PRESIDENTIAL CONTROL OVER AGENCIES: WHEN DOES ENOUGH BECOME TOO MUCH?

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It is easy to see the problems too much power in the hands of the Executive Branch caused in the days of Guantanamo, wiretaps, *Massachusetts v. EPA*, and destroyed torture videos. Without checks and balances in place, the power of any branch will expand until stopped.¹ This is the very problem the first European immigrants to these shores were trying to escape, and the reason our governmental structure is tripartite.² This Note will explore the circumstances that coincidentally aligned to give the Executive too much power over administrative agencies. Finally, it will determine whether the situation will eventually right itself, or if not, and whether anything can be done to redress the power imbalance.

The strengths of presidential control of administrative agencies, seen in the Clinton era, helped the President resolve the impasse that faced him when he attempted to further his domestic policies while faced with a hostile Congress.³ However, in the Bush II administration with the same party controlling the executive and legislative branches, presidential control over agency policies showed that without legislative or judicial constraints, that control may exceed the bounds of the separation of powers that balances our system of government. The struggle for authority over agencies between Congress and the President started with the rise of the administrative state during the New Deal era.⁴ More recently, Presidents Nixon through Clinton laid the foundation for enabling presidential authority to guide regulatory activity by administrative agencies which was solidified by the Bush II Presidency.⁵ The means by which these Presidents brought control over agency regulation more firmly into the grasp of the Executive Office may not be problematic by itself.⁶ However, when that control is coupled with deferential judicial review,⁷ congressional acquiescence,⁸ and the passage of

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⁶ Werhan, supra note 5, at 425-32.


the 2000 Information Quality Act, it has come dangerously close to eliminating the checks and balances on the Executive Branch. There was increasing evidence that Bush II or his deputies forbade heads of agencies from saying certain things that did not follow the party line, suppressed data that did not support predetermined presidential policy, or changed data outright in a manner that extended past the usual policy shifts that accompany a presidential changing of the guard. We expect an elected President to adhere to the party policies which got him elected. However, when those polices are unchecked by any of the other branches of government, the door is opened to presidential and thus partisan control over agency decisions.

Partisan policies may be part of the expectation we have about a duly elected President, but our idea of the government bureaucracy, of which agencies are the chief part, is arguably different. This is succinctly articulated by Justice Stevens, who pointed out that “one of the overriding principles in running the country is the government ought to be neutral, and not use its power to advance political agendas or personal agendas.” Twelve years ago, an analyst warned that the reforms taking place in agency management and judicial review at the time could potentially lead to a politicization of those agencies. It was predicted that, taken together, those changes would delegalize administrative law, thus “encouraging public policymaking to operate outside the reach of the law.” To a large extent, this prediction has come true.

This Note will explore the roles that Judicial oversight, Congressional action, the Executive Branch, and the Data Quality Act have each played in allowing the current state of affairs, and what the next step is in bringing the three branches of government back to parity with each other.

I. JUDICIAL OVERSIGHT

One of the two checks on the Executive Branch is the Supreme Court. The Supreme Court has interpreted the Constitution in such a way that courts have the

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13 Werhan, supra note 5, at 424.

14 Werhan, supra note 5, at 466.

15 Cleary, supra note 1, at 277-81.
ability to review legislation as well as executive decisions, including those of administrative agencies.\textsuperscript{16}

Congress delegates authority to administrative agencies so that they can make rules.\textsuperscript{17} The presumption in the 19th century was that the Supreme Court did not have the authority to review Executive Branch decisions or administrative action unless Congress had expressly put the authority to review into legislation.\textsuperscript{18} However, by the middle of the 20th century the court's resistance to judicial review of agency action had changed.\textsuperscript{19} Instead of a choice between no review and review of the entirety of the agency enabling legislation, the concept of limited review arose.\textsuperscript{20} In addition, a broader reading of Article III of the United States Constitution was used to provide a basis for judicial review where there was no express authorization for that action by Congress in the statute.\textsuperscript{21} In 1946 when the Administrative Procedure Act (APA) was adopted, provisions 701 and 704 of that Act codified judicial review of agency actions so that courts had the ability to review decisions whether there was statutory language giving permission or not, except in cases where the relevant legislation precluded judicial review or gave discretion to the agency statutorily.\textsuperscript{22}

The Supreme Court first upheld delegations of power as proper under the Constitution in 1928.\textsuperscript{23} At that time the standard the Supreme Court used to permit Congress to delegate its authority to make rules was known as the "intelligible principle test."\textsuperscript{24} This test differentiated between the execution of the law which was in agency hands, and the content of the law embodied in the statute, which commentators called a "distinction without a difference."\textsuperscript{25} More recently the


\textsuperscript{17} Garry, supra note 16, at 921, see also Mark Seidenfeld, & Jim Rossi, The False Promise of the "New" Nondelegation Doctrine, 76 NOTRE DAME L. REV. 1, 5-6 (2000).

\textsuperscript{18} LFPA, supra note 16, at 78-79; see also Decatur v. Paulding, 39 U.S. 497, 516 (1840).

\textsuperscript{19} Leedom v. Kyne, 358 U.S. 184, 190 (1958) (holding that courts must protect against "agency action taken in excess of delegated powers.").

