

FOREWORD

Presidential Brokering in the Regulatory State

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ABSTRACT

Presidents seeking to make regulatory policy face formidable hurdles—most recently, heightened litigation risk, reduced judicial deference, and political polarization. In response, they have increasingly relied upon the Executive Office of the President (“EOP”) to manage these challenges. This Foreword spotlights the practice of presidential brokering, a structured process often led by White House policy councils such as the Domestic Policy Council and National Economic Council. Brokering involves the delegated authority to generate and test regulatory options through moderated deliberation with the rulemaking agency and other components of the EOP, ultimately shaping select rules to align with the highest presidential priorities.

This Foreword provides an institutional account of presidential brokering—distinguishing it from more commonly studied mechanisms of administrative oversight, such as regulatory review and executive orders. Through historical and contemporary examples, it illustrates how brokering promotes agency responsiveness through a form of procedural legitimacy and

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enhances rulemaking quality by leveraging diverse perspectives within the EOP. Despite its benefits, however, presidential brokering also presents transparency concerns and imposes significant decision-making costs.

The Foreword thus proposes several reforms. For presidents, they include the continued issuance of publicly available domestic policy directives as well as measures to facilitate more effective regulatory prioritization. Congress, for its part, could enhance its oversight by leveraging statutory offices within the EOP. Finally, courts should revisit the functional premises of the major questions doctrine and continue to reinforce the incentives for honest brokering through independent evaluation of a rule's legal and policy justifications.

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INTRODUCTION

Presidents seeking to make policy through the administrative state—whether regulatory or deregulatory—face daunting challenges. Regulations that seemed settled have now been reopened for litigation.¹ Once in court, agencies no longer receive judicial deference on questions of statutory interpretation.² Their efforts to explain decisions

¹ See, e.g., *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. 799, 806 (2024).

² See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

will be flyspecked.³ Ambitious regulatory efforts will be greeted with skepticism.⁴ Meanwhile, the political landscape remains polarized, requiring great skill to navigate the noise. All of this exists in a world of novel regulatory problems and technological uncertainty.

No wonder presidents have decided not to go it alone. For decades now, they have been building out their own bureaucracy within the Executive Office of the President (“EOP”) as a means of centralizing authority.⁵ A cursory glance at the law reviews might lead one to think that the sole manifestation of this phenomenon was the review process led by the Office of Information and Regulatory Affairs (“OIRA”), which resides in the EOP’s Office of Management and Budget (“OMB”).⁶ By executive order, agencies must submit “significant” regulatory actions to OIRA to ensure that they align with presidential priorities and cost-benefit principles.⁷ Dozens of articles by legal scholars on presidential oversight foreground OIRA’s review process—its mechanics,⁸ criteria,⁹ legality,¹⁰ and prudence.¹¹ Many social scientists too—particularly those writing in an empirical vein—focus on OIRA as the “point of the president’s spear” when it comes to administrative control.¹²

³ See, e.g., *Ohio v. EPA*, 603 U.S. 279, 294–98 (2024); *id.* at 309–19 (Barrett, J., dissenting) (arguing the majority applied stricter standards of review than in previous cases).

⁴ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 113 (2022); *West Virginia v. EPA*, 597 U.S. 697, 706 (2022); *Biden v. Nebraska*, 600 U.S. 477, 483 (2023).

⁵ See JOHN HART, *THE PRESIDENTIAL BRANCH* 3–12 (Christopher J. Kelaher ed., 2d ed. 1995); Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 244 (John E. Chubb & Paul E. Peterson eds., 1985) (“Because the president can count on unequalled responsiveness from his own people, increases in White House organizational competence—for example, through greater size, division of labor, specialization, hierarchic coordination, formal linkages with outside organizations and constituencies—appear to him to have direct, undiluted payoffs for the pursuit of presidential interests.”).

⁶ See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 65 (2006) (“Scholars concentrate primarily on OIRA and less on other White House offices.”).

⁷ Exec. Order No. 12,866, 3 C.F.R. 638, 642–43 (1994), *reprinted as amended* in 5 U.S.C. § 601 note (2018).

⁸ See, e.g., Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1844–63 (2013).

⁹ See, e.g., Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1144–47 (2001) (discussing the role of cost-benefit analysis in agency decision-making); Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1401–04 (2002).

¹⁰ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–31 (2001); Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1097 (2006).

¹¹ See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1300–04 (2006); Richard L. Revesz, *The Evolution of Regulatory Review*, 77 ADMIN. L. REV. 131, 132–34 (2025) [hereinafter Revesz, *Regulatory Review*].

¹² Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?*, 43 PRESIDENTIAL STUD. Q. 443, 444 (2013)

Although OIRA is undoubtedly important, this lopsided attention to one corner of the EOP has obscured other centralized actors within it, such as the White House policy councils. Unlike administration- and issue-specific “czars,”¹³ White House policy councils like the National Economic Council (“NEC”) and the Domestic Policy Council (“DPC”) are increasingly institutionalized features of the administrative state that merit greater scholarly scrutiny.¹⁴ Both DPC and NEC have persisted across presidencies from both parties since the Clinton Administration, with precursors dating back to President Nixon.¹⁵ Although both are technically “councils” comprising cabinet officers and other units within the EOP, in practice, senior White House officials and their staffs lead and drive their day-to-day work.¹⁶

For some of the most high-profile matters, agencies do not simply send draft rules for presidential consideration through OIRA.¹⁷ To the contrary, the President has called upon DPC and NEC to help develop

(“OIRA is the point of the president’s spear in his battle to control the content of federal regulations.”); *see also, e.g.*, Alex Acs, *Policing the Administrative State*, 80 J. POL. 1225, 1226 (2018) (“[T]he conventional wisdom [is] that OIRA has been an effective ‘cop’ of the administrative state.”); Annie Benn, *Presidential Partisanship and Regulatory Review*, 53 PRESIDENTIAL STUD. Q. 316, 318 (2023) (“[T]hrough the review process, OIRA shapes the regulations that emerge from the agencies.”); Simon F. Haeder & Susan Webb Yackee, *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?*, 28 J. PUB. ADMIN. RSCH. & THEORY 475, 475 (2018) (“Presidents rarely intercede personally; instead, they rely on [OIRA] . . . to represent presidential interests during regulatory policymaking.”); Alexander Bolton, Rachel Augustine Potter & Sharece Thrower, *Organizational Capacity, Regulatory Review, and the Limits of Political Control*, 32 J.L. ECON. & ORG. 242, 242–43 (2016) (describing OIRA as one of “the political control apparatus[es] of the administrative state”).

¹³ Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2578 (2011).

¹⁴ *See* SHIRLEY ANNE WARSHAW, *THE DOMESTIC PRESIDENCY* 5 (1997) (defining an “institutional unit” within the EOP as one that “recur[s] from administration to administration, ha[s] a continual presence within White House decision making, involve[s] a staff with certain hierarchical qualities and bureaucratic functions, and whose primary responsibility [i]s consistently focused on domestic policy”); TEVI TROY, *HOW PRESIDENTS USE WHITE HOUSE POLICY COUNCILS TO MANAGE ADMINISTRATION PRIORITIES* 4–5, 8–15 (2024) (describing how “the last half century has seen the occasional creation, and even more infrequent dissolution, of White House policy councils,” though “for the most part they endure”).

¹⁵ *See infra* Section I.A.

¹⁶ *See* BRADLEY H. PATTERSON JR., *THE WHITE HOUSE STAFF* 77 (2000) (observing that it is “the top staffs of the councils—senior White House officers—who supply the leadership, scope out the questions, draft the papers, and call the meetings”).

¹⁷ *See* Bressman & Vandenbergh, *supra* note 6, at 49 (“Although OIRA exerts influence on many day-to-day issues, other White House offices often wield more influence on high-profile or high-stakes matters.”); Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 109 (2016) (“Some participants stressed that the White House will have much greater influence over a small number of rules that administration officials consider to be the most significant ones.”).

and drive rules *ex ante*—that is, well before they are submitted for review. Consider some examples:

- During his campaign, President Clinton promised to “end welfare as we know it.”¹⁸ In August 1996, he signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”),¹⁹ which imposed stricter time limits and work requirements on welfare recipients.²⁰ Clinton subsequently gave DPC the “lead role” in welfare-reform implementation, including a rulemaking effort tightening the child disability standard for supplemental security income.²¹
- During the Obama Administration, White House policy councils sometimes started “a process to consider or promote rulemaking and to help coordinate discussions long before OIRA review” began.²² For example, President Obama had a series of “We Can’t Wait” rulemaking initiatives,²³ one of which included a Department of Health and Human Services (“HHS”) rule requiring all Head Start grantees failing to meet rigorous quality benchmarks to compete for continued federal funding.²⁴
- During the first Trump Administration, Trump’s DPC Director Joe Grogan “had little patience for agencies that fail[ed] to follow through on Trump’s deregulatory measures.”²⁵ Grogan worked alongside NEC to help advance an HHS rule aimed at broadening healthcare options for small businesses.²⁶

¹⁸ Jasmin Sethi, *Lessons for Social Scientists and Politicians: An Analysis of Welfare Reform*, 17 GEO. J. ON POVERTY L. & POL’Y 5, 16, 26 (2010) (quoting Bill Clinton, Governor, Ark., Acceptance Speech at 1992 Democratic National Convention, at 56:20 (July 16, 1992), <https://www.c-span.org/program/historic-convention-speeches/governor-bill-clinton-acceptance-speech-at-1992-democratic-national-convention/146779> [<https://perma.cc/SWB9-5TK6>]).

¹⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

²⁰ *See id.* sec. 103, § 407, 110 Stat. at 2129–34 (codified as amended at 42 U.S.C. § 607).

²¹ Letter from Carol H. Rasco, Assistant to the President for Domestic Pol’y, to Leon Panetta, White House Chief of Staff, & Erskine Bowles, White House Deputy Chief of Staff for Operations (Nov. 25, 1996) (on file with author).

²² Sunstein, *supra* note 8, at 1849.

²³ *Id.* at 1849 n.47.

²⁴ *See* Press Release, Off. of the Press Sec’y, The White House, We Can’t Wait: President Obama Takes Action to Improve Quality and Promote Accountability in Head Start Programs (Nov. 8, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/08/we-cant-wait-president-obama-takes-action-improve-quality-and-promote-ac> [<https://perma.cc/369B-YWKY>].

²⁵ Elaina Plott Calabro & Peter Nicholas, *How a Forgotten White House Team Gained Power in the Trump Era*, ATLANTIC (June 27, 2019), <https://www.theatlantic.com/politics/archive/2019/06/trump-domestic-policy-council/592516/> [<https://perma.cc/H64F-9KJG>].

²⁶ *See id.*

The rule introduced a mechanism whereby employers could provide tax-exempt funds, known as health-reimbursement arrangements, enabling employees to purchase insurance on the individual market rather than relying on traditional company plans.²⁷

In this manner, presidents have turned to White House policy councils to advance their highest regulatory and deregulatory priorities. More recently, the second Trump Administration has explicitly called upon independent regulatory agency chairs to “regularly consult with and coordinate policies and priorities with” DPC and NEC, alongside OMB.²⁸

The importance of this subset of rules—those that have been instigated and actively shaped by White House policy councils—has been heightened by the emergence of the major questions doctrine. Formulations vary, but the basic idea of the doctrine is that courts will “expect Congress to speak clearly” when it assigns agencies matters of “economic” or “political” significance.²⁹ Regulations subject to the major questions doctrine in recent years have been central to presidential regulatory agendas,³⁰ including a COVID-19 vaccination and testing mandate for workers at large employers³¹ and a rule addressing carbon dioxide emissions from existing natural-gas- and coal-fired power plants.³² Despite being issued by the Department of Labor and Environmental Protection Agency, respectively, these regulations involved the active participation of the White House.³³

One of the functional premises of the major questions doctrine—particularly when justified as a canon of avoidance—is that Congress possesses superior deliberative lawmaking procedures.³⁴ In this view,

²⁷ See *id.*

²⁸ Exec. Order No. 14,215, 90 Fed. Reg. 10,447, 10,448 (Feb. 18, 2025).

²⁹ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).

³⁰ See Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the “Chain of Dependence” Across Administrative Law*, 65 B.C. L. REV. 511, 514 (2024) (“The doomed [major questions doctrine] policies were promulgated by agencies linked to presidents with formal supervisory power who directed, actively supported, and took public responsibility for those agencies’ key policy decisions.”).

³¹ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 115, 117 (2022).

³² See *West Virginia v. EPA*, 597 U.S. 697, 711–15, 724 (2022).

³³ See Jody Freeman, *The Environmental Protection Agency’s Role in U.S. Climate Policy—A Fifty Year Appraisal*, 31 DUKE ENV’T L. & POL’Y F. 1, 61 (2020) (describing how White House officials “Podesta, McDonough, and Deese” provided “crucial support for McCarthy and her agency as EPA delivered major climate rules,” including the Clean Power Plan); Short & Shugerman, *supra* note 30, at 540–48 (discussing presidential involvement in the Clean Power Plan and the Occupational Safety and Health Administration’s emergency temporary workplace-safety standard).

³⁴ See *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 124 (Gorsuch, J., concurring) (“[T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine.”);

bicameralism and presentment result in policy choices that are well debated and more democratically legitimate than those made by the President. To evaluate this claim of comparative competence, however, it is critical to appreciate the increasingly institutionalized structures and processes within the presidency to formulate what are likely to be designated as “politically” significant major rules.

This Foreword refers to such dynamics as *presidential brokering*, seeks to explain why this distinct method of agency influence has developed, and normatively evaluates the practice. In the rulemaking context, presidential brokering consists of the delegated authority to generate regulatory options from different perspectives throughout the executive branch; to test the arguments through actively moderated deliberation; and then to elevate decisions up the presidential hierarchy as necessary. When it comes to domestic regulatory policy,³⁵ these delegations often, though not always,³⁶ run to DPC and NEC. Brokering, in turn, can vary in its level of formality. The most formal version involves the use of standardized decision-making memoranda and works through a hierarchy of committees, from lower-level interagency policy committees to those at the level of deputies and then principals. The more informal—and far more common—version uses working groups consisting of personnel from agencies and various units of the EOP, led and managed by White House policy-council staff.

After persisting for years through norms and internal documents,³⁷ the brokering process was publicly memorialized for the first time by the Biden Administration in a formal directive identifying DPC as the “principal forum” for advising and assisting the President in domestic policy development.³⁸ Mirroring counterparts in the national security

Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2048 (2018) (“Interpreted in its best light, the [major questions] doctrine aims to protect and to strengthen the connection between the people and governmental action by presuming that a popular and deliberative process settles major questions of policy.”); *Gundy v. United States*, 588 U.S. 128, 154 (2019) (Gorsuch, J., dissenting) (“Article I’s detailed processes for new laws were also designed to promote deliberation.”).

³⁵ The category of domestic policy may best be thought of as the “residual” of other more defined arenas such as national security or economic policy. Karen M. Hult & Charles E. Walcott, *Domestic Policy Development in the White House*, in *GOVERNING AT HOME* 84, 84 (Michael Nelson & Russell L. Riley eds., 2011). Representative issues include those relating to the environment, health, food, labor, and crime. *See id.* at 92–101. But, of course, the borders between domestic, economic, and national security can be porous, sometimes resulting in intra-White House turf wars. *See id.*

³⁶ President Obama, for example, turned to the Office of Science and Technology Policy (“OSTP”) and the Council on Environmental Quality (“CEQ”) to coordinate national ocean policy. *See* Exec. Order No. 13,547, 3 C.F.R. 227, 229 (2011). Specifically, OSTP and CEQ were to lead a National Ocean Council charged with promoting “stewardship of the ocean, our coasts, and the Great Lakes” to be “healthy[,] . . . resilient, safe[,] and productive.” *Id.* at 227.

³⁷ *See infra* notes 214–28 and accompanying text.

³⁸ Memorandum from President Joseph R. Biden to Cabinet Sec’y’s et al. (May 6, 2021) [hereinafter *Domestic Policy Presidential Directive*], <https://bidenwhitehouse.archives.gov/>

realm,³⁹ the document's stated purpose was to ensure that domestic policy implemented by agencies was "developed and coordinated through a systematic, evidence-driven process" designed to "ensure that all major priorities are addressed, the views of all relevant agencies are considered, [and] appropriate options are analyzed."⁴⁰ In other words, the directive called for DPC to lead a process that incorporated the views of a range of intra-executive branch actors in order to identify policy options and priorities.

Importantly, that process involves not only the rulemaking agency but also a number of structurally distinct entities within the EOP, such as OMB, the Council of Economic Advisors ("CEA"), and the Office of Science and Technology Policy ("OSTP").⁴¹ These entities have generally been established by statute rather than executive action, are charged with congressionally mandated duties and responsibilities, feature heads that require Senate confirmation, and contain career staff that persist through administrations.⁴² As a result, these statutory units are more structurally independent, as compared with the White House, from the personal interests of the President.⁴³ By and large, Congress created them to serve the office of the President, rather than its occupant.⁴⁴ They were designed, in other words, to provide for what Congress, at the time of their creation, perceived as the longer-run interests of the presidency.

This is not to say, of course, that the practice of presidential brokering is always followed. The previous Trump Administration, for example, featured many counterexamples⁴⁵ despite concerted efforts to reestablish the process,⁴⁶ which may help explain why its deregulatory agenda suffered so many losses in court.⁴⁷ Indeed, there are strong

briefing-room/presidential-actions/2021/05/06/domestic-policy-presidential-directive-1-dppd-1/ [https://perma.cc/TN5U-FDVC].

³⁹ See, e.g., Memorandum from President George H.W. Bush to Vice President Dan Quayle et al. (Jan. 30, 1989), <https://bush41library.tamu.edu/files/nsd/nsd1.pdf> [https://perma.cc/H9LQ-RLRY].

⁴⁰ Domestic Policy Presidential Directive, *supra* note 38.

⁴¹ See *id.*; see also *infra* Section I.B.

⁴² See *infra* Section I.B.

⁴³ See *infra* notes 122–23 and accompanying text.

⁴⁴ See Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1151–52, 1211 (2020).

⁴⁵ See Karen M. Hult, *Assessing the Trump White House*, 51 PRESIDENTIAL STUD. Q. 35, 44 (2021) ("To the extent a standard model for guiding presidential decision making has existed in past presidencies, it appeared to be conspicuously absent under Donald Trump." (citation omitted)).

⁴⁶ See *infra* notes 223–26 and accompanying text.

⁴⁷ By one measure, agencies during the Trump Administration had a seventy-eight percent loss rate in litigation—losing 192 out of 246 challenges to the agencies' efforts to implement policy. *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (Apr. 25, 2022), <https://policyintegrity.org/trump-court-roundup> [https://perma.cc/W7C4-93JE].

indications that the practice is not being followed in Trump's second term as well,⁴⁸ but much remains to be seen, especially with a Chief of Staff who professes to prize decision-making discipline.⁴⁹ In the meantime, this Foreword highlights some of the consequences for presidents departing from these established practices. It also considers some exogenous reforms that could help encourage brokering despite an individual president's instincts to the contrary.

Appreciating the dynamics of presidential brokering can also enrich empirical work on administrative control. Some of the literature, for example, posits that presidents use OIRA-coordinated review as a means of partisan control.⁵⁰ Puzzlingly, however, some scholars find that "ideological misalignment between the president and promulgating agencies does not affect review outcomes."⁵¹ Perhaps one partial explanation has been the role of policy councils in influencing administrative agencies *ex ante*—that is, before the rules are submitted for review. If DPC or NEC has achieved a great deal of alignment before the review process begins, then some of the findings to date may be less surprising or at least in need of further refinement. Other empirical efforts focus solely on the "unilateral" issuance of executive orders as evidence of presidential control.⁵² Brokering, however, occurs independently of those orders, thus potentially understating the true magnitude of presidential influence. Finally, although the policymaking process has been studied in depth for legislative proposals⁵³ and executive orders,⁵⁴ focusing specifically on rulemaking is valuable because of the unique challenges of that process as well as the implications for OIRA and judicial review.

