

195. *See, e.g.*, JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42647, CONTINUING RESOLUTIONS: OVERVIEW OF COMPONENTS AND RECENT PRACTICES 1, 13 (2015) (noting that 1997 was the most recent year that the twelve regular appropriations bills that fund the government were all enacted before the end of the fiscal year on October 1 and that since that time, continuing resolutions have been enacted on average six times per fiscal year, for an average duration of almost five months, with full-year continuing resolutions enacted for FY2007, FY2011, and FY2013).

196. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 10, at 2-3, 5; *see also* FISHER, *supra* note 7 (discussing importance of budget execution to the presidential agenda); Joseph White, *The*

affects budget execution through two different levers: the formal *specification lever*, through which it "apportions" and otherwise defines how agencies spend the funds Congress has appropriated, and the informal *monitoring lever*, through which it oversees agencies' implementation of their programs.

1. *The Specification Lever*

While OMB "is much too small to oversee all transactions," nevertheless "[o]n any particular matter it may intervene to influence the use of federal dollars."[197] The specification lever provides four main tools for OMB influence: it must (1) apportion agency spending; (2) approve requests to transfer or reprogram funds; (3) approve requests to defer or rescind funds; and (4) oversee decisions regarding a government shutdown in the event of a failure to reach a budget agreement.

a. Apportionment

Before agencies can spend the funds that Congress has appropriated, OMB must apportion them by specifying how much may be expended, when it may be expended, and even to some extent how it may be expended.[198] The Anti-Deficiency Act[199] requires agencies to spread out appropriated funds so that they do not spend them too quickly and come back asking for more.[200] Under this authority, OMB limits how much agencies can spend either by time period, project, or both.[201] It also reviews apportionments at least four times a year,[202] with the potential to reapportion funds under certain circumstances.[203]

President's Budget vs. Congressional Budgeting: Institutionalizing the Adversarial Presidency?, *in* RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 229, 230 (James A. Thurber ed., 4th ed. 2009) (naming, as one of OMB's mechanisms for "assert[ing] presidential power," its "influence over implementation (the extent to which bureaus do what legislators expected them to do with the budget, or more what decision makers within the administration prefer)").

197. SCHICK, *supra* note 7, at 276.

198. *Id.* at 276-77 (describing OMB's basic apportionment power); TOMKIN, *supra* note 18, at 187 (describing "OMB's apportionment authorities as a tool to closely scrutinize agency expenditures and policies").

199. Act of July 12, 1870, ch. 252, § 7, 16 Stat. 251, 251 (codified as amended in scattered sections of 31 U.S.C.).

200. 31 U.S.C. § 1512(a) (2012).

201. *Id.* § 1512(b)(1).

202. *Id.* § 1512(d).

203. *Id.* § 1512(a).

The apportionment power gives OMB a regular opportunity to control how agencies conduct their operations. The RMOs take the lead in this responsibility.[204]

"Although apportionment is largely a technical procedure," Allen Schick explains, "it is the last point at which OMB formally controls agency spending."[205] Therefore, "OMB sometimes uses apportionment to impose conditions on agency spending or to demand changes in agency practices."[206] For example, the RMO may include a footnote placing further limitations on a particular apportionment amount,[207] such as requiring an agency to spend its funds on particular activities.[208] The RMO may also require that an agency take some action before it receives its apportionment.[209]

The power of the footnote should not be understated: apportionment footnotes are subject to the requirements of the Anti-Deficiency Act,[210] and agency officials disregard them at their peril. Violations of the Act are punishable by adverse employment actions (including suspension without pay or removal from office)[211] and criminal penalties (including a fine of up to $5,000 and up to two years imprisonment).[212] In addition to apportionment itself, then, apportionment footnotes offer OMB an opportunity to specify how agencies spend their money and thus the actions agencies take.

---

204. OMB CIRCULAR NO. A-11, *supra* note 116, § 120.15, 120.19, 120.29, 120.33, 120.61, at 10, 12, 14, 16, 24 (instructing agencies to consult with their RMO examiner throughout the apportionment process); TOMKIN, *supra* note 18, at 188 (describing interviews with various OMB career staffers who suggested that the apportionment process increased the power of the RMO civil servants vis-à-vis PADs or higher-level political appointees, in part, because "apportionment forms normally only required the approval of the division chief, unless a politically sensitive issue was involved," making apportionment "one area that allowed the examiner added discretion and power").

205. SCHICK, *supra* note 7, at 277.

206. *Id.*

207. OMB CIRCULAR NO. A-11, *supra* note 116, § 120.12, 120.34, at 8, 16.

208. *See, e.g.*, TOMKIN, *supra* note 18, at 187 (discussing the use of apportionment footnotes to "direct[] how funds should be spent"); Forest Serv., B-310108, 2008 WL 341538 (Comp. Gen. Feb. 6, 2008), http://www.gao.gov/assets/390/382138.pdf [http://perma.cc/W3DG-GBVD] (discussing substantive limitation OMB placed via an apportionment footnote on Forest Service's use of funds).

209. OMB CIRCULAR NO. A-11, *supra* note 116, § 120.34, at 16; *see also* TOMKIN, *supra* note 18, at 187 (describing the use of apportionment footnotes to make "the release of an agency's quarterly apportionments contingent upon whether the agency had provided OMB with requested information [or] answers to lengthy questionnaires").

210. OMB CIRCULAR NO. A-11, *supra* note 116, § 120.15, 120.34, at 10, 16.

211. 31 U.S.C. §§ 1349(a), 1518 (2012).

212. *Id.* §§ 1350, 1519.

The effect of OMB's apportionment power increases when the government operates under continuing resolutions. As a reporter recently wrote, the number one "hidden cost[] of continuing resolutions" from an agency's perspective is that "OMB gets in your face."[213] OMB directs agencies to "operate at a minimal level until after your regular [fiscal year] appropriation is enacted" and oversees their choices to implement that direction[214] to prevent a situation where a subsequently enacted regular appropriation provides less funding than the agency had expected.[215] While the OMB Director provides a formula that automatically apportions amounts provided under the continuing resolution,[216] the RMOs may further limit this amount,[217] deploy footnotes to specify additional restrictions on its use,[218] and grant requests for sums beyond the automatic apportionment only in "extraordinary circumstances."[219] The uncertainty about what will happen at the end of a continuing resolution thus amplifies the RMOs' attention to agency spending.

---

213. Adam Mazmanian, *6 Hidden Costs of Continuing Resolutions*, FCW (Aug. 19, 2015), http://fcw.com/articles/2015/08/19/hidden-cost-resolutions.aspx [http://perma.cc/3FN4-BS7N] (quoting a former agency chief financial officer's statement that "[r]elationships between agencies and the Office of Management and Budget can be strained in the best of times," but that "during a continuing resolution . . . OMB can 'take on an aura of the trustees [sic] role in a corporate bankruptcy'").

214. OMB CIRCULAR NO. A-11, *supra* note 116, § 123.1, at 1.

215. *Id.* § 123.13, at 5 (telling agencies that "[y]ou must do everything possible to reduce the amount of your existing obligations so that the agency's obligations do not exceed the amounts provided in the full-year enacted appropriations" and directing them to "contact your OMB examiner" to discuss how to address this problem).

216. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 14-03, APPORTIONMENT OF THE CONTINUING RESOLUTION(S) FOR FISCAL YEAR 2015, at 4 (2014), http://www.whitehouse.gov/sites/default/files/omb/bulletins/2014/b-14-03.pdf [http://perma.cc/XH44-P3D8] [hereinafter OMB BULL. NO. 14-03] (providing a formula for the amount automatically apportioned based on the percentage of the year covered by the continuing resolution); OMB CIRCULAR NO. A-11, *supra* note 116, § 123.13, at 6 (describing the process of automatic apportionment).

217. OMB BULL. NO. 14-03, *supra* note 216, at 2 (requiring a written apportionment instead of the automatic apportionment whenever an RMO or an agency "seeks an amount for an account that is more than the amount automatically apportioned" or determines "that an amount for a program should be less than the amount automatically apportioned to ensure that an agency does not impinge on the final funding prerogatives of the Congress and to encourage prudent financial management and execution of mission").

218. *Id.* at 1-2 (noting that apportionment footnotes continue to apply during a continuing resolution).

219. *Id.* at 2; *see also* OMB CIRCULAR NO. A-11, *supra* note 116, § 123.7, at 3 (outlining limited reasons for which OMB would consider granting a written apportionment exception).

b. *Transfers and Reprogramming*

Another tool of the specification lever allows OMB to exert influence when agencies seek to change an aspect of Congress's appropriation. For example, agencies may seek to transfer funds from one account to another or to reprogram funds from one purpose to another within the same account.[220] OMB must approve the request before the agency can discuss transferring or reprogramming funds with the relevant congressional committees.[221] This process, too, gives the RMOs a way to influence where the agency directs its funds.[222]

c. *Deferral and Rescission*

The specification lever is also at work in the less frequent instances when the President proposes to defer or rescind the use of appropriated funds.[223] The Congressional Budget and Impoundment Control Act of 1974,[224] which Congress passed after a showdown with President Nixon over the President's efforts to impound funds for policy reasons, governs this process.[225] The Act

---

220. SCHICK, *supra* note 7, at 281-82 (describing legal limitations on transferring and reprogramming).

221. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.3, at 2-3.

222. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-577R, BUDGET ISSUES: REPROGRAMMING OF FEDERAL AIR MARSHAL SERVICE FUNDS IN FISCAL YEAR 2003, at 6 (2004), http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-577R/pdf/GAOREPORTS-GAO-04-577R.pdf [http://perma.cc/FS9D-SEM6] (noting that while OMB cleared the reprogramming in question, it declined to say whether the OMB director or simply lower-level officials were involved); Memorandum from Danny Werfel, Controller, Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Exec. Dep'ts & Agencies, No. M-13-11, Ongoing Implementation of the Joint Committee Sequestration 1-2 (Apr. 4, 2013), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-11.pdf [http://perma.cc/9QH6-LK6F] (directing agencies to consult with their RMOs if they wish to use their transfer or reprogramming authority).

223. SCHICK, *supra* note 7, at 284-89 (describing this process generally and explaining that a deferral "delays the use of funds" while "rescission cancels budget authority").

224. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

225. FISHER, *supra* note 7, at 147-48, 198-201 (explaining that historically, "impoundment" meant that a President declined to spend appropriated funds for a wide variety of reasons, and describing the controversy under President Nixon as resulting from the President's refusing to spend funds for programs he disliked on policy grounds, rather than refusing for purposes of efficient financial management outside substantive disagreements); SCHICK, *supra* note 7, at 285-86 (explaining that today, impoundment means broadly "any action or inaction that delays or withholds funds," although "in practice," the term is more "narrowly

forbids unfettered policy impoundments and provides for more limited deferrals and rescissions, which must be grounded in more than simply the President's distaste for the program in question and which Congress must approve.[226]

Given this history, deferral and rescission are most often seen as political battles between Congress and the White House.[227] However, deferrals and rescissions are also a way for the White House to control agencies, as an individual agency must provide OMB with the material it requests in support of the President's formal "special message" to Congress requesting deferral or rescission.[228] Because of the need for presidential involvement, policy-inflected decisions around this tool are less within the province of the RMOs and more clearly within White House itself,[229] although the impetus for a particular proposal may come from within OMB in the first instance.[230]

d. Government Shutdowns

Finally, the specification lever is at work in the lead-up to a government shutdown, and if efforts to reach a continuing resolution fail, during the

applied to actions whose purpose is to curtail spending," and noting that all contemporary impoundments are either a deferral or a rescission (internal quotation marks omitted)).

226. FISHER, *supra* note 7, at 198-201; SCHICK, *supra* note 7, at 285-89. In 1987, the D.C. Circuit struck down a provision in the 1974 Act that permitted one house of Congress to approve a rescission as a violation of *INS v. Chadha*, 462 U.S. 919 (1983). City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987). Congress subsequently passed the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 174, *repealed by* Balanced Budget Act of 1997 § 10210, Pub. L. No. 105-33, 111 Stat. 251, 711, to correct this problem and further limited the practice of rescission, providing only limited administrative (and no policy) justifications for the practice.

227. SCHICK, *supra* note 7, at 285-89.

228. OMB CIRCULAR NO. A-11, *supra* note 116, § 112.6, at 3; *see also id.* § 112.5, at 3 (directing agencies to "furnish requested materials expeditiously on a time schedule determined by OMB" in furtherance of a deferral or rescission proposal).

229. *See, e.g.*, *Impoundment Control Act: Use and Impact of Rescission Procedures: Hearing Before the Subcomm. on Fed. Fin. Mgmt., Gov't Info., Fed. Servs., and Int'l Sec. of the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 4-5 (2009) (statement of Susan A. Poling, Managing Associate General Counsel, Office of General Counsel, Government Accountability Office), http://www.gao.gov/assets/130/123935.pdf [http://perma.cc/PH7C-4CU3] (describing Presidents' use of special messages to propose deferral and rescission from the Ford Administration through the Bush II Administration).

230. OMB CIRCULAR NO. A-11, *supra* note 116, § 112.5, at 5 (telling agencies what to do "[i]f OMB suggests changes in or initiates rescission proposals or deferrals").

shutdown itself.[231] While a shutdown was historically an extraordinary event, the possibility and reality of shutdowns have loomed large in recent years,[232] so this tool is more than merely hypothetical.

OMB requires agencies to develop shutdown plans and specifies what these plans must contain,[233] with different OMB Directors providing different kinds of instructions.[234] At bottom, the plans must comply with the requirements of the Anti-Deficiency Act and associated interpretations,[235] which puts OMB in the position of making decisions about which agency employees and activities are "essential" and should continue to operate during a shutdown.[236] Because of the discretion and judgment involved in making these decisions,[237] approval of agencies' shutdown plans can have substantive policy effect.[238] Decisions

---

231. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 124 (governing "agency operations in the absence of appropriations").

232. CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 3, 22 (2014) (describing the typical rarity of shutdowns but outlining the Fiscal Year 1996 and Fiscal Year 2014 shutdowns and discussing other "near-impasses").

233. OMB CIRCULAR NO. A-11, *supra* note 116, § 124.2, at 3.

234. BRASS, *supra* note 232, at 23 (describing variations among different OMB Directors' instructions across two different administrations).

235. *Id.* at 3-6, 9 (describing legal interpretations by the Office of Legal Counsel and OMB about what the Anti-Deficiency Act permits during a shutdown); OMB CIRCULAR NO. A-11, *supra* note 116, § 124.2, at 3 (requiring shutdown plans to include each "agency's legal basis for each of its determinations to retain categories of employees, including a description of the nature of the agency activities in which these employees will be engaged").

236. Stephen Barr, *Official Is No Stranger to Crisis Management; OMB Deputy Director Coordinates Shutdowns*, WASH. POST, Dec. 19, 1995, at A13 (describing OMB Deputy Director for Management John A. Koskinen as "Mr. Shutdown"); Neil Irwin, *Alice Rivlin Was in Charge of the Last Government Shutdown: This Is What She Saw*, WASH. POST (Sept. 27, 2013), http://www.washingtonpost.com/news/wonk/wp/2013/09/27/alice-rivlin-was-in-charge-of-the-last-government-shutdown-this-is-what-she-saw [http://perma.cc/N6QS-P4AP] (transcribing part of an interview with the Director of OMB during the 1995 government shutdown, in which she stated, "The main question that OMB has to solve is who is essential and who isn't").

237. Lesley Clark & David Lightman, *In Federal Shutdown, Deciding Who's Essential Is Essentially a Guess*, MCCLATCHY DC (Oct. 10, 2013), http://www.mcclatchydc.com/news/politics-government/article24756934.html [http://perma.cc/BY3S-DPEJ] ("If there's one thing Republicans and Democrats can agree on, it's that the decision on who's essential often comes down to a judgment call."); Irwin, *supra* note 236 (quoting the OMB Director as saying, "It's really not obvious who's essential and who isn't" and that deciding what activities to close is "a judgment call").

238. *Government Shutdown I: What's Essential?: Hearings Before the Subcomm. on Civil Serv. of the H. Comm. on Gov't Reform and Oversight*, 104th Cong. 35 (1995) (reviewing agencies' experience in determining what was essential in the 1995 shutdown and including an agency official's discussion of "policy choices" raised by that agency's shutdown plan).

about the shutdown plans are also rooted in the political environment, which includes sensitivity to ongoing congressional-White House budget negotiations that could avert a shutdown.[239]

OMB talks with agencies as the plans are being prepared, reviews the plans and any updates to them, and may require changes[240] in advance of making the plans public.[241] OMB "holds meeting[s] or teleconference[s] with agency senior officials" to discuss "shutdown plans" both before and during a shutdown.[242] OMB also maintains regular contact with agencies during a shutdown,[243] in large part because OMB is the point of contact for agencies on any aspect of a shutdown, including legal questions about the Anti-Deficiency Act.[244]

Even in the absence of appropriations, then, OMB uses its responsibility to execute the budget to control agency action through the specification lever. OMB's senior political appointees make decisions regarding shutdown plans,

239. Clark & Lightman, *supra* note 237 (noting that it is difficult to determine who is essential and quoting individuals arguing that the choice may be politically inflected); Irwin, *supra* note 236 (noting the OMB Director's simultaneous role in budget negotiations with Congress and in supervising agencies' shutdown plans); Robert Pear, *Federal Departments Lay Out Plans in the Event of a Government Shutdown*, Apr. 7, 2011, N.Y. TIMES, at A16 (noting that shutdown plans have to take into account "legal requirements, political imperatives and pressure from federal employee unions demanding more information").

240. OMB CIRCULAR NO. A-11, *supra* note 116, § 124.2, at 3.

241. Office of Mgmt. & Budget, Exec. Office of the President, *Agency Contingency Plans*, WHITE HOUSE, http://www.whitehouse.gov/omb/contingency-plans [http://perma.cc/WP6G-ZB9D]. OMB also tells agencies whether, when, and how much agencies can disclose of their shutdown plans. *See* Gregory Korte, *Federal Agencies Guarded on Possible Shutdown Plans*, USA TODAY (Mar. 29, 2011), http://usatoday30.usatoday.com/news/washington/2011-03-29-shutdown29_ST_N.htm [http://perma.cc/27Q9-9Z3B] (explaining that OMB was closely controlling the information agencies could share with Congress and the public about the possibility of a shutdown and their contingency plans); Sheryl Gay Stolberg & Robert Pear, *As Shutdown Looms, Agencies Brace for Its Impact*, N.Y. TIMES, Apr. 6, 2011, at A1 (noting that OMB was not disclosing contingency plans and that the American Federation of Government Employees had sued under the Freedom of Information Act in an effort to obtain them).

242. OMB CIRCULAR NO. A-11, *supra* note 116, § 124.3, at 3.

243. *Id.* § 124.2-3, at 3 (directing agencies to update OMB as the shutdown plans are implemented); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-86, 2013 GOVERNMENT SHUTDOWN: THREE DEPARTMENTS REPORTED VARYING DEGREES OF IMPACTS ON OPERATIONS, GRANTS, AND CONTRACTS 23 (Oct. 2014) (discussing the experience of three agencies during the 2013 shutdown and discussing their daily communication with OMB, along with the Office of Personnel Management).

