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Influenced or Influencer? OIRA's 12,866 Meetings in Review

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Influenced or Influencer? OIRA's 12,866 Meetings in Review

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ABSTRACT

Despite attempts to improve the transparency of its operations, the Office of Information and Regulatory Affairs ("OIRA") has often been maligned as a "black box" subject to improper influence by outside groups, particularly industry. Contributing to this perspective are "12,866 Meetings": meetings between OIRA, outside parties, and sometimes agencies that are governed by disclosure requirements in Executive Order 12,866, as well as strong norms within OIRA. Through an examination of empirical studies and theoretical mechanisms of influence, this Article provides a comprehensive assessment of 12,866 Meetings and their role in the regulatory development process. I argue that there is little evidence to support the view that OIRA is improperly influenced and an equivalent, if not greater volume of evidence supports the view that 12,866 Meetings have a beneficial effect on the rulemaking process. I then situate OIRA's process within the Administrative Procedure Act's legal standards for ex parte communications—off-the-record communications between agencies and parties to agency proceedings. Not only does OIRA's process exceed the relatively minimal statutorily- and judicially-imposed standards, but OIRA's level of transparency is nearly unmatched by any agency across the federal government. If OIRA is a black box, the agencies are a patchwork of even-blacker boxes. To bring more transparency to the rulemaking process, the Biden Administration should issue an executive order allowing OIRA to become an influencer by requiring federal agencies to match OIRA's strong disclosure standards for ex parte communications.

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INTRODUCTION

The White House Office of Information and Regulatory Affairs (OIRA) has been called the "most powerful government agency you've never heard of."[1] In the administrative law world, it might better be described as one of the most controversial government agencies you've all

1. *OIRA 101: The Most Powerful Government Agency You've Never Heard Of*, CTR. FOR PROGRESSIVE REFORM, (May 4, 2016), http://progressivereform.org/our-work/regulatory-policy/oira-101-most-powerful-government-agency-youve-never-heard/ [https://perma.cc/3NE4-4WTV]; *accord Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking: Joint Hearing Before the H. Subcomm. on Health Care, Benefits and Admin. Rules and H. Subcomm. on Gov't Operations of the H. Comm. on Oversight and Gov't Reform*, 114th Cong. 15 (2015) [hereinafter *House Hearing on OIRA*].

heard of.[2] OIRA is intimately involved in the development of nearly all of the federal government's regulations. The small office thus wields enormous influence over American society, particularly since 90% of laws in effect in the United States are in the form of regulation, not statute,[3] and the stage for policymaking battles has shifted in recent years from congressional legislation to administrative regulation.[4]

With great power, of course, comes great responsibility, and OIRA has been maligned by groups across the political spectrum for failing to exercise its power responsibly.[5] Some have criticized the office for being

2. As Donald Arbuckle points out, "how can an office that is reported as 'obscure' so many times still be obscure?" Donald R. Arbuckle, *Obscure But Powerful: Who Are Those Guys?*, 63 ADMIN. L. REV. 131, 132 (2011). This Article does not aim to add to the debate on the constitutionality and normative value of the centralized regulatory review process. For more on that topic, *see* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 38 ADMIN. & REG. L. NEWS 15 (2013); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

3. KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 59 (6th ed., 2018). *See generally* Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 39–40 (2019) (describing the enormous influence of regulation in American society).

4. *See* Lydia DePillis, *Inside The Battle to Overhaul Overtime—and What It Says About How Lobbying has Changed*, WASH. POST (Sept. 4, 2015, 6:19 AM), https://www.washingtonpost.com/news/wonk/wp/2015/09/04/inside-the-battle-to-overhaul-overtime-and-what-it-tells-us-about-how-lobbying-works-now/ [https://perma.cc/4E2X-PLL7].

