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JUDICIAL AND LEGISLATIVE CHECKS ON EX PARTE OMB INFLUENCE OVER RULEMAKING

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INTRODUCTION

In *Whitman v. American Trucking Ass'ns*,[1] the Supreme Court returned to a question to which it has provided the same answer for over fifty years: how aggressively should courts review the procedure an agency employs to implement a broad statutory mandate? In *American Trucking*, this question arose in the context of the non-delegation doctrine, more particularly, the version of that doctrine developed by the D.C. Circuit. According to the court, broadly written regulatory statutes could be struck down as overbroad delegations unless the agency cured the problem by supplying principles or guidelines limiting its own discretion. The Supreme Court rejected this idea, favoring instead the standard version of the non-delegation doctrine, in which the limiting principle had to emanate from Congress.[2]

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1. 531 U.S. 457 (2001).

2. Justice Thomas was the only member of the Court in *American Trucking* to question the standard formula that Congress satisfied the non-delegation requirement by sup-

The Supreme Court's rejection of an agency cure for a non-delegation flaw could be viewed as the triumph of a rigid traditional doctrine over a more nuanced approach to the relationship between Congress and administrative agencies, or as a common-sense rejection of an ultimately incoherent theory. From another perspective, though, the Court's analysis can be viewed as consistent with its past rejections of judicial attempts to control an agency's decision as to the best method of implementing a regulatory statute. The Court's broadest insistence on agency procedural discretion is found in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[3] though analogous statements can be found in several more discrete doctrinal areas.[4]

At the same time, parties dissatisfied with agency action may seek *ex post* review of the substantive rationality of the agency's decision. By contrast to demands for judicially-imposed procedure, to which it has generally been inhospitable, the Supreme Court has at times been willing to engage in serious judicial policing of agency choices under the auspices of such substantive review.

This Article considers the potential for judicial and legislative checks on a troubling aspect of the administrative process: the practice of ex parte Office of Management and Budget (OMB) participation in rulemaking. It begins by noting the past, and the hints of current, administration attitudes toward such ex parte contacts, and suggests those approaches leave open the possibility of inappropriate OMB contacts, thus necessitating a judicial or legislative check. Moving first to the courts, the Article briefly notes examples where the Supreme Court has rejected attempts to impose free-standing judicial conceptions of appropriate administrative procedure, and predicts that such reluctance would probably extend to demands for restrictions on ex parte OMB participation in the rulemaking process. It next examines substantive judicial review of regulatory results, and suggests that such review may not adequately police against inappropriate OMB conduct. Moving back to process—but this time, procedural requirements based on the APA—the Article speculates on the existence and appropriate scope of such APA-based procedural limits on OMB conduct. The Article then examines the possibility of legislative action to check OMB. It concludes where its analysis begins—the White House—suggesting that, ultimately, presidential administrations are the main hope for ensuring that

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plying an "intelligible principle" in the statute. *See id.* at 486-87. Justice Thomas, however, just like the other members of the Court (indeed, to a greater degree, given his insistence on more precision in the statute), refused to allow the agency to cure what would otherwise be a statute's failure to satisfy the non-delegation requirement. *See id.*

3. 435 U.S. 519 (1978).

4. *See infra* Part II.B and text accompanying notes 65-67 (demonstrating the Court's insistence on agency procedural discretion).

OMB oversight does not unduly impair the basic procedural fairness of the rulemaking process.

I. OMB REVIEW AND EX PARTE CONTACTS

The history of OMB review has been told often[5] and will not be repeated here. For the purposes of this Article, the important point is that the commencement of regularized White House review of the regulatory process quickly engendered concern about the executive acting as a confidential partner of and conduit for regulated parties seeking to influence agency action.[6] Such ex parte contacts and uses of OMB as an information conduit generated criticism as impairing the procedural regularity and fairness of the notice-and-comment process, the quality of the substantive regulations the process produced, and the precision of judicial review of the final regulation.[7] In response to these concerns, and sometimes in response to legislative pressure,[8] the White House itself imposed controls that sought to correct this problem.

These White House controls took initial shape during the second Reagan administration, when the OMB's Office of Information and Regulatory Affairs (OIRA) drafted procedures governing such ex parte contacts to head off legislatively-imposed limits on OMB review.[9] The elder President Bush's OMB continued to accept those procedures,[10] which were largely adopted by President Clinton.[11] These procedures impose several relevant limits on OMB's activities. First, they limit the OMB personnel with

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5. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247-48 (2001) (providing background on establishment and development of OMB).

6. *See* Sierra Club v. Costle, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981) (noting an executive branch memorandum dealing with this issue dating from 1979).

7. *See, e.g.*, Richard A. Nagareda, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 U. CHI. L. REV. 591, 624 (1988) (criticizing ex parte contacts and uses of OMB as an information conduit).

8. *See infra* text accompanying note 74 (noting the executive branch has attempted to maintain procedural integrity of administrative rulemaking by disclosing communication between White House and other agencies).

9. *See Sierra Club*, 657 F.2d at 405 n.520 (noting an earlier memorandum, drafted during the Carter administration, also considered this issue, in the context of regulatory review performed by the Council of Economic Advisors).

10. *See* Memorandum from Wendy L. Gramm, Administrator, OIRA, to the Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 (June 13, 1986), *reprinted in* OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE U.S. GOVERNMENT, 683 App. III, Apr. 1, 1991-Mar. 31, 1992 [hereinafter Wendy Gramm Memo].

11. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (establishing new programs to reform the regulatory process).

whom private parties may meet or communicate regarding a rule,[12] and require that the agency be invited to attend such meetings.[13] Second, they require the existence and subject matter of such meetings and communications be disclosed to the public.[14] Finally, they require disclosure to the public of the documents exchanged between OMB and the agency, but only after the agency action[15] is completed.

One difference between the Reagan and Clinton orders deals with disclosure of information sent by private parties to OMB. The Clinton order requires OIRA simply to forward to the agency all written communications between OIRA personnel and the private parties.[16] By contrast, under the Reagan-era regime OMB merely "advised" private parties wishing to submit information to send it both to OMB and the agency, "so that the material may be made a part of the agency record."[17] Thus, under the Reagan procedures OMB did not necessarily forward that information,[18] although the information was publicly available at OIRA itself.[19]

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12. *See* Wendy Gramm Memo, *supra* note 10, at 684; Exec. Order No. 12,866, § 6(b)(4)(A), 3 C.F.R. 638, 647 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (designating the administrator of OIRA, or a particular designee, as the sole person who can receive information submitted to agencies from persons who are not employed by the federal government).

13. *See* Wendy Gramm Memo, *supra* note 10, at 684; Exec. Order No. 12,866, § 6(b)(4)(B)(i), 3 C.F.R. 647 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (requiring OIRA to invite a representative from an issuing agency to any meeting held to discuss a regulatory action under review).

14. *See* Wendy Gramm Memo, *supra* note 10, at 684; Exec. Order No. 12,866 § 6(b)(4)(C)(ii)-(iii), 3 C.F.R. 647 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (mandating OIRA place in its reading room all written materials submitted by persons outside the federal government and a record of all communications taken during meetings concerning the rulemaking process). Under the Reagan and Bush administrations, this disclosure only applied with regard to rulemakings conducted by agencies that elected to participate in this particular safeguard.

15. *See* Wendy Gramm Memo, *supra* note 10, at 684; Exec. Order No. 12,866, § 6(b)(4)(D), 3 C.F.R. 647, 648 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (obligating OIRA to disclose all documents exchanged between OIRA and the agency even if OIRA decides not to publish the results of the regulatory action in the *Federal Register*). The agency action may be a preliminary one, such as an advance notice of proposed rulemaking.

16. *See* Exec. Order No. 12,866 § 6(b)(4)(B)(ii), 3 C.F.R. 647 (1994), *reprinted in* 5 U.S.C. § 601 (2000) (ordering OIRA to forward written communications between OIRA personal and persons not employed by the federal government to the agency within ten working days of its receipt).

17. Wendy Gramm Memo, *supra* note 10, at 683.

18. *See id.* (noting the important exception to this procedure concerning rules promulgated by Environmental Protection Agency (EPA), namely that the Reagan OMB agreed to forward EPA copies of all relevant written material OMB received).

19. *See id.* (explaining a policy in which all written documents and a record of oral communications between OIRA and a private party are maintained in OIRA's public read-

The new administration has sent an interesting signal on this issue. A September 20, 2001 memo from the OIRA Administrator, advising of the administration's practice in implementing Executive Order 12,866, stated that "until a modified or new Executive order is issued," written materials received from outside the Executive branch "are . . . forwarded to the rulemaking agency," but that "[i]t is the responsibility of each agency to place [those materials] in the rulemaking docket."[20] Thus, this statement implicitly suggests the administration would not argue that the forwarding of such private party submissions constitutes constitutionally privileged intra-branch communication. On the other hand, the memo's statement that it is the agency's responsibility to docket the information hints that the Bush administration would not necessarily be displeased if such information was not docketed and made subject to reply by other parties[21] or used in an argument against the substantive rationality of the agency's decision. Obviously, neither the memo nor Executive Order 12,866 itself requires the agency to docket the information, nor to treat such submissions, when appropriate, as public comments.

Thus, current presidential limits on OMB leave open the possibility it will continue to act as a conduit, funneling information that does not end up on the public rulemaking record. Moreover, these limits on OMB do not mention other communications between the White House and agencies, most notably oral communications concerning the consistency of the agency's proposed action with the president's overall regulatory policy. Thus, external checks could remain useful to guard against potentially inappropriate OMB influence over the rulemaking process. This Article first considers judicial checks.

II. JUDICIAL CHECKS ON OMB INFLUENCE

A. Procedural Limits on Agency Action Generally

The Supreme Court has consistently cautioned against imposing on agencies procedural hurdles beyond those clearly mandated by Congress. Its broadest statement of this caution is in *Vermont Yankee*, where it rejected a lower court's conclusion that it had the authority to impose proce-

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ing room).

20. Memorandum from John D. Graham, Administrator, OIRA, to the President's Management Council (Sept. 20, 2001), *available at* http://www.whitehouse.gov/omb/inforeg/oira_review-process.html.

21. *Cf.* FCC Practice and Procedure, 47 C.F.R. § 1.415(c) (2000) (Federal Communications Commission (FCC) rulemaking procedures allowing time for the public to reply to comments submitted in response to a proposed rule).

dures beyond those mandated by the Administrative Procedure Act (APA) if it decided the additional procedures were justified by importance of the issue and the benefits those extra procedures might provide. Beyond *Vermont Yankee*, the Court has endorsed agency procedural discretion in several more discrete contexts. In the following two examples, the U.S. Supreme Court rejected limits on that discretion, even when they were designed to achieve rule-of-law goals such as reasoned decision making open to public participation.

