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Executive Oversight of Administrative Rulemaking: Disclosing the Impact

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Executive oversight of administrative rulemaking is an omnipresent factor for regulatory agencies. The oversight process developed in the Reagan-Bush Administration (Administration) is an institutionalized process for reviewing rules that exerts a powerful supervisory influence over agency rulemaking. Operating through the Office of Management and Budget (OMB), the White House has assumed a partnership with agencies in developing policy that has replaced the role some courts assumed in the 1970s.[1] This expansion in the Administration's role occurred at a time when the Supreme Court increased the scope of matters left to agency discretion in the interpretation of statutes.[2] As a result, the Administration, through its oversight process, can influence a wide range of issues of policy and statutory interpretation. The significance of Administration oversight promises to increase in the future because of the Administration's interest in making agency guidance subject to oversight and its interest in developing policies on basic issues facing several agencies, such as risk assessment procedures.[3] Furthermore, the Clean

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1. *See* Verkuil, *Welcome to the Constantly Evolving Field of Administrative Law*, 42 ADMIN. L. REV. 1, 2 (1990) [hereinafter Verkuil, *Evolving Field*] (the "primary partnership" of the agencies seems to be with OMB, and the "shift to central political control under OMB is the administrative law story of the decade").

2. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984).

3. *See infra* text accompanying notes 40-42.

Air Act Amendments of 1990 require the issuance of numerous rules, which will bring important and disputed policy issues within the oversight process.[4]

Moreover, the oversight process is under scrutiny because the Administration revoked an agreement reached with some congressional leaders under which OMB would have provided reasons for changes made in the oversight process.[5] In addition, the President has assigned to the Council on Competitiveness, chaired by the Vice President, the task of resolving disputes between OMB and the agencies about oversight determinations.[6] The Council's role promises to renew the debate over whether oversight can be exercised in a way that does not displace the agency's statutory responsibility for the decision.[7]

The oversight process has become an established part of the regulatory scene and much has been written about it.[8] Additional attention is warranted because of the importance of oversight, its changing and expanding role, and the continuing debate over whether oversight unduly influences agency decisions.[9] This Article reexamines executive oversight

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4. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. *See also infra* text accompanying notes 45-55.

5. *See infra* text accompanying notes 119-23.

6. *See infra* text accompanying note 36.

7. *See* 137 CONG. REC. S16250 (daily ed. Nov. 7, 1991) (introducing S.1942, Regulatory Review Sunshine Act). *See also infra* text accompanying notes 48-55 and 189-92.

8. *See, e.g.*, Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U.L. REV. 535 (1987); McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U.L. REV. 443 (1987) [hereinafter McGarity, *Presidential Control*]; Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981) [hereinafter Rosenberg, *Beyond the Limits*]; Silverglade, *The Food and Drug Administration's Review of Regulations Pursuant to Cost-Benefit Requirements of Executive Order 12,291*, 39 FOOD DRUG COSM. L.J. 332 (1989); Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538; Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986); *Symposium: Presidential Intervention in Administrative Rulemaking*, 56 TUL. L. REV. 811 (1982); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) [hereinafter Verkuil, *Jawboning*].

9. *See, e.g., FDA's Continuing Failure to Regulate Health Claims for Foods: Hearings Before Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Gov't Operations*, 101st Cong., 1st Sess. 172-81 (1989) [hereinafter *Health Claims Hearings*]; NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PRESIDENTIAL

in light of these factors and recommends that an agency disclose, as part of the rulemaking record, when an agency has adopted an administration policy in the oversight process and the agency's reasons for doing so. Such a disclosure would promote public accountability for administration decisions and help ensure that an agency adequately exercises its statutory decisionmaking responsibility. Furthermore, disclosure would ensure that the agency has adequately considered the policy alternatives and has made a rational choice between its initial position and the position developed in the oversight process. A discussion of the alternatives is appropriate to promote reasoned agency decisionmaking and is accordingly a matter subject to judicial review.

I. Scope of the Article

Public accountability has been offered as both a reason for and against executive oversight of regulatory agencies. Presidential supervision has been viewed as a way to make unelected bureaucrats accountable to elected political officials.[10] On the other hand, the lack of information about the oversight process can defeat accountability and potentially undercut judicial review of agency decisionmaking.[11] The concern over secrecy led to recommendations that communications between agencies and their executive branch overseers be reduced to writing and be included in the public record.[12] However, disclosures of this type can interfere with the deliberative process and are not necessary to ensure judicial review.[13]

This Article's recommendation would promote greater accountability without directly disclosing executive communications in developing policy.[14] Under this approach, agencies would designate, as both an administration and agency position, any policy adopted to reflect specific oral or written comments of OMB or the White House made during the regulatory review process. The designation would be made in the Federal Register preamble to the agency's proposed or final rules. In addition, the agency would identify its initial position as a policy alternative it considered and provide reasons for adopting a different

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Management of Rulemaking in Regulatory Agencies 25 (1987) [hereinafter NAPA Report]; McGarity, *Presidential Control*, *supra* note 8, at 457.

10. *See* Harter, *Executive Oversight of Rulemaking: The President is No Stranger*, 36 Am U.L. Rev. 557, 568 (1987).

11. *See* Houck, *supra* note 8, at 552-53; McGarity, *Presidential Control*, *supra* note 8, at 456-57, 460-61.

12. *See* NAPA Report, *supra* note 9, at 35; McGarity, *Presidential Control*, *supra* note 8, at 445, 460-63.

13. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

14. There have been recommendations and legislative bills concerning disclosure of the facts and reasons for changes in agency positions made as a result of executive oversight. *See infra* notes 134-35 and accompanying text. This Article expands on this rationale and the legal basis for that position.

position. The content of the actual communications between an agency and OMB in developing the policy would not be disclosed.

This Article also examines whether these disclosures are a necessary part of an agency's stated basis for a rule, which is required for purposes of judicial review. In *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[15] the Supreme Court held that an agency's revocation of a rule was inadequately supported because the agency failed to consider a previously identified regulatory alternative.[16] Application of the *State Farm* approach to the executive oversight process will further the goals of reasoned decisionmaking and ensure adequate attention by the agency and others to the factors warranting adoption of an administration position over the initial agency position.

The oversight process should not displace an agency's statutory responsibility to make decisions. To ensure this, an agency should be as free to disregard as to accept the positions developed in the oversight process. An obligation to disclose when an agency adopts an administration position would serve as a counterweight to the elements of the oversight process that can induce acceptance of administration positions, including the present requirement of the Executive Order that agencies disclose the reasons for *not* accepting OMB positions.[17]

The disclosure approach may raise concerns about intrusions into the President's ability to supervise agencies and about the consultative privacy needed to develop policy. This Article does not call for disclosure of communications during policy formation. Rather, the disclosure requirement should only apply to administration policies adopted as a result of the oversight process established under the Executive Order. Communications from the President directly to the agency would not be covered.[18]

A disclosure requirement imposes additional burdens. The required disclosures would indirectly affect the outcome of the consultative process to the extent that the administration is reluctant to have a policy attributed to it or an agency is reluctant to change its initial position because of the difficulty of justifying the alternative. These burdens and consequences are warranted by the benefits provided in promoting accountability and ensuring the responsible exercise of the agency's statutory role. This Article includes an analysis of these concerns and other potential objections, including the claim that disclosure needlessly probes the mind of the agency decisionmaker during rulemaking.

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15. 463 U.S. 29 (1983).
16. *Id.* at 46-51.
17. *See infra* notes 30, 176-81 and accompanying text.
18. *See infra* text accompanying notes 227-28.

The model of reasoned decisionmaking developed in the 1970s does not always mesh easily with the more recent recognition that an agency should be responsive to the policies and political direction of the administration.[19] The proposed disclosure does not aim to insulate agencies from politically responsive influence. On the other hand, the proposal suggests that rulemaking should be more than a response to political choices. Statutory constraints need to be respected, and the agencies need to bring their technical expertise and experience to bear. Moreover, the agencies are ultimately responsible for ensuring that the adoption of an administration position is consistent with the agency's statutory mission. Disclosure will clarify how the agency reconciles these aims. Furthermore, disclosing that an agency decision reflects an administration policy will promote accountability to the public, the hallmark of the legitimacy of political influence. Disclosure will also facilitate examination of the value of executive oversight itself. A clearer identification of administration policy provides a basis for an overall evaluation of whether the costs of executive oversight in the administrative process are justified by the benefits it provides.[20]

Part II of this Article reviews the basis for the executive oversight process, developments that affect its importance, and the reasons that support it. Part III discusses the principal criticisms of the oversight role, and Part IV summarizes the restrictions and disclosures presently applicable to the oversight function. Part V examines the policy reasons that support a broader disclosure requirement. The relevance of disclosure for purposes of judicial review is examined in Part VI. Finally, Part VII analyzes the legal and policy factors weighing against such a proposal and illustrates how the proposal's benefits outweigh these factors.

II. Overview of Executive Oversight: Its Basis, Process, Importance, and Rationale

A. Basis for Executive Oversight

1. OMB Authority Under Executive Order 12,291.—Although Presidential oversight of agencies has a long history,[21] the process assumed

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19. *See* Verkuil, *Evolving Field*, *supra* note 1, at 2 (an increase in the OMB role places courts in a "backup role" with respect to policy outcomes). Although courts no longer assume a partnership role with respect to agency policy decisions, they overturn agency decisions based on the "hard look" standard endorsed by the Supreme Court in *State Farm*.

20. *See infra* note 143 and accompanying text.

21. *See* Exec. Order No. 12,044, 3 C.F.R. 152 (1978) (Carter Administration); Exec. Order No. 11,821, 3A C.F.R. 926 (1976) (Ford Administration); NAPA Report,

a new dimension in the 1980s. The Reagan Administration developed a more expansive and powerful review program than any preceding Administration.[22] The Bush Administration has continued the program. President Reagan's Executive Order 12,291 directed that "all agencies, to the extent permitted by law, shall adhere" to specified "requirements" aimed at promoting economic efficiency.[23] In particular, agencies are not to take action "unless the potential benefits to society for the regulation outweigh the potential costs to society."[24] The agency must also choose the rule with the "least net cost to society."[25] To ensure compliance with the Executive Order, each agency must submit major proposed and final rules and notices of non-major rules to OMB for review before issuance.[26] The agency must submit a regulatory impact analysis (RIA) describing the costs and benefits of the rule, any less costly alternative approaches, and the "legal reasons" for rejecting the alternatives.[27] The review is limited to a specified period unless OMB extends it.[28] There is no limit on the duration of the extension.[29] If the OMB Director notifies an agency of an intent to submit views on a final rule or RIA, the agency must refrain from publishing the rule until the agency has responded to and incorporated the views and its response in the "rulemaking file."[30] This last procedure affects agencies that plan to issue rules despite OMB concerns. Even though an agency is not required to adopt OMB views, the agency must provide a response to them.

The Executive Order expressly provides that it does not displace the responsibility of the agency head to make the decision.[31] When the Order was issued, the Justice Department issued an opinion that the President could direct an agency to use a cost-benefit process that the agency would not have otherwise used.[32] In addition, the opinion stated that,

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supra note 9, at 9-11; J. QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 117-421 (1976) (illustrating the EPA's quest to become the ultimate decisionmaker under the 1970 Clean Air Act, despite objections by OMB under the Nixon Administration).

22. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id. See* Bruff, *supra* note 8, at 566.

30. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

31. *Id.*

32. Proposed Executive Order Entitled Federal Regulation, 5 Op. Off. Legal Counsel

under the Order, an agency has "a considerable amount of decision-making discretion" and retains the "ultimate judgment" on the application of the cost benefit principles as it affects the decision.[33]

2. Process of Oversight.—The OMB review function under the Executive Order has been delegated to OMB's Office of Information and Regulatory Affairs (OIRA).[34] Originally, the Task Force on Regulatory Relief resolved disputes between the agency and OMB concerning the applicability of the Order.[35] Today, the Council on Competitiveness, headed by Vice President Quayle, performs this function.[36]

In practice, implementation of the Order generally involves a process of negotiation and compromise between the agency and OIRA.[37] In testimony before a congressional committee, OIRA characterized its role as advisory and denied that the oversight process requires clearance of agency rules by OMB.[38] Under the Executive Order, agencies are permitted to issue rules to which OMB has formally objected after the agency responds to OMB's objections, but the procedure has been used in only a limited number of cases.[39]

3. Enhanced Importance of Executive Oversight.—Although oversight under Executive Order 12,291 has always been important in shaping the policies of the administrative agencies, its significance continues to grow.

a. OMB policy initiatives

OMB has identified an interest in coordinating the risk assessment procedures used by many agencies. The OMB proposed policy was

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59 (1981), *reprinted in Role of OMB in Regulations: Hearings before Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 491-92 (1981).

33. *Id.*

34. NAPA REPORT, *supra* note 9, at 1.

35. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

36. White House Press Statement (June 15, 1990) (copy on file with the Indiana Law Review). *See infra* text accompanying notes 50-55.

37. Bruff, *supra* note 8, at 559-62. For a description of the review process, see NAPA REPORT, *supra* note 9, at 26 (the "review process is more one of negotiation and accommodation than of agency initiatives being overruled by OMB demands"); Special Project, *The Impact of Cost-Benefit Analysis on Federal Administrative Law*, 42 ADMIN. L. REV. 545, 595-602 (1990) [hereinafter Special Project].

38. *See Health Claims Hearings*, *supra* note 9, at 172 (statement of James B. MacRae, Jr., Acting Administrator, OIRA) ("[W]e provide advice; we do not clear rules.").