5. *See* Arbuckle, *supra* note 2, at 133 (explaining OIRA's distrust across the political spectrum); CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 20 (2013) [hereinafter FUTURE OF GOVERNMENT] ("For [some progressive groups], OIRA was not merely an obstacle but evil . . . the place where indispensable public protections went to die."); James Goodwin, *The Progressive Case Against OIRA*, CTR. FOR PROGRESSIVE REFORM, http://progressivereform.org/our-work/regulatory-policy/progressive-case-against-oira/ [https://perma.cc/5L8J-HMLV]; GANESH SITARAMAN, CTR. FOR AM. PROGRESS, REFORMING REGULATION: POLICIES TO COUNTERACT CAPTURE AND IMPROVE THE REGULATORY PROCESS, 4 (Nov. 1, 2016), https://www.americanprogress.org/issues/economy/reports/2016/11/01/291499/reforming-regulation/ [https://perma.cc/RTW9-QU2K]; Clyde Wayne Crews Jr., *One Nation, Ungovernable? Confronting the Modern Regulatory State*, *in* WHAT AMERICA'S DECLINE IN ECONOMIC FREEDOM MEANS FOR ENTREPRENEURSHIP AND PROSPERITY 117, 127 (Donald J. Boudreaux ed., 2015). *See generally* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325 (2014) (describing problems with OIRA review from the perspective of a former Environmental Protection Agency official).

overly or too prescriptively involved in the rulemaking process. Others have faulted OIRA for deviating from the executive orders (EOs) that largely govern the procedures that the office follows.[6] Still others have likened OIRA to a "black box"[7] in which rules disappear and reappear with untraceable changes—despite major reforms made in the 1990s to address exactly this concern.

Contributing to the perception of a black box are "12,866 Meetings": meetings between OIRA, outside parties, and sometimes agencies that are governed by disclosure requirements in EO 12,866[8] and strong norms within OIRA. OIRA will meet with any stakeholder who requests it, provided that the meeting involves a rule OIRA is formally reviewing[9]; but in practice, these meetings tend to be requested by corporations, trade associations, and, to a lesser extent, public interest groups.[10] Despite the increasingly strong transparency practices, the disproportionate use of the Meetings by industry has contributed to a feeling among some groups that OIRA's process is captured by these outside groups and in need of reform.[11] Few studies have assessed these claims empirically.

Through an examination of empirical studies and theoretical mechanisms of influence, this Article provides a comprehensive assessment of 12,866 Meetings and their role in the regulatory development process. I argue that there is little evidence to support the view that OIRA is captured, and that there is an equivalent, if not greater, volume of evidence supporting the view that OIRA's meetings with outside groups have a beneficial effect on the rulemaking process.

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6. *See* Heinzerling, *supra* note 5, at 325.

7. Niina Heikkinen, *Trump's OIRA: More Bark than Bite*, E&E NEWS (Apr. 11, 2019, 1:01 PM), https://www.eenews.net/stories/1060154303 [https://perma.cc/3TVH-7NGS] ("The agency historically has been opaque, and OIRA under Trump is no exception. Even those who have worked for the agency describe it as a 'black box.'").

8. Exec. Order 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 98–102 (2018).

9. *See infra* note 66 and accompanying text.

10. *See infra* note 72 and accompanying text.

11. *See, e.g.*, *House Hearing on OIRA*, *supra* note 1, at 18 ("I have some concerns . . . about industry domination of those meetings. You know, there is a sense in America that the fox is guarding the hen house in a lot of this rulemaking."); Lisa Heinzerling, *20 Years of 12,866*, CTR. FOR PROGRESSIVE REFORM (Sept. 30, 2013), http://progressivereform.org/cpr-blog/20-years-of-12866/ [https://perma.cc/GXV5-9T9J] ("Meetings with outside parties on rules under review at OIRA are dominated by industry groups and the public has little information about what occurs during those meetings." "One of the defaults of government most corrosive of public trust is to promise transparency—even boast about it—while delivering mostly secrecy.").