⁴⁸ See, e.g., Jonathan Swan & Maggie Haberman, *Inside Trump's Hastily Written Proposal to 'Own' Gaza*, N.Y. TIMES (Feb. 5, 2025), <https://www.nytimes.com/2025/02/05/us/politics/trump-gaza-takeover.html> [<https://perma.cc/HNP7-NXJJ>] ("Inside the U.S. government, there had been no meetings with the State Department or Pentagon, as would normally occur for any serious foreign policy proposal, let alone one of such magnitude. There had been no working groups. The Defense Department had produced no estimates of the troop numbers required, or cost estimates, or even an outline of how it might work.").

⁴⁹ See Rachael Bade, Kara Tabor, Renee Klahr & Krystal Campos, *'The Oracle,' 'the Ice Maiden' and the New Discipline of Trump's White House*, POLITICO (Mar. 22, 2025, 2:00 PM), <https://www.politico.com/news/magazine/2025/03/22/trump-white-house-james-blair-economy-judges-00242434> [<https://perma.cc/37GB-C9QA>].

⁵⁰ See, e.g., sources cited *supra* note 12.

⁵¹ Benn, *supra* note 12, at 316; see also Haeder & Yackee, *supra* note 12, at 484 (finding that ideological extremity in promulgating agencies does not affect review outcomes).

⁵² See, e.g., Kenneth R. Mayer & Kevin Price, *Unilateral Presidential Powers: Significant Executive Orders, 1949–99*, 32 PRESIDENTIAL STUD. Q. 367, 368–70 (2002).

⁵³ See, e.g., ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT'S PROGRAM* (Ira Katznelson et al. eds., 2002).

⁵⁴ See, e.g., ANDREW RUDALEVIGE, *BY EXECUTIVE ORDER* (2021).

Part I begins by placing White House policy councils within the larger institutional context of the EOP. This historical background highlights the structural differences between the White House and other components of the EOP designed by Congress to serve the office of the presidency rather than the individuals within it. This framing seeks to explain why presidents have turned to policy councils rather than alternatives such as OIRA to help advance their highest priority rules. Because such councils are led by White House advisors that do not require Senate confirmation, possess no programmatic duties beyond serving the President, and lack career staff, they are more likely to be responsive to the President's political agenda. Of course, in reality, individual personalities and reputations are relevant as well, but focusing primarily on these structural characteristics can help generate testable hypotheses about how the presidency operates as an institution. More broadly, the discussion seeks to help open the black box of the presidency,⁵⁵ akin to analogous efforts to explore the internal dynamics of traditional administrative agencies.⁵⁶

Against this backdrop, Part II then turns to the development of brokering to implement the President's agenda, given the limits of other better-studied mechanisms of agency control. Strategic appointments suffer from familiar principal-agent problems due to the need for Senate confirmation, narrow statutory missions, and the potential for capture by career staff.⁵⁷ Removals of recalcitrant personnel, in turn, can be politically

⁵⁵ There is a great deal of insightful work on the institutional presidency in political science, but much of it requires updating. *See, e.g.*, PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* (2d ed., rev. 1998); JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY* (Michael Nelson ed., 2d ed. 2000); MATTHEW J. DICKINSON, *BITTER HARVEST* (1996); HART, *supra* note 5; STEPHEN HESS & JAMES P. PFIFFNER, *ORGANIZING THE PRESIDENCY* (4th ed. 2020); JOHN H. KESSEL, *THE DOMESTIC PRESIDENCY* (Katharine G. Tsoulcas ed., 1975); WARSHAW, *supra* note 14; GOVERNING AT HOME, *supra* note 35. The legal literature is comparatively sparser, though similar themes can be found in work sensitive to the institutional aspects of the presidency. *See, e.g.*, ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020); Catherine Crump, *Reforming Policing from the White House: The Challenges of Implementing Police Reform Through Executive Order*, in *RESEARCH HANDBOOK ON PENAL POLICY* (Alessandro Corda ed., forthcoming 2025) (on file with author); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1197–1203 (2012) (recognizing that regulatory coordination can also occur through “White House policy offices, councils, and special advisors” and considering some of the tradeoffs with OIRA, which the authors argue is more “reactive” in nature and focused on “economic efficiency”).

⁵⁶ *See, e.g.*, Rachel E. Barkow, Foreword, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1137 (2016); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) (analyzing power allocation within agencies); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1248 (2017) (discussing internal operations of agencies); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 229 (2016) (discussing divisions of authority within administrations).

⁵⁷ *See infra* notes 170–77 and accompanying text.

costly.⁵⁸ Executive orders, for their part, are not self-executing; indeed, empirical research reveals that agency compliance with them is uneven.⁵⁹ Finally, OIRA-coordinated regulatory review is more reactive than proactive. Generally speaking, the process does not begin until the agency has already completed substantial drafting of the rule.⁶⁰ Presidents have thus developed policy councils to spur agency rulemakings through the brokering process.⁶¹ This Part will illustrate some of these dynamics with an extended case study involving a welfare-reform-related rulemaking during the Clinton Administration.

Part III then turns to a more normative evaluation of presidential brokering by White House policy councils in the rulemaking context. It concludes that the phenomenon has both strengths and weaknesses. One salutary aspect for those who believe presidential oversight provides a measure of accountability is that presidential brokering likely increases agency responsiveness as compared with ad hoc “jawboning.”⁶² This is especially likely when the process is perceived as “honest” — that is, reflecting a sincere effort to identify options from multiple vantage points in ways that build trust and legitimize intra-executive branch decision-making.⁶³ Brokering also improves the quality and effectiveness of regulatory policymaking by drawing upon the expertise of not only the rulemaking agency but also the statutory components of the EOP. Many of these components, such as the CEA, are headed by subject-matter experts drawn from academia or elsewhere who are themselves aided by experienced career staff. Relatedly, presidential brokering also serves a debiasing function. By exposing the political instincts of the White House to competing perspectives, the deliberative process can reduce the White House’s proclivities toward groupthink and other familiar cognitive biases. In this manner, presidential brokering

⁵⁸ See *infra* notes 174–75 and accompanying text.

⁵⁹ See *infra* notes 183–94 and accompanying text.

⁶⁰ See *infra* notes 207–13 and accompanying text.

⁶¹ See Sunstein, *supra* note 8, at 1849–50 (“While OIRA has written formal ‘prompt letters,’ designed to promote agency action, such ‘prompting’ is far more likely to occur informally and from other offices, which have a particular responsibility to explore desirable policy initiatives.” (footnote omitted)); CHRISTOHER P. LIDDELL, *YEAR ZERO* 142 (Guian A. McKee & Marc J. Selverstone eds., 2024) (describing “policy councils” as “the integrating force in the White House” with “elaborate structures and procedures for integrating the diverse units in the organization”).

⁶² See, e.g., Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 (1980) (describing discussions that “pit[] White House advisors . . . against agency officials” as “a variation . . . of presidential ‘jawboning’”); Richard J. Pierce, Jr., *Saving the Unitary Executive from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 600 (2010) (book review) (discussing “[i]argely invisible ad hoc White House jawboning”).

⁶³ See *infra* notes 216–18 and accompanying text.

can further administrative law values such as political accountability and effectiveness.⁶⁴

On the other side of the ledger, however, are a number of features that weaken these values. Perhaps most importantly, these presidential brokering dynamics are largely shielded from public and congressional scrutiny. This lack of transparency stymies monitoring and increases the risk of capture. In addition, the potential for principal-agent problems between the President and the policy councils persists. Policy councils are often staffed by individuals who have worked for interest groups, which may exert outside influence as a result. Second, the broad scope of policy-council responsibilities necessarily results in information asymmetries that cannot be completely redressed through elevation. Finally, presidential brokering also raises concerns about the efficiency of the process. The decision costs of the practice are extremely high. These decision costs, in turn, are exacerbated by the overlapping jurisdictions between DPC and NEC, as well as other components of the EOP.⁶⁵

Part III accordingly offers some suggestions for reform. They include the continued issuance of publicly available domestic policy directives to facilitate transparency and management, as well as measures to facilitate more effective regulatory prioritization, public participation, and coordination with OIRA. Exogenous actors such as Congress and the courts could also bolster the incentives for honest brokering: Congress could leverage statutory offices within the EOP to provide fire-alarm oversight.⁶⁶ Courts, in turn, could revisit some of the functional premises of the major questions doctrine and continue to reinforce the incentives of honest brokering through independent evaluation of a rule's legal and policy justifications.⁶⁷

I. PRESIDENTIAL BUREAUCRACY

Astute observers of the Oval Office have long recognized that presidents have centralized power by drawing authority closer to them through the institutions of the presidency.⁶⁸ Since 1939, those institutions have resided within the EOP.⁶⁹ From its origins, the EOP has exhibited important internal structural variations, emerging from contestations between the President and Congress over the structure of the presidency. These design choices have resulted in various units within the White

⁶⁴ See *infra* Section III.A.1.

⁶⁵ See *infra* Section III.A.2.

⁶⁶ See *infra* Section III.B.2.

⁶⁷ See *infra* Section III.B.3.

⁶⁸ See sources cited *supra* note 55.

⁶⁹ See ARNOLD, *supra* note 55, at 114.

House Office that are less insulated from the President relative to other EOP entities such as OMB and OIRA. Centralization, in this manner, is a matter of degree.⁷⁰ This Part surveys the main structural cleavages for those actors within the EOP most frequently involved in regulatory policymaking and the diverging organizational incentives that result.

A. *White House Policy Councils*

The origins of the EOP can be traced to President Franklin Roosevelt's New Deal aspirations, which put unprecedented pressures on the presidency. "Overlap and redundancy ran through" the jurisdictions of the new agencies he had helped to create.⁷¹ Conditions were thus ripe for the management ideas of public administration scholars like Louis Brownlow and the so-called "Brownlow Committee."⁷² The Committee was charged with devising recommendations regarding the "managerial and administrative relationship of the President to all the farflung . . . agencies."⁷³ One of the Brownlow Committee's most durable recommendations was the creation of the EOP.⁷⁴ The EOP's task would be to aid the President in quickly obtaining information from agencies and to "guide him in making his responsible decisions."⁷⁵ This dedicated institution would provide the Chief Executive with both the staff and resources to discharge his constitutional duties.⁷⁶

President Roosevelt swiftly put the Committee's ideas into action by issuing an executive order pursuant to reorganization plans approved by Congress.⁷⁷ The order provided, among other things, for the creation

⁷⁰ See, e.g., RUDALEVIGE, *supra* note 54, at 216–17 (adopting the "usual distinction between the 'bureaucracy' and the 'White House'" but recognizing that "internal divergences" are also important "as the size of the EOP grows and fragmentation rises"); Peter L. Strauss, Foreword, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 753–54 (2007) ("We can also have no illusions that the decision will be made by 'the' President It will, rather, be made within an apparatus of a few thousand White House employees"); Bressman & Vandenberg, *supra* note 6, at 65–67 (exploring whether "non-OIRA White House offices wield more influence in a given case or across the board"); Sunstein, *supra* note 8, at 1840 (noting that "while the President is ultimately in charge, the White House itself is a 'they,' not an 'it'"); Anya Bernstein & Cristina Rodríguez, *The Diffuse Executive*, 92 FORDHAM L. REV. 363, 367 (2023) ("[E]ven centralized power over agency action can come not from the President individually but from the complex EOP bureaucracy.").

⁷¹ ARNOLD, *supra* note 55, at 89.

⁷² See *id.* at 91, 95.

⁷³ *Id.* at 93 (alteration in original) (quoting Memorandum from Louis Brownlow to President Franklin Roosevelt (Feb. 1936), in LOUIS BROWNLOW, *A PASSION FOR ANONYMITY* 333, 334 (1958)).

⁷⁴ See *id.* at 104, 114.

⁷⁵ See Michael Nelson, *Domestic Policy, Domestic Policy Advisers, and the American Presidency*, in GOVERNING AT HOME, *supra* note 35, at 1, 2.

⁷⁶ See *id.*

⁷⁷ See Exec. Order No. 8248, 3 C.F.R. 217 (1939); Reorganization Plan No. I, 3 C.F.R. 248 (1939), *reprinted as amended in* 5 U.S.C. app. at 609 (2018); Reorganization Plan No. II, 3 C.F.R. 254 (1939), *reprinted as amended in* 5 U.S.C. app. at 616 (2018).

of a new White House Office within the EOP.⁷⁸ The office would comprise six assistants who would “work directly and anonymously” to get “information when needed by the President in making decisions” and ensuring those decisions were “promptly communicated to those who are involved.”⁷⁹ These assistants would be handpicked by the President, their effectiveness a function of their work behind the scenes.⁸⁰ In this manner, a core function of the White House staff would be to gain the information necessary to facilitate presidential decision-making.

With six new presidential assistants, the White House full-time staff during the Roosevelt Administration would now number about forty-three.⁸¹ In subsequent administrations, this number would skyrocket from about fifty-eight in 1944 to 560 in 1974,⁸² eventually settling into numbers closer to 400 in subsequent years.⁸³ One explanation for this growth has been the increasing need for interagency management given the decline of the cabinet as a “coordinating mechanism.”⁸⁴ Cabinet meetings would ultimately prove inefficient and frustrating to many presidents due to the slow pace of policy development within agencies, the perceived lack of creativity, and the necessarily narrow perspectives that jurisdictionally bound agencies could offer.⁸⁵

To aid in this management task, President Nixon was the first to create a White House-centered unit squarely focused on domestic policy within the EOP.⁸⁶ This decision was reached upon the recommendation

⁷⁸ See Exec. Order No. 8248, 3 C.F.R. at 217.

⁷⁹ Summary of the Report of the Committee on Administrative Management, 5 PUB. PAPERS 674, 677 (Jan. 12, 1937).

⁸⁰ See THE PRESIDENT’S COMM. ON ADMIN. MGMT., REPORT OF THE PRESIDENT’S COMMITTEE: ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 19 (1937) [hereinafter BROWNLOW REPORT] (“Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, emit no public statements.”).

⁸¹ HART, *supra* note 5, at 112.

⁸² *Id.*

⁸³ See Nelson, *supra* note 75, at 2; Charles E. Walcott & Karen M. Hult, *White House Staff Size: Explanations and Implications*, 29 PRESIDENTIAL STUD. Q. 638, 643 (1999).

⁸⁴ HART, *supra* note 5, at 125 (“Many attempts to explain the development of the White House staff emphasize its role as a coordinator of executive branch activity, a role assumed as a direct result of the weakness of the Cabinet as a coordinating mechanism.”); see also CONG. RSCH. SERV., RL30673, THE PRESIDENT’S CABINET: EVOLUTION, ALTERNATIVES, AND PROPOSALS FOR CHANGE 9 (2000) (“In the 20th century, the Cabinet has experienced a not-so-gradual decline in its political and administrative relevance to the President.”).

⁸⁵ See CONG. RSCH. SERV., *supra* note 84, at 10–13; Lester M. Salamon, *The Presidency and Domestic Policy Formulation*, in THE ILLUSION OF PRESIDENTIAL GOVERNMENT 177, 181 (Hugh Hecl & Lester M. Salamon eds., 1981).

⁸⁶ See Nelson, *supra* note 75, at 4 (“Starting with Nixon, every president has centered domestic policymaking not in the cabinet departments or in Johnson-style outside task forces, but rather in one or more White House staff units.”); Raymond J. Waldmann, *The Domestic Council: Innovation in Presidential Government*, 36 PUB. ADMIN. REV. 260, 261 (1976) (noting that “the Nixon

of Nixon's own Advisory Council on Executive Management headed by Roy Ash.⁸⁷ In 1970, after receiving approval for his reorganization plan, Nixon issued Executive Order 11,541.⁸⁸ That order formalized the Domestic Council, which was charged with gathering information for "defining national domestic goals," developing "alternative proposals for reaching those goals," and providing "policy advice to the President on domestic issues."⁸⁹ The Domestic Council was to be headed by an executive director with the formal title of Special Presidential Assistant for Domestic Policy.⁹⁰ The cabinet-level Domestic Council was composed of the President, Vice President, Attorney General, and a subset of the cabinet, but it would be driven and staffed by the White House.⁹¹

Every President since has followed Nixon's cue to centralize domestic policymaking, albeit with different naming conventions.⁹² Even those who professed a desire to return to a cabinet-led approach eventually returned the locus of policymaking back to the White House.⁹³ One particularly noteworthy development came with President Clinton, who decided to place White House staff directly onto the freshly renamed

Administration [was] the first to institutionalize and define the relationships" within the White House for policy planning).

⁸⁷ See Edwin L. Harper, *Domestic Policy Making in the Nixon Administration: An Evolving Process*, 26 *PRESIDENTIAL STUD.* Q. 41, 44 (1996). The Ash Council had been charged with studying ways to improve management in the executive branch. See *id.*

⁸⁸ Exec. Order No. 11,541, 3 C.F.R. 141 (1971); see Reorganization Plan No. 2 of 1970, 3 C.F.R. 197 (1971), reprinted as amended in 5 U.S.C. app. at 720 (2018).

⁸⁹ Exec. Order No. 11,541, 3 C.F.R. at 141.

⁹⁰ See Salamon, *supra* note 85, at 182.

⁹¹ See Reorganization Plan No. 2 of 1970, 3 C.F.R. at 198. Domestic Council members included the President; Vice President; Attorney General; Secretary of Agriculture; Secretary of Commerce; Secretary of Health, Education, and Welfare; Secretary of Housing and Urban Development; Secretary of the Interior; Secretary of Labor; Secretary of Transportation; and Secretary of the Treasury. *Id.* The Reorganization Plan also contained catchall language providing that the Domestic Council could also include "such other officers of the Executive Branch as the President may from time to time direct." *Id.*

⁹² President Jimmy Carter, for example, ran on a promise to "devolve domestic policymaking" from the White House back to the cabinet, leading him to abolish the Domestic Council and rename it the Domestic Policy Staff ("DPS") to emphasize that the role would be to staff the cabinet rather than serve as a thought leader. Nelson, *supra* note 75, at 13. However, Carter's disillusionment with his cabinet heads—resulting in his asking for the resignation of his entire cabinet and accepting five midway through his presidency—led to a resurgence of staffing in DPS toward the end of his Administration. See Robert A. Strong, *Recapturing Leadership: The Carter Administration and the Crisis of Confidence*, 16 *PRESIDENTIAL STUD.* Q. 636, 647 (1986). As a result, Carter's "initial plans and intentions were diluted or abandoned," and Nixon's Domestic Council essentially survived reorganization and emerged with a new name but basically the same functions. See Nelson, *supra* note 75, at 13–14. The institutionalization of centralized policymaking continued.

⁹³ See, e.g., WARSHAW, *supra* note 14, at 125, 135 (detailing the Reagan Administration's original goal of "keeping the cabinet officers within the presidential orbit" through the creation of cabinet councils, which were later "redesigned" to "gain control of the policy apparatus within the White House" and "reduce[] the access points for the cabinet into the White House and to the president").

DPC, making it even clearer that domestic policy would be centrally managed.⁹⁴ As in previous iterations, its role would be not only to formulate policy but also to work on its implementation, whether through legislative proposals, executive orders, public speeches, or administrative actions such as rules or grants.⁹⁵ Under Clinton, the number of DPC staff grew to about thirty.⁹⁶ In addition, Clinton created NEC to similarly concentrate economic policymaking in the White House.⁹⁷ NEC under Clinton also had about thirty staff members.⁹⁸ Given the intersection of domestic policy and economic issues, NEC often works closely with DPC and can sometimes have overlapping portfolios as a result.⁹⁹

DPC and NEC also work with a number of other actors in the White House to advance policy. Presidents sometimes create more ephemeral policy councils, often only lasting a year or two. President Nixon, for example, created a Council for Urban Affairs that only lasted from 1969 to 1970.¹⁰⁰ Presidents also sometimes establish single policy “czars” to coordinate specific issues. Take, for example, President George W. Bush’s Director of the Office of Faith-Based and Community Initiatives,¹⁰¹ or President Obama’s Director of the Office of Health Reform,¹⁰² mainly charged with implementation of the Affordable Care Act.¹⁰³ These roles, however, are often repealed relatively quickly or simply eliminated in subsequent administrations.¹⁰⁴

On legal matters, DPC and NEC also work closely with the White House Counsel, who generally serves as the President’s in-house lawyer.¹⁰⁵ The role of the White House Counsel historically grew out

⁹⁴ See *id.* at 161 (“[President] Clinton became the first president to significantly change the composition of the cabinet council by adding a host of White House staff to the membership in 1993.”).

