Delegation and Positive-Sum Bureaucracies

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I develop a formal model to investigate why Congress would choose to delegate authority to an agency whose actions can be controlled, ex post, by a President with divergent policy preferences. Because the President and the Congress might find different policies to be salient to their constituencies, I demonstrate that executive review of agency rulemaking can benefit both branches of government, relative to legislative delegation without the possibility of such review. In trying to undermine the impacts of executive oversight, agencies propose policies that could benefit Congress if the President chose not to intervene in agency policymaking. If the President does intervene, it will establish policy outcomes that can be more desirable than what would ensue absent such review. This joint-desirability of executive review is more likely when congressional and presidential policy preferences are relatively aligned and when congressional and agency policy preferences are relatively divergent. Executive review can increase social welfare depending on the relative effectiveness of the President's oversight of agency policymaking. These results provide insight for why institutions such as the Office of Information and Regulatory Affairs (OIRA) continue to survive in a separation of powers system despite their potential to advantage one branch of government at the expense of the other.

The word most often used to describe the office to which Professor Graham has been nominated—the Office of Information and Regulatory Affairs—is "obscure." Few are aware of OIRA, or of just how powerful the position of "regulatory czar" really is. But this office—this senior White House staff position—exercises enormous authority over every major federal regulation that the government has under consideration.
> —*Prepared Statement of Senator* Richard Durbin *(D-IL) at confirmation hearing of* John D. Graham *to be the Administrator of OIRA. May 17, 2001.*

One of the most fundamental and enduring conflicts in American politics is waged between the legislative and executive branches of national government, over which entity should control policymaking. With the growth of the American administrative state over the past 200 years, this conflict has increasingly been played out in the federal bureaucracy. Scholars who study the bureaucracy in relation to Congress (e.g., McCubbins, Noll, and Weingast 1987) and the presidency (e.g., Moe 1985, 1989) typically focus on how one branch or the other controls the bureaucracy and its policy outputs. Implicit in this scholarship is the notion that whichever branch controls the bureaucracy gains an advantage by imposing its policy interests on the other. Moe summarizes this tension parsimoniously by noting that "in general, presidents favor placing agencies within executive departments . . . they want authority in the hands of their own political appointees," contrary to Congress which wants "to protect their agencies and policy achievements by insulating them from politics, and presidents threaten to ruin everything by trying to control these agencies" (1985, 280). Bureaucratic policymaking, in other words, is seen as an extension of a zero-sum contest—what one branch gains the other loses.

In contrast to this approach, I argue that bureaucratic agencies might instead be viewed as rationally designed institutions that allow both branches of government to efficiently represent different and competing constituency interests. Bureaucratic policymaking, in other words, can be conceptualized as the result of a positive-sum game between the legislative and executive branches. This perspective has very different implications for our understanding of the creation, evolution, and survival of bureaucratic agencies. Under the zero-sum approach, evidence of control by one branch implies defeat and failure by the other, which in turn implies that the losing branch will attempt to reorganize the bureaucracy. The positive-sum approach, in contrast, implies that bureaucratic

organizations, because they can efficiently serve the competing interests of both branches, will be far more stable and enduring.

I advance this argument by developing a formal model of legislative delegation and agency policymaking where agency actions are subject to review by an executive whose preferences diverge from the legislature. To illustrate the implications of this theory, I focus on the Office of Information and Regulatory Affairs (OIRA) in the U.S. Office of Management and Budget (OMB). Since 1981, all executive (nonindependent) agencies have been required to receive OIRA approval for their rules before they are published in the Federal Register, which has ostensibly provided the President with substantial control over agency policymaking. Scholars and pundits have generally agreed that OIRA reflects presidential preferences, and some have argued that Congress would prefer to abolish OIRA altogether. Given this apparent conflict, one wonders how and why OIRA review continues to be a vital part of contemporary American policymaking? The theory developed below suggests that OIRA, while a seemingly coercive institution, can actually be valuable to both branches of government by simultaneously representing their competing interests.

To establish this argument, I deviate from conventional theories that assume that agencies possess informational advantages over the President and Congress, but rather, I analyze a policymaking environment where certain actors are uncertain about whether particular policy choices will be salient to their interests. Because the President might find a given policy salient, inducing OIRA oversight, a strategic agency will try to undermine the effects of OIRA review by proposing policies that deviate from the agency's own interests, and generally benefit Congress. Hence, if OIRA does not intervene, the agency's Congress-friendly policy will be implemented, making Congress better off than if OIRA did not exist (whereby the agency's policy proposals will be more reflective of the agency's preferences). Similarly, if OIRA does intervene, it will move policy away from Congress towards the President's interests, making the President clearly better off than if OIRA intervention were not possible. Depending on how often Congress and the President find the same policies salient to their constituencies, OIRA intervention can actually benefit both branches of government. This finding stands in stark contrast to literature that argues how executive review unambiguously benefits the President at the expense of Congress.

The fact that an apparently coercive institution can be shown to benefit both branches of government

raises broad questions about the appropriateness of conventional zero-sum characterizations of bureaucratic policymaking. These conclusions are particularly relevant given that President Bush recently expanded the purview of OIRA authority to cover agency guidance documents, in addition to rules and regulations (Noll 2008).[1] Moreover, in light of the recent establishment of numerous state-level counterparts to OIRA (Teske 2004, 208–15), as well as the proliferation of analogous regulatory review institutions in several OECD countries (OECD 2003), this theory can provide substantial insights into the regulatory processes within and beyond the American states.

In the next sections, I provide a brief introduction to the history and process of OIRA review and consider how this institution is relevant to the prevailing body of scholarship on delegation, rulemaking, and presidential policymaking. I then present a formal model of delegation with executive review and note the empirical implications that follow from such a model. Finally, I conclude with a summary of findings and a discussion of further extensions.

OIRA History and Process

OIRA review, also known as executive review or executive clearance, is a pervasive feature of contemporary agency policymaking. As agencies have created more (and more detailed) rules over the past 25 years, presidential intervention through OIRA has increased immensely. Whereas less than 10% of agency rules were changed before publication in the Federal Register following OIRA intervention in 1981 (Croley 2003, 848–49), nearly 70% of rules were either changed following OIRA review or entirely withdrawn by the submitting agency in 2001 (Kerwin 2003, 226). A wide body of scholarship (e.g., Croley 2003; Shapiro 2005; United States General Accounting Office 2003) considers the history of OIRA review, but a few points of process are worth noting.

The legal foundation for contemporary executive clearance is EO 12866, which was promulgated under the Clinton Administration in 1993 on the precedents of the Reagan Administration, requiring all federal agencies, other than independent regulatory bodies, to submit any rule regarded as "significant" regulatory

[1]Guidance documents are agency memoranda that effectively advise regulated parties regarding rule implementation. While they are not legally binding, they can substantively influence policy (Noll 2008).

action (United States General Accounting Office 2003, 23) to OIRA. Similar to executive clearance during the Reagan Administration, a rule is deemed "significant" if it is likely to have a sizeable impact (greater than $100 million annually) on the economy, to create contradictions or other inconsistencies with existing law or regulatory practices, or to potentially run counter to the Administration's regulatory mission. Hence, while not explicitly requiring review for all agency rules, EO 12866 affords the Administration a good deal of latitude with which to influence the regulatory process.

Under current practice an agency must submit a proposed rule for review to OIRA before the "notice of proposed rulemaking" is published in the Federal Register. OIRA review is supposed to occur within 90 calendar days following submission, and barring OIRA objection, the proposed rule is then published in the Federal Register. Following publication, the rule undergoes the conventional notice and comment period as required by the Administrative Procedure Act (APA) wherein various stakeholders offer feedback on the proposed rule. Following the notice and comment period, the agency adopts a final rule, which must then be submitted to OIRA for a second round of review. At this stage, OIRA can either conclude that the rule is "consistent with the principles of the executive order," or return it to the agency for "further consideration" (United States General Accounting Office 2003, 31). While OIRA does not have *de jure* authority to disapprove draft rules, EO 12866 does require this explicit review process, and hence, rules that are sent back to agencies for "further consideration" are typically either withdrawn by the agency or revised by the agency to comport with OIRA concerns.[2]

Numerous case studies have illustrated how OIRA intervention has had significant substantive impacts on rules. At a 1986 Senate oversight hearing on OIRA, for example, Deborah Berkowitz, of the AFL-CIO, testified that OIRA had consistently stifled OSHA's six-year effort to establish safety standards to prevent grain dust explosions in grain elevators (United States Government Printing Office 1986, 2–4). In response to a 1982 National Academy of Science study that determined that nearly 80% of U.S. grain elevators were ripe for explosions due to grain dust buildups, OSHA began a 10-month long rule-

making proceeding. After substantial delays and interactions with OIRA, the rule that ultimately emerged exempted more than 90% of the operating grain elevators in the United States from dust control provisions.

While OIRA intervention clearly shaped the content of the grain elevator rule, one could plausibly argue that the final policies promulgated following OIRA intervention are entirely consistent with the preferences of Congress and that no obvious conflict exists. Perhaps OIRA merely alters policies within the bounds of discretion (e.g., Epstein and O'Halloran 1999) that Congress typically provides to agencies. On this point, however, O'Connor (1988) and Heizerling (2006) have both documented how OIRA's intervention in the rulemaking process induced the FDA, and the EPA, respectively, to promulgate rules that deviated from congressional intent. These and other case studies would suggest that OIRA intervention can both influence the substantive content of rules and induce policies that clearly go well beyond the bounds of congressionally authorized agency discretion.

