

A R T I C L E

The President's Budget as a Source of Agency Policy Control

by Eloise Pasachoff

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I. Introduction

One of the secrets only the initiated know is that those who labor here [at the Office of Management and Budget] for long do so because the numbers are the keys to the doors of everything. Spending for the arts, the sciences, foreign policy and defense, health and welfare, education, agriculture, the environment, everything—and revenues from every source—all are reflected, recorded, and battled over—in numbers. And the sums of the numbers produce fiscal and monetary policy. If it matters—there are numbers that define it. And if you are responsible for advising the president about numbers, you are—de facto—in the stream of every policy decision made by the federal government.

—Paul O'Neill, *Former Deputy Director of OMB*.¹

Scholarship on administrative law is replete with analysis of presidential control of executive agencies through centralized review of regulations in the Office of Information and Regulatory Affairs (OIRA), part of the White House's Office of Management and Budget (OMB). While the literature is sharply divided as to whether OIRA's control is salutary or dangerous, the literature largely shares an underlying framework within which the subject matter is discussed: it tends to focus on regulations as the primary lever through which OMB affects agencies' policy choices.

This portrayal of OMB as an institution for asserting presidential control over the administrative state is incomplete. Reviewing regulations is not the only policy lever OMB has to control executive agencies' policy choices. In fact, it may not even be the main one. The budget itself—the core reason for OMB's existence—is a key tool for controlling agencies.

This Article expands the view of centralized control of the administrative state by describing, categorizing, and analyzing the processes by which OMB uses the budget to get “in the stream of every policy decision made by the federal government.”² The Article then assesses OMB's budget work against administrative law values and offers recommendations for how this work can better foster accountability.

II. OMB's Control of Agency Policymaking Through the Budget Process

At the core of OMB's budget work are five Resource Management Offices (RMOs). Together, the RMOs oversee the entire administrative state—cabinet departments, other executive agencies, and independent agencies—in groups organized by subject matter: Natural Resource Programs; Education, Income Maintenance, and Labor Programs; Health Programs; General Government Programs; and National Security Programs.³

Almost half of OMB's 435 employees work in the RMOs.⁴ At the helm of each RMO is a political appointee—not Senate confirmed—called a Program Associate Director or PAD.⁵ The RMOs are further organized into distinct divisions, each run by a career member of the Senior Executive Service, called a Deputy Associate Director, or DAD.⁶ Each division is then split into branches run by a career official called a branch chief.⁷ The remainder of the staff members within each branch are called program examiners, with primary oversight responsibility over part of a large agency, several smaller agencies, or some combination thereof.⁸ In keeping with the high expectations for RMO staff in general, program examiners tend to be

*This Article is adapted from Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016), and is reprinted with permission.*

1. Bernard H. Martin, *Office of Management and Budget*, in *GETTING IT DONE: A GUIDE FOR GOVERNMENT EXECUTIVES* 72 (Mark A. Abramson et al. eds., 2013).

2. *See id.*

3. Office of Management and Budget Organizational Chart, U.S. GOV'T MANUAL, <http://perma.cc/YWL6-LBT9>.

4. *See* SHELLEY LYNNE TOMKIN, *INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET* 12 (1998).

5. *See id.*

6. *See id.* at 12–13.

7. *See id.* at 13.

8. *See id.*

highly credentialed.⁹ They are also often (although not always) relatively junior in their careers.¹⁰

The core of the RMOs' work tracks three distinct parts of the budget process: *budget preparation*, during which the RMOs work with the agencies under their authority to guide the development of their budget proposals; *budget execution*, during which the RMOs ensure that agencies implement the budget in accordance with legislative requirements and the President's priorities; and *management implementation*, which requires the RMOs to ensure that agencies implement various management requirements as the new budget is prepared and the previous budget is executed.¹¹ These three aspects of the budget process structure give the RMOs a great deal of authority over agency action.

A. The Mechanisms of Control Through Budget Preparation

The Congressional Budget Act of 1974 requires the President to submit a detailed budget proposal early each year.¹² In anticipation of this deadline, agencies submit their budget requests to OMB in early fall. OMB then spends the next few months considering these requests, asking agencies to justify them, and often ultimately modifying them as OMB consolidates a budget proposal for the whole federal government.¹³

OMB has three levers that affect agency policymaking during the budget-preparation process: (1) a *form-and-content lever*, under which OMB sets *ex ante* requirements for the budget and policy proposals that agencies must submit for OMB's review; (2) an *approval lever*, under which OMB must consent to those budget and policy requests *ex post*; and (3) a *confidentiality lever*, under which OMB restricts what agencies may disclose about this process.