⁹⁵ See GEORGE E. SHAMBAUGH IV & PAUL J. WEINSTEIN JR., *THE ART OF POLICYMAKING* 59 (3d ed. 2024) (noting that policy implementation can occur through “presidential directive[,] . . . legislation, regulatory change, or simply the use of the presidential bully pulpit”).

⁹⁶ See *id.* at 31–32 (reporting that DPC “grew to around 30 staffers under President Clinton”).

⁹⁷ See Exec. Order No. 12,835, 3 C.F.R. 586 (1994).

⁹⁸ See SHAMBAUGH & WEINSTEIN, *supra* note 95, at 30 (“Under Clinton, the [NEC] staff size was roughly thirty individuals . . .”).

⁹⁹ See HART, *supra* note 5, at 66–67; SHAMBAUGH & WEINSTEIN, *supra* note 95, at 32 (discussing how during Clinton’s second term, DPC “gained control over several issues given to the NEC”).

¹⁰⁰ See Exec. Order No. 11,452, 3 C.F.R. 102 (1970). For a catalog of these entities over time, see HAROLD C. RELYEA, *CONG. RSCH. SERV.*, 98-606 GOV, *THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW* 25–28 (2008).

¹⁰¹ See Exec. Order No. 13,199, 3 C.F.R. 752 (2002).

¹⁰² See Exec. Order No. 13,507, 3 C.F.R. 233 (2010).

¹⁰³ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., 42 U.S.C.); See Exec. Order No. 13,507, 3 C.F.R. at 233.

¹⁰⁴ See, e.g., Exec. Order No. 13,569, 3 C.F.R. 232 (2012) (revoking Executive Order 13,507).

¹⁰⁵ See PATTERSON, *supra* note 16, at 96–97, 112; cf. Crump, *supra* note 55 (manuscript at 14–15) (discussing the ways in which DPC and the White House Counsel’s Office can conflict and engage in turf battles).

of the sense that the President's existing sources of legal advice at the Department of Justice ("DOJ") were untimely and ultimately too divorced from the President's immediate needs.¹⁰⁶ The Roosevelt Administration initially created an Assistant Solicitor General position within DOJ to focus on presidential legal advice—a position that would be renamed the Office of Legal Counsel ("OLC") two decades later.¹⁰⁷ Over the years, however, OLC would develop norms and practices that resulted in the office adopting a "best view" of the law independent of the desires of the President.¹⁰⁸ As a result, presidents have increasingly come to rely on White House Counsels for legal advice on signature regulatory agenda items.¹⁰⁹

B. *The Impersonal Presidency*

White House policy councils also work with a number of other structurally distinct entities within the EOP. If the role of the White House Office was to pursue the President's personal interests at the top of the hierarchy,¹¹⁰ the Brownlow Committee also recognized the need for a more enduring and impersonal arm of the presidency.¹¹¹ This part of the EOP would pertain to the office of the President rather than its transient occupant.¹¹² Core to the Brownlow vision was a revitalized Bureau of the Budget housed in the EOP that would focus on managerial and budgetary needs.¹¹³ Congress had initially created the Bureau within the Department of Treasury in 1921 to compile, review, and send agency budgetary requests to Congress.¹¹⁴ Its "impartial" and "expert" ethos, however, would clash decades later with a President resolute on a New Deal that required large expenditures and deficits.¹¹⁵ To accomplish these aims, President Roosevelt, with the Brownlow Committee's

¹⁰⁶ See *id.* at 97 (describing the "view from the White House" of DOJ as "too remote" and "twenty blocks away").

¹⁰⁷ See Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 819 & n.44 (2017).

¹⁰⁸ *Id.* at 830.

¹⁰⁹ See SHAMBAUGH & WEINSTEIN, *supra* note 95, at 49–50 (discussing the ways in which the White House Counsel is "significantly involved in the policymaking process" and "will use its authority as the president's legal adviser to influence policy proposals" as "its authority continue[s] to grow as presidents rely on the office for more and more legal services" in the face of "narrower interpretations" offered by DOJ).

¹¹⁰ See HART, *supra* note 5, at 50 ("[A]s the Executive Office has developed, so the White House Office has become the directing force and the most powerful division within the EOP").

¹¹¹ See BROWNLOW REPORT, *supra* note 80, at 63.

¹¹² See Renan, *supra* note 44, at 1137–38.

¹¹³ See Exec. Order No. 8248, 3 C.F.R. 217, 218 (1940). These other entities included the Liaison Office for Personnel Management, the Office of Government Reports, and "in the event of a national emergency, or threat of a national emergency, such office for emergency management as the President shall determine." *Id.* at 218–19.

¹¹⁴ See Budget and Accounting Act of 1921, Pub. L. No. 67-13, §§ 207–217, 42 Stat. 20, 22–23.

¹¹⁵ See Moe, *supra* note 5, at 247–48.

support, sought to bring the Bureau more directly under his control within the EOP.¹¹⁶

Given its budgetary levers and infrastructure for coordinating agency proposals, the Bureau of the Budget often participated in domestic policy decisions—with its directors becoming “more overtly involved” during the Kennedy Administration.¹¹⁷ Perhaps as a result, in 1970, President Nixon sought to subject the Bureau to even greater control through the placement of more political appointees at the top, renaming the Bureau the “Office of Management and Budget.”¹¹⁸ At the same time, however, Nixon pointedly did not place the OMB Director on his newly formed White House–based Domestic Council.¹¹⁹ This “demot[ion]”¹²⁰ was apparently motivated by Nixon’s desire to avoid bogging down policy development with OMB’s perceived “single-minded” focus on budgetary concerns.¹²¹ In other words, the Nixon Administration distinguished between the White House and structurally distinct entities such as OMB.

Indeed, the impersonal units of the presidency often share several characteristics insulating them from the President as compared with the White House. To be clear, this is not to question whether the individuals within, especially the political appointees, aspire to serve the President loyally. Rather, these are descriptive observations about the structural design of the presidency that can influence the institutional incentives within it. These impersonal units within the EOP have generally been established by statute rather than executive action,¹²² are charged with

¹¹⁶ See *id.* at 248–49. Accordingly, the Bureau of the Budget sought an enlarged career staff that grew almost overnight from about forty members to more than 500 in number. See *id.* at 249.

¹¹⁷ HART, *supra* note 5, at 86.

¹¹⁸ See Reorganization Plan No. 2 of 1970, 3 C.F.R. 197 (1971), *reprinted as amended in* 5 U.S.C. app. at 720 (2018); ARNOLD, *supra* note 55, at 283.

¹¹⁹ See ARNOLD, *supra* note 55, at 285.

¹²⁰ *Id.* at 285.

¹²¹ Salamon, *supra* note 85, at 183.

¹²² See HART, *supra* note 5, at 39–40. As a historical matter, divisions of the EOP could also be created through a hybrid model. See *id.* at 40. Under this approach, presidents submitted reorganization plans to Congress under a broad grant of reorganization authority. See *id.* Congress often paired these grants with conditions and a limited time period for submission. See *id.* Once submitted, reorganization plans would usually go into effect after sixty days unless defeated by a legislative veto. See *id.* Congress could disapprove the plan through a joint resolution of two houses or a resolution by a single house. See *id.* This scheme gave Congress power to impose conditions on the presidency along with the ultimate power to veto the reorganization. See *id.* at 40–41. On the other hand, the President gained a way to bypass the difficult legislative process. See *id.* at 41. The reorganization plans, after all, did not have to be affirmatively approved by Congress. See *id.* The onus, rather, was on Congress to marshal the resources and opposition to block a plan if it so desired. See *id.* This entire scheme, however, came to a halt when the Supreme Court declared the legislative veto unconstitutional in 1983. See *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983). The following year, Congress required bicameral approval of presidential reorganization plans within ninety days to go into effect. See HART, *supra* note 5, at 41. Because Presidents no longer

statutory duties and responsibilities, feature heads that require Senate confirmation, and contain career staff that persist through administrations.¹²³ Once established by statute, later presidents cannot unilaterally abolish such units. President Clinton, for example, sought to eliminate the statutory Council on Environmental Quality (“CEQ”), further discussed below, in favor of a new office that he claimed would elevate environmental issues in the policy process.¹²⁴ Clinton’s efforts, however, were stymied by the House of Representatives and major environmental groups concerned about losing a statutory body in the EOP.¹²⁵

Moreover, the statutory duties of these units require resources that constrain their ability to pursue purely presidential interests. OIRA, for instance, is statutorily required by the Paperwork Reduction Act¹²⁶ to review information collections¹²⁷—a task that demonstrably detracts from its regulatory review responsibilities.¹²⁸ In addition, the heads of these units are often subject to Senate confirmation,¹²⁹ which can result in delays, vacancies, and nominees that may not otherwise have been the President’s first choice. Finally, tenure-protected career staff can also serve as a form of resistance to the President’s desires, whether due to bureaucratic capture, mission zeal, or good-faith disagreements about how best to accomplish the President’s desires.¹³⁰ In this manner, the impersonal arm of the presidency is structured with more independent institutional incentives relative to those within the White House Office.

had an incentive to seek reorganization authority—it was easier to pursue the traditional legislative process, which lacked the same deadline—this method came to an end in 1984 after the last reorganization statute expired. *See id.* Many units within the modern EOP were established under this method, including the current OMB—the successor to the Bureau of the Budget. *See* 3 C.F.R. 197. Because reorganization plans did not have to be actively approved by Congress and important details were often left to executive orders, on balance, this analysis will largely credit presidents with these innovations.

¹²³ *See, e.g.*, 31 U.S.C. §§ 501–503; Reorganization Plan No. 2 of 1970, 3 C.F.R. at 197. It should be noted that these features often appear together in the impersonal presidency but are not all necessary and admit of some variation. For example, the OIRA Administrator was not subjected to Senate confirmation until 1986. *See* 44 U.S.C. § 3503 (1982), *amended by* Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 813, 100 Stat. 1783-335, 1783-336 (codified as amended at 44 U.S.C. § 3503).

¹²⁴ *See* HART, *supra* note 5, at 93.

¹²⁵ *See id.*

¹²⁶ 44 U.S.C. §§ 3501–3521.

¹²⁷ *See id.* § 3504.

¹²⁸ *See* Bolton et al., *supra* note 12, at 242 (arguing that the “low organizational capacity [of OIRA] inhibits the president’s ability to expedite priority rules”).

¹²⁹ *See, e.g.*, 31 U.S.C. § 502(a).

¹³⁰ *See* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 163–65 (2018); Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1544 (2018); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1663–65 (2018); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 381 (2019).

The first entity created by statute within the EOP since its establishment was CEA.¹³¹ CEA was conceived by the Employment Act of 1946¹³² to assist and advise the President in the preparation of economic reports, to collect and transmit relevant economic data, and to provide the President with economic advice, among other duties.¹³³ More generally, Congress was concerned about the “increasingly dominant role of the president in economic policy,” and the council—with its structurally independent features—“was an attempt to curb and counterbalance presidential power.”¹³⁴ To this end, Congress also mandated a number of statutory qualifications for council members who were to have “training, experience, and attainments” demonstrating that they were “exceptionally qualified to analyze and interpret economic developments.”¹³⁵ As a result, the role of CEA has often been understood as one of providing more “detached, objective, . . . and nonpolitical” advice, bolstered by the fact that CEA is often headed by an academic economist.¹³⁶

Similarly, Congress has also sought to ensure the existence of a statutory office within the EOP charged with providing scientific advice to the President. After the demise of various presidentially established science advisory bodies, Congress passed and President Ford signed a bill in 1976 establishing OSTP within the EOP.¹³⁷ OSTP is charged with providing scientific advice to the President.¹³⁸ In addition, OSTP

¹³¹ See HART, *supra* note 5, at 39.

¹³² Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23 (codified as amended at 15 U.S.C. §§ 1021–1025).

¹³³ See *id.* § 4, 60 Stat. at 24–25 (codified as amended at 15 U.S.C. § 1023); HART, *supra* note 5, at 51.

¹³⁴ HART, *supra* note 5, at 40. The National Security Council, established in 1947, was similarly seen as a “congressional vote of no confidence in presidential management of national security during the war years,” *id.*, though its head has not been subject to Senate confirmation, see 50 U.S.C. § 3021, presumably given the President’s inherent Article II powers.

¹³⁵ Employment Act § 4, 60 Stat. at 24 (codified as amended at 15 U.S.C. § 1023) (“The Council shall be composed of three members . . . each of whom shall be a person who, as a result of his training, experience, and attainments, is exceptionally qualified to analyze and interpret economic developments, to appraise programs and activities of the Government in the light of the policy declared in section 2, and to formulate and recommend national economic policy to promote employment, production, and purchasing power under free competitive enterprise.”).

¹³⁶ See HART, *supra* note 5, at 51–52 (“The requirement that members of the CEA be distinguished professional economists implied, to some observers at least, that the council was meant to dispense advice to the president in a thoroughly detached, objective, scientific, and nonpolitical manner.”); see also Rick Dearborn, *White House Office* (“CEA acts as the White House’s internal research arm for economic analysis.”), in MANDATE FOR LEADERSHIP 23, 39 (Paul Dans & Steven Groves eds., 2023).

¹³⁷ See Presidential Science and Technology Advisory Organization Act of 1976, Pub. L. No. 94-282, 90 Stat. 463 (codified as amended at 42 U.S.C. §§ 6611–6618).

¹³⁸ See 42 U.S.C. § 6613. Congress established OSTP as an office within the EOP to, among other things, “serve as a source of scientific and technological analysis and judgment for the

can serve as a “sounding board and conduit of information” for other agency personnel regarding science policy, as well as assist with resolving interagency conflicts.¹³⁹

Congress has also established more policy-specific units within the EOP. Take, for example, CEQ, created by the National Environmental Policy Act of 1969 (“NEPA”).¹⁴⁰ The Act charges CEQ with offering recommendations to the President on improving environmental policy as well as drafting congressional reports on the subject.¹⁴¹ In addition, CEQ is responsible for implementing NEPA and, in this role, provides oversight on the preparation of environmental impact statements.¹⁴² Similar bodies established by statute that persist today include units devoted to drug policy,¹⁴³ intellectual property enforcement,¹⁴⁴ space policy,¹⁴⁵ homeland security,¹⁴⁶ cyber security,¹⁴⁷ and pandemic preparedness.¹⁴⁸

* * *

The EOP, in this manner, contains a White House Office with policy councils that serve the interests of the sitting President at the top of the hierarchy. Units within it have generally been established by executive order, have no statutory or programmatic responsibilities beyond serving the President, are not subject to Senate confirmation, and have no career staff. By contrast, the impersonal presidency has generally been created through traditional legislation resulting in statutory duties, has leaders subject to Senate confirmation, and contains career staff. In this manner, there is a spectrum of structural independence from the

President with respect to major policies, plans, and programs of the Federal Government.” *Id.* § 6614(a).

¹³⁹ JOHN F. SARGENT JR. & DANA A. SHEA, CONG. RSCH. SERV., RL34736, THE PRESIDENT’S OFFICE OF SCIENCE AND TECHNOLOGY POLICY (OSTP): ISSUES FOR CONGRESS 3–4 (2014) (discussing OSTP’s role).

¹⁴⁰ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347).

¹⁴¹ *See id.* § 204, 83 Stat. at 855 (codified at 42 U.S.C. § 4344).

¹⁴² *See id.* § 102(B)–(C), 83 Stat. at 853 (codified as amended at 42 U.S.C. § 4332(B)–(C)).

¹⁴³ *See* 21 U.S.C. § 1702 (“There is established in the Executive Office of the President an Office of National Drug Control Policy . . .”). This Office, however, has historically seen large reductions in staffing since its creation, likely attributable in part to the perception that its success and tools have been limited. *See* HART, *supra* note 5, at 94.

¹⁴⁴ *See* 15 U.S.C. § 8111 (“The President shall appoint, by and with the advice and consent of the Senate, an Intellectual Property Enforcement Coordinator . . .”).

¹⁴⁵ *See* 51 U.S.C. § 2011 note (“[T]here is established in the Executive Office of the President the National Space Council, which shall be chaired by the Vice President.”).

¹⁴⁶ *See* 6 U.S.C. § 491 (“There is established within the Executive Office of the President a council to be known as the ‘Homeland Security Council’ . . .”).

¹⁴⁷ *See id.* § 1500 (“There is established, within the Executive Office of the President, the Office of the National Cyber Director . . .”).

¹⁴⁸ *See* 42 U.S.C. § 300hh-3 (“There is established in the Executive Office of the President an Office of Pandemic Preparedness and Response Policy . . .”).

President to the broader executive branch—from the personally loyal White House to the statutory components of the EOP, to executive agencies, and then to more independent agencies.¹⁴⁹

II. PRESIDENTIAL BROKERING

Armed with the apparatus of the EOP, presidents must decide how to utilize it most effectively to accomplish their political agendas. The first Section of this Part examines how such agendas are formed, particularly with respect to rules, and how presidents have used the EOP to further those agendas. It then briefly evaluates some prominent mechanisms for presidential control over agency rulemaking—strategic appointments, executive orders, and regulatory review—and explains why each is limited in its ability to help presidents accomplish their highest regulatory priorities. The next Section then identifies a distinct mechanism, presidential brokering, and explores why it has developed and how it operates as a strategy of agency influence.

A. *The Incomplete Toolkit*

Presidents come into power having made many promises.¹⁵⁰ Before his first term, for example, President Trump pledged to radically reform immigration policy¹⁵¹—a priority he has renewed for his second tour in office.¹⁵² President George W. Bush campaigned on reforming education and prescription drug programs,¹⁵³ whereas President Bill Clinton specifically committed to “present a plan” in his first year “to provide affordable, quality health care for all.”¹⁵⁴ These campaign promises often form the most important elements of the President’s agenda, especially in the early years.¹⁵⁵ According to Clinton’s former DPC Director Bruce

¹⁴⁹ See generally Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 770–824 (2013) (discussing the commonalities and distinguishing factors of “executive” and “independent” agencies).

¹⁵⁰ See Andrew E. Busch, *Domestic Policy from Campaigning to Governing* (“Domestic policy advisers from the Nixon administration to the George W. Bush administration agree that campaign promises—at least on major issues that receive significant attention—set public expectations for the president and must be kept.”), in *GOVERNING AT HOME*, *supra* note 35, at 24, 27.

¹⁵¹ See TABITHA BONILLA, *THE IMPORTANCE OF CAMPAIGN PROMISES* 3 (2022).

¹⁵² See Drishti Pillai & Samantha Artiga, *Expected Immigration Policies Under a Second Trump Administration and Their Health and Economic Implications*, KFF (Nov. 21, 2024), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/expected-immigration-policies-under-a-second-trump-administration-and-their-health-and-economic-implications/> [<https://perma.cc/3UR9-W7K4>] (“Immigration was a central campaign issue during the 2024 Presidential election with President-elect Trump vowing to take strict action to restrict both lawful and unlawful immigration into the U.S.”).

¹⁵³ See Busch, *supra* note 150, at 29.

¹⁵⁴ BONILLA, *supra* note 151, at 6.

¹⁵⁵ See Hult & Walcott, *supra* note 35, at 85.

