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An Expanded Version of OIRA Can Ensure Democratic Accountability in the Administrative State

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Abstract

In this contribution to a symposium, Professor Pierce argues that the most promising way of ensuring democratic accountability in the administrative state is to combine an expanded version of OIRA with complementary doctrines.

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The most promising first step toward ensuring democratic accountability in the administrative state is to adopt a proposal that was made by the only Supreme Court Justice in history who was nominated by a president of one party and confirmed during the administration of a president of the other party—Stephen Breyer. In his 1993 book, Breaking the Vicious Circle, Justice Breyer summarized the U.S. approach to regulation as an irrational combination of too little regulation of some risks and too much regulation of other risks. He attributed those unfortunate characteristics to politicians' reactions to famously inaccurate public perceptions of risks. He identified an expanded version of the Office of Information and Regulatory Affairs (OIRA) as a partial solution to the problem of irrational and inconsistent patterns of regulation.

Justice Breyer documented well both his claim that our present system of government regulation is irrational and inconsistent and his claim that the root of the problem lies in the

understandable reactions of politicians to the cognitive limitations of the public. His proposed solution is even more needed and even more promising in today's political climate than it was in 1993. An expanded version of OIRA, coupled with legal doctrines that preclude agencies and the president from exceeding the boundaries on their powers, can ensure the democratic accountability of the administrative state.

In part I, I describe OIRA and the roles that it has played for over forty years in assisting the president in his efforts to improve the performance of the administrative state. In part II, I describe Justice Breyer's proposal to expand OIRA and the advantages that he attributes to his proposed expansion. In parts III and IV, I describe two other expansions of OIRA that other scholars have proposed and the ways in which those expansions would enhance the president's ability to use OIRA to improve the performance of the administrative state. In part V, I describe the extreme and growing political polarity that is adversely affecting the nation's ability to maintain rational and consistent regulatory policies and the ways in which an expanded version of OIRA would reduce the effects of political polarity. In part VI, I describe the legal doctrines that courts should adopt to assist the president in his efforts to improve the performance of the administrative state, reduce the adverse effects of political polarity, and ensure that the president and the administrative state cannot stray outside the boundaries on their power.

I. OIRA

OIRA is an agency within the Office of Management and Budget (OMB) in the White House. It consists of an Administrator who is nominated by the President and confirmed by the

Senate and approximately 45 full-time employees who are civil servants. The employees include many professional economists who specialize in regulatory economics.

President Reagan assigned OIRA its most important task in 1981 when he ordered it to review major rules that are proposed by executive branch agencies. Every subsequent president has continued to use OIRA for that purpose. Cass Sunstein, OIRA Administrator during the Obama administration, has described the two primary ways in which OIRA performs its review function. First, it solicits and assembles the views of all agencies who have roles that are related to the proposed rules and transmits those views to the president. Second, it engages in cost-benefit-analysis (cba) of the proposed rule to determine whether its benefits exceed its costs and to identify any alternative that would improve the ratio of costs to benefits.

OIRA review is the most effective method the president can use to execute the laws. Then Chief Justice and former President Taft described that challenging task in his opinion in *In re Myers:*

> The vesting of the executive power in the president was essentially a grant of power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court.

He went on to hold that Congress could not interfere with the President's power to remove an officer of the Executive Branch.

The President might try to fulfill his responsibilities to execute the laws by attempting to monitor directly the performance of his subordinates and to remove those who refuse to execute

the laws in ways that reflect his views of wise policy. That would be an exercise in futility. There are 1242 principal officers and tens of thousands of inferior officers who have the power to execute the laws. No president can monitor and supervise the performance of all of those presidential subordinates. OIRA is by far the most promising institution to perform that task.

The OIRA Administrator is in an excellent position to perform the critical monitoring and supervision functions for the president. The President can and should delegate the monitoring and supervision roles exclusively to the OIRA Administrator. If at any point in time, the president becomes displeased with the Administrator's performance of those roles, the President can and should replace the Administrator. As one former OIRA Administrator described the relationship between the president and the OIRA Administrator to me in confidence: "The Administrator's office is just a stone's throw from the oval office. If anyone doubts that I can show them the scar on my head that I got when I misunderstood the president's expectations of me on one occasion."