I then turn to whether OIRA's process meets the legal standards for ex parte communications—off-the-record communications between agencies and parties to agency proceedings—and how OIRA's process compares to other federal agencies' practices for managing such communications. The EOs and norms that have developed around 12,866 Meetings, including the database that implements them, are part of the federal-government-wide system that regulates these ex parte communications, which is characterized by few judicial or statutory requirements for disclosure. Looking at OIRA's standards in comparison to the legal requirements and to agency practices shows that OIRA's level of transparency is nearly unmatched across government agencies. If OIRA is a black box, the agencies are a patchwork of even-blacker boxes. President Joe Biden recently tasked the Office of Management and Budget (OMB) with developing recommendations to make interagency review more transparent.[12] Requiring agencies to develop disclosure processes like those involved in OIRA's 12,866 Meetings is one way transparency might be improved across the federal government.

This Article proceeds in five Parts. Part I provides an overview of OIRA and the history and characteristics of 12,866 Meetings. Part II reviews the empirical literature regarding outside influence in OIRA's process and the rulemaking process more generally. It concludes that there is little reason to believe OIRA is improperly *influenced* by outside groups. Part III argues that of the many ways OIRA might be influenced, only a few could give rise to regulatory capture. Part IV situates 12,866 Meetings within the ex parte communications rules of the Administrative Procedure Act (APA)[13] and compares OIRA's process to several federal agencies' processes. Part V then argues that the Biden Administration should issue an executive order allowing OIRA to become an *influencer* by requiring federal agencies to match OIRA's strong disclosure standards for ex parte communications.

I. BACKGROUND ON OIRA AND 12,866 MEETINGS

A. OIRA's Role in the Regulatory Review Process

Seated within the Executive Office of the President, the OMB is the President's vehicle for "overseeing the implementation of his or her vision

12. *See* Modernizing Regulatory Review, 86 Fed. Reg. 7223, 7224 (Jan. 26, 2021) (tasking OMB with "identify[ing] reforms that will promote the efficiency, transparency, and inclusiveness of the interagency review process").

13. Administrative Procedure Act, 5 U.S.C. §§ 500–596.

across the Executive Branch."[14] On one hand, the OMB provides oversight of the regulatory process and coordinates executive branch communications with Congress.[15] On the other, it helps to produce the President's annual budget proposals and oversees other major financial decisions.[16] Both the management and budget sides of the OMB are united by a mission of "promot[ing] wise expenditures"[17] and coordinating across the executive branch.[18]

OIRA is one of the key offices on the OMB's management side. Congress created OIRA through the Paperwork Reduction Act of 1980[19] and tasked it with setting government-wide policies and standards for paperwork reduction, federal statistical activities, records management, records privacy, and information collection requests.[20] OIRA's most well-known role—and the role most relevant to this Article—is as overseer of the executive branch's regulatory activities. The Administrator of OIRA is often titled the nation's "regulatory czar."[21] OIRA reviews "'significant' draft[s] proposed and final regulations" from agencies, except independent agencies.[22] This includes rules with an annual cost or benefit of $100 million and virtually any others OIRA deems worthy of review,[23]

14. *Office of Management and Budget*, WHITE HOUSE, whitehouse.gov/omb/ [https://perma.cc/P6SM-588S].

15. *See id.*

16. *See id.*

17. John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 953 (2006).

18. *See* BARRY ANDERSON ET AL., THE WHITE HOUSE TRANSITION PROJECT 1997–2021, THE OFFICE OF MANAGEMENT AND BUDGET: AN INSIDER'S GUIDE 3 (Steve Redburn et al. eds., 2020).

19. Pub. L. No. 96-511, 94 Stat. 2824 (1980) (codified as amended at 44 U.S.C. §§ 3501–3521). Before OIRA existed, the Nixon Administration had tasked OMB with overseeing the interagency review process for proposed agency rules. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 665 (3d. ed. 2017) (citing Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546–47 (1989)). Presidents Ford and Carter also employed OMB in a similar way. *See id.*

20. Pub. L. No. 87-195, 94 Stat. 2812, 2815 (codified as amended at 44 U.S.C. § 3504); ANDERSON ET AL., *supra* note 18, at 5; Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839 (2013).

21. Sunstein, *supra* note 20, at 1839; ANDERSON ET AL., *supra* note 18, at 45.

22. *See* ANDERSON ET AL., *supra* note 18, at 46.