I. The Form-and-Content Lever

The first lever that OMB can use to control agency policymaking through budget preparation is the ability to tell agencies what they should put in their budget requests in the first place (the content) and how they should convey this information (the form).

OMB operationalizes its form-and-content lever through two sets of documents. The first is OMB Circular

lar A-11, titled *The Preparation, Submission, and Execution of the Budget*.¹⁴ With two major exceptions discussed below,¹⁵ large parts of this 900-page document are technical and do not play a substantial role in controlling agency policymaking.

However, the other set of documents through which OMB uses the form-and-content lever—memoranda issued by the OMB Director to provide more specific guidance to agencies on what their budget submissions should include—can play a significant role in shaping agency policymaking.¹⁶ Among other things, Directors' budget memoranda can instruct agencies to justify their programs in light of particular presidential priorities. Not surprisingly, these initiatives vary significantly according to the preferences of the current President.

2. The Approval Lever

The form-and-content lever derives its strength from the fact that OMB must ultimately approve the agencies' budget requests. In other words, under the form-and-content lever, OMB tells agencies what to include in their budget requests before agencies draft them, while under the approval lever, OMB tells agencies how those initial drafts must be modified before they can be transmitted to Congress. The approval lever functions both at a broad level, securing overall agency compliance with the President's general policy preferences, and at a narrow level, governing budget and policy choices in discrete line items.

3. The Confidentiality Lever

A third lever OMB uses to control agency policymaking through the budget preparation process is the confidentiality lever: the requirement that agency officials silence their own differing preferences and, if those preferences become known, distance themselves from them.¹⁷ As a result, the confidentiality lever limits agencies' ability to state publicly their own views of alternative budget and policy priorities.

B. The Mechanisms of Control Through Budget Execution

OMB's role in the budget process does not end when Congress passes and the President signs the annual appropriations bills (or, in more recent years, continuing resolutions). OMB is intimately involved in budget execution—the way

9. See Gordon Adams, *The Office of Management and Budget: The President's Policy Tool*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 55, 61 (Roger Z. George & Harvey Rishikof eds., 2011).

10. See Tomkin, *supra* note 4, at 13, 23–24.

11. Office of Mgmt. & Budget, Exec. Office of the President, *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, <http://perma.cc/RQX4-PRRP>.

12. See 31 U.S.C. §1102, §1105(a) (2012).

13. See, e.g., ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 97–99 (3d ed. 2007).

14. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2014), <http://perma.cc/M3QW-7M5N>.

15. See *infra* Part II.A.3. (discussing the confidentiality lever) and II.C.2. (discussing the budget-nexus lever).

16. See SCHICK, *supra* note 13, at 96.

17. See OMB CIRCULAR NO. A-11, *supra* note 14, §22, at 1.

federal agencies carry out their work under the budgetary authority they have been granted. OMB affects budget execution through two different levers: the formal *specification lever*, through which it “apportions” and otherwise defines how agencies spend the funds Congress has appropriated, and the informal *monitoring lever*, through which it oversees agencies’ implementation of their programs.

I. The Specification Lever

Before agencies can spend the funds that Congress has appropriated, OMB must “apportion” them by specifying how much may be expended, when it may be expended, and even to some extent how it may be expended.¹⁸ The apportionment power gives OMB a regular opportunity to control how agencies conduct their operations. The RMOs take the lead in this responsibility.¹⁹

Another tool of the specification lever allows OMB to exert influence when agencies seek to change an aspect of Congress’s appropriation. For example, agencies may seek to transfer funds from one account to another or to reprogram funds from one purpose to another within the same account.²⁰ OMB must approve the request before the agency can discuss transferring or reprogramming funds with the relevant congressional committees.²¹ This process, too, gives the RMOs a way to influence where the agency directs its funds.

The specification lever is also at work in the less frequent instances when the President proposes to defer or rescind the use of appropriated funds under the Congressional Budget and Impoundment Control Act of 1974.²² Deferrals and rescissions are a way for the White House to control agencies, as an individual agency must provide OMB with the material it requests in support of the President’s formal “special message” to Congress requesting deferral or rescission.²³

2. The Monitoring Lever

The RMOs also become intimately involved with agencies’ policy choices using the monitoring lever, through which the RMOs oversee agencies’ implementation of their programs. This lever is among the most ambiguous because it is informal; it is not governed by any particular legal source but exists in light of the RMOs’ formal duties.