244. OMB CIRCULAR NO. A-11, *supra* note 116, § 124.1, at 1.

because of their high-profile nature; however, the RMO staff plays a supporting role in communicating with the agencies and evaluating plans.[245]

2. The Monitoring Lever

The RMOs also become intimately involved with agencies' policy choices using the monitoring lever, through which the RMOs oversee agencies' implementation of their programs.[246] This lever is among the most ambiguous because it is informal; it is not governed by any particular legal source but exists in light of the RMOs' formal duties.

The monitoring lever can manifest itself in frequent communication between agency policymaking officials and RMO program examiners.[247] Agency documents reflecting policy choices, such as grant criteria and other allocative decisions, may be significantly revised by the RMOs and sent back to the agency to incorporate changes.[248] Even when the program examiner does not actively change documents, the program examiner may ask questions that require agency policy officials to justify or modify their initial decisions.[249]

Agency policy officials may also reach decisions in anticipation of the RMOs' requests or collaboratively, as part of a regular phone call or meeting.[250] As one analysis suggests, "[E]fficiency is gained by understanding and possibly

245. Barr, *supra* note 236 (describing the Deputy Director for Management's decisions during the shutdown and explaining the supporting work of "OMB's budget and program examiners").

246. *See* Office of Mgmt. & Budget, *supra* note 74 (explaining that program examiners "[m]onitor[] and evaluate[] progress made by departments and agencies in implementing and executing the President's policy"); Office of Mgmt. & Budget, *supra* note 50 (explaining that as part of this work, the RMOs "oversee implementation of policy options").

247. *See* HUDAK, *supra* note 7, at 171-73 (discussing agency officials' "contact with and the influence of OMB in their daily working relationships because of the statutory and political authority that OMB regularly asserts").

248. *See id.* at 172 (describing an agency career official's comments that OMB's influence "included the ability to outline or detail the precise processes used to distribute funds so that OMB has substantial influence on who gets what and when"); Berry et al., *supra* note 7, at 786-87 (noting the importance of presidential influence over grant criteria and allocation decisions); *see also* STEVEN BRILL, CLASS WARFARE: INSIDE THE FIGHT TO FIX AMERICA'S SCHOOLS 259 (2011) (describing the RMOs' work, along with the Domestic Policy Council, on developing the Education Department's Race to the Top grant program).

249. *See* Martin, *supra* note 1, at 72 (listing examples of questions that program examiners will ask agencies in order to have them justify their programs); Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 5 (same).

250. *See* HUDAK, *supra* note 7, at 171-72. For an example, see BRILL, *supra* note 248, at 259.

preemptively incorporating OMB preferences and expectations into outcomes."[251]

Much is left to the discretion of the individual program examiner in this relationship.[252] Of course, the civil servant branch chiefs, DADs, and the political PADs play something of a unifying role. But not every issue will be elevated, and agency officials may be reluctant to go over the heads of the program examiners with whom they work on a regular basis. Similarly, while DADs tend to have long tenures, PADs tend to change multiple times in an administration.[253] Different PADs may have different priorities; agencies subject to significant PAD oversight under one PAD might receive less attention when a new PAD takes over. Different agencies may also receive more or less stringent RMO review depending on the status of the agency's head within the White House.[254] In addition, different RMOs have different longstanding relationships with the agencies under their purview that may transcend administrations.[255]

To be sure, the program examiner's job is to effectuate the President's policy priorities, but it can be difficult to translate big-picture presidential views into reality in each policy decision before an agency. As such, program examiners necessarily use their own judgment.[256] Similarly, while PADs are political appointees with views that are supposed to reflect those of the President, the PADs do not get White House clearance for every decision they make, so again, these officials must use their judgment. Again, this is not to suggest that the RMO staff, whether civil servants or political appointees, regularly implement their own policy priorities[257] but rather to note that independent judgment calls may have substantive effect.[258]

---

251. HUDAK, *supra* note 7, at 171.

252. *See* TOMKIN, *supra* note 18, at 188 (describing examiners' "discretion in areas of little interest to political appointees," and quoting an agency official as stating that examiners' "'micromanagement' extended to the '80 percent of issues at the margin [in] which the policy and political people were not involved'"); Beryl A. Radin, *Overhead Agencies and Permanent Government: The Office of Management and Budget in the Obama Administration*, 7 FORUM, no. 4, at 7 (2009) ("[B]udget examiners have a significant amount of discretion and autonomy and often differ in approach depending on their areas of responsibility.").

253. *See* TOMKIN, *supra* note 18, at 13 (noting that "[s]ince the introduction of the position in the early 1970s, many areas have experienced a turnover of two or more PADs over any four-year term" and that on average, a PAD remains at OMB for eighteen months).

254. *See id.* at 190.

255. *See id.* at 15.

256. *See supra* note 144 and accompanying text.

257. *See* TOMKIN, *supra* note 18, at 188-89 (stating that "OMB insiders thus generally maintain that the overwhelming majority of the examiners using these [budget execution oversight tools] were not pursuing independent agendas and practically always had the tacit approval

As in the budget preparation process,[259] other White House offices may also get involved in different decisions related to budget execution. For example, the relevant staff member on the Domestic Policy Council may weigh in on particular matters of social policy as grant criteria are being developed, communicating either directly with the agency or through the RMOs.[260] But the monitoring lever gives the RMOs the opportunity for the most regular interaction with the agencies on policy decisions.[261]

C. *The Mechanisms of Control Through Management Initiatives*

OMB has often been said to neglect management in favor of its work on the budget.[262] Over the last 25 years, however, management has become a more integral part of OMB's work, "provid[ing] a way for the White House to influence the implementation of its policy agenda."[263] This expanded attention to management is a result of several factors. First, Congress has increasingly

---

of their political-level supervisors," while still noting a "few cases where agency officials believed that OMB civil servants with particularly authoritarian personalities had crossed the line into pursuit of their own agendas"); *see also supra* notes 142-145 and accompanying text.

258. *See* Ross, *supra* note 141, at 132 (noting the "considerable amount of influence over the policy and budgetary outcomes" held by the RMOs' career staff and stating that "[s]ome of the decisions made by the unelected cadre have a significant impact" on OMB's decisions).

259. *See supra* note 147 and accompanying text.

260. *See generally* GOVERNING AT HOME: THE WHITE HOUSE AND DOMESTIC POLICYMAKING (Michael Nelson & Russell L. Riley eds., 2011) (discussing the Domestic Policy Council's authority over different administrations and its collaboration with OMB). For examples, see BRILL, *supra* note 248, at 228, 237-38, 259, which discusses the Domestic Policy Council's work with the RMOs on Race to the Top; and RON HASKINS & GREG MARGOLIS, SHOW ME THE EVIDENCE: OBAMA'S FIGHT FOR RIGOR AND RESULTS IN SOCIAL POLICY 39-43, 45-47, 73-78, 171-72, 214-15 (2015), which discusses the collaboration between OMB and the Domestic Policy Council on evidence-based policymaking under the Obama Administration.

261. *See* JOHN H. KESSEL, PRESIDENTS, THE PRESIDENCY, AND THE POLITICAL ENVIRONMENT 180-83 (2001) (noting that White House and policy council staff "cannot monitor government activity" thoroughly because of that staff's limited size, and that the job of monitoring government activity instead falls to OMB, which because of its size "is much better able to track governmental activities"). To be sure, while OMB's size is large compared to the White House and policy councils' staff, it is small compared to agencies' own staff, and so even the RMOs' ability to monitor every agency action "is at best incomplete." *Id.* at 183.

262. *See, e.g.*, PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 121 (1995) ("By the end of 1994 the old OMB might best be labeled just OB.").

263. Radin, *supra* note 252, at 5; *see also* BIGGS & HELMS, *supra* note 64, at 342 ("[A]s the OMB enters the twenty-first century, the 'M' for Management is beginning to emerge from the shadows of the 'B' for Budget.").

delegated particular management tasks to OMB.[264] Second, there are an increasing number of statutory offices devoted to particular management issues, from financial management[265] to e-government.[266] Third, internal executive branch efforts have contributed, including the 1994 reorganization of OMB to integrate management more thoroughly into the office's budget work[267] as well as more recent Presidents' development and implementation of their own management agendas.[268] This Section focuses on these executive branch efforts as providing particularly strong examples of the RMOs' ability to influence agencies' policy choices through management initiatives.

Two such levers exist: the *Presidential Management Agenda lever*, which sets forth presidential initiatives ostensibly designed to improve the administration of government but that often have a substantive policy overlay, and the *budget-nexus lever*, which connects these management initiatives to the budget process. These levers are related: the budget-nexus lever provides the procedural hook for the more substantive Presidential Management Agenda lever.

---

264. *See* Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5112(b), 110 Stat. 670, 680 (codified as amended at 40 U.S.C. § 11302 (2012)) (charging the Director of OMB with oversight over the acquisition, use, and disposal of information technology in the service of federal programs); Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 5, 31, and 39 U.S.C.) (creating a performance management requirement for federal agencies and requiring OMB to engage with the development of agencies' strategic plans); Chief Financial Officers Act of 1990, Pub. L. No. 101-576, §§ 201-02, 104 Stat. 2838, 2839-41 (1990) (codified as amended at 31 U.S.C. §§ 502(c), 503 (2012)) (creating the position of Deputy Director for Management and a broader authority to promulgate government-wide management policies); *see also* CLINTON T. BRASS, CONG. RESEARCH SERV., R42379, CHANGES TO THE GOVERNMENT PERFORMANCE AND RESULTS ACT (GPRA): OVERVIEW OF THE NEW FRAMEWORK OF PRODUCTS AND PROCESSES 4-11 (2012) (describing the 2010 amendments to the Government Performance and Results Act).

265. *See* Chief Financial Officers Act of 1990 § 102(b) (creating the Office of Federal Financial Management). A separate, non-statutory office exists to coordinate agencies' compliance with the Government Performance and Results Act. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Performance and Personnel Management*, WHITE HOUSE, http://www.whitehouse.gov/omb/performance [http://perma.cc/6YQT-49ZF].

266. *See* E-Government Act of 2002, Pub. L. No. 107-347, § 101(a), 116 Stat. 2899, 2910 (codified at 31 U.S.C. § 507 (2012)) (creating the Office of Electronic Government).

267. *See* Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 3 (setting forth these goals); *see also* TOMKIN, *supra* note 18, at 217-50 (describing this reorganization).

268. *See* BRASS, *supra* note 264, at 1 n.3 (describing the less entrenched management initiatives of previous administrations).

1. The Presidential Management Agenda Lever

Management initiatives are not simply neutral, technocratic procedures. As political scientist Andrew Rudalevidge put it when describing the way President Nixon's political advisors originally viewed the "M" in the new OMB, management was not to be "boring public administration theory" but rather "'management in the get-the-Secretary-to-do-what-the-President-needs-and-wants-him-do-do-whether-he-likes-it-or-not sense.'"[269] To that end, management initiatives often either explicitly contemplate substantive policy choices or implicitly lead to them. The Presidential Management Agenda (PMA) exemplifies this dynamic.

Consider, for example, President George W. Bush's Faith-Based and Community Initiative, which the Administration presented as a management initiative to break down bureaucratic barriers limiting religiously-affiliated organizations from engaging with government.[270] But the initiative was not simply bureaucratic; it attempted to weaken the wall between church and state.[271]

Other initiatives sound more technocratic but end up driving agencies' substantive choices. President Bush's Program Assessment Rating Tool's (PART) stated goal was to integrate budget and performance evaluation to allow for continuation and expansion of well-functioning programs and reform or removal of poorly performing programs.[272] One aspect of the PART process asked program examiners to evaluate agencies' program purpose and design, including the soundness of choices in the underlying legislation.[273] But statutes often contain multiple purposes, and the PART process sometimes led agencies

---

269. RUDALEVIDGE, *supra* note 104, at 61 (describing "new emphasis on the 'M' in OMB" as being "designed to facilitate Nixon's efforts to shape the way executive agencies created and implemented policy"). This private view of President Nixon's advisors stands in contrast to President Nixon's public statement that OMB would be concerned not with what "we [the government] do" but rather "with how we do it, and how well we do it." *See supra* note 59 and accompanying text.

270. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002, at 35-38 (2001), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2002/mgmt.pdf [http://perma.cc/Q9UF-D3Z6] [hereinafter BUSH PMA].

271. *See, e.g.*, JOSEPH LOCONTE, GOD, GOVERNMENT AND THE GOOD SAMARITAN: THE PROMISE AND THE PERIL OF THE PRESIDENT'S FAITH-BASED AGENDA (2001) (describing the transformative potential of President Bush's initiative for American public life).

272. BUSH PMA, *supra* note 270, at 27-30.

273. BERYL A. RADIN, BEYOND MACHIAVELLI: POLICY ANALYSIS COMES OF AGE 48-49 (2d ed. 2013); SCHICK, *supra* note 7, at 301.

to emphasize one over another in an effort to secure program examiner approval.[274]

Likewise, some of President Obama's management initiatives sound technocratic but have substantive effects. For example, the Evidence and Evaluation Agenda seeks to move the federal government towards evidence-based policymaking.[275] This agenda directs investment of federal dollars into programs that have proven effective on the ground and, once the money is awarded, requires ongoing evaluation of the program's implementation and outcomes.[276] The initiative has affected agency policy choices in a number of ways. It has pushed agencies to adopt some policy goals and approaches to service delivery over others.[277] It has prioritized competitive grants over formula grants,[278] and transformed decades-old accountability systems.[279] One

274. RADIN, *supra* note 98, at 108-11 (explaining that the PART process prized efficiency over equity, even for programs that were designed with equity goals); BERYL A. RADIN, FEDERAL MANAGEMENT REFORM IN A WORLD OF CONTRADICTIONS 160-61 (2012) (explaining that through the PART process OMB attempted to limit the goals of the Community Development Block Grant); John B. Gilmour & David E. Lewis, *Does Performance Budgeting Work? An Examination of the Office of Management and Budget's PART Scores*, PUB. ADMIN. REV., Sept.-Oct. 2006, at 744 (discussing how disputes between program examiners and agencies under PART were handled through the "OMB hierarchy," only reaching the higher levels "if necessary").

275. *See* HASKINS & MARGOLIS, *supra* note 260, at 26-30 (describing this agenda).

276. *Id.* at 218-19.

277. *Id.* at 176-77, 216 (discussing tension between OMB and the Department of Labor over what kinds of programs would be funded); *id.* at 214-18, 222-24 (describing how OMB worked with agencies to select outcome measures for agencies to include in their program funding announcements).

278. *Id.* at 214, 216, 222-27, 253-54 app. C (describing OMB's prioritization of competitive grants over formula grants, sometimes over agencies' objections).

279. *See, e.g.*, *New Accountability Framework Raises the Bar for State Special Education Programs*, U.S. DEP'T EDUC. (June 24, 2014), http://www.ed.gov/news/press-releases/new-accountability-framework-raises-bar-state-special-education-programs [http://perma.cc/D3ZT-CGG2] (announcing "a major shift in the way [the Department] oversees the effectiveness of states' special education programs" and quoting the acting Assistant Secretary for Special Education and Rehabilitative Services as stating that the Results-Driven Accountability system "is about using the accountability framework to provide states with incentives and support to implement *evidence-based strategies* to improve results and outcomes for students with disabilities" (emphasis added)); *see also* Christina Samuels, *Special Education Sees Small Increases in White House Budget Proposal*, EDUC. WEEK (Feb. 2, 2015), http://blogs.edweek.org/edweek/speced/2015/02/special_education_sees_small_i.html [http://perma.cc/BQ5U-TJV2] (noting that the President's Budget "sets aside $10 million that the department could use to help states pay for *evidence-based reforms* under the new 'results-driven accountability' model aimed at improving the academic performance of students with disabilities" (emphasis added)).

study of the Evidence and Evaluation Agenda goes so far as to call it a "vast attempt to change the foundation of American social policy."[280]

These management initiatives are also intricately intertwined with political decisions. For example, some have charged that President Obama's evidence-based initiative relies more heavily on evidence that supports the administration's preferred policy decisions.[281] Others suggested that President Bush's PART program was politically motivated to cut the budgets of disfavored programs[282] and that the faith-based initiative was a political maneuver without any meaningful policy analysis or apparatus.[283] In earlier administrations, President Nixon's management reforms were described as intending at once to "improve governmental management,"[284] "redistribute power in the intergovernmental system,"[285] and ensure "political direction" over agencies' activities.[286] And a Reagan Administration official reportedly joked after leaving office that the name for President Reagan's management initiative was I-D-E-O-L-O-G-Y (riffing on the acronym-heavy titles of the previous Presidents' management initiatives).[287]

Management reforms are thus not always simply neutral technocratic reforms; they reflect the substantive policy interests of different administrations and are tied to political contexts as well. Implementing these reforms through the budget process is another lever by which OMB can control agency policymaking, with the RMOs playing an important role.[288]

---

280. HASKINS & MARGOLIS, *supra* note 260, at 10.

281. *See id.* at 161-62; *cf.* Bruce Baker & Kevin G. Welner, *Evidence and Rigor: Scrutinizing the Rhetorical Embrace of Evidence-Based Decision Making*, 41 EDUC. RESEARCHER 98 (2012) (criticizing the Education Department's reliance on sources that lack the rigorous empirical research or analysis needed to guide policy recommendations).

282. *See, e.g.*, RADIN, *supra* note 98, at 97, 108-11; *cf.* Gilmour & Lewis, *supra* note 274, at 747 (reporting a correlation between 2004 PART scores and proposed budgets for programs housed in traditionally Democratic agencies, but not other agencies, and suggesting that other programs are "insulated from the influence" of PART scores).

283. *See, e.g.*, *Ex-Aide Insists White House Puts Politics Ahead of Policy*, N.Y. TIMES (Dec. 2, 2002), http://www.nytimes.com/2002/12/02/us/ex-aide-insists-white-house-puts-politics-ahead-of-policy.html [http://perma.cc/JC7A-LR49] (discussing an interview with the former head of the White House Office of Faith-Based and Community Initiatives).

284. TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 31-32 (1998).

285. *Id.* at 31.

286. TOMKIN, *supra* note 18, at 51.

287. RADIN, *supra* note 273, at 125.

288. *See, e.g.*, Memorandum from Shaun Donovan, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, No. M-15-11, Fiscal Year 2017 Budget Guidance 3 (May 1, 2015), http://www.whitehouse.gov/sites/default/files/omb/memoranda

2. The Budget-Nexus Lever

Management initiatives also serve as a form of policymaking control because they are directly tied to the RMOs' work on the budget, and the budget has the levers for policymaking control described in Sections I.A and I.B above.

PMA is tied to the budget in part because OMB's budget instructions direct agencies to embed the initiatives set forth in the PMA in their budget requests. For example, OMB Circular A-11 requires that agencies present budget requests that "reflect [their] efforts and planned action to strengthen management" in keeping with a series of stated "Administration's commitment[s]."[289] More specifically, the latest version of Circular A-11 explains that "[a]gency [budget] requests are more likely to be fully funded if proposed funding increases and policy changes are grounded" in the Obama Administration's Evidence and Evaluation Agenda.[290] Directors' budget memoranda similarly provide specific instructions for agencies to take particular actions to implement management initiatives.[291]

The PMA is also tied to the budget because of requirements set forth in the PMA itself. For example, President George W. Bush's PMA required each agency to incorporate its substantive policies in its budget requests.[292] One of these initiatives, PART, was itself designed to transform agencies' budget

/2015/m-15-11.pdf [http://perma.cc/5872-YPKP] (stating that "OMB strongly encourages agencies to engage with their RMOs early in the process of developing" their evidence and evaluation proposals as part of their budget submissions); RADIN, *supra* note 274, at 48 ("The OMB budget examiner for each program played the major role in evaluating the assessments [under PART].").