23. *See* Exec. Order No. 12,866 § 3(f), 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 96 (2018).

amounting to about 500 to 700 rules annually.[24] Reviewing rules involves an analytical element of ensuring that "rules meet cost-benefit criteria" and are well-reasoned and well-supported.[25] It also involves a substantive check to ensure planned agency actions are "consistent with presidential priorities."[26] Agencies cannot publish rules without OIRA's official sign-off, so agencies are strongly encouraged to comply the requested changes.[27]

According to Professor Cass Sunstein, a former OIRA Administrator,[28] OIRA's regulatory role is guided by a few "defining mission[s]": (1) "ensur[ing] that rulemaking agencies are able to receive . . . specialized information held by diverse people (usually career officials) within the executive branch[,]" and (2) "promot[ing] a well-functioning process of public comment, including state and local governments, businesses large and small, and public interest groups."[29] In theory, OIRA operates as a defender of a full and transparent rulemaking process by ensuring that all relevant information both from within and outside of government makes its way into decisionmakers' hands, that agencies have a venue for regulatory coordination and dispute resolution, and that the President's agenda is reflected in agency rules.

The mandate to review regulations came through an EO rather than the Paperwork Reduction Act of 1980 or another statutory source. OIRA's regulatory review process remains guided by "a combination of [strong institutional] norms and executive orders, things that are entirely within [a President's] power to change."[30] In EO 12,291, President Reagan first tasked OIRA with reviewing all regulations and established

24. *See* ANDERSON ET AL., *supra* note 18, at 47; MAEVE P. CAREY, CONG. RSCH. SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 1 (2011).

25. Steven J. Balla et al., *Outside Communications and OIRA Review of Agency Regulations*, 63 ADMIN. L. REV. 149, 152 (2011) (citing Exec. Order No. 12,866 § 1(b)).

26. *Id.* (citing Exec. Order No. 12,866 § 2(b)).

27. *See id.* at 150, 152; Sunstein, *supra* note 20, at 1848 ("Agencies may and do decline to accept suggested changes with which they disagree.").

28. The Administrator is the highest-ranking political official at OIRA. *See infra* text accompanying note 177.

29. Sunstein, *supra* note 20, at 1841.

30. Rachel Augustine Potter, *Regulatory Lobbying Has Increased Under the Trump Administration, But the Groups Doing the Lobbying May Surprise You*, BROOKINGS (July 11, 2018), https://www.brookings.edu/research/regulatory-lobbying-has-increased-under-the-trump-administration-but-the-groups-doing-the-lobbying-may-surprise-you/ [https://perma.cc/GCW9-BEX4].

cost-benefit analysis as the guiding analytical framework.[31] In 1993, President Clinton issued EO 12,866, which established a new baseline process and limited OIRA's review to "significant" rules, as defined by the agency.[32]

One of the main changes in EO 12,866 from EO 12,291 was to make OIRA's process more transparent in response to criticism leveled by outside groups and Congress.[33] Under President Reagan, OIRA's review process "at times degenerated into one in which OIRA served as a conduit for the views of industry on particular regulatory actions."[34] The process was opaque; it permitted industry, agencies, and OIRA to meet together behind closed doors with no required disclosure about the existence or nature of such meetings.[35] The lack of disclosure coupled with vast power was alarming to many, particularly given that it arose under the pro-industry, deregulatory presidencies[36] of Ronald Reagan and George H.W. Bush.[37] Two of OIRA's founders testified before Congress in 1981 that the office was "a junkyard dog (powerful) that left no paw prints (obscure)."[38] In response, Congress threatened to defund OIRA.[39]

EO 12,866 initiated a number of reforms aimed to bring "greater openness, accessibility, and accountability" to the process.[40] This fit into a

31. *See* Exec. Order No. 12,291, 1 C.F.R. § 127 (1981); Heinzerling, *supra* note 5, at 327.

32. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 102 (2018).

33. *See* CAREY, *supra* note 24, at 9.