The monitoring lever can manifest itself in frequent communication between agency policymaking officials and RMO program examiners.²⁴ Agency documents

reflecting policy choices, such as grant criteria and other allocative decisions, may be significantly revised by the RMOs and sent back to the agency to incorporate changes.²⁵ Even when not actively changing documents, the program examiner may ask questions that require agency policy officials to justify or modify their initial decisions.²⁶ Agency policy officials may also reach decisions in anticipation of the RMOs’ requests or collaboratively, as part of a regular phone call or meeting.²⁷

C. The Mechanisms of Control Through Management Initiatives

Over the last 25 years, management has become a more integral part of OMB’s work, “provid[ing] a way for the White House to influence the implementation of its policy agenda.”²⁸ Two such levers exist: the *Presidential Management Agenda lever*, which sets forth presidential initiatives ostensibly designed to improve the administration of government but that often have a substantive policy overlay, and the *budget-nexus lever*, which connects these management initiatives to the budget process.

I. The Presidential Management Agenda Lever

Management initiatives are not simply neutral, technocratic procedures. As political scientist Andrew Rudalevige put it when describing the way President Nixon’s political advisors originally viewed the “M” in OMB, management was not to be “boring public administration theory” but rather “management in the get-the-Secretary-to-do-what-the-President-needs-and-wants-him-to-do-whatever-he-likes-it-or-not sense.”²⁹ To that end, management initiatives often either explicitly contemplate substantive policy choices or implicitly lead to them. Management initiatives are also intricately intertwined with political decisions. The Presidential Management Agenda (PMA) exemplifies this dynamic.

2. The Budget-Nexus Lever

Management initiatives also serve as a form of policymaking control because they are directly tied to the RMOs’ work on the budget, and the budget has the levers for policymaking control described in Sections II.A and II.B above.

The PMA is tied to the budget in part because OMB’s budget instructions direct agencies to embed the initiatives set forth in the PMA in their budget requests.³⁰ The PMA

18. SCHICK, *supra* note 13, at 276–77.

19. OMB CIRCULAR No. A-11, *supra* note 14, §120.15, 120.19, 120.29, 120.33, 120.61, at 10, 12, 14, 16, 24.

20. SCHICK, *supra* note 13, at 281–82.

21. OMB CIRCULAR No. A-11, *supra* note 14, §22.3, at 2–3.

22. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.); SCHICK, *supra* note 13, at 284–89 (explaining that a deferral “delays the use of funds” while “rescission cancels budget authority”).

23. OMB CIRCULAR No. A-11, *supra* note 14, §112.6, at 3.

24. See JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 171–73 (2014).

25. See *id.* at 172.

26. See Martin, *supra* note 1, at 72.

27. See HUDAK, *supra* note 24, at 171–72.

28. Beryl A. Radin, *Overhead Agencies and Permanent Government: The Office of Management and Budget in the Obama Administration*, 7 FORUM, no. 4, at 5 (2009).

29. ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 61 (2005).

30. OMB CIRCULAR No. A-11, *supra* note 14, §31.8, at 4.

is also tied to the budget because of requirements in the PMA itself to link budget and management.

III. Assessing OMB's Control of Agency Policymaking Through the Budget Process

While there are some salutary aspects of OMB's control of agency policymaking through the budget process, several aspects of the RMOs' work nonetheless raise accountability concerns.

A. Salutary Aspects

I. Legality

Unlike the OIRA regulatory review process, the legality of which continues to be debated,³¹ there is little doubt that the RMOs' work on budgets and management is legal.

The RMOs' work is defensible under both major understandings of executive power. Proponents of the unitary executive, focusing on the "pre-ratification historical context" as an aid to understanding the original public meaning of the Constitution, might point to Alexander Hamilton's listing with "no distinction" the "command of foreign negotiations, preparation of a budget, spending appropriations, direction of the army and navy, direction of a war, 'and other matters of a like nature'" as core to the executive power of Article II.³²

