
Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation

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Congress has delegated immense legislative (i.e., “rulemaking”) power to federal agencies to control how Americans live and work. Over the last several decades, presidents of both parties have sought to control this power by entrenching a system of centralized White House review of agency rules conducted by the Office of Information and Regulatory Affairs (“OIRA”), which has been described as the “single most important office most people have never heard of.” Centralized review through OIRA can serve important and valuable functions. It also, however, provides a vehicle for increasing the role of political considerations in the rulemaking process as well as the vast power of special interests. These problems are partially a function of the opacity of centralized review, which commonly delays, kills, or alters rules without public explanation.

This Article explores two novel means by which courts and litigants, without waiting for congressional or executive action, might deploy administrative law’s traditional tool for limiting the influence of politics — agencies’ duty of reasoned explanation — to shed needed sunlight on centralized review of rulemaking. More specifically, interested persons should be able to use petitions for rulemaking to require agencies to give prompt, technocratic, public-regarding explanations for delays caused by centralized review. Also, agencies should be required to give reasoned

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explanations for policy changes they make due to centralized review. Adopting these proposals would add to the (often questioned) legitimacy of centralized review both by making its effects more transparent and by discouraging political changes that cannot be supported by persuasive policy rationales.

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Administrative law is “Legal Civics,” no more, no less.¹

INTRODUCTION

Agencies wield immense rulemaking power in the modern administrative state. Over the decades, other powerful actors in our political and legal systems have naturally sought to influence or control this power through a variety of informal and formal means. As a result, the simple notice-and-comment rulemaking process contemplated by the Administrative Procedure Act (“APA”) has gradually transmogrified into an extraordinarily complex endeavor, encrusted with “impact statements” of various sorts and conducted in the shadow of intrusive judicial review, which often carries an ideological charge.² With the transmogrification, agency rulemaking has evolved into a “blood sport,” in which “regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies.”³

Outside the agencies themselves, the White House is the most powerful actor in the blood sport. For some analysts, centralized review by the White House of agency rulemaking follows easily from the premise that the President is, after all, “in charge” of the executive branch.⁴ Also, the need for devices to coordinate rulemaking activity across the executive branch is a common defense of these efforts.⁵ But the greater immersion of the White House in rulemaking review also

¹ WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS*, at xvii (6th ed. 1974) (quoting Frank C. Newman).

² See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting) (describing modern rulemaking as “a laborious, seemingly never-ending process”); Sidney A. Shapiro & Richard W. Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 *GEO. MASON L. REV.* 319, 323-31 (2012) (summarizing studies on ideological judicial review of agency action). See generally JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL RULEMAKING* 219-47 (5th ed. 2012) (providing an excellent overview of the various analysis requirements that now festoon notice-and-comment rulemaking).

³ Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 *DUKE L.J.* 1671, 1671 (2012).

⁴ See, e.g., Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 *GEO. L.J.* 1337, 1346 (2013) (identifying and critiquing the “President is in charge” justification for centralized review).

⁵ See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (discussing, in seminal case on White House influence over rulemaking, the need for coordination across agencies).

comes at a price — the potential for greater politicization of the rulemaking process.⁶

In express, formal terms, the White House exercises control over rulemaking through centralized review by the Office of Information and Regulatory Affairs (“OIRA”), “the single most powerful office most people have never heard of.”⁷ This sobriquet reflects the fact that the President has authorized OIRA to hold up the publication of proposed and final rules for the purposes of ensuring the quality of the agency’s cost-benefit analysis, which also gives the White House a means to alter rules to its liking for other reasons.⁸ These maneuvers occur with little or no transparency,⁹ which may account for its lack of notoriety. Likewise, and more troubling, the opaque nature of White House intervention reduces its accountability for forcing changes in a rule that an agency does not support.

Compounding such concerns, corporate interests dominate by a very wide margin outside contacts with the White House during the centralized review process.¹⁰ Determining the exact effects of this

⁶ See *infra* Part I.B.3 (discussing political effects of centralized White House review).

⁷ Stephanie Young, *OIRA Chief Sunstein: We Can Humanize, Democratize Regulation*, HARV. L. REC. (Mar. 12, 2010), <http://hlrecord.org/?p=9714> (quoting Dean Martha Minow’s introduction of OIRA Administrator Cass Sunstein). The general public may not be familiar with OIRA, but the administrative law literature on its operations is vast. See generally RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* (2008) (proposing reforms to cost-benefit analysis, which is OIRA’s dominant analytical tool); CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013) (providing an account of OIRA’s functions from Professor Sunstein’s perspective as its former Administrator); 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 (2013) (offering strong criticisms of OIRA’s centralized review from Professor Heinzerling’s perspective as a former EPA official); Livermore & Revesz, *supra* note 4 (proposing reforms to centralized review by OIRA to address the problem of agency capture); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1163-64 (2010) (discussing the opacity of centralized review and proposing reforms); Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1 (2013) (criticizing OIRA’s regime of centralized review for undermining values of agency expertise); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 238-67 (2012) (making the case for abolishing centralized regulatory review); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013) [hereinafter *Myths and Realities*] (describing OIRA’s operations and effects; defending it from various charges).

⁸ See *infra* Part I.A–B (discussing evolution of centralized review by OIRA).

⁹ See *infra* Part I.B (discussing the opacity of centralized review by OIRA).

¹⁰ See, e.g., RENA STEINZOR ET AL., *CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH*,

corporate “clout” is impossible, but common sense suggests that the corporations themselves see their efforts as worth their while, which is consistent with critics’ description of the regulatory review process as a “one-way ratchet” weakening regulation.¹¹ Moreover, insofar as the White House almost always delays rather than prompts agency action, its influence might be fairly said to carry an inherently anti-regulatory bias.¹²

Administrative law cannot eliminate the influence of political concerns and special interests from public administration, a goal that is inconsistent with democratic government in any event.¹³ Still, within limits, administrative law has traditionally played a key role in legitimizing agency regulatory action by constraining the operation of politics within the rulemaking process. A primary tool to this end is the requirement of public, reasoned explanation — agencies must offer contemporaneous, public justifications for their policy choices, explaining how they effectuate statutory goals based on a reasonable understanding of the pertinent facts.¹⁴ This duty of explanation has not, of course, turned agency rulemaking into an apolitical enterprise or eliminated the problem of corporate clout.¹⁵ Agencies retain

WORKER SAFETY, AND THE ENVIRONMENT 17 (2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf (observing that “the industry groups participating in the [OIRA] meeting process outnumber the public interest groups by a ratio of 4.5 to 1 — before even taking into account all the law, consulting, and lobbying firms that have met with OIRA on behalf of industry groups”).

¹¹ See, e.g., *id.* at 25 (describing the “one way ratchet” as OIRA weakening regulations in the interest of economic considerations); see also David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 365 (2006) (studying twenty-five rules that the Government Accountability Office (“GAO”) concluded were “significantly changed” by OIRA during 2001–2002, and concluding that in twenty-four of these cases, OIRA pushed for changes that would weaken “environmental, health, or safety protection”).

¹² But see Livermore & Revesz, *supra* note 4, at 1381 (discussing the practice developed under OIRA Administrator John Graham of sending “prompt letters” to agencies to prod regulatory action and noting that this practice, when in place, was ad hoc and that it has since been abandoned).

¹³ Cf. *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (observing informal rulemaking should not be a “rarified technocratic process, unaffected by political considerations or the presence of Presidential power”).

¹⁴ See Jerry L. Mashaw, *Small Things Like Reasons Are Put in A Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 22 (2001) (discussing administrative law’s insistence that “[a]uthority must be combined with reasons, which usually means accurate fact-finding and sound policy analysis. Otherwise, an administrator’s rule or order will be declared ‘arbitrary,’ perhaps even ‘capricious’”).

¹⁵ See Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA’s Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128–29 (2011) (documenting that corporate interests dominate contacts with agencies during both the pre-notice and notice-and-comment stages of rulemaking).

considerable freedom to shape their rules according to the political winds so long as they are able to produce reasonable explanations in terms of their mandates and rulemaking records. The duty of reasoned explanation does, however, help protect the values of reasoned deliberation and expertise from raw politics.¹⁶

This tool has failed to work, however, when the White House delays or kills agency rules. This gap exists because administrative law doctrine regards agency inaction as generally unreviewable.¹⁷ By preventing an agency from taking the action of adopting a rule, the White House thus blocks enforcement of the duty of explanation. This approach has freed the White House to delay rules for years, or even kill them off, with no public justification, either in the courts or the court of public opinion.¹⁸ The Obama Administration has set a new record for delaying proposed regulations under review at OIRA — some key rules were stalled for years under circumstances that suggest raw politics were at work.¹⁹

Moreover, the duty of reasoned explanation works with less force than it ideally should where the White House forces changes to a rule that an agency ultimately adopts. It is true that this duty should generally prevent the White House from forcing an agency to adopt a rule in a form that the agency cannot support with any reasoned explanation at all — thus limiting the scope of political distortions on rules.²⁰ Still, leaving White House alteration of rules in the shadows fosters a regime in which agencies, charged by Congress with

¹⁶ This shift is not cost-free, of course. Many critics contend that aggressive judicial implementation of the agency duty-to-explain has been a major contributor to the “ossification” of notice-and-comment rulemaking, to the detriment of the public. *See, e.g., Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting) (describing modern rulemaking as “a laborious, seemingly never-ending process”); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997) (contending that aggressive judicial review has helped cause the demise of notice-and-comment rulemaking). *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1179 (2008) (reviewing the debate over whether “ossification” is occurring; concluding that “the ossification concern is genuine even if indeterminate”).

¹⁷ *See infra* Part III.A (discussing limits on judicial review of agency inaction).

¹⁸ *See infra* Part I.B.1 (discussing the problem of rules indefinitely delayed by centralized review).

¹⁹ *See infra* Part I.B.1 (discussing instances of delay due to centralized review of rules by the Obama Administration).

²⁰ *See infra* text accompanying notes 70–81 (discussing administrative law’s duty of reasoned explanation as a check on politics).

developing policy and equipped with expert staff to do so, make considered policy choices and then are forced to change these policies by unaccountable political forces. We submit that this regime unhealthily tilts administrative law's balance away from the values of technocratic expertise and toward (unexplained) politics.

This Article explains how litigants and courts might, with a bit of imagination and perhaps a touch of aggression, correct this state of affairs, deploying agencies' duty of reasoned explanation to shed light on White House efforts to delay, kill, or alter agency rules. Our argument proceeds in five steps. First, we provide details on the problems of delay and opaque change of regulations due to White House review. Second, we discuss administrative law's requirement of reasoned explanation as a tool for limiting the influence of politics on policy formation. Third, we propose a mechanism for ameliorating the problem of unexplained delay. More specifically, we propose that courts and litigants deploy petitions for rulemaking to force agencies to provide prompt explanations for indefinite delays connected with centralized review.²¹ For this device to work, courts would need to abandon their reluctance to review agency inaction, and, as we will explain, this attitude adjustment is entirely appropriate. Fourth, we

²¹ The Administrative Conference of the United States ("ACUS") has recently adopted a related recommendation that OIRA should, within 180 days of submission of a draft rule for review, either "inform the public as to the reasons for the delay or return the rule to the submitting agency." See ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE STATEMENT #18: IMPROVING THE TIMELINESS OF OIRA REGULATORY REVIEW 7 (Dec. 6, 2013), available at <http://www.acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%2012-9-13.pdf>; see also CURTIS COPELAND, ADMIN. CONFERENCE OF THE U.S., LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 58 (Oct. 7, 2013), available at <http://www.acus.gov/sites/default/files/documents/Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf> (recommending, in draft report prepared by ACUS consultant, that OIRA post "review letters" on its website "to explain to the public why certain rules have remained under review at OIRA past the review deadlines in the executive order"); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1186 (2014) (suggesting that it would be appropriate for courts to respond to lengthy delays in rulemaking caused by OIRA review by "show[ing] greater willingness to mandate action when delays are not internal to the agency itself, particularly when the agency has already invested substantial resources in a possible regulation"). This Article might be regarded as putting teeth into this recommendation by proposing a means that courts and litigants might pry explanations for delays out of agencies without OIRA's cooperation. Our premise that an outside force is needed to increase transparency seems reasonable given OIRA's past practices. See *infra* Part I.B.2 (discussing transparency problems of centralized review). It also bears noting that the possibility of judicial intervention to require explanations of delay increases the likelihood that OIRA might follow ACUS's recommendation "voluntarily."

suggest how litigants and courts might apply administrative law's duty of reasoned explanation to require agencies to explain changes to their rules made at the White House's behest.²² The gist of this argument is that these alterations force agencies to change their policies. And when agencies change policies, they should be required to answer the question, "Why did you change?"²³ Last, we briefly examine some objections to our proposals and offer responses.

Stepping back to see the larger picture, one of the fundamental tasks of the "Legal Civics"²⁴ of administrative law is to balance the competing values of expertise and politics. Finding the right balance between these values is not the sort of problem that has an ultimate and "correct" solution. Still, centralized review of rules has, in our view, pushed this balance too far in the direction of unaccountable politics. Applying administrative law's duty of reasoned explanation to this context would certainly not eliminate concerns of undue political influence and corporate clout connected with centralized review. It would, however, help nudge the balance back toward expertise. Shifting metaphors, adopting our proposals would shed a bit of sunlight onto a shadowy process, and sunlight, we have been told, disinfects.²⁵

²² Cf. Mendelson, *supra* note 7, at 1163-64 (suggesting reform of "requir[ing] the agencies to summarize the content of [OIRA] regulatory review in issuing rulemaking documents" as means of exposing the role of presidential political and value preferences). Professor Mendelson contemplates that Congress, the executive branch, or agencies themselves might adopt this reform. Our complementary proposal explains how courts and litigants might deploy arbitrariness review to achieve similar results.