Some presidents have departed from the method of monitoring and supervision that President Reagan initiated by delegating the monitoring and supervision functions to multiple White House offices. Two scholars conducted an empirical study that illustrates the predictable adverse effects of such a dispersion of responsibility. The president's subordinates who were responsible for decision making in one important agency reported that they were the subject of attempts by eighteen white house offices to influence their decision making in major rulemakings.

Each of the eighteen offices purported to speak for the president. They often differed significantly in their characterizations of the president's preferences. OIRA was the only office

that communicated with the agency with respect to every major rulemaking and the only office that communicated in a consistent and systematic manner. The agency decision makers were understandably confused by the inconsistent messages that they received from the other white offices with respect to some of the agency's major rulemakings.

The many white house offices employ thousands of people. It is as unrealistic to expect the president to monitor and supervise the performance of all the white house offices and presidential advisors as it is to expect him to monitor the performance of the hundreds of agencies in the executive branch. To be effective, the president must assign the functions of monitoring and supervising the performance of his subordinates exclusively to a single white house office.

Measured in many ways, OIRA has performed its critical monitoring and supervision functions well. OIRA is required by statute to report the results of its monitoring and supervision efforts to Congress each year. It complies with that duty by reporting the estimated benefits and estimated costs of every major rule that was issued by an executive branch agency during the prior ten-year period. Those reports estimate that the aggregate benefits of the rules exceeded the aggregate costs of the rules by a factor of approximately six to one. There is no significant difference between the net benefits of the major rules issued in Republican administrations and Democratic administrations.

In depth studies have identified much broader and deeper indirect beneficial effects of OIRA review of major rules. Agencies have responded to the expectation that OIRA will engage in cost-benefit analysis of their major rules by increasing dramatically their own efforts to

estimate the costs and benefits of their rules and to draft rules that will maximize net benefits. Thus, for instance, EPA has increased the number, quality, and influence of the professional economists that it employs and has enlisted the services of many of the top regulatory economists in the world as consultants. It now has economic analysis capabilities that match or exceed those of any institution in the country.

II. Justice Breyer's Proposed Expansion of OIRA

In Breaking the Vicious Circle, Justice Breyer acknowledges the improvements that OIRA review of major rules has accomplished, but he identifies a deficiency that has long been the basis for persistent criticisms of OIRA's role. OIRA's expertise is primarily in regulatory economics. It has no expertise with respect to the hard science components of regulatory decision making. That dearth of relevant scientific expertise sometimes causes OIRA to fail to identify and to estimate some of the most important potential costs and benefits of a proposed major rule.

Justice Breyer urges Congress and the President to respond to this weakness of OIRA review by expanding the number of civil servants that it employs to include scientists with expertise in every field that is relevant to agency decision making. As so expanded, OIRA would be in a much better position to perform its monitoring and supervision functions on behalf of the president. It would also be well-positioned to perform important related functions. Thus, for instance, it would be able to assist the president in harmonizing and coordinating the functions of regulatory agencies and prioritizing the health, safety, and environmental risks that are candidates for regulation.

III. Proposals to Subject Independent Agencies to OIRA Review

Many scholars and former OIRA heads have urged the President to expand the scope of OIRA's responsibilities to include review of major rules issued by what have traditionally been called the "independent" agencies, e.g., SEC, FTC, FERC, etc. The case for such an expansion has become stronger over time.

Exempting agencies with the power to issue major rules from the scope of OIRA review deprives the nation of both the direct benefits of OIRA review and the indirect benefits of OIRA review. We have no way of knowing whether major rules issued by those agencies yield benefits that exceed the costs that they impose, and studies have found that agencies that are not subject to OIRA review do not engage in the kind of sophisticated economic analysis of proposed rules that characterizes the performance of agencies that are subject to OIRA review.

As I will discuss in greater detail in section VI, changes in both the law applicable to "independent agencies" and the practices of such agencies have greatly weakened the historical justification for exempting them from OIRA review. The Supreme Court has held that Congress cannot create an agency that is headed by an individual who is not subject to the power of the president to remove him without stating a cause for removal. The Court has held that Congress can insulate two agencies that are headed by multi-member bodies from plenary control by the president because those agencies do not perform executive functions, but that rationale has no application to any agency that has the power to issue a major rule.