The RMOs' work would likely pass muster with pluralists as well. Focusing on the extent to which Congress has invested the President with authority to "control the policy discretion of other administrators,"³³ a pluralist might point to the delegation to the President to "prepare budgets of the U.S. Government," "prescribe the contents . . . in the budget," and "change agency appropriation requests."³⁴ The President has statutory authority to delegate these tasks to the Director of OMB, as a Senate-confirmed official, under the Presidential Subdelegation Act of 1950.³⁵ OMB further has specific statutory authority both to work under the President's "direction" to administer the office³⁶ and to promulgate and oversee management policies for the executive branch.³⁷

2. Coordination

OMB's control of agency policymaking through the budget process can also be praised for coordinating across the vast administrative state. From the perspective of administrative law values, coordination is useful to the extent it furthers other goals supporting the legitimacy of the administrative state, such as efficiency, effectiveness, and accountability.³⁸ Much of the RMOs' coordinating work supports the first two of these values and to some extent the last one as well.

For example, some of the RMOs' coordinating work promotes *efficiency*, both within OMB itself and within agencies. The RMOs' coordinating work may also support the *effectiveness* of agency action. The whole point of this work is to ensure that agencies have the resources they need to do their jobs well and that they are managed and monitored appropriately. The high caliber of the OMB staff helps further this goal.³⁹

Still other aspects of the RMOs' coordinating work support some form of *accountability*, including the public nature of the President's budget, PMA, and agency budget justification materials. However, the RMOs' coordinating work supports accountability only at a high level of generality related to the published products that result. As the rest of this Part argues, the RMOs' work raises significant accountability concerns in terms of its process.

B. Troublesome Aspects

There are three troublesome aspects of the RMOs' work related to the issue of accountability—that is, "the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation."⁴⁰ First, there is a lack of transparency in the way the RMOs' work is conducted and the substance of what they discuss. Second, the RMOs' work can elevate OMB's civil servants and lower-level political appointees over Senate-confirmed agency officials, and the ultimate lines of responsibility are ill-defined. Third, the RMOs' seemingly technocratic work on the budget can obscure value-driven or partisan decisionmaking. All three issues make it difficult for Congress and the American public to hold agencies, OMB, and the White House more generally accountable.

I. The Lack of Transparency

Many parts of the budget process remain hidden. We do not know, for example, when, which kind, and how many meetings between the RMOs and agencies occur;

31. See, e.g., Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 367 (2014); Peter L. Strauss, *Overseer, or 'the Decider'?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703 (2007).

32. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 603, 615 (1994).

33. PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 35 (2009).

34. 31 U.S.C. §§1104(a), 1104(b), 1108(b)(1) (2012).

35. 3 U.S.C. §301 (2012).

36. 31 U.S.C. §502(a) (2012).

37. *Id.* §503(b).

38. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1083–94; Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1181–91 (2012).

39. TOMKIN, *supra* note 4, at 23–24; Adams, *supra* note 9, at 61.

40. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005).

what interest groups or other administration officials meet with the RMOs, what the meetings are about, and who is present during such meetings; what kinds of agency policy work interest the RMOs; how often and what kind of apportionment conditions are used; and how all of the above might vary by administration, by OMB Director, by PAD, by program examiner, or by agency.

Much of the substance of these interactions remains hidden, too. For example, only the agency and its RMO see the contents of the agency's original budget request to OMB. PADs offer no public statement of their different priorities when they step into their roles. Additionally, there is no public documentation or acknowledgment when agency policies change in response to the RMOs' encouragement or requirement.

OMB offers two rationales for the confidentiality it requires of agencies. First, it contends that "[p]olicy consistency" is necessary within the executive branch.⁴¹ Second, it suggests that the "institutional interests . . . implicated by [the] disclosure" of confidential budget documents militate in favor of confidentiality.⁴² Such institutional interests include protecting "the deliberative process of the government" by permitting government officials "to express their opinions freely . . . without fear of publicity [that might] . . . inhibit frank discussion of policy matters and likely impair the quality of decisions."⁴³ To that end, the Freedom of Information Act (FOIA) exempts from disclosure documents that are deliberative and predecisional,⁴⁴ like agency-OMB budget discussions.

While each of these rationales has some validity, neither can justify the extent of opacity in the budget process. In addition, neither rationale appropriately distinguishes the substance of predecisional deliberation from information about the procedural aspects of deliberation and the final post-deliberation decisions.

a. Protecting Policy Consistency

First, "policy consistency" does not require a pretense that an agency and OMB never diverged over the appropriate agency budget and policy request. Currently, OMB directs agency witnesses testifying before Congress, if asked about their interest in appropriations beyond the scope of the President's request, to explain that such interest is "not appropriate," since "witnesses are responsible for one or a few programs, whereas the President is responsible for all the needs of the Federal Government."⁴⁵ This explanation, however, could also disclose the backstory of the agency's budget request.

