

A Pen, a Phone, and the U.S. Code

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This Essay concerns a fact and a problem that bedevil modern government. The fact is that, as a society, we rely—deeply and pervasively—on administrative agencies to fix our troubles. By law, we place problems like air pollution, water pollution, climate change, toxic chemicals, food hazards, workplace risk, consumer deception, and more at the doorstep of administrative agencies and say to the agencies: please fix this, will you? The problem is that we often do not let them do their jobs. The result is a vast gulf between the promises of law and the realities we face.

The constraints on agencies and agency personnel take many forms. We slash their budgets, harass them in congressional hearings, nitpick their reasoning to death in the courts, and paralyze them with endless analytical prerequisites to taking action on the problems they are charged with addressing.

Here I would like to discuss just one of the constraints on agencies: White House control over agency decisionmaking. President Obama started this year with a metaphor: “I’ve got a pen, and I’ve got a phone,” the President said.¹ What he meant is that even without action from Congress, he would use executive orders (the pen) and his convening power (the phone) to get things done. Critics of the Administration described the strategy as one of “bypass[ing]” Congress when Congress fails to act.² Picking up the pen and the phone would, according to the President and his aides, lead to a “year of action” on priority issues.³

I will suggest, however, that presidential power is deployed as often to delay or stop agency action as to prompt it. I will suggest that the President—and his aides—should, more often, put down their pens and their phones and let the agencies do their work. The Administration can get a whole lot done not by “bypassing” Congress but by following instructions laid down in statutes Congress has already passed. From this perspective, the President and his aides have much more than a pen and a phone to work with; they also have just about the entire U.S. Code. The hitch is that the Code brings with it limits as well as power.

In large part, my observations are a counterpoint to a justly renowned article published in the *Harvard Law Review* over ten years ago, written by then-Professor, now-Justice Elena Kagan.⁴ In this article, *Presidential Administration*, Justice Kagan made a compelling case for presidential control over agency decisionmaking. She grounded her argument first and foremost in congressional intent. As a matter of legislative intent, she argued, it is reasonable to assume that when Congress delegates authority to an Executive Branch agency, it is also delegating authority to the President and his aides to make the relevant decisions.⁵ Moreover, she went on,

* Justice William J. Brennan, Jr., Professor of Law, Georgetown University Law Center. © 2014, Lisa Heinzerling. This Essay is an edited version of remarks delivered on the occasion of the author’s installation, on February 19, 2014, as the Justice William J. Brennan, Jr., Professor of Law at Georgetown University Law Center. The author is grateful to Matthew Johnson for superb research assistance.

¹ Charles M. Blow, Op-Ed., *A Pen, a Phone and a Meme*, N.Y. TIMES, Feb. 7, 2014, <http://www.nytimes.com/2014/02/08/opinion/blow-a-pen-a-phone-and-a-meme.html>.

² *Id.*

³ *Year of Action*, WHITE HOUSE, <http://www.whitehouse.gov/year-of-action> (last visited July 17, 2014).

⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

⁵ *Id.* at 2288–90, 2312.

as a matter of policy, presidential administration is characterized by energy and accountability; agencies will, in response to presidential prodding, act with vigor and dispatch, and the outcomes will be tied to the President himself.⁶ Kagan's argument has caught hold in academic circles and even more so in political ones.⁷ It fairly describes the kind of administration we have had, across parties, for many years, with presidential control of agencies only deepening in the two administrations that have held office since Kagan wrote.

However influential Justice Kagan's views have been, I respectfully disagree with them. Although presidential intervention can, as she explained, sometimes result in high-profile agency action backed by presidential support, it just as often (or perhaps more often) results in less rather than more executive energy, delaying or even stopping agency initiatives that are inconvenient to the White House. The delays and effective vetoes of agency initiatives are, moreover, handled mostly in secret, with little chance for the accountability Kagan emphasized. Furthermore, the whole apparatus of presidential administration proceeds under the dubious legal assumption that when Congress gives decisionmaking power to an executive agency, it also means to give that power to the President and his aides in the White House. I discuss each of these points in turn.