1. Requiring Agencies to Act Through Rulemaking

Federal and State agencies are sometimes constrained in their discretion to impose rules of conduct on private parties by means of case-by-case adjudications.[22] It is common wisdom that rulemaking enjoys several advantages over adjudications. First, regulations are generally applicable, while adjudicatory results formally apply only to the defendants and thus, raise the possibility of unfair singling-out. Similarly, regulations are usually enacted after a process open to all interested parties, while participation in adjudications is typically limited to the parties directly involved, even though the adjudicatory result may serve as precedent effectively binding non-parties. Finally, regulations are normally prospective, and thus, give regulated parties notice of the law, while adjudications are normally retrospective, and thus, run the risk of imposing new rules of conduct retroactively. While these disadvantages to adjudication can be mitigated, the general consensus holds that rulemaking is normally a superior way for agencies to establish regulatory policy.

Nevertheless, the Supreme Court has made it clear that federal agencies are normally not required to proceed by rulemaking unless Congress explicitly so directs. In its foundational statement on this question, the Court acknowledged that agencies may have good reasons for employing adjudications, and granted them broad discretion to make that determination.[23] Under current doctrine, the only significant limits on that discretion arise, first, when adjudication, retroactively applied,[24] so changes the law as to

22. *See* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN L. REV. 551, 572 n.93 (2001) (noting Florida and Oregon, especially, limit agencies in this regard).

23. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

24. Administrative adjudications do not have to be retrospective. Administrative adjudicative prospectivity, while problematic in that it calls into question the character of the act as adjudicative, may ultimately be no more problematic than judicial adjudicative prospectivity. *See generally* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) (discussing judicial prospectivity). For discussions of administrative adjudicative prospectivity, see William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations*

constitute unfair retroactivity in violation of due process,[25] and, second (and more speculatively), when an agency initially chooses to proceed by rulemaking, and then changes, without justification, to a reliance on case-by-case adjudications in an attempt to avoid the strictures of the rulemaking process it had originally chosen itself.[26] In both of these situations the agency action can fairly be described as arbitrary, either because it imposes a severe retroactive burden without fair notice, or because its switch from rulemaking to adjudication is unexplained.

2. *Non-Delegation*

The non-delegation approach developed by the D.C. Circuit—that agencies could cure an otherwise overbroad delegation by adopting regulations constraining their own discretion—obviously has little to say about the concern underlying the traditional non-delegation doctrine, namely, ensuring that Congress have the final word with regard to the basic value choices underlying government policy. Instead, courts adopting the new non-delegation doctrine attempted to broaden the doctrine's scope by having it respond to larger concerns about administrative accountability, concerns that echo those underlying the general preference for rulemaking over adjudication. For example, according to the appellate court in *American Trucking*, this new version of the doctrine reduced the risk of arbitrary agency action, and helped assure a government responsive to popular will.[27] These concerns find echoes in the rulemaking-versus-adjudication debate's preference for generally applicable rules developed after a process in which all interested parties are allowed to participate.

Still, the D.C. Circuit's embrace of the new non-delegation doctrine, while applauded by some commentators,[28] is open to critique.[29] Most importantly for our purposes, the court's concern for limiting principles ulti-

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of Labels, 57 WASH. & LEE L. REV. 351, 391-96 (2000).

25. *See Chenery*, 332 U.S. at 203; *see also* Araiza, *supra* note 24, at 374-76, 387-91 (discussing due process implications of administrative adjudicative retroactivity).

26. *See generally* Ford Motor Corp. v. FTC, 673 F.2d 1008 (9th Cir. 1981). This latter doctrine is described as speculative because it has only been adopted by the Ninth Circuit, and has been heavily criticized. For a more thorough discussion of Ninth Circuit caselaw on this issue, see Araiza, *supra* note 24, at 365-70. For an example of criticism, see 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 275 (3d ed. 1994).

27. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (explaining one function of the non-delegation doctrine is to reflect the nation's popular will through social policies created by Congress).

28. *See generally* Lisa Schultz Bressman, Schecter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000).

29. *See generally* Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1 (2000).

mately reduces to a concern about the agency explaining its rationale for choosing a certain regulatory result. Logically, this concern is vindicated through review under the "arbitrary and capricious" standard, in particular, the requirement that the agency explain its decision. The D.C. Circuit's version of the non-delegation doctrine may well be grounded in concepts of control and accountability, but those concepts fit much more easily within the concept of ex post review of the rationality of the agency's action.[30]

If there is anything more to the D.C. Circuit's analysis—i.e., if the court did in fact intend for the agency to do more than simply explain its choice better—it must be the "something extra" is more process. Perhaps, for example, the court envisioned agencies bifurcating their rulemaking processes, at step one announcing the principles they would keep in mind when applying the data it had, and at step two applying those principles to that data.[31] If this is what the court had in mind, its analysis—regardless of any possible beneficial effects such bifurcation might bring[32]—represents an even more blatant attempt to dictate to the agency the process it should employ in reaching its decision. Under this reading, the court's opinion conflicts sharply with the Supreme Court's admonition that agencies should enjoy broad discretion when determining how to proceed, subject only to the procedural requirements in the APA itself.

B. Free-Standing Procedural Review and OMB Influence

The Court's rejection of free-standing procedural requirements in these contexts makes it unlikely that such requirements could be imposed on OMB interaction with an agency engaged in a rulemaking. As discussed later in this Article, OMB supervision has at least some constitutional grounding. Regardless of whether that constitutional argument is ultimately meritorious, the existence of these constitutional concerns would only heighten the Court's general reluctance to intrude into agency processes, at least without a statutory mandate or a colorable constitutional counter-argument, such as due process.