Witnesses could note prior views while avowing conversion to the President's proposals.

In some cases, though, masking disagreements about the implications of budgetary choices might place agency officials in the position of speaking untruths to Congress. Officials do not always come to believe that the final decision was right. Agency officials could say that they understand the President's request for their agency in light of the entire government's needs without having to claim that the President's request for their agency will accomplish what they believe it will not. OMB's current confidentiality requirements discourage this kind of honesty.

A second reason that greater disclosure of the intra-executive budget process may promote accountability is that such disclosure could deter self-dealing or one-sided dealing.⁴⁶ Recent political science scholarship has shown a correlation between the President's political interests and the distribution of federal funds. One study found that swing states receive more grants and a greater dollar amount in grants than non-swing states, especially around presidential election cycles.⁴⁷ As the author of this study concludes, "[P]residents engage in pork barrel politics."⁴⁸ Another group of political scientists found that districts receive more federal funding when they are represented in Congress by members of the President's own party.⁴⁹ These authors explain, "For an artful president intent upon redirecting federal outlays to a preferred constituency, the opportunity for mischief is substantial."⁵⁰

b. Protecting the Deliberative Process

OMB's second rationale for requiring secrecy in the intra-executive budget context—protecting the integrity of the government's decisionmaking process—similarly does not justify the full extent of secrecy employed.

The mere existence of a FOIA exemption for documents that reveal the government's deliberative process is no reason to require withholding of those documents. As Attorney General Holder explained in a memorandum sent to agency heads early in the Obama Administration, "an agency should not withhold information simply because it may do so legally."⁵¹

The real question is whether it would help or hinder deliberation to disclose predecisional budget documents that reveal the development of OMB's and agencies' thinking. The deliberative costs associated with too much transparency include entrenching positions rather than letting parties develop more nuanced ideas through conversation; silencing good ideas for fear of being publicly

41. OMB CIRCULAR NO. A-11, *supra* note 14, §22.3, at 2.

42. *Id.* §22.5, at 3.

43. Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (internal quotations omitted).

44. FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5) (2012).

45. OMB CIRCULAR NO. A-11, *supra* note 14, §22.2, at 2.

46. ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 181 (2007).

47. HUDAK, *supra* note 24, at 46, 50.

48. *Id.* at 3.

49. Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 783 (2010).

50. *Id.* at 786 (internal quotation marks omitted).

51. Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, to Heads of Exec. Dep'ts & Agencies, The Freedom of Information Act (FOIA) 1 (Mar. 19, 2009), <http://perma.cc/GUP4-D9KJ>.

rejected or pilloried; and driving deliberation underground, further out of sight, through mechanisms developed to avoid whatever transparency regime is imposed on unwilling participants.⁵²

These are serious concerns. However, there are costs to the current system of opacity. As Lisa Heinzerling has noted in the context of OIRA's lack of transparency, opacity in government limits "people from understanding the way their government operates, how they can intervene and at what points, what the government is up to, who is making important decisions, [and] why the government has made those decisions."⁵³

These costs suggest that some recalibration of the current regime is worthwhile. At the very least, OMB's reliance on the interests implicated by the deliberative process applies only to the content of documents. It does not apply to the confidentiality that exists around procedural aspects of the intra-executive budget process. Similarly, OMB's confidentiality rationales do not extend to post-deliberative decisions like budget execution decisions.

2. The Role of Civil Servants and Political Officials

A second concern involves the players engaged in effectuating OMB's control. Contrary to the usual understanding of power in the administrative state, where higher-level political officials have authority over both lower-level political officials and the civil service, OMB civil servants and lower-level political appointees can supersede the policy goals of Senate-confirmed agency officials. This reversal of expectations impedes accountability and is exacerbated by the lack of transparency discussed above.