I focus here on the ways in which the White House intervenes in the process for developing agency rules. The White House reviews rules through the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). For decades, presidents have directed agencies to send "significant" rules to OIRA for review before issuing them.⁸ The significance of an action (and thus OIRA's jurisdiction over it) is determined solely by OIRA—and OIRA finds a lot significant.⁹ Thus, many agency final rules, proposed rules, pre-rule notices, policy statements, guidance documents, and more go to OIRA—and thus to the larger White House political apparatus—for review. This process has several important consequences for agencies' ability to do their work.

One consequence is delay. Under the terms of the Clinton-era Executive Order that governs regulatory review by the White House to this day, the presumptive maximum period of review is 90 days, with an extension to 120 days if both the action agency and OMB agree.¹⁰ A 2013 report published for the Administrative Conference of the United States found that the average from 1994 to 2011 for the length of an OIRA review was 50 days.¹¹ Yet the average period for such review in 2012 was 79 days, and the average for the first half of 2013 was 140 days.¹² As of February 18, 2014, 114 rules were under review, and 58 (over half) had been there more than 90

⁶ *Id.* at 2339–46.

⁷ See, e.g., Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 *FORDHAM L. REV.* 2455 (2011).

⁸ See Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 *FORDHAM L. REV.* 2487, 2502–32 (2011).

⁹ Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 *PACE ENVTL. L. REV.* 325, 331 (2014).

¹⁰ Exec. Order No. 12,866 § 6(b)(2)(B)–(C), 3 *C.F.R.* 638, 646–47 (1994), *reprinted in* 5 *U.S.C.* § 601 app. at 805 (2012).

¹¹ CURTIS W. COPELAND, *ADMIN. CONFERENCE OF THE U.S., LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* 4 (2013), *available at* <http://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf>.

¹² *Id.*

days.¹³ About one-third of the rules (17 in total) had been there for over six months.¹⁴ One had languished at OIRA since 2010.¹⁵

Why do these delays matter? First, they mean that we must wait longer before the benefits of the rules—cleaner air, cleaner water, safer workplaces, safer food—materialize. Second, the delays mean a greater chance that the rules will not be finished in this Administration—or perhaps ever. Third, delays may prevent agencies from moving on to other work, particularly if that work is linked to or dependent upon the initiatives that are stuck at the White House.

A second consequence of White House review is that many rules are not only delayed, but stopped altogether. It is implausible to believe that rules that have been at OIRA for two, three, or four years are under active review. Indeed, we have direct evidence that some rules have been not only delayed, but stopped. Reflecting on his tenure as OIRA Administrator from 2009 to 2012, Professor Cass Sunstein has written that if some rules got into trouble at OIRA, it is because he, Sunstein, had the authority to “say no to members of the president’s Cabinet,” to deposit “highly touted rules, beloved by regulators, onto the shit list,” and to ensure that some rules “never saw the light of day.”¹⁶ Yet only one rule in the Obama Administration has been publicly rejected, with a written explanation.¹⁷ Clearly, as Sunstein has attested, there have been other rules, as well, on the shit list; but it’s a secret shit list.

Some rules, moreover, never even get to OIRA. In recent years, OIRA has required approval for submission of rules for review.¹⁸ If OIRA does not approve the rules for review, the rules never go to OIRA, they are never issued, and the public never hears about any of this. It is unclear whether this is still happening today, or whether—given a good deal of negative publicity about the practice¹⁹—OIRA has dropped the pre-approval process it had followed for some time. The opacity of the whole process makes it impossible to know for sure. When a rule either goes to OIRA but never comes back or is not approved for formal review by OIRA, it means that a rule the agency believed was legally and technically sound will not issue—and the public does not know why.

Another consequence of aggressive White House review is that rules are sometimes revised beyond recognition while under review. One dramatic example is EPA’s rule updating standards

¹³ Regulatory Review Dashboard, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/EODashboard.jsp> (last visited Nov. 25, 2014) (data as of February 18, 2014).

¹⁴ *Id.*

¹⁵ *Id.* After the occasion for these remarks, the situation continued: as of November 25, 2014, 133 rules were under review, 57 had been there for more than ninety days, 13 for more than six months. *Id.*

¹⁶ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 3, 6–7 (2013).