39. *See* Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1483 (D.C. Cir. 1986); *Health Claims Hearings*, *supra* note 6, at 493-520 (list of examples provided by OIRA); *EPA Final Rule on Small Boilers*, Environment Daily (BNA) (Sept. 5, 1990).

published in the Regulatory Program of the United States with an invitation for public comment.[40] OMB referred to the existing procedures which used conservative assumptions as involving "misordered priorities" and "perverse outcomes."[41] The development of a centralized policy on a basic and debated issue, such as risk assessment, represents an important use of the oversight role.[42]

OMB is also interested in developing a budget to control the aggregate costs of regulation to society.[43] One means of controlling regulation costs is the establishment of overall caps on the total costs of federal regulation and on programs within specific agencies. The United States Environmental Protection Agency (EPA) has agreed to use one of the programs required under the Clean Air Act as a pilot program for developing a regulatory budget.[44]

b. Clean Air Act Amendments

The recent Clean Air Act Amendments mandate the issuance of rules under strict time deadlines.[45] Executive oversight has been criticized for delaying the issuance of rules.[46] The statutory Clean Air Act requirement for the issuance of rules under a fixed schedule means that oversight cannot simply delay a rule. Instead, its impact will be on the *content* of rules that are actually issued. Environmental issues proved

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40. 1990-1991 OMB REGULATORY PROGRAM OF THE UNITED STATES GOV'T 3-5, 13-26 [hereinafter 1990-91 REGULATORY PROGRAM].

41. *Id.* at 24. The OMB analysis has in turn been criticized. *See Prestigious Academic Group Calls OMB Attack on EPA Risk Methods Unbalanced*, 12 Inside EPA 5 (Jan. 25, 1991).

42. *See* NAPA REPORT, *supra* note 9, at 30 (concerns about centralized review).

43. 1990-91 REGULATORY PROGRAM, *supra* note 40, at 11. *See* Fix & Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 293, 312-16 (1985) (history of the regulatory budget).

44. *See Reilly Assures White House EPA Will Toe Administration Line, Minimizing CAA Costs*, 11 Inside EPA 1, 9 (Nov. 9, 1990) (discussing the memorandum from EPA Administrator Reilly to Chairman Boskin of the White House Council of Economic Advisers).

45. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. For examples of mandatory rules with deadlines for issuance, see 42 U.S.C.A. § 7511b (Supp. 1991) (schedule of regulations on consumer products), 42 U.S.C.A. § 7521 (Supp. 1991) ("cold CO" carbon monoxide emission standard to be issued within one year), 42 U.S.C.A. § 7545 (Supp. 1991) (reformulated gasoline standard to be issued within one year), and 42 U.S.C.A. § 7661(a) (Supp. 1991) (permit regulation to be issued within one year). The EPA has been using regulatory negotiation for a number of important rules, and the process may indirectly affect OMB's ability to exercise regulatory review. *See Environmental Negotiators Flesh Out Bare-Bones Law*, N.Y. Times, June 24, 1991, at D1, col. 1 ("Mr. Doniger of the Natural Resources Defense Council said, 'Really, what's going on is that the Office of Management and Budget hates reg-neg, because it denies their power to come in with late hits and jerk the E.P.A. around.'").

46. *See* NAPA REPORT, *supra* note 9, at 37-38.

to be testing grounds for the role of executive oversight in the past, and the effort to implement the new law promises to renew disputes.[47]

Indeed, executive oversight has already emerged as an issue regarding a recent rule issued by the EPA under the Clean Air Act concerning Municipal Waste Combusters (MWCs).[48] The proposed regulation required source separation and recycling of one-quarter of the materials used in new municipal incinerators.[49] The source separation requirement was dropped in the final rule because of several factors, including a meeting of the Council on Competitiveness which exercised its appeal functions under the Executive Order.[50] The agency acknowledged in the Federal Register that part of its basis for the rule was the concern over costs and federalism raised at the Council meeting.[51] The Council also described its position in a "Fact Sheet."[52] A congressional subcommittee criticized the decision and the Council's role.[53] Litigation is pending on the agency rule and on whether the agency failed to exercise independent judgment in responding to the Council's views.[54] Congressional members have also been concerned about the impact of executive oversight on other rulemaking matters under the Clean Air Act Amendments.[55]

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47. *See* Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986) (environmental organization sought court order to force the EPA to promulgate regulations under the Resource Conservation and Recovery Act); Olson, *supra* note 8 (discussing the history of oversight of EPA rules).

48. EPA Standards of Performance for New Stationary Sources; Municipal Waste Combustors, 56 Fed. Reg. 5487 (1991) [hereinafter MWC Rule] (to be codified at 40 C.F.R. §§ 51, 52, 60); *EPA Proposal on Recycling is Trashed, White House Panel Opposes Agency Plan*, Wash. Post, Dec. 20, 1990, at A17. This rule was proposed before the recent amendments, but was the first major rule actually issued under the Clean Air Act as amended.

49. MWC Rule, *supra* note 48, at 5496.

50. *Id.* at 5497-98.

51. *Id.*

52. The Council's Fact Sheet reported that the Council reached a "consensus." President's Council on Competitiveness, Fact Sheet (Dec. 19, 1990) (copy on file with the Indiana Law Review). *See Quayle Council Recommends Killing Recycling Provision in Incinerator Rule*, 21 Env't Rep. (BNA) 1595 (1990).

53. Victor, *Quayle's Quiet Corp.*, Nat'l J., July 6, 1991, at 1676, 1678 (Rep. Waxman says the Council "is not accountable in any way."); *White House "Bullies" EPA Into Weakening Clean Air Act Regulations*, 21 Env't Rep. (BNA) 2124 (1991) (Rep. Waxman says OMB likes "to bully the professionals at OMB").

54. *See* Brief for Petitioners at 1-2, New York v. Reilly, No. 91-1168 (D.C. Cir., appeal docketed Apr. 10, 1991) (review of final agency rule promulgated under authority of the Clean Air Act Amendments of 1990).

55. *Democrats on House Energy Panel Attack Administration's Proposed Air Permit Rule*, 22 Env't Rep. (BNA) 8-9 (1991); *House Members Voice Concern over White House Role in CAA Implementation*, 12 Inside EPA 7 (Mar. 29, 1991) (committee members concerned about the lack of documentation in the public record on the Council's role).

c. Applicability of oversight to agency guidance

The Administration has interpreted the Executive Order as applying not only to substantive rules subject to notice and comment, but also to agency policy guidance to the public. The Council on Competitiveness has stated that the Executive Order applies to "all agency guidance that affects the public," including guidelines, policy manuals, and press releases.[56] In the past, OMB reviewed pending agency decisions of this type on a selective basis.[57]

d. Oversight and Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.

The range of matters upon which courts defer to agency discretion in the interpretation of statutes has been expanded under the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[58] In *Chevron*, the Court held that matters not clearly resolved by Congress in statutes are left to the exercise of the agency's rational discretion.[59] Thus, when the statute is silent or ambiguous, courts will defer to rational agency decisions.[60]

The oversight process has more influence over decisions in areas left to agency discretion. Agency decisions are upheld by courts under a reasonableness standard without independent judicial review of the correctness of the decision. *Chevron* clearly made agency decisions more important and indirectly increased the significance of the oversight process. Oversight can influence a greater number of agency decisions relating to statutory interpretation due to the courts' deferential test for review. The effect not only lessens the role of courts in supervising agencies, but also increases the influence of the President and the oversight process over a wider range of administrative decisions.

B. Reasons for Presidential Oversight

1. Public Accountability and Presidential Supervision.—Presidential oversight of agencies has been seen as a way to make the exercise of agency discretion subject to democratic control. Agency officials are not

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56. Memorandum from the Council on Competitiveness, Mar. 22, 1991, *reprinted in* Fed. Cont. Rep. (BNA) 539 (Apr. 22, 1991).

57. *See* 136 CONG. REC. S16970 (daily ed. Oct. 27, 1990) (Senate manager's explanation of the Clean Air Conference Report) (many EPA guidance documents on control techniques "were watered down by [OMB] review"); Olson, *supra* note 8, at 51; *EPA Balks at OMB Request to Review Major Lead Strategy for Costs, Benefits* 12 Inside EPA 3 (Jan. 18, 1991).

58. 467 U.S. 837 (1984).

59. *Id.* at 842-45.

60. *Id.* at 843.

elected, but when they are subject to policy supervision by the President, the President can be held accountable to the public for the policies. Thus, the President needs to have the ability to encourage agencies to adopt his policies.[61] This supervision is also part of the executive functions given to the President under the Constitution. The Constitution vests the executive power in the President[62] and gives the President the power to appoint officials,[63] obtain the opinions of heads of departments,[64] and to "take Care that the Laws be faithfully executed."[65] These constitutional powers function to ensure that the policies of government agencies are subject to supervision by an official chosen by the public.[66]

2. Coordination.—Presidential oversight is a means of addressing inconsistencies among statutes and ensuring coordination between regulatory programs. For example, Congress may pass laws that overlap, or laws may be enacted to deal with problems that fall within the responsibility of different agencies. Laws may regulate similar activities, but the laws may also be applied differently by different agencies.[67] As part of the coordination function, oversight may help resolve jurisdictional disputes among agencies, or it may serve as an information exchange.[68] Moreover, coordination may assist in developing common policies on issues that affect several agencies, such as risk assessment.[69]

3. Cost-Benefit Analysis for Reviewing Rules and Regulatory Relief.—A major feature of the Reagan-Bush regulatory review program

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61. *See* Harter, *supra* note 10, at 566-69; Strauss & Sunstein, *supra* note 8, at 190. For the classification and full description of the arguments supporting and criticizing the Executive Order, see McGarity, *Presidential Control*, *supra* note 8, at 446-63. *See also* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW ECON. & ORGANIZATION 81 (1985).

62. U.S. CONST. art. II, § 1, cl. 1.

63. *Id.* § 2, cl. 2.

64. *Id.* § 2, cl. 1.

65. *Id.* § 3. *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599-602 (1984).

66. *See* Center for Auto Safety v. Peck, 751 F.2d 1336, 1368 (D.C. Cir. 1985) ("There seems to us nothing either extraordinary or unlawful in the fact that a federal agency opens an inquiry into a matter which the President believes should be inquired into. Indeed, we had thought the system was supposed to work that way.").

67. *See, e.g.*, Strauss & Sunstein, *supra* note 8, at 188-90; AMERICAN BAR ASS'N, COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM (1979) [hereinafter COMMISSION ON LAW]. The ABA Commission report recommended a statute providing authority for Presidential direction of critical regulations. COMMISSION ON LAW, *supra*, at 79-84. Statutory implementation was subsequently not considered necessary for the reasons discussed in Strauss & Sunstein, *supra* note 8, at 182-83.

68. DeMuth & Ginsburg, *supra* note 8, at 1084-85.

69. *See* 1990-91 REGULATORY PROGRAM, *supra* note 40, at 3-5, 13-26; *Reilly Assures White House EPA Will Toe Administration Line, Minimizing CAA Costs*, 11 Inside EPA 1, 9 (Nov. 9, 1990).

is the obligation of agencies to use cost-benefit analysis in a systematic way.[70] The aim is to ensure better decisionmaking by forcing the agencies to look beyond the narrow focus of their usual bureaucratic perspective. Moreover, agencies are forced to consider the costs of their policies on the public at large, rather than solely looking at the ability to achieve a specific program goal.[71]

4. Oversight and the Ability to Identify Administration Policies.— The first two oversight rationales should not preclude identification of presidential or administration policies influencing agencies if those disclosures are otherwise considered appropriate. Policies for which the President is accountable and policies that involve coordination appear to lend themselves to formulation as identifiable policies.

The analysis approach used in executive oversight may, however, make the identification of administration policy more difficult. Under the Executive Order, the implementation of presidentially-identified policies becomes a process for analysis. This process calls for individual review of major decisions. The oversight can be in the form of requests for more information and additional analysis of the costs and benefits.[72] The delay and burden of developing the information can obscure whether rules are inadequate on their policy merits or for the mere lack of additional data. Agencies may delay the development or issuance of rules because of OMB's ability to ask for information that is difficult to develop. Moreover, a rule-focused process can lead to decisions about specific issues rather than the formulation of general statements of policy. The analysis approach thus may make it more difficult to separately identify administration policy. Although these factors complicate the effort to identify an administration policy, they do not eliminate the need to disclose the effect of administration policy. As discussed later, a policy should still be considered to represent both an administration and an agency policy when the initial agency policy is changed as a result of this type of oversight process, even if it is not possible to more specifically identify the administration policy.[73]

III. Criticisms of Executive Oversight

Executive oversight has been the subject of criticism and debate. Many of these concerns, as discussed below, relate to the lack of information about administration policy.

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70. *See supra* text accompanying notes 23-25.

71. *See* DeMuth & Ginsburg, *supra* note 8, at 1082.

72. *See* Bruff, *supra* note 8, at 555-56, 567-68; NAPA Report, *supra* note 9, at 7, 37-38.

73. *See infra* text accompanying notes 241-44.

A. Lack of Accountability

A continuing criticism of executive oversight has been the lack of administration accountability for decisions made as a result of the oversight process.[74] The secrecy of administration intervention prevents the public from "distinguish[ing] those policies attributable to the agencies from those attributable to the President and his aides."[75] Another concern is that the agency decision may be made in a particular way because of administration views, with the agency able to "manipulate" its analysis and explanation of the data "to fit a presidentially required outcome."[76] Moreover, executive oversight is ordinarily exercised by OMB, but OMB is not the President and is not closely supervised by him. Thus, the oversight function is not closely identified with the official who is electorally accountable.