\textsuperscript{20} LFPA, supra note 16, at 79-80.

\textsuperscript{21} Id.

\textsuperscript{22} Administrative Procedure Act, 5 U.S.C. §§ 701 (1)-(2), 704; see also LFPA, supra note 16, at 79-80.

\textsuperscript{23} J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

\textsuperscript{24} Id. at 409-411 (If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority."). See also Marshall Field & Co. v. Clark, 143 U.S. 649, 692-94 (1891) (explaining that non-delegation is an important way to keep the separation of powers under the Constitution intact, but that in this instance, because the President was not only carrying out the will of Congress, he was fulfilling his executive function rather than improperly legislating).

Supreme Court changed the way it articulated the standard to encompass the necessity for Congress to have “an ability to delegate power under broad general principles” in our “increasingly complex” and technical society, as long as the authority delineated in the statute is “specific and detailed.”

This standard showed that the Court’s principle concern in nondelegation cases had changed from the intelligible principle test where the statute that gave life to the agency embodied the standard, to institutional competence. However, the Supreme Court looked at the standard again in *Whitman v. American Trucking Associations, Inc.* and firmly returned to the original standard by saying that “when Congress confers decisionmaking authority upon agencies” through legislation, they must give the person or body concerned an intelligible principle to use in actions or decisions.

The most important concept to understand about judicial review of agencies is that the Supreme Court has determined that agencies have the ability to make legislative rules that have, in effect, the “force of law.” This means that courts may not “substitute their judgment” for that of the agency upon review. Interpretive rules on the other hand are an agencies interpretation of a statute which originally could be changed by a reviewing court. After the *Chevron* decision of 1984, however, judicial review of these policy determinations has become deferential as well. The Supreme Court decided that because these rules do not add anything to the congressionally enacted statute granting authority to the agency, and because they do not prescribe conduct, the agency is entitled to deference when making them.

Agency inaction in a given area is also accorded deferential review by the Supreme Court. A Supreme Court interpretation of the APA guidelines says that when there is agency inaction, unless the agency has failed to act in a duty mandated by law and the type of action the agency has allegedly failed to take is one listed in the APA guidelines, the Court will use an extremely deferential approach to an agency’s exercise of discretion. This deferential approach to agency action through legislative or interpretive rulemaking as well as to agency inaction has “set up free zones within which agencies can create and enforce obligations or standards that exceed statutory authorities and are unchecked by effective judicial review…leav[ing] affected citizens with scant recourse.”

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27 Mallen, supra note 25, at 426-27.
28 531 U.S. at 472.
29 Id.
30 Id.
33 Perch-Ahern, supra note 7, at 417-21.
34 Id. at 421.
A case that demonstrates this deference arose in Utah and came before the Supreme Court in 2004. The issue, as stated by the court was “whether the authority of a federal court under the Administrative Agency Procedure Act . . . [to] compel agency action unlawfully withheld or unreasonably delayed extends to the review of the United States Bureau of Land Management’s (BLM) stewardship of public lands.” This case dealt with the increasingly prevalent use of off road vehicles (ORV) in wilderness or back country areas. The Southern Utah Wilderness Alliance (SUWA) brought suit against the BLM because they claimed the BLM was not protecting Utah’s public lands from the damage caused by ORV use. Three of the claims SUWA made in its suit concerned the BLM’s failure to act. SUWA argued that it could bring suit under the APA provision which forces agencies to take action they have not taken or which is overdue.

Upon appeal, a divided Tenth Circuit stated that a “federal court . . . may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty,” and held that in this case the BLM had a nondiscretionary duty which it did not perform, thereby reversing the District Court decision. The Supreme Court granted certiorari to decide what, if any, limitations “the APA places upon judicial review of agency inaction.” The Supreme Court reversed the Tenth Circuit and determined that a court can compel an agency to take action only when there is a specific act the agency is legally required to take but which it has not taken and the BLM had not violated its mandate in this case. It further explained that the reason for that limitation is to protect an agency from “undue judicial interference with [its] lawful discretion, and . . . judicial entanglement in abstract policy agreements which courts lack both expertise and information to resolve.” This case shows that the Supreme Court is extremely reluctant to interfere with agency inaction.

In a recent Supreme Court case, Massachusetts v. EPA, the court primarily addressed standing. However, it also addressed the issue of an agency’s ability to deny a rule making petition, which is different from an agency’s decision not to act. With respect to the former, a petitioner, with the statutory right to do so,
requests that the agency makes a rule, which is then denied by the agency. The Supreme Court decided that the judicial review “scope…is narrow” in this instance, with the result that an agency’s decision not to enforce is ordinarily not reviewable by courts. However, they went on to say that when an agency refuses to enact a rule that is petitioned for, this is “subject to special formalities,” which coupled with the procedural rights of the petitioner, are susceptible to very narrow and extremely deferential review in which the court “may reverse any such action found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Supreme Court remanded the EPA decision in this case in order for the agency to explain its reasons for inaction or action based upon the statute. However the court did not say which way the agency should rule, and did not remark on whether policy concerns should influence the determination.