¹⁷ The website on regulatory review shows only one return letter during the Obama Administration: President Obama’s direction to then-EPA Administrator Lisa Jackson to withdraw the final rule setting a new air quality standard for ozone. See Letter from Cass R. Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Lisa Jackson, Adm’r, Env’tl. Prot. Agency (Sept. 2, 2011), available at http://www.reginfo.gov/public/return/EPA_Return_Letter_9-2-2011.pdf; *OIRA Return Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/EOReturnLetters> (last visited Nov. 25, 2014).

¹⁸ See Heinzerling, *supra* note 9, at 347–48; Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST, Dec. 14, 2013, http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html.

¹⁹ See, e.g., COPELAND, *supra* note 11; James Goodwin, *Has OIRA Really Improved the Timeliness of Its Reviews? Nope, It Just Has a New Scheme for Delaying Safeguards and Defeating Transparency*, CENTER FOR PROGRESSIVE REFORM (Jan. 22, 2014), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=BA7F8447-BE0E-65D3-7A00AB82FD8404B2>.

for toxic water pollution from power plants.²⁰ This proposed rule went to OIRA with two options, both quite strong.²¹ It came back from OIRA with eight options.²² All of the options added while the rule was at the White House were weaker than the options EPA sent to the White House for review.

Sometimes we do not even know what happens to a rule while it is under review at the White House because compliance with Executive Order mandates on transparency is so spotty. To take one example, the Occupational Safety and Health Administration's rule on crystalline silica in the workplace was stuck at OIRA for two and a half years.²³ After the rule emerged from this lengthy process of review, there was no disclosure of any changes that had been made at OIRA's behest.²⁴ Moreover, even when an agency does disclose the changes that occurred during White House review, there is no public explanation of why the changes occurred.²⁵

Yet another negative consequence of aggressive White House review is that the process can become a secretive conduit for industry views. In a 2011 report, the Center for Progressive Reform found that over the preceding decade, industry representatives had outnumbered public-interest representatives by about five times in OIRA meetings on rules under review.²⁶ No minutes of these meetings were kept; OIRA disclosed only the broad subject matter and attendees at the meetings.²⁷ A more recent media report noted that OIRA staffers sometimes attend three to five meetings *a day* with outside groups.²⁸

Direct involvement at OIRA is not the only way industry wields influence in the OIRA process. Within the OIRA process, an Executive Order issued by President George W. Bush—still in force today—grants the Small Business Administration (SBA) a first-among-equals status among federal agencies in OIRA review.²⁹ SBA can attend meetings and comment frequently on rules, yet the evidence suggests that what SBA is doing in those meetings is representing not small businesses, but some of the largest and most powerful industries in the country. A 2013

²⁰ Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 78 Fed. Reg. 34,432 (June 7, 2013).

²¹ See generally U.S. ENVTL. PROT. AGENCY, DOCUMENTATION OF OMB REVIEW UNDER EXECUTIVE ORDER 12866 (2009).

²² See *id.*; see also Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 78 Fed. Reg. 34,432, 34,458 (June 7, 2013).

²³ OIRA received the rule on February 14, 2011. *Worker Safety Rule Under Review at OIRA for Over a Year: A Tale of Rulemaking Delay*, CENTER FOR EFFECTIVE GOV'T (Feb. 22, 2012), <http://www.foreffectivegov.org/node/11984>. The rule was not officially proposed until September 12, 2013. See Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274 (Sept. 12, 2013).

²⁴ See Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274 (Sept. 12, 2013).

²⁵ See Heinzerling, *supra* note 9, at 361–63.

²⁶ RENA STEINZOR, MICHAEL PATOKA & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 8 (2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

²⁷ *Id.*

²⁸ Robin Bravender & Emily Yehle, *Wonks in Embattled Regulatory Office Are Mysterious—But 'Not Nefarious,'* E&E PUBLISHING LLC (Feb. 18, 2014), <http://www.eenews.net/stories/1059994711>.