²³ See *infra* Part II.B (rooting this requirement in a reading of *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)); see also Farber & O'Connell, *supra* note 21, at 1186 (suggesting that, even without statutory changes, courts could "require more disclosure of IORA's role in shaping regulations and provide a harder look at changes made in response to OIRA pressure, on the theory that those changes do not reflect the agency's expertise under the statute delegating authority to the agency").

²⁴ GELLHORN & BYSE, *supra* note 1, at xvii.

²⁵ LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1913) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."). But see Sally Katzen, *A Reality Check on An Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1508 (2007) (noting, in a defense of OIRA's practices from a former Administrator, that "those who advocate unfiltered sunshine should, at some point, acknowledge that confidentiality is often important to honest deliberations").

I. DELAYS, CHANGES, AND POLITICS AT OIRA

A. *OIRA Review in Theory*

Review of major rules by OIRA began during the early days of the Reagan administration with issuance of Executive Order No. 12,291.²⁶ This order required covered agencies to submit rules to OIRA and to reply to its concerns before publishing their rules in either proposed or final form.²⁷ It also commanded agencies to submit cost-benefit analyses of major rules to OIRA and that rules should only be adopted where regulatory benefits exceeded costs.²⁸ To an untrained ear, this requirement might sound like common sense, but it actually required rules to survive a technical form of analysis rife, according to critics, with opportunities for manipulation and with contestable normative judgments dressed with false precision in numbers.²⁹ Be this as it may, since the issuance of Executive Order No. 12,291, centralized review of rules has persisted across a series of Republican and Democratic administrations and evolved into a permanent fixture of the institutional architecture of rulemaking.³⁰

In 1993, President Bill Clinton issued Executive Order No. 12,866, which continues to provide the basic authority and procedures for centralized review.³¹ This order carried forward the requirements of pre-publication submission to OIRA of proposed and final rules, as well as the requirement of cost-benefit analysis.³² It also, however,

²⁶ Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted as amended in* 5 U.S.C. § 601 at 431-34 (1982). Executive Order No. 12,291 was later superseded by Executive Order No. 12,866. *See* Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 83-87 (2006).

²⁷ *See* Exec. Order No. 12,291 § 3(c), (f)(2), 3 C.F.R. at 128-30.

²⁸ *See id.* §§ 2(b), 3(d)(4), 3 C.F.R. at 128-29.

²⁹ *See, e.g.,* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 84-85 (2005) (observing that cost-benefit analysis “offers a wealth of opportunities for regulated industry to manipulate and debate benefits estimates,” in part because resolving “the relevant issues of risk assessment and economic methodology generally requires enormous technical sophistication”).

³⁰ For discussion of the evolution of centralized review of agency rulemaking, *see, for example,* Heinzerling, *supra* note 7, at 329-42, and Steinzor, *supra* note 7, at 238-67.

³¹ Exec. Order No. 12,866, 3 C.F.R. 638. President Obama has issued his own executive order on centralized review of rulemaking, Executive Order No. 13,563, but this order essentially affirmed Executive Order No. 12,866 with very few modifications. *See* Heinzerling, *supra* note 7, at 325-26 (discussing Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 at 101-02 (Supp. V 2011)).

³² Exec. Order No. 12,866 § 3(e), 3 C.F.R. at 641 (broadly defining “regulatory action[s]”); *id.* § 6(a)(3)(B)–(C), 3 C.F.R. at 645-46 (instructing agencies to submit

responded to critics by including provisions designed to curb regulatory delays and increase transparency. Under section 6(b) of the order, OIRA has only ninety calendar days from the time an agency submits required supporting information to review notices of proposed regulations or final rules.³³ Regarding extensions of this period, the order states: “The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.”³⁴

To increase transparency, the order contains a set of interlocking provisions requiring extensive documentation and disclosure of contacts between OIRA and persons not employed by the executive branch.³⁵ Most notably, for the present purpose, the order also instructs agencies, after publication of an action in the Federal Register, to:

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) [i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.³⁶

OIRA has a reciprocal duty to “make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.”³⁷ Executive Order No. 12,866 thus calls for a process that is a model of bureaucratic speed and transparency. Reality, as explained below, is something quite different.

B. OIRA Review in Practice

OIRA holds up rules for long periods of time without any explanation to an agency or the public. When a rule finally emerges from its hibernation at OIRA, it can be very difficult, and sometimes

cost-benefit analyses to OIRA for “significant regulatory action[s]”); *id.* § 8, 3 C.F.R. at 648-49 (forbidding agencies from publishing regulatory actions subject to OIRA review until its completion).

³³ *Id.* § 6(b)(2)(B), 3 C.F.R. at 647.

³⁴ *Id.* § 6(b)(2)(C), 3 C.F.R. at 647.

³⁵ *See id.* § 6(b)(4), 3 C.F.R. at 647.

³⁶ *Id.* § 6(a)(3)(E), 3 C.F.R. at 646.

³⁷ *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.

not possible at all, for an outsider to trace what changes were made at the White House's behest.

1. Unexplained Delays

As just noted, Executive Order No. 12,866 sets a clear ninety-day deadline for review and allows only a one-time thirty-day extension in limited circumstances.³⁸ Nonetheless, as of August 15, 2013, OIRA was stunningly overdue in finishing its review of the following regulations according to its own deadlines: the Environmental Protection Agency's ("EPA") Chemical Concerns List rule (1077 days overdue); the Department of Energy's ("DOE") Efficiency and Sustainable Design Standards for New Federal Buildings (614 days overdue); the DOE's Energy Conservation Standards for Walk-in Coolers and Walk-In Freezers (578 days overdue); the Occupational Safety and Health Administration's ("OSHA") Occupational Exposure to Silica Rule (799 days overdue); and the EPA's Clean Water Protection Guidance (427 days overdue).³⁹

In fact, the Obama Administration has set a new record for delaying the regulatory process. A report prepared by Curtis Copeland, a consultant for the Administrative Conference of the United States ("ACUS"), found that "in 2012, the average time for OIRA to complete reviews increased [from 51 days] to 79 days, and in the first half of 2013, the average review time was 140 days — nearly three times the average for the period from 1994 through 2011."⁴⁰ The report also found that the number of rules that had been at OIRA for more than six months or for more than a year has risen in the Obama Administration: "From 1994 through 2011, an average of fewer than 10 completed reviews per year (less than 2%) took more than six months; however, in the first half of 2013, 63 reviews (nearly 30%) took more than six months, and 27 (nearly 13%) took more than one year."⁴¹ It is also possible that "these statistics may understate the extent of the delays" because according to "senior employees in 11

³⁸ *Id.* § 6(b)(2)(B)–(C), 3 C.F.R. at 647 (stating that OIRA's reviews should be completed within ninety days, but may be extended by the Director of the Office of Management and Budget ("OMB") for thirty days and at the request of the agency head).

³⁹ Sidney A. Shapiro, *Does OIRA Improve the Rulemaking Process? Cass Sunstein's Incomplete Defense*, ADMIN. & REG. L. NEWS, Fall 2013, at 6, 6.

⁴⁰ COPELAND, *supra* note 21, at 4.

⁴¹ *Id.*

departments and agencies . . . OIRA has increasingly used ‘informal reviews’ of rules prior to their formal submission”⁴²

How is it possible for OIRA to flout Executive Order No. 12,866’s strict deadlines? One reason is that the order itself expressly blocks using the courts to enforce its terms.⁴³ A second is that OIRA has exercised a form of “Mother-may-I” control over when the clocks for these deadlines start running by instructing agencies to delay formal submission of rules for centralized review.⁴⁴ A third is that OIRA has de facto plenary control over extensions. Recall that “review may be extended (1) once by no more than 30 calendar days upon the written approval of the Director [of OMB] *and* (2) at the request of the agency head.”⁴⁵ Professor Sunstein, former Administrator of OIRA, has explained that the italicized “and” is disjunctive.⁴⁶ Therefore, *either* the Director *or* an agency head can authorize an extension, and an agency head’s extensions are not limited in either time or number. Professor Heinzerling, based on her experience as a high-ranking EPA official, reports that “OIRA calls an official at the agency and *asks the agency to ask for an extension*. It is clear, in such a phone call, that the

⁴² *Id.*

⁴³ See Exec. Order No. 12,866 § 10, 3 C.F.R. at 649 (“This Executive order . . . does not create any right or benefit . . . enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officer or employees, or any other person.”).

⁴⁴ See COPELAND, *supra* note 21, at 38 (reporting that, starting in 2012, agency officials “had to obtain OIRA’s approval before submitting each [significant] rule” at a “Mother-may-I” meeting); Heinzerling *supra* note 7, at 359 (noting that it has “been widely reported that OIRA has lately been in the habit of not allowing agencies to send rules for review until OIRA has cleared them for review”); 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 (“Some agency officials were instructed to hold off submitting proposals to the White House for up to a year to ensure that they would not be issued before voters went to the polls, the current and former officials said.”). Compounding this problem, there have been time delays between an agency’s formal submission of a rule to OIRA “and the date those rules are logged into OIRA’s data system as having been ‘received.’” COPELAND, *supra* note 21, at 40 (recounting reports of delays varying between a week and over a year; also reporting signs “that this problem may be getting better”).

⁴⁵ Exec. Order No. 12,866 § 6(b)(2)(C), 3 C.F.R. at 647 (emphasis added).

⁴⁶ Sunstein, *Myths and Realities*, *supra* note 7, at 1847 n.39 (observing that “it has long been understood that the agency head may request an extension of any length, including an indefinite one. Within the executive branch, it is agreed that an agency head may request more time for review as discussions continue”).

agency is not to decline to ask for such an extension.”⁴⁷ So much, then, for the ninety-day deadline.

2. Opaque Changes

Executive Order No. 12,866, by its terms, seems to require a highly transparent process that should enable any interested party to determine how centralized review has changed the substance of agency rules.⁴⁸ This appearance is misleading. In 2009, the Government Accountability Office (“GAO”) issued a report with a long name that diagnosed the problem: *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*.⁴⁹ This report reviewed twelve rules submitted to OIRA for formal review. In some respects, it found substantial compliance by agencies with the executive order’s transparency requirements regarding agency disclosure of regulatory changes initiated by OIRA.⁵⁰ That said, the process was difficult, in part due to inconsistent agency labeling practices.⁵¹ It also did not help that most published rules did not identify “whether substantive changes had been made during the OIRA review period (and therefore documentation of the changes should be included in the rulemaking docket).”⁵² Overall, the picture presented by the GAO report is that skilled GAO employees can scour a rulemaking docket to figure out some of what OIRA may have done to a rule in the course of the formal period of centralized review.⁵³

⁴⁷ Heinzerling, *supra* note 7, at 359; *see also* COPELAND, *supra* note 21, at 48 (reporting accounts of agency officials that “virtually all agency requests for extensions of review were actually made because OIRA suggested that they do so”).

⁴⁸ *See supra* text accompanying notes 35–37 (summarizing and quoting transparency provisions of Executive Order No. 12,866).

⁴⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 32 (2009), *available at* <http://www.gao.gov/new.items/d09205.pdf>.

⁵⁰ *Id.*

⁵¹ *Id.* at 34.

⁵² *Id.*; *see also* Mendelson, *supra* note 7, at 1157 (reporting, in 2010, that “[w]ith a couple of notable exceptions, numerous searches of Federal Register statements issued since January 1981 have disclosed no proposed or final rules in which the agency referred to the content of OMB or OIRA review or presidential preferences, directives, or priorities”).

⁵³ *See* Mendelson, *supra* note 7, at 1157 (confirming GAO’s conclusions on difficulty of tracing OIRA-inspired changes to rules and observing that “while documents reporting changes from OIRA review are sometimes placed in the agency’s

GAO's conclusions are broadly consistent with many scholarly critiques of OIRA opacity.⁵⁴

3. The Politics

It is not possible to determine the extent to which delays and changes resulting from centralized review are motivated by political considerations. Still, when politics and expertise collide in the White House, we can safely expect that political considerations will often prevail.⁵⁵

Professor Cass Sunstein, who was the OIRA administrator in the first term of the Obama Administration, concedes that politics may sometimes play a role in interventions by various White House offices, but he maintains that OIRA staff members are not political, but are bureaucrats, and that OIRA reviews are therefore technical, not political.⁵⁶ Even if we accept for the sake of argument that OIRA itself is relatively apolitical, Professor Sunstein's claim does not rebut the fact that other White House offices, more motivated by politics, appear to be deeply involved in overseeing rules. In 2011, for example, the White House decided to postpone a proposed EPA rule that would have significantly reduced emissions of smog-causing chemicals because the proposed regulation would have been too burdensome on industry and local governments during a period of economic distress.⁵⁷ News reports attributed the decision to heavy lobbying by industry interests and the White House's political concerns that the proposed rule would harm the president's re-election.⁵⁸ Professor Sunstein

docket, which also includes all comments received from various sources, it is fair to say that they can be extremely difficult to locate").

⁵⁴ See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1309-10 (2006) (discussing OIRA's "long and well-documented history of secrecy"); Livermore & Revesz, *supra* note 4, at 1356-57 (concluding that "transparency at OIRA is far from complete, and improvements should be made"); Mendelson, *supra* note 7, at 1149-50 ("In view of the data, OMB review over the past several presidential administrations has almost certainly had significantly greater effects on agency rulemaking than the number of public or posted review or return letters would suggest.").