B. Displacement of the Agencies and Unfaithful Execution of the Laws

Executive oversight may risk a conflict with the President's constitutional responsibility to ensure that the laws are faithfully executed. The underlying concern has been that executive oversight may displace the decisionmaking vested by statute in the agency head.[77] Although the President may influence agency decisions, the legal responsibility for the decision remains with the agency.[78] The agency's ability to fulfill its responsibility is complicated, however, by the President's constitutional power to dismiss the head of an executive agency for any reason.[79] Moreover, OMB exercises control over the agency's initial budgetary

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74. *See* 132 CONG. REC. 572-73 (1986) (Statement of Sen. Levin) (OMB "acts with the iron hand, and then lets the agencies turn slowly in the wind to meet the repercussions and defend the OMB-imposed actions."); Houck, *supra* note 8, at 552-53; McGarity, *Presidential Control*, *supra* note 8, at 456-57.

75. McGarity, *Presidential Control*, *supra* note 8, at 451. *See also* Morrison, *supra* note 8, at 1064-67 (criticizing OMB's overruling a Cabinet officer's decisions and the resulting delay in rulemaking).

76. McGarity, *Presidential Control*, *supra* note 8, at 457. *See also* Olson, *supra* note 8, at 14.

77. Olson, *supra* note 8, at 15-17, 25-27; Rosenberg, *Beyond the Limits*, *supra* note 8, at 214-15.

78. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988); Strauss & Sunstein, *supra* note 8, at 191.

79. *See* Myers v. United States, 272 U.S. 52, 135 (1926). The President's power to dismiss the heads of independent regulatory commissions is limited. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935). *See also* Strauss, *supra* note 65, at 609-15 (removal power over independent agencies is limited with respect to adjudicatory functions, but is less clearly limited with respect to rulemaking).

requests to Congress and has other indirect influences on the funds that are the life of an agency. In addition, the Executive Order establishes a review process that has a strong potential for influencing the agency.[80] Although OIRA considers its role to be advisory only, the process has been described as "more than advisory, but less than mandatory."[81] Congressional testimony indicates that in some instances, agency officials have perceived the process as requiring OMB approval.[82]

The continuing debate over the oversight process has identified some of the factors that provide safeguards against these risks. The Executive Order expressly recognizes that the agency decision is not to be displaced.[83] The recognition of the agency as the primary decisionmaker should have a restraining effect on the supervisory process.[84] Mere knowledge by the agency that the administration supports a particular position is not considered sufficient to displace the agency's judgment.[85]

In practice, the President's ability to dismiss an agency head also has practical limits. A dismissal is likely to lead to public visibility of the reasons for dismissal and congressional attention to the issue during the appointment of a successor. Thus, the agency head has some ability to resist executive influence and to threaten resignation in a dispute.[86] Nonetheless, concerns remain regarding the ability of executive oversight to influence the agency's decision.[87]

The constitutionality of Executive Order 12,291 has also been questioned because of its scope and its potential to displace the agency's

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80. Bruff, *supra* note 8, at 559-68.

81. *Compare Health Claims Hearing*, *supra* note 9 (OIRA testimony) *with* NAPA REPORT, *supra* note 9, at 26 (Although OMB views its role as purely advisory, the National Academy of Public Administration concluded in its 1987 report that the review process is more than advisory, but less than mandatory).

82. *Health Claims Hearing*, *supra* note 9, at 121 (testimony of Dr. Frank Young, Comm'r of the Food and Drug Administration) ("If OMB does not concur, I do not believe those rules can be published. We have to get an approval to publish a regulation"). *See also id.* at 177 (statement of Rep. Ted Weiss) (FDA perceives OMB's role as more conclusory and determinative than OMB views it to be); Olson, *supra* note 8, at 43-50.

83. Exec. Order No. 12, 291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

84. Strauss & Sunstein, *supra* note 8, at 191.

85. *See* Center for Auto Safety v. Deck, 751 F.2d 1336, 1369 (D.C. Cir. 1985) ("It is entirely absurd to suggest that a delegated decision is vitiated by the mere knowledge that the superior would have preferred it to come out the way it did"); Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 857 (1982) ("That individuals within the agency conform to the preference expressed by the President or his representative rather than risking removal from office does not change the solid fact that if any change is made in the agency's rule the change is made by the agency.").

86. Strauss, *supra* note 65, at 590.

87. For recent Congressional criticisms of OMB's role, see *supra* notes 7, 55.

judgment.[88] The concept of a "unitary executive" making decisions is viewed as inconsistent with the statutory responsibility of the agency, a responsibility the President is constitutionally bound to respect. In *Chevron*, the Supreme Court recognized that it is appropriate for the incumbent administration to influence an agency,[89] but courts have not directly resolved the constitutionality of the Order.[90]

C. Inconsistency with Judicial Review

Commentators have also viewed presidential oversight as potentially impeding judicial review of agency action for conformance to the statute and lack of arbitrariness.[91] A particular concern has been that the agency will make its decision a particular way because of executive oversight, but no record will exist of the true grounds upon which the decision is based, and the decision may be upheld on other grounds.[92]

In *Sierra Club v. Costle*,[93] however, the court stated that face-to-face presidential communications to the agency are not a necessary part of the agency record for review purposes.[94] The President has constitutional authority to exercise "control and supervision" over executive agencies and can invoke executive privilege to protect "consultative privacy."[95] Disclosing presidential communications would disrupt the deliberative process. Moreover, disclosure is not necessary to ensure a rational decision. A rule issued by an agency must have factual support

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88. *See* Rosenberg, *Beyond the Limits*, *supra* note 8; Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of the Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199 (1981). *See also* Bowers, *Establishing the Constitutional Legitimacy of OMB's Regulatory Review: A Shared Powers Perspective*, 25 NEW ENG. L. REV. 397 (1990) (executive review, like legislative veto, should require a written statement and an opportunity for Congress to override). *But see* Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291*, 23 ARIZ. L. REV. 1235 (1981).

89. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

90. *See* Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) ("difficult" constitutional questions were not addressed because of other grounds for invalidating the decision); Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986) (improper use of executive order to withhold approval of rules until agency accepted OMB changes would encroach on agency's statutory role).

91. McGarity, *Presidential Control*, *supra* note 8, at 460-61.

92. *See* Olson, *supra* note 8, at 32.

93. 657 F.2d 298 (D.C. Cir. 1981).

94. *Id.* at 407. In certain instances, the court recognized that docketing of oral presidential communications may be necessary, such as where a statute "*specifically requires* that essential 'information or data' upon which a rule is based be docketed." *Id.* (emphasis in original).

95. *Id.* at 405.

in the record, and under the particular statute, the rule may not be based on information or data not in the record.[96] The court recognized the risk that the President could direct an outcome that is factually based in the record, but that is different from the one that would have occurred absent presidential influence.[97] The possibility of such a political impact is one that "the courts could not police."[98] Congress did not intend for courts to make rulemaking a process unaffected by presidential power.[99] Although the communications in *Sierra Club* concerned a single direct presidential discussion, oral communications are not made a matter of record in the more expansive oversight program established under Executive Order 12,291.[100] Recommendations continue to be made that communications made during oversight be summarized for the record, but these recommendations have not been adopted.[101]

IV. Limitations on Executive Oversight and Extent of Disclosure

Notwithstanding criticism, executive oversight has survived and grown in importance. OMB has adopted some restrictions in response to the criticisms and the recommendations of the Administrative Conference. In addition, Congress considered measures to ensure additional disclosure of the impact of oversight and to limit OMB's influence in other respects. The measures adopted by OMB deal with conduit communications from private parties and provide for the disclosure of draft rules and other limited information about administration positions.

A. Conduit Communications

One risk of executive oversight is that a private party may communicate concerns to OMB which will be reflected in OMB's comments to an agency, but will not appear in the agency record. Failure to include outside views in the agency record precludes an opportunity to respond for the record. Moreover, the administrative record used to support the rule for judicial review will not reflect the positions of those outside the government that influenced the decision. These conduit comments from outsiders may assume "special prominence in the agency's review" due to their endorsement by OMB.[102]

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96. *Id.* at 407 n.529.
97. *Id.* at 408.
98. *Id.*
99. *Id.*
100. *See* Olson, *supra* note 8, at 35 n.162.
101. *See* McGarity, *Presidential Control*, *supra* note 8, at 445, 461-63; NAPA Report, *supra* note 9, at 35.
102. Bruff, *supra* note 8, at 579.

OMB has, as a matter of policy, adopted procedures to disclose written communications in all proceedings and to list oral communications in the rulemakings of EPA and other agencies upon request.[103] Under the procedures, the written communications are available in the OIRA reading room, and OIRA advises the public to send comments to the agency as well as to OIRA.[104] OMB also invites EPA and other agencies requesting the procedure to all scheduled meetings with outsiders and sends these agencies copies of written communications.[105] OMB may still communicate orally with outside parties, but these communications are made with the approval of the OIRA director and in the case of EPA and requesting agencies, the agency must be informed.[106]

The conduit restrictions represent one means of establishing limits on executive oversight by providing a limited paper record of the input from the public. The written communications and list of the oral communications are available at OIRA. Those who examine the OIRA records can consider the effect of the communications for themselves. The disclosures for this purpose do not, however, directly identify OMB policies.

B. Disclosure of Written OIRA Communications

In addition to conduit communications from outsiders, executive communications are also subject to voluntary OIRA disclosure provisions, but these are more limited in scope. OIRA adopted a procedure of disclosing written correspondence exchanged between OIRA and the agency head.[107] OIRA procedures provide in "general" for written reasons to the agency when a rule is returned to the agency for inconsistency with the President's program.[108]

These restrictions provide only a limited basis for discovering administration policy. Written communications are included in the record, but only when they are from the head of OIRA. Communications from staff are not covered. Furthermore, oral communications are not part of the record even though they can be important in negotiating a rule

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103. Memorandum from Wendy L. Gramm, Adm'r OIRA, to Agency Heads (June 13, 1986, rev. Aug. 8, 1986), *reprinted in* 1990-91 REGULATORY PROGRAM, *supra* note 40, at 605 [hereinafter Gramm Memorandum].

104. *Id.* at 605-06.

105. *Id.* at 606.

106. Memorandum from Robert P. Bedell, Deputy Adm'r OIRA, to OIRA staff (May 30, 1985) (discussing OIRA policies), *reprinted in* 1988-1989 OMB REGULATORY PROGRAM OF THE UNITED STATES GOV'T 537 (as Attachment D to Gramm Memorandum, *supra* note 103).

107. Gramm Memorandum, *supra* note 103, at 530.

108. *Id.* at 529-30.

between OMB and an agency.[109] Rule changes are more likely to occur as a result of the oral negotiation process. In its recent review of OMB procedures, however, the Administrative Conference of the United States did not recommend the summary of oral communications for the record because of the adverse impact on free discussion, negotiation, and compromise that are aspects of developing policy during the oversight process.[110]

C. Disclosure of Agency Draft Rules Submitted for Review

Since 1977, the Clean Air Act has mandated that EPA drafts and interagency communications relating to oversight be made publicly available upon publication of the proposed or final rule.[111] Agency draft revisions responding to OMB comments are also included in the agency docket. The disclosures are made only after the proposed or final rule is published, thus averting last-minute interventions or lobbying by outside parties.[112] Although the Act requires that the drafts be available in the public docket, it does not require that drafts be part of the administrative record for judicial review. According to the *Sierra Club* court, the exclusion occurred because Congress presumably recognized that the court was "not to concern itself with who in the Executive Branch advised whom about which policies to pursue."[113]

As a matter of policy, OMB now provides for the disclosure of drafts submitted to OMB by an agency after a proposed or final rule is published upon a written request to OIRA for the draft.[114] The agencies do not, however, necessarily make the drafts available in their rulemaking record. Drafts are not available, for example, in the agency rulemaking docket at the Food and Drug Administration.[115] The Administrative Conference has also recommended disclosures of agency drafts, including drafts submitted to OMB when no rule is proposed.[116] These steps create a paper trail that allows some monitoring of the effect of executive

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109. *See* NAPA REPORT, *supra* note 9, at 35; Bruff, *supra* note 8, at 583 (discussion of "gaps" in OIRA procedures).

110. *See* Recommendations of the Admin. Conference of the United States, 54 Fed. Reg. 5207, 5208 (1989) (to be codified at 1 C.F.R. § 305.88-9); Bruff, *supra* note 8, at 588. *But see* NAPA REPORT, *supra* note 9, at 35 (recommending disclosure of oral communications).

111. 42 U.S.C. § 7607(d)(4) (1988). *See also* The Clean Air Act Amendments of 1977, P.L. No. 95-95, 91 Stat. 685.

112. *See* Bruff, *supra* note 8, at 585.

113. Sierra Club v. Costle, 657 F.2d 298, 405 n.519 (D.C. Cir. 1981).

114. Gramm Memorandum, *supra* note 103, at 605, 606.

115. Telephone interview with Linda Horton, Assoc. Chief Counsel for Regulations and Hearings, Food and Drug Admin. (Oct. 9, 1991).

116. 1 C.F.R. § 305.88-9, para. 4 (1991).

oversight without the need to disclose particular communications within the Executive Branch.

The disclosure of proposed drafts and final rules transmitted by the agency to OMB provides valuable indirect disclosure about the impact of OMB's review. The effect of the disclosure of the drafts is generally to make OMB changes detectable to the diligent who compare the version sent to the version adopted. By focusing on separate revisions and insertions made by the agency to the initial draft, one may detect the changes made as a result of OMB discussions. Still, additional effort is required to compare the versions, which may be lengthy, and to decipher whether the changes reflect OMB views. Effort is also needed to obtain the drafts from OIRA and the agency record, if available. There is no disclosure in the Federal Register to alert the public to these differences. Moreover, because of timing difficulties and statutory deadlines, the agency may send its draft to OMB for concurrent review while agency review is still being completed. This practice of concurrent review by OMB and the agency hinders identification of OMB's involvement in the final decision because one may be unable to determine whether changes were made in response to OMB views or were modifications made at the agency's own initiative.[117] This step is, then, only an indirect and time-consuming way of discovering the impact of OMB decisions on agency rules. Moreover, although the drafts may be disclosed by OIRA, they may not be part of the agency record for purposes of judicial review.[118]

On a policy basis, these disclosures are useful as a safeguard for ensuring that the process reflects the appropriate standards and for permitting better public and congressional understanding of the basis of OMB's positions. The utility of these procedures will be examined later, but at this point, their value and limits must be recognized in promoting accountability.