289. OMB CIRCULAR NO. A-11, *supra* note 116, § 31.8, at 4; *see also id.* § 51.1, 51.7, 51.9, at 1-2, 4-6 (including similar directions).

290. *Id.* § 51.9, at 6.

291. *See, e.g.*, Memorandum from Brian C. Deese to the Heads of Dep'ts & Agencies, *supra* note 124, at 4 (telling agencies to submit budget requests that, among other things, "provide at least two and up to five examples" of the agencies' "[m]ost significant accomplishments over the past year" in complying with the evidence and evaluation initiative and their "[h]ighest priorities in these areas for the coming year," along with descriptions of the agencies' "[p]lan for embedding [the initiative] in new (or existing) programs," so that OMB can "work[] closely with you in the coming months to develop a budget request that supports the President's vision"); Memorandum from Brian C. Deese, Acting Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Exec. Dep'ts & Agencies, No. M-14-12, Management Priorities for the FY 2016 Budget 1 (July 18, 2014), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2014/m-14-12.pdf [http://perma.cc/N8FJ-F6PK] (instructing agencies to present budget requests incorporating certain aspects of the President's Management Agenda).

292. BUSH PMA, *supra* note 270, at 5, 13, 20.

requests by connecting them to program evaluation.[293] President Obama continued and perhaps even expanded this trend by setting forth his management agendas directly in his budget.[294]

In practice, the link between the budget process and management initiatives means that program examiners can play a large role in influencing agencies' policy choices through executive management initiatives.[295]

III. ASSESSING OMB'S CONTROL OF AGENCY POLICYMAKING THROUGH THE BUDGET PROCESS

This Part turns to a normative assessment of OMB's control of agency policymaking through the budget process. Section III.A makes the case that there are some salutary aspects of this power, including its firm legal basis (a strength in comparison with OIRA's regulatory review) and its promotion of coordination across the expansive administrative state. Section III.B nonetheless argues that three aspects of the RMOs' work raise accountability concerns: the RMOs' lack of transparency; the delegation of significant policy responsibility to the RMOs' civil servants and non-Senate-confirmed officials; and the potential for the RMOs' technocratic-sounding work to obscure policy and political decisions.

A. Salutary Aspects

1. Legality

Unlike the OIRA regulatory review process, the legality of which continues to be debated,[296] there is little doubt that the RMOs' work on budgets and management is legal.

---

293. *See supra* text accompanying notes 272-273.

294. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2010, at 3, 9-10 (2009) (setting forth the President's first-term management agenda); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015, at 3, 9-10 (2014) [hereinafter OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES FY 2015] (setting forth the President's second-term management agenda).

295. *See* Radin, *supra* note 252, at 4-5; Office of Mgmt. & Budget, *supra* note 74 (describing program examiners' influence on agency policy initiatives).

296. *See, e.g.*, Heinzerling, *supra* note 2, at 367 (noting that "as in 1981, there remains a significant legal issue whether OIRA may exercise decision-making authority—not just oversight—with respect to regulatory decisions lodged by statute in particular agencies" because "it is

The RMOs' work is defensible under both major understandings of executive power. Proponents of the unitary executive, focusing on the "pre-ratification historical context" as an aid to understanding the original public meaning of the Constitution, might point to Alexander Hamilton's listing with "no distinction" the "command of foreign negotiations, preparation of a budget, spending appropriations, direction of the army and navy, direction of a war, 'and other matters of a like nature'" as core to the executive power of Article II.[297]

The RMOs' work would likely pass muster with pluralists as well. Focusing on the extent to which Congress has invested the President with authority to "control the policy discretion of other administrators,"[298] a pluralist might point to the delegation to the President to "prepare budgets of the United States Government,"[299] "prescribe the contents ... in the budget,"[300] and "change agency appropriation requests."[301] The President has statutory authority to delegate these tasks to the Director of OMB, as a Senate-confirmed official, under the Presidential Subdelegation Act of 1950.[302] OMB has specific statutory authority both to work under the President's "direction" to administer the office[303] and to promulgate and oversee management policies

---

not at all obvious that a delegation to a specific agency to make a specific decision delegates authority to the President to make that decision himself; it is even less obvious that such a delegation gives decision-making authority to OIRA career staff" and others involved in OIRA's regulatory review); Strauss, *supra* note 2, at 703 ("[A]s some (but not all) Attorneys General have concluded, when Congress creates duties in others, that act creates in the President constitutional obligations not only to oversee but also to respect their independent exercise of those duties," and so just as the President "must respect a statutory framework that assigns care for the national parks to the Department of the Interior, and care for the national forests to the Department of Agriculture, on this view, he must respect a statutory framework that assigns actual decision making about particular issues affecting air quality to the EPA ....").

297. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 603, 615 (1994); *see also* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 262 (2008) (praising the establishment of the Bureau of the Budget as an "important step ... to bolster the unitary executive").

298. SHANE, *supra* note 2, at 35; *see also* Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) (explaining that the President can "bind the discretion of lower level officials ... only when the statute expressly grants power to the President in name").

299. 31 U.S.C. § 1104(a) (2012).

300. *Id.* § 1104(b).

301. *Id.* § 1108(b)(1).

302. 3 U.S.C. § 301 (2012).

303. 31 U.S.C. § 502(a) (2012).

for the executive branch.[304] Even the authority to exert control over independent agencies' budgets is calibrated by statute.[305]

One might nevertheless question whether the full extent of policymaking control that OMB can exert through the budget process is within the scope of this delegation. Critics might note that no statute determines OMB's role in budget execution. The Anti-Deficiency Act requires OMB to apportion agency spending but does not indicate that OMB may place additional conditions on apportionment.[306] Nor is the regular communication between RMO program examiners and agency officials on their policy decisions and implementation set forth anywhere.

The better argument, however, is that, the RMOs' work on budget, management, and policy stands on firm legal footing. As a textual matter, the expansive scope of authority otherwise given to the President and to OMB on both budget preparation and management contemplates the RMOs' role in budget execution. As a functional matter, it is hard to imagine a sensible system that could permit OMB's annual assessments of agency activity in order to devise a budget and strategic plan while not also ensuring appropriate implementation. As a historical matter, the Brownlow Committee on Administrative Management—whose 1937 recommendations resulted in a reorganization of the executive branch and OMB's predecessor office[307]—told Congress: "[t]he execution, as well as the preparation, of the budget should be supervised by the Bureau of the Budget and should be closely correlated with fiscal programs and plans."[308] That Congress explicitly rejected many of the Brownlow Committee's recommendations[309] but not this one further supports the idea that Congress did not mean to leave the President and OMB without this authority.

304. *Id.* § 503(b).

305. *See* sources cited *supra* notes 93, 162-163 (discussing a variety of ways statutes require independent agencies to engage with OMB in the budget process).

306. 31 U.S.C. § 1341 (2012).

307. *See* CALABRESI & YOO, *supra* note 297, at 291-95 (discussing the Brownlow Committee's recommendations).

308. PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 19 (1937).

309. *See* CALABRESI & YOO, *supra* note 297, at 295-99 (discussing Congress's debates over the Brownlow Committee's recommendations).

2. *Coordination*

OMB's control of agency policymaking through the budget process can also be praised for its coordinating effects.[310] The administrative state is a sprawling behemoth, employing millions of people in hundreds of agencies.[311] It creates and implements policies that affect every aspect of American daily life (and the world beyond the United States as well). The RMOs' work usefully coordinates this endeavor. At its best, this coordination provides value not only to the President (whose duty to take care that the laws are faithfully executed is supported by this work) and to Congress (which benefits from this work to such an extent that it continually increases OMB's statutory duties[312]), but also to "We the People," in whose name the government operates in the first place.[313]

Coordination is apparent in all aspects of the budget process. As to budget preparation, for example, the form-and-content and approval levers give OMB the opportunity to ensure that agencies are not working at odds with each other, especially when the form-and-content lever directs a group of agencies to share approaches to particular problems. The confidentiality lever supports coordination by requiring agencies to trade their own goals for the broader whole.

---

310. *See, e.g.*, BRESSMAN ET AL., *supra* note 10, at 11 (explaining that because "coordination of agency policies can allow . . . consistent and uniform regulatory regimes to develop . . . agencies are often judged in terms of their coordination (or lack thereof)"); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1103-07 (2013) (discussing the value of enhanced coordination, including through OMB, of agencies' enforcement policies); Freeman & Rossi, *supra* note 19, at 1173-91 (discussing the value of executive coordination, including through OMB, of agency activities in "shared regulatory space"); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 850-57, 881 (2015) (discussing the value of executive oversight, including through OMB, of coordinated interagency adjudication).

311. ACUS 2012 SOURCEBOOK, *supra* note 45, at 12-15.

312. *See supra* notes 36-37, 50, 264-266 and accompanying text (discussing OMB's creation as the Bureau of the Budget to streamline agencies' budget requests to Congress, the creation of statutory offices on various management-related tasks, and the expansion of the statutory offices and the increase in OMB's statutory responsibilities).

313. Advocates of OIRA's work also proffer coordination of disparate agency policies throughout the administrative state as a value of that office. *See, e.g.*, DeMuth & Ginsburg, *supra* note 2, at 1079-82 (describing the ways that OIRA coordinates agency proposals); Sunstein, *supra* note 19, at 1840, 1845-46, 1850 (same). Some scholars who otherwise dislike OIRA's control of regulatory policy nonetheless would be comfortable if its role were simply to coordinate rather than (as they argue) to direct. *See, e.g.*, SHANE, *supra* note 2, at 172-73 (explaining the potential value of OIRA to coordinate disparate regulatory regimes and lamenting the fact that "OIRA has never truly played" that role); Morrison, *supra* note 2, at 1064 (acknowledging that OIRA has a valuable role to play in coordinating related agency work).

As to budget execution, the specification lever can support coordination if the RMOs use tools like apportionment to ensure consistency across agencies. But it is really the monitoring lever, in conjunction with the pyramid structure, that has the greatest potential as a coordination tool. The RMOs' monitoring permits regular assessment of where agencies might be drifting away from their commitments, while the pyramid structure can ensure that the right people are talking to each other about related matters.

As to management, presidential management initiatives can promote coordination, whether through streamlining government-wide interactions with faith-based organizations or requiring agencies to embed evidence-based policymaking throughout their programs, while the budget-nexus lever helps ensure the implementation of shared initiatives as part of the budget process.

To be sure, the RMOs' coordination is not perfect. The broad discretion of individual program examiners leaves the potential for agencies to receive disparate rather than unifying instructions, whether as to budget preparation, budget execution, or management initiatives.[314] Because the individual RMOs are structured to reflect agency-by-agency oversight, they may suffer from the same "stovepiping" problem as the rest of the executive branch, effectively limiting "cross-agency perspectives and knowledge."[315] The RMOs may also fail to coordinate with other OMB offices, including the statutory offices that are responsible for distinct management issues throughout the executive branch. This lack of coordination could contribute to the dissemination of conflicting instructions to agencies.[316]

That said, the pyramid structure of the RMOs works to counter these concerns by letting the officials at each higher level know what is going on

---

314. *See, e.g.*, RADIN, *supra* note 274, at 138, 142 (describing varying approaches taken by different program examiners to evaluating agency programs under the PART).

315. Adams, *supra* note 72, at 62 (describing this problem as "not unique to OMB").

316. *See, e.g.*, Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 4 (discussing the potential for "unnecessary duplication between the management and budget areas that may result in our giving conflicting signals to agencies on the same issues"); *see also* RADIN, *supra* note 274, at 175 (asserting that the management staff "has operated alone, often failing to draw on the program and policy expertise within the OMB budget examiner staff"); *cf.* Seth D. Harris, *Managing for Social Change: Improving Labor Department Performance in a Partisan Era*, 117 W. VA. L. REV. 987, 1005-15, 1025-26 (2015) (critiquing GPRA and its 2010 update and describing the efforts undertaken by the author, a former Deputy Secretary and Chief Operating Officer of the Labor Department, to have his agency's management work as required by GPRA taken seriously by congressional and OMB overseers on the M-side and the RMO staff); Office of Mgmt. & Budget, Exec. Office of the President, *Performance & Personnel Management*, WHITE HOUSE, http://www.whitehouse.gov/omb/performance [http://perma.cc/8MVG-ZP8L] (describing the work of a separate M-side office rather than the RMOs in overseeing performance evaluation under GPRA).

below, allowing the officials to share information across program areas.[317] The goal of increasing OMB's coordination has long been a focus of OMB's internal reform efforts.[318] And because the RMOs' coordination serves the President's political interests – after all, Presidents can be judged by how well the administrative state functions and how successfully they implement their policies – there are strong forces supporting ongoing fortification of the RMOs' coordinating efforts.

From the perspective of administrative law values, however, coordination itself is not the final goal; coordination is useful to the extent it furthers other goals supporting the legitimacy of the administrative state, such as efficiency, effectiveness, and accountability.[319] Much of the RMOs' coordinating work supports the first two of these values and to some extent the last one as well.

For example, some of the RMOs' coordinating work promotes *efficiency*,[320] sometimes within OMB itself. The structure of the RMOs' budget preparation review – with clear deadlines and hard decisions made behind closed doors – "move[s] decisions along quickly" and permits "budget cuts that enable the government to hit the bottom line," promoting both "micro- and macro-efficiency."[321] The speed with which the RMOs can work to respond to policymakers' questions, and the lack of ceremony involved in getting all levels of the hierarchy together to make a decision, also further the efficiency of the operation.[322]

Other aspects of the RMOs' work promote efficiency in agency action. The approval lever and form-and-content lever both signal to agencies what work the White House and OMB will support as Congress begins the appropriations process, reducing the need for agencies to engage in unproductive wish lists or

317. *See, e.g.*, TOMKIN, *supra* note 18, at 188 (noting that program examiners' policy choices often have the approval of officials higher in the pyramid). To be sure, the pyramid structure may provide an effective counterweight only as to high-salience items that RMO staff members are likely to elevate.

318. *See, e.g.*, Memorandum from Leon E. Panetta & Alice M. Rivlin to All OMB Staff, *supra* note 19, at 4-6 (describing creation of RMOs as, in part, one designed to improve coordination within OMB and throughout the administrative state).

319. *See* Andrias, *supra* note 310, at 1083-94 (discussing the way coordination of agency enforcement policy can promote these values); Freeman & Rossi, *supra* note 19, at 1181-91 (discussing how coordination in "shared regulatory space" can promote these values).

320. Efficiency in this context encompasses issues such as "agency decision costs and transaction costs," Freeman & Rossi, *supra* note 19, at 1181, rather than social welfare.

321. Ross, *supra* note 141, at 131.

322. *See* Adams, *supra* note 72, at 58.

to try to read the "political tea leaves."[323] The pyramid structure promotes efficiency by letting only the most contentious issues rise to the top. The specification and monitoring levers encourage matters to be resolved before they become problems, so an upfront investment of time can save time on the back end.[324] Management initiatives focus on efficient conduct in agency action overall.

The RMOs' coordinating work may also support the *effectiveness* of agency action. The whole point of this work is to ensure that agencies have the resources they need to do their jobs well and that they are managed and monitored appropriately. The high caliber of the OMB staff—more than half have master's degrees, more than ten percent have doctorates, and they are often seen as among "the best and brightest" in government[325]—helps further this goal. The depth of program expertise, especially in the long-time RMO employees that tend to hold the branch chief and DAD positions, provides institutional memory and subject-matter expertise,[326] both of which aid sensible decision making.

---

323. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 59 (2009) (describing the value of more direct presidential intervention instead of leaving the agency "to read the political 'tea leaves' on its own").

324. *Cf.* Freeman & Rossi, *supra* note 19, at 1182-83 (describing a similar cumulative time savings when agencies sharing regulatory space consult with each other initially).

325. Ross, *supra* note 141, at 134; *see also* TOMKIN, *supra* note 18, at 23-24 ("OMB is currently able to attract the best and the brightest graduates from prestigious graduate programs."); Adams, *supra* note 72, at 61 ("OMB staff is highly trained . . . [and] highly experienced.").

326. *See* TOMKIN, *supra* note 18, at 13 (noting that DADs commonly stay in their roles across several administrations while PADs turn over regularly); Adams, *supra* note 72, at 61 (describing value of long-time civil servants in OMB); Martha Joynt Kumar et al., *Meeting the Freight Train Head On: Planning for the Transition to Power*, *in* THE WHITE HOUSE WORLD, *supra* note 148, at 21 (describing the value of OMB career staff and noting that "[w]hen in one administration a senior political staff member suggested that the deputy associate directors be fired, an OMB veteran pointed out that this 'would be a catastrophically dumb idea both from the point of view of ever having OMB as an institution work very well but also from the point of view of all the institutional knowledge and skill you lose'"). In contrast to the senior civil servant branch chiefs and DADs, however, and more like the shorter-term political PADs, program examiners tend to stay less long in the organization, perhaps burned out by the pace and intensity of the work. *See* TOMKIN, *supra* note 18, at 13, 24 (reporting that "PADs remain in OMB an average of eighteen months" while program examiners typically leave after three years); Adams, *supra* note 72, at 58 (reporting that OMB staff work White House hours and days, with the standard joke being "Thank God, it's Friday; only two more working days until Monday!"); Ross, *supra* note 141, at 136 (noting that in the 1970s, examiners used to stay at OMB for about ten years, but currently most program examiners leave after three years). The relative inexperience of program examiners and the short-term tenure of most PADs may work against the effectiveness provided by the long-term civil servant supervisors. *See, e.g.*, Forshey, *supra* note 139, at 428-29, 432 (acknowledging, from the perspective of the program

Still other aspects of the RMOs' coordinating work support some form of *accountability*.[327] The President's budget is a public statement that represents a coordinated synthesis of past activities and forward-looking goals, allowing the President to take ownership of the activities of the administrative state. The accompanying PMA furthers this goal. Agencies' budget justification materials submitted to Congress and posted on their websites publicly state what the agencies' goals are and justifies both why they are the right goals and the amounts requested to support those goals.[328] The RMOs are critical in both putting these documents together and making the programs reflected in the documents work, and to that extent can be said to support accountability.

However, the RMOs' coordinating work supports accountability only at a high level of generality related to the published products that result. As the rest of this Part argues, the RMOs' work raises significant accountability concerns in terms of its process. Overall, these concerns undercut the general accountability that might be associated with the budget, the PMA, and agencies' congressional justifications.

B. Troublesome Aspects

There are three troublesome aspects of the RMOs' work, all related to the issue of accountability, by which I mean "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation."[329] First, there is a lack of transparency in the way the RMOs' work is conducted and the substance of what they discuss. Second, the RMOs' work can elevate

examiner author, that as "an examiner I am often younger, less credentialed, and less experienced than those with whom I am working" in the two public health agencies she oversees, and that before she took the position, her only previous "background in health policy consisted of two graduate-level courses" as part of her master's program in public policy).