⁵⁵ Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10433, 10439 (2005) (stating that in clear cases where "an administration's political preferences conflict with economic analysis, analysis loses").

⁵⁶ Sunstein, *Myths and Realities*, *supra* note 7, at 1871-72.

⁵⁷ John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES (Sept. 2, 2011), <http://www.nytimes.com/2011/09/03/science/earth/03air.html>.

⁵⁸ See, e.g., John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y.

claims the previous decision was based on judgments about the merits,⁵⁹ but this claim does not seem fully credible in light of press accounts.⁶⁰

More generally, the contention that the White House does not play politics when it comes to delaying or killing rules smacks of Captain Renault's claim that he was "shocked, shocked to find gambling was going on here."⁶¹ Only in a Panglossian world would the White House, despite legal and often effective political immunity, completely discount political expediency when exercising influence to delay, alter, or kill agency rules.

Further complicating matters, the sources of political influence and control can be impossible to pin down. Based on her experiences as a high-ranking EPA official involved in rulemaking, Professor Lisa Heinzerling reports that "it was often hard to tell who exactly was in charge of making the ultimate decision on an important regulatory matter."⁶² She notes that Professor Sunstein has described OIRA as an "information-aggregator" that collects from a variety of sources across the White House and the broader executive branch. On this view, resistance to a rule could come from many different sources — it could be the Chief of Staff or another agency head.⁶³ Her general sense was that OIRA wielded much more clout than the mild-mannered "information-aggregator" description suggests. Along these lines, Professor Sunstein suggested in his recent book that he had the power to throw "highly touted rules, beloved by regulators, onto the shit list."⁶⁴

TIMES (Nov. 16, 2011), http://www.nytimes.com/2011/11/17/science/earth/policy-and-politics-collide-as-obama-enters-campaign-mode.html?pagewanted=all&_r=2& (recounting President Barack Obama's decision to block promulgation of an EPA rule limiting ozone until after his reelection).

⁵⁹ Sunstein, *Myths and Realities*, *supra* note 7, at 1858.

⁶⁰ See, e.g., Eilperin, *supra* note 44 (reporting, based on "documents and interviews with current and former administration officials," that "[t]he White House systematically delayed enacting a series of rules on the environment, worker safety and health care to prevent them from becoming points of contention before the 2012 election").

⁶¹ CASABLANCA (Warner Bros. 1942).

⁶² Heinzerling, *supra* note 7, at 342; see also COPELAND, *supra* note 21, at 46 (reporting, based on accounts of two senior agency officials, that under an expanded interagency review regime, an OIRA desk officer sends rules out for comment "to anyone who might have an interest" first in other agencies and then in the Executive Office of the President; it appears that "anyone in the review process appears to have veto power over the rules").

⁶³ Heinzerling, *supra* note 7, at 342-43.

⁶⁴ See SUNSTEIN, *supra* note 7, at 6.

Proponents of centralized review often rely on the justifications that the President is ultimately in charge of the executive branch and that coordination of regulatory efforts across agencies is plainly necessary.⁶⁵ Indeed, Judge Patricia Wald stressed just these points in 1981 in her influential opinion in *Sierra Club v. Costle*.⁶⁶ In *Sierra Club*, however, the source of executive influence was not in doubt — President Carter himself attended one of the White House meetings at issue.⁶⁷ If the unitary executive theory can justify centralized review in any circumstance, surely this would be it. OIRA review, by contrast, creates a routinized system for inviting interference with agency decisions from across the White House, which is hardly the same thing as the President, as well as from other elements of the executive branch. OIRA review thus makes the rulemaking process more opaque and diffuses and obscures accountability.⁶⁸ The executive is a “they” not an “it.”⁶⁹

II. THE DUTY OF REASONED EXPLANATION AS A CONTROL ON POLITICS

This part sets the stage for discussion of our specific proposals by exploring the scope and limits of the duty of explanation as a means of checking politicization of public administration. The black letter is, of course, familiar to all with a passing knowledge of administrative law. Courts review an agency policy choice for “arbitrariness” based on the agency’s contemporaneous justification for its action.⁷⁰ This explanation must explain how the agency considered the “relevant factors” established by its enabling act.⁷¹ Put another way, the agency must demonstrate that it thought about what Congress wanted it to

⁶⁵ Livermore & Revesz, *supra* note 4, at 1344-50 (identifying and critiquing these justifications).

⁶⁶ 657 F.2d 298, 405-06 (D.C. Cir. 1981).

⁶⁷ *See id.* at 388, 404.

⁶⁸ *See* Livermore & Revesz, *supra* note 4, at 1347-50 (discussing “reasons to doubt that OIRA is always the best proxy for presidential preferences”).

⁶⁹ This catchy phrase is not, of course, original to this Article. Commentators have noted over time that Congress, the judiciary, and the executive are all “theys” rather than “its.” *See, e.g.,* Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (“Presidential control is a ‘they,’ not an ‘it.’”); Sunstein, *Myths and Realities*, *supra* note 7, at 1840 (“We shall see that while the President is ultimately in charge, the White House itself is a ‘they,’ not an ‘it.’”).

⁷⁰ *See, e.g.,* *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (observing that the courts “may not supply a reasoned basis for [an] agency’s action that the agency itself has not given” (citation omitted)).

⁷¹ *Id.*

think about. The flipside of this requirement is that the agency must avoid basing its exercise of discretion on factors that Congress has indicated as irrelevant or forbidden.⁷² In addition to demonstrating that the agency thought about the right stuff, as it were, the agency's explanation must also avoid any "clear error of judgment."⁷³

In theory, judicial review under the arbitrariness standard is therefore supposed to be highly deferential. Courts are not supposed to second-guess agency factual judgments or policy choices so long as they are reasonable and reasoned.⁷⁴ In practice, arbitrariness review obviously leaves a great deal of space for judicial discretion. Critics have assailed this form of judicial review, as practiced, for being too aggressive and political and for contributing to the ossification of rulemaking.⁷⁵ We count ourselves among those who believe these concerns have considerable force. To foreshadow a point we will develop later, however, we do not believe that they undermine our proposals to use courts to force agencies to give reasoned explanations for delays and alterations to rules caused by White House interference. Deployed in this manner, judicial review would protect agency policymaking from undue politicization rather than foster it.

In recent years, scholars of administrative law have devoted substantial attention to the role of political considerations in arbitrariness review.⁷⁶ Much of this scholarship starts with a frank

⁷² Cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 n.4 (2001) (observing that the EPA Administrator is forbidden from considering the costs of attainment when determining a national ambient air quality standard ("NAAQS") under § 109(a) of the Clean Air Act and concluding that consideration of this factor would therefore render a NAAQS subject to invalidation as arbitrary).

⁷³ See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

⁷⁴ See, e.g., *id.* ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

⁷⁵ Shapiro & Murphy, *supra* note 2, at 323-31 (summarizing literature on politicization of judicial review of agency action). For a few citations to the large "ossification" literature, see *supra* note 16.

⁷⁶ See, e.g., CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 192 (1990) (suggesting that courts should "credit politics as an acceptable and even desirable element of decision making"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001) (proposing relaxation of hard look review "when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, [an] administrative decision"); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) (proposing that certain "political influences" should count in favor of a rule's validity so long as they "are openly and transparently disclosed in the agency's rulemaking record"). But see Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 144-45 (2012) [hereinafter *The Irrelevance*] (contending that "although politics may

recognition that policymaking should not be and cannot be an entirely technocratic affair. It requires value judgments and thus necessarily involves politics too. On one increasingly prominent view, administrative law should absorb this plain truth by expressly acknowledging that courts should defer to presidential policy preferences. According to this approach, a court should be more inclined to defer to an agency policy choice where the agency explains that it is the President's preference, too.⁷⁷

Administrative law has not chosen this path. It accepts, to be sure, that political influence can and indeed should play a role in agency policy formation.⁷⁸ It checks this influence by generally insisting that agencies' explanations for their actions rest on an essentially technocratic foundation of reasoned discussion of the relevant factors.⁷⁹ Put another way, courts require agencies to come up with reasoned justifications that can theoretically stand on their own regardless of which political actors might favor them. To explore this point further, we now turn to two well-known cases with important discussions of the relation of the duty of reasoned explanation to control of political influence — the D.C. Circuit's *Sierra Club v.*

be a legitimate motivation for agency regulation, it should be irrelevant to judicial review of that regulation"); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 852, 898-99 (2012) (criticizing proposals that courts should give positive weight to political reasons in review for arbitrariness on the ground that the presidential control model for legitimizing agency action is deeply flawed; proposing that democratic deliberative theory justifies a more modest role for political reasons in justifying agency action).

⁷⁷ See generally Watts, *supra* note 76, at 8-9 (arguing that agencies should openly disclose political, including presidential, influences on rulemaking and that courts should acknowledge that these influences can, under some circumstances, help legitimize agency action).

⁷⁸ See *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (rejecting the premise that informal rulemaking is or should be a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power"); Seidenfeld, *The Irrelevance*, *supra* note 76, at 148-49 (explaining that hard-look style judicial review for arbitrariness is based on the premise "that agency action will and should reflect politics").

⁷⁹ See, e.g., Seidenfeld, *The Irrelevance*, *supra* note 76, at 144 (observing that "courts have not credited citations to political influence in evaluating whether agency rulemaking meets the hard-look standard"); Watts, *supra* note 76, at 14-32 (explaining that courts, agencies, and scholars generally accept that arbitrariness review of rulemaking forces agencies to give technocratic, expertise-based explanations).

Costle,⁸⁰ and the Supreme Court's much more recent case, *FCC v. Fox Television Stations, Inc.*⁸¹

A. *Sierra Club's Accommodation of Politics in Policy*

In *Sierra Club v. Costle*, the D.C. Circuit addressed challenges brought by environmental groups to pollution control standards for coal-fired plants.⁸² Two of these challenges centered on claims that EPA had allowed improper ex parte contacts regarding its proposed rule after the close of the comment period from the White House and from Senator Robert Byrd of West Virginia.⁸³ The White House meetings included a one-hour briefing held for the "President, White House staff, and high ranking members of the Executive branch."⁸⁴ Senator Byrd held two brief meetings with high-ranking agency officials, including the EPA's administrator.⁸⁵

Several years before, in *Home Box Office, Inc. v. FCC (HBO)*, the D.C. Circuit had held that, after issuance of a notice of proposed rulemaking for an informal rulemaking under the APA, all ex parte contacts with agency officials involved should be barred.⁸⁶ The court imposed this bar, notwithstanding the absence of any express supporting text in the APA, to block the "intolerable" possibility that there could be "one administrative record for the public and this court and another for the Commission and those 'in the know.'"⁸⁷ The court added that, where an agency does not disclose all the information and contacts on which it relies, the court would have to regard the agency's public justification for a decision "as a fictional account of the actual decisionmaking process and . . . perforce find its actions arbitrary."⁸⁸

Sierra Club was one of a string of cases that gutted *HBO* without technically overruling it. *Sierra Club* stressed that the "very legitimacy" of agency policymaking rests "in no small part on the openness, accessibility, and amenability of [agency] officials to the

⁸⁰ *Sierra Club*, 657 F.2d 298.

⁸¹ 556 U.S. 502 (2009).

⁸² *Sierra Club*, 657 F.2d at 311-12.

⁸³ *See id.* at 386-91.

⁸⁴ *Id.* at 388.

⁸⁵ *Id.* at 388, 408.

⁸⁶ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (per curiam).

⁸⁷ *Id.* at 54.

⁸⁸ *Id.* at 54-55.

needs and ideas of the public.”⁸⁹ Absent express instructions from Congress barring contacts outside the notice-and-comment process, the court refused to presume such a bar was in order.⁹⁰

The *Sierra Club* court also minimized the danger of the “secret record” that had so troubled it in *HBO*. The rule at issue in *Sierra Club* had been adopted pursuant to the Clean Air Act’s modified template for notice-and-comment rulemaking.⁹¹ Under this template, the agency was forbidden from relying on information or data not in the public docket.⁹² The agency therefore had to justify its rule “solely on the basis of the record it compiles and makes public.”⁹³

This response to the “secret record” problem could not preclude the possibility that an agency might, due to hidden political influence, adopt a rule that the agency concluded was technically suboptimal but still plausible enough to support with a public justification sufficient to survive judicial review.⁹⁴ The *Sierra Club* court both recognized this danger and minimized it. Writing in 1981 near the dawn of the age of centralized review of agency rulemaking, Judge Wald observed that the President, both as a matter of law and sound policy, has power to “control and supervise executive policymaking.”⁹⁵ Agency heads “exposed on a 24-hour basis to a dedicated but zealous staff need[] to know the arguments and ideas of policymakers in other agencies as well as in the White House.”⁹⁶ Ultimately, such review might mean that EPA adopts rules that differ in some degree from those that it would have adopted without intra-executive interference. The court, however, did not believe “that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”⁹⁷

Nevertheless, the court recognized an earlier case, *D.C. Federation of Civic Associations v. Volpe*,⁹⁸ as establishing some limits on political

⁸⁹ *Sierra Club*, 657 F.2d at 400-01.

⁹⁰ *Id.* at 400-04.

⁹¹ *Id.* at 401.

⁹² *Id.* (imposing requirement that “[t]he promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket” (quoting 42 U.S.C. § 7607(d)(6)(C))).