34. Heinzerling, *supra* note 5, at 329 (citing Claudia O'Brien, *White House Review of Regulations Under the Clean Air Act Amendments of 1990*, 8 J. ENV'T L. & LITIG. 51, 58–80 (1993)).

35. *See id.*

36. *See, e.g.*, Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697, 723 (2019).

37. *See* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 151–52, 202 (1991).

38. Arbuckle, *supra* note 2, at 131.

39. *See, e.g.*, Jack Wright & Tiago Mata, *Epistemic Consultants and the Regulation of Policy Knowledge in the Obama Administration*, 58 MINERVA 535, 538 (2020).

40. Exec. Order No. 12,866 § 6(b)(4), 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 106 (2018). There were several notable reforms: First, OIRA meetings with outside parties must provide an opportunity for the rule's issuing agency to participate, and any written communications OIRA receives from outside groups must be forwarded to the issuing agency. *Id.* § 6(b)(4)(B). Second, OIRA must disclose contacts with outside parties regarding a given rule during the time in which that rule is under review. *Id.* § 6(b)(4)(C). Third, after a final decision has been rendered on a rule, OIRA must make any documents exchanged with outside parties available to the public. *Id.* § 6(b)(4)(D). And fourth, the issuing agency is supposed to describe to the public any sub-

broader transformation of government practices at that time aimed at reducing regulatory capture—particularly by business interests—by broadening access to policymakers and diversifying the sources of information reaching those policymakers.[41] Presidents Bush,[42] Obama,[43] Trump,[44] and Biden[45] have all issued subsequent EOs that modify the requirements of EO 12,866, yet OIRA's process remains largely the same as laid out in the original EO 12,866. Professor Sunstein has referred to EO 13,563—President Obama's EO that reaffirmed EO 12,866—as a "mini-constitution for the regulatory state[.]"[46] Transparency has been a pervasive focus and theme of OIRA's work throughout the various iterations of these "mini-constitutions." For example, Bush Administration OIRA Administrator John Graham emphasized transparency as a core value in his communications with staff, and he encouraged the office to build on the transparency requirements in EO 12,866.[47] Transparency in OIRA's processes has continued to be a stated goal of many OIRA Administrators and Congress since then.[48] Despite reforms and these recommitments to transparency, some progressives have identified "[o]verhauling regulatory review [as] crucial to advancing Biden's priorities[.]"[49]

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stantive changes to a regulation made during OIRA review or at OIRA's direction. *Id.* § 6(b)(4)(E).

41. *See* JAMES Q. WILSON, BUREAUCRACY 86 (1989) [hereinafter BUREAUCRACY].

42. *See* Exec. Order No. 13,258, 3 C.F.R. § 204 (2002); Exec. Order No. 13,422, 3 C.F.R. § 191 (2008). President Obama revoked both of these Bush EOs. *See* Exec. Order No. 13,497, 3 C.F.R. § 218 (2010).

43. *See* Exec. Order No. 13,563, 3 C.F.R. § 215 (2012).

44. *See* Exec. Order No. 13,771, 3 C.F.R. § 284 (2017); Exec. Order No. 13,777, 3 C.F.R. § 293 (2017); Exec. Order No. 13,891, 3 C.F.R. § 371 (2019); Exec. Order No. 13,892, 3 C.F.R. § 375 (2019); Exec. Order No. 13,893, 3 C.F.R. § 380 (2019). President Biden revoked all of these Trump EOs. *See* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 25, 2021).

45. *See* 86 Fed. Reg. 7049. President Biden also issued a Presidential Memorandum reaffirming the principles in EO 13,563 and tasking the OMB with improving the interagency regulatory review process. Modernizing Regulatory Review, 86 Fed. Reg. 7223, 7224 (Jan. 26, 2021).

46. CASS R. SUNSTEIN, VALUING LIFE 17 (2014) [hereinafter VALUING LIFE].

47. Heinzerling, *supra* note 5, at 335 n.58 ("I believe that the transparency of OIRA's regulatory review process is critical to our ability to improve the nation's regulatory system. Only if it is clear how the OMB review process works and what it does will Congress and the public understand our role and the reasons behind our decisions." (quoting John D. Graham, *OIRA Disclosure Memo-B*, OFF. OF MGMT. & BUDGET (Oct. 18, 2001)).