For a period of time the judiciary reviewed agency procedures with more vigor than they did substantive policies. This was known as hard look review. It arose out of a judicial doctrine that required an agency to take a hard look at all relevant data, including “underlying questions of policy and fact” before making a decision. The basic procedural guidelines used in agency decision making found in the APA were merely that the agency must give notice of a possible rule, receive comments from interested outsiders and once the rule was passed, accompany it with a concise and general statement about the basis and purpose of the rule. The hard look doctrine demanded that besides the records they keep, agencies must also look at all alternatives, relevant data, significant issues, and in the end “provide a detailed explanation of its conclusions” in case they were subject to judicial review. Courts expanded their review of the hard look doctrine by taking a hard look themselves as to whether the agency had complied with the APA and judicially imposed procedural requirements designed to prevent agency decisions from being arbitrary and capricious.

The Rehnquist Court, in large part, had a dubious attitude toward judicial power in general, and limited the role of judicial review in many areas, including that of agency decisionmaking. Indeed, of the four opinions Rehnquist wrote in agency cases, three of the four had “powerful statements that courts should leave

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48 Id. at 527.
49 Id.
50 Id. at 528 (citing 42 U.S.C. § 7607(d)(9)).
51 Id. at 535.
52 Id. at 534-535.
54 Id. at 257.
57 Kagan, supra note 3, at 2270.
58 Miles & Sunstein, supra note 55, at 762.
The Rehnquist Court believed that congressional decisions with respect to agencies were representative of the people’s will, and therefore should not be scrutinized too closely by courts, who are not entitled to substitute their decisions for that of the elected branch of government. This examination of judicial review demonstrates that judicial review is extremely deferential under all circumstances in regards to agency action or inaction.

II. THE LEGISLATIVE CHECK

A. Congressional Oversight

Turning to the legislative check on Executive Branch authority, the struggle between these two branches of government over control of agencies started in the New Deal era. It has continued through today with the Executive Branch in the ascendency at the present time. The original grant of legislative authority comes to Congress through Article I of the Constitution which says “all legislative powers herein granted shall be vested in a Congress of the United States.” From the beginning of the first Congress however, it was expected that legislation would be carried out by Officers in the executive “departments” under the President. Despite Congress not having the ability to delegate its legislative power under the Constitution, in practice Congress has delegated since the Constitution was adopted. Delegation was described by Chief Justice John Marshall, in 1825 as a subject “in which a general provision may be made, and power given to those who are to act under such general provisions.” Since there is no clarity as to what subjects must be regulated by Congress and which subjects can be given to others to regulate, there is disagreement about the ability of Congress to delegate at all.

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61 Herz, supra note 59, at 302-18.
63 Cleary, supra note 1, at 277-81.
64 Rosenbloom, supra note 4, at 175-77 (1998); see generally George B. Shepherd, Fierce Compromise: the Administrative Procedure Act Emerges from New Deal Politics, 90 NW. U. L. REV. 1557 (1996) (for an interesting look at the politics and battles between New Dealers and those who preferred the status quo, and their eventual turn to legislative help when judicial help failed).
65 Kagan, supra note 3, at 2249.
67 U.S. CONST. art. II, § 2, cl. 1 (“[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices”); see also LFPA, supra note 16, at 51.
68 LFPA, supra note 16, at 52.
70 Kagan, supra note 3, at 2255.
The non-delegation doctrine has only been used to invalidate delegation of power to an agency twice in the Supreme Court, both times in 1935.71

In the first case, President Roosevelt used his authority under the National Industrial Recovery Act (the Act) of 1933 to issue an Executive Order prohibiting petroleum and petroleum products from being transported “in interstate and foreign commerce” in excess of state allowed amounts.72 This was challenged on the grounds that it was an impermissible “delegation of legislative power.”73 The Supreme Court said that they needed to scrutinize the statute to determine whether Congress had “declared a policy with respect to that subject . . . [and] a standard for the President’s action.”74 The Justices stated that “Congress manifestly is not permitted to . . . transfer to others, the . . . legislative functions with which it is . . . vested” unless there are “prescribed limits and . . . facts to which the policy . . . is to apply.”75 The Court quoted the intelligible principle language from *Hampton* and then held that when there is no standard, rule, requirement, or “definition of circumstances and conditions in which the [action] is to be allowed or prohibited” the delegation is invalid.76

The second case also dealt with the National Industrial Recovery Act.77 Here the President, under the authority given to him by the Act, approved a Live Poultry Code for purposes of ensuring fair competition in the “live poultry industry” of New York City and the surrounding area.78 Schechter Poultry Corporation was convicted of a violation of the Code, and appealed based on various Constitutional theories, including an “unconstitutional delegation by Congress of legislative power.”79 Following its earlier decision in *Panama Refining*, the Supreme Court held that the Act gave the President unlimited discretion to “make whatever laws he thinks may be needed or advisable” to rehabilitate or expand trade and industry.80 This was deemed to be legislative power, and thus an unacceptable delegation of Congressional authority.81 Interestingly though, while the Court followed the holding of *Panama Refining*, it did not mention the intelligible principle language.