⁹³ *Id.*

⁹⁴ *See id.* at 408 (conceding that “[i]n such a case, it would be true that the political process did affect the outcome in a way the courts could not police”).

⁹⁵ *Id.* at 406.

⁹⁶ *Id.*

⁹⁷ *Id.* at 408.

⁹⁸ *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).

influence. In *D.C. Federation*, civic groups challenged the Department of Transportation's designation of a bridge as part of the interstate highway system.⁹⁹ The petitioners contended that the agency's decision had been unduly influenced by Representative William H. Natcher, the Chairman of the House Subcommittee on the District of Columbia who had indicated to the public "in no uncertain terms that money earmarked for the construction of the District of Columbia's subway system would be withheld unless the Secretary approved the bridge."¹⁰⁰ The court agreed that the agency's decision would be invalid as arbitrary if it had been motivated "in whole or in part" by Representative Natcher's pressure.¹⁰¹ It then remanded "so that the Secretary could make this decision strictly and solely on the basis of considerations made relevant by Congress in the applicable statute."¹⁰² Presumably, the Secretary on remand was supposed to forget anything he might have heard on the relationship of bridges to subway funding.

Sierra Club summarized *D.C. Federation* as requiring two conditions for throwing out agency action due to congressional pressure: (1) the pressure must involve irrelevant factors; and (2) consideration of these irrelevant factors must affect the agency decision.¹⁰³ Members of Congress can avoid the first prong by not being too ham-fisted. Proof of the second prong is problematic at best. An agency is unlikely to offer a public justification for an action explaining that the agency had been blackmailed, and investigation of the agency's "true" motives is excluded by the "*Morgan Principle*" generally barring investigations of the mental processes of the administrator.¹⁰⁴

Thus, as a practical matter, cases like *Sierra Club* acknowledge the potential for undue political influence on agency rulemaking by political actors but also quietly concede that there is little to be done about the problem beyond demanding a reasoned explanation based on a public record for agency rules. Judicial review for arbitrariness must make do with a focus on public justifications rather than hunt for "true" motivations.¹⁰⁵

⁹⁹ *Id.* at 1235-36.

¹⁰⁰ *Sierra Club*, 657 F.2d at 409 (characterizing facts of *D.C. Federation*).

¹⁰¹ *D.C. Fed'n*, 459 F.2d at 1246.

¹⁰² *Sierra Club*, 657 F.2d at 409 (citing *D.C. Fed'n*, 459 F.2d at 1246).

¹⁰³ *Id.* (citing *D.C. Fed'n*, 459 F.2d at 1246-47).

¹⁰⁴ See *United States v. Morgan*, 313 U.S. 409, 422 (1941).

¹⁰⁵ See Seidenfeld, *The Irrelevance*, *supra* note 76, at 150 (observing that "[h]ard-look review . . . concerns itself with justification, not motivation. A policy that is motivated by the president's desire to provide benefits to his political supporters may nonetheless be defensible as good policy" (footnote omitted)).

B. Fox's Contestable Message on Explaining Agency Policy Changes

Administrative law credits that agency policies should, within the space allowed by reason, evolve to reflect new learning and shifting values,¹⁰⁶ but it also imposes a duty of explanation on agencies to explain notable policy shifts. The Supreme Court examined, but did little to resolve, the precise nature of this duty in its 2009 decision in *FCC v. Fox Television Stations, Inc.*¹⁰⁷

Congress has charged the FCC with the unfortunate task of policing against “indecent” broadcasts.¹⁰⁸ For many years, the agency adhered to a policy that it would not hold broadcasters liable for “fleeting expletives.”¹⁰⁹ Then Bono, Cher, and Nicole Ritchie, appearing on live broadcast television, said variations of a word that Justice John Paul Stevens hears when a golf partner “shank[s] a short approach.”¹¹⁰ The FCC determined that, although it would not impose sanctions on the broadcasters, it would no longer allow a fleeting-expletive safe harbor.¹¹¹

Writing for a five-Justice majority, Justice Antonin Scalia observed that the Second Circuit's opinion below had declared that an agency making a policy change must explain “why the original reasons for adopting the [earlier] rule or policy are no longer dispositive” and “why the new rule effectuates the statute as well as or better than the old rule.”¹¹² He also took note that the D.C. Circuit has indicated that “a court's standard of review is ‘heightened somewhat’ when an agency reverses course.”¹¹³

¹⁰⁶ For an especially noteworthy statement of this position, see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863-64 (1984), which states that “[a]n initial agency interpretation is not instantly carved in stone. . . . [T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.”

¹⁰⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

¹⁰⁸ See Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992) (codified as amended at 47 U.S.C. § 303 (2010)) (instructing the FCC to enforce statutory ban on indecent broadcasts); see also 18 U.S.C. § 1464 (2012) (providing for fines or imprisonment of persons who utter “obscene, indecent, or profane language by means of radio communication”).

¹⁰⁹ See *Fox Television Stations*, 556 U.S. at 508, 512 (explaining evolution of agency policy).

¹¹⁰ See *id.* at 543 (Stevens, J., dissenting) (“As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent.”).

¹¹¹ *Id.* at 512-13.

¹¹² *Id.* at 514 (quoting *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456-57 (2d Cir. 2007), *overruled by* 556 U.S. 502) (internal quotation marks omitted).

¹¹³ *Id.* (citing *NAACP v. FCC*, 682 F.2d 993, 998 (1982)).

According to Justice Scalia, this stance is wrong: policy changes should not be subject to *stricter* review than the usual demand of a reasoned explanation.¹¹⁴ That said, a reasoned explanation for a policy change will generally require an agency to: (a) acknowledge that it is changing course; (b) identify any changes in its understanding of the relevant facts; and (c) take into account reliance interests engendered by the abandoned policy.¹¹⁵ The agency need not “demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”¹¹⁶

Writing for a four-Justice dissent, Justice Stephen Breyer emphasized that the duty of reasoned explanation is a means to protect technocratic decision-making from politics.¹¹⁷ Asking one of those questions designed to provide its own answer, he queried, “Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?”¹¹⁸ To protect against this danger:

[E]xplain[ing] a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, “Why did you change?” And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue. An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, “Well, one side seemed as good as the other, so I flipped a coin.” But even assuming the rationality of that explanation for an *initial* choice, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later.¹¹⁹

Acknowledging a role for value judgment, he added that “*sometimes* the ultimate explanation for a change may have to be, ‘We now weigh

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 515.

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 547 (Breyer, J., dissenting).

¹¹⁸ *Id.* at 552.

¹¹⁹ *Id.* at 549.

the relevant considerations differently” — but agencies need to acknowledge such values-based decisions forthrightly.¹²⁰

Five beats four, so one might think that Justice Scalia won his point that agencies need only explain why their new policies are “reasonable” rather than answer Justice Breyer’s query of “why change?” The reader, however, is neglecting the possibility that Justice Anthony Kennedy might have written a concurring opinion — and he did. In it, he ostensibly joined the majority’s discussion of the proper means to apply arbitrariness review to policy change,¹²¹ but he also declared that he “agree[d] with the dissenting opinion of Justice Breyer” that an agency making a policy change “must explain why ‘it now reject[s] the considerations that led it to adopt that initial policy.’”¹²² Sounding a technocratic theme, he continued:

The question in each case is whether the agency’s reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are *rational, neutral, and in accord with the agency’s proper understanding of its authority*.¹²³

So, the five-to-four vote actually seems to favor Justice Breyer’s insistence that agencies answer the “why change” query. In one sense, this limitation does little to lessen agencies’ room for maneuver. An agency remains free to adopt any policy position for which it can offer a reasoned explanation based on a defensible understanding of the pertinent facts. It can answer the “why change?” query either by explaining why its view of the facts has changed or, where a rational understanding of the facts permits, by conceding that it is making a different value judgment. Nonetheless, an agency must offer a public justification *for the shift* that is, to use Justice Kennedy’s favored terms, “rational” and “neutral.” And the point of this requirement is to protect policy formation from politics.¹²⁴

¹²⁰ *Id.* at 550.

¹²¹ *See id.* at 504, 535-39 (noting that Justice Scalia delivered the opinion of the Court except with regard to Part III-E). Justice Kennedy thus joined Part III-A, which contained Justice Scalia’s discussion of principles of arbitrariness review, discussed earlier in this section. *See supra* text accompanying notes 114-16.

¹²² *Id.* at 535 (Kennedy, J., concurring) (quoting Justice Breyer’s dissent).

¹²³ *Id.* at 536 (emphasis added).

¹²⁴ *See id.* at 548 (Breyer, J., dissenting) (observing that arbitrariness review under the APA “helps assure agency decisionmaking based upon more than the personal preferences of the decisionmakers”).

Combining the lessons of *Sierra Club* and *Fox* reveals: (a) courts realistically expect political considerations to affect agency discretionary actions, including rulemaking; (b) courts check the role of politics by requiring agencies to give public-regarding justifications for their policy choices that are generally technocratic in nature; (c) courts, wisely, generally refrain from trying to discern the “true” motivations underlying agencies’ public justifications; (d) a consensus exists that an agency, when it abandons an old policy in favor of a new one, must give a public justification that acknowledges the change, assesses reliance concerns, and explains the agency’s reassessment, if any, of relevant facts; and (e) a narrow majority of the Supreme Court appears to agree that, on changing policy course, the agency must satisfactorily answer the question, “Why change?”

III. FORCING EXPLANATIONS FOR DELAY THROUGH PETITIONS FOR RULEMAKING

Having explored in general how the Supreme Court has used the duty of reasoned explanation to limit the politicization of public administration, we now turn to our particular proposals for applying this duty to shed light on centralized White House review of agency rules. More specifically, this part proposes using petitions for rulemaking to force agencies to give technocratic, public-regarding explanations for lengthy delays caused by centralized review. Part IV contends that, following Justice Breyer’s lead in *Fox*, agencies should be required to give reasoned explanations for changes to their rules caused by centralized review.

One of the more frustrating aspects of centralized review is the problem of unexplained delay.¹²⁵ An important rule can vanish for years with no official justification to provide accountability or transparency.¹²⁶ OIRA’s power to delay rules free of judicial interference is largely attributable to the line that administrative law draws between “action” and “inaction.” Generally speaking, administrative law allows judicial review of the former but not the latter.¹²⁷ When OIRA kills or indefinitely stalls an agency rule, it

¹²⁵ For an especially strong statement of this frustration, see, for example, Heinzerling, *supra* note 7, at 362, which states that “OIRA simply hangs onto the rules indefinitely, and they wither quietly on the vine. This is how it comes to pass that a list of chemicals of concern or a workplace rule on crystalline silica lingers at OIRA for years.”

¹²⁶ See *supra* Part I.B.1 (giving examples of lengthy delays due to centralized review).

¹²⁷ See generally *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 66-67 (2004) (explaining that sharp limits on the availability of review of agency inaction

blocks completed agency action, thus precluding legal limitations on the operation of politics in this context.

A litigant can challenge the lack of agency action by filing a rulemaking petition that asks the agency to promulgate a rule. In theory, judicial review is available if the agency rejects the petition, or even if it just fails to answer it. Judges, however, are extremely deferential to agencies that reject rulemaking petitions, and they normally are reluctant to force agencies to answer a petition until a significant number of years have passed.¹²⁸

We propose that the usual reasons why courts are deferential in these circumstances do not apply to a petition to promulgate a rule that has been the subject of excessive delay in the White House. Courts should therefore look favorably on rulemaking petitions as a way to bring a minimal level of judicial oversight of the operation of politics in this context.¹²⁹

A. *Inaction and Judicial Review*

Determining whether and when to act requires agencies to allocate constrained resources and to make expert, discretionary trade-offs implicating competing priorities.¹³⁰ Little wonder, then, that administrative law is extremely hesitant to authorize generalist courts to review and remedy agency inaction. An obvious cost of this reluctance is that an agency may be able to avoid implementing its statutory obligations with little fear of judicial accountability.

are necessary to “avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve”).

¹²⁸ See *infra* Part III.B (discussing lax nature of judicial review of denials of rulemaking petitions and judicial reluctance to order agencies to answer them).

¹²⁹ This Article proposes deploying petitions for rulemaking as a means to address delays caused by OIRA’s centralized review process. By way of an interesting contrast, Professors Revesz and Livermore propose using OIRA review of petitions for rulemaking to address the problem of agency inaction. See Livermore & Revesz, *supra* note 4, at 1382-83 (recommending that OIRA review petitions for review submitted to agencies “to identify areas where action is needed but where agencies have failed to move forward”). Although these proposals deploy petitions for rulemaking quite differently, they share the same underlying goal of prompting and speeding agency regulatory action.

¹³⁰ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (establishing presumption that agency decisions to decline to take enforcement action are not subject to judicial review and observing, among other reasons, that such decisions often hinge on “a complicated balancing of a number of factors which are peculiarly within [agency] expertise”).

Administrative law tolerates this cost because, in general, the cost of a judicial remedy is perceived to be still greater.