Existing Research

On its face, executive clearance might seem coercive in that it "allows the president and his agents to monitor and influence the substance of individual regulations" (Cooper and West 1988, 871). Hence, OIRA review might undermine the administrative safeguards that were created under the Administrative Procedure Act (Cooper and West 1988, 873), so that agency decisions will benefit the president and be "based on considerations relating to political goals and incentives rather than considerations relating to the substantive implications or requirements of statute" (882). While the above examples provide anecdotal support for such arguments, it is not entirely clear whether such broad claims are accurate.[3]

First, the prevailing theoretical scholarship on delegation offers little help in evaluating these claims given that these theories typically consider relations between one principal and one agent, without the prospect for *ex post* oversight by a competing principal.[4] Epstein and O'Halloran (1994, 1999), for example, model legislative delegation to an agency

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[2]Less than 3% of rules are coded as "returned" to agencies, meaning that they were returned and not subsequently altered to comport with OIRA review (United States General Accounting Office 2003, fn. 3).

[3]Jordan (2006), for example, argues that OIRA review allows the President to maintain preference alignment between himself and his appointees, rather than a means with which to implement rule changes.

[4]See Bendor, Glazer, and Hammond (2001) for recent reviews of the delegation literature in political science.

that unilaterally makes policy, subject to a bound of discretion afforded it by the legislature, where agency and executive preferences are perfectly aligned. Given that OIRA changes a substantial portion of agency rules, however, it is questionable whether the preference-alignment assumption is appropriate. My model builds on this point in analyzing a policy environment where the agency, legislature, and executive have competing policy interests; and hence, the executive has an obvious incentive to engage in oversight through OIRA.[5]

McCubbins, Noll, and Weingast's (1987) work on administrative procedures does consider the potential effects of preference divergence among the President, the agency, and Congress, yet they, too, do not explicitly account for the possibility of executive control in a way that is reflective of OIRA intervention. While Kiewiet and McCubbins briefly consider OIRA in their work on the appropriations process, and even suggest that Congress "appears to have achieved some sort of working relationship with OIRA and its regulatory review activities" (1991, 182), the rationale for congressional acquiescence is not transparent. More generally, it is not obvious why Congress might accept, or even prefer, OIRA intervention compared to the policy choices of an unconstrained agency.

A body of informational theories (e.g., Bendor and Meirowitz 2004; Epstein and O'Halloran 1999; Gilligan and Krehbiel 1989) might suggest that Congress would be willing to delegate to an agency that is subject to OIRA review (even potentially incurring a policy loss), in exchange for the informational gains that it acquires from delegation. In considering the process of OIRA review, however, the relevance of conventional informational theories is questionable. Given that OIRA can effectively alter any agency policy after it has been proposed, one would suspect that agencies would be hesitant to develop (presumably costly) expertise, which would likely compromise any informational benefits to Congress associated with delegation. Recent work by Gailmard and Patty (2008) explicitly engages these issues by developing an informational theory of delegation in a separation of powers system, which identifies how a legislature might benefit from committing to policies that are different from their ideal positions. One of their fundamental findings, however, is that Congress does not have an incentive to bias experts (i.e., agencies)

away from the authorities (i.e., the President), which (as noted above) does not seem to be empirically realized in contemporary bureaucracies, where policy conflict is reasonably commonplace between these actors.[6]

Second, while scholars of administrative policymaking have made recent advances in understanding how different practices such as regulatory negotiation (e.g., Coglianese 1997), advisory committee participation (e.g., Balla and Wright 2001), or formal (e.g., Yackee 2006) and informal (e.g., Balla 2004/2005) communications with agencies have influenced the development of rules, surprisingly little attention has been devoted to executive clearance. Instead, most research considering agency oversight has focused on the role of the courts following the publication of the rule (e.g., Eskridge and Ferejohn 1992), rather than executive actions prior to publication.[7] Analyses of legislative oversight of the bureaucracy (e.g., Bawn 1997) have generally neglected executive review altogether, even though it can effectively undermine whatever oversight tools the legislature devises. While Kerwin (2003, 224–38) considers OIRA's role in policymaking, similar to Cooper and West (1988), he argues that OIRA generally benefits the President over the Congress, and he focuses little systematic attention to the policy impacts of executive clearance.[8]

Kerwin's arguments are echoed by scholars of the "administrative presidency" (e.g., Moe 1985; Nathan 1983) who have characterized OIRA's continued existence as one more example of the rise of presidential control over contemporary policymaking (Cooper 2002, 93–95; Howell 2003). Moreover, Moe and Wilson (1994, 34–30) and Moe and Howell (1998, 168) have argued that Congress would strictly prefer to abolish OIRA, but cannot because "collective action problems" prevent Congress from coordinating the diverse preferences of its members towards a unified goal. While such arguments seem plausible, they do not comport well with a substantial body

[5]Analysis of models wherein the executive possesses veto authority over agency actions (e.g., Volden 2002a, 2002b) have identified how the potential for *ex post* control can influence the initial delegation decision.

[6]This is not to say that no informational theory could explain the existence of contemporary OIRA review, but rather that conventional informational theories, do not comport well with the realities of congress-agency-OIRA interactions. While these topics are worthy of serious consideration, they go beyond the scope of this paper.

[7]Bueno de Mesquita and Stephenson (2007), however, consider a model wherein an agency creates policy that is subject to veto by a reviewing agency such as OIRA.

[8]Balla, Deets, and Maltzman (2005), analyze the impacts of *ex parte* communication with OIRA during regulatory review and note how their findings do not clearly demonstrate who stands to gain or lose from the review process.

of legislative scholarship (e.g., Cox and McCubbins 2005; Krehbiel 1998; Wiseman and Wright 2008) that illustrates how Congress makes choices based on the preferences of certain pivotal members.[9]

Third, while administrative law scholars have explicitly considered the impacts of OIRA review on policymaking, they have arrived at decidedly mixed opinions with respect to its positive and normative consequences. DeMuth and Ginsburg (1994) and Seidenfeld (1994) have argued that OIRA review benefits society because the president is in the best position, institutionally speaking, to evaluate regulations based on the merits. In contrast, Bruff (1989) and Strauss and Sunstein (1986) have argued that prevailing procedures should be altered to enhance the efficiency and benefits of regulatory review. Finally, scholars such as Elliot (1994) and Shapiro (1994) have claimed that OIRA review undermines the intentions of Congress, biases policy outcomes in favor of the president, and degrades the quality of regulatory policy. Croley's (2003) large-sample study of OIRA review uncovers several findings that could be interpreted to support a variety of these perspectives.

While existing scholarship offers little in terms of definitive answers, consensus appears to have been reached regarding certain features of executive review. First, over the past 25 years, OIRA has become a central player in administrative policymaking in the United States, inducing changes in nearly 70% of the agency rules it reviews. Second, OIRA intervention generally appears to benefit the President at the expense of competing interests, particularly Congress. Third, Congress would presumably like to abolish OIRA, but is unable to do so because of legislative coordination problems. Fourth, OIRA review could potentially benefit different constituencies, depending on which theoretical perspective is embraced.

These preliminaries motivate several questions. First, how does OIRA intervention map into policy outputs? Second, does OIRA intervention truly benefit the President at the expense of congressional interests? Third, does Congress have a clear incentive to abolish OIRA? Fourth, does OIRA intervention lead to rules that significantly deviate from legislative intent and decrease social welfare? The theory pre-

sented below provides a first step towards answering these questions.

A Theory of Legislative Delegation with Executive Review

The model developed here involves Congress delegating policymaking authority to an agency, which is subject to presidential (i.e., OIRA) review. I assume that actors have preferences over policies, which are influenced by the political ramifications of the policies that are implemented. More specifically, I assume that Congress and the president have well-defined policy preferences, yet they do not know at the time a policy is proposed whether it will be deemed important to their constituents, which would presumably induce them to *care* about it. This uncertainty over political salience could arise because actors do not have complete information about their constituencies' policy priorities, or more generally, about whether their constituencies will be attentive to certain policy debates. While this assumption deviates from conventional modeling approaches, it clearly comports with reality. Even on matters as controversial as environmental policy, scholars are quick to note that "the primary constraint on [politicians'] desire to address an issue is its salience—that is, the extent to which the public cares about it. Even if the president or a congressional leader thinks an issue is important, neither is likely to expend political resources on it unless he or she perceives it to be widely salient ... [and] ... an issue's salience can be difficult to discern" (Layzer 2006, 10). This uncertainty over political salience provides for situations under which both Congress and the President will strictly prefer the institution of OIRA review to an institutional arrangement wherein executive clearance does not exist.

In equilibrium, OIRA only intervenes when an agency's proposed rule is revealed to be salient to the President's interests after it is proposed. If OIRA intervenes, it alters an agency's proposed rule so that it is more reflective of presidential preferences than was the initial proposal. Alternatively, if it does not intervene, the agency's rule stands as proposed and is promulgated into law. This potential for OIRA review induces the agency to strategically propose policies that deviate from its ideal point and actually favor Congress over the President, effectively limiting the range of OIRA's influence. The magnitude of the policy divergence between the agency's proposed rule and congressional preferences depends on the

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[9]A more nuanced version of this argument, consistent with Howell (2003), might be that the Senate's supermajoritarian requirements make it unlikely that congress can systematically limit OIRA review, especially given the potential for presidential veto (Volden 2003). Alternatively, Congress might actually prefer OIRA review, as it allows legislators to "blur responsibility" (Arnold 1990) between Congress and the President over regulatory outcomes.

probability of OIRA intervention. Hence, in certain situations the agency proposes policies that are relatively close to Congress, and revealed to be politically salient to congressional interests, yet are not altered by OIRA. In other situations, agency policies are altered by OIRA, yet those policies are not salient to Congress, and hence it doesn't mind OIRA intervention. Finally, in certain cases agency policies are altered by OIRA, and both branches of government find the policies salient to their interests, creating an obvious conflict. Despite this potential for conflict, executive clearance may still make both actors strictly better off than if OIRA did not exist, depending on the relationship between the presidential and congressional preferences, and their expectations over policy salience.