D. Retraction of OMB-Congressional Agreement for OMB Disclosure of Reasons

At one point, as a result of congressional pressure, OMB agreed in principle to provide "a detailed written explanation of the specific reasons for all substantive changes" made to a proposed or final rule when a review "is concluded with substantive changes made by the agency as

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117. *See* Olson, *supra* note 8, at 46-47 (EPA involves OMB in the development of some rules even before drafts are formally submitted to OMB).

118. For a discussion of whether review could be excluded depending on the issues concerning executive privilege, see *infra* notes 213-20 and accompanying text.

a result of the review process" or as a result of a suspension of review or return of the rule to the agency.[119] The explanation was to be included in the OIRA public docket.[120] The agency was also to have the opportunity to supplement the agency public docket to give a written explanation of the agency's reasons for making the changes in response to any oral or written OIRA comment on a proposed draft or final rule.[121] Substantive changes included "suggested changes to or criticisms of" the agency proposal.[122] However, the agreement was retracted by the Administration in 1990 because it "would fundamentally impede the president's conduct of his constitutional responsibility."[123]

Although there are important similarities between the disclosure obligation provided for in the revoked agreement and that recommended in this Article, the disclosure obligation under the agreement would have been more limited. The disclosure would have been made by OIRA, and the agency would have had the option, but not an obligation, to provide an explanation of the changes in the agency docket. The Federal Register notice accompanying the rule would not require disclosure of the reason for the changes. Disclosures made solely in the OIRA docket would have been less accessible to the public. Most importantly, the significance of the disclosures for purposes of judicial review would not have been clear.

E. OMB Disclosures in the Regulatory Program of the United States

On occasion, OMB has included general information about its oversight of agency rules in the introductory sections of the annual Regulatory Program. This annual book lists forthcoming rules that are part of the annual regulatory agenda.[124] This summary indicates that OMB review found only seventy-four percent of the agency rules consistent without changes in 1989, as compared with eighty-seven percent in 1981.[125] The 1987-1988 Regulatory Program provided nine case studies of rules that were improved because of OMB oversight, but it provided little infor-

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119. 135 CONG. REC. E3925 (daily ed. Nov. 17, 1989) [hereinafter Administrative Agreement] (Administrative Agreement Outlining Procedures Governing OIRA Review of Regulations Under Executive Order Nos. 12291 and 12498).

120. *Id. See also* Olson, *supra* note 8, at 64-67.

121. Administrative Agreement, *supra* note 119, at E3926.

122. *Id.*

123. *Conyers Asks to Eliminate OIRA Fundings*, 21 Env't Rep. (BNA) 334 (June 15, 1990).

124. The preparation of a yearly regulatory agenda is provided for under Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

125. *See* 1990-91 REGULATORY PROGRAM, *supra* note 40, at 646.

mation about the specific nature of the changes made in the other rules.[126]

F. Statutory Requirements and Deadlines

Executive oversight is permissible only within the scope of the discretion delegated to an agency.[127] OMB may not influence an agency to violate statutory provisions, including time limits for action established by law.[128] One court specifically found that OMB may not direct an agency to delay the issuance of a rule to permit review under the Executive Order when the review period would extend beyond the statutory deadline.[129] Thus, the establishment of specific statutory deadlines and requirements provides a means to limit OMB's ability to influence agencies.

Recent congressional enactments include a number of mandatory requirements and fixed deadlines governing rules that curtail the scope of agency discretion.[130] The recently enacted Clean Air Act Amendments are replete with specific requirements and time deadlines, many of them remarkably short.[131] In part, these restrictions reflect an effort by Congress to limit OMB's ability to affect agency decisions.[132] Consequently, as executive oversight has increased, the willingness of Congress to rely on administrative discretion has suffered some decline.

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126. 1987-1988 OMB REGULATORY PROGRAM OF THE UNITED STATES xv-xxii. *See also* DeMuth & Ginsburg, *supra* note 8, at 1082-85 (additional examples of the effect of oversight).

127. *See* Dole v. United Steelworkers, 494 U.S. 26 (1990) (invalidating agency action based on an incorrect OMB interpretation of the Paperwork Reduction Act); Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988) (recognizing that review is permissible only to the extent permitted by law).

128. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

129. Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986) (OMB review may not delay promulgation of rule beyond statutory deadline). *See also* Public Citizen Health Research Group v. Commissioner, 724 F. Supp. 1013 (D.D.C. 1989) (unnecessary reproposal constituted unreasonable delay, with agency and OMB enjoined to issue rule); Special Project, *supra* note 37, at 601-02 (limited situations in which OMB may exercise review power).

130. *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. § 6924(c)(2) (1988) ("administrator shall promulgate final regulations" within 15 months). *See also* Shapiro & Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 825-28 (suggesting that specific statutory requirements were enacted as a response to agency inaction and to agency actions inconsistent with the statute).

131. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

132. *See Enforcing the New Clean Air Rules*, Wash. Post, Nov. 19, 1990, at A13, col. 1.

The imposition of deadlines and the restriction of agency discretion has its own drawbacks.[133] The deadlines may prove to be unrealistic. Because Congress cannot always anticipate the factors affecting policy decisions, the statutory restrictions may have undesired effects. In addition, the statutory provisions may even provide more agency discretion when interpreted in the light of *Chevron* than Congress might have expected in enacting the seemingly mandatory requirements. Still, the enactment of statutory requirements and deadlines is an important, but problematic, means available to Congress to limit executive oversight.

G. Agency Disclosure of Reasons for Changing Position

Agency disclosure of the reasons for changes from the agency's initial position as a result of executive oversight has received some support. Commentators have recommended that the Executive Order be amended to require disclosure.[134] In addition, congressional bills have proposed requiring agencies to establish a public file disclosing OMB intervention and the reason for changes in the agency rule.[135] This Article expands on the policy and legal rationale for adopting such an obligation and for making the disclosure a matter relevant for purposes of judicial review.

V. Disclosure of Administration Policy: Policy Support

A. Nature of Recommendation

This Article recommends a broader disclosure requirement than those discussed previously. Each agency should be responsible for disclosing in the preamble of a proposed or final rule any portions of a rule that have been revised to reflect administration policy as a result of the

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133. Shapiro & Glicksman, *supra* note 130, at 844.

134. Davis, *supra* note 85, at 857. *See* Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 Tul. L. Rev. 830, 847-48 (1982) (supporting disclosure requirement preferably through a statutory change).

135. 137 Cong. Rec. S16250 (daily ed. Nov. 7, 1991) (Regulatory Review Sunshine Act); 132 Cong. Rec. 572, 574 (1986) (S.2023 proposing establishment of file); *Id.* at 578 (statement of Senator Levin) (S.2023 aids in accountability because by "requiring the extent of OMB's involvement to be in the public record, OMB will itself be responsible for its own actions and will not be able to hide behind the agency and escape public scrutiny"). For an earlier example, see 128 Cong. Rec. 5285-305 (1982) (S. 1080, the Regulatory Reform Act of 1982, passed the Senate as amended); 128 Cong. Rec. 25662-63 (1982) (statement of Rep. John D. Dingell criticizing the Senate reform bill). Further background is provided in *Oversight of OMB Regulatory Review and Planning Process: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Govt'l Affairs*, 99th Cong., 2d Sess. 56, 98 (1986) (statements of Senators Levin and Durenberger regarding proposed act requiring disclosure of OMB involvement).

oversight process and the reasons for the change. The disclosure should apply when an agency adopts a policy as a result of oral or written communications with any officials involved in the executive oversight process, whether the officials are in the OIRA, the OMB, the Council on Competitiveness, or the White House. The disclosures, however, should not apply to direct communications from the President to the agency unless they are based on the oversight process under the Executive Order. A policy should be deemed an administration policy when the agency adopts a position in response to comments from the OIRA staff. In addition, the disclosure should apply to a joint agency-administration policy developed through informal negotiations aimed at clearance of the rule. Disclosure would be needed only for substantive changes, but would not extend to insignificant changes that correct errors.

The disclosure should identify the agency's initial policy and the reasons for adopting a different policy position as a result of the oversight process. The disclosure of the administration's contribution in developing the policy could take the form of an indication that the final position was developed in consultation with the administration by a designation of the policy as both an administration and agency policy or in some other manner that reflects the administration's contribution to the development of the specific position. Instead of being designated as an administration policy, the policy could be described as OMB or OIRA policy.

The disclosure should apply to administration policies adopted at any stage of the rulemaking process. Thus, the disclosure is appropriate for a proposed as well as a final rule. When an administration position affects the agency's response to comments in the final rule, the agency should indicate its initial policy response to the comment and the role of administration policy in reaching the ultimate result. In addition, when OMB is involved in the initial development of an agency proposed rule prior to submission for formal review, the agency should disclose any specific positions that were developed in conjunction with the administration.[136]

This recommendation has two parts. The first is an obligation to discuss the policy alternative initially considered by the agency, along with the reasons for the policy adopted. The second is a designation that the policy adopted reflects an administration as well as an agency policy. The first obligation is especially important in ensuring that the basis for the decision is fully disclosed, and the second is important for

136. *See* Olson, *supra* note 8, at 46-47 (examples of OMB involvement at preproposal stage and effectiveness of this means of exerting influence).

ensuring accountability. Even though the two parts are interrelated, each may be separated and individually adopted.

B. Policy Reasons for Recommendation

1. Public Accountability for Administration Policy.—Disclosure of administration policy leads to greater public accountability for the oversight role in the process of policy development. Executive oversight increases the President's ability to influence agencies and promotes accountability of the agencies through the electoral process. If the administration's contribution to policy development through the oversight process is not disclosed, no corresponding accountability exists for the administration's role in influencing the agency's decisions.[137]

Critics of executive oversight are concerned that an agency decision influenced by undisclosed executive oversight will be justified by other factors upon judicial review.[138] The secrecy of the communications has especially prompted such a concern. Under this recommendation, communications between the agency and OMB would remain confidential in order to allow free discussion and "consultative privacy" in formulating policy. The agency would, however, have to acknowledge the administration's contribution to the decision adopted. The disclosure avoids the suspicions that otherwise arise when the administration's influence is not acknowledged.[139]

Disclosing a policy as an administration position may be considered unnecessary to ensure accountability because the President is responsible for all activities of agencies. The President also appoints the agency head. Moreover, all agency rules may be deemed to represent an administration position by virtue of having passed through the Executive Order oversight process, either with or without change.[140] The review process itself may be thought to ensure accountability for administration policies without the need for specific disclosures.

The argument, however, does not recognize the additional need for accountability for the specific effect oversight has on agency decisions. The administration itself has not considered the appointment process or the general provisions of the Executive Order sufficient to ensure the accountability of agencies absent the additional contribution provided by the oversight process.

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137. McGarity, *Presidential Control*, *supra* note 8, at 456-57. *See also* Houck, *supra* note 8, at 555-56 (proposing a presidential veto over agency rule as a better means of identifying the Administration's involvement).

138. *See supra* notes 91-101 and accompanying text.

139. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

140. *See* Harter, *supra* note 10, at 568.

The oversight process has a distinct power to influence agencies, and disclosure is needed to reflect the specific contribution of the administration in the oversight process. Moreover, when the agency and OMB differ on policy issues, difficulties exist in applying the administration's principles in the particular setting. In this context, the public identification of an administration policy will illuminate the administration's contribution on the more difficult and significant policy issues.

Under this proposal, the disclosure reflecting the administration's role in developing policy would be in the preamble to the rule or proposal. Placement in the preamble makes the impact of administration positions more readily discernible to the public than other disclosure measures, such as the docketing of agency drafts for the record. A disclosure in the preamble indicates when an administration policy actually has an impact on a particular decision. This type of disclosure provides for a more informed public understanding of administration policy.

2. Policy-Directed Oversight.—Another reason for recommending that administration policy be designated in agency rules is to encourage oversight that identifies general policy positions, rather than oversight that simply reviews and second-guesses agencies in the implementation of policies in a particular statutory setting. The recent Reagan-Bush forms of executive oversight are largely concerned with the application of cost-benefit principles to the rulemaking process. Only to a limited degree has the oversight process resulted in statements of broader policy principles.[141]

Part of the supporting rationale for oversight is coordination of agency policies in areas of overlap.[142] These broader policy objectives are aided by the public identification of general policies. Indeed, oversight that aims to make agencies take account of considerations beyond their narrow bureaucratic concerns should be facilitated by a continuing effort to state the effect of the broader policy concerns as the policy impacts the specific issues. Agencies have been urged to articulate their general policies because it provides for accountability and better direction.[143]

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141. For OMB efforts to state its policies for comment in its annual Regulatory Program, see *supra* notes 40-41. The articulation of general policies, although preferable to ad hoc review, increases the importance of public comment and review of the policies OMB seeks to have the agencies adopt. *See also* NAPA REPORT, *supra* note 9, at 30.

142. *See* Strauss & Sunstein, *supra* note 8, at 193 (criticizing oversight that intervenes in general run of cases, but supporting oversight in cases needing coordination or involving important issues).

143. Administrative Conference of United States, Recommendation 71-3, 1 C.F.R. § 301.71-3 (1991); H. FRIENDLY, THE FEDERAL AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

This principle applies equally to executive oversight. Oversight focused on particular rules can suffer from some of the defects it is intended to counteract. Oversight that fails to identify general policies can elude accountability.