The Supreme Court gave a recent and important discussion of this problem in *Norton v. Southern Utah Wilderness Alliance (SUWA)*, in which the Court unanimously held that an environmental group (“the Alliance”) could not challenge the failure of the Bureau of Land Management (“BLM”) to protect “wilderness study areas” (“WSA”) in Utah from damage caused by the use of off-road vehicles.¹³¹ BLM has a statutory obligation to prevent “impairment” of WSAs.¹³² The Alliance hoped to persuade a court to use its authority under the APA to “compel agency action unlawfully withheld or unreasonably delayed” to force the agency to discharge this statutory duty.¹³³

In a unanimous opinion written by Justice Scalia, the Court stopped the Alliance’s suit in its tracks, using the APA’s definition of “agency action” to do so.¹³⁴ The concept of “agency action” is the linchpin of the APA’s cause of action: § 702 grants statutory standing to persons “adversely affected or aggrieved by agency action”; § 704 permits review of “final agency action”; and § 706 authorizes courts to set aside illegal “agency action[s]” and to “compel agency action unlawfully withheld or unreasonably denied.”¹³⁵ The APA defines “agency action” as including “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.”¹³⁶

The last type of “agency action” on the list, “failure to act” gives the definition an “Alice in Wonderland” quality. It also raises an obvious interpretive problem: At any given moment, agencies are failing to take an infinite number of actions, but it would be senseless to suggest that all of them should be subject to judicial review. Accordingly, the Court set itself the task of adopting a narrow construction of “failure to act” to curtail potential judicial control of agency inaction.¹³⁷

The Court began this effort by picking apart the components of the definition of “agency action,” which starts by listing five primary

¹³¹ *SUWA*, 542 U.S. at 66-67.

¹³² *Id.* at 59 (citing 43 U.S.C. § 1782(c)).

¹³³ 5 U.S.C. § 706(1) (2012).

¹³⁴ *SUWA*, 542 U.S. at 61-62.

¹³⁵ *Id.* (discussing the role of “agency action” as deployed by these three statutory provisions).

¹³⁶ 5 U.S.C. § 551(13) (2012).

¹³⁷ *Cf. SUWA*, 542 U.S. at 63 (noting the importance of limiting the category of “failure to act”).

categories — rules, orders, licenses, sanctions, and relief.¹³⁸ The “equivalents” of these five are included to ensure that labeling games do not stymie review.¹³⁹ In addition, an agency’s outright “denial” of any of the five constitutes agency action.¹⁴⁰ For example, a formal denial of a petition for rulemaking counts as an “agency action” even though the agency uses such a device, in one sense, to declare its intent *not* to act. The last and eighth category, “failure to act,” captures “omission of an action without formally rejecting a request.”¹⁴¹

To limit the potentially infinite reach of “failure[s] to act,” the Court declared that this term is “properly understood as a failure to take an *agency action* — that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13).”¹⁴² In support of this stance, the Court observed that the first seven listed categories of “agency action” all share the feature that they are “circumscribed,” or “discrete.”¹⁴³ The Court then declared that the eighth category, “failure to act,” should share this attribute of discreteness.¹⁴⁴ Limiting the reach of “failure to act” to a failure to take one of the other seven (discrete) types of “agency action” accomplishes this aim.

Given just this much, one might think that the APA authorized the Alliance to sue BLM for failing to adopt a particular (and “discrete”) rule to prevent impairment of WSAs. The Court blocked this possibility on the ground that § 706(1) of the APA grants courts authority to compel an “agency action” only if it has been “unlawfully withheld.”¹⁴⁵ A court cannot use this provision to force an agency to deploy its lawful discretion in a particular way that a plaintiff prefers because, by hypothesis, such a choice is not compelled by law and thus cannot be “unlawfully withheld.”¹⁴⁶ This restrictive reading,

¹³⁸ *Id.* at 62.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 63.

¹⁴² *Id.* at 62.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 63 (observing that “the interpretive canon *ejusdem generis* would attribute to the last item (‘failure to act’) the same characteristic of discreteness shared by all the preceding items”).

¹⁴⁵ *Id.* at 62 (quoting 5 U.S.C. § 706(1)). Section 706(1) also authorizes a court to compel agency action that has been “unreasonably delayed,” but Justice Scalia dealt with this possibility by observing that “a delay cannot be unreasonable with respect to action that is not required.” *Id.* at 63 n.1.

¹⁴⁶ *Id.* at 64 (stating that “§ 706(1) empowers a court only to compel an agency ‘to perform a ministerial or non-discretionary act,’ or ‘to take action upon a mater,

Justice Scalia noted, aligns judicial authority to compel agency action under § 706(1) with judicial authority to issue writs of mandamus, which is normally limited to enforcement of a “specific unequivocal command.”¹⁴⁷

This construction of the APA left the Alliance between a rock and hard place. The pertinent statute left BLM with discretion regarding how to prevent “impairment” of the WSAs.¹⁴⁸ The law therefore did not require BLM to adopt any *particular* rule to prevent impairment. As such, the Alliance could not properly ask a court to force BLM to adopt one. Suppose instead that the Alliance simply asked a court to require BLM to commence rulemaking to develop a rule of the agency’s own choosing. This request would not pose the threat of infringing agency discretion. It should still be dismissed, however, because a “failure to commence rulemaking” would not qualify as a “failure to act” within the meaning of the APA’s definition of “agency action” as narrowly construed by the Court.¹⁴⁹

Appreciating the Court’s underlying motivation in *SUWA* is ultimately more important than following every twist of its (eye-glazing) statutory construction. Justice Scalia emphasized that the “principle purpose of the APA limitations we have discussed — and of the traditional limitations on mandamus from which they were derived — is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”¹⁵⁰ Judicial review of agency inaction would necessarily entangle the courts in “day-to-day management” of agencies with a level of “pervasive oversight . . . not contemplated by the APA.”¹⁵¹

Whatever the validity of these concerns, *SUWA* fits neatly into a longstanding trend in the Court’s administrative law precedents reinforcing an asymmetry between the ability of regulated parties and public interest groups to obtain judicial review of agency

without directing *how* it shall act” (quoting U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947)).

¹⁴⁷ *Id.* at 63 (quoting *ICC v. N.Y., N.H. & H.R. Co.*, 287 U.S. 178, 204 (1932)) (internal quotation marks omitted).

¹⁴⁸ *Id.* at 66.

¹⁴⁹ *See id.* at 64-65 (noting that § 706(1)’s “limitation to *discrete* agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990”).

¹⁵⁰ *Id.* at 66.

¹⁵¹ *Id.* at 67.

rulemaking.¹⁵² The ability of plaintiffs to press public-interest claims has waxed and waned over the last half-century as the membership of the Court has evolved. Before the 1960s, judicial review gave little protection to plaintiffs seeking to enforce statutory entitlements for the benefit of the public.¹⁵³ During the 1960s and 1970s, the Court expanded judicial access by adjusting various constitutional and administrative law doctrines, notably including due process, statutory hearing rights, reviewability, and standing.¹⁵⁴ Since that time, the Court has moved administrative law in a “back to the future” direction, eroding earlier efforts by the courts and Congress to level the playing field between regulated entities and beneficiaries.¹⁵⁵ We are left with a system where regulated entities (with their property interests) can take full advantage of administrative law’s checks on the political influence of public interest groups, if and when such influence actually manifests itself. The public and its advocates, by contrast, have been increasingly relegated to the political system to check agency discretion, a battleground that also highly favors regulated entities, not regulatory beneficiaries.¹⁵⁶

B. Rulemaking Petitions and Judicial Review

Decisions such as *SUWA* do not leave plaintiffs entirely powerless to contest an agency’s failure to promulgate rules. Under the APA, an “interested person” has “the right to petition for the issuance,

¹⁵² See Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Progressive Government*, 48 KAN. L. REV. 688, 719-20 (2000) [hereinafter *Administrative Law*] (contending that a “counter-reformation” in administrative law has, by restricting access to judicial review, diminished the influence of regulatory beneficiaries).

¹⁵³ See, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1435 (1988) (explaining that, during the early period of administrative regulation, “the interests of statutory beneficiaries were invisible as far as the courts were concerned”).

¹⁵⁴ Shapiro, *Administrative Law*, *supra* note 152, at 694-95 (describing how changes in administrative law during the 1960s to 1970s increased participatory rights of regulatory beneficiaries in agency decision-making as well as their access to the courts for review of agency action).

¹⁵⁵ *Id.* at 717-19 (discussing the Court’s tightening of requirements for citizen groups to obtain review of agency action, focusing in particular on standing doctrine).

¹⁵⁶ See, e.g., Bagley & Revesz, *supra* note 54, at 1306 (observing that, “[p]redictably, . . . the available evidence supports the view that the mix of participants active in the OIRA review process heavily favors industry”); Wagner, Barnes & Peters, *supra* note 15, at 128-31 (documenting that the overwhelming majority of contacts with EPA during rulemaking proceedings for hazardous air pollutants were with industry groups).

amendment, or repeal of a rule.”¹⁵⁷ An agency might respond in three ways to such a petition. It might grant the petition, and, if it commences rulemaking in a timely fashion, so much the better for the petitioner. Alternatively, the agency might deny the petition, but this order would not necessarily end proceedings as the petitioner could seek judicial review of this final agency action.¹⁵⁸ Most problematically, an agency inclined to avoid either rulemaking or judicial review of a denial might just sit on the petition — neither granting nor denying it. In other words, an agency might respond to a petition for rulemaking designed to remedy indefinite agency delay with more indefinite agency delay.

In practice, the petition process has done relatively little to require agencies to promulgate rules — regardless of whether an agency denies a petition outright or delays acting on it indefinitely. In both instances, as we are about to explain, the courts do little to guard against the politicization of public administration, albeit for understandable reasons.

1. Denial of a Rulemaking Petition

In the case of outright denials, the APA requires an agency to give prompt notice including “a brief statement of the grounds for denial.”¹⁵⁹ The agency can generally expect this explanation to garner judicial deference that borders on the obsequious.¹⁶⁰ The D.C. Circuit’s approach is typical. Its scope of review is “very narrow,” “limited to ensuring that the agency has adequately explained the facts and policy concerns relied on, and that the facts have some basis in the record.”¹⁶¹ Even if the agency offers an arbitrary explanation, a court may remand the petition back to the agency to provide a more adequate explanation.¹⁶² In short, the courts will compel an agency to institute rulemaking proceedings “only in the rarest and most compelling of circumstances.”¹⁶³

¹⁵⁷ 5 U.S.C. § 553(e) (2012).

¹⁵⁸ See *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (confirming that denials of petitions for rulemaking are reviewable, albeit under a highly deferential standard).

¹⁵⁹ 5 U.S.C. § 555(e) (2012).

¹⁶⁰ *EPA*, 549 U.S. at 527-28 (noting that review of a refusal to promulgate a rule “is extremely limited and highly deferential”).

¹⁶¹ *Ark. Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984).

¹⁶² See *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 7 (D.C. Cir. 1987).

¹⁶³ *Id.* at 7 (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981)) (internal quotation marks omitted).

The court's reluctance to be more aggressive is in part the result of the procedural context in which this issue arises. When a litigant appeals the denial of a rulemaking petition, there is no rulemaking record that a judge can use to assess the arbitrariness of the agency's reasons for its actions. The judge instead has little more than the petition, the agency's contemporaneous explanation for rejecting the petition, and the briefs of the plaintiff and agency respectively challenging and defending that explanation.¹⁶⁴ In this circumstance, judges are not comfortable second-guessing an agency's reasons for denying the petition, even if they are threadbare.

2. Failure to Respond to a Petition

Although the APA and *SUWA* preclude judicial review of most agency failures to act, they do permit a limited form of judicial review to challenge an agency's unreasonable delay in responding to a petition. The APA imposes a legal obligation on an agency to respond "within a reasonable time" to "a matter presented to it."¹⁶⁵ Therefore, an answer to a petition is legally required. Also, an agency's final answer to a petition for rulemaking constitutes an "order."¹⁶⁶ As the APA lists "order[s]" as a type of "agency action,"¹⁶⁷ it follows that, under *SUWA*, an agency's failure to issue an order constitutes a "failure to act" that qualifies as "agency action."¹⁶⁸ A party suing to challenge an agency's unreasonable delay in answering a petition for rulemaking thus seeks to force a "discrete" agency action that is legally required, and it may invoke § 706(1) as a basis for seeking a writ of mandamus.¹⁶⁹

Telecommunications Research & Action Center v. FCC (TRAC) has long provided the judicial framework for deciding whether a court

¹⁶⁴ The APA's procedural requirements for petitions for rulemaking are sparse. See 5 U.S.C. § 553(e) (2012) (stating that interested persons have the right to "petition [an agency] for the issuance, amendment, or repeal of a rule"); *id.* § 555(e) (providing that "[p]rompt notice shall be given of the denial in whole or in part of a written . . . petition . . . of an interested person made in connection with any agency proceeding").

¹⁶⁵ 5 U.S.C. § 555(b).

¹⁶⁶ *Id.* § 551(6) (2012).

¹⁶⁷ *Id.* § 551(13).

¹⁶⁸ See *supra* text accompanying notes 142–44 (discussing the Court's construction in *Norton v. S. Utah Wilderness Ass'n (SUWA)*, 542 U.S. 55, 62–63 (2004), of the term "failure to act" as used by the APA's definition of "agency action").