Accordingly, this Article turns to the APA's substantive rationality requirement as a tool for courts seeking to limit inappropriate OMB interference in rulemaking. Such substantive review answers the concerns raised in *American Trucking*, and goes at least some of the way toward ensuring

30. For a similar conclusion, see *id.* at 9; *see also* Craig N. Oren, *Run Over by* American Trucking *Part I: Can EPA Revise Its Air Quality Standards*, 29 Envtl. L. Inst. 10,653, 10,657-58 (1999) (arguing the D.C. Circuit's decision was in reality a decision that the EPA's rule was arbitrary and capricious).

31. *See* Seidenfeld & Rossi, *supra* note 29, at 11-13 (suggesting the D.C. Circuit's version of the nondelegation doctrine entails essentially a *two step* process).

32. *See id.* (questioning whether such benefits would accrue).

reasonable exercise of agencies' discretion to choose between rulemaking and adjudication. The question to which this Article now turns is whether substantive review also offers hope as a check on inappropriate OMB activity.

C. Substantive Rationality Review as a Check on OMB Involvement in Rulemaking

Under the APA, courts review the substantive reasonableness of an agency decision under either the "arbitrary and capricious" or "substantial evidence" standards. While courts have used different language to describe the scrutiny called for under these two standards, the general consensus today is that the two standards require an approximately equivalent degree of judicial inquiry. The two standards may be different, however, with regard to the allowable sources of supporting evidence. While serving on the D.C. Circuit, Justice Scalia suggested that in substantial evidence review, support for the agency's action must be found in the public record created by the agency, while arbitrary and capricious review allows the agency to support its decision with information never disclosed to the public in the notice-and-comment process.[33]

Thus, under the arbitrary and capricious standard the agency could defend its decision before a court by explicitly pointing to non-public information, such as information provided confidentially by OMB. By contrast, such information cannot be used to support a decision reviewed under the substantial evidence test. However, this restriction does not mean that conduit information or OMB's policy-based arguments can play no role in the agency's decision making when the substantial evidence standard applies. Judicial review of administrative rulemaking requires only that the decision be *supportable* by the record. Courts do not insist on knowing the government's actual motivations. Thus, a requirement that a decision be adequately supported by record evidence still allows non-public information (factual or policy-based) to play a decisive role in the agency's actual decision to adopt a particular alternative, as long as the public record contained adequate support for the agency's explanation of its decision.[34]

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33. *See* Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 684 (D.C. Cir. 1984). Congress could also enact a hybrid statute, in which it leaves in place the arbitrary and capricious standard as the applicable standard for judicial review of the regulation's substance, but requires the court not to consider certain information (e.g., information provided by OMB). *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 405 n.519 (D.C. Cir. 1981) (describing such a provision in the Clean Air Act).

34. *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 981 n.204 (1980).

This conclusion places judicial review of administrative rulemaking—whether formal or informal—squarely between the two extremes of constitutional review: the "rational basis" standard, under which courts are free to hypothesize justifications for government action, and strict scrutiny, under which courts insist on knowing the government's actual motivations. The question is whether this middle position adequately addresses concerns about the legitimacy of agency action. If ex post review serves simply to ensure that agency decisions are based on reason, in the sense that the agency's explanation for the result is supported by data relevant to the factors Congress intended for the agency to consider, then it might suffice for courts to require only that there be adequate evidence, whether or not publicly disclosed, supporting its rationale.

However, courts rejected this limited conception of administrative rationality during the rulemaking revolution of the 1970's. That revolution firmly linked the public's right to participate in rulemaking with substantive ex post review, on the theory that a lack of public participation deprived the agency of the benefit of the public's knowledge, thus making it likely the agency's final choice was not fully informed and hence arbitrary.[35] In turn, the right to participate implied the right to access the information before the agency. As a common-sense matter, this linkage between disclosure of information and substantive rationality seems appropriate: certainly, a "reasonable" decision can be defined as one taken only after careful consideration of all the logical alternatives,[36] which in turn requires that private parties have the information the agency thinks relevant to its consideration of those alternatives, to critique and improve the agency's thought process. As a matter of administrative law, however, this linkage has caused some confusion as to the source of the disclosure requirement. As noted above, some courts have viewed the disclosure requirement as inextricably linked to the requirement that agency action not be substantively arbitrary.[37] Other judges, including Justice Scalia when serving on the D.C. Circuit, have viewed the disclosure requirement as emanating from the APA's procedural requirements themselves, even if those requirements are informed by the "arbitrary and capricious" review standard.[38]

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35. *See, e.g.*, Nat'l Black Media Coalition v. FCC, 791 F.2d 1016, 1023-24 (2d Cir. 1986) (holding the agency's action to be arbitrary and capricious on this ground).

36. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48-51 (1982) (holding the agency's action was arbitrary and capricious because it failed to consider logical alternatives to its action).

37. *See Nat'l Black Media Coalition*, 791 F.2d at 1023-24.

38. *See Data Processing*, 745 F.2d at 684. Then-judge Scalia suggested the requirement emanated from the APA since it only applied to informal rulemakings—for which

Ultimately, it should not matter where one locates the source of the disclosure requirement. The point is that any judicial check on OMB involvement in rulemaking would ultimately have to be based on the agency's failure to provide an adequate process. However, in contrast to the previously-discussed procedural controls courts have attempted to impose, these procedural controls are found in the APA, whether explicitly in the section 553 notice-and-comment procedures, or as a gloss on the APA's substantive review standards. The next Part of this Article discusses those procedural requirements.