Preliminary Developments

Before moving on, it is worthwhile to explore the implications of assuming that the President and the agency have different policy preferences. For the purposes of illustration, suppose that agency rulemaking can be represented as a very simple two-period, complete, and perfect information game between two players, an Agency with ideal point A, and OIRA, with ideal point E, which I assume shares the President's preferences.[10] Assume that both actors' ideal points are defined over one dimension (E and $A \in R^1$), and assume that the agency is located to the left of OIRA ($A < E$).

In period 1, the Agency selects a policy $a \in R^1$, and in the second period, OIRA observes the policy chosen by the Agency, and if it decides to do so, changes policy subject to a cost.[11] Because agencies are located in the executive branch, one might interpret OIRA's costs as reflecting the political costs it incurs from overriding its own administration's policy. Alternatively OIRA's costs could also reflect the time and effort that its staff devotes to determining options to the Agency's proposal, which faces

lower costs as a policy specialist.[12] The actors' preferences are defined over the final policy implemented, x, which is either the Agency's proposed policy, $x = a$, or the policy proposed by OIRA, as well as the costs incurred to change policy. More specifically, assume that the Agency's and OIRA's preferences can be represented by the following utility functions:

$$U_A(x) = -(A - x)^2$$

$$U_E(x) = -(E - x)^2 - c(a - x)^2$$

where $c > 0$ represents the marginal cost OIRA incurs from moving policy away from the agency proposal.[13] From an empirical standpoint, one might expect OIRA's costs to increase the scope of policy change for several reasons. If OIRA's costs are political in nature, they should be larger for more significant policy changes, which correspond to more substantial public signals of Executive branch dissention. Alternatively, if costs are labor-induced, larger policy changes likely correspond to more cumbersome levels of analysis than smaller policy changes.

Accepting either of these rationales, a straightforward application of backwards induction yields the equilibrium agency proposal and final policy, $a^\star$ and $x^\star(a^\star)$, for this model. In the last period, having been presented with a by the Agency, OIRA will choose $x^\star(a)$ to maximize its utility. Application of the calculus reveals that $x^\star(a) = \frac{E + ca}{1 + c}$. In other words, for any agency proposal, OIRA will choose x so that it is somewhere in between its ideal point and the agency proposal, depending on how costly it is to move policy. Because the Agency knows that for any policy it proposes, $x^\star(a)$ will be the final policy implemented, it will chose $a^\star$ to maximize its expected utility: $U_A(x(a)) = -(A - (\frac{E + ca}{1 + c}))^2$. Analysis reveals that $a^\star = \frac{A(1 + c) - E}{c} \Rightarrow x^\star(a^\star) = A$. In other words, faced with the prospect of OIRA review, the Agency will propose a policy to the left of its ideal point, knowing that OIRA will move the policy as close to E as possible, which will yield a final policy at

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[10]In reality, OIRA's Administrator is nominated by the President and is subject to Senate confirmation, and historically has been the subject of extremely contentious confirmation proceedings due to his/her influence over the bureaucracy and proximity to the President.

[11]While I am assuming that there is no status quo policy, regulatory status quos do presumably influence agency and OIRA behavior. One could imagine how OIRA review might prevent regulation altogether (which might be completely counter to congressional interests, and it would presumably try to prevent by imposing statutory deadlines for rules). While such topics go beyond the scope of this model, they are clearly relevant to understanding regulatory processes and worthy of further study.

[12]Olson (1984, 14) notes how the EPA consistently complained about having to educate OMB staff about the details of particular rulemakings in the early 1980s. Unlike substantive policy agencies that have considerable staff resources, OIRA is currently staffed by 55 FTEs (United States General Accounting Office 2003, 60).

[13]A crucial assumption for the results that follow is that costs are increasing in policy movement. As demonstrated in the supplementary appendix, however, these costs do not have to be quadratic, as the main results, and nearly all other results are identical when costs are linear in policy change. These results cannot be obtained, however, if OIRA incurs solely a fixed cost for changing policy.

the Agency's ideal point. Figure 1 illustrates the equilibrium a^*, and $x^*(a^*)$ of this model, where $A = 2$, $E = 3$, and $c = 1$.

This simple model clearly demonstrates how the sequential nature of policymaking and executive review, given actors' preference divergence, provides the Agency with an incentive to propose policies that effectively lessen the influence of OIRA intervention. The broader model developed below builds on this insight by incorporating the legislature as an additional player, and considering a policy environment in which OIRA review does not occur with certainty.

Players and Preferences

The actors in this model consist of Congress with ideal point L, a substantive policy Agency with ideal point A, and an agency that engages in executive oversight (OIRA) with ideal point E, which is equivalent to the President.[14] Similar to the baseline model above, I assume that all actors' ideal points, L, E, and $A \in R^1$, and that $L < A < E$. In other words, I explicitly assume that the Agency is located somewhere in between Congress and the President, which effectively provides for the most difficult scenario in which to establish how executive clearance may benefit both Congress and the President.[15] Without loss of generality, I assume that $L = 0$.[16] All actors' preferences are defined over the final policy implemented, as well as any costs they must incur to influence policy, and whether a particular policy is politically salient to their interests. That is, I explicitly assume that certain policies are more salient to the actors' interests than other policies. As noted above, these variations in salience might reflect external constituency considerations, random shocks by nature, or other concerns that are not modeled here.

More formally, Congress's preferences can be represented by the following utility function:
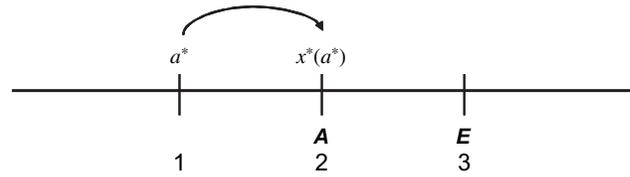
$$U_L(x, k) = -\lambda(L - x)^2 - k,$$

FIGURE 1 Equilibria of Agency Policymaking with OIRA Oversight Control Game

where $x \in R^1$ is the final policy outcome, $k \geq 0$ is the cost that it must incur if it chooses not to delegate to the agency and rather make policy itself, and $\lambda \in \{0, 1\}$, which is determined stochastically, identifies whether the policy under consideration is politically salient to Congress. Hence, while Congress generically prefers policies that are located closer to its ideal point, some policies will not be politically salient ($\lambda = 0$), so that it will be indifferent between a variety of policies, including those that are far away from its ideal point.[17] A natural interpretation of k is that it represents the level of effort that Congress must exert to create sufficiently detailed statutes that ensure that the final implemented policy is consistent with its wishes. These costs will naturally vary depending on the complexity of the issue and Congress's previous experience of lawmaking in a given policy domain.

Similar to the baseline model above, the Agency's preferences can be represented by the following utility function:

$$U_A(x) = -(A - x)^2.$$

Unlike Congress, this specification implies that the Agency considers all policies salient, which could be interpreted as the Agency responding to its legislative mandate to create policy, or the fact that agencies are generally issue-specific in their focus.

Finally, I assume that OIRA's utility can be represented by the following form:

$$U_E(x) = -\varepsilon(E - x)^2 - c(a - x)^2,$$

where a is the Agency's proposal, x is the final policy chosen by OIRA, $c \geq 1$, and $\varepsilon \in \{0, 1\}$, which is determined stochastically.[18] Hence, conditional on

[14]While this model analyzes Congressional-Presidential-agency interactions, it is relevant to more general cases of executive clearance. Hence, I employ L and E to represent a generic legislature and executive, respectively.

[15]This assumption seems empirically plausible as well, given that agency heads are proposed by the President and confirmed by the Senate, and hence they are likely located somewhere between these actors' ideal points.

[16]For the current model, I am implicitly assuming that L represents the legislative median, but he/she could easily represent other pivotal actors (e.g., a committee chair with agenda-setting powers).

[17]While this is admittedly a very stylized way to denote that the Legislature cares more about some policies than others, similar results would follow from allowing λ to take on values between zero and 1.

[18]The assumption that $c \geq 1$ is not necessary for derivation of the equilibrium, but facilitates a parsimonious presentation of the comparative statics, which would be somewhat cumbersome for certain cases when $c \in (0, 1)$.

OIRA learning that a policy is politically salient ($\varepsilon = 1$), its utility is determined by how far the final policy (x) is located from its ideal point (E), as well as how far the final policy is from the Agency's proposal (a).[19]

Sequence of Play

The game begins with Congress making a legislation decision in stage 1, $l = (d, x_L)$ consisting of a delegation decision ($d \in \{1, 0\}$) for whether or not to cede policymaking authority to a substantive Agency, and a policy decision $x_L \in R^1$. For the purposes of analysis, I assume that if Congress delegates authority to the Agency ($d = 1$), the Agency has complete discretion over where to set policy, whereas if Congress does not delegate ($d = 0$), then it decides where to set policy, $x_L \in R^1$, subject to paying a fixed cost, $k \geq 0$. If delegation has occurred, then the Agency chooses a policy $a \in R^1$, which will potentially be subject to OIRA review.

