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Controlling Agencies through the President's Budget Process

By Eloise Pasachoff*

It is obvious that the federal budget is central to the functioning of the administrative state. But a critical element about the federal budget is often missing from analyses of both the budget and the administrative state more generally: the way the President's budget process—the year-round, continuous process of developing the new budget while executing the last one—provides a major source of control over agency policy choices, regardless of whether or how much Congress eventually appropriates at all. Scholars, practitioners, and observers of the administrative state ought to acknowledge this reality and consider its implications.

In the administrative law literature, OMB is often referred to interchangeably with OIRA, the Office of Information and Regulatory Affairs. The idea behind that interchangeability is that review of regulations is the key tool for centralized control of agency policymaking. But OIRA is only one office within OMB, with only around 45 of the 435 OMB employees. Almost half of OMB's employees work in the "Resource Management Offices" (RMOs), five subject-matter-focused offices on OMB's "budget side" that collectively are more than four times as big as OIRA. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE



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PRESIDENT, FISCAL YEAR 2016 BUDGET 11 (2015).

OIRA is often jokingly called the most important government office you've never heard of, because of its outsized but secretive role in overseeing regulations. But the RMOs surely vie for that title. Their pervasive role overseeing agencies' work on policy choices and implementation associated with the budget and management is even

less well known than OIRA's work is. And in some sense, the RMOs oversee even more of the federal executive establishment than OIRA does. In part, this is because most independent agencies run their budgets through OMB, whereas they are not subject to OIRA's regulatory review process. But in large part, this is just because money really matters for setting policy choices. As one former political appointee in charge of an RMO has explained, "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." Gordon Adams, *The Office of Management and Budget: The President's Policy Tool*, in THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH 58 (Roger Z. George & Harvey Rishikof eds., 2011).

What are the ways in which the RMOs exert their influence? For each component of the executive budget process—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—the RMOs have a series of levers that function as a form of policy control.

During budget preparation, when agencies are working with OMB to put together their budget requests for Congress, three levers for control exist. Through the *form-and-content lever*, OMB sets *ex ante* requirements for the budget and policy proposals that agencies must submit for OMB's review. In other words, OMB tells agencies what they should put in their budget requests in the first place (the content) and how they should convey this information (the form).

A second lever during budget preparation is the *approval lever*, under which agencies must get OMB approval for their budget requests. Using this lever, OMB tells agencies how their initial budget proposals must be modified before they can be transmitted to Congress. The approval lever functions both at a broad level, securing overall agency compliance with the President's general policy preferences, and at a narrow level, governing budget and policy choices in discrete line items.

The third lever during budget preparation is the *confidentiality lever*. Under this lever, agency officials are not allowed to talk about requests that the agency made that OMB denied. The confidentiality lever limits agencies' ability to state publicly their own views of alternative budget and policy priorities.

OMB continues its influence over agency action during budget execution. Under the *specification lever*, the RMOs "apportion" and otherwise define how agencies spend the funds

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Congress has appropriated. This is a formal lever with tools set forth in law, such as in the Anti-Deficiency Act, 31 U.S.C. § 1512(a) (2012). The other lever relevant to budget execution is more informal: the *monitoring lever*, under which OMB, with individual RMO staff members assigned to each agency, oversees the ongoing work of that agency through regular communication.

OMB also uses the executive budget process to implement government-wide management initiatives, which are often more substantive than technical. President Bush's faith-based initiative, for example, found expression through the management side of OMB. There are two levers for control at work during management implementation. One is the *presidential management agenda lever*, where management initiatives either explicitly contemplate substantive policy choices or implicitly lead to them. The other is the *budget-nexus lever*, where the budget documents themselves require implementation of management initiatives.

Collectively, these seven levers provide a great deal of control over the administrative state. Is it *presidential* control? It depends. On the one hand, because of the RMOs' direct line into agencies, this process provides a ready way to communicate presidential (and OMB director) direction. On the other hand, because of the deep programmatic knowledge and frequent longevity of RMO staff, conversations with expert RMO staff can often affect what the President and OMB director decide. In these circumstances, the RMO views help shape presidential control. Moreover, many RMO decisions do not require elevation to more senior political appointees at all, and so from the agency perspective, RMO direction can often feel less like presidential control and more like control by the

RMO staff member with the agency relationship.