While Congress at first specifically delegated power to administrative agencies so that they “function[ed] as little more than transmission belts for implementing legislative directives,” they have not done this consistently.82 The earliest cases on the subject demonstrate the particularity with which directives

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72 *Panama Refining Co.*, 293 U.S. at 405-06.
73 *Id.* at 414.
74 *Id.* at 415.
75 *Id.* at 421.
76 *Id.* at 430.
77 *Schechter Poultry Corp.*, 295 U.S. at 521.
78 *Id.* at 523.
79 *Id.* at 519.
80 *Id.* at 537-38.
81 *Id.*
were given to the Interstate Commerce Commission, which dealt with transportation of goods via ship and rail.\textsuperscript{83} In determining that the power the Commission had was narrowly specified by Congress, the Court pointed out that a broader grant of power should never be implied from legislation (such as the power to fix tariff rates) as “the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication.”\textsuperscript{84}

However, this specific delegation soon became the broader grant of authority the \textit{Interstate Commerce Commission} Court worried about so that much of the power given to agencies is open-ended allowing the “relevant agency’s discretion” to decide major public policy matters.\textsuperscript{85} Once Congress makes these delegations they do not have an effective means of controlling what an agency does, and the means they do have, they do not use, whether through “lack of knowledge and interest” or because they don’t want to be responsible for “politically difficult decisions.”\textsuperscript{86} In addition, subsequent court decisions have made it clear that Congress is allowed to “give agencies policymaking powers with virtually no guidelines.”\textsuperscript{87}

One method Congress used to attempt to regulate agency activity in the twentieth century was the legislative veto.\textsuperscript{88} This was a vote of one branch of Congress which could be used to prevent agency action.\textsuperscript{89} Provisions allowing this method of control were added to federal statutes, as well as provisions that allowed for two house resolutions concerning agency action without subsequent presidential approval.\textsuperscript{90} The legislative veto was ruled unconstitutional by the Supreme Court because it did not follow the “explicit and unambiguous provisions of” Article I of the Constitution.\textsuperscript{91} That Article requires that any legislative action go before both the Senate and the House of Congress, and once passed then must be presented to the President for approval.\textsuperscript{92}

\begin{itemize}
  \item \textsuperscript{83} See Interstate Commerce Comm. v. Cincinnati, New Orleans, and Texas Pacific Railway Co., 167 U.S. 479 (1897) (discussing the cases that dealt with the subject and the history of Commissions in England and America).
  \item \textsuperscript{84} Id. at 494-95.
  \item \textsuperscript{85} Kagan, \textit{supra} note 3, at 2255; see also Whitman v. Am. Trucking Associations, 531 U.S. 457, 474 (2001) (holding that “even in sweeping regulatory schemes we have never demanded . . . that statutes provide a determinate criterion for saying how much of [the regulated harm] is too much.”); Mistretta v. United States, 488 U.S. 361, 372 (1989) (holding that “in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).
  \item \textsuperscript{86} Kagan, \textit{supra} note 3, at 2255-57.
  \item \textsuperscript{87} Garry, \textit{supra} note 16, at 958.
  \item \textsuperscript{88} INS v. Chadha, 462 U.S. 919, 944-45 (1983) (explaining that the first veto provision was used in 1932, and that since then, “295 congressional veto-type procedures have been inserted in 196 different statutes.”).
  \item \textsuperscript{89} Id.
  \item \textsuperscript{91} Chadha, 462 U.S. at 945.
  \item \textsuperscript{92} U.S. CONST. art. I, § 1, § 7, cl. 2, cl. 3; Chadha, 462 U.S. at 945-46.
\end{itemize}
Therefore, the only ability Congress has to oversee agencies now is statutory, requiring the full panoply of a bill in front of both houses, passage by two-thirds of the members of both houses and the approval of the President. \(^{93}\) In an attempt to address the slowness of this type of action Congress passed the Congressional Review Act (CRA) as a provision in the Small Business Regulatory Enforcement Fairness Act in 1996. \(^{94}\) In the first ten years of the CRA’s existence it was used once to disapprove an agency rule. \(^{95}\) Even if, as some commentators suggest, the scrutiny of five percent of the major rules passed in those ten years indicates that Congress has oversight of agency actions, that oversight is by no means thorough. \(^{96}\)

**B. The Congressional-Presidential Two Step**

The rise of the administrative agency pre-dates the passage of the APA in 1946. \(^{97}\) Indeed, even before the adoption of the Constitution, Congress established administrative committees to help with the execution of legislation. \(^{98}\) It wasn’t until the New Deal, however, that President Roosevelt saw the need for entities that could provide quicker and more flexible responses to national problems than Congress or the Courts were able to manage. \(^{99}\) President Roosevelt established the President’s Committee on Administrative Management (PCAM) which reported that the formation of so many new agencies “created a . . . headless fourth branch of government.” and proposed to remedy the situation by legal and institutional reforms that would put the President in charge. \(^{100}\)

Meanwhile, Congress sought to maintain “legislative supremacy,” by creating the APA after the explosion of growth and power in the Executive Branch. \(^{101}\) The fear was that Congress would lose its “constitutional place in the Federal scheme.” \(^{102}\) Congress therefore redefined its role in regards to agencies so that it could keep control over them. \(^{103}\) The APA was enacted ostensibly to clarify and define the relationship between agencies and the entities that were regulated by them, although the truth is that it was a compromise between pro New-Dealers (and thus pro Executive Power) and those who opposed the proliferation and

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\(^{96}\) *Id.* at 926.