Oversight of the analysis type may not lend itself to the statement of specific administration policies because the review may reflect a different evaluation of the balance of competing considerations. If a specific administration policy cannot be stated, the impact of the review process should be indicated by disclosing that the final policy was developed by the agency in conjunction with the administration. The oversight process should be accountable for the contribution it makes even if it is only an analysis-review function.

Oversight of the analysis-review type may be necessary to counteract staff capture.[144] After an agency head is presented with a final package, the official may be reluctant to make changes because of the substantial amount of time invested by the agency.[145] The need to prevent staff capture does not eliminate the appropriateness of disclosing administration policy. Indeed, the disclosure will ensure that the agency head gives adequate attention to the staff's position on the policy issues. Agency heads get "captured" by their staffs largely because of the need to deal continually with the restraints on the agency's powers. The staff's influence grows out of its expertise with the technical issues, a continuing experience with the history of the issues, an effort to develop a sustainable, somewhat consistent policy over time, and the need to make legally defensible decisions.[146] In making decisions, the agency head also needs to be aware of the concerns of public interest groups, regulated industries, and congressional oversight committees. The agency head may be captured, not by the staff, but by an awareness of the wider views of the agency's mission. The oversight process has drawbacks as a solution to staff capture unless careful consideration is given to the reasons why agency policy, as formed by administration concerns, warrants a different result from the one the agency and its staff initially recommended.

Executive oversight that is isolated from the process and from public accountability does not have the agency's perspective and the type of perspective generally needed to make ultimate decisions. Requiring an agency to state reasons why it departed from its initial views ensures that careful attention will be devoted to the agency's initial policy issues by those involved in oversight, including the agency head.

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144. *See* Harter, *supra* note 10, at 568-69; Strauss & Sunstein, *supra* note 8, at 187.

145. Harter, *supra* note 10, at 568.

146. *See* Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363 (1976); Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1132-33 (1954).

Currently, executive oversight undertakes a silent role in affecting the agency policy without providing accountability for the decisions made. The need, though, is to have policy that is publicly articulated at the agency level. Appointing agency officials who can identify administration policy as it reflects the agency's mission is a preferable means of influencing agency decisions. If oversight is used instead to prompt the adoption of administration policy in the context of reviewing particular rules, then a disclosure policy will be beneficial in directing the process towards adequately considering the issues in light of the agency's mission and in providing better identification of the administration's policy.

Executive oversight imposes costs on the process in terms of delay and the personnel resources involved. By disclosing when oversight has led to the adoption of an administration policy, there is a basis for knowing the contribution that oversight is making with respect to policy formulation. That contribution can be evaluated in relationship to the costs it imposes.[147]

3. Policy Safeguard to Ensure Faithful Execution of the Law and Agency Responsibility for the Decision.—The separate identification of administration policy can provide an additional safeguard, on a policy basis, that executive oversight reflects the appropriate statutory considerations and does not displace the agency's primary responsibility for interpreting and applying the statute. The general safeguards currently preventing undue influence rely on the self-restraint of the agency and the executive to recognize the statutory assignment of responsibility, the prospect for highlighting the dispute if the agency head resigns or is dismissed for issuing a rule contrary to the views expressed during the oversight process, and the availability of judicial review of the support for the actual decision.[148]

The constraint provided by the possibility of resignation and dismissal relies on a type of brinkmanship to ensure an adequate agency role. An obligation to disclose the impact of administration policy when changing an initial agency position in the rule would provide a more regular and routine means of ensuring that full weight is given to the agency position. Furthermore, the administration and the agency bring different perspectives to the resolution of public issues — one is a concern about the wider public interests and the costs to the economy,

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147. For the limited information available from OMB relating to the impact of oversight, see *supra* notes 124-26 and accompanying text. *See also* McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987) [hereinafter McGarity, *Regulatory Analysis*] (discusses advantages and disadvantages of regulatory analysis in bureaucratic decisionmaking).

148. *See supra* notes 83, 96 and accompanying text.

and the other is the specific problem focus that underlies the statute. Decisions shaped by executive oversight warrant more attention because of the risk that oversight may relate to wider public interest factors, not explicit in the statute, that may be beyond those that the statute permits.[149] A disclosure in a rule that a policy represents an administration policy permits additional examination of whether the wider public interest concerns were appropriately considered with respect to the particular issue under the statute.

The degree of agency discretion under the statute may often complicate the determination of whether the wider administration position is reasonable and appropriate. Whether the statute is being faithfully executed may be a question without a clear answer. This very uncertainty about the appropriate standard and the scope of discretion within which oversight can play a role supports the need for disclosure on policy grounds. Disclosure also provides added assurance that the agency position has been considered and that the agency has exercised its judgment in determining the relevant factors in a setting in which the appropriate factors may be debatable. These considerations support the adoption of a disclosure obligation by statute or as a matter of policy.

VI. Disclosure as an Element of a Basis of Decision for Judicial Review

Disclosure of the impact of oversight on agency decisions has not been considered necessary for judicial review. Instead, the fact that a rule needs rational support in the agency record is generally seen as sufficient to ensure its rationality for purposes of judicial review.[150] The content of the decision is considered to be important for review, rather than the identification of who advised the agency in reaching the decision.[151] The analysis below points to the insufficiency of solely examining the rationality of the adopted decision to ensure that the record reflects the factors an agency should consider in reaching a rational decision when the agency has changed its position as a result of executive oversight. Furthermore, it is important, under the law, that the agency make the

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149. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988); Olson, *supra* note 8, at 51-53; Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 Ariz. L. Rev. 1267 (1981) (cost benefit analysis may be appropriate for statutes concerned with market failure, but its application across the board would raise "serious questions of separation of powers").

150. National Grain & Feed Ass'n v. OSHA, 866 F.2d 717, 729 n.22 (5th Cir. 1989); Sierra Club v. Costle, 657 F.2d 298, 407 (D.C. Cir. 1981).

151. *Sierra Club*, 657 F.2d at 404-05 n.519.

decision. Disclosure by the agency of its reasons for adopting an administration policy would help ensure that the decision is rationally based and that the agency has reached its own decision and has not merely deferred to the supervisory influence represented by the oversight process. Disclosure would also permit meaningful comment on a proposed rule and help identify the supporting basis for the rule.

A. Identification of Regulatory Alternatives as Part of the Statement of Basis

The Administrative Procedure Act requires agencies issuing rules to provide "a concise general statement of their basis and purpose."[152] The considerable judicial gloss on this provision has made it necessary for agencies to develop an administrative record at the time of proposal that discloses the basis of the rule.[153] The agency statement and record become the basis for comments by the public and are the focus for review. The United States Supreme Court has endorsed the need for an agency to supply an explanation for its rule that is consistent with "reasoned decisionmaking" and to "cogently explain why it has exercised its discretion in a given manner."[154]

In some circumstances, an agency is required to discuss the policy alternatives available and the agency's reasons for adopting the option selected. In *State Farm*, the Supreme Court held that the agency decision to rescind a regulation requiring passive restraints in automobiles was inadequate because of the failure to explain the reasons for not adopting the alternative of requiring airbags.[155] The airbag alternative was a technological alternative the agency recognized in an earlier version of the rule.[156] The Court disclaimed imposition of any requirement, however, that agencies discuss every policy alternative "regardless of how uncommon or unknown."[157]

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152. 5 U.S.C. § 553(c) (1988).

153. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *See also* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) ("The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality. . . .").

154. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42, 52 (1983). The *State Farm* decision confirmed the applicability of the "hard look" standard to informal rulemaking. *See also* Note, *OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review*, 95 YALE L.J. 1789, 1805 (1986) (arguing that evidence of abrupt shifts in agency policy warrants judicial broadening of the record for review).

155. *State Farm*, 463 U.S. at 51.

156. *Id.*

157. *Id.* (citing Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)).

The obligation to consider alternatives has been recognized as extending to alternatives raised in comments, in the agency's proposal, and in related agency proceedings.[158] The alternatives requiring consideration may include "common and known or otherwise reasonable options."[159] The obligation to consider alternatives, however, has been criticized as imposing a burdensome and unpredictable standard on agencies that can dissuade regulation.[160]

When an agency submits a rule to OMB for review, the policy alternatives reflected in the agency draft represent more than an uncommon or speculative alternative. Instead, the alternative represents a considered agency judgment, if not a final judgment, that the alternative is a feasible and rational choice. Absent OMB comments, the agency would have presumably adopted the option as its official position.

Unlike the policy alternative considered in *State Farm*, the agency alternative in the draft rule has not been previously adopted by the agency, and does not become public, unless the draft is docketed or requested from OIRA after the rule is published. There has been no public reliance on an established agency policy.[161] Nonetheless, in this setting, a need remains for agency consideration of the reasons for the change. The initial option has been identified by the agency as an appropriate choice. Requiring an agency to articulate the reasons for adopting a different option serves the goal identified in *State Farm* of ensuring that the agency bring "its expertise to bear" with respect to the choice to be made in a considered way.[162]

The option ultimately adopted presumably has advantages over the agency's initial position, and those advantages led the agency to change

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158. Chemical Mfrs. Ass'n v. EPA, 919 F.2d 158, 166-67 (D.C. Cir. 1990) (EPA considered alternatives); Public Citizen v. Steed, 733 F.2d 93, 103 (D.C. Cir. 1984) (alternatives in related proceeding); International Ladies' Garment Workers Union v. Donovan, 722 F.2d 795, 815-18 (D.C. Cir. 1983) (alternatives in comments).

159. *Donovan*, 722 F.2d at 818. *See also* Williams Natural Gas Co. v. Federal Energy Regulatory Comm'n, 872 F.2d 438 (D.C. Cir. 1989) (need to discuss reasons for termination of proposed rule).

160. *See* Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 (1986); Pierce, *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 22-29 (1991). *But see* Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (the adequate reasons requirement serves as a form of scrutiny required by separation of powers).

161. *See Williams Natural Gas*, 872 F.2d at 444.

162. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 54 (1983).

its views. It would not be rational to adopt a position that the agency recognizes is less beneficial than another available and feasible alternative. The agency needs to find that the second option is equivalent to, if not better than, the initial option.[163] The agency's initial choice and the policy adopted may represent rational alternatives. Because courts defer to agency decisions when the decision is rational, an agency could seek to rely on a statement that identifies support only for the option ultimately adopted. When both alternatives are rational, however, such a limited statement does not necessarily identify the factors and policy considerations that influenced the agency to change its views. Explaining the reasons for the change leads the agency to articulate the factors that influenced the choice and permits review of the grounds that influenced the decision.[164]

Moreover, the factor that influenced the agency to change its position may well be the administration's policy views. The Supreme Court recognized in *Chevron* that "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."[165] When the administration's views influence an agency position, the agency should acknowledge the administration

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163. Executive Order 12,291 directs that the agency choose an alternative that achieves a regulatory goal at the least cost. Exec. Order No. 12,291, 3 C.F.R. 127 (1987), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988). This directive might be thought sufficient to explain the agency's basis for choice without the need for a specific discussion. However, this directive is so general that it has little value as guidance and is not objectionable as unduly directive. *See* Strauss & Sunstein, *supra* note 8, at 201. The agency's evaluation of the costs and benefits of the different regulatory options represents a real choice and the one for which more disclosure is needed.

164. *See* McGarity, *Presidential Control*, *supra* note 8, at 460-61.

165. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984). The Court's discussion might be read as assuming that an agency's position reflects the views of the incumbent administration without any distinction between an agency and an administration view or any need for a special designation of an administration position. On the other hand, the reference to the agency's "reliance" on administration views suggests that there are circumstances when the policy views of the administration are a special factor in reaching a decision. When the agency takes account of the policy views of the administration, particularly those identified in the regulatory review process, to change the outcome the agency would have developed based on its more limited focus, recognition of the special significance of the administration policy views seems appropriate. For a discussion of the appropriateness of an agency taking account of the President's views in reaching a decision, see Natural Resources Defense Council v. Hodel, 865 F.2d 288, 315 (D.C. Cir. 1988) ("That the program permits the Secretary to heed the President's desires as the Secretary reconsiders minimum bid pricing for particular sales should be no source of discredit, so long as that review assures receipt of fair market value in light of prevailing market conditions.").

position as a relevant factor upon which the decision is based. This is consistent with requiring the statement of basis for a rule to specify the actual basis of the rule. The legislative history of the Administrative Procedure Act reflects that the statement accompanying the final rule should "with reasonable fullness explain the *actual* basis and objectives of the rule."[166]

B. Assurance of the Exercise of the Agency's Judgment

Disclosure of the agency's acceptance of an administration position is also needed to ensure that the agency exercised its judgment and did not simply defer to an OMB position. The executive oversight process under Executive Order 12,291 is structured to give OMB positions special weight in agency decisionmaking.[167] Under the Order, agencies are required to base their decisions on certain cost-benefit principles to the extent permissible.[168] The agencies must submit their analyses to OMB for review before issuance and can issue their rules over formal OMB objections only after observing specified procedures.[169] These procedures include the provision of a written response to any written OMB objections to the "rulemaking file," thus making the different positions public.[170] Disputes over the application of the Order are to be referred to the Council on Competitiveness.[171] The Order directs agencies to refrain from issuing rules until review is completed, including indefinite extensions of time made by OMB.[172]

Oversight is to be advisory only. It is not to displace the agency's statutory responsibility to make the decision.[173] To achieve this aim, the agency should be as free to disregard as to accept positions developed in the oversight process. The structure of the review program, however, makes it more difficult for an agency to issue a rule to which OMB objects than one the agency modified in response to OMB comments. Consequently, an agency may accept an OMB position, not because the agency agrees fully with the merits of the position, but in order to

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166. S. Doc. No. 248, 79th Cong., 2d Sess. 201, 259 (1946) (emphasis added). The Clean Air Act also requires that the agency discuss the policy considerations underlying a proposed rule and that the final rule indicate the basis for major changes made in the proposal. 42 U.S.C. § 7607(d)(3)(C), (d)(6) (1988).