IV. Proposals to Give OIRA the Power to Engage in Ex Post Review of Major Rules

OIRA engages in ex ante review of estimates of the costs and benefits of proposed major rules. Its estimates necessarily are subject to a significant margin of error. Scholars have long recognized the critical need to add ex post analysis of the costs and benefits of major rules to OIRA's ex ante estimates. Ex post estimates are inherently more accurate than ex ante estimates.

Ex post estimates are valuable for two purposes. First, by comparing ex post estimates with ex ante estimates, OIRA can identify flaws in in its methods of making ex ante estimates. OIRA and regulatory agencies can then improve the accuracy of their ex ante estimates by correcting their methodology to reflect and reduce those flaws. Second, ex post estimates can be used as the basis to identify existing rules that should be rescinded, replaced, or amended.

Every President for the past ____ years has ordered regulatory agencies to engage in ex post evaluation of their rules. The results have been disappointing both quantitatively and qualitatively. That result should not be surprising. Regulatory agencies confront two major obstacles to accurate, thorough, and candid ex post evaluation of their rules—competing demands for scarce resources and a natural reluctance to acknowledge their past mistakes. An expanded version of OIRA would not confront those obstacles. It would be in an excellent position to perform the ex post evaluations of existing rules that we so desperately need.

V. Increased Political Polarity Has Increased the Need for an Expanded OIRA

During the thirty years since Justice Breyer proposed an expansion of OIRA, political polarity has increased dramatically. That increase manifests itself in many ways. The bi-partisan votes to confirm nominees for positions as judges, Justices, and Officers of the United States that

used to be the norm have completely disappeared. A nominee is fortunate if she is able to persuade a handful of members of the opposition party to vote to confirm her appointment. The bi-partisan compromises that often resulted in unanimous votes to enact or amend major regulatory statutes are also a relic of history. Increasingly, Presidents must face the reality that they can address regulatory issues only by taking executive actions. In most cases, those actions can be taken only by agencies that are acting based on the powers that Congress delegated to them thirty to eighty years ago.

The increased political polarity also has effects on the incentives of presidents and their subordinates who head agencies. The bases of the Republican and Democratic parties have opposite views on many important issues. Every newly elected president and his appointees have an incentive to respond to the preferences of the base of their party and to reverse the major decisions of their predecessors. This tendency can produce a new and more extreme version of the problems of inconsistency and irrationality that inspired Justice Breyer to propose an expanded version of OIRA. No country can prosper and meet the needs of its citizens effectively if it lurches from far right to far left or the reverse every four to eight years.

An expanded version of OIRA can serve as a much-needed counterweight to the tendency of each president and his appointees to reverse the policies of their predecessors. The OIRA Administrator and the President for whom she works will change with every administration, but the bipartisan team of professional economists and scientists who engage in the ex ante and ex post analyses of proposed and existing major rules will remain constant from one administration to the next. The expanded version of OIRA that Justice Breyer and others propose will provide

the president with the powerful ammunition that he needs to respond to the instinctive and untutored pressures from his base to reverse all of the policies of his predecessor.

VI. Doctrines that Enable an Expanded OIRA to Ensure the Democratic Accountability of the Administrative State

As Justice Breyer recognized, an expanded version of OIRA is only one important step in creating a legal environment that ensures the rationality and democratic accountability of the administrative state. To be fully effective for those purposes, we must combine an expanded OIRA with an appropriate combination of judicially enforced doctrines applicable to the administrative state. Fortunately, we are well on our way toward creation and application of a combination of doctrines that will work well with the expanded version of OIRA to further that goal. I will describe those doctrines under four headings—doctrines that allow the president to supervise effectively a large and powerful executive, reliance on textualism to ensure that agencies and the president remain within the boundaries set by Congress, doctrines that encourage agencies to maintain consistent policies over time and that deter agencies from changing their policies without giving well supported reasons for the changes, and doctrines that accord an appropriate level of deference to agency policy decisions in ways that encourage agencies to use the methods of making policy decisions that are most likely to yield politically accountable policies.