In stage 3 Nature jointly determines whether a policy under consideration is salient to OIRA and/or Congress with the following probabilities: with probability p_1, the policy is salient to both OIRA and Congress ($\varepsilon = 1$, $\lambda = 1$), with probability p_2, the policy is salient to OIRA, but not Congress ($\varepsilon = 1$, $\lambda = 0$), and with probability p_3, the policy is salient to Congress, but not OIRA ($\varepsilon = 0$, $\lambda = 1$), where $\sum_{i=1}^{3} p_i = 1$.[20] There are several reasons that the President and Congress might find different policies salient to their interests. First, given that the President and pivotal legislator(s) might face different electoral constituencies (e.g., rural vs. urban, Midwest vs. coasts, etc.), they might place different priorities on those policies that were more relevant to their core voters.[21] Related to this point, most regulations have multiple dimensions, and hence, it's quite plausible that even the same rule might encompass different issues that resonate with different constituencies (inducing different degrees of salience between the President and Congress).

To reinforce a point above, this probability distribution represents the fact that actors might not have perfect information regarding their constituencies' priorities, yet after explicit policies are proposed, actors likely receive information from their constituencies which might induce them to care about the policies in question (i.e., McCubbins and Schwartz 1984). Shapiro describes such a dynamic underlying contemporary OIRA review whereby "prior to the publication of a proposed rule, the President and his staff have no other way of learning about particular issues in a regulation ... the notice and comment process ensures that interest groups will keep the White House informed about the details of agency actions" (2007, 693–94).[22] Finally, in Stage 4, OIRA observes whether an Agency proposal has been made, ascertains whether the policy area is politically salient to its interests, and (where relevant) chooses a final policy, $x_E \in R^1$.[23]

For the purposes of analysis, I assume that $p_2 = p_3 = \rho$: the probability that Nature reveals that a policy is salient to Congress but not to OIRA is equal to the probability that the opposite ensues. Put simply, ρ characterizes *ex post* divergent preferences, while $p_1 = 1-2\rho$ characterizes *ex post* aligned preferences.[24] The equilibrium concept is subgame perfect Nash, and Figure 2 presents the extensive game form.[25]

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[19]One might also consider an extension wherein the Agency suffers a similar cost if OIRA intervenes and changes policy. Analysis of such a model yields substantively similar results to the model developed here, so long as the marginal cost incurred by OIRA is greater than that incurred by the Agency.

[20]A more general model can be analyzed in an analogous manner that assumes with probability $p_4 \geq 0$ the policy is salient to neither actor ($\varepsilon = 0$, $\lambda = 0$), where $\sum_{i=1}^{4} p_i = 1$. The current model disregards this option, given that all policies presumably resonate with some presidential or congressional constituency.

[21]Madison evokes a similar argument in *Federalist 39* when he articulates the manner in which various constituencies will be appropriately represented by the legislative and executive branches under the Constitution.

[22]Yackee's finding that agencies are responsive to interest group comments submitted during the notice and comment period begs the question of whether agencies change rules on their own volition, or whether these comments alert the President of rules' political salience, inducing OIRA to mandate changes.

[23]One might question whether OIRA intervention is really tantamount to policy changes or a simple veto over agency policy proposals (i.e., Bueno de Mesquita and Stephenson 2007). The current modeling choice seems appropriate in light of numerous documented cases of OIRA intervention (e.g., Bruff 1989; O'Connor 1988, 196; Olson 1984) wherein OIRA explicitly dictated to agencies the conditions for rule approval.

[24]This restriction is not crucial for deriving and characterizing equilibria, and the qualitative properties of the final policies enacted under delegation are identical to a more general model (where $p_2 \neq p_3$).

[25]More formally, I refine the set of subgame perfect Nash equilibria by assuming Congress delegates to the agency when indifferent. It is important to note that the analysis that follows is sensitive to the assumption that the agency's uncertainty about policy salience is common knowledge.
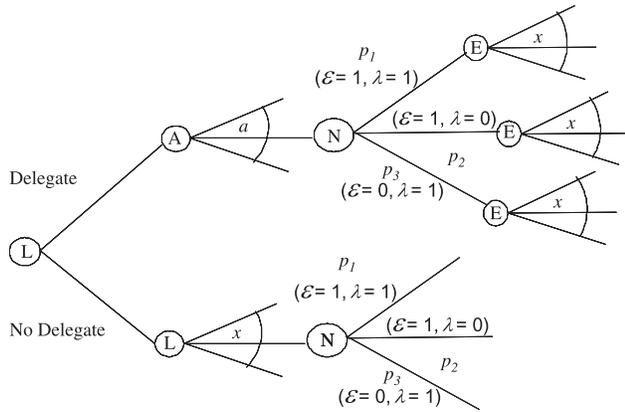
Results

The equilibrium to this game can be deduced by employing backwards induction.[26] Building on the results of the baseline model above, it is obvious that if Congress delegates to the Agency, OIRA will set $x^\star(a) = \frac{E + ca}{1 + c}$ for any Agency policy, a, that is salient to its interests ($\varepsilon = 1$). Because it is common knowledge that OIRA will select $x^\star(a)$ if it learns that the policy is salient, the Agency will choose a policy, a, that maximizes its expected utility, which is influenced by the probability of OIRA intervention. More formally, the agency will choose a policy, a, that maximizes the following function:

$$EU_A(a) = -(1 - \rho)(x^\star(a) - A)^2 - \rho(A - a)^2.$$

Applying the calculus yields the optimal policy chosen by the agency:

$$a^\star = \frac{A\rho + Ac(1 + \rho + c) - Ec(1 - \rho)}{c^2 + \rho + 2c\rho}.$$

In light of what will occur under delegation, Congress considers the following: if it creates policy internally, it can promulgate its ideal policy, but must pay cost k. If it delegates to the Agency, however, Congress might end up with $a^\star$ (which could be quite favorable) with probability ρ, but it could end up with $x^\star(a^\star)$ (which could be quite undesirable), if the

[26]The supplemental appendix analyzes the robustness of these results where the President incurs linear and fixed costs, respectively, from inducing policy change.

policy is revealed to be salient to the President with probability $(1 - \rho)$. These tradeoffs directly influence Congress's delegation decision, and Proposition 1 characterizes the equilibrium of this game. (Proofs of all results are in the appendix.)

Proposition 1: *The subgame perfect Nash equilibrium of this game is defined as an optimal legislation decision, an optimal agency policy proposal, and an optimal oversight decision as follows*:

$$l^\star = \begin{cases} (0,0) & \text{if } k < k^\star \\ (1,0) & \text{if } k \geq k^\star \end{cases}$$

$$a^\star = \frac{\rho A + Ac(1 + \rho + c) - Ec(1 - \rho)}{c^2 + \rho + 2\rho c}$$

$$x^\star(a) = \begin{cases} \dfrac{E + ca}{1 + c} & \text{if } \varepsilon = 1 \\ a & \text{if } \varepsilon = 0 \end{cases}$$

$$\text{where } k^\star = (1 - 2\rho)\left(\frac{Ac(\rho + c) + \rho E(1 + c)}{c^2 + \rho + 2\rho c}\right)^2$$

$$+ \rho\left(\frac{\rho A + Ac(1 + \rho + c) - Ec(1 - \rho)}{c^2 + \rho + 2\rho c}\right)^2.$$

Hence, Congress's expected utility from delegation effectively depends on the probability that the President learns that a policy is salient, which would induce OIRA intervention following agency policymaking, as well as the probability that the policy is not salient to the President, resulting in the Agency's proposed policy. It is worth noting that in all cases following delegation, the Agency's proposed policy is closer to Congress's ideal point than the promulgated policy following OIRA intervention.

Figure 3 illustrates the equilibrium Agency and OIRA proposals, $a^\star$ and $x^\star(a^\star)$, respectively, for the case where $L = 0$, $A = 2$, $E = 3$, $c = 1$, and $\rho = \frac{1}{3}$. In other words, one-third of the time the policy is revealed to be salient to Congress but not the President, one-third of the time the opposite holds, and one-third of the time the policy is revealed to be salient to both actors.

In comparing Figure 3 to Figure 1, it is clear that when the Agency is uncertain about the potential for OIRA intervention, it no longer proposes a policy that substantially deviates from its ideal point, such as $a^\star = 1$. Instead, it proposes a policy closer to its ideal point because it knows with a certain probability ($\rho = \frac{1}{3}$) OIRA will not intervene, and $a^\star$ will become the final policy. Of course, because OIRA intervention might occur (with probability

FIGURE 3 Equilibria in Delegation with OIRA Oversight Game
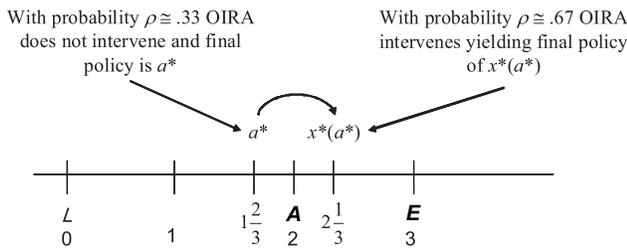
$(1 - \rho) = \frac{2}{3}$), the Agency proposal still deviates from its ideal point, favoring Congress, to ensure that any $x^\star(a^\star)$ chosen by OIRA will be relatively favorable to Agency interests. Given these tradeoffs and the assumptions above, the equilibrium Agency proposal will be $a^\star = \frac{5}{3}$, which will induce $x^\star(a^\star) = \frac{7}{3}$ if OIRA intervenes; and Congress will delegate to the Agency, even with the potential for OIRA oversight, if $k \geq \frac{41}{9}$.

Will Congress Ever Want the Possibility of OIRA Intervention?