\(^{97}\) Shepherd, *supra* note 64, at 1561 (“Before 1900, approximately one-third of present federal agencies already existed”).

\(^{98}\) Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 601 (1994) (describing how the 1775 Congress organized administrative committees to execute congressional directives).


\(^{100}\) Rosenbloom, *supra* note 4, at 174; see also Shepherd, *supra* note 64, at 1584-85.

\(^{101}\) Rosenbloom, *supra* note 4, at 173-97.

\(^{102}\) *Id.*

power of New Deal agencies (those who wanted to keep Congress on a level playing field). The APA’s passage also represented an expansive view of agencies as “extensions of Congress,” with corresponding congressional ability to delegate, regulate, and supervise. This enabled Congress to keep its place in the separation of powers. The Executive Branch, meanwhile, has continued to try to gain control over agency functions by using various devices which are described in the next section. Today it is increasingly clear that “[w]e live . . . in an era of Presidential administration.”

III. THE RISE OF THE PRESIDENTIAL ADMINISTRATION

The Office of Management and Budget started in 1921 as a part of the Department of the Treasury. That office was moved to the Executive Office of the President during the Nixon Administration, and was renamed the Office of Management and Budget (OMB). Its primary responsibility was to help the President prepare the federal budget and to oversee its implementation and administration in the agencies that come under the umbrella of the Executive Branch. Part of that responsibility today entails making sure that “agency reports, rules, testimony and proposed legislation are consistent with the President’s budget and with administration policies,” which was listed as the first goal in the OMB’s objectives in its 2006 Strategic Plan.

Presidents have two main executive tools that affect domestic policy. One is the executive order, and the other is the signing statement used by the President to assert that a bill should be changed, interpreted differently, or that a provision unconstitutionally encroaches upon the executive power. In the Bush II administration, the President has substituted the signing statement for his ability to veto, effectively “marginaliz[ing] the legislative . . . branch . . .” because Congress may not override a signing statement.

When a President wants to submit an executive order, he must first submit his proposed order to the OMB. Once the order goes through the approval procedure it is treated as if it were congressional legislation because “executive orders issued

104 Shepherd, supra note 64, at 1557-61.
105 LFPA, supra note 16, at 30-34.
106 Id.
107 Rosenbloom, supra note 4, at 189-192.
110 Kagan, supra note 3, at 2276.
113 Cleary, supra note 1, at 266-68.
114 Id. at 288.
115 Id. at 288-89.
pursuant to delegated authority, have the force of law in the same way as legislative rules” with regard to agencies. Critics have observed that these orders are a tool that allows presidential “legislation” to be made without congressional or public knowledge.

The effort to corral and coordinate agency regulation has continued from Roosevelt’s time through the various administrations up through the current one. Nixon started the ball rolling by creating the Domestic Council which devised policy advice on domestic issues. He also gave the OMB enhanced review powers over agency decisionmaking which in turn set the stage for a greater executive role in that decisionmaking. Ford and Carter also encouraged more inter-agency review processes, but these were treated by the agencies as “paperwork obligation[s]” rather than substantive ones. Therefore agencies still had legal and practical control of their own policy decisions until the Reagan administration took all but the most minimal regulatory ability by the agencies and put that under the oversight of the Office of Management and Budget through Executive Orders 12,291 and 12,498.

The express aim of President Reagan’s Executive Order 12,291 was to cut back “if not . . . destroy, the regulatory system established by Congress.” The result of the order was to gain an unprecedented level of control over the “administrative apparatus.” Executive Order 12,498 strengthened OMB’s oversight role, in essence “stop[ping] agency rulemaking before it began and . . . redirect[ing] the policy priorities of federal administrators” thus giving the OMB more control of policy decisions. Additionally, Reagan began using his appointment power to pick agency officials who were on the same wavelength politically and ideologically in order to exert more influence over regulations that were made, while simultaneously making it more difficult to make regulations at all.

The rise in procedures and requirements applied to informal rule-making starting with the APA and added to by Presidential Orders, and judicial doctrine have led to delays in adopting rules and a sort of inertia that has become increasingly “rigid and burdensome.” One analysis showed that the original

118 Cleary, supra note 1, at 287.
119 Rosenbloom, supra note 4, at 173-92.
120 Kagan, supra note 3, at 2276.
121 Kagan, supra note 3, at 2276.
122 Id.
123 Werhan, supra note 5, at 426-29.
125 Bagley & Revesz, supra note 124, at 1263.
126 Werhan, supra note 5, at 428-29.
“concise general statements” required of an agency were as little as one page long (the original Clean Air Act Amendments of 1970 as seen in the 1971 Federal Register), while the published part of a preamble to a 1987 revision of the Act was thirty-six pages long and was “supported by a 100-plus-page staff paper, a lengthy Regulatory Impact Analysis that cost the agency millions of dollars, and a multi-volume criteria document.”129 The length of time it takes to write the accompanying documents to a proposed agency rule which used to average about six months now can average five years or more with all the analytical steps added by the executive, judicial and legislative branches in the past thirty years.130