167. *See supra* notes 23-30 and accompanying text.

168. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

obtain the permission or clearance the agency views as necessary to issue the rule.[174] Experience under the oversight process shows that it influences agency decisions through negotiation and compromise and that agency officials may view OMB permission as necessary to issue a rule.[175] The need for disclosure depends, however, not simply on particular examples, but on the degree of supervisory influence created by the provisions of the Order itself.

The disclosure obligation can serve as a counterweight to the ability of OMB to object formally to a rule. When OMB formally provides written comments, the agency must respond in writing and must include both statements in the "rulemaking file."[176] The effect of inclusion in the rulemaking file for purposes of judicial review is not clear.[177] The statement could potentially become a factor in considering whether the agency decision is appropriate on the whole record, and in any event, the analysis by OMB will be available to those seeking review in formulating their positions. The Order makes disclosure of the agency and OMB positions a matter of public record, but does so only in the case of an agency decision to proceed despite formal OMB objections. A statement for the record of the agency's reasons for accepting OMB comments would ensure evenhanded consideration of the impact of OMB positions. The deliberations that affect a final decision would be subject

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174. *See supra* note 82. An agency has to refrain from publishing a rule until OMB completes its review. If the agency publishes a rule with which OMB disagrees, the agency must respond to formal OMB objections. This need to wait for OMB action before the agency publishes a rule gives the process some of the characteristics of a clearance system. *But see supra* note 38 and accompanying text.

175. *See* NAPA REPORT, *supra* note 9, at 5-6, 26-28; Bruff, *supra* note 8, at 568-74; Houck, *supra* note 8, at 540-41; Mason, *Current Developments in Federal Grant Law*, 4 PUBLIC CONTRACT NEWSLETTER 10 (1989) ("Rule-making coordination in the field of grants . . . has been grossly abused by OMB's agency arm-twisting. . . ."); Mason, *A Constitutional Problem*, 2 PUBLIC CONTRACT NEWSLETTER 21 (1987).

176. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

177. Section 9 of the Order states that the Order is not intended to create enforceable rights. However, under this section, the agency is required to base the decision on the whole record, including its determination under § 4 of the Order that the rule has substantial support in the record. The agency's responses to the OMB objections might be used to support arguments by those opposed to agency action that the decision was not adequately supported on the whole record or that the agency did not adequately consider the alternatives. *See* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 537-39 (D.C. Cir. 1983) (discussion of the availability of judicial review of a Regulatory Flexibility Analysis when the statute made analysis part of the whole record for review, but otherwise precluded separate review); McGarity, *Regulatory Analysis*, *supra* note 147, at 1322 (review of judicial consideration of regulatory impact analyses); Note, *Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659 (1987) (arguing that judicial review over executive orders is proper under separation of powers).

to disclosure with respect to changes that OMB has successfully sought, as well as those for which OMB has been unsuccessful.

It is true that, in practice, OMB rarely objects formally to agency decisions. The significance of the OMB right to file objections lies, however, not in the frequency of its use, but in its availability to OMB. When an agency is not willing to make changes requested by OMB, the objection process has an added potential to induce the agency to accept OMB views.[178] In theory, the agency has the option, even now, to include a discussion of OMB's position in the Federal Register when the agency makes changes. However, the agency can be influenced in its use of this option by OMB.[179] The disclosure obligation should be judicially recognized or otherwise established as an obligation that binds OMB as well as the agency.

The statutes vest decisionmaking in the agencies. In view of the degree of influence that the administration can exercise under the Executive Order, a disclosure obligation is justified by the need to implement the statutory provisions that delegate decisionmaking authority to the agency.[180] An agency should accept an administration view because the agency is persuaded by the position and chooses to adopt it as an acceptable policy under the statute, not simply because the administration position is rational or would be sustained on judicial review.[181] The agency decision must involve more than deference to make meaningful an agency's decisionmaking responsibility under the law.

The agency's ultimate rule reflects an evolution of a position as a result of the oversight process. The agency, in its thought processes as an institution, must be mindful of its responsibility to make the decision, rather than simply deferring to OMB's desires. The agency cannot fully evaluate whether it is persuaded that the administration position has merit compared to the agency's initial position unless the agency identifies the reasons for the change in position.

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178. *See* Olson, *supra* note 8, at 45.

179. *See Health Claims Hearings*, *supra* note 9, at 121-22, 293, 295 (explanation of FDA staff memorandum recommending changes in Federal Register notice to refer to "lack of consensus in government," rather than a draft "acceptable to OMB," because "the truth about OMB would guarantee that they would stop the document").

180. The Executive Order cannot displace the agency's authority to make the ultimate decision. *See* Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986) ("President's exercise of supervisory powers must conform to legislation enacted by Congress. . . . [T]he President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress.").

181. Exec. Order No. 12,291 provides that agencies shall give their "legal reasons" for not adopting the least costly alternative available and suggests that the agency's discretion to reach a decision different from that provided for under the principles in the Order is limited to situations in which the agency does not have the legal authority to do so.

A public statement requirement ensures greater attention by the agency because there is greater accountability to Congress and the public for the explanation. A public statement is also important because the agency is placed in a difficult position because it is subject to supervisory influence through executive oversight and remains responsible for its ultimate result. The agency is responsible for the decision whether to accept the influence by those who have an ability to affect the tenure of agency officials and resources or to "go public" if the agency does not accept OMB's views. The disclosure statement makes the agency accountable to those outside the executive branch for accepting an administration position as an agency policy and provides a safeguard that the agency has exercised independent judgment.

Although disclosure has importance for judicial review, the significance of the disclosure will be tested largely by public debate over the underlying policy and administration position. The disclosure will permit the public and Congress to learn how the general administration policy positions influence specific agency decisions. Discussion of the policy issues may lead to changes in the policy or may create more support for the policy. A major benefit of a disclosure obligation, and perhaps its most important role, will be to open up oversight decisions to increased political accountability.

Another benefit of a disclosure obligation will be to aid in understanding the nature of the agency's responsibility in reacting to views developed through the oversight process. The recognition of a disclosure obligation will clarify that the agency is obligated to exercise independent judgment. Oversight provides advice to the agency on its positions, but cannot displace the agency's judgment. The agency is statutorily responsible for decisions influenced by oversight and should be publicly accountable for them.

C. Meaningful Comments on a Proposal

Disclosing that a proposed policy represents an administration position facilitates effective public comments on a proposed rule. The public should be informed about the proposal and any factors that may affect the agency's willingness to change it.[182] Disclosing that a policy reflects an administration as well as an agency policy is important for commenting on the proposed position because of the need to take account of the administration and the agency perspectives. When the public knows that a policy reflects an administration policy, this factor may

182. With respect to the disclosure of factual premises, see United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

affect the type of policy considerations raised in the comments. The comments may emphasize the wider policy considerations reflected in the Executive Order. Moreover, the disclosure may affect the way in which the public comments. Comments might be sent to OMB and the agency for inclusion in the public record.

Sending public comments to OMB is undesirable from a policy perspective because it lessens the agency's role and displaces the agency docket as the focus of decisionmaking. OMB procedures provide for sending the agency copies of correspondence sent to OMB from the public.[183] Nonetheless, because OMB takes a role in the process, receives comments, and may meet with the public on agency rules, the opportunity to comment to OMB should be available to the public, especially for those proposals for which OMB has a position.[184] Indeed, if the public sends more comments to and requests more meetings with OMB, then the special effect of having comments transmitted by OMB to the agency may be diluted.[185]

D. Need to Identify Administration Policy to Describe Basis

The identification of a position as an administration position may be needed to describe adequately the scope and support underlying the policy of the proposed or final rule. If, for example, OMB adopted general risk assessment procedures like the ones it described for comment[186] and an agency used the new procedures in a proposed rule, reference to the use of the OMB risk assessment procedures would be appropriate to identify the agency's actions and its rationale. If an agency proposed the use of a regulatory budget — a policy that the administration has supported[187] — identification of the history of the policy and the administration's reasons for supporting it may provide the type of background and support for a rule that ordinarily is provided to facilitate comments and an understanding of the rule's basis. When an agency relies on a study from outside sources in developing a rule, the supporting studies are cited in the proposal in order to permit

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183. *See supra* text accompanying notes 103-06.

184. Olson, *supra* note 8, at 55-57 (discussion before OMB's adoption of its procedures with respect to conduit communications). *See supra* notes 100-06 and accompanying text (OMB procedures for transmitting comments to the agency and informing the agency of meetings).

185. *See* Bruff, *supra* note 8, at 579.

186. *See supra* notes 40-42 and accompanying text.

187. *See supra* notes 43-44 and accompanying text.

comment.[188] In addition, the agency will often cite its own studies or past policies either to support a proposal or to illuminate the issues. There would seem to be no need to treat OMB or administration positions differently in this respect.

E. Appeal Procedures and Council on Competitiveness

EPA's revision of the MWC rule, discussed above,[189] provides an example of an agency acknowledgment that administration policy views were a factor in the decisionmaking. In that case, the agency changed its position after a meeting with the Council on Competitiveness.[190] The Council functions to resolve issues concerning the application of the Executive Order.[191] A disclosure is especially needed when an agency changes a position based on review by the Council because of the Council's dispute resolution function. Although some disclosure was made in connection with the MWC rule, a need exists for an established procedure for disclosing decisions that have been influenced by the Council's review.[192]

VII. Considerations Weighing Against Disclosure

Some factors weigh against the recognition of a disclosure obligation, whether the obligation is based on policy considerations or is viewed as a necessary element of rational decisionmaking under existing law. In particular, concerns may exist that the designation will intrude into the administrative decisionmaking process and upon the ability of the administration to oversee and supervise agencies.

A. Intrusion Into Agency Decisionmaking Process

The identification of an administration policy and a discussion of the reasons for not adopting the agency's initial position may be viewed as inconsistent with the lessons of *United States v. Morgan*[193] because such disclosure would open up the agency decisionmaking process for

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188. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

189. *See supra* notes 48-51 and accompanying text.

190. MWC Rule, *supra* note 48, at 5497-98.

191. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988) ("subject to the direction of the Task Force, which shall resolve any issues raised under this Order [or] ensure that they are presented to the President. . . .").

192. Even with a disclosure that the agency has changed its position, the question whether the agency exercised independent judgment remains. *See* Brief for Petitioners, New York v. Reilly, No. 91-1168 (D.C. Cir., appeal docketed Apr. 10, 1991) (petition for review of final agency rule). The disclosure provides a basis for evaluating the adequacy of the agency's reasons for changing its position.

193. 313 U.S. 409 (1941).

undue probing.[194] No similar need exists to have the agency disclose the options raised by agency subdivisions or the reasons for not adopting those options, except when statutorily required.[195] Discussions within the administration may be seen as the same as those within an agency which need no such acknowledgment. Moreover, the disclosure indirectly indicates the initial policy option of the agency, as presented to OMB, in addition to the position of the administration.

The rationale for treating administration policies differently is the supervisory character of oversight under the Executive Order. Although an agency head is free to weigh and reject views within the agency, the agency head has less freedom to weigh administration positions and to proceed despite differences. The agency head has supervisory authority over those in the agency. Thus, the decisions of the agency as an institution can be attributed to the agency head. In the oversight situation, OMB exercises supervisory influence with respect to the agency. The Executive Order establishes a review process that inevitably makes administration positions influential.[196] The procedural limitations on the OMB role, adopted by OMB and widely supported, demonstrate that OMB is not the same as the agency. Moreover, the Order itself reflects the institutional difference between the agency and those exercising an oversight function, particularly with respect to the procedure for enacting a rule despite OMB objections.[197]

B. Effect on Oversight: Executive Privilege and the President's Supervisory Role

1. Impact on the Deliberative Process.—The identification of administration policy may be viewed as unduly intruding on the deliberative process and the President's role in supervising administrative agencies. The Court in *Sierra Club v. Costle*[198] recognized a need for "consultative privacy" that makes the docketing of presidential communications concerning rules unnecessary absent any specific congressional intent to cover these communications.[199]

The District of Columbia Circuit also recognized in *Wolfe v. Department of Health and Human Services*[200] that agency-OMB communications are protected by the Freedom of Information Act exemption

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194. *See id.* at 422.

195. *See, e.g.*, United Steelworkers of America v. Marshall, 647 F.2d 1189, 1210-16 (D.C. Cir. 1981), *cert. denied*, 453 U.S. 913 (1981).

196. *See supra* text accompanying notes 167-72.

197. *See supra* notes 31-32 and accompanying text.

198. 657 F.2d 298 (D.C. Cir. 1981).

199. *Id.* at 405.

200. 839 F.2d 768 (D.C. Cir. 1988).

for deliberative communications.[201] Under this decision, a regulatory log was exempt from disclosure not only because it would reveal the timing of pending decisions, but also because it would indirectly show the outcome recommended by the agency.[202] The dissenters agreed that disclosure was inappropriate to the extent it would have revealed the reasons and tentative conclusions of the agency, as distinct from the facts of the process.[203] Thus, in the context of disclosure of a log, the court as a whole regarded the agency's positions, submitted for OMB review, as predecisional matter protected by the deliberative process privilege.