While Proposition 1 identifies when Congress might prefer to delegate to an agency subject to OIRA intervention (i.e., when $k \geq k^*$), it does not tell us when Congress would prefer the potential of OIRA review to a situation in which there was no executive clearance. Suppose however, that Congress had a choice of playing a similar delegation game, where it chose whether to delegate to an Agency, and if delegation occurred, the Agency created policy unilaterally and the game ended. Without the prospect of executive oversight, the Agency would obviously propose a policy at its ideal point ($a^\star = A$), and Congress would only delegate when the costs from creating policy internally were greater than the distributive policy loss it experienced by outsourcing policymaking authority to the agency, or whenever $k \geq A^2$.[27] Comparing A^2 to the boundary on k in Proposition 1 above, one sees that depending on the values of ρ, the Legislature might strictly prefer to delegate to an agency that is subject to OIRA review, compared to delegating to an unconstrained agency. This intuition is stated more formally in the following proposition.

Proposition 2: *There exists an ex post preference divergence probability cutpoint, $\rho^\star$, such that for $\rho \geq \rho^\star$, Congress would prefer to delegate to an agency with the possibility of OIRA intervention, and for $\rho < \rho^\star$, Congress would strictly prefer to delegate to an Agency without the possibility of OIRA intervention.*

Because the possibility of OIRA intervention induces the Agency to propose policies that are closer to Congress than it would if oversight did *not* occur with certainty, the Congress will strictly prefer the institutional arrangement modeled here to one in which OIRA did not exist, depending on the correlation between λ and ε. In the starkest case, suppose that $\rho = .5$, meaning that every policy that Congress found salient the President did not find salient, and the opposite held true as well. In such a situation, the Congress would strictly prefer delegating with the possibility of *ex post* oversight to a world in which delegation occurred without the possibility of OIRA intervention. Every policy that Congress found salient would be located closer to its ideal point than the Agency's ideal point, A, and every policy that OIRA decided to change would be a policy that Congress effectively did not care about. While this stark characterization is unlikely to hold for all (or most) policies, the same intuition holds for more moderate correlations $\rho \in (0, .5)$. If one believes that the President and pivotal legislator(s) are sometimes beholden to different constituencies, and there is uncertainty over whether those constituencies will flex their muscles to induce the executive or Congress to take notice of particular policies, then so long as the probability of *ex post* preference conflict between the President and Congress is not too great (i.e., ρ sufficiently larger than zero), both actors will unambiguously benefit from the institution of executive clearance.[28]

More broadly speaking, even though OIRA appears to be a coercive institution that generally favors presidential interests, its existence can actually allow both branches of government to realize benefits that would not exist if lawmaking occurred without its mediating influence.[29] The relevant question, then, is

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[27]If Congress created policy internally, it would set policy at its ideal point and pay cost k, yielding utility equal to $-k$. In contrast if Congress delegated to the agency, the agency would set policy at its ideal point, and Congress's utility will be: $-(A)^2$. Hence, the Congress will delegate whenever $k > A^2$.

[28]If $\rho = 0$, however, then Congress would never strictly prefer OIRA oversight to delegating to an unconstrained agency. That said, delegation might still occur so long as the costs from making policy internally were greater than the distributive loss from outsourcing policymaking to the Agency (i.e., $k > k^* = A^2$).

[29]While our analysis has focused on Congress thus far, results presented in the appendix identify conditions under which OIRA review would also be pareto improving for the President in comparison to unconstrained agency policymaking.

how plausible is this scenario? If we were to think of the parameters in this game as being generated by some underlying random process, wherein the players learn the parameters (including ρ, but not ε or λ, which depend on ρ) and then play the game, how frequently will the value of ρ be sufficiently high to induce Congress to strictly prefer OIRA review, rather than policymaking to an unconstrained agency? The answer to this question can be attained by identifying how the crucial level of preference divergence, ρ^*, varies with respect to the exogenous parameters of the model, and Result 1 summarizes these findings.

Result 1: *Based on comparative statics over ρ^*, Congress is ceteris paribus, more likely to prefer OIRA review to delegation without OIRA when*

i)   *it has relatively similar policy preferences (ideal points) with the President,*
ii) *it has relatively different policy preferences (ideal points) from the Agency, and*
iii) *OIRA's costs of policy change are high, and when the Agency and Congress have relatively different ideal points.*

In explicating Result 1, we might begin by characterizing the expected policy following delegation subject to OIRA review as

$$\tilde{x} = (1 - \rho)(x^*(a^*)) + (\rho)(a^*)$$
$$= \frac{Ac(2\rho + c) + \rho E(1 - \rho) + \rho^2 A}{c^2 + \rho + 2\rho c}.$$

Inspection reveals that as the President moves further away from Congress, so too, does the expected policy implemented. Hence, Congress is more likely to favor OIRA review, *ceteris paribus*, when the President and Congress have similar policy preferences. Analogously, Congress would be more likely to delegate policymaking authority to agencies subject to OIRA review, in contrast to independent agencies, when government is unified, rather than divided. Consistent with this implication, Kiewiet and McCubbins observe (1991, 181) that during the divided government years of the Reagan administration, congressional Democrats consistently tried to subvert OIRA review by simply writing agency rules into law—that is, creating policy internally, in the context of this model.

As the Agency moves farther away from Congress, Congress is more likely to prefer OIRA review because executive clearance induces the Agency to propose policies that are, *ceteris paribus*, more

Congress-friendly than what it would propose in the absence of OIRA. The fact that these agency proposals might be moved to $x^*(a)$ if OIRA intervenes is not problematic, so long as the Agency is sufficiently far away from Congress's ideal point to make the possibility of OIRA intervention worthwhile in comparison to a world in which all policies were located at A with certainty. For a similar rationale, when the Agency and Congress are relatively close to each other, Congress is less likely to prefer the possibility of OIRA intervention as intervention becomes more costly (c increases), yet this relationship reverses when the Agency is relatively close to OIRA. Because increases in OIRA's marginal costs generally cause final policies (either the Agency's proposal or OIRA's policy) to be located closer to the Agency, Congress is less likely to prefer OIRA when the Agency and Congress's ideal points are relatively similar and OIRA faces high costs.[30] For some critical value of A, however, the potential policy gains that follows from delegation with OIRA are so great, that even as OIRA's costs increase, leading to final policies generally closer to the Agency, Congress will still prefer the possibility of OIRA intervention given that the final policy implemented will sometimes deviate from the Agency towards Congress.

How Might Congress Want to Support OIRA?

Having identified why Congress might clearly want the potential for OIRA intervention in agency policymaking, one might ask how OIRA intervention, or constraints on OIRA, influences social welfare. Though not modeled here, Congress establishes OIRA's budget through the appropriations process, which presumably influences the effectiveness of OIRA review. Scholars (e.g., Shane 1995) have noted how Congress has historically leveraged appropriations to induce changes in OIRA review processes. Implicit in these accounts is the argument that influencing OIRA's budget can lead to policy outcomes that more appropriately reflect the interests of the American polity. The following results explore these possibilities.

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[30]Comparative statics analysis on the equilibrium policies in Proposition 1 reveals that $\frac{\partial a^*}{\partial c} > 0$ and $\frac{\partial x^*(a^*)}{\partial c} < 0$.

Proposition 3: *The expected policy enacted following delegation moves closer to Congress as OIRA's costs increase.*

As noted above, increasing OIRA's costs has two impacts in regards to policy. First, the equilibrium Agency proposal becomes more pro-President, which occurs because the Agency knows that OIRA review will be constrained, and hence, offers more right-leaning policies. Second, if a policy is salient to the President, the equilibrium policy outcome becomes more pro-Congress, because even though the Agency has proposed a more OIRA-friendly policy, OIRA has less resources with which to move the policy rightwards. While these marginal effects go in opposite directions, inspection reveals that the marginal impact of costs on OIRA's optimal policy, weighed by the probability that OIRA learns that the policy is salient $(1-\rho)$, is greater in magnitude than the marginal impact of costs, weighed by the probability of OIRA not intervening (ρ), on the Agency's optimal proposal. Hence, as OIRA's costs increase, the expected policy enacted following delegation becomes more left-leaning, favoring Congress. In light of this finding, one would suspect that Congress would strictly prefer to increase OIRA's costs, which would induce more left-leaning policies. The following Proposition reveals that this is not always the case.

Proposition 4: *The expected utility of OIRA is decreasing in its costs, while the expected utility of the Agency is increasing in OIRA's costs. Ceteris paribus, Congress's expected utility is*

i) *increasing (decreasing) in OIRA's costs when the Agency is relatively close to (far from) Congress,*
ii) *increasing (decreasing) in OIRA's costs when the President is relatively far from (close to) Congress, and*
iii) *increasing (decreasing) in OIRA's costs for lower (higher) values of c.*

Because increases in OIRA's costs induce leftward movements in the expected final policy implemented, it is unsurprising that marginal increases in OIRA's costs correspond to increases and decreases in the utilities of the Agency and OIRA, respectively. The impact of OIRA's costs on Congress's expected utility, however, profoundly depends on the actors' preference alignment and the baseline level of c.

Consistent with Result 1 above, we know that Congress is more likely to prefer OIRA intervention when its ideal point is further from the Agency and/or closer to OIRA. Hence, it is unsurprising that when Congress is relatively close to the Agency, and/or relatively far from OIRA, Congress would prefer that OIRA's costs be increased, which will decrease the impact of OIRA review. That said, the impact of OIRA's costs on Congress's expected utility is nonmonotonic in that when OIRA's costs are low, Congress would strictly prefer to increase OIRA's costs, which will cause the expected final policy to move sharply towards Congress from OIRA. For higher baseline costs, however, increasing OIRA's costs has a negligible impact on the expected final policy. While it continues to move slightly towards Congress, Congress would be better off by decreasing OIRA's costs, which would induce the Agency to propose more pro-Congress policies to accommodate for a bureaucratically competent OIRA.