D. APA-Based Procedural Restrictions on OMB Involvement in Rulemaking

Cases considering alleged agency failures to disclose information indicate that, while the right to comment includes the right to hear from the agency the information it thinks most relevant to the issue, the agency need not disclose every bit of information it had. A recent decision summarizing the law stated that the APA is violated by "nondisclosure of the central 'subjects or issues involved' in the rule making by withholding the data prompting the decisional change."[39] Such nondisclosure would include a failure to disclose any of the technical information underlying a regulation,[40] or data, or methodologies for obtaining data, which the agency itself cited as dispositive in its defense of the regulation.[41] By contrast, nondisclosure of a study that simply corrected alleged methodological flaws in

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there is a notice requirement in the APA—but not to informal adjudications, for which the APA did not prescribe procedures but which are subject to the same arbitrary and capricious review as rulemakings.

39. Mortgage Inv. Corp. of Ohio v. Gober, 220 F.3d 1375, 1380 (Fed. Cir. 2000).

40. *See* United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 251 (2d Cir. 1977) ("'It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [in] critical degree, *is known only to the agency*.'").

41. *See* United States Lines v. Fed. Mar. Comm'n, 584 F.2d 519, 533 (D.C. Cir. 1978) (finding agency's failure to disclose a written agreement and other information violative of the APA where it was "clear that the decisions made in reliance on these data were critical" to its decision, because failure to provide data precluded "searching and careful" judicial review); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–94 (D.C. Cir. 1973), *superseded by statute on other grounds by* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (finding agencies' failure to include testing information violative of the APA where agency relied on such testing when it created new industry standards to enable industry participants to comply with the Clean Air Act where other evidence showed the testing and methodologies used were inconsistent and flawed); *see also Nat'l Black Media Coalition*, 791 F.2d at 1023-24 (finding failure to disclose methodologies used to create data, and interpretations of that data, which appeared to provide at least a significant part of basis for agency's decision, does not violate APA).

earlier agency studies,[42] or information about a facet of the issue that did not define the agency's approach,[43] have been found not to violate the APA. On balance, these cases suggest that significant information can remain undisclosed as long as it is not critical to the decision. Thus, they also suggest that much conduit information could be kept secret.[44]

Applying these principles to OMB involvement in rulemaking might benefit from distinguishing between the types of communications emanating from OMB. Reflecting the close link between process and substantive rationality, the cases construing section 553 suggest that procedural requirements are motivated, at least in part, by a concern for the accuracy of the agency's decision.[45] If public participation increases accuracy, it must logically be due to the value of the public's information. If so, then ex parte OMB communications concerning policy arguments should probably be less restricted than OMB communications funneling empirical data to the agency.[46] This distinction responds to the common-sense idea that pri-

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42. *See* Cmty. Nutrition Inst. v. Block, 749 F.2d 50, 57-58 (D.C. Cir. 1984) (distinguishing facts in present case from facts of *Portland Cement* in finding agency not in violation of the APA by noting that studies relied upon in present matter did not provide new information but instead only "expanded on and confirmed" information already known to the Commissioner of the FDA). "Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments. The response may, moreover, take the form of new scientific studies without entailing the procedural consequence appellants would impose, unless prejudice is shown." *Id.* at 58.

43. *See Mortgage Investors*, 220 F.3d at 1379-80 (holding failure to disclose peripheral data regarding trends in foreclosure rates did not violate APA because the APA "does not . . . expressly require that interested parties receive notice of, and an opportunity to comment on, antecedent factual underpinnings for agency rule making.").

44. It should be noted that some of these opinions have noted the concern with the practicalities of rulemaking; most importantly, that requiring too much disclosure would lead to an endless circle of comment, generating new agency data which would then have to be let out for yet more comment. *See, e.g., Cmty. Nutrition*, 749 F.2d at 58.

> Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments. . . . It is impossible to perceive why correction of an asserted deficiency in earlier studies—which correction confirms the accuracy of those studies—should give rise to an additional opportunity to comment.

Id.; *see also Nova Scotia Foods*, 568 F.2d at 251 n.15 (recognizing a concern an agency's disclosure would trigger a never-ending discussion between the agency and the commentors); *cf.* Consol. Edison Co. of N.Y. v. Richardson, 233 F.3d 1376 (Fed. Cir. 2000) (holding an agency need not solicit a new round of comments if the final rule was the logical outgrowth of the version that had been open to comment). This problem would not arise in the case of OMB ex parte contacts: as long as the conduit information was disclosed, section 553 would be satisfied.

45. For a discussion of this point, and an argument suggesting that accuracy is the important factor in disclosure issues, see *supra* note 26, 1 DAVIS & PIERCE, at 306-09.

46. For a statutory example of this distinction, see 42 U.S.C. § 7607(d)(6)(C) (2000)

vate parties will have more valuable things to say about such empirical information, and less to say about OMB's policy arguments.

Beyond its functional appropriateness, this distinction improves doctrinal clarity. First, it plays a large role in process at large, i.e., constitutional due process, both in its development[47] and recent exposition.[48] Indeed, understanding due process more broadly, it could be argued that a "due process" right to participate in the setting of regulatory policy is guaranteed by the right to participate in the electoral process, which ultimately concerns the wisdom of alternative government policies. Second, this distinction tracks the basic contrast between the political and the technocratic conceptions of the administrative process, allowing presidential influence when policy matters are the subject, but limiting it when the issue is the weight to be accorded empirical data in the application of a regulatory principle to particular facts. Finally (and relatedly to the preceding points), this distinction historically has helped inform the separation of powers analysis concerning the scope of executive authority, in particular, when a president has the constitutional authority to dismiss agency officials.[49] Just as courts have held that Article II does not give the president the power to fire a member of the bureaucracy in order to influence the outcome of a particular adjudication, so too it seems reasonable (if not quite as unassailable) to limit the president's power to inordinately influence how an agency interprets particular empirical facts.[50]

(requiring EPA rules promulgated under the Clean Air Act "not be based . . . on any *information or data* which has not been placed in the [rulemaking] docket") (emphasis added).