327. *See* Andrias, *supra* note 310, at 1090-94; *cf.* Freeman & Rossi, *supra* note 19, at 1182, 1187-91 (explaining how agency coordination instruments, including presidential management of coordination, can improve accountability of agency decision making).

328. SCHICK, *supra* note 7, at 234-35, 270-71 (describing agency budget justification materials). For an example of an agency justification, see ADMIN. FOR CHILDREN & FAMILIES, *supra* note 136.

329. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005); *see also* Mark Bovens et al., *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 3-6 (Mark Bovens et al. eds., 2014) (summarizing conceptions of accountability across different disciplines and suggesting that there is a "minimal conceptual consensus" that accountability "is about answerability to others with a legitimate claim to demand an account"; "is furthermore a retrospective – ex post – activity"; and is "a consequential activity").

OMB's civil servants and lower-level political appointees over Senate-confirmed agency officials, and the ultimate lines of responsibility are ill-defined. Third, the RMOs' seemingly technocratic work on the budget can obscure value-driven or partisan decision making.

All three of these issues make it difficult for Congress and the American public to hold agencies, OMB, and the White House more generally accountable. It is hard "to demand an explanation or justification"[330] when it is not clear what to ask about, whom to ask, or when or why an explanation or justification would be needed, or when it is impossible to ask the right person or to get a straight answer. It is similarly hard "to reward or punish . . . on the basis of . . . performance or . . . explanation"[331] when it is not clear whose performance is fundamentally at issue. The rest of this Section elaborates on the accountability problems associated with each of these troublesome aspects of the RMOs' work.

1. *The Lack of Transparency*

At first blush, it may seem strange to suggest that the RMOs' work suffers from a lack of transparency. After all, OMB posts much material online, from directors' memoranda to OMB circulars; agencies post documents explaining and justifying their congressional budget requests; and the budget itself is a voluminous public document that details the policy choices embedded therein.

But as suggested by the earlier discussion of the confidentiality lever,[332] the RMOs' work does exhibit a lack of transparency.[333] While the details of the budget process are known in broad brush strokes, there are nevertheless many parts that remain hidden. We do not know, for example, when, which kind,

---

330. Rubin, *supra* note 329, at 2119.

331. *Id.*

332. *See supra* notes 174-175 and accompanying text.

333. *Cf.* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 188 (2007) ("Some of the least transparent stages of the budget process are those that occur entirely within the executive branch. Most opaque are policy discussions that take place wholly within the executive branch among administrators . . . ."); Ross, *supra* note 141, at 130 ("[T]he public is not privy to the questions or answers exchanged during the OMB hearing period, and no OMB decision sees the light of day before it is published in the president's budget. In fact, even after Congress passes the final budget, all details about the agency's budget request, OMB's recommendation, and the dialogue that took place between OMB and the agencies is embargoed."). As the literature critiquing OIRA frequently laments, OIRA's work is also not transparent. *See, e.g.*, Bressman & Vandenbergh, *supra* note 3, at 78-79, 92-93; Heinzerling, *supra* note 2, at 326, 361-64; Steinzor, *supra* note 2, at 251, 264, 272-73. As I will argue, however, OIRA's work is in some ways more transparent than the work of the RMOs. *See infra* notes 366-367, 439-465 and accompanying text.

and how many meetings between the RMOs and the agencies occur over the course of the budget preparation season and throughout budget execution; what interest groups or other administration officials meet with the RMOs, what the meetings are about, and who is present during such meetings; what kinds of agency policy work interest the RMOs, and what kinds do not; how often apportionment footnotes are used and the kinds of demands that are made therein; and how all of the above might vary by administration, by OMB Director, by PAD, by program examiner, or by agency.

Much of the substance of these interactions remains hidden, too. For example, only the agency and its RMO see the contents of the agency's original budget request to OMB, which includes the amount requested, the agency's proposed allocation among different programs, its assessment of its own capacities, and its own priorities. PADs offer no public statement of their different priorities when they step into their roles. Additionally, there is no public documentation or acknowledgment when agency policies change in response to the RMOs' encouragement or requirement.

OMB offers two rationales for the confidentiality it requires of agencies. First, it contends that "[p]olicy consistency" is necessary within the executive branch, particularly when speaking or giving documents to Congress and the media.[334] Second, it suggests that the "institutional interests . . . implicated by [the] disclosure" of confidential budget documents militate in favor of confidentiality.[335] Such institutional interests include protecting "the deliberative process of the government" by permitting government officials "to express their opinions freely . . . without fear of publicity [that might] . . . inhibit frank discussion of policy matters and likely impair the quality of decisions."[336] To that end, the Freedom of Information Act (FOIA) exempts from disclosure documents that are deliberative and predecisional, like agency-OMB budget discussions.[337]

However, while each of these rationales has some validity, neither can actually justify the extent of opacity in the budget process, as the next two Subsections argue. In addition, neither rationale appropriately distinguishes the substance of predecisional deliberation from information about the

334. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.3, at 2.

335. *Id.* § 22.5, at 3.

336. Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (quoting Ryan v. Dep't of Justice, 617 F.2d 781, 789-90 (D.C. Cir. 1980)); *see also* 5 U.S.C. § 552(b)(5) (2012) (describing the "deliberative process privilege" FOIA exemption).

337. *Bureau of Nat'l Affairs*, 742 F.2d 1484 at 1498 (holding that the Environmental Protection Agency's budgetary recommendations to OMB could be withheld from public disclosure, under FOIA's deliberative process exemption).

procedural aspects of deliberation and the final post-deliberation decisions, as the third Subsection below explains.

a. Protecting Policy Consistency

First, "policy consistency" does not require a pretense that an agency and OMB never diverged over the appropriate agency budget and policy request. Currently, OMB directs agency witnesses testifying before Congress, if asked about their interest in appropriations beyond the scope of the President's request, to explain that such interest is "not appropriate," since "witnesses are responsible for one or a few programs, whereas the President is responsible for all the needs of the Federal Government."[338] This explanation could also disclose the backstory of the agency's budget request, without sacrificing policy consistency. Witnesses could disclose prior views while avowing conversion to the President's proposals. Such disclosure need not undercut OMB's goal of policy consistency because agency officials could explain why they came to believe the final decision was the right one.

In some cases, though, such masking of disagreements about the implications of different budgetary choices might place agency officials in the position of speaking untruths to Congress. Officials do not always come to believe that the final decision was the right one.[339] On the one hand, OMB's reminder to agency witnesses testifying before Congress that the President has responsibility for the whole government while agency witnesses have responsibility for a limited number of programs is surely right and surely justifies the President's ultimate decision-making authority. But agency officials could say that they understand the President's request for their agency in light of the entire federal government's needs—acknowledging that the President and Congress alike face hard choices in the budgetary process—without having to claim that the President's request for their agency will

338. OMB CIRCULAR NO. A-11, *supra* note 116, § 22.2, at 2.

339. *See, e.g.*, Walsh & Culliton, *supra* note 119, at 294 ("It is not uncommon for someone to find himself publicly saying the opposite of what he thinks because he lost a battle with OMB."); *supra* note 184 and accompanying text (describing budget disagreements between agencies and OMB); *see also* David C. Vladeck, *Unreasonable Delay, Unreasonable Intervention: The Battle To Force Regulation of Ethylene Oxide*, *in* ADMINISTRATIVE LAW STORIES 191, 217 & nn.69-70 (Peter L. Strauss ed., 2006) (describing OMB's power over agencies' budgets, regulations, and testimony before Congress generally, and stating that "OMB holds too much power over agencies for an agency head to disregard OMB's objections. . . . As then-OMB Director James Miller, put it [in 1981], '[i]f you're the toughest kid on the block, most kids won't pick a fight with you'" (second alteration in original) (citing *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, REGULATION, Mar.-Apr. 1981, at 14, 19)).

accomplish what they believe that it will not.[340] OMB's current confidentiality requirements discourage this kind of honesty.

To be sure, such honesty might present several dangers. First, agency officials might simply push for more funding, rather than carefully discussing the nuances of policy tradeoffs. Second, despite agency officials' best efforts, Congress and the media might focus on the fact of intra-executive squabbles instead of the substance of the discussion. Rather than a thoughtful discussion of policy tradeoffs, we might be left with politicized soundbites for ideological spin. It is hard enough for the President to move anything through Congress as it is, without permitting the exploitation of a history of internal executive disagreement.

This concern is valid enough. But, at the same time, Congress has mandated by statute that agencies do a particular job. In all likelihood, it wants that job done. So, presumably, do the people for whose benefit the job is undertaken. The confidentiality requirements rooted in the goal of policy consistency make it hard for agency officials to say anything meaningful about the extent to which the agency is up for the task, the tradeoff among different priorities, or the real resource constraints that agencies face.[341] These requirements therefore make it hard for Congress, much less the public, to know and understand what is actually happening.

Permitting such a disclosure, either where agency officials are asked directly or where they think in particular instances that disclosure is valuable, would accordingly help promote accountability—one of the primary values a well-designed transparency regime can serve.[342] It could help give Congress information that it needs in order to set overall funding levels for individual

340. *Cf.* Shapiro & Steinzor, *supra* note 104, at 1760 (describing institutional pressure to "reassure the agency's overseers that [the agency is] doing fine," in lieu of "a frank discussion" about the practical implications of insufficient budgets). Shapiro and Steinzor critique the budget information that agencies present to Congress pursuant to the Government Performance and Results Act, *see supra* note 264, but this institutional pressure also functions in the context of the confidentiality requirements more generally, *see* Shapiro & Steinzor, *supra* note 104, at 1778-79.

341. *Cf.* Shapiro & Steinzor, *supra* note 104, at 1763-69 (discussing the way the EPA's and FDA's respective strategic plans and performance reports failed to disclose "funding challenges" or to make plain the implications of allocating agency budgets between different kinds of oversight activities, in ways that undercut public health and safety).

342. SHANE, *supra* note 2, at 160 ("[T]he openness of agency decision making to public scrutiny—the relative transparency in terms of process—is itself a guarantee of public accountability."); VERMEULE, *supra* note 333, at 6 ("Transparency is necessary, at least to some degree, to any conception of accountability . . . ." (emphasis omitted)); Mendelson, *supra* note 3, at 1161 ("[S]ubmerging presidential preferences undermines electoral accountability for agency decisions . . . .").

agencies and allocate across competing priorities within each agency, thereby improving Congress's ability to hold agencies accountable. It could also help give the public information that would make concrete the policy choices that are reflected in the budget, as such choices are often best understood within the context of the alternatives that were rejected.[343]

It is true that disclosure of the final decisions permits some level of post-hoc accountability.[344] But the budget is so many thousands of pages and requires so much analysis and translation that the cost of finding, much less understanding, alternatives that were rejected along the way is extremely high. Individual agency and sub-agency budget justifications to Congress can themselves reach hundreds or thousands of pages. A clear articulation of points of difference, and why they were resolved as they were, can help citizens and civil society organizations better identify specific decisions for which to hold officials accountable.[345] This is especially so because voters often need concrete disputes to crystallize their own views about policy choices.[346]

Nor is it enough to say that interest groups will provide sufficient information about the implications of different budgetary decisions to Congress and the public throughout the appropriations process. Interest groups will not have all of the inside information that agencies do; they are unlikely to capture the full scope of issues that may be important; they may be biased; and agencies may be forced to deny their accuracy.[347] Similarly, back channels between agency officials and Hill staffers may get some information across, but inconsistently, given the formal limits the confidentiality

343. *See* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 104 (2012) (noting the importance of context for disclosure of funding information, including the salience of such factors as "why a certain decision to allocate funds was made" and possible "alternatives" to the decision). *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995) (describing an alternative-driven policymaking model).

344. *Cf.* Katzen, *supra* note 22, at 1503 ("[I]t is the *product* of the decision-making, not the *process* of the decision-making, that is the key to accountability . . . ."). *But see* Heclo, *supra* note 21, at 131 ("[W]e must judge public organizations not only by what they do, but by how they do it . . . .").

345. RUBIN, *supra* note 5, at 282 ("Analyzing what is not in the budget is often as revealing as examining what is included."); SHANE, *supra* note 2, at 166 ("[A]ccountability requires . . . widespread access to information about the nature of the decisions at issue.").

346. Mendelson, *supra* note 3, at 1163 ("It may take an event, a government action, or a public discussion to engage an individual voter with specifics so that she can form preferences.").

347. *Cf.* THOMAS T. HOLYOKE, INTEREST GROUPS AND LOBBYING 170-73 (2014) (describing ways in which interest groups' knowledge and goals may differ from those of agencies).

requirements place on these back channels.[348] Moreover, back channels do little for the public's ability to hold anyone in either branch accountable.

A second reason that greater disclosure of the intra-executive budget process may promote accountability, regardless of OMB's interest in policy consistency, is that such disclosure could deter self-dealing or one-sided dealing, which is no less a danger in the budget context than in the regulatory context.[349] For example, recent political science scholarship has shown a correlation between the President's political interests and the distribution of federal funds. One study found that swing states receive more grants and a greater dollar amount in grants than non-swing states;[350] this result was more pronounced in the two years leading up to a presidential election than in the two years after one.[351] As the author of this study concludes, "[P]residents engage in pork barrel politics."[352] Another group of political scientists found that districts receive more federal funding when they are represented in Congress by members of the President's own party.[353] These authors explain, "For an artful president intent upon redirecting federal outlays to a preferred constituency, 'the opportunity for mischief is substantial.'"[354]

These studies do not directly tie OMB to changing expenditure levels, but researchers have found evidence suggestive of such a link. For example, in a related study, agency officials whose job involved decisions about procurement awards, licenses or loans, or grants—identified as "distributors"[355]—reported more levels of "policy influence" from OMB than did nondistributors.[356] A

348. *See, e.g.*, SCHICK, *supra* note 7, at 236 (discussing "[i]nformal contacts with appropriations committee members and [agency] staff"); *supra* text accompanying notes 192, 194 (discussing OMB's ability to monitor and punish agencies that attempt to go around confidentiality requirements).

349. VERMEULE, *supra* note 333, at 181 (noting that "transparency deters officials from engaging in self-interested bargaining").

350. HUDAK, *supra* note 7, at 46.

351. *Id.* at 50.

352. *Id.* at 3.

353. Berry et al., *supra* note 7, at 783.

354. *Id.* at 786 (quoting FISHER, *supra* note 7, at 88).

355. HUDAK, *supra* note 7, at 138-39.

356. *Id.* at 145 & tbl.6-2. Distributors report "significantly more policy influence from each category [the White House, OMB, political appointees, Congressional committees, Republicans in Congress, and Democrats in Congress] than do nondistributors." *Id.* at 145. The lone exception was senior civil servants, where the difference was not statistically significant. *Id.* Interestingly, of these categories, "policy influence" from OMB ranked higher (on a scale of 1 to 5, 4.15 for distributors and 3.94 for nondistributors) than did policy influence from the White House (3.87 for distributors and 3.74 for nondistributors). *Id.* at tbl.6-2. The study did not attempt to determine where the policy influence originated

related set of interviews provided some anecdotal evidence that "after the peer review process produces a ranking of grant applications by quality scores, OMB can change the order in which proposals are funded in many programs, thereby influencing the timing, location, and likelihood of funding."[357] In these ways, the conductor of these interviews suggests, OMB "facilitates presidential control of federal agencies, thereby enhancing the ability of the White House to affect micro-level public policy decision making."[358]

While these studies do not disaggregate which office in OMB is at issue, the RMOs are a likely candidate, given the direct ongoing interactions about the budget and related policy matters between the RMOs and the agencies they oversee.[359] Moreover, the extent of interest group lobbying of, or even informational meetings with, the RMOs is unknown.[360] Recent research on OIRA shows that lobbying that office can affect regulatory policy.[361] The lack of transparency around who is meeting with RMO officials, when, and about what limits our understanding of the factors and actors that influence budget and related policy decisions.[362]

---

from—for example, whether OMB was actually a conduit for influence from the White House—but its results underscore the importance of understanding the way OMB's budget levers operate. "[A]s the budgetary arm of the White House," the author of this study explains, "OMB affects distributive outcomes in direct and formal, yet politically strategic ways." *Id.* at 171.

357. *Id.* at 173; *see also id.* at 154-57 (describing the system of "elite interviewing" employed and its benefits and limitations).

358. *Id.* at 174.

359. Of course, even if the RMOs are involved in making these changes, that does not mean that the RMOs' involvement comes at their own initiative given the way the RMOs can serve as a conduit for instructions from other, more obviously political, White House offices. *See supra* notes 23-24 and accompanying text.

360. Clearly, these meetings do happen at least sometimes. *See, e.g.*, HASKINS & MARGOLIS, *supra* note 260, at 32-33 (describing an RMO's meeting with an organization seeking support in the budget).

361. *See* Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 507 (2015) (finding that lobbying during OIRA review of government regulations is associated with policy change).

362. There have been some efforts to unpack these factors in the context of OIRA's work. *See, e.g.*, SHANE, *supra* note 2, at 162, 172 (discussing organizational factors that make industry groups more powerful in general in the administrative process, both inside OIRA and inside agencies); Haeder & Yackee, *supra* note 361, at 518 (finding that unopposed lobbying by industry groups in OIRA is likely to end in rule change, but that the same is not true for public interest groups); Shapiro & Steinzor, *supra* note 104, at 1751-56 (summarizing literature showing that "business interests have a significant resource advantage when it comes to lobbying agencies and filing rulemaking comments"). Note that any skew in decision making need not be intentional; even good-government civil servants can be

b. Protecting the Deliberative Process

OMB's second rationale for requiring secrecy in the intra-executive budget context – protecting the integrity of the government's decision-making process – similarly does not justify the full extent of secrecy employed though it, too, is rooted in valid and important concerns.

Preliminarily, the mere existence of a FOIA exemption for documents that reveal the government's deliberative process – Exemption 5[363] – is no reason to require withholding of those documents. As Attorney General Holder explained in a memorandum sent to agency heads early in the Obama Administration, "an agency should not withhold information simply because it may do so legally."[364] OMB has thus disclosed material protected by Exemption 5 because "disclosure would not create a harm protected by that exemption."[365] Similarly, the executive order that governs regulatory review requires agencies to disclose both their original regulatory proposals and the substantive changes OIRA requested and to explain to the public "in a complete, clear, and simple manner" the differences between the two[366] even

affected by "epistemic capture" or take actions rooted in unintentional bias. *See, e.g.*, Sunstein, *supra* note 19, at 1860-63 (considering, although ultimately downplaying, the possibility that OIRA's meetings with a skewed set of outsiders result in "epistemic capture," in which "a view might develop, at OIRA or within the EOP, because of the distinctive set of people who have provided relevant information"); *see also infra* notes 428-429 and accompanying text (discussing unintentional bias in decision making).

363. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2012).

364. Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, to Heads of Exec. Dep'ts & Agencies, The Freedom of Information Act (FOIA) 1 (Mar. 19, 2009), http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf [http://perma.cc/GUP4-D9KJ].

365. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CHIEF FREEDOM OF INFORMATION ACT (FOIA) OFFICER'S REPORT 1 (Mar. 2014), http://www.whitehouse.gov/sites/default/files/omb/assets/foia/Chief%20FOIA%20Report%202014.pdf [http://perma.cc/L4R2-V84U]. *But see* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANNUAL FREEDOM OF INFORMATION ACT (FOIA) REPORT FOR FY 2014, at 10 (2014), http://www.whitehouse.gov/sites/default/files/omb/foia/annual_reports/foia_annual_report_fy2014.pdf [http://perma.cc/W8QG-6CLA] (showing that OMB applied Exemption 5 thirty-one times in refusals to disclose during the 2013-14 fiscal year); Shkabatur, *supra* note 343, at 90 (critiquing the Obama Administration for failing to live up to the openness policy in practice).

366. Exec. Order No. 12,866, *supra* note 92, § 6(a)(3); *see also* Exec. Order No. 13,563 § 1(b), 3 C.F.R. 215 (2012) (reaffirming principles of Exec. Order No. 12,866).

Whether agencies are actually permitted to comply with this requirement and whether the requirement is relevant at all are separate matters. *See, e.g.*, Heinzerling, *supra* note 2, at

though OMB during the Reagan Administration had successfully used Exemption 5 to block disclosure of much more information about the agency-OIRA regulatory process.[367]

The real question, therefore, is whether it would help or hinder deliberation to disclose predecisional budget documents that reveal the development of OMB's and agencies' thinking,[368] in keeping with the purpose of Exemption 5.[369] The deliberative costs associated with too much transparency often include entrenching positions rather than letting parties develop more nuanced ideas through conversation;[370] silencing good ideas for fear of being publicly rejected or pilloried;[371] and driving deliberation underground, further out of sight, through mechanisms developed to avoid whatever transparency regime is imposed on unwilling participants.[372] These interests may be heightened in politically polarized times, when interest groups monitor their own party for orthodoxy and the other party for everything, and when Congress and the executive are at war with each other.

These are serious concerns that we should not dismiss lightly. However, there are costs to the current system of opacity with respect to accountability. As Lisa Heinzerling has noted in the context of OIRA's lack of transparency, opacity in government limits "people from understanding the way their government operates, how they can intervene and at what points, what the government is up to, who is making important decisions, [and] why the government has made those decisions."[373]

---

361 ("OIRA follows, and allows the agencies to follow, almost none of the disclosure requirements of EO 12,866."); *infra* notes 443-465 and accompanying text (discussing the relevance of the transparency requirement).

367. *See, e.g.*, Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 775-76 (D.C. Cir. 1988) (preserving the Department of Health and Human Services's ability to withhold predecisional recommendations under Exemption 5).

368. *See, e.g.*, Mendelson, *supra* note 3, at 1166-68 (discussing potential trade-offs between transparency and effective decision making); Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1352 ("Transparency may well prevent bad officials from engaging in corrupt or otherwise bad acts, but . . . transparency can also make it more difficult for good officials to engage in good acts.").

369. *See, e.g.*, *Wolfe*, 839 F.2d at 773 ("Congress adopted Exemption 5 because it recognized that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." (citations omitted)).

370. *See, e.g.*, VERMEULE, *supra* note 333, at 11-12, 181-82; Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 908 (2006).

371. *See, e.g.*, VERMEULE, *supra* note 333, at 11-12, 181-82.

372. *See, e.g.*, *id.* at 212; Fenster, *supra* note 370, at 922-24; Mendelson, *supra* note 3, at 1168.

373. Heinzerling, *supra* note 2, at 364-65 (describing reasons why "opacity in government in general is a problem").

Moreover, the problems associated with too much transparency may already be present under the current non-transparent system. We just do not know about it. For example, agency officials and the RMOs may already find themselves in entrenched positions simply by virtue of the structure of their relationship.[374] Agency officials may already silence good, creative ideas if they constrict their proposals based on what they think their program examiner wants to see.[375] And the pyramid structure of OMB's operation may drive deliberation underground. That is, program examiners may reach agreements with agency officials on certain matters on the condition that agency officials take certain actions; subsequently, those agreed-upon actions may not become an issue as the agency's budget request moves up the chain of command within OMB.

These costs suggest that some recalibration of the current regime is worthwhile. In another context, the D.C. Circuit has rejected the contention that "the congressional goal of centralized budget formulation cannot be achieved without secrecy," reasoning that the requirement that "the President submit a single, unified executive branch budget proposal to Congress for consideration" does not "require that the President's proposals be the only budgetary information available to the public."[376] While formally discussing the public-meeting requirement for multi-member agencies, the D.C. Circuit used language about good public policy that could apply more generally: "disclosure of budget deliberations would . . . inform the public 'what facts and policy considerations the agency found important in reaching its decision, and what alternatives it considered and rejected,' and thereby . . . permit 'wider and more informed public debate of the agency's policies.'"[377]

Indeed, in this same litigation, OMB attempted to justify secret deliberations about the budget without distinguishing between multi-member

374. *See, e.g.*, SCHICK, *supra* note 7, at 99 (calling program examiners and agency officials "budgetary adversaries": "Agencies want more than OMB gives them, and their priorities and program assessments often differ from OMB's"). *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 3 (Bruce Patton ed., 3d ed. 2011) (explaining that the default position in most negotiations is positional bargaining, in which positions become easily entrenched).

375. *See, e.g.*, HUDAK, *supra* note 7, at 171 (describing the preemptive incorporation of OMB's views during the budget execution process); *cf.* Heinzerling, *supra* note 2, at 352 (describing how the anticipation of OIRA review can suppress agencies' ideas).

376. Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 931-32 (D.C. Cir. 1982). This case considered and rejected the possibility that the Government in the Sunshine Act, 5 U.S.C. § 552b (1976), which requires that meetings of multi-member agencies be open to the public, contained a statutory exception for agency budget deliberations. 674 F.2d at 932-35.

377. *Common Cause*, 674 F.2d at 934 (quoting S. REP. NO. 94-354, at 5-6 (1975)).

and executive agencies. Its arguments relied on the general "importance of the budget process" and the fact that internal "budget discussions lead to presidential recommendations reflecting the President's 'best judgment of how the nation's fiscal resources should be allocated to meet its future economic and social needs'" with respect to "'vital policies and billions of dollars . . . at issue every year.'"[378] The D.C. Circuit roundly rejected this argument and demanded disclosure: "The public can reasonably be expected to have an interest in matters of such importance."[379]

The question then is how to design a more nuanced approach to transparency that would accommodate the public interest while still taking seriously the need to protect the deliberative process.

c. *Disclosing Procedural Aspects of the Budget Process and Post-Deliberative Decisions*

At the very least, it should be clear that OMB's reliance on the interests implicated by the deliberative process applies only to the content of documents.[380] It does not apply to the confidentiality that exists around the RMOs' interactions with agencies and with outside interest groups or to other procedural aspects of the intra-executive budget process that remain hidden. OMB's interest in protecting policy consistency by forbidding the disclosure of predecisional budget material also does not extend to these procedural aspects. More disclosure of this procedural information could be a valuable source of accountability because it would permit better monitoring of who is participating in the process and when.

In addition, OMB's confidentiality rationales do not extend to the various post-deliberative decisions that are nonetheless not routinely disclosed, such as its budget execution decisions. For example, while apportionment requests and decisions are formal documents made on a standardized government form and transmitted via a standardized web-based portal,[381] there is no public collection

---

378. *Id.* at 937 (quoting Joint Appendix at 118, *Common Cause*, 674 F.2d 921 (Nos. 81-1975 & 81-2147) (Affidavit of Carey P. Modlin, Office of Mgmt. & Budget, Exec. Office of the President)).

379. *Id.* at 937-38.

380. *See* 5 U.S.C. § 552(b)(5) (2012) (exempting "inter-agency or intra-agency memorandums or letters," not facts or processes, from disclosure).

381. *See* OMB CIRCULAR NO. A-11, *supra* note 116, § 185.37, at 64-66 (including sample SF 132 Apportionment and Reapportionment Schedules); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB INTERNET APPORTIONMENT SYSTEM: USER GUIDE 1 (June 2007), http://max.omb.gov/maxportal/webData/apportionment/webusertraining [http://perma.cc/UL33-GWS4].

of apportionment decisions, much less apportionment footnotes, which makes it difficult for the public to track OMB's directions to agencies. Similarly, there is no centralized compendium of OMB's approved requests to Congress to transfer or reprogram sums, making it difficult for the public to track how agencies' spending diverges from Congress's original appropriations decisions or the extent of Congress's approval and disapproval of these requests.[382] Here, too, more disclosure would improve accountability.[383]

2. *The Role of Civil Servants and Political Officials*

A second concern about OMB's control of agency policymaking through the budget process involves the players engaged in effectuating that control. Contrary to the usual understanding of power in the administrative state, where higher-level political officials have authority over both lower-level political officials and the civil service,[384] civil servants and lower-level political appointees in OMB can supersede the policy goals of Senate-confirmed agency officials. This reversal of expectations impedes accountability and is exacerbated by the lack of transparency discussed above.[385]

One conventional concern about White House control over agency policymaking is that high-level political advisors close to the President may direct agency officials, whether political appointees or civil servants, to take actions that are illegitimate. For example, these advisors may direct officials to

---

382. As Allen Schick explains, it can be difficult for the public to track reprogrammings "because they do not change the volume of resources in the affected account." SCHICK, *supra* note 7, at 281. In principle, transfers provide an opportunity to monitor "in the program and financing schedules published in the president's budget," but understanding such transfers requires some parsing through which accounts have lost resources and which have gained. *Id.* (citation omitted); *see* OMB CIRCULAR NO. A-11, *supra* note 116, §§ 82.6, 82.14-15, at 5-9, 18-19 (telling agencies how to present transfers for publication in the budget).

383. *Cf.* Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 767-72 (2014) (critiquing federal regulations that incorporate private standards by reference without making the standards "readily, publicly accessible" to the public as hindering accountability).

384. *See, e.g.*, FRANCIS E. ROURKE, BUREAUCRACY, POLITICS, AND PUBLIC POLICY 127 (3d ed. 1984) (discussing "the interaction between political executives at the top of the administrative pyramid and career officials subordinate to them").

385. This concern, like the previous one, echoes some concerns voiced about OIRA's staff. *See, e.g.*, Bressman & Vandenbergh, *supra* note 3, at 73-74, 98-99; Heinzerling, *supra* note 2, at 362-63, 367-68; *see also* Morrison, *supra* note 2, at 1064, 1066-67 (discussing similar concerns with OMB staff generally). These concerns in the RMO context are heightened because of the RMOs' even broader portfolio, see *supra* notes 74-78 and accompanying text, and because unlike the OIRA Administrator, the PADs are not Senate-confirmed, see *infra* notes 399-402, 485-502.

take actions going beyond the agency's legal authority, or beyond the facts, in the service of a pre-ordained position driven by private political interests.[386] More generally, these advisors may direct officials to act on the basis of "pure partisanship or raw politics" instead of some notion of the public interest.[387] Another view is that the White House achieves some of these same goals by nominating ideologically partisan political appointees to head the agencies—appointees who will loyally align their policies with the President's goals without being swayed by "civil-service-led resistance to their preferred policies."[388]

Relatedly, the value of civil servants in agencies is thought to be their ability to "resist and redirect agency leaders intent on shortchanging procedures, ignoring or downplaying congressional directives or scientific findings, or championing unvarnished partisan causes."[389] "[U]nlike the political leadership beholden to a particular presidential agenda," this view holds, "the civil servants are . . . generally understood to be animated by professional norms and legal commitments to fair administration and enforcement of the laws."[390]

The structure and work of the RMOs complicate this view. On the one hand, it is civil servants, not political appointees, who take a front-line position in directing agency action.[391] To be sure, these civil servants are also bound by professional norms,[392] with loyalty to the institution of the presidency rather

386. Mendelson, *supra* note 3, at 1141-46 (calling these methods of presidential control illegitimate while leaving room for "appropriate," "value-laden" methods of control).

387. Watts, *supra* note 323, at 56 (calling these methods illegitimate while leaving room for political influence where "policy considerations or value judgments" are implemented).

388. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1127, 1121-33 (2008) (describing the politicization of agency officials through an increase in the number of political appointees overall and through more presidential control over the nomination process); *see also* Moe, *supra* note 21, at 244-45 (discussing the increased centralization and politicization of the institutional presidency).

389. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544 (2015).

390. *Id.* at 546.

391. *See, e.g.*, Adams, *supra* note 72, at 61 ("The best OMB staffers learn how to . . . restrain agency independence and resistance and to encourage agency responsiveness to the White House agenda."); Walsh & Culliton, *supra* note 119, at 288 ("Department and agency heads resent the fact that they frequently are relegated to dealing with young budget examiners who rank relatively low in the federal hierarchy, rather than with OMB directors. They resent the fact that these often inexperienced examiners make the decisions that count.").

392. *See* Adams, *supra* note 72, at 61 (describing "the professional ethos of the OMB culture").

than to any political party.[393] And most of the time, RMO staff work with agency staff, rather than directly with Senate-confirmed agency officials. But RMO staff hardly serve a checking function over political or politicized activity; to the contrary, their very job is to ensure that agency policy is consistent with presidential priorities.[394] Their portfolio is vast and full of discretion, and they play an unusual role for civil servants in high-level policy decisions,[395] especially with respect to their power over activities taking place elsewhere in the government.[396] There is accordingly a danger, more than theoretical, that their role will be co-opted in the service of partisan action.[397] Moreover, while senior RMO civil servants like branch chiefs and DADs often have deep policy expertise in the areas they oversee, that is not always the case for the more junior program examiners who tend to have front-line interactions with agency staff.[398]

---

393. *See id.* at 57, 60 (describing OMB's role as "impartial advisor" serving Democratic and Republican administrations equally loyally); Heclo, *supra* note 21 (promoting the value of OMB's "neutral competence").

394. *See, e.g.*, TOMKIN, *supra* note 18, at 14 ("[E]xaminers must be proficient as translators of broad presidential priorities into specific programmatic applications in order to be able to explain presidential policies to the agencies . . . ."); Adams, *supra* note 72, at 56-58 (finding that OMB "civil service staff" have the knowledge and skills "that a president needs to shape and implement policy, ensure that resources support that policy, and control, to the extent possible, executive branch operations"); Moe, *supra* note 21, at 239, 266 (describing OMB's value to presidents as providing "responsive competence" rather than "neutral competence").

395. *See, e.g.*, Adams, *supra* note 72, at 62 (describing how RMO civil servants have "unusual access across a range of policies and processes not available to other agency staff, sometimes including policy staff," such as, for example, "participat[ing] in senior-level meetings in the Cabinet Room, the Situation Room, and interagency deliberations covering virtually every aspect of government operations").

396. It is true that, in general, throughout the administrative state, "[c]ivil servants exercise discretion over a host of major and minor decisions." Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 611 (2003). For the most part, however, these discretionary decisions govern only actions taken within the civil servant's own agency, rather than some other agency the civil servant supervises, as is the case with the RMOs. *Id.* (giving as standard examples of civil servant discretion the fact that "the individual forest supervisor at the United States Forest Service may have considerable discretion to grant (or deny) access to particular forest lands, while a line attorney at the Department of Justice will have responsibility for developing and framing legal arguments in a brief").

397. *See, e.g.*, Adams, *supra* note 72, at 57 ("[A]s OMB's functions have expanded to include shaping program and congressional and public advocacy, these more politicized roles have conflicted with the agency's neutral and more technical image."); Radin, *supra* note 252, at 4 ("Program officials have sometimes found career OMB staff to be more like members of the administration than some of the political appointees within their program agency.").

398. *See supra* note 326 and accompanying text.

On the other hand, while there are political appointees at the top of the RMOs, they are not Senate-confirmed.[399] The PADs work at the "middle level of management,"[400] between Senate-confirmed officials and civil servants. The PADs are even less transparent and more powerful than the so-called "czars" that received so much attention, much of it negative, in the early Obama Administration.[401] They are less transparent because their appointment is routine, so their existence and portfolio is not scrutinized. Their work remains shrouded in secrecy because of the confidentiality lever. They are more powerful because they have clear responsibilities and duties that operate under statutory- and OMB-driven deadlines through all of the budget preparation, budget execution, and management levers discussed above. They do not fall under either category of political official presented in the conventional view[402]—they are neither senior White House political advisors nor Senate-confirmed agency officials.

One potential answer to this conundrum is that RMO officials are merely an extension of the President.[403] It would thus not matter that middle-management political appointees and civil servants were playing a major role in controlling agency policy choices. This answer seems unlikely, however, both as a descriptive matter and as a legal matter.

As a descriptive matter, the hundreds of program examiners and their civil servant supervisors do not sit in the White House and have no regular contact with the President;[404] their instructions to agency officials most often come from channeling the President's expected views, sometimes as conveyed by the PADs.[405] Given the politicization of agency officials documented by others,[406]

---

399. *See supra* note 67 and accompanying text.

400. ACUS 2012 SOURCEBOOK, *supra* note 45, at 84; *see also id.* at 83-87 (describing categories of political appointees).

401. *See, e.g.*, Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577-79, 2583-95 (2011) (cataloguing critiques and design features of President Obama's czar system).

402. *See supra* notes 386-388 and accompanying text.

403. *Cf.* Kagan, *supra* note 2, at 2338 ("[O]ften when I refer to 'the President' in this Article, I am really speaking of a more nearly institutional actor—the President *and* his immediate policy advisors in OMB and the White House.").

404. TOMKIN, *supra* note 18, at 11.

405. *See, e.g.*, Forshey, *supra* note 139, at 430 (describing the two-hour Director's Review meeting where budget decisions are made as the examiner's "one guaranteed moment to work collaboratively with the Administration's leadership").

406. *See, e.g.*, Barron, *supra* note 388, at 1121-33 (noting the increasing number of agency political appointments since World War II and the growing extent of Presidential control over selection processes).

there is no particular reason to think that these civil servants better represent the President's actual views than these agency officials.

The descriptive case for the five PADs as an extension of the President fares only slightly better. While the PADs are politically appointed and sit near the White House in the Eisenhower Executive Office Building,[407] their access to the President is sporadic,[408] and they do not have the same intimate advisory connection enjoyed by other executive officials sometimes viewed as speaking for the President. To be sure, PADs do have more regular conversations with White House advisors than agency officials do,[409] but that does not ensure that PADs are actually speaking for the President.[410] Given the information flow from the RMOs up to White House advisors and the President,[411] it is possible that decisions made by White House advisors are actually just what the PADs (or even the RMO civil servant staff) advised them to decide. And some subset of decisions made by PADs does not get further elevated.[412]

As a legal matter, the fact that OMB is considered an "agency" under FOIA means that it is considered "substantially independent" rather than meant "solely to advise and assist" in a manner akin to "the President's immediate personal staff."[413] Further, while the boundaries of the presidential communications privilege remain unsettled,[414] one might see its narrow scope as related to the question of who speaks for the President. The D.C. Circuit has held that the privilege "should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected," and so it should be available only to "those members of an immediate White House adviser's staff who have broad and significant

---

407. TOMKIN, *supra* note 18, at 11.

408. *Cf.* ACUS 2012 SOURCEBOOK, *supra* note 45, at 31 n.85 (discussing evidence that "even the highest-level officials in the White House speak to the President substantively barely once a month").