Reed, “We treated the campaign promises as gospel [when establishing policy priorities]. That was the only scripture to guide us.”¹⁵⁶ Because White House policy councils are most likely “to share the president’s intense concern” about fulfilling these commitments, they became the “trusted keeper[s] of the flame.”¹⁵⁷

Although the early days of an administration are often preoccupied with campaign promises, presidential priorities evolve and shift.¹⁵⁸ By many accounts, presidents seek to advance their most ambitious undertakings in the first year because they anticipate reductions in political support.¹⁵⁹ Since presidents can usually expect a loss of party seats during midterm elections, they often move early to strike while the iron is hot.¹⁶⁰ By contrast, electoral considerations complicate the second and fourth years.¹⁶¹ In addition, presidents are keenly attuned to public opinion.¹⁶² As a general matter, they can expect an overall erosion in public approval ratings throughout their term, further augmenting the incentive to act quickly.¹⁶³ For these reasons, the President only has limited “policy windows” — that is, opportunities for effective interventions.¹⁶⁴

Given these constraints, rules are attractive to presidents as policymaking instruments because they have binding effects on classes of individuals.¹⁶⁵ Like statutes, rules can bring about highly consequential policy changes as compared to adjudication or enforcement.¹⁶⁶ Rules, however, also demand a great deal of resources to draft alongside their preambles and required analyses. Indeed, some research suggests that

¹⁵⁶ Busch, *supra* note 150, at 27 (quoting JOHN P. BURKE, PRESIDENTIAL TRANSITIONS 207–08 (2000)).

¹⁵⁷ Nelson, *supra* note 75, at 7.

¹⁵⁸ See Busch, *supra* note 150, at 27, 29.

¹⁵⁹ See PAUL C. LIGHT, THE PRESIDENT’S AGENDA 41–42 (3d ed. 1999) (“Presidents and staffs . . . understand that the essential resource, capital, evaporates over time, [such] that the first year offers the greatest opportunity for establishing the domestic program.”).

¹⁶⁰ See *id.* at 36 (observing that “[a]t least for the past fifty years, all Presidents, whether Democratic or Republican, have faced a drop in House party seats at the midterm election”).

¹⁶¹ See *id.* at 40.

¹⁶² See Jon C. Rogowski, *Public Opinion and Presidents’ Unilateral Policy Agendas*, 67 AM. J. POL. SCI. 1134, 1134–35 (2023).

¹⁶³ See LIGHT, *supra* note 159, at 36 (“Today the President can expect a near-linear drop in his approval rating in the first three years of office, with a slight rebound at the end of the term.”).

¹⁶⁴ JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 166 (2d ed., Pearson New International ed. 2013).

¹⁶⁵ See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386 (2004) (“Many agencies have the authority to promulgate legislative rules, which are akin to statutes in that they prospectively set forth a general substantive standard of conduct for a class of private actors.”).

¹⁶⁶ See *id.* at 1394 (“[A] legislative rule . . . , if valid, operates like a statute.”).

rulemakings can take an average of two years or more to complete.¹⁶⁷ These tradeoffs mean that presidents must weigh the benefits and costs of rulemaking when forming their agendas. Although the number of rules on the presidential agenda may be relatively “small” as compared with the thousands of rules issued by agencies each year,¹⁶⁸ they are likely among the “most significant” along many dimensions.¹⁶⁹

Rules, however, can only be issued by agencies with the statutory authority to promulgate them. Thus, the President must rely on tools of administrative control when seeking to pursue this policymaking strategy. Yet some of the most prominently studied tools are limited in their ability to advance the President’s priorities. First, presidents can “politicize” the bureaucracy through strategic appointments on the basis of preference alignment or ideology.¹⁷⁰ The reality, however, is much messier. Presidents and their appointees suffer from familiar principal-agent problems, which are exacerbated by similar issues between agency heads and their career staff.¹⁷¹ There is, for example, the prospect of bureaucratic capture by external special interests, exacerbated by the notorious “revolving door.”¹⁷² Moreover, agency heads may focus only

¹⁶⁷ See MICHAEL TANGLIS, PUB. CITIZEN, UNSAFE DELAYS: AN EMPIRICAL ANALYSIS SHOWS THAT FEDERAL RULEMAKINGS TO PROTECT THE PUBLIC ARE TAKING LONGER THAN EVER 27 (Taylor Lincoln et al. eds., 2016), <https://www.citizen.org/wp-content/uploads/unsafe-delays-report.pdf> [<https://perma.cc/TTW2-A9YE>] (finding that “the length of completed rulemakings inched up to 2.7 years in 2016”); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959 (2008) (reporting that “[a]ll agencies but the HHS completed rulemakings started by a[Notice of Proposed Rulemaking] in less than two years, on average”).

¹⁶⁸ See MARK FEBRIZIO, FEDERAL AGENCIES ARE PUBLISHING FEWER BUT LARGER REGULATIONS 2 (2021), <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2022-06/gw-reg-studies-fewer-yet-larger-regulations-mfebrizio.pdf> [<https://perma.cc/Y7DH-N8CJ>] (showing that agencies produce thousands of rules each year, though the numbers are declining in the aggregate).

¹⁶⁹ Coglianesse & Walters, *supra* note 17, at 109 (reporting that participants in an expert discussion “stressed that the White House will have much greater influence over a small number of rules that administration officials consider to be the most significant ones”).

¹⁷⁰ See DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 202–05 (2008) [hereinafter LEWIS, PRESIDENTIAL APPOINTMENTS]; David E. Lewis, *Presidential Appointments and Personnel*, 14 ANN. REV. POL. SCI. 47, 49–50 (2011).

¹⁷¹ See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 64 (2014). Much empirical evidence supports the notion that the preferences of career civil servants within an agency diverge from those of political appointees. See, e.g., Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 345–46 (2012).

¹⁷² See PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 4, 187–88 (1981). According to this argument, regulated industries have the resources, incentives, and information necessary to influence agency career staff or political appointees. See *id.* at 23–24. Similarly, public interest groups are also influential given their ability to marshal publicity and political pressure. See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169 (1990).

on their narrow statutory missions rather than adopt the more general perspective of the President.¹⁷³

Such misalignment could be of little concern if presidents simply removed recalcitrant appointees.¹⁷⁴ Such removals, however, can exact high political costs, especially when they defy norms or conventions about the removed party's perceived need for independence.¹⁷⁵ Relatedly, the requirement of Senate confirmation for top agency leadership imposes significant delays, often resulting in vacancies.¹⁷⁶ Although presidents have sometimes offset this problem through the appointment of acting administrators—nonconfirmed temporary leaders—such “actings” are often limited in their ability to effect change.¹⁷⁷ For these reasons, presidents cannot rely on agency personnel alone to accomplish their highest regulatory priorities.

Second, if political appointees cannot generate the desired results, then perhaps issuing executive orders or other presidential directives could do the trick. Indeed, then-Professor Elena Kagan's account of the proactive nature of presidential administration focused on such directives,¹⁷⁸ as have contemporary social scientists studying what they call “unilateral” executive action.¹⁷⁹ In Kagan's estimation, executive orders are powerful instruments of bureaucratic control because they are framed in legal terms and can invoke the President's directive authority.¹⁸⁰ Such orders can serve to “lock in” a policy even if the agency

¹⁷³ See Freeman & Spence, *supra* note 171, at 64.

¹⁷⁴ Although Congress can subject such removals to for-cause requirements, the Supreme Court has made such efforts more constitutionally suspect. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204–05 (2020); *Collins v. Yellen*, 594 U.S. 220, 250–51 (2021).

¹⁷⁵ See Pierce, *supra* note 62, at 607 (describing numerous examples of when “legal obstacles to the use of the President's removal power [we]re insignificant in their effects” while the “political obstacles [we]re often formidable”).

¹⁷⁶ See 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, 1647 (2015). Recent empirical work suggests that such delays are only increasing in length, both due to limited Senate floor time and competing priorities in the White House. See *id.* (noting that between fifteen and twenty percent of senior agency positions are vacant at any point in time).

¹⁷⁷ See Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 617, 699–700 (2020) (“[A]cting leaders typically govern more as caretakers than change agents.”).

¹⁷⁸ See Kagan, *supra* note 10, at 2285, 2290–99 (describing directives as the “most important” presidential “technique[]” of administrative control and discussing such directives). Interestingly, Elena Kagan herself was the Deputy Assistant to the President for Domestic Policy and Deputy Director of DPC, but one possible, purely speculative, reason she did not expand in great detail about its innerworkings and practices was because DPC had just been established in its current form by President Clinton and yet to be fully institutionalized.

¹⁷⁹ See, e.g., Kenneth Lowande & Jon C. Rogowski, *Presidential Unilateral Power*, 24 ANN. REV. POL. SCI. 21, 23–24 (2021).

¹⁸⁰ See Kagan, *supra* note 10, at 2298–99.

may have been resisting it.¹⁸¹ They also increase the costs of noncompliance by agency officials by “spotlight[ing]” the results and putting the agency publicly on the hook for them.¹⁸²

Presidential directives, however, are not self-executing. They require a great deal of sustained leadership and coordination to implement, especially with rules; put differently, “the exercise of formal directive authority cannot, by itself, overcome the management and coordination dilemmas inherent in the administrative process.”¹⁸³ In addition, agencies are also subject to congressional oversight, which can stymie implementation.¹⁸⁴ For example, although President Obama issued an executive order to fulfill a campaign promise to close the Guantanamo Bay detention camp,¹⁸⁵ Congress refused to appropriate the funds necessary for the closure.¹⁸⁶

In fact, a growing body of research suggests that executive orders often result in limited agency responsiveness on the ground.¹⁸⁷ One empirical study, for example, finds that when an order names an agency and explicitly requests the promulgation of a rule, the probability of response is about sixty-seven percent.¹⁸⁸ In other words, more than thirty percent of orders directing a discrete agency to promulgate a rulemaking do not yield the result sought. Meanwhile, if the executive order fails to name a specific agency but still calls for the promulgation of a rule, the probability of response drops to about thirty-five percent.¹⁸⁹ It drops even further to about an 8.5% probability if the agency is named but the promulgation of a rule is not specifically requested.¹⁹⁰ Agencies that are more structurally insulated from the President appear to be even less responsive, especially if they have had only limited involvement in the drafting of the executive order itself.¹⁹¹ Relatedly, Andrew Rudalevige’s rich archival-based work details how a substantial number of executive

¹⁸¹ See David J. Barron, Foreword, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1116 (2008) (describing how executive orders “locked an agency into a path that it had not yet finally settled upon”).

¹⁸² Kagan, *supra* note 10, at 2299.

¹⁸³ Jennifer L. Selin, Cody A. Drolc, Jordan Butcher, Nicholas L. Brothers & Hanna K. Brant, *Under Pressure: Centralizing Regulation in Response to Presidential Priorities*, 52 PRESIDENTIAL STUD. Q. 340, 343 (2022).

¹⁸⁴ See Joshua B. Kennedy, “‘Do This! Do That!’ And Nothing Will Happen”: *Executive Orders and Bureaucratic Responsiveness*, 43 AM. POL. RSCH. 59, 65 (2015).

¹⁸⁵ See Exec. Order No. 13,492, 3 C.F.R. 203 (2010).

¹⁸⁶ See Kennedy, *supra* note 184, at 65.

¹⁸⁷ See, e.g., Alex Acs, *Presidential Directives in a Resistant Bureaucracy*, 41 J. PUB. POL’Y 776, 779–80 (2021); Kennedy, *supra* note 184, at 65; Joshua B. Kennedy & Andrew Rudalevige, *Implementing Executive Orders in the Administrative State*, 55 PRESIDENTIAL STUD. Q. 72, 78 (2025).

¹⁸⁸ Kennedy, *supra* note 184, at 72.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Kennedy & Rudalevige, *supra* note 187, at 79–80.

orders are primarily drafted by agencies themselves, suggesting that such orders may serve other functions distinct from presidential control.¹⁹² Yet another body of work suggests that presidential directives often serve more as glorified press releases¹⁹³ or vehicles to signal competence to voters, rather than efforts to actually change agency policy on the ground.¹⁹⁴

Perhaps as a result, a bipartisan consensus of presidents has also imposed a regime of ex post review on agency rules. This third strategy essentially allows presidents to evaluate and surgically influence draft rules before they are issued.¹⁹⁵ Although President Nixon was arguably one of the first to do so,¹⁹⁶ President Reagan exerted more supervisory control “self-consciously and openly”¹⁹⁷ when he issued Executive Order 12,291 in 1981.¹⁹⁸ Among other things, the order required executive agencies to submit draft proposed and final rules along with cost-benefit analyses to OMB,¹⁹⁹ a role delegated soon thereafter to the then newly established OIRA.²⁰⁰

Although Executive Order 12,291 persisted through George H.W. Bush’s Administration, President Clinton issued Executive Order 12,866 in 1993, which continues to govern the process today.²⁰¹ Unlike the previous regime that reviewed all regulations, agencies now only have to submit those rules that are the most “significant.”²⁰² The effort

¹⁹² See Rudalevige, *supra* note 54, at 99–101.

¹⁹³ See, e.g., KENNETH LOWANDE, FALSE FRONT 1 (2024) (“When presidents sign orders, they put on a show.”).

¹⁹⁴ See Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 AM. POL. SCI. REV. 397, 397–98 (2011).

¹⁹⁵ See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 97 (2007) (noting that “whereas the president lacks the ability to veto selective pieces of legislation, he enjoys a ‘line-item veto,’ so to speak, of agencies’ regulatory initiatives”).

¹⁹⁶ See Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. 37, 44–45 (2011). Specifically, Nixon’s “quality of life reviews” focused on draft rules “pertaining to environmental quality, consumer protection, and occupational and public health and safety.” Memorandum from George P. Shultz, Dir., Off. of Mgmt. & Budget, to the Heads of Dep’ts & Agencies (Oct. 5, 1971), <https://theclerk.com/ombpapers/QualityofLife1.htm> [<https://perma.cc/82TJ-88ZE>]; see also Tozzi, *supra*, at 46; Andrew Rudalevige, *Beyond Structure and Process: The Early Institutionalization of Regulatory Review*, 30 J. POL’Y HIST. 577, 582 (2018).

¹⁹⁷ Kagan, *supra* note 10, at 2277.

¹⁹⁸ Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

¹⁹⁹ *Id.* at 128–30.

²⁰⁰ *Id.* at 131. Created under the Paperwork Reduction Act of 1980, OIRA is located within the EOP and more specifically, OMB Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 3503, 94 Stat. 2812, 2814–15 (codified as amended at 44 U.S.C. § 3503); see also U.S. GEN. ACCT. OFF., GAO-03-929, RULEMAKING: OMB’S ROLE IN REVIEWS OF AGENCIES’ DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 17–18 (2003).

²⁰¹ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2018); see also Exec. Order No. 14,094, 3 C.F.R. 369 (2024) (reaffirming Executive Order 12,866).

²⁰² Exec. Order No. 12,866, 3 C.F.R. at 645.

was an attempt to make the process more selective “so as to focus resources on the most important” rules.²⁰³ This criterion for review has always explicitly included the potential for a rule to bear on presidential priorities.²⁰⁴ At the same time, one standard of the review itself is to ensure the rule’s alignment with those priorities.²⁰⁵ President Trump has recently extended this review process to independent regulatory agencies as well.²⁰⁶

The reactive nature of review, however, severely limits its utility for pursuing the President’s affirmative regulatory agenda.²⁰⁷ The OIRA process generally does not begin until after the agency has submitted its draft rule.²⁰⁸ OIRA sometimes receives draft rules from agencies “informally”—that is, before they are formally submitted—but this informal review still usually only begins after the agency has already done a substantial amount of work.²⁰⁹ At that point, most of the core policy choices will have already been drafted into the rule and accompanying analyses. Asking agencies to change course at that point would result in much wasted time and effort along with further delay. To be sure, OIRA is uniquely situated to pursue a number of crosscutting managerial goals with respect to the rulemaking process.²¹⁰ And OIRA administrators have also occasionally issued “prompt letters” to agencies suggesting the development of rules in particular areas.²¹¹ Administrator John Graham, for example, encouraged the Occupational Safety and Health Administration to prioritize the promotion of automatic external heart defibrillators.²¹² By most accounts, however, such letters have rarely spurred new agency rulemaking efforts on their own.²¹³

²⁰³ Kagan, *supra* note 10, at 2287; *see also* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 105 (2011) (describing the various impacts of Executive Order 12,866 on OIRA review).

²⁰⁴ *See* Exec. Order No. 12,866, 3 C.F.R. at 645.

²⁰⁵ *See id.* at 640.

²⁰⁶ Exec. Order No. 14,215, 90 Fed. Reg. 10,447, 10,448 (Feb. 18, 2025).

²⁰⁷ *See* Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1288 (2006) (“OIRA has traditionally been a reactive force in the rulemaking process, commenting on draft proposed and final rules that are generated by the agencies.”); Kagan, *supra* note 10, at 2285 (describing regulatory review as the “least significant” instrument of presidential administrative control during the Clinton Administration).

²⁰⁸ *See* Copeland, *supra* note 207, at 1273–74.

²⁰⁹ *See id.* at 1278–81.

²¹⁰ *See* Revesz, *Regulatory Review*, *supra* note 11, at 134.

²¹¹ *See* Copeland, *supra* note 207, at 1288–89.

²¹² *See id.*

²¹³ *See id.* at 1288 (“Several . . . agencies took action in response to the letters, but few new rulemakings have directly resulted from them.”).

B. *Brokering*

Given the shortcomings of the strategies above, presidents have sought other mechanisms to accomplish their regulatory priorities. Specifically, they have developed the institution of policy councils and the practice of brokering to spur agency rulemaking on priority timelines. Presidential brokering is a structured set of deliberative White House–led interactions between components of the EOP and the rulemaking agency to formulate policy. The practice, as defined here, consists of delegated authority to identify an array of regulatory options from different intra-executive branch perspectives; to test arguments through moderated deliberation; and to elevate decisions up the presidential hierarchy when consensus is not otherwise achieved.

The process has evolved over the years, but a “once-lively” debate has been replaced by a broad “consensus” model that is now “wide[ly] accept[ed]” by many presidents from both parties.²¹⁴ This growing, though not always linear, trend can be attributed to multiple channels, including veterans of previous administrations engaging in repeated government service and an emerging bipartisan consensus among external transition advisors and academics.²¹⁵ Central to this model is the perceived need for what has become known as the “honest” broker.²¹⁶ An honest broker seeks the best outcome for the President and therefore presents options from multiple EOP vantage points beyond the White House in ways that build trust in the process.²¹⁷ The honest broker does not advocate for a particular point of view but rather seeks to synthesize and fairly include those of others.²¹⁸

Historically, this decision-making approach had its roots in the Eisenhower Administration, which had a chief of staff and a staff secretariat to manage the process.²¹⁹ Although subsequent presidents adopted

²¹⁴ Charles E. Walcott & Karen M. Hult, *White House Structure and Decision Making: Elaborating the Standard Model*, 35 *PRESIDENTIAL STUD. Q.* 303, 303 (2005); see also LIDDELL, *supra* note 61, at 115–19; Daphna Renan, *Presidential Norms and Article II*, 131 *HARV. L. REV.* 2187, 2223–24 (2018).

²¹⁵ See, e.g., Walcott & Hult, *supra* note 214, at 311 (seeking to “refute[] the old saw that the White House has no institutional memory”); LIDDELL, *supra* note 61, at 136 (“[I]n practice in recent White Houses, most of the actual structure looks very similar to previous ones, mainly because a lack of conscious design causes the president and White House staff to simply copy what has come before.”); TROY, *supra* note 14, at 3–4 (“This policy process has a long and storied White House history, one that, for the most part, continues from administration to administration, regardless of partisan affiliation.”).

²¹⁶ See JOHN P. BURKE, *HONEST BROKER?* 1–4 (2009).

²¹⁷ See LIDDELL, *supra* note 61, at 118 (“Honest brokers are to arrange different options, and do so out of a genuine desire to seek the best result, in a way that builds trust in the person and the system.”).