Given this nonmonotonicity, the welfare effects of changing OIRA's costs are ambiguous. To the extent that Congress, the Agency, and the President represent different and collectively exhaustive, sets of constituencies in the American polity, the sum of the actors' expected utilities might be interpreted as a measure of social welfare. Hence, reforms aimed at constraining OIRA's influence might not lead to general increases in social welfare, as both the Congress and the President may be harmed; and in certain situations social welfare could be enhanced by actually *strengthening* OIRA's oversight capabilities.

Empirical Implications and Conclusion

In a separation of powers system, there is an obvious potential for conflict between the legislative and executive branches. As each branch of government develops new institutions to influence the policy-making process, it is natural for scholars and pundits to observe these institutions in action and to comment on how any given decision benefits one branch of government over the other. While such characterizations are straightforward to postulate, they may also be wrong. This paper advances a new perspective by arguing that certain bureaucratic institutions are created and survive, not because they benefit one branch of government at the expense of the other, but because they can efficiently serve the competing interests of *both* branches. The model developed here demonstrates how the possibility of OIRA

review generally induces agencies to propose poli-
cies that are biased away from the President towards
Congress. Because OIRA presumably only inter-
venes in rulemaking on policies that are salient to
the President's political constituencies, executive
clearance offers clear opportunities for political
gains from trade between the legislative and exec-
utive branches.

In certain cases OIRA will change policies to
benefit the President, while leaving other policies
unchanged even though they favor Congress. If
Congress and the President do not find too many
policies salient to their joint interests, OIRA review
can actually induce a positive-sum equilibrium in
which each of these competing institutions can
experience policy gains as a result of the agency's
strategic proposal. Contrary to the arguments of
many scholars, Congress might actually prefer that
OIRA be empowered with oversight capacity rather
than be hindered by cumbersome procedures and
limited resources. The model suggests that the scope
of the policy gains experienced by the legislative and
executive branches, as well as the locations of
proposed and final policies, and the incidence of
OIRA intervention, will depend profoundly on the
preference divergence among the actors, on the
probability of political salience to the President, and
on the relevant costs that OIRA must incur to change
policy. This paper therefore confronts the puzzle of
why a legislature might prefer *ex post* review by an
executive with divergent preferences over agency
policymaking. Put simply, executive review ensures
that bureaucratic policies are responsive to their
political principals in ways that could not be obtained
if agencies were unconstrained. These results suggest
several testable hypotheses.

First, and most obvious, the model suggests that
agencies strategically propose policies that deviate
from their ideal points in an effort to undermine the
potential incidence of executive clearance. There is
some evidence that such a dynamic occurs. In his
study of executive clearance during the Reagan
Administration, Maltzman notes that EPA staff
members were likely to add extra provisions to many
of their draft rules that they would be "willing to
'trade' with the OMB as a means of protecting the
important aspects of the rule" (1986, 102). Shapiro
identifies this precise dynamic at play in his study of
the Clinton-era ergonomics rule. In reviewing the
historical record, one of the most substantial changes
that followed from OIRA review of the ergonomics
rule was to alter worker restriction protection (WRP)
provisions from guaranteeing full pay and benefits for
incapacitated workers (OSHA's proposal) to guaran-
teeing only 90% take home pay and full benefits.
While this was clearly a notable change in policy,
interviews with OSHA officials suggest that they
never *actually* expected to implement the full pay
and benefits guarantee, but rather retained them in
earlier versions of the rule "so that they would be
available to give away" in later stages of the rule-
making process (Shapiro 2007, 693). In terms of
substantive policy influence of OIRA review, consid-
eration of the proposed ergonomics rule that was
published in the Federal Register reveals that OIRA
intervention reduced the annual estimated costs of
WRP by nearly $350 million per year.[31] Hence, one of
the most fundamental predictions of the theory ap-
pears to have face validity in contemporary agency-
OIRA interactions. Analysis of further case studies
and data would be helpful in ascertaining the general-
ity of agency over-proposals.

Second, the model suggests that the initial deci-
sion to delegate should be influenced by the prefer-
ence divergence between Congress the President, as
well as between Congress and the substantive agency.
As noted above, one straightforward hypothesis that
follows from the model is that Congress is more likely
to delegate to agencies subject to OIRA review during
periods of unified rather than divided government.
Other scholars (e.g., Epstein and O'Halloran 1999)
have found support for this hypothesis; yet regardless
of whether government is unified or divided, Result 1
suggests that Congress is more likely to delegate to
agencies subject to OIRA review the more closely
aligned they are to the President, which goes beyond
the predictions of existing theories. By analyzing how
delegation varies with respect to the agency's level of
political insulation, one could assess the veracity of
this prediction.

Third, with regard to policy outputs, comparative
statics analysis on the equilibrium policies identified
in Proposition 1 implies that the substantive effects of
OIRA intervention should be greatest on those pol-
icies that were a priori least salient to the President.[32]
Assuming that OIRA intervention leads to rules that
deviate from what would emerge from conventional
rulemaking proceedings, one would expect that those
rules would likely be judicially challenged for being

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[31] < http://www.osha.gov/pls/oshaweb/owadisp.show_document?
p_table=federal_register&p_id=16305> (accessed 1/7/08).

[32] More specifically, we see that $\frac{\partial x^\star(a^\star)}{\partial \rho} = \frac{c^2(E-A)(1+c)}{(c^2+\rho+2\rho c)^2} > 0$.

inconsistent with legislative intent (and/or that the rulemaking process was arbitrary and capricious). Hence, one plausible indicator of policy change following OIRA intervention is the amount of litigation that emerges following publication of the rule in the Federal Register, and it would be interesting to analyze the relationship between court challenges to rules following OIRA intervention, and the salience of the rule to Presidential interests.

Fourth, given that several states have incorporated OIRA-like institutions into their administrative lawmaking processes, there are clear opportunities for comparative state research. The results of the model suggest that legislatures in those states with OIRA-like institutions should be more likely to delegate to executive agencies under cases of unified government than those states without OIRAs. Consideration of this and related hypotheses can allow scholars to exploit the rich institutional variation that exists among the American states. Regardless of what direction is taken, the current model provides insight for why apparently contentious political institutions continue to survive and thrive in a contemporary separation of powers system. As states and comparative democracies continue to explore various methods of agency and regulatory oversight, these results should provide insight regarding the likely impacts of these institutions.

Appendix

Proof of Proposition 1: The equilibrium of this game is established by backwards induction. Upon realizing that policy under consideration is salient to its interests ($\varepsilon = 1$), OIRA will choose x^* to maximize its utility:

$$\underset{x}{\text{ArgMax}}\, U_E(x) = -(E-x)^2 - c(x-a)^2.$$

Differentiating $U_E(x)$ with respect to x and setting the first order condition equal to zero yields:
$\frac{\partial U_E(x)}{\partial x} = 2(E-x) - 2c(x-a) = 0 \Rightarrow x^*(a) = \frac{E+ca}{1+c}$, which is the optimal policy, $x^*(a)$, implemented by OIRA, in the event that it chooses to alter a.

In the previous stage, upon being delegated policymaking authority, the Agency will choose the a^* that maximizes its expected utility, which is based on the probability that OIRA deems the policy salient and chooses to move it to $x^*(a)$:

$$\underset{a}{\text{ArgMax}}\, EU_A(x) = -(1-\rho)(x^*(a)-A)^2 - \rho(A-a)^2.$$

Differentiating $EU_A(x)$ with respect to a, and setting the first order condition equal to zero yields:

$$\frac{\partial EU_A(x)}{\partial a} = \frac{\begin{array}{c}2(Ac(1+c+\rho)-Ec(1-\rho)\\-a(c^2+\rho+2\rho c)+\rho A)\end{array}}{(1+c)^2} = 0$$

$\Rightarrow \frac{\rho A + Ac(1+\rho+c) - Ec(1-\rho)}{c^2+\rho+2\rho c} = a^*$, which is the optimal agency policy proposal, and will induce an optimal OIRA policy of $x^*(a) = \frac{Ac(\rho+c)+\rho E(1+c)}{c^2+\rho+2\rho c}$ in the case of OIRA intervention.

Finally, Congress's equilibrium delegation and policy choice is based on its consideration of its expected utility following from delegation in comparison to its utility if it creates policy internally. If Congress decides to create policy internally, it will incur cost k, and it will set policy at its ideal point, yielding utility: $EU_L(\text{no delegation}) = -(1-2\rho) \times (L-L)^2 - \rho(L-L)^2 - \rho(0) - k = -(1-\rho)(0-0)^2 - \rho(0) - k = -k$. Alternatively, if Congress delegated to the agency, given the possibility of OIRA intervention, its expected utility is:

$$EU_L(\text{delegation}) = -(1-2\rho)(0-x^*(a))^2$$
$$- \rho(0)(0-x^*(a))^2 - \rho(0-a^*)^2$$

$$= -(1-2\rho)\left(\frac{Ac(\rho+c)+\rho E(1+c)}{c^2+\rho+2\rho c}\right)^2$$
$$-\rho\left(\frac{\rho A + Ac(1+\rho+c)-Ec(1-\rho)}{c^2+\rho+2\rho c}\right)^2.$$ Hence,

Congress will choose to delegate to the agency, even with the prospect of OIRA intervention whenever:

$$(1-2\rho)\left(\frac{Ac(\rho+c)+\rho E(1+c)}{c^2+\rho+2\rho c}\right)^2$$
$$+\rho\left(\frac{\rho A + Ac(1+\rho+c)-Ec(1-\rho)}{c^2+\rho+2\rho c}\right)^2 < k = k^*,$$

and will choose to create policy internally whenever $k < k^*$.