One conventional concern about White House control over agency policymaking is that high-level presidential advisors may direct agency officials to take actions that are illegitimate.⁵⁴ Another view is that the White House achieves some of these same goals by nominating ideologically partisan political appointees who will head agencies without being swayed by "civil-service-led resistance to their preferred policies."⁵⁵

Relatedly, the value of civil servants in agencies is thought to be their ability to "resist and redirect agency leaders intent on shortchanging procedures, ignoring or downplaying congressional directives or scientific findings, or championing unvarnished partisan causes."⁵⁶

The RMOs complicate this view. On the one hand, it is civil servants, not political appointees, who take a front-

line position in directing agency action. To be sure, these civil servants are also bound by professional norms, with loyalty to the institution of the presidency rather than to any political party. And most of the time, RMO staff work with agency civil servants. But RMO staff hardly serve a checking function over political or politicized activity; to the contrary, their very job is to ensure that agency policy is consistent with presidential priorities.

On the other hand, while there are political appointees at the top of the RMOs, they are not Senate-confirmed. The PADs are even less transparent and more powerful than the so-called "czars" that received so much attention, much of it negative, in the early Obama Administration.⁵⁷

The relationship between RMO staff and agency staff has troubling implications for accountability, especially in light of the transparency problems discussed above. At the agency level, one "[k]ey element[] of accountability" is "the requirement[] that administrators appear annually before Congress in order to justify their budget requests and respond to periodic demands from congressional oversight committees to explain and justify their decision making in public testimony."⁵⁸ But if all agency officials can offer is what OMB has told or permitted them to say, any reward or punishment the agency receives will not be fully grounded in reality. Accountability is also compromised within OMB itself, because the public and Congress have no way of knowing what the RMO are doing behind the scenes.

The President can also use the RMOs to avoid accountability. As Richard Neustadt observed almost sixty years ago, when "[t]he voice that speaks is not the President's . . . [but] the Budget Bureau's[.] . . . when need be, the Budget serves as whipping-boy."⁵⁹ Instead of claiming the RMOs' decisions, the President can "blam[e] a nameless OMB bureaucrat five levels down from the top."⁶⁰

3. The Policy and Political Implications of Technocratic Decisions

These critiques would matter less if the budget were simply a dry, neutral document about numbers. But, of course, that is not the case: "[B]udgeting is a political decision influenced by the political content of programs themselves and the political predispositions of key actors in the budgeting process."⁶¹ This reality underscores a third problem with the RMOs' work: its complexity allows a technocratic appearance to obscure underlying substantive choices.

52. See, e.g., VERMEULE, *supra* note 46, at 11–12, 181–82.

53. Heinzerling, *supra* note 31, at 364–65.

54. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1141–46 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 56 (2009).

55. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1127, 1121–33 (2008).

56. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544 (2015).

57. See, e.g., Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–79, 2583–95 (2011).

58. SHANE, *supra* note 33, at 159–60.

59. Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641, 671 (1954).

60. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1772 (2009) (internal quotation marks omitted).

61. John B. Gilmour & David E. Lewis, *Assessing Performance Budgeting at OMB: The Influence of Politics, Performance, and Program Size*, 16 J. PUBL. ADMIN. RES. & THEORY 169, 171 (2006).

Some substantive choices, such as tradeoffs among competing interests, might be appropriate for a budget because it is a public statement of national priorities. At the same time, it is not clear that those who are making the decisions are the right people to make those decisions, especially given the broad scope of authority held by the RMOs' civil servants. Alternatively, even if making these decisions is a valid part of their job, it might not always be clear, even to them, that the decisions they are making are actually policy choices.⁶²

Sometimes, however, substantive choices made in the budget are more problematic, such as those based on "pure partisanship"⁶³ or political pressure beyond the public interest, at least when made by the RMOs and couched in the language of technocracy.⁶⁴

To be clear, value-laden decisions are perfectly appropriate in—indeed, inseparable from—the budget process. The problem arises when the language of technocracy obscures value choices, whether intentionally or unintentionally. Such technocratic cover hides the fact that people are making choices, conceals who is making them, and opens the door to partisan decisionmaking. Under any of these scenarios, accountability suffers.

IV. Responding to OMB's Control of Agency Policymaking Through the Budget Process

Any response to OMB's control of agency policymaking through the budget process must be nuanced, mitigating the system's problematic lack of accountability while protecting its valuable coordinating work. Opportunities for reform exist both inside and outside the executive branch.

A. Inside the Executive Branch

To increase accountability of the RMOs, the President could issue an executive order governing the RMOs' work. At a smaller scale, OMB could also take steps to increase its own transparency and engagement with the public.