47. This distinction is traceable to two foundational due process decisions from the early twentieth century, *Londoner v. Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). *See also* 2 DAVIS & PIERCE, *supra* note 26, at 7-8 (explaining the pragmatic distinction, based on the value of the privately-held information, between requiring government to provide a hearing when the issue pertains to matters of historical, or "adjudicative" fact, and not requiring a hearing when the issue pertains to legislative, or "policy" facts).

48. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (announcing a three-part test to determine what procedures are required by due process, including a factor asking how much more accurate the result would be if the requested procedure was provided).

49. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (stating Congress has power to insulate from presidential removal-at-will status agency heads exercising quasi-legislative or quasi-judicial powers); Myers v. United States, 272 U.S. 52, 135 (1926) (stating such authority does not extend to dismissals intended to influence results of agency adjudications in the midst of an opinion strongly supportive of the president's Article II-based authority to dismiss agency personnel). Elsewhere, I argue that one of the most important characteristics of adjudication (as opposed to legislation/rulemaking) is the former's reliance on the litigants' particular facts. *See* Araiza, *supra* note 24, at 391-96.

50. This statement might not be quite as unassailable because our concepts of due process, and thus the *Myers*-based limit on presidential influence, turn heavily on the need for impartiality when government singles out an individual. The APA recognizes this, for ex-

But even given the abstract logic of a more stringent attitude toward disclosure of OMB fact communications, such an interpretation of the APA might still allow significant amounts of such information to remain secret. First, the line between fact and policy arguments is not distinct. Recall, for example, National Highway Traffic Safety Administration's (NHTSA) argument in *State Farm* that the relatively high use of automatic seat belts in test cars suggested a broader program would *fail*.[51] The agency concluded the purchasers of the specially-equipped test cars could be expected to be especially committed to seat belt use, and their less-than-unanimous use of the device suggested the general public would reject it. Surely that interpretation of the usage data was influenced by the Reagan administration's overall anti-command-and-control and pro-market forces philosophy. Would such an argument have to be disclosed for testing in the notice-and-comment process? Would it yield a better empirical understanding of the world, which would lead to better regulation?

The uniqueness of OMB review complicates the analysis, even assuming a clearly empirical fact-based communication. In real life the weight the agency accorded such factual information would not rest solely with the information's intrinsic value, but also partially with the fact that OMB "sponsored" it before the agency.[52] Indeed, much of OMB's value as an information conduit presumably arises from the possibility that OMB might adopt the information and use its influence to press it upon the agency.[53] Thus, it might be very difficult for a reviewing court to know how impor-

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ample, when it limits its most stringent decisional independence requirements to formal adjudications, rather than to formal agency action in general. *See* 5 U.S.C. § 554(d) (2000). Often such singling out implies the defendant has very useful information, since the government decision presumably turns in large part on the defendant's own conduct, about which the defendant can be expected to have good information. *See, e.g., Bi-Metallic*, 239 U.S. at 445-46; *see also* 2 DAVIS & PIERCE, *supra* note 26, at 7-8 (discussing idea of right to be heard and adjudicative versus legislative facts). The same question—how useful is the information private parties typically hold?—yields a similar answer when the issue is one of empirical, rather than policy, fact, even if the empirical dispute arises in a rulemaking. However, because rulemakings do not raise the same basic concern about singling-out, there may be slightly less call for limiting presidential influence in that situation.

51. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52-54 (1983) (analyzing argument that passive belts will not yield substantial increases in seatbelt usage).

52. *See, e.g.*, Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 579 (1989) ("[D]ue to their endorsement by OMB, [communications forwarded from private parties to agencies via OMB] may assume special prominence in the agency's analysis, risking unfairness to those interested persons who do not enjoy the same access.").

53. For an early example of this dynamic, see Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 61 n.308 (1984).

tant a piece of information really was to an agency simply by examining the information in the abstract. Moreover, if the agency accorded significant weight to the information because OMB had sponsored it, rather than because of its intrinsic persuasiveness, it would not increase decisional accuracy to require its disclosure to the public.[54]

Thus, it is possible that the functional concern for accurate decision-making—the concern that led to the distinction between factual and policy communications in the first place—would not always be served by requiring disclosure of factual information. When an agency values a piece of information in part because of its sponsorship by OMB, a disclosure requirement would confuse the technocratic/scientific vision of agency action—under which disclosure of data would allow private parties to critique it, thus creating a better understanding of the problem—with the vision in which agency action is ultimately political action, responsive to the politically accountable White House. Under this latter vision the real importance of the data lies in the fact that it came from political higher-ups whose power the agency decision-maker has to respect as a practical matter. Of course, a court could attempt to recreate the actual decision making climate within the agency, to determine the degree to which OMB's sponsorship of the information made that information important to the agency.[55] But, that task seems quite difficult, and arguably inappropriate given courts' hesitancy to inquire into the mind of the decision-maker.[56]

III. LEGISLATIVE ACTION IN RESPONSE TO OMB INFLUENCE

The above analysis assumes legislative inaction, which forces litigants to argue that existing law limits OMB involvement in rulemaking. Subject to constitutional constraints, Congress could, of course, legislate explicit controls over OMB. The controversy concerning the secrecy and private influence over the Bush administration's early energy policy discussions, while not precisely analogous, raises the possibility that this issue could become politically prominent.[57] The possibility increases given the combination of

54. It should also be noted that this problem is not addressed by the Clinton order's requirement that all privately-generated information sent to OMB be forwarded to the agency. Indeed, the problem is that, as OMB forwards the information, it exerts pressure on the agency to accord it more weight than the agency might otherwise.