²¹⁸ See *id.*

²¹⁹ See Walcott & Hult, *supra* note 214, at 304.

a more “spokes of the wheel” model involving multiple coequal staffers reporting to the President, President Nixon returned to Eisenhower’s hierarchical model, now delegating a brokering role to his newly created Domestic Council.²²⁰ In the words of his Chief of Staff Alexander Haig, Nixon wanted multiple perspectives presented “not waffled, not mushed into consensus-type recommendations but rather in sharp, clear, conceptually pure, philosophically pure options.”²²¹ His Domestic Council Director, John Ehrlichman, and his staff accordingly brokered Nixon’s signature programs in welfare reform, labor disputes, urban growth, health, and revenue sharing, among others.²²²

Since then, administrations from both parties have largely adhered to this increasingly “standard” approach through the use of policy councils.²²³ Some exhibit variations early in their terms but invariably return to the model.²²⁴ Even the first Trump Administration, which famously bucked many norms, saw Chief of Staff John Kelly seeking to reimpose discipline through the brokering process after a chaotic first year.²²⁵ That process would “integrate the input of Cabinet agencies and policy councils and present the president with various options, as well as with the advantages and drawbacks of each one.”²²⁶ It would represent “a reversion to the habits of previous administrations” to “ensure competing views are completely and straightforwardly presented to the president.”²²⁷ More recently, the Heritage Foundation’s Project 2025 also recommended a return to the brokering model in a second Trump term,²²⁸ but only time will tell whether its prescription will be followed.

President Biden, as mentioned earlier, embraced the model explicitly in the domestic policy context. Although previous administrations largely relied on internal memos²²⁹ and norms²³⁰ to reinforce the importance of brokering, the Biden Administration was the first to publicly memorialize important aspects of the process in a formal

²²⁰ *Id.* at 305–06.

²²¹ KAREN M. HULT & CHARLES E. WALCOTT, *EMPOWERING THE WHITE HOUSE* 20 (2004).

²²² See RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 36 (1983).

²²³ See Walcott & Hult, *supra* note 214, at 309–11.

²²⁴ See *id.*; *supra* note 92 and accompanying text.

²²⁵ See Hult, *supra* note 45, at 40, 44.

²²⁶ Eliana Johnson & Nancy Cook, *Kelly Moves to Control the Information Trump Sees*, *POLITICO* (Aug. 24, 2017, 5:11 AM), <https://www.politico.com/story/2017/08/24/john-kelly-trump-control-241967> [<https://perma.cc/SAF3-4GZL>].

²²⁷ *Id.*

²²⁸ See Dearborn, *supra* note 136, at 36 (recommending that the second Trump White House have a process to “ensure that all relevant offices are included; that competing or conflicting opinions are thoroughly discussed and evaluated; and, when there is disagreement among White House senior staff or among Cabinet members, a well-structured question is presented to the President for an intermediate or final decision”).

²²⁹ See Johnson & Cook, *supra* note 226.

²³⁰ See Renan, *supra* note 214, at 2228, 2236–37.

domestic policy directive.²³¹ First, the directive specified a model involving an increasingly hierarchical set of committees.²³² This general model, sometimes referred to as the “Principals Committee” process, was originally adopted in the context of the White House National Security Council.²³³ As specified in Biden’s domestic policy directive, the main day-to-day work of the process would occur through interagency policy committees, which would meet on a “regular basis” to generate policy options.²³⁴ This committee would “be composed of representatives from all relevant agencies . . . with significant management and policymaking responsibilities.”²³⁵

When issues would require resolution amidst disagreements, matters would then be elevated to a Deputies Committee, the “senior sub-Cabinet forum.”²³⁶ As the name suggests, this level would involve more senior, deputy-secretary-level staff from agencies, the White House, and other components of the EOP.²³⁷ Many key decisions are often made in these meetings “because the deputies generally have the necessary time that their principals often lack to ensure quality control and the seniority to work through disputes to the extent possible.”²³⁸ In Biden’s model, the committee would be chaired by the White House Deputy Assistant to the President for Domestic Policy.²³⁹ Through a brokering process, this committee would whittle down open issues by reaching consensus on some issues and then elevate any remaining disputes to the last committee in the hierarchy—the Principals Committee, which is a cabinet-level senior forum.²⁴⁰ Under Biden, the White House DPC Director would chair this committee, which would generally be composed of agency heads, including those within the EOP.²⁴¹ It is at this stage that final options would be developed for the President’s consideration, if appropriate.²⁴²

²³¹ Domestic Policy Presidential Directive, *supra* note 38.

²³² *See id.*

²³³ LIDDELL, *supra* note 61, at 116; *see also* JOHN W. ROLLINS, CONG. RSCH. SERV., R44828, THE NATIONAL SECURITY COUNCIL: BACKGROUND AND ISSUES FOR CONGRESS 8 (2022). It is almost certainly not a coincidence that the DPC Director at the time of this directive’s issuance was Susan Rice, the former head of the National Security Council. *See* Zolan Kanno-Youngs & Eileen Sullivan, *Susan Rice to Step Down as Biden’s Domestic Policy Adviser*, N.Y. TIMES (Apr. 24, 2023), <https://www.nytimes.com/2023/04/24/us/politics/susan-rice-biden.html> [<https://perma.cc/PA2Y-T2S8>].

²³⁴ Domestic Policy Presidential Directive, *supra* note 38.

²³⁵ *Id.*

²³⁶ *See id.*

²³⁷ *See* LIDDELL, *supra* note 61, at 116.

²³⁸ *Id.* at 116–17.

²³⁹ *See* Domestic Policy Presidential Directive, *supra* note 38.

²⁴⁰ *See id.*

²⁴¹ *See id.*

²⁴² *See* LIDDELL, *supra* note 61, at 117 (noting that “[i]t is at this level that the true final options are developed for presidential decisions”).

While this structured, formal process is used for many important priorities, it is frequently supplemented by more informal working groups and task forces drawing upon the same logic: White House policy council staff help to generate regulatory options from different perspectives throughout the executive branch, test arguments through moderated deliberation, and elevate decisions as necessary.²⁴³ In Bradley Patterson's words,

The picture [of formal councils] is more fakery than fact. The formal assemblages, chaired by the president, rarely assemble. Principals meet as teams, often without the president; deputies get together frequently; working groups abound. It's the top staffs of the councils—senior White House officers—who supply the leadership, scope out the questions, draft the papers, and call the meetings. Even the final sessions of cabinet folks and White House staffers in the Oval Office are not the grinding of formal “council” machinery but informal decisionmaking clusters.²⁴⁴

In this manner, the presidential brokering process varies in terms of its level of formality and scope.

Whether informal or formal in nature, White House policy councils can influence the brokering process in many ways, including through control over agenda setting, participant selection, framing, and discretion over when to elevate a decision and to whom. Policy councils accordingly exercise levers of power hidden to the agencies.²⁴⁵ As famously recognized by Peter Bachrach and Morton Baratz, this subterranean form of agency influence is no less real or effective than its more observable facets.²⁴⁶ Although such decisions may be guided by the ideal of honest brokering, policy councils like any other bureaucratic actor

²⁴³ See *id.* at 113 (opining that a presidential decision-making framework “should allow for a level of less structured process [as well], because uncontrollable external events and changing presidential directives drive so much activity”).

²⁴⁴ PATTERSON, *supra* note 16, at 77.

²⁴⁵ Note that some of the descriptive claims are presented here to draw a contrast to a rich portrait of presidential policymaking recently offered by Anya Bernstein and Cristina Rodríguez based on agency-centered interviews. See Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600, 1606–08, 1617–28 (2022). Although they too emphasize the deliberative nature of the policymaking process, *id.* at 1638–50, their account presents officials that “continually present ideas to be reviewed, vetted, and tested by other actors” and “routinely lead to the reconsideration of views,” *id.* at 1607–08. Policymaking, from this perspective, has a decidedly languid feel amidst what they characterize as a “web” of “multifarious” and “reticulated” norms of engagement. *Id.* at 1638–39. Perhaps due to their reliance on the agency's perspective, however, this characterization arguably does not sufficiently account for the ways in which the presidency structures and drives these deliberations.

²⁴⁶ See Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 *AM. POL. SCI. REV.* 947, 949 (1962).

must “satisfice”—that is, make decisions that are good enough amid often severe resource constraints.²⁴⁷ Policy councils are also motivated to serve the President’s political agenda while facing acute time pressures. As a result, they are likely to manage and structure deliberations in ways that serve the President’s substantive and procedural interests.

To illustrate some of these dynamics in action, recall the rulemaking mentioned above involving President Clinton’s promise to “end welfare as we know it.”²⁴⁸ In August 1996, Clinton signed into law PRWORA, which generally imposed stricter time limits and work requirements on welfare recipients.²⁴⁹ The text and legislative history of the statute made clear that Congress called for a more stringent standard for children’s disability benefits.²⁵⁰ The question for the Administration was how much stricter. The answer required a rulemaking from the Social Security Administration (“SSA”) under extreme time pressure: The statute required action within ninety days, and in the meantime, new social security claims could not be processed.²⁵¹ President Clinton delegated the “lead role” in brokering this rulemaking to DPC.²⁵²

The first critical task for DPC was to ensure that the rule became and remained a priority, both in terms of SSA’s regulatory agenda as well as within the EOP itself. To this end, Clinton’s DPC Director Carol Rasco circulated a top-ten list of “Hot” items that included both things that “must get done immediately” and “‘big’ issues.”²⁵³ Second on the list was SSA’s child disability benefits rule.²⁵⁴ To further drive the point home, Rasco sent an internal memo to cabinet secretaries and select EOP units making clear that “[t]he successful implementation of the

²⁴⁷ See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 118 (4th ed. 1997).

²⁴⁸ Sethi, *supra* note 18, at 16.

²⁴⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 103, § 407, 110 Stat. 2105, 2129–34 (codified as amended at 42 U.S.C. § 607).

²⁵⁰ See *id.* sec. 211(a), 110 Stat. at 2188–89 (codified as amended at 42 U.S.C. § 1382c); H.R. REP. NO. 104-651, at 1387 (1996) (“The committee intends that only needy children with severe disabilities be eligible for [supplemental security income] and that the Listings and other disability determination regulations as modified by these provisions properly reflect the severity of disability contemplated by the statutory definition.”). Before the Act’s enactment, a child was considered disabled if the child had an impairment of “comparable severity” to that of an adult in order to receive means-tested cash benefits. See 42 U.S.C. § 1382c(a)(3)(A) (1994). The new welfare law now provided that a child was disabled if the child had an impairment that resulted in “marked and severe functional limitations” that could “be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” Personal Responsibility and Work Opportunity Reconciliation Act sec. 211(a), 110 Stat. at 2188 (codified as amended at 42 U.S.C. § 1382c).

²⁵¹ See Memorandum from Brian Coyne, Chief of Staff, Soc. Sec. Admin., to Diana Fortuna, Assoc. Dir., Domestic Pol’y Council 2 (Sept. 12, 1996) (on file with author).

²⁵² Memorandum from Carol H. Rasco to Leon Panetta & Erskine Bowles, *supra* note 21.

²⁵³ Memorandum from Jeremy D. Benami, Deputy Domestic Pol’y Adviser, Domestic Pol’y Council, to Diana M. Fortuna, Assoc. Dir., Domestic Pol’y Council (Oct. 22, 1996) (on file with author).

²⁵⁴ See *id.*

welfare reform bill is one of the President's highest priorities for the second term."²⁵⁵ She set an ambitious biweekly meeting schedule to ensure that progress would be made.²⁵⁶ Outside of these meetings, DPC staff also generally kept in regular contact with political appointees within the agency to prod and keep abreast of their activities.²⁵⁷ In this manner, White House policy councils played a critical agenda-setting role.

Policy-council staff also have the discretion to decide who gets to be involved in the policy process and when. This decision necessarily dictates which perspectives are represented and incorporated into the outcome. According to meeting manifests drafted by DPC staff, many of the discussions regarding welfare reform included the Chief of Staff, OMB, NEC, and the offices of the First Lady, Vice President, Legislative Affairs, and White House Counsel.²⁵⁸ At other points in the process, Rasco decided that the statutory Office of National Drug Control Policy ("ONDCP") should also be included in the meetings given that "substance abuse is a much bigger factor in welfare reform than many want to admit."²⁵⁹ CEA also played an important role in welfare-reform implementation more generally.²⁶⁰ In this manner, DPC convened many components of the EOP beyond those in the White House.

In addition to deciding who gets to participate, policy councils also have the ability to frame the decisions at hand. Framing implicates the ways in which a problem or choice is presented, which can in turn influence the perception and ultimately the preferences of those deliberating

²⁵⁵ Memorandum from Carol H. Rasco, Assistant to the President for Domestic Pol'y, to Cabinet Sec'y's (Nov. 13, 1996) (on file with author).

²⁵⁶ See *id.*; Draft Memorandum from Carol Rasco, Assistant to the President for Domestic Pol'y, & Bruce Reed, Director, Domestic Pol'y Council, to the President of the United States (Sept. 2, 1996) (on file with author); Annotated Memorandum from Carol H. Rasco, Assistant to the President for Domestic Pol'y, & Frank Raines, Director, Off. of Mgmt. & Budget, to the President of the United States (Oct. 2, 1996) (on file with author).

²⁵⁷ See Memorandum from Carol H. Rasco, Assistant to the President for Domestic Pol'y, to Thomas O'Donnell & Elizabeth E. Drye (Nov. 13, 1996) (on file with author). This practice was also used during the Reagan Administration. See Roger B. Porter & Mark Goldberg, Interview, *Roger B. Porter on How the White House Works*, BROOKINGS REV., Fall 1985, at 37, 39. According to Roger Porter, the Director for Reagan's Office of Policy Development, "We are in constant contact with departments and agencies and periodically will ask them—say, every three months or every six months—to provide us with a list of issues that they anticipate will require attention in the next three to six months." *Id.*

²⁵⁸ See, e.g., Letter from Jeremy D. Benami, Deputy Domestic Pol'y Adviser, Domestic Pol'y Council, to Claudia M. Rayford-Williams (Nov. 26, 1996) (on file with author).

²⁵⁹ Memorandum from Carol H. Rasco to Thomas O'Donnell & Elizabeth E. Drye, *supra* note 257.

²⁶⁰ See Eric Swank, *Clinton's Domestic Policy Makers: Big Business, Think Tanks, and Welfare Reform*, 2 J. POVERTY 55, 63 (1998) (noting that CEA was one of Clinton's important advisers regarding welfare reform based on "governmental flow charts and 'inside' reports that identified Clinton's closest domestic advisors").

over a matter.²⁶¹ Practically speaking, presidential brokers usually hold the pen on decision memos, framing the relevant issues and deciding how to incorporate feedback and comments from other executive branch actors. One regulatory context in which framing is especially salient, for example, is in debates regarding environmental regulatory tools.²⁶² When tools are market based, such as those calling for tradeable pollution permits, they often “emphasize the role of private actors” rather than government.²⁶³ This framing “separate[s] pollution from the underlying benefit of the activity that results in pollution generation” and, as a result, can increase support for such schemes.²⁶⁴

Returning to the welfare reform example, DPC played a critical framing role during the Clinton Administration. SSA had presented the relevant policy choices in terms of procedural fairness and had generated some options for consideration accordingly.²⁶⁵ One option, for example, relied on a “functional equivalence” test to determine by a standard format if a child’s disability rose to the level of one of the medical conditions on SSA’s listings.²⁶⁶ SSA believed this option would “better focus adjudicators on functional equals, clarify the process,” and allow “adjudicators to explain their decision in a standard format.”²⁶⁷ In a memo to the President coauthored with OMB, however, DPC framed the issue differently: The choice instead was a tradeoff between monetary cost savings and children now ineligible for disability benefits.²⁶⁸

DPC, however, disagreed with OMB on the right course of action. Although the memo laid out five analytically distinct options,²⁶⁹ OMB advocated for an approach less stringent than the understanding at the time of statutory enactment. The initial baseline at enactment would have rendered 190,000 children ineligible with cost savings of \$8.4 billion over six years.²⁷⁰ By contrast, OMB favored a rulemaking that would “limit the impact of tightened eligibility requirements on children with multiple physical impairments” and also “require [SSA] adjudicators to complete a standard form that will promote greater

²⁶¹ See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981) (explaining framing effects and implications for rational choice theory).

²⁶² See Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 *NOTRE DAME L. REV.* 313, 315 (2006).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See Memorandum from Brian Coyne to Diana Fortuna, *supra* note 251.

²⁶⁶ *Id.* at 2.

²⁶⁷ *Id.* at 3.

²⁶⁸ See Memorandum from Franklin D. Raines, Director, Off. of Mgmt. & Budget, & Carol H. Rasco, Assistant to the President for Domestic Pol’y, to the President of the United States 1 (Nov. 15, 1996) (on file with author).

²⁶⁹ See *id.* at 5–7.

²⁷⁰ *Id.* at 5.

uniformity” — options which had also been suggested and supported by SSA.²⁷¹ This OMB-favored option would result in 145,000 children losing benefits and would cost an additional \$2.4 billion.²⁷² DPC, however, wanted to go further to ease the standard for benefits. It recommended an approach that would provide “additional recognition of children with chronic or episodic illnesses” with an additional “assessment of children on the borderline.”²⁷³ This option would only result in 100,000 ineligible children but would cost \$4.2 billion more relative to the baseline.²⁷⁴ In this manner, DPC brokered a process resulting in the identification of multiple regulatory options framed in the manner it preferred.

White House policy councils also help drive the brokering process to reach legal conclusions, which can then determine which policy options are on or off the table. For this task, they usually work closely with the Office of White House Counsel alongside a “diffuse” number of other executive branch lawyers, including those from DOJ and agency general counsels’ offices.²⁷⁵ These deliberative efforts often enable presidents to pursue their policy priorities on the strongest legal footing.²⁷⁶ During its initial presentation of regulatory options, for example, SSA opined that

the most likely meaning based on SSA’s discussions with congressional staff as the bills were being drafted, and the one that is best supported by the conference agreement, is that a child’s impairment(s) will be disabling if it “meets,” “medically equals,” or “functionally equals” the severity of an impairment in our listings.²⁷⁷

After intra-executive branch debates, however, DPC reported to President Clinton that SSA had more legal flexibility to define childhood disability than expected, even though “Congress would undoubtedly view this [stance] as subverting their intent.”²⁷⁸ SSA was able to interpret child “impairment” in a way that struck “the right balance” between competing policy priorities, including those of the President.²⁷⁹ In this manner, DPC was deliberating with SSA and other EOP components

²⁷¹ *Id.* at 6–7.

²⁷² *Id.*

²⁷³ *Id.* at 6.

²⁷⁴ *Id.*

²⁷⁵ Daphna Renan, *supra* note 107, at 835 (detailing “diffuse” executive branch lawyers “talking shop” about legal and policy questions).

²⁷⁶ *See id.*

²⁷⁷ Memorandum from Brian Coyne to Diana Fortuna, *supra* note 251, at 2.

²⁷⁸ Annotated Memorandum from Carol H. Rasco & Frank Raines to the President of the United States, *supra* note 256, at 4.

²⁷⁹ *Id.*

about the scope of SSA's legal authority, while recognizing SSA's primary role in determining that scope.

Finally, in addition to helping determine the relevant legal issues, brokering also includes the ability to influence when and to whom to elevate an issue for a final decision.²⁸⁰ Elevation is often necessary when the members of a working group cannot agree on an issue or when that issue is so central to a president's agenda that it requires sign-off from someone at the highest levels of the EOP hierarchy.²⁸¹ Given the importance of welfare reform to the presidential agenda, DPC initially sought to elevate the decision to President Clinton himself, but it remains unclear from publicly available documents whether he personally weighed in.²⁸² Indeed, sometimes the threat of elevation alone can help those involved in brokering to reach a mutually satisfactory compromise.²⁸³ After further meetings and deliberation between the EOP and SSA, the approach eventually adopted was a hybrid of the OMB- and DPC-favored options as reflected in SSA's interim final rulemaking.²⁸⁴

In this manner, presidents can foster greater responsiveness from agencies through brokering led by White House policy councils. According to former Clinton DPC Director Bruce Reed, "We always describe it as an honest broker, but it isn't exactly that It's to force the government to deal with what the president wants to do, rather than force the president to do what the government wants to do."²⁸⁵ Brokering, in other words, can help the President influence the substance and timing of an agency's rulemaking agenda. Beyond legislatively or judicially mandated rules, agencies have substantial discretion over which rules to prioritize.²⁸⁶ Although the degree to which the White House succeeds

²⁸⁰ See Sunstein, *supra* note 8, at 1856–57 (describing how an "issue may be 'elevated,' which means that it has to be resolved at a higher level").