Proof of Proposition 2: To prove Proposition 2, it is sufficient to identify the critical value of ρ, such that Congress is indifferent between delegating to an agency that is subject to OIRA review, and delegating to an agency that sets policy without any oversight. If Congress were to delegate to an agency not subject to OIRA review, that agency would obviously set all policy equal it its ideal point, A. Hence, the expected

utility of Congress under delegation without OIRA would be:

$$EU_L(\text{del., no OIRA}) = -(1-2\rho)(L-A)^2$$
$$-\rho(L-A)^2 - \rho(0) = -(1-\rho)A^2.$$

In contrast, as noted above, if Congress delegated to an agency that was subject to OIRA review, its expected utility would be equal to:

$$EU_L(\text{del., OIRA}) = -(1-2\rho)$$
$$\times \left(\frac{Ac(\rho+c) + \rho E(1+c)}{c^2 + \rho + 2\rho c}\right)^2$$
$$-\rho\left(\frac{\rho A + Ac(1+\rho+c) - Ec(1-\rho)}{c^2 + \rho + 2\rho c}\right)^2.$$

Hence, setting these two expressions equal to one other and solving for $\rho^\star$ yields three roots: $\rho^\star \in \{\rho_A, 0, \rho_B\}$. Analysis demonstrates that $\rho_A < 0$, hence, the relevant solution which defines the critical $\rho^\star = \rho_B$:

$$\rho^\star = -\frac{1}{2}\left(\frac{Ec(c-2) + Ac(2c^2 + 3c - 2) - (E+A)}{Ec(4+c) + Ac(6+3c) + 2(E+A)}\right.$$
$$\left. -\frac{\sqrt{EA(\kappa) + A^2(\theta) + E^2(\psi)}}{Ec(4+c) + Ac(6+3c) + 2(E+A)}\right),$$

where $\kappa = (20c^3 + 16c^2 + 4c^4 + 8c + 2)$, $\theta = (13c^4 + 12c^6 + 8c^3 + 6c^2 + 4c + 1)$, and $\psi = (5c^4 + 12c^3 + 10c^2 + 4c + 1)$.

Comment on Result 1: To prove Result 1, it is sufficient to identify the signs of the first derivatives of $\rho^\star$ with respect to the variables of interest. While somewhat cumbersome, analysis reveals that:

$$\frac{\partial \rho^\star}{\partial E} > 0, \frac{\partial \rho^\star}{\partial A} < 0, \text{ and } \frac{\partial \rho^\star}{\partial c} > 0 \text{ for}$$
$$c \leq \bar{c} \text{ and } \frac{\partial \rho^\star}{\partial c} < 0 \text{ for } c > \bar{c}.$$

(Complete presentations of the relevant first-order conditions and $\bar{c}$ are omitted.)

Proof of Proposition 3: To prove Proposition 3, it is sufficient to identify the sign of the first derivative of the expected policy, $\tilde{x}$ with respect to c.

Given that $\tilde{x} = (1-\rho)(x^\star(a^\star)) + (\rho)(a^\star)$
$$= \frac{Ac(2\rho + c) + \rho E(1-\rho) + \rho^2 A}{c^2 + \rho + 2\rho c},$$

$$\frac{\partial \tilde{x}}{\partial c} = \frac{2\rho(A-E)(\rho+c)(1-\rho)}{(c^2 + \rho + 2\rho c)^2} < 0.$$

Proof of Proposition 4: To prove Proposition 4, it is sufficient to identify the sign of the first derivative of the expected utilities of the Agency, OIRA, and Congress.

For the Agency, $EU_A = \frac{\rho(\rho-1)(A-E)^2}{c^2 + \rho + 2\rho c}$. Hence, $\frac{\partial EU_A}{\partial c} = \frac{2\rho(A-E)^2(c - \rho c + \rho - \rho^2)}{(c^2 + \rho + 2\rho c)^2} > 0$.

For OIRA, $EU_E = \frac{c(c-1)(\rho-1)((E-A)(c+\rho))^2}{(c^2 + \rho + 2\rho c)^2}$. Hence, $\frac{\partial EU_E}{\partial c} = \frac{(\rho-1)(c+\rho)(E-A)(2\rho c^3 + c^3 + 5\rho c^2 - 3\rho c - \rho^2)}{(c^2 + \rho + 2\rho c)^3} < 0$.

For Congress, $EU_L = -(1-2\rho) \times \frac{(\rho E(1+c)^2 + Ac(c+c^2 + \rho c + \rho))^2}{(1+c)^2(c^2 + \rho + 2\rho c)^2} - \rho\frac{(A(c+c^2 + \rho c + \rho) + Ec(\rho-1))^2}{(c^2 + \rho + 2\rho c)^2}$.

Hence, $\frac{\partial EU_L}{\partial c} = \frac{E^2\alpha + EA\beta + A^2\gamma}{(c^2 + p + 2pc)^3}$, where $\alpha = \{\rho c(3 \times (\rho^2 - c + 2\rho c) + c^2(1+\rho) + \rho - 1) + c^3 + 2\rho^3\}$, $\beta = \{\rho c(c^2(2+c) - 2\rho) - \rho^3\}$, and $\gamma = \{\rho c(3(c - (\rho+c)^2) - c^2(c+\rho) + \rho + 1) + c^3 + \rho^2(1+\rho)\}$.

Inspection reveals that this derivative has several inflection points across the relevant domain that constitutes the parameter range under consideration. More specifically:

$$\frac{\partial EU_L}{\partial c} < 0 \text{ when } E \in (A, E^\star), \text{ and } \frac{\partial EU_L}{\partial c} > 0 \text{ when } E > E^\star, \text{ where}$$
$$E^\star = -\frac{\rho c(\rho(3\rho-1) + c(c^2 + 3c - 3) + \rho c(6+c) - \rho - 1) + \rho^2(\rho-1) + c^3}{\rho c(\rho(2\rho+1) + c(c-3) + \rho c(6+c) + \rho - 1) + \rho^2(2\rho-1) - c^3}.$$

$$\frac{\partial EU_L}{\partial c} > 0 \text{ when } A \in (0, A^\star), \text{ and } \frac{\partial EU_L}{\partial c} < 0 \text{ when } A \in (A^\star, E), \text{ where}$$
$$A^\star = -\frac{\rho c(\rho(1+3\rho) + c(c-3) + \rho c(6+c) - 1) + \rho^2(2\rho-1) - c^3}{\rho c(3(\rho+c)^2 + c(c^2 + \rho c - 3) - \rho - 1) + \rho^2(\rho-1) + c^3}.$$

Finally, $\frac{\partial EU_L}{\partial c} > 0$ when $c \in (1, c^\star)$, and $\frac{\partial EU_L}{\partial c} < 0$ when $c > c^\star$, where $c^\star$ is determined by setting $\frac{\partial EU_L}{\partial c}$ equal to 0 and solving for c (explicit form not presented here).

Comment on Footnote 28: To establish that OIRA review is pareto-improving for the President in comparison to unconstrained agency policymaking, it is sufficient to identify the crucial value of ρ such that the following holds: $EU_E(\text{OIRA}) \geq EU_E(\text{No OIRA})$

$$\Rightarrow -(E - x^\star(a))^2 - c(a - x^\star(a))^2 \geq$$
$$-(E - A)^2 \Rightarrow \rho \geq \rho^\star_E = \frac{c\sqrt{c^4 + 3c^3 + 3c^2 + c} - c^2}{3c^2 + 3c + 1}.$$

Hence, so long as $\rho \geq \rho^\star_E$, OIRA review is a pareto improving institution for the President.

Acknowledgments

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To identify the robustness of the results that are presented in the body of the manuscript, this supplementary appendix analyzes two extensions. First, we consider a model where the President incurs costs that are linear in policy change (rather than quadratic, as in the manuscript). Second, we analyze a model where the President incurs a simple fixed cost from altering policy, which is unrelated to the scope of policy change.

Delegation model with linear costs

For the purposes of analysis, we will assume that the sequence of play, and the preferences and ideal points of the actors are identical to those in the body of the manuscript, with the exception that we assume that the President's preferences can be represented by the following utility function:

$$U_E(x) = -(E - x)^2 - c(x - a),$$

where $c > 1$.
In other words, we assume that the President incurs costs that are linear in the distance between the final policy implemented and the agency proposal.