55. In at least one case, *New York v. Reilly*, 969 F.2d 1147, 1152 n.9 (D.C. Cir. 1992), the court refused to consider challenges to objections President Bush's Council on Competitiveness made to proposed EPA regulations, finding, without further explanation, that none of the objections were "a decisive factor" in EPA's final decision.

56. *See* United States v. Morgan, 313 U.S. 409, 422 (1941) (concluding that, just as examination of a judge would be destructive, so too is examination of a decision-maker).

57. On February 22, 2002, the Comptroller General of the United States sued Vice

a Republican administration and at least a partially Democratic Congress, the same combination that led to serious clashes over OMB's role during the 1980s.

In response to a concern about OMB influence, Congress could simply limit OMB's role in regulatory review across the board, or with regard to a particular regulatory program.[58] Such legislation would not have to be phrased as restrictions on OMB per se, but merely as requirements on the agency that all information of a certain type be docketed on the public record. Such requirements could potentially raise constitutional issues to the extent they precluded confidential meetings between the White House and the agencies at which policy issues were discussed,[59] just as such a requirement might be problematic if it was found by a court interpreting the APA.[60] Such a statute might be constitutionally troubling to the extent it was viewed as intentional congressional interference in White House policy coordination to increase Congress's power in the tug-of-war over agency policy. Even *Morrison v. Olson*'s formula, which generously allowed legislative power to intrude on the performance of executive functions, noted the problem raised by one branch's attempt to aggrandize itself at the expense of another.[61] On the other hand, as discussed earlier, there is less

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President Dick Cheney over the latter's refusal to turn over records relating to the Bush Administration's National Energy Policy Development Group. *See* Walker v. Cheney, Civ. Act. No. 1:02cv00340 (D.D.C. filed Feb. 22, 2002). This suit is nearly unprecedented and has attracted a great deal of political notoriety, in large part because of the collapse of Enron Corporation, which is thought to have participated in the group's deliberations.

58. Of course, such limits need not take the form of a formal statute. In the mid-1980's, for example, congressional pressure led OMB to adopt ex parte contact procedures that were later adopted, as modified, in the Clinton executive order. *See Hearings*, *infra* note 74.

59. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 404-08 (D.C. Cir. 1981).

60. It is possible that a clear congressional command to that effect might be considered on firmer constitutional ground, if it represented an explicit statement by Congress, especially if the command came in the same statute granting the agency the authority to regulate in a particular area. The Court's separation of powers jurisprudence generally examines the factual context of the action alleged to have encroached on another branch's prerogatives. In our situation, the fact that a limitation on OMB influence was enacted as part of a statute granting an agency significant regulatory power might influence a court's holding on constitutionality, when compared, for example, with a similar requirement emanating from a congressional attempt to limit OMB across the board. *See, e.g.*, CFTC v. Schor, 478 U.S. 833 (1986) (setting forth factors to decide the legality of Article I courts, including limited nature of encroachment on traditional objects of Article III court concern). It is also unlikely that a court would impose such a requirement on OMB as part of section 553, since that interpretation would be in no way compelled by the language of that statute, and would create a significant constitutional issue for the court to decide.

61. *See* 487 U.S. 654, 694 (1988); *see also* Bowsher v. Synar, 478 U.S. 714, 727 (1986) (discussing the dangers of congressional usurpation of power from a coordinate branch).

reason to be concerned if the legislation only pertained to non-policy communications, such as analyses of empirical data. To the extent such non-policy communications reflect the technocratic side of the agency's personality, statutory limits on secret executive communications would not seem to unduly restrict the president's ability to set his law-enforcement agenda.[62]

An interesting question would arise if Congress took a more subtle route, and prescribed a formal rulemaking process for a given regulatory program. In that case, the APA would prohibit such contacts,[63] but what would be the result if the president argued Article II required he be allowed such contacts to set his administration's regulatory policy? Ideally, formal rulemakings should be viewed as reserved for situations where the character of the issue is quasi-adjudicative, such that the due process analysis and the Article II issue both cut against presidential power.[64] For example, in *United States v. Florida East Coast Railway*,[65] the Court strained to find an authorizing statute to not require formal rulemaking. The majority focused in part on the due process implications of the distinction between rulemaking and adjudication.[66] The Court determined the issue—rates set by the Interstate Commerce Commission (ICC) for rented railroad boxcars—was closer to a legislative-type issue for which informal rulemaking procedures were appropriate.[67] But, there is no reason to assume that Congress could not require formal rulemakings for a topic that is not quasi-adjudicative. Indeed, if Congress was looking for a way to limit OMB's influence with-

62. *Cf. Morrison*, 487 U.S. at 691 (focusing on whether statutory restrictions on the President's removal power "impede [his] ability to perform his constitutional duty").

63. *See* 5 U.S.C. § 557(d) (2000).

64. *See* Myers v. United States, 272 U.S. 52, 135 (1926) (observing, as an exception to its otherwise strong endorsement of presidential control over agency personnel, that the President would not have the authority to exercise that control in order to influence a particular adjudication).

65. 410 U.S. 224 (1973).

66. *See id.* at 244-46. Justice Douglas' dissent also focused on this issue, reaching the opposite conclusion—namely, that the type of proceeding involved historically had been viewed as quasi-adjudicatory. *See id.* at 256 (discussing fact that administrative agencies must promulgate rules by "taking and weighing . . . evidence," and make agency decisions which are supported by such evidence).