A. Presidential Supervision of the Executive

At the time that Justice Breyer proposed an expansion of OIRA, there was robust debate about the law governing what have traditionally been called "independent agencies."

Historically, the characterization of an agency as "independent" has been based entirely on a single criterion—whether the president can remove the head of the agency without stating a cause for removal. Because many people, including some strategically placed members of Congress, believed that some agencies should be insulated to some extent from the supervisory power of the president, President Reagan and his successors exempted "independent agencies" from OIRA's power to review proposed major rules. As a result, agencies like the SEC are free to issue major rules with little or no evaluation of their expected costs and benefits.

The debate about the legal status of "independent agencies" has largely been settled. In two opinions issued in 2020 and 2021, the Supreme Court held that Congress cannot limit the power of the president to remove the head of an agency by requiring the president to state a cause for removal. That eliminated the statutory for cause requirement applicable to the heads of two of the three agencies that were headed by individuals who could only be removed for cause. Immediately after the Court issued the second of those opinions, President Biden asked the Office of Legal Counsel (OLC) whether he could remove without cause the remaining agency head who was subject to a statutory for cause limit. After OLC issued an opinion in which it concluded that the "for cause" limit on the power of the President to remove the Administrator of the Social Security Administration was unconstitutional, President Biden removed the Administrator without stating any cause for removal.

The actions of the Court and the President in 2020 and 2021 left only one outstanding question about the legal status of "independent agencies." In 1935, the Court had held that Congress could limit the power of the president to remove one of the five Commissioners of the Federal Trade Commission, and in 1958, the Court held that the president could not remove a

member of the War Claims Tribunal without stating a cause for removal. Those holdings have been interpreted to stand for the broad proposition that Congress can limit the power of the president to remove a member of a multi member agency by requiring the president to state a cause for removal.

That interpretation of the Court's past decisions has been undermined by a combination of the reasons the Court gave for requiring the president to state a cause for removal of an FTC Commissioner and a member of the War Claims Tribunal and the recent patterns of behavior of agencies. In its opinion that upheld the limit on the president's power to remove an FTC Commissioner, the Court based its holding on its characterization of the FTC as an agency that does not perform any executive functions and that exercises only "quasi-judicial and quasi legislative" powers. That characterization was accurate in 1935. At that time, the FTC often advised Congress about whether to enact a statute to address perceived problems with respect to the performance of a market. Its only other function was to adjudicate disputes with individual firms that it accused of engaging in unfair practices. It had no power to issue rules.

Today the Chair of the FTC has announced her plans to issue many rules to define unfair practices, and both the Chair and the President behave in ways that reflect their obvious beliefs that the FTC performs executive functions subject to the supervision of the president. The current chair of the FTC stood behind President Biden when he signed an executive order in which he directed many agencies, including the FTC, to change the country's competition law policies in 72 ways. He then handed her the pen that he used to sign the Executive Order.

When the Court held that the President could not remove a member of the War Claims Tribunal without stating a cause for removal, it characterized the Tribunal's sole functions as indistinguishable from the functions of a federal court. Its sole task was to "adjudicate according to law." That reasoning may well apply to multi-member agencies like the Occupational Safety & Health Review Commission (OSHRC). Its sole function is to adjudicate disputes in which another agency, the Occupational Safety & Health Administration (OSHA), accuses an employer of violating a rule that OSHA issued. It has no application to agencies like OSHA or SEC that make policy decisions on a regular basis by issuing major rules. There is no reason in law or policy to exempt "independent agencies" like OSHA, SEC, or FTC from OIRA's power to review major rules today, and there are good reasons to extend OIRA review to major rules that are proposed by those agencies.

B. Textualism as the Basis for Limits on the Executive

Ensuring that the president can monitor and supervise effectively the actions of executive branch agencies gets us only part of the way to ensuring the political accountability of the administrative state. We also must have means through which we ensure that the president and agencies act within the statutory limits on their power. There is good news on this doctrinal front as well. The Court's adoption of a textualist approach to statutory interpretation accomplishes that goal.