409. KESSEL, *supra* note 261, at 182 (describing the White House staff's more limited ability to monitor agencies than OMB's); Martin, *supra* note 1, at 70 (discussing regular communication between OMB staff and the policy councils).

410. *See, e.g.*, KESSEL, *supra* note 261, at 187-88 ("On many occasions, issues are decided [by White House staff] without the president's involvement.").

411. *See supra* note 25 and accompanying text.

412. *See supra* notes 146-149, 259-261 and accompanying text.

413. Meyer v. Bush, 981 F.2d 1288, 1293 (D.C. Cir. 1993); *see also id.* at 1292 (noting that FOIA's definition of "agency," while generally encompassing the EOP, does not include "the President's immediate personal staff *or* units in the Executive Office whose sole function is to advise and assist the President" (citations omitted)).

414. *See, e.g.*, Mendelson, *supra* note 3, at 1170 n.210 (discussing recent disagreements between the White House and Congress over the scope of the privilege); Saiger, *supra* note 401, at 2594 n.89 (collecting sources on disputes over the scope of the privilege).

responsibility for investigating and formulating the advice to be given the President . . . ."[415] The few cases to have considered the question have concluded that OMB as a whole is too far removed from the President's inner circle for its officials to receive the privilege.[416] Even if the privilege were to apply to OMB in some instances, it seems unlikely that the RMO staff, whether civil servants or the PADs, are high level enough to qualify as "immediate White House adviser[s]" and their staff.[417]

The implausibility of regarding PADs and program examiners as extensions of the President has troubling implications for accountability, especially in light of the transparency problems discussed above. One way to secure accountability is through "the complex structure of the administrative hierarchies that constitute our basic mechanism for governing ourselves."[418] The structure of the RMOs and the RMOs' interactions with agencies pose challenges for accountability at each level of the hierarchy.

At the agency level, one "[k]ey element[] of accountability" is "the requirement[] that administrators appear annually before Congress in order to justify their budget requests and respond to periodic demands from congressional oversight committees to explain and justify their decision making in public testimony."[419] But if all agency officials can offer is what OMB has told or permitted them to say, any reward or punishment the agency receives will not be fully grounded in reality. To hold agency officials accountable requires understanding what they wanted to do and what OMB told them to do.[420]

---

415. *In re* Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997).

416. *See* Wolfe v. Dep't of Health & Human Servs., 815 F.2d 1527, 1533 (D.C. Cir. 1987) ("[E]xtension of the presidential privilege to the OMB is unprecedented and unwarranted."), *rev'd on other grounds*, 839 F.2d 768, 773 n.5 (D.C. Cir. 1988) (noting that the government abandoned the argument that the executive privilege protected communications between the Department of Health and Human Services and OMB); Ctr. for Biological Diversity v. Office of Mgmt. & Budget, 625 F. Supp. 2d 885, 891-92 (N.D. Cal. 2009) (noting that "[t]he privilege only protects immediate White House advisers and their staff" and declining to extend it to "intra-OMB discussions").

417. Mendelson has suggested that even the Senate-confirmed OIRA Administrator probably would not qualify under the privilege, at least for communications with an agency. Mendelson, *supra* note 3, at 1170-71 n.210.

418. Rubin, *supra* note 329, at 2120.

419. SHANE, *supra* note 2, at 159-60.

420. *Cf.* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 451 (1987) ("[S]ecret interactions between the agencies and the White House or OMB staff in no way increase overall governmental accountability, because the electorate cannot distinguish those policies attributable to the agencies from those attributable to the President and his aides.").

Accountability is also compromised within OMB itself, in large part because the public and Congress have no way of knowing what the PADs and RMO staff are doing behind the scenes. Like OIRA review, the RMO process "offers the tantalizing possibility of influence without fingerprints."[421] It is no answer to say that accountability is satisfied because the RMOs report through the Senate-confirmed OMB Director to the President, given the limited number of RMO actions that reach the Director, much less the President.

At the top of the hierarchy, the President can use the RMO process to avoid accountability. As Richard Neustadt observed almost sixty years ago, when "[t]he voice that speaks is not the President's . . . [but] the Budget Bureau's[,] . . . when need be, the Budget serves as whipping-boy."[422] Instead of claiming the RMOs' decisions, the President can distance himself from the RMOs, "blaming 'a nameless OMB bureaucrat five levels down from the top.'"[423]

3. *The Policy and Political Implications of Technocratic Decisions*

These critiques would matter much less if RMOs simply applied neutral expertise, if the budget were simply a dry document about numbers, and if program examiners were simply bean counters. But, of course, none of that is the case. "[B]udgeting is a political decision influenced by the political content

421. Lisa Heinzerling, *Classical Administrative Law in an Era of Presidential Administration*, 92 TEX. L. REV. SEE ALSO 171, 177 (2014) (describing the OIRA process).

422. Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641, 671 (1954).

423. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1772 (2009) (quoting MARK BOWEN, CENSORING SCIENCE: INSIDE THE PERSONAL ATTACK ON DR. JAMES HANSEN AND THE TRUTH OF GLOBAL WARMING 228 (2007)). The quotation comes from Marlin Fitzwater, then serving as Press Secretary for the first President Bush, after NASA official Dr. James Hansen disavowed his own congressional testimony and alleged that OMB had erroneously changed its substance for political reasons. Instead of acknowledging the OMB policies that required such review, the Press Secretary was able to deflect the criticism onto the individual program examiner. *See id.* at 1771-74; *see also* TOMKIN, *supra* note 18, at 188 ("[The RMOs'] agency oversight activities also sometimes played useful roles for the Reagan administration as protective cover for unpleasant directives of political origin. As one observer commented, 'examiners were not acting independently and were not given a free hand to do what they wanted. It was easier to not have the political levels do these things so that the career staff could be blamed.'" (internal citation omitted)). For a more recent example of the RMO hierarchy permitting presidential distancing, consider the official statements made in response to public disclosure of a program examiner's threats to "make life miserable" for an inspector general who wanted to share with Congress his view that his agency's budget would not let him do his job. The OMB Director, rather than the President, issued a statement, and the statement focused only on narrow training of program examiners about their statutory obligations to inspectors general, rather than on anything broader about OMB's interactions with other kinds of agencies. *See supra* note 192.

of programs themselves and the political predispositions of key actors in the budgeting process."[424] Even if every decision is not a political one, neither is it a technical application of objective principles. It involves complex, value-laden decisions about how to "confront tradeoffs and project them into an uncertain future."[425] This reality underscores a third problem with the RMOs' work: its complexity allows a technocratic appearance to obscure underlying substantive choices, thereby reducing accountability.[426]

Some substantive choices, such as tradeoffs among competing interests, might be appropriate for a budget because it is a public statement of national priorities. At the same time, it is not clear that those who are making the decisions are the right people to make those decisions, especially given the broad scope of authority held by the RMOs' civil servants.[427] Alternatively, even if making these decisions is a valid part of their job, it might not always be clear, even to them, that the decisions they are making are actually policy choices.[428] Both of these problems reflect what Wendy Wagner in another context has called "the unintentional science charade"—the false belief that science alone can answer all of the questions related to scientific policy decisions, accompanied by the unintentional substitute of technocrats' own unarticulated value choices at those junctures where science cannot provide an answer.[429]

---

424. John B. Gilmour & David E. Lewis, *Assessing Performance Budgeting at OMB: The Influence of Politics, Performance, and Program Size*, 16 J. PUB. ADMIN. RES. & THEORY 169, 171 (2006).

425. Eugene Bardach, *Report from the Trenches: The Life of the Apprentice Budget Analyst*, 24 J. POL'Y ANALYSIS & MGMT. 419, 419 (2005) (explaining that "[a]ny respectable budget shop employs people whose raison d'etre is to do just this").

426. This concern, too, echoes concerns raised in the OIRA literature. *Cf.* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 128-29 (2004) (arguing generally that cost-benefit analysis, OIRA's lead analytic tool, provides a technocratic cover that obscures ideology and values-based decision making); Watts, *supra* note 323, at 33 (arguing that instead of letting agencies hide behind "technocratic façades" in the rulemaking context, "political influences [should be permitted] to come out into the open, thereby enabling greater political accountability, monitoring, and transparency").

427. For a classic statement of this problem, see V.O. Key, *The Lack of a Budgetary Theory*, 34 AM. POL. SCI. REV. 1137, 1144 (1940) (arguing that because budgeting is a political question, "the question occurs whether almost sole reliance on persons trained primarily in accounting and fiscal procedure is wise. The thousands of little decisions made in budgetary agencies grow by accretion into formidable budgetary documents which from their sheer mass are apt often to overwhelm those with the power of final decision").

428. *See id.* (noting that budget officials make decisions about alternatives all the time, "but not always consciously").

429. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1631-32 (1995).

Sometimes, however, substantive choices made in the budget are more problematic, such as those based on "pure partisanship"[430] or political pressure beyond the public interest, at least when made by the RMOs and couched in the language of technocracy.[431] Such decisions would be examples of what Wagner calls the "intentional" or even "premeditated science charade"—when "bureaucrats consciously disguise policy choices as science" or first make a decision and only then selectively introduce scientific evidence to justify it.[432]

To illustrate how substantive policy choices underlie technocratic-sounding budgetary decisions, consider, for example, a decision to cut back on NIH training grants, making them available only in fields with a shortage of researchers.[433] This approach may seem like a neutral way to decide how to allocate a limited sum of money. But the program examiners asked NIH to justify its proposal by explaining the different scientific accomplishments it expected from training people in different fields.[434] Making decisions on the basis of answers to these questions is necessarily a value-laden choice about the relative merits of different scientific outcomes. It could also lead to a more partisan decision about what kinds of outcomes would be acceptable.

The same set of circumstances can exist in the budget execution context. For example, grant competition priorities can appear neutral while in fact privileging certain sets of applicants, whether those whose work is favored on substantive policy grounds[435] or those who are politically important.[436] And examples of both value-laden policy decisions and the possibility of partisan

430. *Cf.* Watts, *supra* note 323, at 54 (arguing that courts should be wary of relying on partisan politics in the rulemaking process as the justification for a rule).

431. *Cf.* Mendelson, *supra* note 3, at 1144 (rejecting such influence in the rulemaking context).

432. Wagner, *supra* note 429, at 1640–50.

433. Walsh & Culliton, *supra* note 119, at 293–94.

434. *Id.*

435. *See, e.g.*, BRILL, *supra* note 248, at 152, 228, 237–38, 259 (describing RMOs' work with the Education Department, along with staff members in the Domestic Policy Council, to prioritize longstanding policy goals of the PAD in designing the Race to the Top priorities); Michael Grunwald, *Billions for an Inside Game on Reading*, WASH. POST (Oct. 1, 2006), http://www.washingtonpost.com/wpyn/content/article/2006/09/29/AR2006092901333.html [http://perma.cc/9TK5-J8TQ] (describing the Bush II Administration's privileging of phonics over whole-language methods of reading in the Reading First grant priorities process).

436. *See, e.g.*, HASKINS & MARGOLIS, *supra* note 260, at 161–62 (describing controversy about whether grants awarded under the Obama Administration's Social Innovation Fund "might have reflected favoritism more than merit"); Grunwald, *supra* note 435 (describing the Bush II Administration's privileging of politically connected program providers in the Reading First grant awards process); *supra* notes 349–354 and accompanying text (describing research showing an alignment between grant allocations and the President's political interests).

decision making through the RMOs' implementation of management initiatives abound, as I explained earlier.[437]

To be clear, value-laden decisions are perfectly appropriate in preparing and executing a budget, as well as in designing and overseeing management initiatives. Indeed, value judgments are inseparable from those activities. The problem arises when the language of technocracy obscures value choices, whether intentionally or unintentionally. Such technocratic cover hides the fact that people are making choices, conceals who is making them, and opens the door to partisan decision making. Under any of these scenarios, accountability suffers.

IV. RESPONDING TO OMB'S CONTROL OF AGENCY POLICYMAKING THROUGH THE BUDGET PROCESS

Any response to OMB's control of agency policymaking through the budget process must be nuanced, mitigating the system's problematic lack of accountability while protecting its valuable coordinating work. Section IV.A offers two variations on this effort from inside the executive branch, mapping out ways that the President and OMB itself could reform OMB's work. Section IV.B sets forth potential responses from outside the executive branch, suggesting ways for Congress and civil society organizations to better engage with the RMOs' work. Finally, Section IV.C broadens the lens to OIRA reform, explaining that the RMOs' authority should be considered in any discussion of reforming OIRA, since the work of those offices is complementary and could involve spillover.

A. Inside the Executive Branch

To increase accountability of the RMOs, the President could issue an executive order that both sets forth how he or she intends to use the RMOs to work with agencies on setting and implementing policy and establishes various transparency requirements. At a smaller scale, OMB could also usefully take steps to increase its own transparency and engagement with the public.

1. The President

An executive order governing the RMOs' work and making it more transparent would enhance accountability in two ways. First, the mere fact of

437. *See supra* Section I.C.1 (describing how the President's Management Agenda can drive both policy decisions and partisan decision making).

its existence would provide an opportunity for Presidents to claim the RMOs' work as their own. Second, the executive order's substantive transparency requirements would provide opportunities for the public to better monitor the RMOs' work.

As to presidential claiming, an explanatory executive order would enhance accountability by requiring the President to take ownership of the RMOs' actions. New Presidents could put their own stamp on the process, furthering accountability. The executive order would parallel Presidents' other executive orders detailing how they intend to use OIRA for regulatory review,[438] a process that itself developed out of originally uncodified practices on the budget side of OMB.[439]

For all of the criticisms of its substance and implementation,[440] the executive order governing OIRA's regulatory review at least provides a sequence and scope of activities that the public can expect. The absence of such a document on the RMO side means that a set of offices more than four times as large as OIRA, with oversight over more of the federal executive establishment, operates with more opacity. Such a document would also set clear guidelines for the RMOs and for agencies beyond what Circular A-11 already requires, to the extent that it would set forth a high-level vision of budgetary policymaking and of the relationship between the RMOs and agencies. In a similar way, while various OMB circulars govern the details of OIRA's work,[441] the executive orders nonetheless provide an overall presidential vision of that office's scope.

The substantive details of the executive order would also seek to increase the RMOs' transparency.[442] Several options for how to do so exist. The rest of this Section considers three possibilities, in order of their likely level of controversy: (a) transparency of procedural aspects of the budget process; (b)

438. *See, e.g.*, Exec. Order No. 13,563, *supra* note 366 (setting forth President Obama's agenda for OIRA and "reaffirm[ing] the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866"); Exec. Order No. 12,866, *supra* note 92 (setting forth President Clinton's agenda for OIRA); Exec. Order No. 12,291, *supra* note 80 (setting forth President Reagan's regulatory review in the new OIRA).

439. *See* Tozzi, *supra* note 80, at 45, 48.

440. *See* Heinzerling, *supra* note 2; Steinzor, *supra* note 2.

441. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, REGULATORY ANALYSIS (2003); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-94 REVISED, GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS (1992).

442. *Cf.* Heinzerling, *supra* note 2, at 329-35, 358-61 (discussing OIRA's increased focus on transparency, at least in writing, from 1986 onwards, including some practices introduced by George W. Bush's OIRA Administrator, and critiquing OIRA for violating its transparency obligations).

transparency of final budget execution decisions; and (c) transparency of predecisional budget preparation information.

a. Transparency of Procedural Aspects of the Budget Process

The least controversial option would require transparency as to procedural aspects of the RMOs' work alone. The executive order could, for example, explain what the interactions between the RMOs and the agencies should involve over the course of the year, with a rough timeline of when the different steps will take place.[443] It could clarify which kinds of policy decisions the RMOs will get involved with and which kinds they will not.[444] It could clarify appropriate rationales for decisions.[445] And it could require both logging and disclosure of meetings the RMOs have with entities outside the executive branch and preparation of summaries of their agendas.[446]

Requiring disclosure of the RMOs' processes would do some work to increase accountability.[447] Much of what we know about OIRA comes from the

---

443. *Cf.* Exec. Order No. 12,866, *supra* note 92, §§ 4, 6 (outlining schedule requirements in OIRA's process).

444. *Cf. id.* § 3(f) (defining types of regulatory actions on which OIRA will focus).

445. *Cf. id.* § 6 (setting forth standards for OIRA's regulatory review).

446. *Cf. id.* § 6(b)(4) (setting forth disclosure requirements).

447. Some information about RMO meetings with outside entities might be available through other means, including through White House Visitor Logs or FOIA requests (since the deliberative process privilege would not apply to these meetings, see *supra* note 380 and accompanying text). However, routine disclosure would be a superior option. White House Visitor Logs do not make plain with whom or on what subject visitors are meeting, and in any event, they would not capture meetings that take place offsite. *See, e.g.*, Philip Bump, *Want To Know Who Has Visited the White House? Here's How*, WASH. POST (Mar. 27, 2015), http://www.washingtonpost.com/news/the-fix/wp/2015/03/27/want-to-know-who-has-visited-the-white-house-heres-how [http://perma.cc/NU7G-EGPP] (noting that visitor logs "can be hard to navigate; [the information is] presented on the site as a long list of visitors with inscrutable codes identifying where they were headed and the people with whom they met," and offering a newspaper-modified version that is easier to understand). Further, the Logs are not always complete or accurate. *See, e.g.*, Fred Schulte & Viveca Novak, *White House Visitor Logs Riddled with Holes*, CTR. PUB. INTEGRITY (Apr. 13, 2011), http://www.publicintegrity.org/2011/04/13/4115/white-house-visitor-logs-riddled-holes [http://perma.cc/J7DH-B77T]. For its part, FOIA is requester-driven, and the results of FOIA requests are not always made available to the general public, making disclosure of RMO meetings through this path much more limited. *See, e.g.*, Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (detailing prominence of commercial users, as opposed to public interest organizations or journalists, in FOIA requests, and noting that commercial interests sell some of the information they received from FOIA requests back to the public); David C. Vladeck, *Information Access – Surveying the Current Legal Landscape of Federal Right-To-Know Laws*, 86 TEX. L. REV. 1787, 1789 (2008) (cataloguing flaws of FOIA). Unlike an

disclosure requirements about its procedures.[448] Disclosing who meets with OIRA and when provides important facts about who influences the office and the scope of its power.[449] Even where OIRA's process disclosure is incomplete or misleading, the expectation of disclosure gives the public a metric against which to measure compliance, permitting the public to track discrepancies between OIRA's promises and its reality.[450] An executive order requiring similar process-based disclosure for the RMOs would therefore add value.

b. Transparency of Final Budget Execution Decisions

A second option would require increased transparency about budget execution decisions under formal mechanisms such as apportionment and requests to Congress about transfers or reprogramming. These are final decisions, so nothing predecisional would be released. Apportionment decisions are legal requirements and are subject to the Anti-Deficiency Act. Requests to transfer or reprogram have legal effect on agency action once Congress approves them. These requirements thus govern agency spending just as appropriations acts do, and their regular disclosure would serve similar values as publication of appropriations acts themselves. Disclosure would be especially valuable if the information is presented to the public in a way that permits targeted review by affected interests: in searchable formats, organized by agency and by subject-matter.[451]

This option might be more controversial than mere disclosure of the RMOs' general process, in large part because it would reveal some substantive decisions made by the RMOs, potentially unsettling any claim that the RMOs

executive order, disclosure via these alternate paths would only demonstrate that RMO meetings occurred and would not provide information about the other procedural aspects of the RMOs' work. *See supra* notes 443-446 and accompanying text.