1. The President

An executive order governing the RMOs' work would enhance accountability in two ways. First, the mere fact of its existence would provide an opportunity for Presidents to claim the RMOs' work as their own. The executive order would parallel Presidents' other executive orders detailing how they intend to use OIRA for regulatory review.⁶⁵ For

all of the criticisms of its substance and implementation,⁶⁶ the executive order governing OIRA's regulatory review at least provides a sequence and scope of activities that the public can expect. The absence of such a document on the RMO side means that a set of offices more than four times as large as OIRA, with oversight over more of the federal executive establishment, operates with more opacity.

Second, an executive order's transparency requirements could provide opportunities for the public to better monitor the RMOs' work. Transparency requirements might focus solely on procedural aspects of the budget process, such as the disclosure of meetings the RMOs have with entities outside the executive branch. Another option might require increased transparency about final budget execution decisions under formal mechanisms such as apportionment. A third, more controversial, option would increase transparency about the substance of interactions between the RMOs and agencies as to predecisional budget and policy deliberations. Different administrations would likely take different positions on these transparency options.

2. OMB

OMB itself can improve its transparency and increase its accountability.

First, OMB could provide more and better information online. Despite valid charges that OIRA's regulatory dashboard is incomplete,⁶⁷ it is nonetheless valuable for capturing some important information about OIRA's interaction with agencies.⁶⁸ This information both informs the public and allows for better public critique and engagement.⁶⁹ In a similar capacity, OMB could present in visually helpful ways where the budget process is. OMB would not have to disclose the substance of the RMOs' work with agencies to make such a dashboard valuable; information about process and scope alone would be a big improvement.

Second, OMB could solicit input from the public on its major management-related policy choices. The challenges of both engaging the public and gleaning information that is likely to be useful for government decisionmaking are well documented.⁷⁰ But OMB could do more than it currently does, particularly with respect to policies that are governmentwide.

62. Cf. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1631–32 (1995) (describing "the unintentional science charade").

63. Cf. Watts, *supra* note 55, at 54.

64. Cf. Mendelson, *supra* note 55, at 1144; Wagner, *supra* note 62, at 1640–50 (describing the "intentional" and "premeditated science charade").

65. See, e.g., Exec. Order No. 13,563 (setting forth President Obama's agenda for OIRA); Exec. Order No. 12,866 (President Clinton's OIRA order); Exec. Order No. 12,291 (President Reagan's original OIRA order).

66. See Heinzerling, *supra* note 31; Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012).

67. See Heinzerling, *supra* note 31, at 363–64.

68. See *Regulatory Review Dashboard*, OFFICE OF INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>.

69. *White House Safeguard Tracker*, PUB. CITIZEN, <http://perma.cc/XEA6-9UCK>.

70. See Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012); Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

B. Outside the Executive Branch

Both Congress and civil society have an important role to play in mitigating accountability concerns related to OMB's ability to control policy through the budget process.

I. Congress

The scope of the RMOs' policymaking effect is large, and the potential for politicization is present. Congress should therefore increase its monitoring and oversight across administrations and do so in a public forum.

Congress might attempt to get more information about the extent of the RMOs' work by requesting that agencies provide information about policy alternatives that were considered and rejected during the preparation of the President's overall budget. Given the confidentiality lever, however, these requests are not likely to produce much information.

Congress might instead turn to the PADs, seeking to learn through their testimony how the RMOs influenced agency policy goals. The PADs are not currently among the OMB officials who testify before Congress. Typically, as is the case with White House staff members in general, congressional testimony is reserved for, or at least standard for, those officials who are confirmed by the Senate. Occasionally, though, Congress has created an OMB position that is subject only to presidential appointment, and yet the official in that position is still expected to testify.⁷¹ Accordingly, Congress could choose to require PADs to testify before Congress when asked. This requirement would speak to two of the three accountability concerns discussed above: it would make the scope of the RMOs' work more transparent by bringing to light the work that these offices do, and it would help make more perceptible the values-based decisions underlying seemingly technocratic budget work.

Alternatively, Congress could also require Senate confirmation for the PADs, which would additionally address the third accountability concern: it would limit the elevation of a low-level political appointee over Senate-confirmed officials in agencies. Senate confirmation would provide an opportunity to probe the PADs' different policy commitments and goals. In so doing, it would increase both the transparency and the accountability of the RMOs' work. While newly requiring Senate confirmation would run counter to trend and has downsides,⁷² the possibility is worth further discussion, especially in light of precedent for turning OMB's high-level policy positions into Senate-confirmed ones. Congress turned

the Director and Deputy Director of OMB into Senate-confirmed positions as the scope of their policymaking authority grew and as the President started to use OMB more politically.⁷³ Congress similarly turned the Administrator of OIRA into a Senate-confirmed position out of concern that the position's vast authority required more congressional oversight.⁷⁴ Two other Senate-confirmed positions in OMB oversee offices that are much smaller than the RMOs and have a narrower purview.⁷⁵ Against this backdrop, making the PAD positions Senate-confirmed in an effort to enhance transparency and accountability could be a natural evolution.