The first Bush Presidency continued the anti-regulatory policies that marked the Reagan White House by using the Council for Competitiveness as an oversight office of the OMB with then Vice President Quayle as the Chair.131 Although the Clinton Administration repealed Reagan’s Executive Order 12,291, when President Clinton signed Executive Order 12,866, he put agencies under the same oversight as Reagan had, but also added steps that comported with legal economic theory such as undertaking cost/benefit analyses of each regulation an agency contemplated as to monetary costs and benefits, social costs and benefits and a host of others.132 One result of this order plus the passage of the Paperwork Reduction Act of 1980 was the creation of the Office of Information and Regulatory Affairs (OIRA) within the OMB as the central office for the collection and dissemination of agency information.133

The OIRA is not insulated from public interest groups, contrary to the arguments of supporters of this agency.134 Because the OIRA does not fall under the APA, none of the provisions of that Act apply to it, including judicial review.135 If regulatory action is transferred to the OIRA, the federal judiciary is taken out of the process altogether.136 In addition, since there is no worry about potential judicial review, the OIRA does not keep records with the same care that agencies do under the APA.137 Considering that during the period from 1993–2000 only 10% of the meetings held by the OIRA in which outside parties could participate, involved “non-profit public-interest groups,” while 56% of the meetings had representatives of industry groups present, it is easy to see the ability of industry interest groups to gain easy access to the Executive Office.138

129 McGarity, supra note 128, at 1387.
130 Id. at 1400-07.
131 Bagley & Revesz, supra note 124, at 1310-11.
134 Bagley & Revesz, supra note 124, at 1308.
135 Id. at 1309.
136 Id.
137 Id.
138 Id. at 1306-07.
Clinton recognized that Reagan had set the stage for his ability to exercise “substantial control . . . over [the] regulatory state” and so maintained the structure put in place by Reagan while adding his own mark with the responsibilities given to the OIRA.139 The effect of his presidential directive was to pull the reins of agency ability firmly into the political purview of the White House and the Executive Branch by putting the Vice President in charge of advising regulatory policy recommendations.140

The Bush II Presidency during its first term solidified executive control over regulatory policy.141 The change with the most effect was the creation of the prompt letter, a tool used by the OIRA to proactively influence “agency regulatory policy” which in turn, allowed for the ability of the Executive to oversee rulemaking.142 The prompt letter is sent by the head of the OIRA to the head of an agency asking for the agency to undertake a regulatory action.143 This has had the effect of turning the traditionally reactive office into one that had significant power over changing regulatory policy, and allowing for the President to in turn promote his agenda through the OIRA.144 The result of the actions taken by the Presidents from Nixon onwards has been the increased ability of the Executive Office to not merely influence but suggest regulatory policy, thereby reflecting a particular political agenda. The last piece of the puzzle leading to too much control over agency policy is the Information Quality Act or Data Quality Act of 2000.

IV. THE INFORMATION QUALITY ACT

The final coincidental influence that helped the Executive Office’s ability to control agency power was the Information Quality Act of 2000 (IQA—also known as the Data Quality Act or the DQA).145 This little known Act was a “two-paragraph provision buried in an appropriations bill.”146 While there had been a growing concern in the Senate for a number of years about using cost/benefit analyses of data, coupled with an emphasis on the best available scientific practice,147 there was no discussion of this section prior to passage of the appropriations bill.148 The Act provided for the OIRA to issue government-wide

139 Id. at 1266-67.
142 Id.
143 Id.
144 Id. at 279 (“[P]articipation can...crowd out thoughtful analysis and political accountability and lead to strategic obfuscation” (emphasis added)).
145 Bagley & Revesz, supra note 124, at 1314.
147 Hecht, supra note 133, at 246-48.
guidelines for the dissemination of federal agency information.\textsuperscript{149} It also provided
the public a chance to challenge the information used to support regulatory activity
by an agency.\textsuperscript{150} The Act has been opposed by the American Association for the
Advancement of Sciences, the National Academy of Sciences, the National
Institutes of Health, the Council on Undergraduate Research and the Association of
American Universities, due to the “distorting influence” challengers to
disseminated information will generate.\textsuperscript{151} Comparisons can be drawn between the
standard allowing expert witness testimony to come before a court found in the
\textit{Daubert} case, which also restricted the entry of “junk” scientific evidence into
federal court cases, and the way the IQA influences the entry or restriction of
scientific evidence into agency regulations.\textsuperscript{152}

Early in his presidency, Bush II demanded that policy decisions be based on
“sound science” as a pretext for “delaying or junking scientific findings” that did
not support his agenda.\textsuperscript{153} Bush II conversely approved projects based on what
scientists argued were flawed scientific findings, such as the Yucca Mountain
Project, when they did support his agenda.\textsuperscript{154} Agencies can refuse to regulate based
on the scientific uncertainty of data, potentially leading to “pro-business, laissez
faire regulation at the expense of protecting the health, safety, and well-being of
the general public.”\textsuperscript{155} The mandate given to the IQA only allows “objective”
information to be used when disseminated by agencies.\textsuperscript{156} The guidelines provide
for a rebuttable assumption that peer reviewed data is acceptably objective.\textsuperscript{157}
Additionally, all studies that agencies rely upon when passing regulations in the
areas of health, safety or the environment require the use of the “best available
peer-reviewed” science.\textsuperscript{158} In 2004, the OIRA promulgated a new policy that said
point blank that all information intended for dissemination not only be peer
reviewed, but that information that is \textit{highly} influential (novel, controversial, or
potentially costing $500 million in one year) must be peer reviewed according to
standards that are not left to the agencies discretion.\textsuperscript{159} Even so, the OIRA allows