In 2015, Justice Kagan famously announced that "we're all textualists now."[1] The unanimous opinion of Justice Breyer in *AMC Capital Management v. FTC* illustrates the effect of

[1] Elena Kagan, Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elana Kagan on the Reading of Statutes (Nov. 25, 2015).

the Court's adoption of textualism on attempts by agencies to stray beyond the statutory limits that Congress imposes on their powers. Before the Court issued its opinion, the FTC had long asserted the equitable power to require a firm that engages in an unfair practice to disgorge the profits that it made as a result of its unlawful behavior. The agency had enjoyed considerable success in defending that power in circuit courts. The Court unanimously put a halt to those efforts by writing an opinion in which it relied on the text of the FTC Act to support its conclusion that Congress had not conferred on FTC the power to order a firm to disgorge the profits it made as a result of its unfair practices.

C. Doctrines that Encourage Consistency

By subjecting all major proposed rules to rigorous evaluation by a bipartisan team of professional economists and scientists, OIRA review can counteract the incentives of presidents and their subordinates to respond reflexively and thoughtlessly to the demands of the base of their party to reverse the policy decisions of their predecessors. Doctrines that encourage agencies to maintain consistent policies complement that socially desirable effect of OIRA review.

Courts have adopted two doctrines that encourage agencies to maintain consistent policies. The first is illustrated by the findings of the study of 1330 circuit court opinions on review of agency actions by Kent Barnett and Chris Walker. They found that courts uphold longstanding agency interpretations of statutes far more frequently (87.6%) than recent interpretations (74.5%) or changed interpretations (65.6%). The Supreme Court's recent opinions also reflect greater deference to longstanding interpretations than to recent or changed interpretations. The

second doctrine is illustrated by a line of recent opinions in which the Court has imposed on agencies a heavy duty to explain why they changed a policy.

D. Doctrines That Encourage Agencies to Make Policy Decisions Through Use of Rulemaking

OIRA reviews only policy decisions that agencies make by using the notice and comment process to issue major rules. Doctrines that encourage agencies to use that process maximize the beneficial effects of OIRA review. Three conservative scholars have recently concluded that application of the *Chevron* deference doctrine, as the Court has qualified it over the past forty years, yields politically accountable policies if, but only if, the agency uses the notice and comment rulemaking process to make the decision that the court is reviewing.

Tom Merrill was just named one of the fifty most influential scholars of all time. At the end of the recent book in which he applies a rigorous series of criteria to the *Chevron* doctrine and its many qualifications, Merrill concludes that:

> Notwithstanding all these qualifications and corrections, the central lesson of the *Chevron* opinion—and of the entire era of jurisprudence that it eventually spawned—is that the agency, rather than the reviewing court, is the preferred institution for filling in the space that Congress has left for future interpretation in the statute under which the agency operates. This, as *Chevron* explained, is because the agency is more accountable to elected officials than the reviewing court, and the agency has more expertise in understanding the way the statute operates in its contemporary incarnation.

Merrill would apply *Chevron* deference only to policy decisions that agencies make through use of the notice and comment rulemaking procedure. His preferred review regime consists of two tests. The first can be summarized as a version of the *Chevron* test that reflects the many qualifications that the Court referred to in its 2019 opinion in *Kisor v. Wilkie*. Courts should apply that test only to statutory interpretations that agencies develop through use of the notice and comment process, however. The second test is a version of the less deferential test that the Court announced in its 1944 opinion in *Skidmore v. Swift & Co.* Courts would apply it to all agency interpretations that were not developed through use of the notice and comment process. Kristin Hickman and Aaron Nielson have reached the same conclusions as Merrill through use of similar reasoning.

The notice and comment rulemaking process has advantages that are complementary to the advantages of OIRA review. Both rely heavily on data and analysis as the basis for making and reviewing major policy decisions. Rules that are adopted through use of the notice and comment process also have another quality that makes them particularly attractive in the period of extreme political polarity that we are now experiencing. Professor Nielson refers to them as "sticky rules." They are harder to change than other types of rules. An agency head in a new administration can only respond to the pressure to reverse one of his predecessor's policies if he is willing to devote a lot of scarce resources to the effort and he believes that he can amass the data and engage in the analysis necessary to persuade a reviewing court to uphold his decision.

Conclusion