The disclosure obligation considered in this Article does not relate to the disclosure of a specific agency document, nor does it involve disclosure in advance of the issuance of a final decision. Thus, there is no risk of precipitating a hurried decision on a pending matter. Such a risk formed part of the concern in the *Wolfe* case.[204] The disclosures would instead be made by the agency in the final opinion and would discuss the reasons for adopting a position the administration supports in place of the policy alternative initially recommended by the agency. There would be no disclosure of the give-and-take and possible revisions of views that are involved in developing the final or initial policy options. However, the concerns expressed in *Wolfe* about the protection of the deliberative process and the need to prevent chilling of frank discussion may arguably be at stake precisely because the disclosure would publicly reveal the initial recommendation of the agency to OMB.[205] According to the court, when "subordinates are reporting to superiors, disclosure could chill discussion at a time when agency opinions are fluid and tentative."[206]

The deliberative process protection, reflected in executive privilege, could be seen as extending not only to the discussions themselves, but to the ability to influence and change an agency's initial position. A concern may exist that the public disclosure of a different agency position may lock the administration into accepting that position, unless the administration is ready to accept the criticisms that may come with publicly "overturning" the agency position. The agency's acceptance, even preliminarily, of a particular position as a reasonable approach

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201. *Id.* at 776.
202. *Id.* at 775.
203. *Id.* at 778-79 (Wald, J., dissenting).
204. *Id.* at 776.
205. *Id.* at 775-76.
206. *Id.* at 776. *See* DeMuth & Ginsburg, *supra* note 8, at 1086 (agency and OMB disputes should be resolved by the President without being compromised by preliminary disclosures).

can give that option a patina of expertise and reasonableness that may have appeal, even when another option is adopted and justified as reasonable and acceptable.

The impact on the deliberative process, to the extent it occurs, would be a product of the effort to ensure a greater accountability for administration positions and to provide that the agency exercises its statutory responsibility to make the ultimate decision. Moreover, the chilling effect should not be overestimated. The administration would presumably be dissuaded by a designation that a policy is an administration policy only if the administration did not wish to have responsibility for its policy views attributed to it, but such an unwillingness should not necessarily be assumed or indulged if true.[207] If disclosure would chill the administration from taking a position, that interest should not be protected. Proponents of OMB review contend that review makes the government accountable. If the President and OMB are unwilling to make a decision because of adverse publicity, then the cause of democracy is not served by permitting them to avoid both disclosure and public opinion.

A second concern is that the agency will present a more popular view as its initial position because it knows the administration bears the onus of overriding that position.[208] However, under this recommendation, the agency would have to explain its reasons for changing its initial view and for accepting the administration policy as its own policy. Thus, the incentive for such posturing is limited.

A third concern is that the agency will become "locked into" its initial position because of the need to disclose changes. As a result, the agency may be reluctant to make changes and the administration may be less able to influence the agency.

The disclosure recommended in this Article can take the form of an acknowledgement of the other options considered by the agency and the reasons for selecting the one adopted. This format lends itself to acknowledgment by the agency that various alternatives were considered in formulating a policy. It is not uncommon for an agency to discuss other alternatives in proposed rules.[209] In issuing final rules, agencies

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207. *See supra* notes 48-52 and accompanying text (acknowledgment of the Council's views in the MWC rule). *But see* Olson, *supra* note 8, at 58-60 (discussion of OMB reluctance to have views identified).

208. *See* Bruff, *supra* note 8, at 587.

209. An agency's ability to revise a final rule to respond to comments without a reproposal is limited by the extent of notice of the scope of the regulatory issues. *See* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 546-47 (D.C. Cir. 1983). As a result, the agency has an incentive to discuss in the proposal the possible options that the agency may consider in issuing a final rule. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants, 53 Fed. Reg. 28,496, 28,497 (1988) (to be codified at 40 C.F.R. pt. 61).

often change their proposed views based on comments. Thus, an agency is not likely to consider itself precluded from changing its position merely because its initial position was different so long as the agency can explain its support for the position ultimately adopted. The Executive Order itself provides for the agency to discuss, in the regulatory analysis, the alternatives that could result in less cost and the legal reasons for not adopting a less costly alternative.[210] Thus, the disclosure of alternatives considered by the agency is not viewed as chilling the deliberative process of the agency when the agency has a position that may differ from the cost-benefit principles of the Executive Order. When the agency's initial position is changed by the oversight process, the alternatives considered by the agency need identification to ensure a rational decision. The consideration of these alternatives should similarly be viewed as not chilling discussion.

The disclosure should indicate that the agency took account of administration views in adopting its ultimate position. Some may view this additional disclosure as particularly detrimental to the deliberative process and the ability to influence the agency's views. Such a disclosure obligation, however, may contribute to the quality of the policy discussions and serve to enhance the deliberative process. At present, agencies may simply incorporate the policy they perceive as representing OMB views into draft rules submitted to OMB and may resist OMB policy views largely on the grounds of their legal defensibility.[211] A policy that calls for disclosure of the agency's initial views encourages the agency to formulate its own policy position because the agency would know that these views would receive careful consideration in the internal policy debate. The need to state the reasons for changing the initial position would also focus attention on important substantive policy issues. In the end, a disclosure policy is likely to affect the ease with which the administration is able to influence an agency. An agency may be less willing to change its position if a satisfactory public explanation cannot be provided for changing the position. This impact of a disclosure policy is desirable in reinforcing the agency's responsibility to make the ultimate decision.

The agency's role is different from the ordinary situation in which the subordinate provides advice and the superior is officially and publicly responsible for the decision. In the ordinary setting, the superior will endeavor not to chill the preliminary views of subordinates because the superior wants to hear the full range of options before deciding on one

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210. *See supra* notes 25-27 and accompanying text.

211. *See* Olson, *supra* note 8, at 50 (EPA drafts rules that the agency believes will clear OMB).

for which the superior will be accountable. In the oversight setting, the agency, while "subordinate" to supervisory influence, is statutorily responsible for the decision. There needs to be concern in this setting, both with the quality of the discussion and the risk that discussions with a "superior" may chill the subordinate-agency in its responsibility to make the ultimate decision. That risk is of special concern in the oversight setting when the agency is not as free to disregard the advise as to accept it. If the agency disagrees, OMB may file formal public objections, continue to extend the time for review, and refer disputes to the Council on Competitiveness. The disclosure obligation recommendation in this Article makes an agency's acceptance of OMB views public, just as an agency decision to disagree with OMB is public when OMB formally objects. Disclosure helps ensure that the OMB views are indeed only advisory and do not displace the agency's decisionmaking responsibility.

An additional risk of a disclosure policy is that agencies may become reluctant to state a forceful initial position or any position at all. When the agency changes its view, it must disclose the change and provide a defensible basis for the ultimate outcome. Faced with this difficulty, the agency may not present a position initially. However, this possibility has a check because the agency would still have to acknowledge in the rule that the position adopted was developed in conjunction with the administration as an administration policy. The agency should also discuss any alternatives seriously considered, even if the agency did not have an initial position. An agency reluctant to explain its changed position may be reluctant to be in the position of having no views. Thus, overall, the disclosure obligation is likely to encourage an agency to formulate and pursue its policy views.

The administration might also seek to intervene in the process before the agency develops an initial view, so that the administration could more easily affect the outcome. If OMB intervenes, the position developed in conjunction with OMB should still be designated as an administration position. Furthermore, if earlier OMB intervention in agency decisions becomes established as a general policy, the OMB policy should be described in a general notice published in the Federal Register.[212] The publication of the policy is important to permit public discussion and consideration of the limits that may be needed for the new process. A new Executive Order may also be needed if the practice represents a modification of the existing Order.

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212. Publication of general statements of policy is called for under the Freedom of Information Act, 5 U.S.C. §552(a)(1)(D) (1988). *See also* Sierra Club v. Andrus, 581 F.2d 895, 902 (D.C. Cir. 1978); Davis, *supra* note 85, at 856. The President may be considered not to be an agency. *See* Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991).

2. Executive Privilege.—The appropriateness of disclosure of administration policy in rulemaking must also be considered with respect to whether it will unduly intrude on the President's constitutional role. Executive privilege protects the President's ability to exercise the constitutional function of supervising agencies.[213] Although that privilege has been stated in broad terms, in practice, administrations have agreed to limits on the privilege that implicitly recognize a need to balance the privilege against other appropriate concerns.[214]

In analyzing separation of powers questions when there is a risk of one branch of government aggrandizing its powers at the expense of another, the Supreme Court uses a formalist analysis, establishing a bright line test to provide boundaries.[215] Absent a risk of aggrandizement, a functional approach that considers the needs of each branch to protect its core functions is appropriate.[216] Executive privilege involves the overlapping interests of the three branches of government with respect to administrative agencies. The President has an interest in supervising agencies, but Congress and the courts also have interests in ensuring that the agencies properly exercise their statutory responsibilities. In balancing those interests, the need for confidentiality is especially strong with respect to protecting direct presidential communications and pending decisions because these disclosures would most adversely affect decisionmaking and the President's functions.[217] In analyzing restrictions that impact on executive privilege, it is appropriate to consider the additional benefits provided by fostering openness and the additional burdens of disclosure and the "interference with the values served by confidentiality."[218]

Many of the elements in this test have been discussed separately, but a summary of the balance of factors and the marginal contribution of the disclosure policy is useful. The disclosures would indeed increase the burdens on the agency by requiring an affirmative disclosure of the policy options and reasons for adopting an administration policy. The inclusion of that discussion in the rulemaking record would also open up the possibility of judicial review with respect to the rationality of

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213. *See* United States v. Nixon, 418 U.S. 683, 703-16 (1974); Wolfe v. Department of Health & Human Servs., 815 F.2d 1527, 1538-40 (D.C. Cir. 1987) (Bork, J., dissenting).

214. *See* Bruff, *supra* note 8, at 585.

215. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986). Formalist tests have been used in several cases. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); Buckley v. Valeo, 424 U.S. 1 (1976).

216. *See Schor*, 478 U.S. at 856-57.

217. *See Nixon*, 418 U.S. at 708; Bruff, *supra* note 8, at 585.

218. Bruff, *supra* note 8, at 586.

the decision in light of the options and factors identified by the agency. The disclosure policy would not affect the confidentiality interests most strongly protected by executive privilege because there would be no summary of oral communications or disclosure of a pending decision. There may be some indirect impact on the deliberative process and the ability of the administration to influence an agency. The agency's willingness to change a position will depend upon whether there is a sufficient basis for explaining why the alternative adopted is satisfactory.

The designation in a rule that a policy represents an administration position and the identification of other policy options considered by the agency encourages openness by allowing the public to determine the impact of oversight more readily. Disclosure permits public and congressional discussion of the merits of administration policies, thus placing that matter in the public arena. This provides added assurance that the agency considered the appropriateness of adopting an administration policy and did not merely acquiesce in the policy because of its minimal reasonableness.

Moreover, executive privilege is limited to the extent necessary to comply with the law.[219] These disclosures help to ensure that the agency fully considered the appropriateness of adopting an administration policy and did not simply acquiesce in a policy because of its minimal rationality.[220] If that analysis is correct, executive privilege should not preclude disclosure that provides the appropriate assurance that the agency exercised its judgment after adequately considering the alternatives while minimizing the impact on the deliberative process.

3. Docketing of Drafts and Disclosure Policy.—The practice of docketing agency drafts submitted for OMB review provides indirect support for the finding that the disclosures recommended here would not unduly intrude into the deliberative process protected by executive privilege. Some agencies include the drafts in their docket, and OIRA makes the drafts available upon a written request. The disclosures called for in this Article would serve to make information more readily available to the public that could with greater difficulty be obtained by comparing the draft available in the agency or OIRA docket.[221] Docketing makes it possible to identify the initial agency position generally and to discern

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219. *See* United States v. Nixon, 418 U.S. 683, 706-07 (1974); Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986) (although a certain amount of deference must be given to the President to control executive policymaking, use of Exec. Order No. 12,291 to create delay and to impose substantive changes raises constitutional questions).

220. *See supra* text accompanying notes 167-72.

221. For a similar disclosure provision, see *supra* notes 109-17 and accompanying text.

indirectly the impact of the oversight process. Because OMB has agreed to the voluntary adoption of these indirect means of disclosing the agency position, a direct disclosure of the initial agency position and a change in position should not be seen as unduly chilling the deliberative process.

On the other hand, the recommended disclosure policy goes beyond the docketing practice and includes disclosure in the Federal Register, makes the disclosures part of the record for judicial review, and expressly indicates when changes reflect an administration policy, as opposed to a last minute change solely at the agency's initiative. Some may question the marginal benefit of a disclosure requirement as compared to the existing docketing practices, given these added burdens on the agency and the impact on confidentiality and the deliberative process. However, the disclosures provide an additional benefit: they promote openness by making the impact of administration input more readily discernible to the general public. The public is less likely to have access to the OIRA or agency docket or to be able to compare routinely the draft with the rule to discern differences. Moreover, under this recommendation, the agency must discuss the reasons for choosing between its initial policy options and the final one, thus providing additional assurance of agency attention to its statutory responsibility to make the decision.

This disclosure policy should not, however, be viewed as a substitute for the docketing of agency drafts. The docketing provision provides information about the evolution of the full agency position during the oversight process. This recommendation and the docketing provisions are complementary in assuring accountability and openness in the process.

4. Presidential Communications.—There may be a concern that a disclosure obligation will intrude on the President's personal responsibility under the Constitution to supervise administrative agencies. The doctrine of executive privilege has been viewed as protecting the ability of the President to consult with and to exercise a supervisory role over the executive branch.[222] The President normally must operate through delegation, and the privilege, with its constitutional aspects, has been viewed as applying to the President's delegates, although perhaps with diminished force.[223]

This Article's recommendation is directed at oversight that occurs as part of the process established under Executive Order 12,291, rather

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222. *See Nixon*, 418 U.S. at 708; Rosenberg, *Beyond the Limits*, *supra* note 8, at 242 (presumptive privilege extends only to communications with closest advisers to thrash out policy, not policy recommendations to agencies); Verkuil, *Jawboning*, *supra* note 8, at 978-82.