67. *See id.* at 245-46. Tellingly, the Court's reluctance in *Florida East Coast* to read a statute as requiring formal rulemaking has not transferred to adjudication, where courts have been more willing to require formal procedures. *See, e.g.*, Marathon Oil Co. v. EPA, 564 F.2d 1253, 1262 n.30 (9th Cir. 1977); *see generally* STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 584 (4th ed. 1999). This fact suggests the Court in *Florida East Coast* was, at the very least, reading Congress's procedural mandates against a backdrop of the different applicability of due process guarantees for rulemaking and adjudication.

out explicitly saying so (and thus possibly provoking a political collision), it might decide to do so by requiring a formal rulemaking process, which would trigger the APA's prohibition on this type of ex parte contact.

Because formal rulemaking has fallen into disrepute, courts have not had occasion to consider this issue. Such a case would squarely present the question of the scope of Article II's requirement that the president be able to consult confidentially with his agents on matters of general regulatory policy, as against Congress's determination that a particular issue was best dealt with through a formalized, quasi-judicial process. In the past, courts rejecting claims of unfair ex parte contacts with agency decision makers have given weight to congressional directions that the agency consult with outside parties.[68] Conversely, other courts have accorded weight to a congressional mandate that certain decisions be quasi-adjudicative, even though that determination had the effect of limiting executive influence over the agency's decision.[69] To the extent that these courts give significant weight to these congressional categorizations, they necessarily imply that Congress has a role in the constitutional decision of how much authority Article II gives the president to influence the agency confidentially.[70]

Regardless of the outcome of the constitutional dispute, the key point is that Congress's tool is procedural. Attempting to control ex parte communications by means of prescribing a standard of review, or by requiring that an agency's decision be based on a particular record, would most likely not end such contacts, especially when the subject matter is on the frontier of scientific knowledge, where the evidence can reasonably support widely different conclusions and where courts defer to the agency's technical expertise in interpreting the data. Indeed, the only situation in which such a record-evidence rule would make a difference would be one, governed by the substantial evidence standard, in which the secret, off-the-public-record

68. *See, e.g.*, Sokaogon Chippewa Cmty. v. Babbitt, 929 F. Supp. 1165, 1176-77 (W.D. Wis. 1996) (rejecting tribe's request for discovery beyond agency record into agency decision, based in part on fact that Congress had directed agency to consult with state and local officials before acting, thus rendering decision not quasi-adjudicative and subject to more restrictive ex parte contact rules).

69. *See, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1541 (9th Cir. 1993).

70. Another example of the weight accorded congressional determinations was provided in *FTC v. Cement Institute*, 333 U.S. 683 (1948). In that case, the Court rejected a due process claim of bias and prejudgment based on the fact that the commissioners of the FTC had investigated industry conditions and found a certain practice to probably constitute a legal violation, and then had prosecuted a company in that industry for violating the law for engaging in that practice. The Court rejected the firm's due process claim in part because it would have meant the frustration of Congress's will in structuring the agency to give it both general investigatory and prosecutorial powers. *See id.* at 701-02.

information was crucial to the *supportability* of the decision, as opposed to the agency's *actual* decision of which record-supportable option to choose. But, in that case, there would most likely be a violation of the APA's rulemaking procedures. The situation, by hypothesis, would be one in which the non-disclosed information was crucial to the decision's rationality. Thus, courts would likely find the information so crucial as to require agency disclosure and testing through the rulemaking process.[71] Thus, in this case—the only one where OMB influence might cause a court to strike down a regulation as violating the APA's substantive review requirements—the substantive review standard does not carry any weight independent of procedural requirements.

However, process review may also be incapable of fully guarding against inappropriate OMB involvement. Constitutional due process does not apply to rulemaking. The APA's informal rulemaking procedures may not stretch to include significant limits on OMB interference, and *Vermont Yankee*[72] counsels against courts requiring more procedure without congressional mandate. Finally, such mandates might encounter an Article II obstacle, especially to the extent OMB involvement consists of policy-based "jawboning." Indeed, as noted earlier in the discussion of NHTSA's seat belt argument,[73] it might even be difficult to tell when a policy argument stopped and an empirical, or "objective," analysis began.

CONCLUSION

Ultimately, limits on judicial policing of the rulemaking process may make limitations on OMB interference analogous to an underenforced constitutional norm, which the offending branch itself is primarily responsible for guarding. Just as legislatures bear primary responsibility for ensuring that the lawmaking process is marked by deliberation and at least some attention to the public good, so too the executive may bear ultimate responsibility for ensuring the procedural integrity of the administrative rulemaking process. The fact that presidents, since at least Carter, have taken steps to disclose White House communications with agencies[74] suggests it is not

71. Moreover, since the issue in substantive review is the technocratic rationality of the decision, a situation in which OMB-supplied information was crucial would be one in which that information was of a factual nature, thus making it more appropriate from a functional point of view for the court to use rulemaking procedural requirements as the basis for striking down the regulation.

72. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

73. *See supra* note 51 and accompanying text.

74. Of course, at least with regard to the Reagan and Bush administrations, these steps were taken only after Congress had applied political pressure. *See President's Management*

unrealistic to expect future presidents to do the same, and thus, to ensure what courts by themselves may not be able to guarantee: an open and fundamentally fair rulemaking process.

Legislative Initiatives: Hearing on S.J. Res. 190, S. 1206, S. 1657, S. 2004-S. 2010, H.R. 2401 Before the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 56-58, 97 (1986).