Proposition 1 under linear costs

The equilibrium of this game is established by backwards induction. Upon realizing that the policy under consideration is salient to its interests ($\varepsilon = 1$), OIRA will choose x^* to maximize its utility:

$$\underset{x}{\text{ArgMax}}\, U_E(x) = -(E - x)^2 - c(x - a)$$

subject to the constraint that $-(E - x)^2 - c(x - a) > -(E - a)^2 \Rightarrow c \le 2(E - a)$. Solving this constrained optimization problem yields:

$$x^*(a) = \begin{cases} 2E - c - a \text{ if } c > 2(E - a) \\ E - \dfrac{c}{2} \text{ if } c \le 2(E - a) \end{cases}.$$

In the previous stage, upon being delegated policymaking authority, the Agency will choose the a^* that maximizes its expected utility, which is based on the probability that OIRA deems the policy salient and chooses to move it to $x^*(a)$, as well as the marginal costs incurred by OIRA. More specifically, if $c \le 2(E - A)$, the agency knows that it's proposal won't influence OIRA's policy choice, so it will obviously set $a^* = A$, which will maximize its utility in those cases where $\varepsilon = 0$. However, if $c > 2(E\text{-}A)$, then the agency knows that its proposal can influence OIRA's policy, and hence, it will choose a^* to maximize the following function

$$\text{ArgMax}_{a} \, EU_A(x) = -(1-\rho)(x*(a)-A)^2 - \rho(A-a)^2.$$

Subject to the constraint that $-(1-\rho)(x*(a)-A)^2 - \rho(A-a)^2 \geq -(1-\rho)(A-(E-\frac{c}{2}))^2$, where

the latter expression is the utility that the Agency receives if it simply proposes $a = A$, failing to influence OIRA's policy choice when $\varepsilon = 1$. Solving this constrained optimization problem yields:

$$a* = \begin{cases} A \text{ if } c \leq 2(E-A) \\ A \text{ if } c > 2(E-A) \text{ and } \rho > \dfrac{1}{4} \\ 2E(1-\rho) + A(2\rho-1) + \rho c \text{ and } \rho \leq \dfrac{1}{4} \end{cases}.$$

Finally, Congress's equilibrium delegation and policy choice is based on its consideration of its expected utility following from delegation in comparison to its utility if it creates policy internally. If Congress decides to create policy internally, it will incur cost k, and it is obvious that it will choose to set policy at its ideal point, yielding utility equal to:

$$EU_L(\text{no delegation}) = -(1-2\rho)(L-L)^2 - \rho(L-L)^2 - \rho(0) - k = -k.$$

Alternatively, Congress delegates to the agency, given the possibility of OIRA intervention, its expected utility is equal to:

$$EU_L(\text{delegation}) = -(1-2\rho)(0 - x*(a))^2 - \rho(0)(0 - x*(a))^2 - \rho(0-a*)^2$$

$$= \begin{cases} -(1-2\rho)(\dfrac{c}{2}-E)^2 - \rho A^2 \text{ if } c \leq 2(E-A) \\ -(1-2\rho)(2\rho E - A(2\rho-1) - \rho c)^2 - \rho(2E(1-\rho) + A(2\rho-1) + \rho c)^2 \text{ if } c > 2(E-A) \end{cases}.$$

Hence, when $c \leq 2(E-A)$ Congress will choose to delegate to the agency, even with the prospect of OIRA intervention if $(1-2\rho)(\dfrac{c}{2}-E)^2 - \rho A^2 < k = k*$, and will choose to create policy internally whenever $k < k*$. Alternatively, if $c > 2(E-A)$, Congress will choose to delegate to the agency, even with the prospect of OIRA intervention if:
$$-(1-2\rho)(2\rho E - A(2\rho-1) - \rho c)^2 - \rho(2E(1-\rho) + A(2\rho-1) + \rho c)^2 < k = k**.$$ and will choose to create policy internally whenever $k < k**$.

Proposition 2 under linear costs

To establish a result analogous to Proposition 2 in the paper, it is sufficient to identify the critical value of ρ, such that Congress is indifferent between delegating to an agency that is subject to OIRA review, and delegating to an agency that sets policy without any oversight. As we know from the paper, if Congress were to delegate to an agency not subject to OIRA review, that agency would set all policy equal it its ideal point, A. Hence, Congress's expected utility under delegation without OIRA would be:

$$EU_L(\text{del., no OIRA}) = -(1-2\rho)(L-A)^2 - \rho(L-A)^2 - \rho(0) = -(1-\rho)A^2.$$

In contrast, as noted above, if $c \le 2(E-A)$ and Congress delegated to an agency that was subject to OIRA review, its expected utility would be equal to

$EU_L(\text{del., OIRA}) = -(1-2\rho)(\frac{c}{2}-E)^2 - \rho A^2$, whereas if $c > 2(E-A)$, it's expected utility from

delegating to an agency that was subject to OIRA review would be:
$EU_L(\text{del., OIRA}) = -(1-2\rho)(2\rho E - A(2\rho-1) - \rho c)^2 - \rho(2E(1-\rho) + A(2\rho-1) + \rho c)^2$. It is
clear that when OIRA's costs are relatively small, Congress would never prefer to delegate to an
agency subject to OIRA oversight, rather than delegating to an unconstrained agency. However,
if OIRA's costs are more substantial (and specifically if $c > 2(E-A)$), Congress will strictly
prefer to delegate to an agency subject to OIRA oversight if $\rho \ge \rho^*$, where

$$\rho^* = \frac{2E + 4A - c - \sqrt{20(E^2 - Ec) + 8(2AE - Ac) + 5c^2}}{2(2A - 2E + c)}$$

Result 1 under linear costs

To establish a result analogous to Result 1 in the manuscript, it is sufficient to identify the signs
of the first derivatives of ρ^* with respect to the variables of interest. Similar to the results in the

manuscript, we can demonstrate that $\frac{\partial \rho^*}{\partial E} > 0$. Unlike the results in the paper, however, we also

see that $\frac{\partial \rho^*}{\partial A} > 0$, and $\frac{\partial \rho^*}{\partial c} < 0$. In other words, ρ^* is monotonically increasing in A, yet

monotonically decreasing in c. (Complete presentations of the relevant first-order conditions are
omitted for space considerations.)

Proposition 3 under linear costs

To establish a result analogous to Proposition 3 in the manuscript, it is sufficient to identify the
sign of the first derivative of the expected policy, $\tilde{x}$ with respect to c. If $c \le 2(E-A)$, we know

that $\tilde{x} = (1-\rho)(E - \frac{c}{2}) + \rho A$, whereas if $c > 2(E-A)$, $\tilde{x} = (1-\rho)(4\rho E - 4\rho A - 2\rho c) + A$. In the

former case, we see that $\frac{\partial \tilde{x}}{\partial c} = -\frac{1}{2} + \frac{p}{2} < 0$, whereas in the latter case, we see that

$\frac{\partial \tilde{x}}{\partial c} = 2\rho^2 - 2\rho < 0$, which are substantively identical to the results reported in the manuscript.

Proof of Proposition 4

To establish a result analogous to Proposition 4 in the manuscript, it is sufficient to identify the
sign of the first derivative of the expected utilities of the Agency, OIRA, and Congress.

When $c \leq 2(E - A)$, we see that:

$$\frac{\partial EU_A}{\partial c} = -(1 - \rho)(A - E - \frac{c}{2}) > 0, \frac{\partial EU_E}{\partial c} = (1 - \rho)(A - E + \frac{c}{2}) < 0, \text{ and}$$

$$\frac{\partial EU_L}{\partial c} = -(1 - 2\rho)(-E + \frac{c}{2}) > 0.$$

The first two results are substantively the same as those reported in the paper, whereas now we see that when OIRAs costs are relatively low (i.e., $c \leq 2(E - A)$), Congress's expected utility is monotonically increasing in c.

When $c > 2(E - A)$, we see that:

$$\frac{\partial EU_A}{\partial c} = (1 - \rho)(4\rho E - 4\rho A - 2\rho c) > 0,$$

$$\frac{\partial EU_E}{\partial c} = 2(\rho - 1)((E - A)(3\rho - 2\rho^2 - 1) + c(\rho^2 - 2\rho + 1)) < 0,$$

and $\frac{\partial EU_L}{\partial c} = (2\rho c - 4\rho E)(\rho^2 + \rho - 1) + 2\rho^2 A(2\rho - 1) > 0$ when $c < c*$ and $\frac{\partial EU_L}{\partial c} < 0$

when $c > c*$ where $c* = \dfrac{2E(\rho^2 + \rho - 1) + A(\rho - 2\rho^2)}{\rho^2 + \rho - 1}$.

These results are substantively the same as those reported in the paper.

Delegation model with fixed costs

For the purposes of analysis, we will assume that the sequence of play, and the preferences and ideal points of the actors are identical to those in the body of the manuscript, with the exception that we assume that the President's preferences can be represented by the following utility function:

$$U_E(x) = -(E - x)^2 - z,$$

where $z > 0$ if $x \neq a$, and $z = 0$ if $x = a$. In other words, we assume that the President incurs a fixed cost equal to z if he/she changes the policy from the agency's proposal in any way, otherwise he/she incurs no cost, and ends up with the agency proposal as the final policy. In analyzing this extension, it is straightforward to show that many of the results in the body of the manuscript, and Proposition 2, in particular cannot be obtained.
To see this, note that for any policy a, the President will prefer to move the policy to his ideal point (E), unless a is greater than $E - \sqrt{z}$ (it is obvious that the agency will not propose any policy to the right of the President, hence, this is the relevant constraint.) So, the question becomes, under what conditions will the agency propose a policy that influences the President's final policy choice?
If the agency simply proposes ideal point, its expected utility equals:

$$EU_A = -(1 - \rho)(E - A)^2.$$

Alternatively, if it proposes $a = E - \sqrt{z}$, its expected utility equals:

$$EU_A = -(A - E + \sqrt{Z})^2.$$

In comparing these expressions, we see that so long as $\rho \geq \dfrac{2\sqrt{z}(E-A)-z}{(E-A)^2}$, the agency will propose $a^* = E - \sqrt{z}$, and it will propose $a^*=A$, otherwise. In either case, we see that the agency will never propose $a^* < A$, hence, there are no circumstances under which Congress could potentially benefit from delegating to an agency subject to OIRA review, rather than simply delegating to an unconstrained agency.