What ought we to make of the RMOs' expansive work? There are many good things about this process, not the least of which is that it is undoubtedly legal. This might sound like faint praise, but given the perpetual questions about the legal basis for OIRA's decision-making authority, it is no small matter. More substantively, the RMOs provide a valuable service in coordinating across the vast executive establishment, thereby promoting

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efficiency. In addition, given the high caliber of RMO staff members, decisions may often be better along some metrics than had agencies chosen on their own.

However, there is also cause for concern about the way OMB exerts its control through the executive budget process. Three different accountability issues arise. First, there is a lack of transparency in the way the RMOs' work is conducted. There is a great deal that we do not know about the day-to-day process of this work and about the substance of policy ideas that OMB rejected. OMB offers two rationales for this lack of transparency, but both responses are over-inclusive. OMB's claim for “policy consistency from the executive branch,” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF

THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2014), § 22.3, at 2, for example, should not necessarily demand a fiction that there was never any internal disagreement. Relatedly, OMB's claim that confidentiality is needed to protect the deliberative process, *id.* at § 22.5, at 3, should not necessarily require secrecy about all of the procedural steps—such as who met with whom, when, and about what. That kind of information could let the public assess potential capture problems. Greater transparency could also deter one-sided dealing through the budget process.

The second accountability problem is that the RMOs' work can elevate OMB's civil servants and lower-level political appointees over Senate-confirmed agency officials, and the ultimate lines of responsibility are not well defined. The staff in the RMOs can exert a lot of control throughout the budget process, and political actors in the agencies cannot elevate everything to political officials at OMB and the White House without losing credibility. But the lack of transparency with which the civil servants interact with agency officials means that everyone can avoid accountability when need be. The RMOs' work is so behind-the-scenes that no one really talks about it, much less calls them to account for it. The confidentiality lever limits agency officials from saying what they want to say. And the President can use this system to distance himself from hard decisions.

The third accountability problem is that the RMOs' work on the budget can seem very technocratic, and that perception can obscure value-driven or partisan decision making. Values-based decision making is perfectly valid for a budget; in fact, one common definition of a budget document is that it is a statement of

values. But sometimes the budget can be portrayed or perceived as a “just the facts” document, obscuring the fact that real choices based on values are being made. Decisions that are being made on the basis of values can be masked with technocratic rhetoric.

All three of these issues make it difficult for Congress and the American public to hold anyone accountable for these decisions—agencies, OMB, and the White House more generally. How, then, to respond to these problems, keeping what is good about the RMOs’ work while at the same time increasing accountability?

Some reforms are possible inside the executive branch itself (for an administration that wishes to make them). For example, presidents could issue executive orders governing the RMOs’ process, like the executive orders presidents routinely issue governing OIRA’s process. Ideally these executive orders would make the process more transparent and in so doing would create a degree of ownership by the President of the whole system. Both steps would increase accountability. OMB itself could do more to make its process more transparent, in the same way

that OIRA has implemented a regulatory dashboard to improve the public information flow about the process of regulatory review.

But presidential administrations have incentives to maintain opacity, so other reforms outside the executive branch are important as well. For its part, Congress should pay more attention to the intra-executive budget process and ask more questions about it. Congress could, for example, require the political appointees who run each RMO but who are not Senate confirmed to testify about their budget and policy work. Congress could also make these positions Senate confirmed. There would be a lot of drawbacks to doing so, but there could also be some countervailing benefits in terms of oversight. History suggests that Congress could well take this project on; when President Nixon began to use OMB in politicized ways, for example, Congress reacted in part by making more OMB positions Senate confirmed.

Civil-society organizations also have an important role to play as watchdogs of OMB. These organizations should start paying closer attention to seemingly obscure budget instructions coming from the OMB

director. They should try to get Congress to conduct more oversight of the budget process. And they should include RMO staff in their lobbying as they do Congress, agency officials, and OIRA.

Understanding the work of the RMOs also casts doubt on a reform proposal critics have sometimes offered about OIRA: that it has become too powerful and ought to be cut back, returning final rulemaking authority to agencies. The RMOs’ existence demonstrates why such a reform would not have the desired outcome. OIRA’s process is vastly more transparent than the similarly expansive budget process. If OIRA’s work were cut back, the budget process could easily take it up, while driving the reality of OMB’s control further underground.

Paul O’Neill, a former deputy director of OMB, once explained that policy debates are “reflected, recorded, and battled over” in budget numbers and that “the numbers are the keys to the doors of everything.” The administrative law community ought to pay much more attention to how these keys operate. ○

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