²⁹ Exec. Order No. 13,272 § 1, 5, 3 C.F.R. 247, 247–48 (2003), reprinted in 5 U.S.C. § 601 app. at 810–11 (2012). The Center for Progressive Reform has made a persuasive case for revoking this order. See SIDNEY SHAPIRO & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY'S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY 3, 21–25 (2013), available at http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf.

report by the Center for Effective Government drew upon emails, obtained under the Freedom of Information Act, which were sent from SBA to industry groups and that show a direct line from industry trade groups and their talking points to comments by SBA on agency rules and the outcome of the OIRA process.³⁰ In this way, the views of powerful industry groups are laundered first through SBA and then through OIRA. A scroll through the public notices of recent OIRA meetings reveals that SBA still faithfully attends meetings for rules that would not seem to remotely involve small businesses.³¹ If historical practice is any guide, SBA is there faithfully representing the interests of some of the largest companies in the country.

Professor Sunstein's account of the cast of players involved in White House regulatory review also shows opportunity for industry involvement as well as the likely consideration of factors that go beyond statutory bounds. According to Professor Sunstein, an agency rule could face problems at OIRA due to the objections of any number of entities, including as many as ten different White House offices.³² The Chief of Staff might have a problem with the rule.³³ The Secretary of Agriculture might have a problem with the rule.³⁴ Maybe the Office of Legislative Affairs has a problem, or maybe the career staff at OIRA or the Department of Agriculture has a problem.³⁵ The objections from many different sources can play a role in the review (and possible rejection or forced revision) of agency rules.

The large cast of players makes it difficult to hold anyone accountable for a rule not issuing. If a rule issues and the President has asked for it, there is a big, happy moment and an identification of those responsible.³⁶ If a rule does not issue, there is instead a shadowy mélange of possible characters who might have influenced the rulemaking, and we do not really know who made the objection that stuck.³⁷

In addition, with the possibility of decisive objections from outside the action agency comes a greater chance that the reasons for inaction are not faithful to the underlying statute. The Department of Agriculture does not implement the Clean Water Act; it is not the agency charged by Congress with implementing the statute nor is it the agency with the expertise as to the meaning of that statute and its requirements. Yet, in the current OIRA process, the Department of

³⁰ See generally RANDY RABINOWITZ, KATIE GREENHAW & KATIE WEATHERFORD, CTR. FOR EFFECTIVE GOV'T, SMALL BUSINESSES, PUBLIC HEALTH, AND SCIENTIFIC INTEGRITY: WHOSE INTERESTS DOES THE OFFICE OF ADVOCACY AT THE SMALL BUSINESS ADMINISTRATION SERVE? (2013), available at <http://www.foreffectivegov.org/files/regs/office-of-advocacy-report.pdf>.

³¹ *Meeting Records*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_meetings (last visited Nov. 25, 2014).

³² Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1855 (2013); see also Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 64 n.107 (2006) (listing nineteen different White House offices playing a role in regulatory review).

³³ See Sunstein, *supra* note 32, at 1858.

³⁴ See *id.*

³⁵ See *id.* at 1841.

³⁶ See, e.g., Press Release, Env'tl. Prot. Agency, EPA Proposes First Guidelines to Cut Carbon Pollution from Existing Power Plants/Clean Power Plan is Flexible Proposal to Ensure a Healthier Environment, Spur Innovation and Strengthen the Economy (June 2, 2014), <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/5bb6d20668b9a18485257ceb00490c98!opendocument>.

³⁷ See generally WENDY WAGNER, SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES (2013), available at http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf (documenting hundreds of technical changes made by OIRA to EPA's scientific analysis of air quality rules).

Agriculture could have the decisive word on, say, a rule defining the scope of the Clean Water Act. It is not fanciful to suppose that the Department of Agriculture's first consideration in offering its views on a rule under the Clean Water Act would not be fidelity to the Clean Water Act. When one enlarges the circle of people who can delay, stop, or alter regulatory action, one almost certainly enlarges the circle of factors, including extralegal factors, that will be considered in delaying, stopping, or altering regulatory action.