\textsuperscript{149} Hecht, \textit{supra} note 133, at 245-46.
\textsuperscript{150} 44 U.S.C. § 3517(b) (2006); \textit{see also} Hecht, \textit{supra} note 133, at 234 (“\textit{[T]he DQA provides}
an unprecedented channel through which both individual citizens and industries may challenge types
of agency action that had long been immune from legal scrutiny.”), Stuart Shapiro, \textit{supra} note 141, at
281 (explaining how the IQA provides another means of challenging agency action).
\textsuperscript{151} Donald T. Hornstein, \textit{Science in the Regulatory Process: Accounting for Science: the
Independence of Public Research in the New, Subterranean Administrative Law}, 66 LAW &
CONTEMP. PROBS. 227, 228 (2003).
\textsuperscript{152} Hecht, \textit{supra} note 133, at 262-66; \textit{see also} Daubert v. Merrell Dow Pharmaceuticals, 509
U.S. 579 (1993) (giving judges the “gatekeeping” function of deciding if expert scientific and
technological testimony is well founded).
\textsuperscript{153} David S. Caudill, \textit{Symposium: Images of Expertise: Converging Discourses on the Use and
Abuse of Science in Massachusetts v. EPA}, 18 VILL. ENVTL. L.J. 185, 195-96 (2007).
\textsuperscript{154} \textit{Id}.
\textsuperscript{155} Hecht, \textit{supra} note 133, at 234-35 (writing an entire section entitled “Industry and Business
Groups: Decidedly in Favor of the DQA,” at 258).
\textsuperscript{156} \textit{Id} at 254.
\textsuperscript{157} Bagley & Revesz, \textit{supra} note 124, at 1314-15.
\textsuperscript{158} Hecht, \textit{supra} note 133, at 256.
\textsuperscript{159} \textit{Id}.
for any interested party to have an opportunity to “challenge” the objectivity after
the information has been used or disseminated. The peer review process,
however, imposes a burden on agency information dissemination that has resulted
in further delay, additional cost, less reliance on rulemaking, more emphasis on
“informal adjudication when protect[ing] health, safety, and the environment,” and
sometimes a refusal to disseminate information to the public altogether.

Finally, the Office of Science and Technology Policy (OSTP) which is the
main scientific and technological advisory board to the President, is another means
by which the Executive Office potentially can influence agency action that relies
on scientific data. OSTP’s mandate calls for it to “serve as a source of scientific
and technological analysis and judgment for the President with respect to major
policies, plans, and programs of the Federal Government.” Its director was a
senior staff member to the President who participated at the highest level of
presidential policy making. While the guidelines themselves bend over
backward to make it clear that the OSTP is an objective organization that merely
ensures that agency information dissemination comports with OMB guidelines, it
was clear that the director of the OSTP was a mouthpiece for Bush II policies.

V. IS THERE ANYTHING THAT CAN BE DONE?

While there are some indications that the balance may be swinging back,
those indications are not conclusive. The recent Supreme Court case Massachusetts v. EPA shows some of the influences brought to bear on the EPA by
the Executive Office in the realm of climate change and carbon emissions, and
perhaps a Supreme Court reaction to that influence. In that case, a group of

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160 Hecht, supra note 133, at 256.
161 Stephen M. Johnson, Information Regulation: Controlling the Flow of Information to and
from Administrative Agencies: Junking the “Junk Science” Law: Reforming the Information Quality
162 See OMB Watch, OMB Bulletin on Peer Review: Making Science Vulnerable to Political
Manipulation (2003), http://www.ombwatch.org/node/1562 (discussing the influence politics will
have over science as a result of the peer review required under the OMB and the OSTP) (last visited
Apr. 12, 2009).
164 Office of Science and Technology Website, http://www.ostp.gov/cs/compliance_guidelines
/freedom_of_information_act/Mission (OSTP's Senate-confirmed Director also serves as Assistant to
the President for Science and Technology. In this role, he co-chairs the President's Committee of
Advisors on Science and Technology . . . and supports the President's National Science and
Technology Council) (last visited Apr. 12, 2009).
165 See generally Chris Mooney, John Marburger on the Defensive, (Feb. 28, 2006),
http://scienceblogs.com/intersection/2006/02/john_marburger_is_getting_real.php (last visited Apr.
12, 2009); CNN.com, Scientists: Bush Administration Distorts Research, (Feb. 19, 2004),
http://edition.cnn.com/2004/ALLPOLITICS/02/19/scientists.bush.ap/index.html (last visited Apr. 12,
2009); Dennis Wingo, Some thoughts Regarding Presidential Science Advisor John Marburger’s
?id=1116 (last visited Apr. 12, 2009).
called for by the President on the “greatest certainties and uncertainties” in the science of climate
petitioners filed a rulemaking petition requesting that the EPA regulate auto emissions under § 202 of the Clean Air Act, which granted the EPA that power, as confirmed in 1998 in a legal opinion by the EPA’s General Counsel. The EPA had still declined to exercise that authority, however, when the Massachusetts v. EPA suit was filed. In January 2001, the EPA opened a public comment period specifically requesting scientific and technical comments. Before the comment period closed, the White House asked for the National Research Council (NRC) to identify the areas in climate change science that held the greatest uncertainties. Because the NRC report asked for by the White House said that there was no unequivocally established causal link between greenhouse gases and rising global temperatures, and because the EPA stated that any regulation would “conflict with the President’s ‘comprehensive approach’ to the problem,” including the President’s negotiations with foreign countries, the EPA declined to make a regulatory rule as requested by the petitioners.