2. Civil Society Organizations

Civil society organizations could expand their oversight of what is already public about OMB's actions through the budget process. For example, it is typically a major news story when the President releases the budget, but the OMB directors' release of budget or other memoranda is not often a story, at least not outside the Beltway. It should be. Civil society organizations should also call for more transparency in the RMOs' process overall.

Moreover, if the RMOs are making policy, it is important to ensure the RMOs are hearing from a broad base of interests. OMB budget review is an insider's game.⁷⁶ Civil society organizations could help expand access.

C. A Cautionary Note

Critics of OIRA, concerned that it has become too powerful, have sometimes suggested returning final rulemaking authority to agencies.⁷⁷ Understanding the broader scope of OMB's work through the RMOs should give these critics pause in suggesting the elimination of OIRA's review of regulations as a cure for its ills.

Much of the effect OIRA currently has on agencies' regulations could be implemented through the RMOs' work on budget preparation, budget execution, and management. The approval lever and form-and-content lever could direct which regulations agencies should and should not prioritize. The monitoring lever could ensure that agencies take the steps OMB directs. The Presidential Management Agenda lever could demand that particular regulations receive more attention than others. And the confidentiality

73. See LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 51–55 (1975).

74. See Wendy L. Gramm, *Regulatory Review Issues, October 1985-February 1988*, 63 ADMIN. L. REV. 27, 29–30 (2011).

75. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *FISCAL YEAR 2016 BUDGET* 11 (2015), <http://perma.cc/EW76-DTR8> (comparing staff numbers within OMB offices); CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., *RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS* 36 (2013) (listing the six positions in OMB requiring Senate confirmation).

76. See T.R. Goldman, *Lobbying the OMB: The Inside Game*, INFLUENCE (Aug. 22, 2001), <http://perma.cc/SQE2-XB8L>.

77. See, e.g., Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1071–72 (1986); Steinzor, *supra* note 66, at 277.

71. See, e.g., 44 U.S.C. 3602(a)-(b) (2012) (establishing in OMB the Office of Electronic Government and providing for its administrator to be subject only to presidential appointment); Office of Mgmt. & Budget, Exec. Office of the President, *Testimony*, WHITE HOUSE, <http://perma.cc/R955-CW8M> (listing testimony from that office's administrator during the Bush II Administration).

72. See, e.g., Paul C. Light, *Back to the Future on Presidential Appointments*, 64 DUKE L.J. 1499 (2015) (describing trends and scholarship on the appointment process).

lever could keep much of this secret. Affecting agencies' regulations through these other means instead of through OIRA would simply drive OMB's policy control even further underground.

Discussions about reforming OIRA should thus incorporate analysis of the RMOs' authority to avoid the "whack-a-mole" effect," where a restriction on agency practice simply leads to experimentation to get around the restriction.⁷⁸ Attention to the RMOs' work more generally is critical for understanding OMB's capacity to control the administrative state.

V. Conclusion

This Article began with the observation from Paul O'Neill, former deputy director of OMB, that policy debates are "reflected, recorded, and battled over" in budget numbers and that "the numbers are the keys to

the doors of everything."⁷⁹ By identifying and elucidating the levers OMB has at its disposal to control agency policymaking through the President's budget process, I have sought to show that this observation is correct. It is through the budget that OMB finds itself "in the stream of every policy decision made by the federal government."⁸⁰ While OIRA's control of agency policymaking through regulatory review is important, it is only one mechanism through which OMB may exercise policymaking authority over federal agencies.

Beyond this descriptive analysis, the Article sketched the various ways in which OMB's budget work is simultaneously salutary and concerning, and offered a series of potential reforms that would improve accountability while still maintaining OMB's beneficial coordinating role. In the end, however, the Article is not intended to provide the last word, but rather to open a conversation, on the President's budget as a source of agency policy control.

78. Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 526 (2014).

79. Martin, *supra* note 1, at 72.

80. *Id.*