¹⁶⁹ *Norton v. S. Utah Wilderness Ass'n (SUWA)*, 542 U.S. 55, 62–64 (2004); see also 5 U.S.C. § 703 (2012) (authorizing parties invoking the APA cause of action to use "any applicable form of legal action," including "writs . . . of mandatory injunction").

should force an agency to take action in response to a petition.¹⁷⁰ In *TRAC*, the D.C. Circuit set forth a “hexagonal” test that provides a modest amount of structure:

Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is “unreasonably delayed.”¹⁷¹

TRAC’s instruction to apply a “rule of reason” invites a wide-ranging consideration of the totality of the circumstances. As part of this inquiry, it is natural that courts should consider factors weighing in favor of immediate action (i.e., “the nature and extent of the interests prejudiced by delay” (fifth factor) as well as, more particularly, whether health and safety concerns are threatened (third factor)).¹⁷²

Courts should also, however, consider factors weighing in favor of respecting agency autonomy. *TRAC* recognizes this point in its fourth factor, which requires courts to consider how granting relief will affect “agency activities of a higher or competing authority.”¹⁷³ Courts are slow to doubt claims by an agency that it has more pressing business and will order a response only if “the agency’s delay is so egregious as to warrant mandamus.”¹⁷⁴ This judicial hesitancy is so strong that it can apply even where an agency has violated a congressional deadline for action.¹⁷⁵ As a result of this deference, courts typically will not

¹⁷⁰ See *Telecomms. Research & Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

¹⁷¹ *Id.* at 80 (citations and internal quotation marks omitted).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 551 (D.C. Cir.

order an agency to take action until a substantial period of time has passed, sometimes four to eight years (or more),¹⁷⁶ at which point an agency's claim that it has more pressing priorities loses credibility.

This judicial reluctance to intrude reflects the same general concerns that led the Supreme Court in *SUWA* to construe narrowly the scope of judicial review of agency inaction under the APA.¹⁷⁷ Courts should not take over the job of choosing agency priorities and allocating their scarce resources of time and money. Moreover, in these days of shrinking agency budgets,¹⁷⁸ it is entirely credible that agency resources cannot be stretched to accommodate petitioners' various objectives. The price of this judicial solicitude, however, is to permit an agency to sit on a rulemaking petition, or deny it outright, because it is the politically expedient thing to do — with very little fear of judicial interference.

C. *Increasing Accountability for Centralized Review with Petitions for Rulemaking*

Although petitions for rulemaking have, in general, proven to be very weak checks on agency delay or inaction, this device might nonetheless prove to be a useful tool for addressing unexplained delay

1999) (“Our conclusion that the Secretary has violated the deadline does not end the analysis. . . . [W]e must continue our analysis of the TRAC factors to determine whether mandamus is appropriate in this case.”). *But cf.* *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190-91 (10th Cir. 1999) (holding that “when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and the courts, upon proper application, must compel the agency to act”).

¹⁷⁶ See, e.g., *In re Core Communications, Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (finding seven-year delay in issuing a justification for a rule after the rule was remanded without vacation was unreasonable); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419-20 (D.C. Cir. 2004) (failure to respond to rulemaking petition in seven years is unreasonable); *In re United Mine Workers*, 190 F.3d at 551-54 (ordering agency to produce timetable for promulgating final rule after eight-year delay); *Forest Guardians*, 174 F.3d at 1193 (finding four-year delay in promulgating a rule to be unreasonable in light of one year statutory deadline for promulgation); *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (five-year delay in promulgating final rule “treads at the very lip of the abyss of unreasonable delay”).

¹⁷⁷ See *supra* text accompanying notes 150–51 (discussing policy rationale underlying the Court's restriction of judicial review of agency inaction in *Norton v. S. Utah Wilderness Ass'n (SUWA)*, 542 U.S. 55, 66-67 (2004)).

¹⁷⁸ See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY AND THE ENVIRONMENT* 65-67 (2010) (documenting budget cuts at health and safety agencies).

caused by centralized review. The source of this optimism is that the primary rationale for courts' reluctance to grant petitions for rulemaking does not apply to delays caused by centralized review, and courts' treatment of such petitions should change accordingly.

1. Rejection of the Petition

Suppose a public interest group is frustrated that an agency's rule has vanished into the hallways of the White House and has not been seen for years. *SUWA*, as we have seen, generally poses a serious obstacle to any effort by that group to use the courts to challenge directly the agency's failure to issue the rule, regardless of whether delays are a result of agency decisions or a decision in the White House to hold up the rule indefinitely.¹⁷⁹ In theory, however, the petition process offers an indirect path to challenging this delay. Suppose, for example, that a public interest advocate files a rulemaking petition at an agency that has had a rule delayed at OIRA for two years. Assume further that the agency rejects the petition and the advocate seeks judicial review of the denial. The advocate could then seek judicial review of this denial to test the grounds for the delay.

Embedded in this indirect path lies the premise that the agency should have to answer for delays caused by OIRA rather than by the agency itself. This premise finds support in the way in which Executive Order No. 12,866 finesses fundamental questions concerning the balance between agency and White House power. Centralized review has long been at the center of controversies over the unitary executive.¹⁸⁰ Agency enabling acts typically delegate rulemaking authority to agency heads, not the President.¹⁸¹ Centralized review poses the problem of White House usurpation of these statutory

¹⁷⁹ See *supra* text accompanying notes 142–47 (discussing *SUWA*, 542 U.S. at 62–64). But see *In re Paralyzed Veterans of Am.*, 392 F. App'x 858, 861 (Fed. Cir. 2010) (granting petition for writ of mandamus to require issuance of final rule by Secretary of Veterans Affairs where the statutory deadline for issuance had been exceeded but the rule, though submitted to OIRA for centralized review, had not yet been cleared).

¹⁸⁰ See, e.g., Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1080 (1999) (noting reliance of centralized review of rulemaking on the “unitary executive” theory of presidential power); Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 732–38 (2007) (criticizing Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007), *revoked* by Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009)), for innovations tightening presidential control of agency rulemaking).

¹⁸¹ Kagan, *supra* note 76, at 2250 (noting Congress's “usual” practice of delegating rulemaking authority to an agency official rather than the President).

delegations of power. To a strong proponent of the unitary executive, this danger is illusory because the Constitution vests the President with the “executive power.”¹⁸² To opponents of this view, presidential seizure of ultimate rulemaking authority vested by statute in an agency head violates the law rather than enforcing it.¹⁸³

Rather than take a clear side in this foundational debate, Executive Order No. 12,866 adopts studied ambiguity. OIRA has no formal power under the order to command an agency to adopt or reject any particular rule, and section 9 provides that “[n]othing in this order shall be construed as displacing agencies’ authority or responsibilities, as authorized by law.”¹⁸⁴ Where the agency and OIRA cannot resolve a conflict, section 7 provides for resolution ultimately by the “President, or the Vice President acting at the request of the President.”¹⁸⁵ This provision would constitute a clear and ringing endorsement of unitary executive power but for its caginess about the binding effect of presidential resolution. In this regard, section 7 provides that “[a]t the end of the review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President’s decision with respect to the matter.”¹⁸⁶ Although this provision does not expressly state that the President’s decision will bind the agency, in the wink-is-as-good-as-a-nod department, an agency head (and presidential appointee) on the receiving end of the presidential communication presumably will treat it as such. The order thus prefers to rely on the de facto political power of the President rather than risk expressly claiming de jure constitutional authority.

In keeping with this general approach, Executive Order No. 12,866 leaves *agencies* nominally in charge of delaying rules past the order’s seemingly strict deadlines. Recall that, on the face of the order, OIRA has a default deadline of only ninety calendar days from agency submission to review notices of proposed rules or final rules.¹⁸⁷ As construed by OIRA, the order permits the head of OMB to extend this

¹⁸² *Id.* at 2251.

¹⁸³ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 649-50 (1984) (stating that, where Congress delegates rulemaking authority to an agency, the agency, not the President, has “ultimate decisional authority”).

¹⁸⁴ Exec. Order No. 12,866 § 9, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 83-87 (2006).

¹⁸⁵ *Id.* § 7, 3 C.F.R. at 648.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 6(b)(2)(B), 3 C.F.R. at 647.

deadline just once and only for thirty days.¹⁸⁸ An agency head, however, can request an indefinite delay.¹⁸⁹ It follows, then, that any lengthy delay following agency submission to centralized review must be, by the terms of Executive Order No. 12,866, as construed by OIRA, at the sufferance of the agency itself. The *agency* decides to approve indefinite delays.

A petition for rulemaking directed at a rule indefinitely stalled during centralized review would essentially ask an agency to answer the query, “Why are you delaying implementation of a policy you have already chosen?” Under standard administrative law principles, the propriety of this discretionary decision should stand or fall on the basis of the agency’s contemporaneous rationale.¹⁹⁰ Thus, the agency should, in theory, justify denying the petition by reiterating the justification it relied upon to support the decision to delay in the first place. In other words, the petition would not be asking the agency to spend the time and resources necessary to devise a new explanation for a decision. Rather, the petition would in effect be asking the agency only to make public an explanation that is already in the agency’s possession — or at least should be.

Of course, implementing our proposal may leave an agency in a difficult position where, as Professor Heinzerling’s observations suggest is often the case, the *real* reason for the agency delaying a rule is something like: “OIRA requested the delay, and we know what is good for us.”¹⁹¹ Such an answer should not suffice. Review of a denial of a petition for rulemaking is deferential, but administrative law, as we discussed above, requires agencies to give technocratic, public-regarding explanations for policy decisions.¹⁹² This requirement of a technocratic, public-regarding justification would tend to discourage agencies from granting (or OIRA from asking for) delays for which no such explanation can be given.

¹⁸⁸ *Id.* § 6(b)(2)(C), 3 C.F.R. at 647.

¹⁸⁹ See *supra* notes 45–47 and accompanying text (discussing OIRA’s practice of requesting delays which agencies grant).

¹⁹⁰ See, e.g., Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 *YALE L.J.* 952, 955 (2007) (“One ‘fundamental’ and ‘bedrock’ principle of administrative law is that a court may uphold an agency’s action only for the reasons the agency expressly relied upon when it acted.”).

¹⁹¹ See Heinzerling, *supra* note 7, at 359 (observing “that the agency is not to decline to ask” for an extension when OIRA asks the agency to ask for one).

¹⁹² See *supra* note 79 (citing sources on administrative law’s requirement of technocratic, expertise-based explanations).

2. Failure to Respond to the Petition

Assume again that a public interest advocate has filed a rulemaking petition at an agency that has had a rule delayed at OIRA for two years. This time, however, rather than reject the petition outright, the agency sits on it and does not respond — a likely enough event if it is attempting to avoid explaining that it kowtowed to the White House. The advocate sues the agency for failing to respond to the petition after thirty days pass. If the normal *TRAC* approach applies, a court would be extremely unlikely to condemn the agency's delay of such a short time after the petition.¹⁹³ This conclusion in turn suggests that our preceding subsection describing how courts might review agency rejections of petitions is unrealistic at best.¹⁹⁴

The normal *TRAC* approach should not, however, apply to our proposed use of petitions because the concerns that motivated *TRAC* do not apply in this context. *TRAC*'s tolerance for delay is rooted in the common-sense consensus that courts should not choose how agencies allocate scarce resources to develop and implement their policies.¹⁹⁵ These concerns, however, should have little or no traction where a petitioner seeks to force an agency to produce an explanation, which it should in theory already possess, for delaying a rule that *the agency itself wishes to promulgate* but that is now stuck in a lengthy and unexplained limbo at OIRA.¹⁹⁶ In fact, to the degree our proposed petitions might create impetus to help move the rulemaking process forward, they might be fairly said to aid rather than hinder agencies' ability to give effect to their discretionary policy choices. This argument is at its most persuasive when OIRA is reviewing a final rule, where the agency's policy commitment would presumably be at its peak. It applies with little less force, however, to proposed rules, which, by the time they are submitted to OIRA, have been the object

¹⁹³ See *supra* text accompanying notes 174–76 (discussing judicial tolerance of agency delays where applying *TRAC* factors).

¹⁹⁴ See *supra* Part III.C.1 (discussing scenario in which agency affirmatively rejects a petition for rulemaking).

¹⁹⁵ See *supra* text accompanying notes 150–51 and 173–76 (discussing judicial reluctance to usurp agency policymaking discretion or interfere with agency priorities).

¹⁹⁶ See Farber & O'Connell, *supra* note 21, at 1186 (suggesting that courts might address delays caused by centralized review by showing “greater willingness to mandate [agency] action . . . particularly when the agency has already invested substantial resources in a possible regulation”).

of considerable agency resources,¹⁹⁷ and, in the case of significant rules, will be accompanied by a burdensome cost-benefit analysis.¹⁹⁸

3. But Would the Explanations Be Worth Anything?

As we explain above, we believe that the petition mechanism should provide a means to obtain relatively prompt, technocratic explanations for long delays caused in rulemaking by centralized review. In this subsection, we respond to grounds for concern that these explanations would not prove to be helpful or illuminating enough to be worth the bother.

One objection is that requiring a reasoned explanation cannot stop agencies from making up cover stories. Agencies will simply confabulate technocratic explanations for unexplained political delays required by or channeled through OIRA. This objection, however, is generally applicable to agency discretionary decisions, not just to decisions to extend centralized rulemaking. *Sierra Club* gave administrative law's basic response four decades ago. We expect political influences to affect agency decision-making in a democracy, and these influences are acceptable or at least tolerable so long as an agency can offer a neutral, public-regarding explanation for its choice.¹⁹⁹ The limits of reasoned decision-making thus determine the space in which politics can operate. Put another way, we expect a degree of confabulation, but that confabulation must at least be reasonable, which limits discretion (and politics).

Another closely related objection is that once an agency has given an explanation for a delay, courts will apply a toothless form of arbitrariness review, making the exercise pointless.²⁰⁰ As a threshold matter, this objection seems a little overblown insofar as courts should be expected to reject purely political explanations. It is also possible that courts might take a hard line against certain types of nominally technocratic explanations. For instance, if an agency justified delaying issuance of a proposed rule on substantive concerns flagged for OIRA

¹⁹⁷ See Wagner, Barnes & Peters, *supra* note 15, at 110 (observing that “the emphasis on developing a proposed rule that is ready for comment pushes a great deal of the policymaking and true regulatory work earlier in the process, during the rule development stage”).