A system where a rule that is ready to go, from the agency's perspective, can be delayed at OIRA for months or years or even stopped altogether is also not the right environment for the kind of "energy" and "vigor" that Justice Kagan described.³⁸ Instead, the process of OIRA review—and the larger system of presidential administration in which it is embedded—may make the agency less likely to take initiative. When I was working as a political appointee at EPA during the first two years of the Obama Administration, it struck me that when someone would have a good, creative, and legal idea for taking action to protect the environment, the first question asked would not have to do with whether the idea was good or creative or legal, but rather, "Will this get past OIRA?" A system characterized by unpredictable and secretive hierarchical control is not a good incubator for creative governance.

In sum, White House interventions, far from leading to energetic regulation and accountable action, actually lead to a highly opaque and mysterious process in which rules are often delayed, stopped, or weakened for reasons we do not know and, apparently, cannot be told. Thus, Justice Kagan's policy arguments for aggressive White House intervention in agency decisionmaking—that such intervention promotes an energetic and accountable executive branch—do not reflect much of current reality.

Justice Kagan's legal argument for White House intervention is also questionable. Recall that Justice Kagan argued that when Congress grants power to an executive agency to make a decision, it can be presumed also to intend to grant that power to the President and his aides in the White House.³⁹ This is a striking presumption. After all, it seems at least equally sensible to think that, for example, where a statute directs EPA to set air quality standards for particular pollutants, Congress intended for those standards to be set by EPA, the entity given that power in the statute. Ordinarily, in interpreting statutes, we would tend to think that when a statute says EPA, it means EPA, rather than the Department of Agriculture, the Small Business Administration, career staff at OIRA, or even the President and his aides in the White House. The presumption also seems quite aggressive, because it applies to all of our statutes across 200 years of our country's history, 113 Congresses, numerous wars, and many different theories of the extent to which the President controls the regulatory process. It is bold to conclude that the President gets to make the call for all statutes unless there is good evidence suggesting otherwise.

A convenience of Justice Kagan's argument is that it sidesteps difficult constitutional questions about the so-called "unitary executive." If we adopt Justice Kagan's presumption about congressional intent, we need not ask if the Constitution calls for the President's power at the top to extend all the way down to agency decisionmaking; the handy, across-the-board presumption saves us that trouble and tells us that all the statutes we have give that sort of power to the President so long as the head of the agency is removable by the President. There is no need to address the thorny constitutional issues, yet the result is the same: the President and his aides are entitled to make the decisions delegated to executive agencies.

³⁸ Kagan, *supra* note 4, at 2307, 2339–43.

³⁹ *Id.* at 2326–28.

The other convenient aspect of Justice Kagan's statutory presumption is that we do not actually have to read statutes one by one and ask whether they can bear the interpretation Kagan offers for them. If we did actually read the statutes, we would often find that, in fact, it seems more reasonable to conclude that Congress did not intend to give decisionmaking power to the President. The Clean Water Act was passed in 1972 over the veto of President Nixon, who then famously impounded half of the money given to EPA to implement part of the statute. The Supreme Court eventually overturned the President's decision, finding it inconsistent with the statute.⁴⁰ But if Justice Kagan is right, we need to assume that Congress, in passing the Clean Water Act over President Nixon's veto, intended to give President Nixon the authority to make regulatory decisions under that Act.⁴¹ It seems preposterous to suppose this was Congress's intent, but thanks to Justice Kagan's presumption and to the loyal following it has attracted, we need and do not consult the statute itself before concluding that the President and his aides in the White House have dominion over it.

I may not have much company in this view—as I have noted, Justice Kagan's argument has won the day in many circles—but I think we should try to turn this ship around. The system that we have does not, in the run of cases, lead to the kind of energetic and accountable action that Justice Kagan described. In many cases, it instead leads to stasis and failures of accountability. Instead of simply presuming that statutes giving authority to one executive entity give authority to the President and his aides, we should actually read the statutes and decide: Did Congress intend for this statute to give decisionmaking authority to the President and his aides in the White House? If not, then the President and his aides should not make those decisions.

⁴⁰ See *Train v. City of New York*, 420 U.S. 35, 48–49 (1975).

⁴¹ Ironically, the Clean Water Act is one of the statutes that has come under the heaviest fire from OIRA in the intervening years. See generally Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 *FORDHAM URB. L.J.* 1097 (2006).