The Court said that “while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws,” thus acknowledging his influence over the EPA’s decision. As this decision shows, while generally the Supreme Court takes a very deferential approach to agency decisions, under certain limited situations the Court will overturn them. The Court did not address whether the role the Executive Office played in influencing the EPA decision was one such situation. However, the court held that an agency decision not to regulate is judicially reviewable under the arbitrary and capricious standard from the APA. Additionally, some commentators suggest that the “expansive deference” accorded presidential control over administrative agencies has recently been reconsidered by the Supreme Court in this decision.

Another sign of an evening out of the power imbalance between the branches was seen in recent congressional activity, in particular from the Committee on Oversight and Government Reform. In the report of that committee’s activities for years 2007–2008, Representative Waxman, the Majority Head of the Committee at change, the EPA, contrary to its former stance said that the Clean Air Act did not allow for rulemaking on emissions that had global implication as Congress had specifically passed the act in order to curb local emissions. The EPA also said that even if it could regulate those pollutants, this was not a good time to do so.

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167 Id.
168 Id.
169 Id. at 511.
170 Id.
171 Id. at 513; See also Michael Sugar, Massachusetts v. Environmental Protection Agency, 31 Harv. Envtl. L. Rev. 531, 537-40 (2007) (stating that causation was attenuated because there was no direct rise in temperature that directly attributable to an increased emission).
172 Mass. v. EPA, 549 U.S at 534.
173 Sugar, supra note 171, at 539.
174 The Supreme Court, 2006 Term - Leading Cases: Federal Statutes and Regulations – Review of Administrative Action – Limits on Agency Discretion, 121 Harv. L. Rev. 415, 415-21 (2007) (describing Massachusetts v. EPA as a recent case to show an “emerging shift away” from Chevron deference and toward a more focused look at agency action while simultaneously looking suspiciously at arguments that Presidential control over agencies should be expansive).
that time, said that among other concerns he would be looking into abuses of power:

Another subject of significant House oversight will be the limits and use of executive power. The Committee on the Judiciary will look into a variety of concerns regarding unilateral exercise of authority, particularly where it affects individual rights and liberties. The Committees on Armed Services and Intelligence will review issues relating to the implementation of the Military Commission Act and the detention policies of the U.S. Military. In addition, the Permanent Select Committee on Intelligence plans to conduct an in-depth review of the President’s NSA Surveillance Program. Both the Permanent Select Committee on Intelligence and the Committee on Oversight and Government Reform plan to examine the classification, over-classification, and selective declassification of executive branch material. Finally, the Committee on Appropriations will review budget requests for and the execution of intelligence activities.¹⁷⁵

By contrast, during the five previous Congresses, the Committee on Oversight did not fulfill this important responsibility with respect to the Executive Branch.¹⁷⁶ In his capacity as head of the minority position on the Oversight Committee in the report of upcoming activity for the years 2005–2006, Representative Waxman, speaking on behalf of a group of House members, said “we are concerned that Congress is not conducting meaningful oversight of the Bush administration.”¹⁷⁷ As its actions have repeatedly shown, the Bush II administration liked to operate in secret with little public or congressional oversight. This is not healthy for our democracy. In 2003, Waxman said “[t]he majority has failed to recognize the important role Congress should play in examining questionable activities by officials,” and in regard to science added “Congress should also conduct oversight of the administration’s inclination to place politics ahead of science in multiple areas. For example, the administration has removed valuable information from public health web sites, replaced respected scientists on scientific advisory boards, and based policies on misleading data.”¹⁷⁸ If this oversight has teeth to it, it may help to restore a power balance between the branches of government.

¹⁷⁷ Id.
VI. CONCLUSION

The dangers posed by the presidential administration may only occur when the other checks on the Executive Branch are weak. As demonstrated in this note, when the Congress belongs to the same party as the President and so chooses to uphold his political agenda, coupled with deferential judicial review over both agency and Executive Branch actions, there is little judicial or congressional check on the Executive. In addition, treating scientific data as unusable unless certain leads to a politicization and potential for manipulation of agency regulation, which in turn leads to serious consequences for our nation. It is only to be hoped that the Obama administration recognizes that danger and does not fall victim to the same problems.