223. *See* Wolfe v. Department of Health & Human Servs., 815 F.2d 1527, 1539 (1988) (Bork, J., dissenting); Strauss, *supra* note 65, at 660-61 (need for the President to act through delegation); Verkuil, *Jawboning*, *supra* note 8, at 988-89.

than any individual communications between the President and the agency. OMB oversight occurs under the terms of the Executive Order and is bound by the Order. The process establishes a review system that gives OMB positions added influence in the decision, which makes it more difficult for an agency to reject than to accept OMB views. When agencies disagree, they must respond for the rulemaking record to any formal OMB written comments, deal with appeals to the Council on Competitiveness, and expect OMB extensions of time for additional review.[224] If the agency issues a rule before OMB has completed its review or while review has been suspended, the agency has not complied with the terms of the Executive Order.[225] In addition, the Executive Order requires consideration of factors that may not be explicit in the statute.[226] This process is routine for all major agency rules. This type of supervisory influence warrants additional restrictions to ensure that there is no displacement of the agency's statutory responsibility to make the ultimate decision.

Communications from the President differ because of the President's personal constitutional responsibility to enforce the law.[227] The President also has the ability to define the basis of the communications in a way that differs from those under the Executive Order. The discussion may be consultative and may leave the matter to the agency to decide in light of the discussion. Presidential communications directed to the agency are also likely to be infrequent contacts dealing with exceptional circumstances. Although presidential communications need not be subject to the same restrictions that apply to those exercising oversight under the Executive Order, the recommendations may be appropriate on a policy basis even with respect to presidential communications. The contents of the communications themselves are not directly disclosed. The policy can be described as an administration policy and not specifically as a presidential policy. Thus, this approach has a limited impact on the consultative privacy of presidential communications.

Communications between White House officials and the agency that occur as part of the oversight process established by the Executive Order

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224. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 note at 473-76 (1988).

225. *Id. See also Health Claims Hearings*, *supra* note 9, at 118 (remarks of FDA Commissioner that "[I]f OMB does not concur, I do not believe those rules can be published.").

226. *See supra* note 149 and accompanying text.

227. The President is personally responsible under the Constitution to "take Care" that the laws are faithfully executed. U.S. CONST., art. II, § 3. *See* Verkuil, *Jawboning*, *supra* note 8, at 978-89.

should be covered by the recommendation because these communications reflect the supervisory influence established by the Executive Order. Furthermore, coverage ensures that oversight functions under the Executive Order are not simply shifted to White House or other officials outside OMB to avoid the restraints placed on OMB because of its oversight function under the Order.[228]

C. Appropriateness of Judicial Review

A need to designate administration policy as part of the basis of agency rules may appear inconsistent with the thrust of judicial decisions which have not indicated any need for such acknowledgments in the cases dealing with executive oversight. Indeed, the *Chevron* Court expressly recognized the appropriateness of agency responsiveness to political views of the administration, without any discussion of disclosure.[229] In *Sierra Club*, the court of appeals noted that drafts submitted to OMB, which the statute required be made part of the public docket, were not included in the record for review because Congress presumably recognized that it did not matter which person within the administration affected the decision.[230] In *State Farm*, the Court examined the rationality of an agency decision without discussing the process.[231] *State Farm* provides some suggestive support for the appropriateness of identifying administration policies when the policies affect agency decisions. The dissent by then Justice, and now Chief Justice, Rehnquist indicates that a policy stated to be a new administration's policy would provide support for a change in position.[232] The majority, while not discussing the weight of an administration policy directly, rejected the related substantive argument made by the agency that adverse public reaction warranted the recision of the standards.[233] The rejection occurred not because that point lacked relevance in supporting a decision, but because it was not one of the reasons for the agency's decision.[234] The lesson seems to be that to the extent an administration position is a relevant consideration supporting a rule, the agency must explicitly acknowledge the administration position and the basis for it in the statement of basis accompanying the rule and must seek to identify the policy basis underlying the position.

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228. *See* Bruff, *supra* note 8, at 588.

229. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 853-59 (1984).

230. Sierra Club v. Costle, 657 F.2d 298, 404-05 n.519 (D.C. Cir. 1981).

231. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

232. *Id.* at 59 (Rehnquist, J., dissenting).

233. *Id.* at 50.

234. *Id.*

The need to identify the administration policy or the impact of oversight was not directly at issue in these cases. Moreover, *Sierra Club* arose before the systematic oversight process of Executive Order 12,291 was developed, and the case specifically concerned presidential communications.[235] The appropriate parameters for executive oversight remains an issue yet to be fully tested.

The courts also noted the appropriateness of congressional development of limits on the oversight process. Congress has not done so directly, but the need to obtain presidential approval creates difficulties in enacting general statutes that limit the President's ability to influence the agencies. Instead, Congress established statutory time limits and mandatory duties in specific statutes as a means of limiting executive oversight.[236] However, such an approach has its own limits.

Developing a suitable means to account for the significance of executive oversight without unduly intruding on the President's role remains a difficult task. Courts may be willing to recognize limits on the supervisory role if the tests are manageable and take account of the underlying separation of powers concerns. The measures suggested here seem reasonably responsive because they provide more accountability for oversight without unduly intruding into the process. The issues are difficult, and there may not be a fully satisfactory resolution of the competing interests. Yet, the need remains to develop some means to reflect the impact of executive oversight adequately in the process of agency decisionmaking. A disclosure obligation is important as a means to ensure that the agencies perform their statutory role to make the decision in a rational manner.

Lastly, there may be concerns about the scope of judicial review in cases involving an agency decision to adopt an administration position. The *State Farm* decision provides for a "hard look" at the agency's rationale.[237] These restraints on discretion may be viewed as inappropriate limits on presidential power. The availability of review may also be thought to open up difficult and unmanageable questions for review. The test for review of an agency decision, as influenced by the oversight process, presents some novel questions, but the test should build on the existing standards. The application of judicial review will require the agency to identify the relevant factor that led the agency to change its initial view. That factor may be the identification of an administration

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235. Sierra Club v. Costle, 657 F.2d 298, 388, 404 (D.C. Cir. 1981). The communications in *Sierra Club* involved an informational briefing. *See* Olson, *supra* note 8, at 35.

236. *See supra* notes 127-33 and accompanying text.

237. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

policy and its policy basis.[238] Thus, the additional support needed by the agency may not be extensive or onerous to develop. However, whether the administration's views were in fact sufficient will, in the end, depend upon the particular issues involved.

The fact that an initial agency position did not become final should also be considered in assessing the extent of the support needed for the position adopted. When an agency changes an established public policy, the agency must have more support than would be required to justify a new policy. Under the *State Farm* decision, a change in the *status quo* requires additional support.[239] This burden is especially appropriate in view of the reliance interest that develops on the part of the public.

The oversight process involves agency positions that are in the process of development. The reliance of the public on existing rules is not a factor. Consequently, a change in a rule that has not been issued may be "more easily defensible" than a change in an existing rule that affects the *status quo*.[240] Thus, a change made during the oversight process may be considered rational if the agency reasonably finds the option equivalent, but not necessarily better, than the initial option considered. An agency decision to change its initial position is not appropriate if the agency considered the alternative adopted to be a worse option. However, the option may not have to be better than the initial one because there has been no public reliance on an established agency position and because administration views can play a role in informing and supporting agency decisions.

In practice, the disclosure obligation may not change the outcome on judicial review in many cases. Nonetheless, the obligation is important because it can serve to assure adequate attention within the administration to the rationale for the changes. These reasons must satisfy the agency and be adequate to deal with congressional and public reactions, in addition to meeting the test for judicial review. The public accountability for the choice made is a major factor in ensuring its rationality.

D. Distinguishing Administration from Agency Policy

Distinguishing between administration and agency policies is made difficult by the process of negotiation and compromise that occurs during oversight. OMB may view the process as the provision of advice and

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238. *See supra* note 165 and accompanying text.

239. *State Farm*, 463 U.S. at 42.

240. Williams Natural Gas Co. v. Federal Energy Regulatory Comm'n, 872 F.2d 438, 444 (D.C. Cir. 1989) (standard of review for withdrawal of a proposed rule).

a "socratic dialogue."[241] OMB may also perceive changes made by the agency in response to oral comments from OMB as agency-initiated policies, rather than administration policies.

As discussed above, the oversight process poses a risk of displacing the agency decision. The process makes it more difficult for the agency to disagree than to agree, thereby inducing negotiation and compromise.[242] If the process does not displace the agency decision, it represents a shared decision. Therefore, the OMB role in reaching the decision should be acknowledged.[243] Thus, when an agency position changes as a result of the oversight process, the change should be viewed as representing both an agency and an administration position. The administration has contributed to shaping the outcome by virtue of its views and the added influence the oversight process provides. Even though OMB may not obtain as many changes as sought, its views help shape a compromise decision. The policy also represents an agency position because the agency should not accept the position if it is not persuaded of its merit and rationality. Thus, any change made in an initial agency position because of oral or written comments from staff or through formal comments during the oversight process should be disclosed as representing an administration and agency policy.

There may be occasions, however, when the oversight discussions lead to changes of a nonsubstantive nature or insignificant changes to correct errors. An agency change in these circumstances will not need disclosure as an administration position. These changes are ones that the agency would have made on its own initiative to correct a mistake, whether the issue was raised by the administration or by others, even if review was concluded with no changes. When, however, the views expressed during the oversight process influence the agency in choosing between two reasonable positions or represent a significant change, there should be disclosure that the policy represents a joint administration and agency position.

The need to designate a policy as an administration policy may also serve to clarify the administration position. The oversight process involves compromise, and OMB may only comment by stating objections.[244] The

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241. *See Health Claims Hearings*, *supra* note 9, at 172 (OIRA Acting Administrator MacRae's testimony that "we provide advice; we do not clear rules"); Houck, *supra* note 8, at 544 (citing *Senate Democrat Leaders Lambast OMB for Control Over Environmental, Safety, Health, Rules*, 16 ENV'T REP. (BNA) 1807 (Jan. 31, 1986)).

242. *See supra* text accompanying notes 167-78.

243. *See Health Claims Hearings*, *supra* note 9, at 179 ("An agency comes in with a proposal, we will have discussions, and we will mutually agree on changes, and the rule will go out.").

244. *See id.* at 177-80 (examples of confusion about the proper role of OMB).

agency may assume, based on OMB comments, that OMB wants a particular change, which the agency then proposes. At the same time, OMB might assume that the revised position is "really" an agency initiative because the agency suggested the revision. When the agency is required to designate the policy as an administration position, OMB must focus more clearly on whether the policy change exceeds OMB's views of what is needed. Moreover, the designation ensures that the administration is willing to assume responsibility for changes that OIRA staff members induce the agency to make. The responsibility for jawboning the agencies is too important to be delegated to the OIRA staff without holding OIRA and the administration institutionally accountable for the decisions affected.

VIII. Conclusion

The identification of the impact of administration policy on the development of agency rules during the oversight process has policy benefits. Requiring disclosures of changes in agency rules that occur as a result of oversight improves both administration and agency accountability for decisions made. The need to identify administration policy in a public statement also encourages articulation of the administration's general policy positions rather than merely second-guessing of agency decisions. In addition, disclosure is important for purposes of judicial review because it ensures that the rules disclose the factors that have influenced the decision. Agency decisions affected by the oversight process may involve a choice between two rational policy options which the agency considered acceptable. The disclosure assures an identification of the factors that persuaded the agency to adopt the position chosen rather than its initial position.

Disclosing that the agency accepted an administration position will also provide a safeguard that the agency exercised the judgment delegated to it under statute based on factors that the agency considers appropriate. The Executive Order makes it more difficult for an agency to issue a rule to which OMB objects. If the agency disagrees and OMB formally objects to the agency rule, the agency must include a response in the rulemaking file. In addition, the agency may face further delays because of OMB's extended review and because of possible appeals to the Council on Competitiveness. Disclosure for the record of an agency's reasons for agreeing with OMB provides balance and helps ensure that OMB advises, but does not displace, the agency decision. A disclosure obligation is appropriate under a model of agency decisionmaking that views agencies as having an independent obligation to determine policy, as compared to a deference model in which the agency can be influenced to accept any administration position that is minimally rational.

Recognizing a disclosure obligation may have an indirect effect on the deliberative process and may reduce the ability of the administration to influence the agency decision. Such diminished influence over agencies might be viewed by some as an inappropriate intrusion into the deliberative process protected by executive privilege. The give-and-take of executive and agency communications in thrashing out a position would not be disclosed, however. The impact on the deliberative process occurs indirectly when the administration is reluctant to accept accountability for influencing the decisions actually reached or when the agency finds that it cannot state a satisfactory basis for changing its initial position in light of the public disclosure.

Still, the agency and oversight process may be characterized as a single predecisional step. Separate identification of an initial agency position may be thought to be an unnecessary and undesirable intrusion into the decisionmaking process. However, the Executive Order recognizes the agency decisionmaking process as a distinct matter for disclosure in the public record when the agency disagrees with a formal OMB position. Furthermore, by law or under OMB policy, the drafts of rules are included in the public record, but not in the record for judicial review. The availability of drafts indirectly discloses the deliberative process and differences between OMB and the agency, but the form of disclosure makes the impact of the OMB positions difficult for the public to determine.

The administration has a recognized role in influencing agency decisions, but that influence cannot exceed the statutorily delegated responsibility to the agency. A recognition in the public record of the distinct contribution of administration positions provides enhanced accountability to the public. Moreover, disclosure provides better assurance that the agency will exercise its distinct statutory responsibility.[245] The disclosure obligation ensures the accountability of the administration and the agency and serves to identify the impact that executive oversight has on agency rulemaking decisions.

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245. Absent a legislative change, the policy considerations support such a disclosure obligation, even if the obligation is not viewed as necessary for purposes of judicial review. Disclosure of the initial option considered by the agency and the agency's adoption of an Administration policy could be made in the public docket, if not in the record for judicial review.