²⁸¹ See *id.* at 1857.

²⁸² See Memorandum from Franklin D. Raines & Carol H. Rasco to the President, *supra* note 268. Although this memo sought decisions from President Clinton, the record is unclear on whether he signed off on a particular approach; this particular memo, despite bearing signatures from Raines and Rasco, does not indicate any decisions. See *id.*

²⁸³ See William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76, 86 (2005).

²⁸⁴ See Supplemental Security Income; Determining Disability for a Child Under Age 18, 62 Fed. Reg. 6408, 6411–18 (interim final rule Feb. 11, 1997) (to be codified at 20 C.F.R. pts. 404, 416).

²⁸⁵ *Developing Domestic Policy*, C-SPAN, at 1:25:06 (June 12, 2009), <https://www.c-span.org/program/public-affairs-event/developing-domestic-policy/207492> [<https://perma.cc/3EYV-SLOQ>].

²⁸⁶ See William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RSCH. & THEORY 495, 504 (2013) (reporting that sixty percent of the rules and 52.5% of the significant rules in their sample were "agency initiatives"—that is, "at [the] agencies' discretion"); Coglianesi & Walters, *supra* note 17, at 101 ("[A]round thirty-seven percent of all agency rules are legally required—that

in changing agency priorities remains an ongoing empirical debate,²⁸⁷ the available evidence is consistent with the observation that the White House is effective at shifting agency regulatory agendas, at least for a “small number of rules that administration officials consider to be the most significant ones.”²⁸⁸ Put differently, policy councils appear to successfully get agencies to prioritize the President’s highest priority rules.

Presidential brokering helps in this endeavor through multiple channels. First, the process usually involves high-level political appointees within the agencies.²⁸⁹ These political appointees help to drive agency priorities.²⁹⁰ Second, the costly nature of the brokering process also requires more resources from other actors such as career staff and policy analysts within the agency. Presidential brokering thus helps to shift agency agendas through the internal reallocation of agency resources. Finally, the deliberative nature of presidential brokering likely increases the internal legitimacy of the decisions reached. Through a process of mutual reason giving, rulemaking agencies who may otherwise bristle at presidential involvement are more likely to perceive the resulting decision as worthy of respect.²⁹¹

is, they are initiated in response to either legislative mandates . . . or court orders imposed on agencies without a clear underlying statutory source . . .”).

²⁸⁷ See Coglianese & Walters, *supra* note 17, at 109–10 (concluding that “it seems at a minimum premature at this time to conclude definitively that the presidency does not exert significant influence over agency agenda-setting”).

²⁸⁸ *Id.* (reporting that participants in an expert discussion “stressed that the White House will have much greater influence over a small number of rules that administration officials consider to be the most significant ones”). One interview-based study of political appointees at EPA, for example, found that more than sixty-one percent of respondents perceive that “White House involvement sometimes or often induced the agency to change its regulatory priorities.” See Bressman & Vandenbergh, *supra* note 6, at 77. In other words, more than a majority of respondents perceived that the White House succeeded in shifting the regulatory agenda, at least at one of the highest profile regulatory agencies. On the other hand, empirical work based on surveys from listed contacts in rules found that the White House had limited influence, though it is unclear the extent to which such contacts had visibility into discussions with the White House. See West & Raso, *supra* note 286, at 510–11 (“[R]ulemaking staff may not always be aware of communications between the White House and agency executives.”). Regardless, this study found that seven percent of the rules in its sample had been instigated as a result of presidential influence. *Id.* at 504.

²⁸⁹ See Selin et al., *supra* note 183, at 340 (“[E]xecutive agencies respond to presidential policy preferences by centralizing policymaking to the top of an agency’s hierarchy, placing regulation in the hands of political appointees.”); Bernstein & Rodríguez, *supra* note 245, at 1607–08, 1626 (reporting that “conversations with higher-placed appointees with larger policy purviews within their agencies” are a means for the President to communicate diffuse priorities).

²⁹⁰ See Selin et al., *supra* note 183, at 347 (“When the upper echelons of an agency’s hierarchy are involved in policy, an agency’s leadership can exert more control over the regulatory process.”).

²⁹¹ See Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 352 (1987) (discussing how political decisions can be legitimized by more deliberative environments).

Beyond agency agenda setting, policy councils will also remain heavily involved after the agency submits the rule to OIRA for the regulatory review process.²⁹² Once OIRA receives the rule, OIRA will circulate it widely to other agencies as well as to other units of the EOP.²⁹³ This review process allows a broader group to review the entire draft rule rather than just the core policy choices.²⁹⁴ At this stage, however, large-scale changes are more difficult for rules that have been brokered in advance. Many of the actors reviewing the rule have already sunk substantial decision-making costs with “psychological commitments” to particular courses of action.²⁹⁵ According to former OIRA Administrator John Graham, revisiting central policy choices in draft rules “make[s] waves and bruise[s] egos, which means that they will be resisted, sometimes fiercely and effectively.”²⁹⁶ As a result, the review process is likely to proceed more quickly; empirical work suggests that this is indeed the case for the highest priority rules subject to brokering, at least when there is a confirmed OIRA Administrator.²⁹⁷

III. IMPLICATIONS

This Part now turns to a normative assessment of presidential brokering. The first Section evaluates some of the strengths and weaknesses of the practice in terms of fostering accountable, effective, and efficient regulatory policymaking. The second Section then considers potential reforms from the perspective of the President, Congress, and the courts. Among other things, it argues that the executive branch is best situated to enforce the ideal of honest brokering through OIRA but that Congress and the courts can reinforce exogenous incentives as well.

²⁹² See Sunstein, *supra* note 8, at 1854–55. Because the draft rule is likely to be deemed “significant” under the relevant executive orders as pertaining to presidential priorities, the agency is then likely to submit it to OIRA. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended* in 5 U.S.C. § 601 note (2018).

²⁹³ See Sunstein, *supra* note 8, at 1854.

²⁹⁴ See *id.* at 1854–55.

²⁹⁵ CURTIS W. COPELAND, CONG. RSCH. SERV., R40713, THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 5 (2009).

²⁹⁶ *Id.* (quoting John D. Graham, Adm’r, Off. of Info. & Regul. Affs., Remarks Prepared for Delivery to the National Economists Club (Mar. 7, 2002), <https://georgewbush-whitehouse.archives.gov/omb/legislative/testimony/graham030702.html> [<https://perma.cc/U3HX-S2XX>]).

²⁹⁷ See Bolton et al., *supra* note 12, at 249. It is also possible that this result stems from increased “informal” review of the rule as well, though the study’s authors take this possibility into account. See *id.* at 265. Informal review simply means that agencies share preliminary drafts of rules or cost-benefit analyses informally with OIRA in order to receive early input and feedback. See *id.* at 245 n.3. According to a 2001 annual OIRA congressional report, “This practice is useful for agencies since they have the opportunity to educate OIRA desk officers in a more patient way, before the formal 90-day review clock at OMB begins to tick.” OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 43 (2001).

A. Evaluating Brokering

1. Strengths

Insofar as presidential oversight provides a measure of accountability,²⁹⁸ one beneficial aspect of brokering is that it increases agency responsiveness in the ways described above. Debates over the legality of such agency influence by the President are long running, with competing claims of constitutional and statutory interpretation as to whether the President can displace the discretion afforded to agency heads by statute and, if so, when statutes should be read as congressional blessings to do so.²⁹⁹ While these debates will not be resolved here, brokering adds yet another reason to think that the line between presidential command and persuasion—which is thin in practice—is even thinner when a process exists to afford a sense of procedural legitimacy to the outcome reached.³⁰⁰ In other words, the White House can influence regulatory outcomes through means beyond simple direction or cajoling backed by the threat of removal.

Presidents, however, require more than agency responsiveness to promulgate regulations capable of withstanding legal challenge. They also need information.³⁰¹ And rulemaking, as discussed, imposes especially high demands.³⁰² Brokering improves the quality and effectiveness of regulatory policy by drawing upon the expertise of not only the rulemaking agency but also the EOP. Many components, such as CEA, are headed by subject-matter experts drawn from academia or elsewhere; these components are also served by experienced career staff with expertise as well as experience working with the relevant agencies.³⁰³ OMB too has a wealth of substantive and managerial experience, not only within OIRA, but also within its resource management

²⁹⁸ See Bernstein & Rodríguez, *supra* note 245, at 1605 (“Agency action is often regarded by judges and commentators as accountable only insofar as it can be directly controlled by the elected President.”).

²⁹⁹ See Kagan, *supra* note 10, at 2317; Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264–67 (2006) (rejecting implicit presidential directive authority over agencies); Strauss, *supra* note 70, at 696–705 (arguing that presidential authority consists of oversight over agencies rather than directive authority).

³⁰⁰ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) (“[B]ecause of the general understanding that the President is in charge of the executive branch, agency heads will generally follow the President on matters of importance. Most likely, they will acquiesce in the President’s preference, even when that preference runs contrary to their own. In practice, then, the distinction between presidential influence and command might be thin indeed.”).

³⁰¹ See RUDALEVIGE, *supra* note 53, at 28–29, 35–36 (explaining centralization as a function of the “primacy of information” to the President and the President’s centralized need for “technical expertise”).

³⁰² See *supra* notes 167–77 and accompanying text.

³⁰³ See *supra* notes 134–36 and accompanying text.

offices.³⁰⁴ In addition, White House policy councils supplement their own expertise by hiring detailees: temporary employees drawn from administrative agencies.³⁰⁵

Beyond strengthening expertise, however, the President also needs a means of mitigating the cognitive biases that can influence expert judgment.³⁰⁶ The President, in other words, also requires a means of debiasing.³⁰⁷ This need is particularly acute for the White House: Its members are more likely than other units of the EOP to be subject to “groupthink,” the tendency of groups to breed conformity of thought.³⁰⁸ This phenomenon is most likely to arise in highly cohesive organizations operating under conditions of high stress.³⁰⁹ Many DPC and NEC staff begin their jobs early in an administration having just helped wage a campaign to win the presidency³¹⁰—dynamics which are especially prone to breeding a “hard-hearted” attitude toward outgroups.³¹¹ This group identity and coldness toward outsiders frequently privileges loyalty and morale above critical thinking.³¹²

Presidents are also called upon weekly, if not daily, to react to new political circumstances and exogenous events.³¹³ Such conditions of high stress and fast thinking further exacerbate now well-known behavioral

³⁰⁴ See Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2199–2201 (2016).

³⁰⁵ 3 U.S.C. § 112 (“The head of any department, agency, or independent establishment of the executive branch of the Government may detail, from time to time, employees of such department, agency, or establishment to the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration.”); HART, *supra* note 5, at 43–44 (discussing the practice in which “EOP personnel were ‘detailed’ to the presidential staff from the departments and agencies”).

³⁰⁶ Cf. Itiel E. Dror, Bridget M. McCormack & Jules Epstein, *Cognitive Bias and Its Impact on Expert Witnesses and the Court*, JUDGES’ J., Fall 2015, at 8, 8 (surveying how “expert evidence may be influenced by contextual information and cognitive bias”).

³⁰⁷ See generally Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (detailing legal mechanisms to achieve debiasing).

³⁰⁸ See Irving L. Janis, *Groupthink*, PSYCH. TODAY, Nov. 1971, at 43, 44.

³⁰⁹ See *id.* at 43–44.

³¹⁰ See PATTERSON, *supra* note 16, at 77 (“Some of the domestic policy chiefs have come straight from the presidential campaign staff . . .”); see also, e.g., Kierra Frazier, *Trump Picks Former Gingrich Aide to Lead Domestic Policy Council*, POLITICO: INSIDE CONG. LIVE (Nov. 26, 2024, 9:02 PM), <https://www.politico.com/live-updates/2024/11/26/congress/trumps-domestic-agenda-00191823> [<https://perma.cc/T8KR-6U48>] (“President-elect Donald Trump has chosen his campaign speechwriter to lead his Domestic Policy Council.”).

³¹¹ Janis, *supra* note 308, at 43.

³¹² See *id.*

³¹³ See Paul C. Light, *Domestic Policy Making*, 30 PRESIDENTIAL STUD. Q. 109, 111 (2000) (arguing that domestic policy not only reflects the “president’s priorities” but also “works its will on presidents and the presidency[,] . . . shap[ing] the office even as the office seeks to shape it, whether by placing new issues on the agenda or bringing new participants to the fore, by creating short-term crises or breaking down existing coalitions”).

quirks, such as judgment errors through the use of simple heuristics,³¹⁴ status quo biases,³¹⁵ and other cognitive shortcuts.³¹⁶ While the temptation to make decisions “in house”—that is, without the involvement of agencies or the broader EOP—is strong, presidents have learned the hard way that their instincts must be tempered and tested by competing perspectives.³¹⁷ In the words of Egil Krogh, Nixon’s Domestic Council Assistant Director,

when the president is spoken to individually there’s risk, or when he sets up a unit on his own and tells them they can’t talk to anybody else—“You come up with it and go forward”—there’s risk. You need to have a system in place where you can bring to bear all the different points of view Otherwise, [the president is] out and he’s exposed and he can get into a terrible amount of trouble.³¹⁸

As a result, presidents and their advisers have come to appreciate Herbert Simon’s central insight that institutions can be designed to overcome human cognitive limitations.³¹⁹

By designing a process that encourages debate between the rulemaking agency and structurally distinct EOP units with jurisdictional overlap, such as NEC and CEA,³²⁰ the President is able to invite opposing perspectives and thus test the premises underlying regulatory options. The same is true for the White House Counsel and more insulated OMB General Counsel’s Office for legal arguments—or DPC and other policy-specific statutory units within the EOP, such as ONDCP. Presidents, in this manner, have discovered the value of agents that can provide opposing perspectives from an outsider’s point of view. Exposure to these conflicts can reduce the effects of many behavioral limitations, such as those arising from anchoring, confirmation, and hindsight biases.³²¹

³¹⁴ See Jolls & Sunstein, *supra* note 307, at 203–04.

³¹⁵ See *id.* at 205 (describing prospect theory, in which perspectives are biased toward an “initial reference point”).

³¹⁶ See *id.* at 204–06 (discussing hindsight bias, optimism bias, endowment effects, and framing effects).

³¹⁷ See ROGER B. PORTER, *PRESIDENTIAL DECISION MAKING* 241–42 (1980).

³¹⁸ Panel Discussion with James M. Cannon III, Bertram Carp, Egil Krogh, Roger Porter, Charles Walcott & Karen Hult, *in* *GOVERNING AT HOME*, *supra* note 35, at 108, 119.

³¹⁹ See SIMON, *supra* note 247, at 110–17.

³²⁰ See HART, *supra* note 5, at 50 (observing that the EOP “necessarily overlaps, second-guesses, and often conflicts with the work done in the departments and agencies”).

³²¹ See Jolls & Sunstein, *supra* note 307, at 204–06, 210.

2. Weaknesses

On the other side of the ledger, however, are a number of features that weaken core administrative law values. Perhaps most important, many of these dynamics are largely shielded from both public and congressional scrutiny, thus undermining accountability. In addition to the breadth of the deliberative process privilege under the Freedom of Information Act (“FOIA”),³²² the Supreme Court has also interpreted the statute so as not to cover the “Office of the President” and “the President’s immediate personal staff.”³²³ The D.C. Circuit, for its part, has further clarified that if the sole role of an entity within the EOP is to “advise and assist the President,” it is not covered.³²⁴ Under these principles, White House policy councils like DPC and NEC are generally not subject to FOIA.³²⁵

The records of such policy councils are also covered by the Presidential Records Act,³²⁶ which shields them from the public for at least five years after the conclusion of the presidency.³²⁷ Presidents have also historically claimed absolute immunity from congressional investigations for their “immediate advisors” who lack “statutory authority and instead act solely to advise and assist the President.”³²⁸ What limited precedent exists, however, suggests that courts will not accept such arguments absent illegitimate congressional purposes and national security concerns;³²⁹ nevertheless, the practice of invoking immunity can deter congressional oversight given the inevitable delays.

³²² 5 U.S.C. § 552.

³²³ *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. REP. NO. 93-1380, at 15 (1974) (Conf. Rep.)).

³²⁴ *Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993).

³²⁵ See David Cohen, Note, *FOIA in the Executive Office of the President*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 203, 226 & nn.158–59 (2018).

³²⁶ 44 U.S.C. §§ 2201–2209.

³²⁷ See *id.* §§ 2201, 2204. A number of exceptions, however, could potentially allow presidents to restrict public access for up to twelve years. See *id.* §§ 2201(2), 2204(a), 2204(b)(2)(A); NAT’L ARCHIVES & RECS. ADMIN., GUIDANCE ON PRESIDENTIAL RECORDS 2, <https://www.archives.gov/files/presidential-records-guidance.pdf> [<https://perma.cc/D88Q-MHDD>] (interpreting the Presidential Records Act to cover the “Office of Policy Development,” a precursor to DPC, and the “National Economic Council”).

³²⁸ TODD GARVEY, CONG. RSCH. SERV., LSB10301, LEGISLATIVE PURPOSE AND ADVISER IMMUNITY IN CONGRESSIONAL INVESTIGATIONS 5 (2019); see also PATTERSON, *supra* note 16, at 5 (observing a “strong tradition, rather strictly adhered to, that no persons serving in the White House are to appear before congressional committees and testify about their actions: nor do they, except in connection with criminal investigations . . . or allegations of wrongdoing that would create great political embarrassment for the White House if they refused to appear”).

³²⁹ See, e.g., *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 105 (D.D.C. 2008) (suggesting that qualified immunity may exist in some situations “involving national security or foreign affairs” or in situations “where Congress is not utilizing its investigatory authority for a legitimate purpose”).

Second, the sheer scale of policy-council responsibilities results in a large workload as well as information asymmetries that cannot be completely redressed through elevation. Presidents have often delegated broad portfolios to the policy councils.³³⁰ President Biden's recent domestic policy directive, for example, called for DPC to

lead interagency policy processes on a wide range of issues, including but not limited to those related to health care and public health; substance use disorders; racial equity and justice; gender equity and justice; criminal justice reform; native affairs; disability policy; LGBTQ+ policy; immigration; veterans; education; faith-based and community initiatives; gun policy and community safety; poverty reduction; domestic human trafficking; youth policy; disadvantaged and marginalized communities; labor and workforce development; the caregiving economy; agriculture; food security and nutrition; rural, suburban, and urban affairs; housing; strengthening American democracy; national service; the United States Postal Service; and the census.³³¹

These broad portfolios require substantial resources and make policy councils more difficult to monitor.

As for effectiveness, policy-council staff who lack previous government experience often face a steep learning curve regarding how to work productively with agencies.³³² These challenges are exacerbated by relatively high rates of turnover and the lack of career staff.³³³ Relatedly, presidential brokering in its current form also raises concerns about the efficiency of the process. Simply stated, the decision costs of the practice are extremely high.³³⁴ Convening committees and working groups requires time and resources, as does drafting informational or decision memoranda, preparing for deliberations, and elevating decisions. These decision costs, in turn, can also be exacerbated by the overlapping jurisdictions between DPC and NEC, as well as other components of the EOP.³³⁵

B. Reforms

In light of the normative concerns identified above, this Section considers some reforms to improve the practice of presidential

³³⁰ See, e.g., Domestic Policy Presidential Directive, *supra* note 38.

³³¹ *Id.*

³³² See Crump, *supra* note 55 (manuscript at 2) (describing “rapid turnover” at the Biden DPC).

³³³ See LEWIS, PRESIDENTIAL APPOINTMENTS, *supra* note 170, at 145, 184, 211.