448. *See, e.g.*, Sunstein, *supra* note 19, at 1860-61 (noting that "one reason for the attention" to the question of whether OIRA is captured by regulated industry "is that OIRA has a high degree of transparency" in the first place).

449. *See, e.g.*, Haeder & Yackee, *supra* note 361 (uncovering the effect of lobbying organizations from OIRA's meeting logs and disclosure of rule changes based on OIRA's input).

450. *See, e.g.*, Heinzerling, *supra* note 2, at 363-64 (noting that information disclosed on OIRA's Regulatory Dashboard is "spiffy and informative, but woefully incomplete" because of discrepancies in what appears on the dashboard and when); *White House Safeguard Tracker*, PUB. CITIZEN, http://safeguardsdelayed.org [http://perma.cc/XEA6-9UCK] (tracking delays in rules beyond the deadlines promised in the executive order, with data drawn from OIRA's Regulatory Dashboard).

451. *Cf.* Harris, *supra* note 316, at 1040-45 (discussing the value to the public of all data on agency performance plans and evaluations, especially where stakeholders across interest groups can search for data and information relevant to those groups).

do not make policy.[452] On the other hand, the majority of these decisions are likely to be fairly straightforward, so disclosure might on balance support the RMOs' contention that the bulk of their work is not policy-oriented. Either way, this information would be useful information to the public. Moreover, in the context of a presidential executive order asserting ownership of the RMOs' work, this disclosure would frame budget execution decisions as the President's decisions rather than the RMOs' decisions, just as the budget itself is. In so doing, disclosure might support presidential claiming, one of the goals of the executive order in general.

c. Transparency of Predecisional Budget Preparation Information

A third, even more controversial, option would increase transparency about the substance of interactions between the RMOs and agencies as to predecisional budget and policy deliberations.

A mandatory version of this transparency option would require disclosure of RMO-agency communications about budget and policy. For example, after the President's budget is submitted to Congress and appropriations decisions are made, RMOs and agencies would have to make available, perhaps by posting online, the agencies' original requests, any related documents from the RMOs, and a summary of what changes OMB made during the approval process. This mandatory disclosure would parallel what the OIRA executive order currently requires as to regulations,[453] even though two of OIRA's early administrators originally dismissed calls to make that information routinely public because of the possible harm to the deliberative process.[454]

A permissive version of this transparency option would simply allow disclosure of this substantive information. Agency heads would be permitted to disclose the original requests, related documents, and summary of changes to discuss the evolution of their thinking, their understanding of the implications of various funding levels and policy alternatives, and the policy directions they received during the execution process. The executive order could provide some guidance setting forth circumstances when disclosure would be permitted, such as the standard Congress has given to Inspectors General. Under that standard, Inspectors General must provide independent comments to Congress when they perceive that the President's Budget request "would substantially

---

452. *See supra* notes 424-437 and accompanying text (suggesting that some RMO staff members view their work as neutral and technocratic rather than policy-laden).

453. *See* Exec. Order No. 12,866, *supra* note 92, §§ 6(a)(3)(E), (b)(4)(D).

454. DeMuth & Ginsburg, *supra* note 2, at 1075 nn.1-2, 1085-86; *see also supra* note 367 and accompanying text.

inhibit the Inspector General from performing the duties of the office."[455] Or the executive order could give the agency head discretion in deciding when to disclose, providing broader opportunities to discuss policy differences.

Requiring the disclosure of the substance of RMO-agency interactions is likely to be more controversial, and ironically might not even accomplish its goal of improving transparency and accountability. For one thing, the equivalent mandatory disclosure in the OIRA process has little compliance.[456] Moreover, full compliance might result in a data dump that would not be useful for the public.[457] Mandatory disclosure might also push conversations between the agencies and the RMOs underground, resulting in fewer documents available for disclosure.[458] Or it might lead agencies to use their initial budget requests to posture for their clientele rather than to make hard decisions themselves. This behavior might in turn give more power to the RMOs to construct workable realistic budgets. It might also lead Congress to exploit differences between agency goals and administration preferences for political gain, rather than for meaningful accountability.

Permissive disclosure might get around some of these concerns, especially because agency officials and the RMOs would not know *ex ante* what internal conclusions will be reached. Thus, there might be less opportunity to game the system and less danger of a data dump. At the same time, permissive disclosure could pose its own problems. Agency heads loyal to the President may not wish to disclose any policy differences at all,[459] limiting the value of this intervention in terms of accountability.[460] Alternately, agency heads may wish instead to use

---

455. 5 U.S.C. § 6(f)(3)(E) (2012); *see supra* note 189 and accompanying text.

456. *See, e.g.*, Heinzerling, *supra* note 2, at 361-63 (describing the failure of both OIRA and agencies, sometimes at the direction of OIRA, to disclose what the executive order would seem to require).

457. *See, e.g.*, Vladeck, supra note 447, at 1832 ("No one would benefit if an undifferentiated mass of information were posted on the Web; the cost of sifting through it would overwhelm its value.").

458. *See, e.g.*, Fenster, *supra* note 370, at 921 ("[O]penness is the keystone of democratic politics, but proposals to achieve it are likely to prove insufficient when they take no account of the pressures causing secretiveness in the first place." (quoting DAVID BEETHAM, BUREAUCRACY 101 (2d ed. 1996))); Shkabatur, *supra* note 343, at 122 (discussing the way transparency requirements under sunshine acts have simply led agencies to "adopt[] alternative methods of confidential communication" and advocating for process transparency instead).

459. *See* Barron, *supra* note 388, at 1096 (noting that Presidents have increasingly politicized agencies so that "agencies increasingly *want* to align their own judgments with the White House view—even if top agency officials are not ordered to do so by the political aides working at 1600 Pennsylvania Avenue").

460. *See* Heinzerling, *supra* note 2, at 365 (suggesting that promising transparency and then not delivering can sometimes be worse than not promising it in the first place, because people

the potential for disclosure as a threat to gain leverage in the budget process, leading to worse decision making inside OMB and the White House in hopes of avoiding a public intra-executive dispute.

Because these potential issues point in opposite directions, a permissive disclosure regime might not be clearly problematic. Indeed, the same pressures that might dissuade agency heads from disclosing policy differences might also keep them from threatening disclosure as leverage; the removal power (for executive branch officials)[461] and the power of relationships (for all appointees, whether in independent or executive agencies)[462] might further limit the leverage problem. Moreover, the structural forces that might dissuade disclosure could make the disclosure that happens that much more useful to the public—less boy-who-cries-wolf and more watchdog. Even loyal agency officials sometimes find themselves wanting to share information that they believe would be useful to Congress and the public.[463] A permissive regime could allow them to do so in a way that would appropriately calibrate the interests of transparency with the interests of the deliberative process.

At this preliminary stage of sketching what an executive order governing the RMOs' work might look like, an acknowledgment that different administrations would likely take different positions on these various transparency options is more useful than a delineation of the ideal transparency regime. The choice among various options would itself give the public valuable information about the administration's priorities.[464]

---

can be "lull[ed] . . . into thinking they have all the information they might need or want about this process").

461. *See supra* note 178 and accompanying text.

462. *See* Strauss, *supra* note 93, at 590-91 (noting the potential for close relationships between the President and administrators of independent agencies).

463. In the budget context, consider, for example, efforts undertaken by the second President Bush's head of the Army Corps of Engineers to disclose to Congress his belief in the dangers of his budget shortfall, which resulted in his firing, several years before the disasters some believe were attributable to the Army Corps of Engineers during Hurricane Katrina. *See* Caruso, *supra* note 184 (describing testimony and subsequent firing); *see also* Jason Vest & Justin Rood, *Ex-Army Corps Officials Say Budget Cuts Imperiled Flood Mitigation Efforts*, GOV'T EXECUTIVE (Sept. 1, 2005), http://www.govexec.com/defense/2005/09/ex-army-corps-officials-say-budget-cuts-imperiled-flood-mitigation-efforts/20033 [http://perma.cc/6FGW-M5HX]. Or, for an example of agency disclosure of disagreements within the administration outside the budget context, consider President Obama's Food and Drug Administration Commissioner disclosing her belief that she had been directed to take action that ran counter to reasonable scientific judgment. *See, e.g.*, Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 947-48 (2014) (describing this disclosure).

464. To be sure, an administration could decide not to change the executive order much but nevertheless modify how it operates in practice, which would provide useful information to

Overall, the lesson from the expansion of OIRA's transparency obligations alongside its transparency problems is not that promoting transparency in the RMOs' work is doomed to failure but rather that transparency is a goal worth pursuing, with the devil in the details.[465] An executive order would provide a good opportunity to work these details out in a manner that would promote accountability.

2. *OMB*

Another set of reform possibilities lies within OMB's own control. OMB itself can improve its transparency and increase its accountability, even in the absence of presidential claiming.[466]

First, OMB could provide more and better information online. Despite valid charges that OIRA's dashboard is incomplete,[467] the dashboard is nonetheless valuable for capturing at least some important information about what OIRA is reviewing from which agencies and how long draft regulations have been under review.[468] This information both informs the public and allows for better public critique and engagement.[469] In a similar capacity, OMB could present in visually helpful ways where the budget process is—for example, the steps being taken to execute last year's budget, prepare this year's budget, and plan for next year's budget in addition to the status of congressional action. Instead, the website is largely a compendium of

---

the public about that administration's priorities only to the extent the modifications become known. *Cf.* Heinzerling, *supra* note 2, at 334-36 (describing President George W. Bush's two executive orders governing the OIRA process as making "relatively minor" changes and detailing how the "intellectually forceful and politically shrewd OIRA administrator" made other, informal modifications to the regulatory review process that nevertheless had a significant effect).

465. *See id.* at 369 ("If OIRA followed EO 12,866's requirements for transparency, a good number of the issues surrounding OIRA's opacity would disappear.").

466. OMB could also take steps to improve its coordination between the management offices and the RMOs, see *supra* notes 314-316 and accompanying text, as well as to try to improve the programmatic and subject-matter policy knowledge that more junior RMO staff members have, see *supra* notes 325-326, 398 and accompanying text. In this Section, however, I focus on OMB's external relationship with the public as a key factor in the accountability of the office.

467. *See* Heinzerling, *supra* note 2, at 363-64.

468. *See Regulatory Review Dashboard*, OFFICE OF INFO. & REG. AFF., http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp [http://perma.cc/9UZ4-8X47].

469. *See White House Safeguard Tracker*, *supra* note 450 (critiquing OIRA's delays by using information from OIRA's dashboard).

documents,[470] making OMB's work appear static and leaving out the important interactions OMB has with agencies throughout the year. OMB would not have to disclose everything about the substance of the RMOs' work with agencies to make such a dashboard valuable; information about process and scope alone would be a big improvement.[471]

Second, OMB could solicit input from the public on its major policy choices, targeting underrepresented voices.[472] The challenges of both engaging the public and gleaning information that is likely to be useful for government decision making are well documented.[473] But OMB could do more than it currently does, particularly with respect to policies that are government-wide and not likely to be the subject of large-scale notice-and-comment rulemaking anywhere.

---

470. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Management*, WHITE HOUSE, http://www.whitehouse.gov/omb/management [http://perma.cc/HB4N-7HNB] (describing the management offices and linking to their documents); Office of Mgmt. & Budget, Exec. Office of the President, *The President's Budget for Fiscal Year 2016*, WHITE HOUSE, http://www.whitehouse.gov/omb/budget [http://perma.cc/JP69-NAYM] (describing the current budget and providing links to supporting and historical documents).

471. New for the 2016 Budget, the White House released what it called an "interactive budget," which presents the amounts in the overall budget as a series of rectangles of different sizes and colors, to show proportional amounts for different categories of spending, and permits a user to click on any rectangle to see a brief text-based summary of new initiatives proposed in that category. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Interactive Budget*, WHITE HOUSE, http://www.whitehouse.gov/interactive-budget [http://perma.cc/8MY9-YF4H]; *see also* Lindsay Holst & Tanya Somanader, *5 New Things About the Fiscal Year 2016 Budget*, WHITE HOUSE BLOG (Feb. 2, 2015 1:47 PM), http://www.whitehouse.gov/blog/2015/02/02/five-new-things-about-the-fy2016-budget [http://perma.cc/FV7B-X5F5] (describing this budget as the "nation's first open-sourced budget," with underlying data released so that "anyone who wants to create their own visualizations or products from the data is free to do so"; explaining that "[f]or the first time ever, we've also made the full text of the budget available on a blogging platform," so that "anyone can weigh in and give their feedback by adding a comment to a given section"; and noting that visualization of the budget as a series of color-coded rectangles will permit anyone to "take a look at where taxpayer dollars are going, why, and who those initiatives will impact"). This "interactive budget" is an improvement, but still does not come close to the process-based information reflected on the OIRA dashboard. Instead, it is more akin to what OIRA's dashboard would look like if the dashboard merely provided a year-end visual summary of each agency's number of rulemaking documents published in the Federal Register.

472. *See* Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 145-47 (2012) (describing the value of hearing these voices); Michael Hertz, *Using Social Media in Rulemaking: Possibilities and Barriers*, ADMIN. CONF. U.S. 22-23 (Nov. 21, 2013), http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf [http://perma.cc/W34M-NBE6] (same).

473. *See* Farina et al., *supra* note 472; Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011); Hertz, *supra* note 472.

For example, in the new Evidence and Evaluation Agenda, which is having a substantial effect on domestic social policy,[474] OMB has not publicly engaged with critiques of evidence-based policymaking that characterize the approach as unreasonable and misleading.[475] It is possible that OMB is aware of the critiques and has simply discounted them,[476] but the public has no way of knowing that OMB has done so and no mechanism to engage with or suggest improvements to the policy. Public comment on individual agencies' proposed regulations that incorporate OMB's evidence-based policymaking requirements is no substitute, as there is little chance that OMB will shift the direction of the government-wide initiative based on an objection raised in a particular rulemaking. Soliciting early feedback on large-scale government-wide policy choices could both improve the quality of OMB's decision making and enhance OMB's accountability.

---

474. *See supra* notes 275-280 and accompanying text. This initiative is now firmly embedded as a presidential management priority, but when it began, it was OMB that took the lead in publicly driving it forward. *See* HASKINS & MARGOLIS, *supra* note 260, at 9-10 (identifying Peter Orzag as "the first head of Obama's OMB and one of the primary early movers in the administration's evidence-based strategy"); OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES FY 2015, *supra* note 294, at 51 ("The President has made it clear that policy decisions should be based upon evidence."); *id.* at 65 (noting that the administration's "widespread commitment to an evidence culture" is reflected in and builds upon OMB's May 2012 budget directions and a 2013 memo co-signed by OMB along with the Domestic Policy Council, the Office of Science and Technology Policy, and the Council of Economic Advisers); Peter Orzag, *Building Rigorous Evidence To Drive Policy*, OMBLOG (June 8, 2009 8:39 AM), http://www.whitehouse.gov/omb/blog/09/06/08/BuildingRigorousEvidenceto DrivePolicy [http://perma.cc/39UZ-7D54].

475. *See, e.g.*, Trisha Greenhalgh & Jill Russell, *Evidence-Based Policymaking: A Critique*, 52 PERSP. BIOLOGY & MED. 304, 308 (2009) (arguing that "the ethical and moral questions inherent to the policymaking process cannot be reduced to issues of evidence; that deficiencies in research evidence are not generally resolvable by undertaking more or bigger studies; that the policymaking process does not consist of a series of technical 'stages'; that the evidence considered in policymaking goes far beyond conventional research evidence; and that policy decisions do not usually occur as clearly defined 'decision points'"); Edward J. Mullen & David L. Streiner, *The Evidence For and Against Evidence-Based Practice*, 4 BRIEF TREATMENT & CRISIS INTERVENTION 111, 111 (2004) (explaining that evidence-based policymaking has been both "heralded as one of the major advances in health care, education, criminal justice, and the human services, promising to revolutionize both policymaking and practice" and "excoriated as a development that will reduce professionals to mindlessly (and soullessly) following recipe books for the betterment of insurance companies").

476. *See, e.g.*, Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. (forthcoming 2016) (manuscript at 5) (on file with author) (explaining, in reference to substantive objections to agency decisions raised by lawyers and accepted by judges, that "in all likelihood, every one of those objections will have been carefully considered within the executive branch, and often for many hours of substantive discussion by many people").

B. Outside the Executive Branch

Structural reforms from within the executive branch are not the only potential responses to the accountability concerns related to the scope and extent of OMB's ability to control policy through the budget process. Both Congress and civil society have an important role to play as well.[477]

1. Congress

Congress took a more active role in attempting to oversee the work of OMB in the 1970s[478] and of OIRA in the 1980s[479] as the scope of those offices grew and as Congress grew concerned about reports of their politicization. That is not to suggest that the RMOs are currently particularly politicized, either in the abstract or in reference to any particular administration. But the scope of the RMOs' policymaking effect is large, and the potential for politicization is present. As such, Congress should increase its monitoring and oversight across administrations and do so in a public forum that permits citizen review. It could do so by attempting to get more information about the extent of the RMOs' work either from agencies or directly from the PADs themselves.

If Congress were to focus on agencies, it might request agencies to provide information about policy alternatives or designs that were considered and rejected in addition to the congressional justifications submitted to Congress along with the President's overall budget. Congress might also ask this question of officials testifying during appropriations hearings. Given the confidentiality lever, however, these requests are not likely to produce much information—unless the executive branch has committed to the disclosure of predeliberative budget information discussed above[480]—as agency officials' responses would be cleared by OMB.

Congress might instead turn to the PADs, seeking to learn through their testimony how the RMOs influenced agency policy goals. The PADs are not currently among the OMB officials who testify before Congress.[481] Typically,

---

477. *See* Michaels, *supra* note 389, at 547-51 (explaining the importance of civil society to the separation of powers in the contemporary administrative state).

478. *See* FISHER, *supra* note 7, at 51-55; LIGHT, *supra* note 262, at 153-55; Walsh & Culliton, *supra* note 119, at 282.

479. *See* Copeland, *supra* note 19, at 111; Wendy L. Gramm, *Regulatory Review Issues, October 1985-February 1988*, 63 ADMIN. L. REV. 27, 29-30 (2011).

480. *See supra* notes 453-463 and accompanying text.

481. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Testimony*, WHITE HOUSE, http://www.whitehouse.gov/omb/legislative_testimony_default [http://perma.cc/R955-CW8M] (listing testimony from executive officials who appeared before Congress;

as is the case with White House staff members in general, congressional testimony is reserved for, or at least standard for, those officials who are confirmed by the Senate,[482] which the PADs are not. Occasionally, though, Congress has created an OMB position that is subject only to presidential appointment, and yet the official in that position is still expected to testify, as is the case for the Chief Information Officer, who runs the Office of E-Government.[483] Accordingly, Congress could choose to require PADs to testify before Congress when asked.[484] This requirement would speak to two of the three accountability concerns discussed above: it would make the scope of the RMOs' work more transparent by bringing to light the work that these offices do, and it would help make more perceptible the values-based decisions underlying seemingly technocratic budget work.