¹⁹⁸ Exec. Order No. 12,866 § 6(a)(3)(B), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 83-87 (2006).

¹⁹⁹ See *supra* Part II.A (discussing *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)).

²⁰⁰ See *supra* notes 173–76 and accompanying text (documenting deferential judicial approach to agency refusals to promulgate rules).

by other agencies, a court might well respond that OIRA's concerns might be addressed through the notice-and-comment process. More generally, even granting that agencies and OIRA might game the recommended approach, requiring public, reasoned explanations would increase political accountability, forcing agencies and OIRA (and by extension, the White House) to take overt responsibility for delaying promulgation of rules.

Another objection to our proposal is that the judicial review that we seek is unlikely to lessen the problem of delay as such. Agencies, and OIRA, will learn to respond to petitions for rulemaking by offering technocratic reasons for delay sufficient to satisfy deferential review for reasoned decision-making. Along these lines, it is worthwhile to note that Professor Sunstein insists that delays due to centralized review often occur simply because it takes time for OIRA to work through various technocratic problems.²⁰¹ If a petitioner for rulemaking subsequently tries to force an agency to address these problems promptly, the agency will be able to plead alternative priorities and scarce resources. The courts, following their traditional reluctance to tell agencies how to deploy their resources, will allow the agency to stall for years.

An initial response to this objection is to reiterate that *explained* delay is better than *unexplained* delay. Moreover, it is not obvious that courts would show the same patience where an agency fails to "clean up" a rulemaking by addressing issues raised by centralized review as they do when a petitioner tries to force an agency to initiate a new rulemaking. In the latter context, absent a statutory deadline, there is likely to be no real focus for judicial review — the petitioner wishes rulemaking to proceed, but that rulemaking may raise innumerable issues the court can scarcely imagine, so the court will naturally be inclined to take the agency's word that it has other, higher priorities. Where an agency need only address a focused list of technocratic concerns identified by OIRA, the need for extensive delay should often be less plausible, especially as the agency's own earlier rulemaking activity will suggest that it involved a high agency priority.

For instance, where OIRA has technical objections to an agency's cost-benefit analysis, it should not take long for the agency (or its contractor) to make the necessary changes unless OIRA has very significant objections requiring major reworking of the report. If so, the agency can defend substantial delay on this basis. Where OIRA has

²⁰¹ See Sunstein, *Myths and Realities*, *supra* note 7, at 1840-42 (stressing the technocratic nature of OIRA's functions).

objections to a rule (or is the conduit for such objections), it should not, generally speaking, take years for agency administrators and OIRA officers to negotiate changes to meet these objections — so long as the real goal is not to kill the rule by delaying it indefinitely. If the issues raised are very complex, requiring substantial rewriting of the rule, the agency can defend substantial delay on this basis.

American administrative law, as exemplified by cases such as *Sierra Club*, is willing to tolerate White House influence on rulemaking without limitations on ex parte communications because White House oversight is part and parcel of our democratic system. It does not endorse, however, delaying a rule for reasons that have nothing to do with the issues in the rulemaking, such as a proposed rule would be bad for the President's reelection prospects. Our proposal would extend this constraint into an area of the rulemaking process to which it has not been applied. It extends "law" into what is now the realm of pure politics.

IV. BETTER EXPLANATIONS FOR OIRA'S CHANGES

Executive Order No. 12,866 seems strongly committed to transparency. For instance, after a regulatory action is taken, OIRA "shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA."²⁰² Also, the agency itself is supposed to "[i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."²⁰³ Even better, all information provided to the public by either OIRA or the agency "shall be in plain, understandable language."²⁰⁴ Notwithstanding these provisions, it can be very difficult to determine how or why, precisely, centralized review changes rules.²⁰⁵ In this subsection, we suggest how judicial arbitrariness review could help change this circumstance.²⁰⁶

As a threshold matter, Executive Order No. 12,866 tries to keep courts out of the centralized review process by expressly stating that it "does not create any right or benefit . . . enforceable at law or

²⁰² Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. at 648.

²⁰³ *Id.* § 6(a)(3)(E)(iii), 3 C.F.R. at 646.

²⁰⁴ *Id.* § 6(a)(3)(F), 3 C.F.R. at 646.

²⁰⁵ See *supra* Part I.B.2 (discussing opacity of changes in rules associated with centralized review).

²⁰⁶ See Farber & O'Connell, *supra* note 21, at 1186 (proposing that courts, even without benefit of statutory authorization, might "provide a harder look at changes [in rules] made in response to OIRA pressure").

equity.”²⁰⁷ The order cannot, however, relieve agencies of their duty to avoid arbitrary action, which requires them to justify their policy choices through reasoned decision-making. Our thesis here is that OIRA-inspired changes to rules should be regarded as agency policy shifts. It follows that agencies have a duty to explain them, or at least acknowledge them.

An obvious objection to this thesis is that an unpromulgated rule (still subject to centralized review) has not yet crystallized into an agency policy. As such, OIRA review should be regarded as part and parcel of the deliberative process for *forming* initial agency policy commitments rather than as a device for *changing* those commitments. Much of the force of this rejoinder comes from the obvious point that rulemaking, especially for complex matters of broad import, can be a magnificently complex affair involving many moving parts and many people both inside and outside an agency. The duty of reasoned decision-making cannot practicably apply — and should not apply — to every internal twist and turn of the agency rulemaking process as various staffers and officials within an agency develop tentative understandings of the pertinent facts and stake out initial policy positions.

Note, however, that changes in rules due to centralized review come *after* an agency has finished its internal deliberations to prepare its position. This point applies with the most obvious force where an agency has submitted its attempt at a significant “final” rule promulgated by notice-and-comment to OIRA for review. This rule will likely have started with extensive agency efforts to develop a notice of proposed rulemaking, which will have involved heavy outreach to the regulated community.²⁰⁸ The agency will have submitted its proposed notice of proposed rulemaking to OIRA along with a preliminary cost-benefit review.²⁰⁹ After receiving permission from OIRA, the agency will have published the notice and proceeded through the notice-and-comment process.²¹⁰ Agency staffers or contractors will have worked through the comments. The agency will

²⁰⁷ Exec. Order No. 12,866 § 10, 3 C.F.R. at 649.

²⁰⁸ See E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992) (observing that “[i]f the agency is to state the detailed basis for its actions in such a way that its actions will survive judicial review, public input through formal notice-and-comment rulemaking must come relatively close to the end of the agency’s process, when the proposed rule has ‘jelled’ into something fairly close to its final form”).

²⁰⁹ See Exec. Order No. 12,866 § 6(a)(3)(B)–(C), 3 C.F.R. at 645-46.

²¹⁰ See 5 U.S.C. § 553 (2012).

have developed a lengthy and exhaustive “concise general statement of . . . basis and purpose” for the rule as well as the various impact statements required by statute or executive order.²¹¹ It will also, of course, have worked up a detailed cost-benefit analysis to submit to OIRA along with its “final” versions of the rule.²¹² For a rule of any importance and complexity, this process will likely have taken years. It will also represent the policy choice that the agency intends to implement so long as OIRA will let it.

We concede that categorizing OIRA-inspired changes to a proposed rule as constituting agency policy changes presents a closer call. One might well say that a *proposed* rule, by hypothesis, does not represent the agency’s final, crystallized policy choice. If it did, then it would follow that notice-and-comment, considered as a device for agency policy formation, is essentially a sham.

Notice-and-comment is, however, something of a sham.²¹³ The APA, on its face, requires very little for a notice of proposed rulemaking. For instance, an agency need not publish a draft of a proposed rule — it can make do instead with “a description of the subjects and issues involved.”²¹⁴ Of course, every one with a passing familiarity with the actual operation of notice-and-comment rulemaking knows that an agency best not take the APA too literally on this score. An agency preparing a notice of proposed rulemaking knows that it must include all scientific and technical information on which it has relied.²¹⁵ The agency will also know that the terms of the noticed proposal will substantially limit its later room for maneuver — if the final rule is not a “logical outgrowth” of the proposal, a court will vacate it.²¹⁶ The

²¹¹ The APA requires a rule issued via notice-and-comment to include a “concise general statement of . . . basis and purpose.” *Id.* § 553(c). Courts, however, require these statements to include a response to all material comments. *See* *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393-95 (D.C. Cir. 1973) (requiring agencies to respond to material comments). As a result, agencies’ “concise” explanations for their rules are lengthy and exhaustive agency. Congress has added to this burden by requiring agencies to prepare various impact statements as part of the rulemaking process. *See, e.g.,* *Regulatory Flexibility Act*, 5 U.S.C. §§ 603–605 (2012) (requiring impact statements on the effects of rules on small businesses at the proposal and final issuance stages of rulemaking).

²¹² *See* Exec. Order No. 12,866 § 6(a)(3)(B)–(C), 3 C.F.R. at 645-46.

²¹³ *See* Elliott, *supra* note 208, at 1492 (likening notice-and-comment to Kabuki theatre).

²¹⁴ 5 U.S.C. § 553(b)(3).

²¹⁵ *See* *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977).

²¹⁶ *See* Jack M. Beer mann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 7-8 (2011) (discussing development of the “logical outgrowth” test for the adequacy of notices of proposed rulemaking).

upshot of these considerations is that a proposed rule represents a substantial, if not iron-clad, agency policy commitment, and departures from such commitments warrant explanation.

Case law on arbitrariness review of terminated rulemakings supports this point. Suppose an agency initiates a rulemaking and conducts notice-and-comment, but then terminates the rulemaking rather than promulgating a rule. One might think that the termination should be treated as a species of agency inaction, making it difficult or impossible for an unhappy petitioner to obtain judicial review. The D.C. Circuit has not taken this tack, instead sometimes requiring agencies to give reasoned explanations for *terminations* of rulemaking.²¹⁷ The court has offered two justifications for this stance. First, terminated proceedings provide a far more focused and developed rulemaking record than will exist where the agency refuses to initiate proceedings.²¹⁸ Thus, for a terminated rulemaking, “a court will have a sufficient evidentiary base for determining whether or not the Commission’s ultimate decision was arbitrary and capricious or in contravention of the statute.”²¹⁹ Second, where an agency commences rulemaking, it has expressed its “tentative views” that the rule makes policy sense.²²⁰ Having done so, it has an obligation to explain why it changed those views and terminated the rulemaking.²²¹ Courts should review this explanation more deferentially than a decision to promulgate a rule but more intensely than the “exceedingly narrow standard” applicable where an agency refuses to initiate rulemaking at all.²²²

The conclusion that changes in rules due to centralized review represent agency policy shifts leads us back to *FCC v. Fox Television Stations, Inc.*, the Court’s most recent major discussion of the contours of arbitrariness review of agency policy decisions for reasoned decision-making.²²³ Recapping our earlier discussion, recall that Justice Scalia wrote a majority opinion for five Justices that controlled the outcome of this case, but only four Justices joined without reservation the entirety of his opinion on the issue of how courts

²¹⁷ See *Williams Natural Gas Co. v. FERC*, 872 F.2d 438, 443, 450 (D.C. Cir. 1989); see also *Int’l Union, United Mine Workers of Am. v. U.S. Dep’t of Labor*, 358 F.3d 40, 43-44 (D.C. Cir. 2004) (reviewing withdrawal of proposed rule for arbitrariness and following *Williams*).

²¹⁸ See *Natural Res. Def. Council v. SEC*, 606 F.2d 1031, 1046-47 (D.C. Cir. 1979).

²¹⁹ *Williams Natural Gas Co.*, 872 F.2d at 443.

²²⁰ See *id.* at 446.

²²¹ *Id.*

²²² *Id.* at 443.

²²³ See *supra* Part II.B.

should apply arbitrariness review to agency policy changes.²²⁴ For these four, an agency need not explain why its new policy is better than the old one. Rather, the agency need only explain why the new policy is reasonable on its own terms.²²⁵ In the context of a policy shift, however, reason does require acknowledging the change, assessing reliance interests implicated by the change, and, if the agency has changed its conclusions regarding pertinent underlying facts, explaining these changes.²²⁶

Justice Breyer wrote a dissenting opinion for four Justices, but his analysis of how agencies should explain policy changes captured a fifth, Justice Kennedy, who also authored a solo concurrence.²²⁷ For these five Justices, to protect the technocratic values underlying delegations of agency authority from arbitrary or nakedly political manipulation, an agency that changes policy course must answer the question, “Why did you change?”²²⁸

In truth, *Fox* left the requirements for agency explanations of policy changes somewhat unsettled — and we admit that we are pushing an aggressive reading of these requirements. Still, on the theory that five beats four, application of *Fox* to centralized review leads to the conclusion that agencies should give reasoned explanations as to why they have adopted regulatory policy changes at the White House’s behest. Moreover, even on Justice Scalia’s more relaxed view, agencies should identify those changes and explain how White House interventions may have caused them to change their conclusions regarding pertinent facts.

Of course, a party cannot challenge a policy change if it does not learn of it. Under the express terms of Executive Order No. 12,866, agencies are supposed to identify changes in their rules attributable to OIRA review.²²⁹ In practice, as we have seen, identifying these changes can be very difficult.²³⁰ Still, where assiduous parties prove able to

²²⁴ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 504, 515 (2009). Parsing *Fox* is difficult as Justice Kennedy provided a fifth vote for the majority’s discussion of arbitrariness review of agency policy changes, *id.* at 513-16, but he also wrote a concurrence expressing broad agreement with the dissent’s approach, *id.* at 535-36 (Kennedy, J., concurring). For a more in-depth analysis of the Justices’ statements on arbitrariness review in *Fox*, see *supra* Part II.B.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See *id.* at 546-47 (Breyer, J., dissenting); *id.* at 535 (Kennedy, J., concurring).