³³⁴ See *supra* note 247 and accompanying text.

³³⁵ See *supra* notes 99–100 and accompanying text.

brokering from the perspective of presidents seeking to drive their regulatory agendas. It will then inquire into the ways in which Congress and the courts can better incentivize honest brokering within the executive branch.

1. President

To enhance accountability, presidents should continue to publicly promulgate domestic policy directives outlining the organization of DPC and NEC and their decision-making processes. Presidents have long issued such directives in the national security context, often on day one.³³⁶ A directive in the domestic policy context would likely increase confidence in government decision-making as well as provide much needed transparency. Should such directives omit important components of the EOP, for example, or otherwise not reflect the norms of honest brokering, they could be subject to public criticism. By emphasizing the importance of honest brokering, formal directives could help reinforce internal norms of fair process and the inclusion of relevant perspectives.³³⁷

Documents such as these can also help socialize White House staff and other political appointees—some of whom may be new to government—into the brokering process. Making these operating procedures public would also help sustain more consistency across administrations.³³⁸ These directives should additionally be supplemented by trainings provided by a statutory component of the EOP with institutional memory, such as OMB.³³⁹ On the whole, these directives would increase the accountability of the process as well as reduce decision costs by serving as a means of intra-executive branch coordination.

In addition, presidents could also consider issuing a directive specific to agency rulemaking—analogue to executive orders governing regulatory review. Such a directive would be an opportunity to articulate best practices to govern the relationship between regulatory policy development and review. Presidential brokering, as discussed, helps to inform and debias regulatory policymaking through a process often led by White House policy councils to advance the President’s priorities

³³⁶ See PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT* 225 (2d ed. 2014) (observing that “one of the first orders of business in almost all administrations is to organize the [National Security Council]” and “define the administration’s preferred processes for developing” national security directives).

³³⁷ See, e.g., Domestic Policy Presidential Directive, *supra* note 38 (emphasizing the need for “coordinat[ion] through a systematic, evidence-driven process that will ensure that all major priorities are addressed, [and] the views of all relevant agencies are considered”).

³³⁸ See Walcott & Hult, *supra* note 214, at 310–11 (detailing issues in attempting to radically modify the EOP).

³³⁹ See PATTERSON, *supra* note 16, at 232–34 (emphasizing the need for training of new appointees).

and timing.³⁴⁰ Many of these goals are shared and also well-served by the OIRA-coordinated review process once the agency has drafted the rule.³⁴¹ The two processes, however, differ in ways that can result in organizational inefficiencies. Perhaps most importantly, while the policy-council-led process privileges presidential interests, regulatory review also considers whether the benefits of a rule justify its costs.³⁴²

Because it is easier to change course earlier in the policy development process rather than after the agency has drafted the rule and submitted it for review, the brokering process would benefit from some earlier attention to a rule's anticipated costs and benefits.³⁴³ Although the policy options may be too general to allow for detailed analyses, there is still value in seeking out preliminary information to help inform deliberations, as in the Clinton welfare-reform rulemaking discussed above.³⁴⁴ Memorializing those considerations for the policy process as it pertains to rulemaking could help facilitate the review that occurs later.

In addition, this directive could encourage early consultation with OIRA to ensure that the appropriate agencies are included in the policymaking process. The OIRA-coordinated review process, unlike the preceding policy process, usually features an OIRA career desk officer who helps determine in the first instance which agencies and units of EOP should get a draft of a rule.³⁴⁵ Sometimes, such career staff, by virtue of their longer experience in government or previous reviews, may identify equities in a particular agency that the initial policy coordination process may not have considered. For example, say DPC had brokered a high-profile FDA rulemaking regarding electronic cigarettes; those efforts may not have appreciated the implications of the rule on smoking cessation programs developed by the Department of Veterans

³⁴⁰ See *supra* Section III.A.1.

³⁴¹ See Sunstein, *supra* note 8, at 1838 (“One of OIRA’s chief functions is to collect widely dispersed information—information that is held by those within the Executive Office of the President, relevant agencies and departments, state and local governments, and the public as a whole.”); see also Revesz, *Regulatory Review*, *supra* note 11, at 134 (“OIRA’s review . . . can . . . be[] harnessed to issue regulations more expeditiously, address biases of benefit-cost analysis, and promote the priorities of the sitting President.”).

³⁴² See Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2018) (“Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”); *supra* notes 207–13 and accompanying text.

³⁴³ See CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 94–95 (2018).

³⁴⁴ See *supra* notes 248–84 and accompanying text.

³⁴⁵ See Sunstein, *supra* note 8, at 1854 (“Very soon after submission, the relevant OIRA desk officer—as noted, a member of the career staff—will generally circulate the rule to a wide range of offices and departments, both within the Executive Office of the President and outside of it.”). Of course, the desk officer will usually honor all requests from political appointees to see a rule, but that initial circulation list is an exercise in discretion. See *id.* at 1855.

Affairs (“VA”) until the OIRA-coordinated review process. It would have been much more efficient, however, if DPC had included the VA in the policy process and benefited from their perspective from the start. Involving OIRA, at the very least as an observer, during the brokering process could also facilitate a more efficient review down the road.

Beyond the issuance of a domestic policy directive, the brokering process could also be improved by greater attention to and discipline with respect to regulatory prioritization. Because of the costly nature of brokering, presidents should deploy the strategy only for the rulemaking efforts in which it would produce the most procedural benefits. Those rules that are the most important to the President should be brokered by White House policy councils, while the remainder would still be subject to more limited oversight through the OIRA-coordinated review process.³⁴⁶ Although formal planning mechanisms for prioritization theoretically already exist, they are not effectively deployed in practice.³⁴⁷ By executive order, for example, the Vice President is called upon to convene an annual meeting of White House advisers and agency heads to set regulatory priorities for the year ahead,³⁴⁸ but it is unclear how often these meetings occur, if at all. In addition, agencies are required to publish their short- and long-term rulemaking plans in the Unified Agenda,³⁴⁹ but the document is usually incomplete, either for strategic or resource-related reasons.³⁵⁰ According to one former OIRA Administrator, however, the Unified Agenda “process itself has become more of a paper exercise than an analytical tool.”³⁵¹

³⁴⁶ For example, the OIRA review process only covers “significant” rules, which was an effort to make the process “more selective” as to which rules would undergo review. Katzen, *supra* note 203, at 105.

³⁴⁷ See Freeman & Rossi, *supra* note 55, at 1179 (“This planning process affords OIRA several opportunities to identify regulations that might implicate the jurisdiction or interests of other agencies, and to intervene to help ensure that such actions are consistent and coordinated. It is not clear, however, whether in practice OIRA spends significant resources on such tasks.”).

³⁴⁸ See Exec. Order No. 12,866, 3 C.F.R. 638, 642 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2018) (“Early in each year’s planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.”).

³⁴⁹ See Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 748–50 (2016). By statute and executive order, agencies are required to publish semiannual regulatory agendas. See *id.* Their entries usually include the agency’s name, a short description of the rule, the rule’s title, and the estimated rulemaking schedule. OIRA then circulates the Unified Agenda for intra-executive branch review, during which DPC and other EOP entities can comment and share concerns on the substance and timing of the rules. See *id.*

³⁵⁰ See *id.* at 765 (“[A]gencies substantially underreport their rulemaking activit[ies] . . .”); Coglianesse & Walters, *supra* note 17, at 108 (“[I]t is clear that the *Unified Agenda* is itself not the locus of the most important decisionmaking within agencies and reflects only a partial snapshot of the totality of agencies’ ‘real’ regulatory agenda-setting.”).

³⁵¹ See Katzen, *supra* note 203, at 111.

Perhaps a more realistic approach is for presidents to task their chiefs of staff or other high-level managers with running a disciplined prioritization process during the transition period and at regular intervals afterward.³⁵² Although preparations for the State of the Union Address are a natural focusing event,³⁵³ special attention should be paid to this exercise of disciplined prioritization in the early months of the administration, given that it can take years to successfully promulgate a final rule.³⁵⁴ Such an effort should seek to identify only a very limited number of regulatory priorities per agency to allow for robust brokering and implementation.³⁵⁵ These efforts could complement more informal efforts to monitor agencies' regulatory agendas to identify opportunities that could further presidential goals. According to Roger Porter, one of Reagan's domestic policy advisors, the White House often develops these "early warning system[s]" with staff who "are in constant contact with departments and agencies."³⁵⁶ With this information in hand, the Chief of Staff could then continue to set priorities by "taking stock of the President's campaign promises[and] identifying current and prospective opportunities" through further discussions involving the OIRA Administrator, policy councils, and heads of agencies.³⁵⁷

Although some have proposed cost-benefit analysis as a method to inform priority setting,³⁵⁸ as a descriptive matter, presidents take into account a host of other considerations, including political ones.³⁵⁹ Given this broader set of considerations from the President's perspective, the process would also benefit from centralized input by important interest groups and constituencies.³⁶⁰ The most natural institutional home for such a task would likely be the White House Office of Public Liaison.³⁶¹

³⁵² See Dearborn, *supra* note 136, at 24 (describing the role of the Chief of Staff as fulfilling the need to "implement the President's agenda by setting priorities" for the White House Office); LIDDELL, *supra* note 61, at 190–91 (arguing that proposed regulations should be drafted during "Year Zero").

³⁵³ See Dearborn, *supra* note 136, at 30.

³⁵⁴ See TANGLIS, *supra* note 167, at 27.

³⁵⁵ See LIDDELL, *supra* note 61, at 190–91 (proposing that such efforts be limited to "three meaningful" priorities per agency to ensure execution and effective implementation).

³⁵⁶ Porter & Goldberg, *supra* note 257, at 39.

³⁵⁷ Dearborn, *supra* note 136, at 24.

³⁵⁸ See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE* 139–40 (2002) (defending cost-benefit analysis as "an approach that attempts to assess the magnitude of problems and to ensure sensible priority setting").

³⁵⁹ See Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENV'T L. REP. 10,433, 10,442 (2005).

³⁶⁰ See LIGHT, *supra* note 159, at 136–39 (arguing that "three basic cost criteria act to screen policy alternatives: political, economic, and technical").

³⁶¹ See Joseph A. Pika, *The White House Office of Public Liaison*, 39 PRESIDENTIAL STUD. Q. 549, 550 (2009). This Office has sometimes been renamed and reorganized in different administrations. The Biden Administration, for example, renamed it the Office of Public Engagement.

That Office was originally created during the Nixon Administration “to formalize a set of staff responsibilities for working with interest groups that had been unsystematically scattered among staff members during [previous] presidencies.”³⁶² Although different presidents have used the Office in different ways, the Office could serve a more focused function by helping to identify public regulatory priorities through meetings, proactive outreach, and information gleaned from rulemaking petitions.³⁶³

Once these limited regulatory priorities have been identified, they should then be delegated to White House policy councils like DPC to help develop those policies through the brokering process. This effort should strongly limit the ability of individual DPC or NEC staff to advance their own rulemaking priorities without clear sign-off from the Chief or another high-level White House official. Setting these limits would reduce the likelihood that various EOP offices send agencies conflicting signals about priority rulemaking efforts.³⁶⁴ OIRA should also continue to play an important role in helping to ensure that presidential priority rulemakings are expedited during the review process.³⁶⁵

Finally, there is also an important part for the Chief of Staff to play in resolving the potential for jurisdictional overlap between DPC and NEC, as well as other components of the EOP. In the Reagan Administration, for example, the Chief of Staff “assign[ed] issues” when there was a “question in some people’s minds about whether an issue is primarily economic or primarily domestic or primarily foreign policy.”³⁶⁶ Although such overlap can sometimes be productive,³⁶⁷ turf battles are especially costly in the context of agency rulemaking given the sheer amount of time and resources at stake.

See *Office of Public Engagement*, THE WHITE HOUSE, <https://bidenwhitehouse.archives.gov/ope/> [<https://perma.cc/3GQE-LKTH>].

³⁶² Pika, *supra* note 361, at 550.

³⁶³ This proposal would be analogous to proposals to task OIRA with initiating rules based on rulemaking petitions, a proposal which may be limited due to OIRA’s institutional characteristics and role in regulatory review. See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1382–83 (2013) (“OIRA can use information generated by private actors to identify areas where action is needed but where agencies have failed to move forward.”).

³⁶⁴ See Bressman & Vandenberg, *supra* note 6, at 68 (reporting that “[a]s many as nineteen White House offices were involved in EPA rule-making,” offices that “often were not on the same page”).

³⁶⁵ See Revesz, *Regulatory Review*, *supra* note 11, at 103.

³⁶⁶ Porter & Goldberg, *supra* note 257, at 38.

³⁶⁷ See Freeman & Rossi, *supra* note 55, at 1139 (“[O]verlapping delegations can produce positive goods by generating productive interagency competition and prompting agencies to produce ‘policy-relevant information.’” (footnote omitted)).

2. Congress

The account of presidential brokering offered here has emphasized the structures and processes within the presidency to help implement the President's highest regulatory priorities. Those structures include EOP units created by executive order as well as those established and designed by Congress to foster what it perceives as the longer-term interests of the office.³⁶⁸ Congress could potentially improve the presidential brokering process, however, by continuing to consider what kinds of information could benefit from relative insulation within the EOP and creating institutional homes for them. Recall that CEA was an effort by Congress to provide the President with relatively "detached, objective, scientific, and nonpolitical" economic advice in the wake of the economic turmoil introduced by the Great Depression and World War II.³⁶⁹ Since then, as mentioned above, Congress has also created a number of substantive units within the EOP that focus on issues such as drug policy, intellectual property enforcement, space, homeland security, cyber security, and pandemic preparedness.³⁷⁰ Given the important policy choices ahead regarding artificial intelligence, Congress might similarly consider seeking a means to build expertise within the EOP and provide advice to the President accordingly.³⁷¹

At the same time, Congress should continue to repeal or transfer units out of the EOP that are outdated or have proven ineffective over time. Indeed, Congress has a long history of doing so and has revisited dozens of units since the original establishment of the EOP.³⁷² For example, it established the National Council on the Arts in 1964 to assist the President with regard to the "growth and development" of arts and cultural resources, but later transferred this unit out of the EOP.³⁷³ In 1975, Congress also transferred out programs of the Office of Economic Opportunity that it had originally established within the EOP to provide education and training opportunities.³⁷⁴ The need for Congress to continue revisiting EOP units is especially important because each new component increases the coordination costs of the brokering process.

³⁶⁸ See *supra* text accompanying notes 41–44.

³⁶⁹ HART, *supra* note 5, at 52. As a result, Congress designed it to be headed by three presidentially appointed and Senate-confirmed members with statutory qualification requirements: They were to be "exceptionally qualified" by virtue of their "training, experience and attainments," which has traditionally meant that CEA members are drawn from academia. *Id.* at 51.

³⁷⁰ See *supra* notes 143–48 and accompanying text.

³⁷¹ See Diana Gehlhaus, *The Race for Data and AI Expertise in Government*, FED. NEWS NETWORK (Dec. 13, 2024, 10:28 AM), <https://federalnewsnetwork.com/commentary/2024/12/the-race-for-data-and-ai-expertise-in-government/> [<https://perma.cc/QHQ9-7DG8>] (discussing the need for greater artificial intelligence expertise in government).

³⁷² See RELYEA, *supra* note 100, at 25–28 (collecting examples).

³⁷³ *Id.* at 12.

³⁷⁴ See *id.* at 14.

Regardless of whether Congress establishes a unit within the EOP, however, the President still has “considerable freedom to use the component parts of the EOP in the manner he chooses, irrespective of the reason they were ordained in the first place, especially if he wants to ignore them.”³⁷⁵ In other words, presidents can always refuse to consider the advice of offices even if Congress places them within the EOP. OSTP, for example, saw its status “deteriorate[] rapidly” during the Nixon Administration, which displayed an “antipathy . . . toward scientists who were” viewed as “symbolic of the academic and intellectual community’s hostility toward” the Administration.³⁷⁶ As a result, OSTP saw its responsibilities diminished and was shut out of important meetings.³⁷⁷

Similarly, President Carter’s domestic policy staff purportedly “tried as much as possible to freeze OMB out of the process” regarding welfare-reform implementation efforts because they “knew [OMB was] going to oppose the plan.”³⁷⁸ Apparently, OMB was “concerned over its costs,” so DPC “wouldn’t always invite them to meetings.”³⁷⁹ President Reagan moved the statutory CEQ out to Jackson Place rather than keeping them in the Old or New Executive Office Buildings, which house most EOP staff.³⁸⁰ President Trump, during his first term, “all but ignored OSTP during his first [six] months in office, . . . excluding it from even a cursory role in formulating science-related policies and spending plans.”³⁸¹

The ideal of honest brokering, however, demands that these diverse perspectives are given an opportunity to be a part of the deliberations when relevant, even if the views are not ultimately adopted. In other words, the norm encourages conflicting perspectives to be presented and thoroughly debated. It is these opposing sources of information within the presidency that contribute to the expertise and debiasing of the political proclivities of the White House. The statutory offices established by Congress should thus be allowed to participate in the brokering process when their views are relevant, even if their particular concerns do not end up winning the day.

³⁷⁵ HART, *supra* note 5, at 49.

³⁷⁶ *Id.* at 98.

³⁷⁷ *See id.*

³⁷⁸ DANIEL E. PONDER, GOOD ADVICE 116 (2000).

³⁷⁹ *Id.*

³⁸⁰ *See* HART, *supra* note 5, at 92–93.

³⁸¹ Jeffrey Mervis, *Trump’s White House Science Office Still Small and Waiting for Leadership*, SCIENCE (July 11, 2017), <https://www.science.org/content/article/trump-s-white-house-science-office-still-small-and-waiting-leadership> [<https://perma.cc/LL9W-9DR8>] (“President Donald Trump has all but ignored OSTP during his first 6 months in office, keeping it small and excluding it from even a cursory role in formulating science-related policies and spending plans.”).

The OIRA-coordinated review process reinforces this ideal.³⁸² Once a rule is submitted to OIRA, the established practice is that all units within the EOP and other executive branch agencies presumptively get to have their say on it.³⁸³ Although views offered by these statutorily created EOP units may not prevail, they are at least aired for the rulemaking agency and other reviewers during the process. When these units submit comments, they can raise the decision costs by calling for responses and elevating issues when unsatisfactorily resolved.³⁸⁴ In this manner, OIRA-led review can serve as a means for Congress to ensure that the views of statutory EOP entities receive consideration during the rulemaking process. This conceptualization of OIRA-coordinated review may help explain congressional acquiescence to the review process as well as the protracted fight and eventual victory by Congress to subject the OIRA head to Senate confirmation.³⁸⁵

When a White House policy council cuts certain units out of the preceding policymaking process, however, that does not mean that these congressionally established components are without recourse. To use Margo Schlanger's terminology, these components resemble "[o]ffices of [g]oodness," which possess tools to exert influence even without formal authority.³⁸⁶ They are internal units within an agency, the EOP, whose role in the presidential policy process is advisory in nature and which are infused with values that can be orthogonal to the President's personal interests.³⁸⁷ Their placement within the EOP often gives them access to information that would be more difficult to access if housed in an external agency. Reagan's tactics notwithstanding,³⁸⁸ the individuals within these units are usually physically proximate to other members of the EOP, which includes them in informal networks that can yield intelligence as to when their views have been excluded. As a result, these statutory units can raise "fire alarms" with the public or congressional committees when their perspectives are cut out of the process.³⁸⁹ Even when presidents appoint sympathetic heads of these EOP components, these units also contain career staff who can similarly raise alarms.³⁹⁰

³⁸² See *supra* notes 207–13 and accompanying text.

³⁸³ See Sunstein, *supra* note 8, at 1840 (describing OIRA's role as an "information aggregator" across EOP entities and executive branch agencies).

³⁸⁴ See *id.* at 1854–59 (discussing OIRA's "internal process").

³⁸⁵ See Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 813, 100 Stat. 1783-335, 1783-336 (codified as amended at 44 U.S.C. § 3503).