Alternatively, Congress could also require Senate confirmation for the PADs, which would additionally address the third accountability concern: it would limit the elevation of a low-level political appointee over Senate-confirmed officials in agencies. Beyond securing the PADs' testimony, the extra

---

no PADs are on the list); Office of Mgmt. & Budget, Exec. Office of the President, *Testimony of Prior OMB Officials*, WHITE HOUSE, http://www.whitehouse.gov/omb/legislative_testimony_default_prior2009 [http://perma.cc/BU4J-A6CP] (same).

482. *See, e.g.*, Jack Moore, *Republican Lawmakers Want More Accountability for US CTO Role*, NEXTGOV (Apr. 20, 2015), http://www.nextgov.com/cio-briefing/2015/04/republican-lawmakers-want-overhaul-us-cto-role/110539 [http://perma.cc/LMU2-D7BM] ("Longstanding White House policy – across both Republican and Democratic administrations – is to permit only Senate-confirmed appointees to testify before lawmakers."). *But see* Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 394 (2002) ("When White House officials are asked to testify before congressional committees, administrations frequently advise Congress that under 'long-established' precedents the immediate staff of a president do not appear before committees. In fact – given the right political conditions – they do appear, and they appear in great numbers.").

483. 44 U.S.C. § 3602(a)-(b) (2012) (establishing in OMB the Office of Electronic Government and providing for its administrator to be subject only to presidential appointment); *Testimony of Prior OMB Officials*, *supra* note 481 (listing testimony from that office's administrator during the Bush II Administration); *OPM: Data Breach: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (statement of Tony Scott, U.S. Chief Information Officer), http://oversight.house.gov/wp-content/uploads/2015/06/Scott-CIO-OMB-Statement-6-16-Data-Breach.pdf [http://perma.cc/KY9C-WFL8]; Office of Mgmt. & Budget, Exec. Office of the President, *Office of E-Government & Information Technology*, WHITE HOUSE, http://www.whitehouse.gov/omb/e-gov [http://perma.cc/3SAB-Y62J] (noting that the office is currently headed by the Chief Information Officer).

484. For the same reasons that the PADs are not likely to be able to claim the presidential communications privilege, see *supra* notes 413-417, this requirement would likely pose no constitutional problem. *See also* Saiger, *supra* note 401, at 2603-09 (arguing that, while "[t]he separation of powers is sometimes thought to . . . require[e] the law to leave the President's staff alone," "separation of powers imposes no such requirement").

requirement of Senate confirmation would provide an opportunity to probe the PADs' different policy commitments and goals. In so doing, it would increase both the transparency and the accountability of the RMOs' work.[485]

Nevertheless, this proposal for Senate confirmation is not a perfect solution. For one thing, it runs counter to trend. The Presidential Appointment Efficiency and Streamlining Act of 2011 removed the requirement of Senate confirmation for 163 positions in the executive branch.[486] This Act was in keeping with a growing body of scholarship critiquing the appointment process as cumbersome and full of delays[487] and as leading to too much politicization of the executive branch.[488]

But the positions recently removed from advice-and-consent were generally those with "little or no policy role" or "lower-level or administrative positions."[489] Assistant secretaries for public affairs, directors and deputy directors of single-issue bureaus, and members of various boards and advisory councils are among those no longer subject to Senate confirmation.[490] The PADs exercise significantly more policy authority than these positions do. To be sure, also eliminated from Senate confirmation were a number of assistant secretaries in low-level management,[491] which arguably bear some parallel to

485. *See, e.g.*, BARBARA L. SCHWEMLE ET AL., CONG. RESEARCH SERV., R40856, THE DEBATE OVER SELECTED PRESIDENTIAL ASSISTANTS AND ADVISORS: APPOINTMENT, ACCOUNTABILITY, AND CONGRESSIONAL OVERSIGHT 6-8, 46-47 (2014) (discussing the view that transparency and accountability are served well by the process of Senate confirmation for high-level executive branch officials); Bruce Ackerman, Opinion, *Restoring the Cabinet's Role*, WASH. POST (Mar. 11, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/10/AR2009031002839.html [http://perma.cc/VU28-43AL] (arguing that Congress ought to confirm White House "czars" to hold these officials accountable).

486. Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012) (codified in scattered sections of U.S.C.).

487. *See, e.g.*, Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1574-76 (2015); Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1624-27 (2015); Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1669-76 (2015) [hereinafter O'Connell, *Shortening Vacancies*]; Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 966-68 (2009) [hereinafter O'Connell, *Vacant Offices*].

488. *See* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 202-11 (2008); LIGHT, *supra* note 262, at 45-46.

489. MAEVE P. CAREY, CONG. RESEARCH SERV., R41872, PRESIDENTIAL APPOINTMENTS, THE SENATE'S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS 13-14 (2012).

490. *See id.* at 19-20.

491. *See id.*

the PAD positions. But other management and budget positions still require Senate confirmation,[492] as do most policy positions with which the PADs interface.[493] The recent reduction in Senate-confirmed positions does not, then, suggest that it is implausible to imagine Senate confirmation for the PADs. Similarly, while Congress might not wish to highlight the importance of the PADs through the confirmation process, in an effort to downplay the importance of the President's budget as compared to its own appropriations authority, Congress might nonetheless value the enhanced oversight that comes with the ability to question directly.

Of course, this enhanced oversight is exactly why presidentialists, not to mention the President, would likely resist this proposal. And that reaction would have some substantive merit. The delays associated with the appointment process,[494] one of Congress's concerns in passing the 2011 Act,[495] could hamper OMB's ability to meet the deadlines associated with putting the President's budget together, especially when a new President takes office. It might result in submission of less careful, less vetted proposals to Congress. These delays could result in vacancies at the head of the RMOs and, therefore, decreased accountability,[496] since there would be no one answering to the President at the helm of the RMOs other than the OMB Director and Deputy Director. Further, these two leaders could be so overloaded with PAD-level decisions that higher-level work would suffer or they could simply ignore the PAD-level decisions and delegate them to the civil servant DADs and branch chiefs; neither result would provide any accountability benefit.

---

492. For example, the Assistant Secretary for Planning, Evaluation and Policy Development in ED, which frequently interacts with the PAD overseeing that Department, remains a Senate-confirmed position. *See* CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 30 (2013).

493. Note that all of the unit heads within the Departments of Health and Human Services and Labor who must justify their units' budgets remain Senate-confirmed, for example. *See id.* at 30-31.

494. *See, e.g.*, Mendelson, *supra* note 487, at 1574-76 (arguing that confirmation delays are a bigger problem with lower levels of management than higher ones); Metzger, *supra* note 487, at 1624-27 (arguing that "delays in staffing agencies are not a new phenomenon," but have gotten worse); O'Connell, *Shortening Vacancies*, *supra* note 487, at 1692-93 (discussing the "deleterious effects" of "delays in staffing agencies"); O'Connell, *Vacant Offices*, *supra* note 487, at 937-43 (discussing the effect of leadership vacancies on agency confusion and inaction).

495. *See, e.g.*, S. REP. NO. 112-24, at 3-6 (2011) (discussing the problem of delays associated with Senate confirmation).

496. *See, e.g.*, Mendelson, *supra* note 487, at 1580-81, 1598 (discussing agencies' "electoral accountability"); O'Connell, *Vacant Offices*, *supra* note 487, at 943-46 (discussing how agency vacancies undermine accountability).

Similarly, the cumbersome nature of the confirmation process could deter high-quality applicants from pursuing the PAD position as opposed to other policymaking positions in the EOP that require no confirmation, such as the policy councils. The process of confirmation could itself enhance the politicization of the positions rather than cabin it,[497] leading PADs to make decisions that are rooted more in politics than in the merits.

At the same time, these problems are not sure to arise with any consistency, and when they do, there might be workarounds. For example, on the issue of delay, the Senate has often confirmed OMB Directors efficiently,[498] and it might extend the same courtesy to the PADs in light of Congress's own interest in the budget process. Presidents could also request that candidates for the PAD positions commit to staying in place for a significant length of time if confirmed, thus reducing frequent turnover and associated delays.[499] Review of agency budget requests among the civil servants in the RMOs would be less affected by delays in the Senate, and some short-term slippage in accountability (due to branch chiefs and DADs making more of the decisions) might be tempered by the increased systemic accountability a confirmation requirement would bring.

Although the increased burden associated with Senate confirmation might deter qualified candidates, it might also expand the pool, given the prestige associated with Senate confirmation. Nor would Senate confirmation necessarily increase politicization; the PADs are already political appointees who serve at the pleasure of the President. Requiring their confirmation would arguably make the fact of their work more public without increasing their politicization.

Thus, despite some justifiable skepticism, there are good reasons to think that Senate confirmation for the PADs would be valuable. At the very least, the possibility is worth further discussion, especially in light of precedent for turning OMB's high-level policy positions into Senate-confirmed ones. The Director and Deputy Director of OMB were not originally subject to Senate confirmation, but Congress turned them into Senate-confirmed positions as

---

497. *See generally* LEWIS, *supra* note 488, at 202-19 (discussing the effects of politicizing the bureaucracy).

498. *See, e.g.*, Mendelson, *supra* note 487, at 1575 n.12 (reporting that Obama's first OMB Director was confirmed on January 20, 2009); Office of Mgmt. & Budget, Exec. Office of the President, *Former Directors of OMB and BOB*, WHITE HOUSE, http://www.whitehouse.gov/omb/organization_former_directors [http://perma.cc/QW5A-D3BX] (demonstrating that the first OMB Directors for Presidents George W. Bush, Bill Clinton, and George H.W. Bush were confirmed shortly after each President took office).

499. *See* O'Connell, *Vacant Offices*, *supra* note 487, at 988-90 (making such a recommendation for nominees more generally).

the scope of their policymaking authority grew and as the President started to use OMB more politically.[500] Congress similarly turned the Administrator of OIRA into a Senate-confirmed position out of concern that the position's vast authority required more congressional oversight.[501] The analogy is not perfect because these positions all began as congressionally created positions, unlike the PADs, but the history reflects congressional interest in expanding oversight of OMB. Indeed, two other Senate-confirmed positions in OMB oversee offices that are much smaller than the RMOs and have a narrower purview.[502] Against this backdrop, making the PAD positions Senate-confirmed in an effort to enhance transparency and accountability could be a natural evolution.

2. *Civil Society Organizations*

Civil society organizations could also take steps both to monitor and influence OMB in an effort to improve the system's accountability.

As to monitoring, civil society organizations could expand their oversight of what is already public about OMB's actions through the budget process. For example, it is typically a major news story when the President releases the budget, but the OMB directors' release of budget or other memoranda is not often a story, at least not outside the Beltway. It should be.

Civil society organizations should call for more transparency in the RMOs' process overall, including on the budget execution side. Civil society groups might even play a role in bringing about the kind of pro-transparency executive order proposed above.[503] Because a President once in office might find it difficult to resist the status quo of the non-transparent RMO process, open-government groups might work to secure a campaign promise to commit to such a reform.

Moreover, if the RMOs are making policy, it is important to ensure the RMOs are hearing from a broad base of interests.[504] OMB budget review is an

500. *See supra* note 478 and accompanying text.

501. *See supra* note 479 and accompanying text.

502. *See* OFFICE OF MGMT. & BUDGET, *supra* note 17, at 11 (demonstrating that in FY 2014, each of the five RMOs contained between twenty-seven and fifty-one full-time employee equivalents, while the Office of Federal Financial Management contained thirteen and the Office of Federal Procurement Policy contained fourteen); *see also* Davis & Mansfield, *supra* note 492, at 36 (listing heads of these offices as among the six positions in OMB requiring Senate confirmation).

503. *See supra* Section IV.A.1.

504. At times, OMB itself has encouraged such an effort, although the effort has waxed and waned over time and has also varied by RMO branch. *See* TOMKIN, *supra* note 18, at 183-84,

insider's game.[505] There is a small group of D.C. lobbyists with specialties in OMB, who serve a client base that is likely dominated by well-heeled corporate clients.[506] While less is known about the RMOs' meetings with outsiders because there is no requirement to document them, there is no reason to believe that the imbalance is any less present with the RMOs than it is with OIRA.[507]

Civil society organizations could help redress this likely imbalance. Publicizing the importance of what the RMOs do and how to engage with them would be one small step towards encouraging greater participation. More broadly, civil society organizations that already meet with agency officials and congressional staff members on policy matters could ensure they have the RMOs in their sights as well. Former OMB officials could take on pro bono projects with civil society organizations seeking to influence the RMOs or run training sessions on how to incorporate the RMOs into a federal lobbying strategy. The goal would be not to politicize the RMOs but rather to ensure the RMOs are hearing from a broad base of affected interests. This strategy would ultimately increase accountability to the public as a whole, rather than to the segment of the public that knows how to gain access.

C. A Cautionary Note

Critics of OIRA, concerned that it has become too powerful, have sometimes suggested returning final rulemaking authority to agencies.[508] Understanding the broader scope of OMB's work through the RMOs should give these critics pause in suggesting the elimination of OIRA's review of regulations as a cure for its ills.

---

186 (describing variation in use of interest groups within OMB and among different branches throughout the 1970s, 1980s, and 1990s).

505. *See* T.R. Goldman, *Lobbying the OMB: The Inside Game*, INFLUENCE (Aug. 22, 2001), www.thecre.com/pdf/20040927_lobbying.pdf [http://perma.cc/SQE2-XB8L].

506. *See id.* (describing one OMB lobbyist who declined to disclose the identities of his clients but is on record as having received thousands of dollars in fees from companies like Goodyear Tire and Rubber Co. and Aventis).

507. *See* Haeder & Yackee, *supra* note 361 (finding that rule change is more likely when only business groups lobby than when public interest groups lobby).

508. *See, e.g.*, Morrison, *supra* note 2, at 1071-72 (recommending that Congress bar OMB participation in agency rulemaking beyond on-the-record comments or, alternatively, the President should amend the executive orders to clarify OMB's advisory role); Steinzor, *supra* note 2, at 277 ("White House staff should stop reviewing individual rules and rule proposals on a routine basis, instead delegating this responsibility to the political appointees who lead the agencies and are already accountable for making wise and balanced decisions," while retaining "responsibility for dealing with cross-cutting issues.").

Much of the effect OIRA currently has on agencies' regulations could be implemented through the RMOs' work on budget preparation, budget execution, and management.[509] The approval lever and form-and-content lever could direct which regulations agencies should and should not prioritize, while the pyramid structure of the RMOs could let political officials maintain plausible deniability. The monitoring lever could ensure that agencies take the steps OMB directs. The Presidential Management Agenda lever could demand that particular regulations receive more attention than others. And the confidentiality lever could keep much of this secret. Affecting agencies' regulations through these other means instead of through OIRA would simply drive OMB's policy control even further underground.

To be sure, a President hoping to rescind the practice of OIRA's regulatory review would be unlikely to shift the work to the RMOs. At the same time, a President might wish to capitalize on public praise for returning authority to the agencies while nonetheless gaining from the RMOs' less public ability to effect control. A subsequent President might then wish to keep the whole process of influence secret. Alternatively, the RMOs themselves might fill the gap of their own accord.

Discussions about reforming OIRA should thus incorporate analysis of the RMOs' authority to avoid the "'whack-a-mole' effect," where a restriction on agency practice simply leads to experimentation to get around the restriction.[510] Attention to the RMOs' work more generally is critical for understanding OMB's capacity to control the administrative state.[511]

---

509. *See* RADIN, *supra* note 98, at 116 (discussing pressure put on the director of EPA's Office of Research and Development to "focus on program outcomes in a manner that was acceptable to the OMB budget examiners"). Recall also that centralized review of regulations began as a practice on the budget side long before OIRA was even created. *See supra* note 80. Moreover, when Congress proposed placing certain transparency requirements on OIRA in 1990, the Bush I Administration suggested in response that it could just as well perform OIRA's regulatory review functions from "other White House offices." Vanessa Jo Grimm & Kevin Power, *White House to Hill: Let's Abolish OIRA*, 9 GOV'T COMPUTER NEWS, May 14, 1990, 1990 WLNR 4439229.

510. Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 526 (2014) (describing the challenges of policing agencies that shift their policymaking form in response to efforts to limit that form because "agencies are likely to react to a restriction on one type of policymaking activity (to the extent that the restriction works at all) by moving to even more difficult-to-monitor methods of setting policy").

511. For example, an emerging body of scholarship considers the possibility that agencies try to avoid OIRA review by changing the form of their policymaking and discusses what OIRA's response should be to this potential phenomenon. *See, e.g.*, Mendelson & Weiner, *supra* note 79, at 481-507 (creating a typology of OIRA review avoidance tactics and suggesting that "the problem of agency avoidance and response measures [is] . . . a problem of optimal

CONCLUSION

This Article began with the observation from Paul O'Neill, former deputy director of OMB, that policy debates are "reflected, recorded, and battled over" in budget numbers and that "the numbers are the keys to the doors of everything."[512] By identifying and elucidating the levers OMB has at its disposal to control agency policymaking through the President's budget process, I have sought to show that this observation is correct. It is through the budget that OMB finds itself "in the stream of every policy decision made by the federal government."[513] While OIRA's control of agency policymaking through regulatory review is important, it is only one mechanism through which OMB may exercise policymaking authority over federal agencies.

Beyond this descriptive analysis, the Article sketched the various ways in which OMB's budget work is simultaneously salutary and concerning. This work appears to go no further than is legally authorized, and it plays a valuable role in coordinating the expansive administrative state. But at the same time, by operating non-transparently, by giving so much discretion to lower-level political appointees and civil servants, and by making it possible for values-based decision making to be obscured by technocratic-sounding analysis, OMB's Resource Management Offices present troubling challenges to accountability.

The Article therefore offered a series of potential reforms that would improve accountability while still maintaining OMB's beneficial coordinating role: an executive order governing the RMOs' process and requiring more transparency; increased OMB efforts to make its budget work more transparent and to engage the public on its government-wide policy decisions;

---

regulation"); Nou, *supra* note 19 (discussing agency incentives to avoid presidential review). While the literature on OIRA avoidance has not yet incorporated consideration of the RMOs' authority over agency policymaking, the RMOs' work greatly increases the capacity of OMB to oversee agency action of all varieties. Future work on OIRA avoidance should thus include analysis of the RMOs' collaboration with OIRA and overall oversight. *Compare* Mendelson & Weiner, *supra* note 79, at 470 n.86 (noting in passing that "it is unclear how often the budget side of OMB acts to assist the regulatory side of OMB and OIRA"), *and* Tozzi, *supra* note 80, at 67 (recommending that "primary jurisdiction for the review of select rules [be assigned] to budget examiners"), *with* Copeland, *supra* note 19, at 120 (suggesting that program examiners already need to "sign off" on OIRA's review of rules for the program examiners' agencies), Sunstein, *supra* note 19, at 1845 (noting close collaboration between RMOs and OIRA on rules of shared interest), *and Program Examiner*, *supra* note 74 (explaining that program examiners "perform . . . regulatory analyses").

512. Martin, *supra* note 1, at 72.

513. *Id.*

greater congressional monitoring and oversight of the RMOs' budget work; and expanded attention and engagement from civil society organizations.

In the end, however, the Article is not intended to provide the last word, but rather to open a conversation, on the President's budget as a source of agency policy control.