²²⁸ *Id.* at 549 (Breyer, J., dissenting); *id.* at 535-36 (Kennedy, J., concurring).

²²⁹ See Exec. Order No. 12,866 § 6(a)(3)(E)(iii), 3 C.F.R. 638, 646 (1994), *reprinted as amended in* 5 U.S.C. § 601 at 83-87 (2006).

²³⁰ See *supra* Part I.B.2 (discussing difficulty of tracing regulatory changes due to

identify changes by sifting through the record, the logic of *Fox* indicates they should be able to require explanations through arbitrariness review. Were courts to agree to this conclusion, then, to protect a rule from vacation, an agency would have an incentive to offer such an explanation up front when issuing its final rule — rather than risking that a court would hold the rule arbitrary for want of a reasoned explanation.

V. LAW VERSUS POLITICS

The great question of how to balance politics and technocratic concerns in agency decision-making has no clear answer, and debates over this problem will last longer than the Republic. Nevertheless, judicial review of agency action requires courts to strike this balance, and, over time, they have developed a model for doing so that looks to the duty of reasoned explanation to limit the operation of raw politics on policy. To date, the courts have not stretched their use of this tool to constrain the extent to which the White House can block, stall, or alter agency rulemaking with little or no accountability or transparency. Parts III and IV offered our modest efforts to fill that gap — at least part of the way. One might, however, object that our proposals are misguided because this gap should not be filled. Alternatively, one might object that our proposals would not actually fill this gap or that the costs of the judicial intervention they seek exceed the benefits. In this last part, we offer responses to these global objections.

A. *Don't Undermine the Unitary Executive*

Our suggestions, if effective at all, would subject “White House” decisions to stall, alter, or kill a rule to an indirect form of judicial review, thus weakening, to some degree, the President’s control over rulemaking by executive branch agencies. These suggestions might therefore be characterized as impinging on the President’s power as the “unitary executive” to control all executive power.²³¹ Also, on a closely related theme, one might object that our proposals are

centralized review).

²³¹ The unitary executive “allocates the power of law execution and administration to the President alone.” Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 549 (1994). On this view, even where Congress has expressly delegated rulemaking authority to an agency, the President should have the final word over the agency’s exercise of discretion regarding the timing or substance of rulemaking. *Id.* at 581-82.

inconsistent with administrative law's longstanding acceptance of executive influence on rulemaking. Taking a *Sierra Club* approach, administrative law accepts that the White House will influence agency rulemaking and that, within limits, such influence enjoys democratic legitimacy.²³² On this view, it should not ultimately matter how White House influence may have changed a rule, so long as the agency can offer a reasonable explanation for it at the right time.

This argument rests on the premise that the results of centralized review can be meaningfully attributed to the President's influence and whatever legitimating effects it might carry. This premise made perfect sense in *Sierra Club* — the President himself had attended a meeting on the rule in question.²³³ This premise does not, however, fit centralized review as it typically operates several decades after *Sierra Club*. In addition to empowering OIRA, centralized review creates a locus for routinized, opaque interference from any number of officials in and out of the White House.²³⁴ According to both critics and proponents, OIRA gathers information and objections to agency rules from across the executive branch.²³⁵ It is therefore far from clear that the influence emanating from or channeled through OIRA, although it is a "White House" office, should be categorically regarded as representing the presidential will to a greater degree than the decisions of the heads of executive agencies.²³⁶

Suppose, however, that the jumble of influences represented by OIRA review really amount to the President's alter ego for the purpose of reviewing rules. The President, even on a strong understanding of the unitary executive, is still subject to the rule of law. Regulatory decisions are, necessarily, a mix of policy and politics, and it can be perfectly appropriate for the highest elected official in the land or her appointees to wield influence over agency policymaking. Winning an

²³² See *supra* notes 94–97 and accompanying text (discussing the court's understanding of legitimate presidential influence on rulemaking in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)).

²³³ Cf. *Sierra Club v. Costle*, 657 F.2d 298, 387–89 (D.C. Cir. 1981) (assessing the legality of agency contacts with the White House in connection with rulemaking; noting that the President himself had attended one meeting).

²³⁴ See *supra* notes 62–69 and accompanying text (discussing how centralized review diffuses power to block rules across the executive branch, obscuring responsibility and accountability).

²³⁵ See *supra* notes 62–64 (discussing OIRA as "information aggregator").

²³⁶ See Livermore & Revesz, *supra* note 4, at 1347–48 (questioning why OIRA should better reflect presidential preferences than agencies headed by presidential appointees).

election, does not, however, entitle an administration to refuse to regulate or alter regulations arbitrarily — and thus unlawfully.

Accordingly, our proposals in essence require that, once an agency has applied its policy expertise in its domain of statutory authority and reached a decision that the evidence compels protection of people or the environment, it must be able to offer a reasoned justification for decisions to delay or alter these protections, even if these changes were “suggested” by the White House. At the end of the day, this limitation blocks only those regulatory changes for which no one can produce a reasonable answer to the question, “Why did you make that change?”²³⁷

For those preferring Justice Elena Kagan’s statutory road to the unitary executive, we have a similar response. On her view, Congress signals that the President has directive authority over agency rulemaking where it fails to designate an agency as “independent.”²³⁸ Granting this premise, it does not follow that Congress has also authorized the President to ignore for political reasons an agency’s determination that its statutory mandate requires it to propose a particular rule to address some outstanding problem. As long as we are making up fictive legislative intent, it is more likely that Congress would have expected that the President should have a plausible policy rationale (tied to the agency’s mission) for stalling or blocking the agency’s rule.²³⁹

B. *Nice Try, but Water Seeks Its Own Level*

A far more potent objection, in our view, is that trying to limit political influences on rulemaking in a complex bureaucracy subject to control by elected officials and political appointees is, in a word, futile. People with power will find a way to influence the exercise of power. Current practice confirms this point as applied to the White House’s regime of centralized review. Executive Order No. 12,866, as discussed above, includes many laudable provisions designed to make

²³⁷ See *supra* notes 223–28 (discussing the requirement that agencies justify policy shifts by answering the question, “Why change?”).

²³⁸ See Kagan, *supra* note 76, at 2251 (“I argue that a statutory delegation to an executive agency official — although not to an independent agency head — usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion.”).

²³⁹ Cf. *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (rejecting an EPA justification for denying a rulemaking petition on the ground that the reason it offered was divorced from the statutory text).

centralized review run on a strict timeline in a transparent way.²⁴⁰ The White House, however, has evaded the timelines by, among other means, instructing agencies to delay submission of their rules for formal centralized review and by requesting extensions of time, which agencies are smart enough to grant.²⁴¹ The White House has avoided transparency requirements by engaging in the rulemaking process informally, before an agency makes its formal submissions for review.²⁴² Moreover, neither the White House nor the rulemaking agencies have made it easy, as a general matter, for interested persons to identify changes attributable to centralized review.²⁴³ These facts of bureaucratic life suggest that, were courts to take meaningful steps to oversee the effects of formal centralized review, the White House would simply rely still more heavily on informal steps to alter, delay, or kill rules.

We readily admit that politics will sometimes find a way to evade the force of our proposals, but nonetheless think they are worthwhile. As an initial point, perhaps it bears noting that this futility argument, taken to its logical extreme, runs counter to the entire enterprise of administrative law, which presumes that procedural law, rationality requirements, and judicial review can tilt the balance between policy and politics toward the former. Also, a better answer to the futility objection than giving up on reform may be to explore further reforms. Along these lines, Curtis Copeland has suggested mitigating the problems of transparency and delay associated with “informal” OIRA review by recommending that the “clock” for formal review begin to tick “as soon as OIRA has received a draft rule [for review] that represents [the] agency’s considered opinion (with appropriate input from political appointees).”²⁴⁴

Independent of these points and despite the potential for evasion, we see our proposal as having at least some bite for several reasons. First, establishing a mechanism for limited judicial review of regulatory changes attributable to centralized review would create a

²⁴⁰ See *supra* Part I.A (identifying provisions of Executive Order No. 12,866 that seem to impose strict timelines and require transparency).

²⁴¹ See *supra* notes 44–47 and accompanying text (discussing OIRA’s controls over deadlines for centralized review).

²⁴² See Heinzerling, *supra* note 7, at 335–69 (noting OIRA’s stance that the transparency requirements of Executive Order No. 12,866 begin to apply only after formal submission of a rule for centralized review).

²⁴³ See *supra* notes 49–54 and accompanying text (discussing difficulty of tracing regulatory changes due to centralized review).

²⁴⁴ COPELAND, *supra* note 21, at 59.

legal norm that the White House needs to have substantive reasons for overriding an agency determination that a rule is necessary to protect the public or the environment. To the extent that the norm influences those in the White House, it would operate as a constraint on political behavior. Meaningful judicial review, even if sometimes evaded, would help the executive “internalize” this norm.

Second, evasion of the norm, if it became public, would come at a political price that does not now exist. The political price likely would be greater if a pattern of evasion is revealed. Of course, the White House would pay a price only if its actions were revealed, but it could not count on the fact that this would not happen.

Third, the White House may not have the time or bandwidth to anticipate ahead of time all of the rules that it might like to alter, delay, or kill. Presidents, as *Sierra Club* illustrated, have wielded influence over rulemaking prior to the establishment of OIRA.²⁴⁵ Formal, centralized review at the White House provides an especially efficient, routinized means for checking for rules to alter, delay, or kill. If our proposals cause the White House to shift to less effective means of exercising undue influence over regulations, then so much the better.

Last but not least, we believe our proposals serve an aspirational function that should not be discounted. Administrative law long ago abandoned the idea that administrators can legitimately exercise regulatory power because they are mere technocrats serving as “transmission belts” to implement a politically neutral public interest.²⁴⁶ One can be realistic about the (properly) political and pluralist nature of administration, however, but still uphold the value of expertise, which administrative law does by insisting on rational, technocratic, public-regarding explanations for agency policies. Our proposals recognize that the OIRA review process, focused in theory on a supposedly hyper-rational cost-benefit approach to administration, should likewise be required to uphold, rather than serve as a means for evading, this value of expertise.

C. *Abetting Excessive Judicial Interference*

Finally, there is the objection that judicial review slows and distorts the rulemaking process and generally undermines the role of expert

²⁴⁵ See *supra* Part II.A (discussing *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)).

²⁴⁶ See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1516-18 (1992) (critiquing the “transmission belt” theory for legitimating administrative authority).

agencies in the regulatory state.²⁴⁷ We are sympathetic to this argument and find ourselves surprised to be recommending an expanded judicial role.²⁴⁸ Using judicial review to ensure that changes in agency policy due to centralized review have a policy basis — in addition to any political motivations — is a Hobson's choice. Nevertheless, adopting a variation of the proverb that the enemy of my enemy is my friend, we are persuaded that judicial review has a constructive role to play in combatting intra-executive distortion and politicization of agency rulemaking at an acceptable cost.

The judicial role we suggest for addressing the problem of unexplained delay is essentially a device for forcing transparency. Requiring an agency to answer promptly a petition for rulemaking to explain a delay due to centralized review does not create much opportunity for ideological judging. Also, requiring agencies to explain delays would, if anything, tend to speed rather than slow the rulemaking process.

One might argue that requiring agencies to give reasoned explanations for changes in their rules attributable to centralized review creates greater grounds for concern insofar as this practice would increase agencies' burden of explanation, increase the number of obvious targets for litigation by persons challenging a rule, and increase the potential number of "mistakes" that generalist (or ideological) judges might make as they review agency policy choices. The potential scope of these problems would, however, remain in the White House's control — were it to insist on fewer changes, then there would be fewer changes for agencies to explain or litigants to attack. Also, the practical effect of a court finding that a regulatory change due to centralized review was arbitrary would be to reinstate the agency's own original policy choice (i.e., it was arbitrary for the agency not to retain the policy that it thought best in the first place). This aspect of the proposal should mitigate concerns over policy damage due to judicial "errors."

CONCLUSION

Finding the right balance between politics and policy in public administration is the type of problem that does not admit of a permanent solution, and different people reach different conclusions

²⁴⁷ See *supra* note 16 (discussing the charge that judicial review has "ossified" agency rulemaking).

²⁴⁸ See Shapiro & Murphy, *supra* note 2, at 322-42 (criticizing judicial review of agency decision-making as excessively ideological and proposing reforms).

based on their experiences and biases. We count ourselves among those troubled by the role of centralized review of rulemaking by OIRA, and the potential role of political considerations that it transmits, in killing, delaying, and altering rules developed by expert agencies acting within the scope of their congressionally delegated powers. In an effort to shift the balance back toward policy, we have suggested novel ways to deploy a traditional tool of administrative law for monitoring and limiting the influence of politics — the requirement that agencies give reasoned, public justifications for their policy choices. More specifically, interested parties should be able to use petitions for rulemaking to require agencies to give technocratic, public-regarding explanations for excessive delays caused by centralized review. Also, agencies should be required to give reasoned explanations for policy changes they make due to centralized review. Adopting these proposals would add to the (often questioned) legitimacy of centralized review both by making its effects more transparent and discouraging political changes that cannot be supported by persuasive policy rationales.