³⁸⁶ Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 55, 60–61 (2014) (defining "[o]ffices of [g]oodness" as "advisory rather than operational," "value-infused," and "internal and dependent on their agency").

³⁸⁷ See *id.* at 60–61.

³⁸⁸ See *supra* text accompanying note 380.

³⁸⁹ Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

³⁹⁰ See, e.g., Kitrosser, *supra* note 130, at 1537; Nou, *supra* note 130, at 357.

Congress could bolster these fire alarms by imposing greater transparency requirements on presidential brokering. For example, Congress could enact a general requirement that agencies docket written comments from various components of the EOP or do so on a statute-specific basis.³⁹¹ Congress could also go further and require agencies to explain how they changed their rules in response to those comments and why.³⁹² The potential chilling effects of these measures on the robust deliberations that lie at the heart of presidential brokering, however, ultimately render them undesirable.

Alternatively, Congress could pursue other transparency-enhancing measures that better preserve the candor necessary for the deliberative process. For example, as it did for OIRA, Congress could threaten to defund the White House to pressure the White House into disclosing meetings with outside visitors.³⁹³ Such measures could, at a minimum, help to prevent regulatory capture as well as the appearance of it. Presidents currently disclose outside meetings with the White House inconsistently.³⁹⁴ When such meetings are disclosed, these visitor logs have been subject to criticism regarding their utility.³⁹⁵ Finally, congressional staff could also establish regular contacts with statutory units to stay apprised of the extent of these units' involvement—or lack thereof—in presidential decision-making and hold public hearings accordingly.³⁹⁶

3. Courts

Turning from Congress to the courts, the practice of brokering for the President's highest-priority rules bears on a number of doctrines functionally premised on the superior policymaking capacity of Congress as compared with the executive branch. The emergence of the

³⁹¹ See Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1164 (2010) (suggesting these reforms in the context of a broader argument for disclosure of presidential oversight).

³⁹² See *id.*

³⁹³ See HAROLD C. RELYEA, CONG. RSCH. SERV., RL30590, PAPERWORK REDUCTION ACT REAUTHORIZATION AND GOVERNMENT INFORMATION MANAGEMENT ISSUES 12–15 (2007); Exec. Order No. 12,866, 3 C.F.R. 638, 648 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2018).

³⁹⁴ See Josh Dawsey & Nolan D. McCaskill, *White House Says It Won't Make Visitor Logs Public*, POLITICO (Apr. 14, 2017, 5:14 PM), <https://www.politico.com/story/2017/04/white-house-says-it-wont-make-visitor-logs-public-237235> [<https://perma.cc/B5C8-XH9C>].

³⁹⁵ See, e.g., Fred Schulte & Viveca Novak, *White House Visitor Logs Riddled with Holes*, CTR. FOR PUB. INTEGRITY (Apr. 13, 2011), <http://www.publicintegrity.org/2011/04/13/4115/white-house-visitor-logs-riddled-holes> [<https://perma.cc/T4N8-55LV>].

³⁹⁶ See, e.g., *Committee Holds Hearing on Political Influence on Government Climate Change Scientists*, HOUSE OF REPRESENTATIVES COMM. ON OVERSIGHT AND GOV'T REFORM DEMOCRATS (Jan. 30, 2007, 12:56 PM), <https://oversightdemocrats.house.gov/legislation/hearings/committee-holds-hearing-on-political-influence-on-government-climate-change> [<https://perma.cc/87TK-XGD5>].

major questions doctrine, for example, has called for judges to apply a heightened degree of scrutiny to what are most likely to be presidentially brokered rules.³⁹⁷ Under this doctrine, the Supreme Court requires a clear statement from Congress authorizing an agency action of “economic and political significance.”³⁹⁸ In recent cases, however, the Supreme Court has emphasized the political over the economic dimensions of agency action.³⁹⁹ As described by Justice Gorsuch, politically significant rules are those that implicate an “earnest and profound debate across the country,” including debates in state legislatures and Congress⁴⁰⁰—circumstances in which White House policy councils are most likely to become involved.

For those rules, judges apply what amounts to a substantive presumption that Congress did not delegate the requisite authority to the executive branch.⁴⁰¹ In Chief Justice Roberts’s words, courts are to “presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”⁴⁰² As a result, the presidential brokering process must yield an especially compelling legal showing that the agency has the statutory authority to promulgate the rule at hand. The Court’s justifications for this doctrine have shifted over time, but one prominent rationale offered by Justice Gorsuch arises in part from the need for judges to engage in constitutional avoidance.⁴⁰³ Under this rationale, statutory grants of agency power to decide “major questions” are more likely to run afoul of nondelegation concerns; thus, judges should strive to interpret such statutes so as not to grant what amounts to legislative power absent a clear indication from Congress.

On Gorsuch’s account, the Constitution designed a lawmaking process—bicameralism and presentment—“requiring a broad consensus to pass legislation . . . to ensure that any new laws would enjoy wide social acceptance[and] profit from input by an array of different

³⁹⁷ See Short & Shugerman, *supra* note 30, at 514 (“The doomed [major questions doctrine] policies were promulgated by agencies linked to presidents with formal supervisory power who directed, actively supported, and took public responsibility for those agencies’ key policy decisions.”).

³⁹⁸ *West Virginia v. EPA*, 597 U.S. 697, 716 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

³⁹⁹ See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1051–56 (2023).

⁴⁰⁰ *West Virginia v. EPA*, 597 U.S. at 743 (Gorsuch, J., concurring) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

⁴⁰¹ See *id.* at 723 (majority opinion).

⁴⁰² *Id.* (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

⁴⁰³ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) (arguing that “the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine”); *West Virginia v. EPA*, 597 U.S. at 737 (Gorsuch, J., concurring) (“In Article I, ‘the People’ vested ‘[a]ll’ federal ‘legislative Powers . . . in a Congress.’” (alterations in original) (first quoting U.S. CONST. pmbl.; and then quoting *id.* art. I, § 1)).

perspectives during their consideration.”⁴⁰⁴ In other words, Gorsuch praised the ability of the legislative process to foster wide support, garner democratic legitimacy, and incorporate diverse perspectives. The Court, however, rarely acknowledges the role of the President in cases involving major questions⁴⁰⁵—let alone the ways in which presidential brokering serves many of the same goals that Gorsuch identifies with congressional policymaking.⁴⁰⁶

Presidential brokering, for example, exhibits public support and features of democratic legitimacy. As Justice Breyer’s dissent in *FDA v. Brown & Williamson Tobacco Corp.*⁴⁰⁷ put it,

Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.⁴⁰⁸

In other words, if one purpose of the major questions doctrine is to ensure politically accountable policy decisions, then the President too is an important source that the Court has yet to acknowledge in this context.

Next, presidential brokering, like the lawmaking process in Congress, also seeks to “profit from input by an array of different perspectives.”⁴⁰⁹ Although these perspectives are not the same as those that arise from bicameralism, they are arguably superior along some dimensions, including fostering greater expertise. Brokering, as discussed, is a procedural mechanism for surfacing and incorporating diverse, expert views from the rulemaking agency and different components within the EOP.⁴¹⁰ By contrast, when Congress considers a bill that implicates overlapping committees, a referring parliamentarian grants jurisdiction over that bill to one of the committees,⁴¹¹ with limited coordination or

⁴⁰⁴ *West Virginia v. EPA*, 597 U.S. at 738 (Gorsuch, J., concurring).

⁴⁰⁵ *See* Short & Shugerman, *supra* note 30, at 569 (“Many of the core [major questions doctrine] cases do not even mention the President.”).

⁴⁰⁶ *See* *West Virginia v. EPA*, 597 U.S. at 738 (Gorsuch, J., concurring) (“[T]he framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto.”).

⁴⁰⁷ 529 U.S. 120 (2000).

⁴⁰⁸ *Id.* at 190–91 (Breyer, J., dissenting).

⁴⁰⁹ *West Virginia v. EPA*, 597 U.S. at 738 (Gorsuch, J., concurring).

⁴¹⁰ *See supra* Section II.B.

⁴¹¹ *See* DAVID C. KING, *TURF WARS* 37–39 (1997) (“Precedent-setting referral decisions are made by the House and Senate parliamentarians routinely . . .”).

consultation thereafter.⁴¹² Congress's permanent bureaucracy can provide more policy support, but the main institutions for doing so, such as the Congressional Research Service and Government Accountability Office, are not subject-matter specific in the same way as some of the statutory components of the EOP.⁴¹³

As such, the rise of presidential brokering arguably helps to ameliorate the major questions doctrine's functional concerns with political accountability and deliberative expertise-based policymaking.⁴¹⁴ These considerations may not sway more formalist defenders of the doctrine such as Justices Gorsuch and Thomas.⁴¹⁵ Nevertheless, the future of the major questions doctrine remains in doubt after the Court's recent decision in *Loper Bright Enterprises v. Raimondo*,⁴¹⁶ overturning *Chevron*'s⁴¹⁷ call for judges to grant deference to reasonable agency interpretations of ambiguous statutes.⁴¹⁸ *Chevron* itself celebrated the President's influence on agencies as a legitimizing source of political accountability.⁴¹⁹ Critics, however, argued that *Chevron* encouraged interpretive "aggressiveness on a large scale," including from the "White House," which often went unchecked by judges.⁴²⁰

⁴¹² See *id.* at 139 (describing "Congress's scattered approach to policymaking" as "often unfocused and uncoordinated"). King observes, however, that coordination may be improving through sequential referrals. See *id.* at 144.

⁴¹³ See Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1624 (2020) (noting that the Congressional Research Service and Government Accountability Office "provide the most direct substantive policy support . . . [and] may produce policy reports that Congress can use as it wishes").

⁴¹⁴ See Short & Shugerman, *supra* note 30, at 590 ("The democratic deficit argument falls flat, however, when the agency has acted at the direction of the President.").

⁴¹⁵ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'").

⁴¹⁶ 603 U.S. 369 (2024).

⁴¹⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright*, 603 U.S. 369.

⁴¹⁸ See *id.* at 865–66. The *Chevron* two-part test called for the judge, first, to ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress's intent is "clear," then that intention governs; but if the statute is ambiguous or silent, then judges next ask whether the agency's interpretation is reasonable or "permissible" and, if so, defer accordingly. *Id.* at 842–43.

⁴¹⁹ See *id.* at 865–66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

⁴²⁰ See Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017) ("[T]he *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of

Loper Bright, by contrast, calls for judges to exercise “independent judgment”⁴²¹ using the “traditional tools of statutory construction.”⁴²² One such tool is the continued granting of *Skidmore*⁴²³ weight to agency interpretations according to their “power to persuade.”⁴²⁴ Under this canon, interpretations are more likely to be persuasive the more “thorough[],” “valid[],” and “consisten[t]” they are, along with any other persuasive factors.⁴²⁵ In addition, *Loper Bright* endorsed the idea that Congress can constitutionally delegate interpretive authority to an agency.⁴²⁶ According to the *Loper Bright* Court, Congress can “authorize[]” agencies to “exercise a degree of discretion” by granting rulemaking authority to fill gaps⁴²⁷ or to regulate pursuant to a term that “leaves agencies with flexibility.”⁴²⁸

By identifying other indicia of congressional intent to delegate beyond “express” or clear delegations, *Loper Bright* could be read as softening the major questions doctrine’s professed search for clarity, perhaps in favor of a return to an older version that relied more heavily on the ordinary tools of construction rather than operating as a substantive presumption.⁴²⁹ Under this approach, a rule’s political and economic significance could simply be understood as important “contextual” factors in determining whether there has been an implicit delegation to the agency, as Justice Barrett has argued in a recent concurring opinion.⁴³⁰ As Thomas Merrill notes, the major questions doctrine is also inconsistent with *Loper Bright*’s approach to interpreting the Administrative Procedure Act (“APA”),⁴³¹ which looked to case law preceding the statute’s enactment to shed light on its meaning.⁴³² Simply put, the “major questions doctrine has no analog in pre-APA decisional

ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes. I saw this first-hand when I worked in the White House . . .”).

⁴²¹ *Loper Bright*, 603 U.S. at 394 (“The [Administrative Procedure Act], in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.”).

⁴²² *Id.* at 401 (“The very point of the traditional tools of statutory construction . . . is to resolve statutory ambiguities.”).

⁴²³ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁴²⁴ *Id.* at 140; see also Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 228–29, 253 (2024) (remarking that “*Loper Bright* makes clear that independent judgment includes three substantive canons of interpretation that apply when a court is reviewing an agency interpretation,” including *Skidmore* weight).

⁴²⁵ Merrill, *supra* note 423, at 253 (quoting *Skidmore*, 323 U.S. at 140).

⁴²⁶ See *Loper Bright*, 603 U.S. at 394–95.

⁴²⁷ *Id.* at 394.

⁴²⁸ *Id.* at 395 (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

⁴²⁹ See Merrill, *supra* note 423, at 270–71 (noting that “it is conceivable that the *Loper Bright* regime could, in time, supersede the major questions doctrine”).

⁴³⁰ See *Biden v. Nebraska*, 600 U.S. 477, 514–15 (2023) (Barrett, J., concurring).

⁴³¹ 5 U.S.C. §§ 551–559, 701–706.

⁴³² See Merrill, *supra* note 423, at 240.

law, which would suggest . . . that the major questions doctrine violates the APA.”⁴³³ For all these reasons—doctrinal and functional—the major questions doctrine should abandon its substantive presumption and instead merge into *Loper Bright*’s call for judges to engage in independent statutory interpretation.

In addition, even when judges have determined the scope of an implicit delegation, *Loper Bright* makes clear that judges still have a role to play in ensuring that the agency has engaged in “reasoned decisionmaking.”⁴³⁴ In other words, as under *Chevron*, judges must still undertake an inquiry into whether the agency’s decision is adequately supported. Judicial application of *Loper Bright* thereby increases the motivation for executive branch lawyers to deliberate over the “best” reading of the statute and to ensure that the discretion exercised remains reasonable.⁴³⁵ Relative to the *Chevron* regime, it is now more risky for White House lawyers to simply pick between a range of interpretive possibilities without deliberating with agency general counsels and other EOP lawyers in search of a defensible “point estimate.”⁴³⁶ Purely presidential interests are thus more likely to be tempered by the views of a broader array of lawyers within the executive branch amid the need to now provide a stronger justification for them.

Similar incentives also exist for policy decisions that fall within the bounds of a statute thanks to the development of “hard look” review under the APA’s arbitrariness standard.⁴³⁷ Under this approach, agencies are required to show that they have “examine[d] the relevant data and [then] articulate a satisfactory explanation for [their] action[s].”⁴³⁸ These explanations must demonstrate “rational connection[s] between the facts found and the choice[s] made.”⁴³⁹ This obligation has been supplemented by other doctrines providing that a court will only uphold an agency’s decision on the grounds that an agency originally acted on, as opposed to those grounds introduced as post hoc litigating positions.⁴⁴⁰ As a result, these prospects similarly help to bolster the White House’s incentives to debias and test the basis for its policy choice through honest brokering.

Should arbitrariness review more directly enforce the ideal of honest brokering by taking notice of deficiencies in the brokering

⁴³³ *Id.* (footnote omitted).

⁴³⁴ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

⁴³⁵ *See id.* at 400 (“It therefore makes no sense to speak of a ‘permissible’ interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best.”).

⁴³⁶ E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV’T L.J. 1, 11 (2005).

⁴³⁷ *See* 5 U.S.C. § 706(2)(A).

⁴³⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴³⁹ *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁴⁴⁰ *See SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943).

process? Under this potential approach, evidence that a policy council had not engaged in honest brokering might help inform the court's evaluation of the agency's policy rationale. If that process excluded agencies or EOP components with relevant expertise, for example, the resulting agency rule may not be deemed per se arbitrary, but that evidence may nevertheless inform the court's independent evaluation of the policy justification. A version of this approach was arguably on display during lower courts' consideration of President Trump's first-term executive order that imposed a ninety-day entry ban on nationals of seven majority-Muslim countries.⁴⁴¹

One of the initial complaints in the litigation alleged that the executive order "did not arise out of the usual process of consulting with the relevant cabinet-level officials and agencies" but was instead "primarily drafted by a small team of Presidential aides, overseen by chief White House strategist Stephen K. Bannon."⁴⁴² The district court accordingly found that the order "did not involve traditional interagency review by relevant departments and agencies."⁴⁴³ Upon appeal in a related action, the Ninth Circuit also emphasized the lack of an "interagency" process in concluding that the President did not make a required legal finding.⁴⁴⁴ Analogously, one could argue that courts should take notice of the lack of brokering as context through which to evaluate an agency's justification under arbitrariness review.

There are multiple problems, however, with this approach in the rulemaking context. The first is that deficiencies in the brokering process will rarely come to light to inform judicial review. As discussed earlier, the process is highly opaque due in part to the limited coverage of FOIA and its exemptions.⁴⁴⁵ Moreover, White House communications with agencies generally need not be disclosed in rulemaking records.⁴⁴⁶ Although such information may become available to the public through leaks and other channels, it will not reliably be available for courts to evaluate. Second, this doctrinal innovation would also be in some tension with *Vermont Yankee Nuclear Power Corp. v. Natural Resources*

⁴⁴¹ See, e.g., *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 545 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated*, 583 U.S. 912 (2017); see also Exec. Order No. 13,769, 3 C.F.R. 272 (2018).

⁴⁴² Complaint for Declaratory and Injunctive Relief at 15, *Int'l Refugee Assistance Project*, 241 F. Supp. 3d 539 (No. 17-cv-00361).

⁴⁴³ *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 545.

⁴⁴⁴ *Hawaii v. Trump*, 859 F.3d 741, 756 (9th Cir. 2017) (per curiam), *vacated*, 583 U.S. 941 (2017); see also Renan, *supra* note 214, at 2259 (characterizing this approach as an indirect approach to enforcing deliberative norms).

⁴⁴⁵ See *supra* notes 322–25 and accompanying text.

⁴⁴⁶ See *Sierra Club v. Costle*, 657 F.2d 298, 408–09 (D.C. Cir. 1981) (holding that ex parte communications with the President or presidential staff during informal rulemaking is permissible and need only be docketed if the agency relies on factual support provided during such communications).

Defense Council, Inc.,⁴⁴⁷ which forbids courts from requiring more process from agencies than that demanded by statute.⁴⁴⁸ If courts were to key arbitrariness determinations to the quality of the deliberations that a rulemaking agency had with the White House, then courts risk running afoul of this prohibition.

For these reasons, courts should continue to engage in substantive evaluation of agencies' legal and policy justifications to indirectly encourage the norm of honest brokering. Although Congress and the courts have an important role to play in providing exogenous incentives, the direct enforcement of the ideal by White House policy councils may best be left to the executive branch—specifically, more independent actors like OIRA whose role during regulatory review has been to facilitate the inclusion of intra-executive branch viewpoints that may have otherwise been excluded during the preceding policy process.

CONCLUSION

This Foreword has sought to understand how the President organizes the presidency to advance domestic regulatory policy. In doing so, it has foregrounded a set of centralized bodies beyond OIRA. One of its contributions has been to shed light on structural variations within the EOP, why they matter, and how they likely affect the President's decision to delegate the authority to coordinate policy. Appreciating these institutional differences can enrich both positive and normative debates about centralization in the rulemaking context.

Many research questions, of course, remain: What explains structural variations not only between various parts of the EOP, but also over time? Do they reflect partisan dynamics between the President and Congress, or can they be better explained by information-based theories? How many rules are involved in the presidential brokering process and in what ways are they treated differently during the review process? Which units within the EOP are more influential than others at both stages?

On the heels of another recent presidential transition, this Foreword has argued that more attention is owed to the design, structure, and internal processes of the presidency as a core part of the administrative state. Such matters should be front and center of any administration eager to wrest control over domestic regulatory policy as well as for those eager to provide more checks on the White House. Presidential power, in this view, lies not only in the interstices between the President and administrative agencies but also between the President and the presidency.

⁴⁴⁷ 435 U.S. 519 (1978).

⁴⁴⁸ *See id.* at 524–25.