48. *See House Hearing on OIRA*, *supra* note 1, at 2–3.

49. Amy Sinden, *Rep. Mary Gay Scanlon Should Hold Biden's Feet to the Fire on Regulatory Agenda*, PHILA. INQUIRER (Feb. 18, 2021), https://cpr-assets.s3.amazonaws.com

B. 12,866 Meetings

This Article focuses on EO 12,866's reforms to OIRA's meetings with outside groups and the subsequent disclosure of those meetings. EO 12,866 anticipates, directs, and regulates meetings between OIRA and non-federal government stakeholders;[50] however, more attention and concern has been directed at the potential influence of non-governmental actors. Collectively, I refer to meetings between OIRA and outside stakeholders, typically non-governmental actors, as "12,866 Meetings," since these meetings are regulated by the EO.

Under Section 6(b)(4)(C)(iii), OIRA is required to maintain a publicly available database of 12,866 Meetings that includes "[t]he dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications."[51] For many years, OIRA disclosed only the minimum information required by the EO and placed it on OIRA's docket library in handwritten form[52]—a practice researchers referred to as "cryptic[.]"[53] But in 2001, OIRA leapt into digital transparency, making information about its communications with external groups publicly available on the Internet.[54] Transparency improved again in 2003 when OIRA adopted a Government Accountability Office (GAO) recommendation to also provide the "regulatory action . . . being discussed and the affiliation of the meeting participants."[55] This was the only recommendation OIRA actually implemented of eight items the GAO recommended, which were aimed at clarifying the OIRA review process and helping the public better understand the effects of

/documents/cpr-dfp-cba-polling-sinden-phillyinquirer-oped-021821.pdf [https://perma.cc/WM44-3XQD].

50. Sections (1)(b)(9) and (4)(e) of Exec. Order No. 12,866 encourage OIRA and agencies to seek the views of state, local, and tribal officials whose jurisdictions may be affected by regulations.

51. *Id.* § 6(b)(4)(C)(iii).

52. *See OIRA Transparency Improves as Action Increases*, CTR. FOR EFFECTIVE GOV'T (Feb. 25, 2002), https://www.foreffectivegov.org/node/360 [https://perma.cc/UQ2N-7T3Z].

53. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 854 (2003).

54. Balla et al., *supra* note 25, at 151.

55. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-505T, OPPORTUNITIES REMAIN FOR OMB TO IMPROVE THE TRANSPARENCY OF RULEMAKING PROCESSES 5 (2016).

OIRA's review.[56] However, before the mid-2000s, the GAO still noted reliability concerns with the meeting log data.[57]

In April 2014, OIRA overhauled its website to provide even more information and to make the database more easily searchable.[58] In addition to the required information, the regulatory action being discussed, and the participants' affiliations, OIRA reports (1) who requested the meeting; (2) whether the meeting was via teleconference or in person; and (3) whether the meeting was completed, was scheduled, or was a "no show."[59] Any documents provided by the outside group are available to view.[60] The public database is also searchable by agency, sub-agency, date range, stage of rulemaking, and regulatory identifier.[61] It currently contains all[62]

56. *Id.*

57. Simon F. Haeder & Susan Webb Yackee, *Out of the Public's Eye? Lobbying the President's Office of Information and Regulatory Affairs*, 9 INT. GRPS. & ADVOC. 410, 414 (2020) (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS (2003); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS (2009)).

58. *Accountability and Transparency Reform at the Office of Information and Regulatory Affairs: Hearing Before the H. Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 2 (2016) (statement of Howard Shelanski, OIRA Administrator), https://republicans-oversight.house.gov/wp-content/uploads/2016/03/2016-03-15-Howard-Shelanski-OMB-Testimony.pdf [https://perma.cc/JS5V-2JAN].

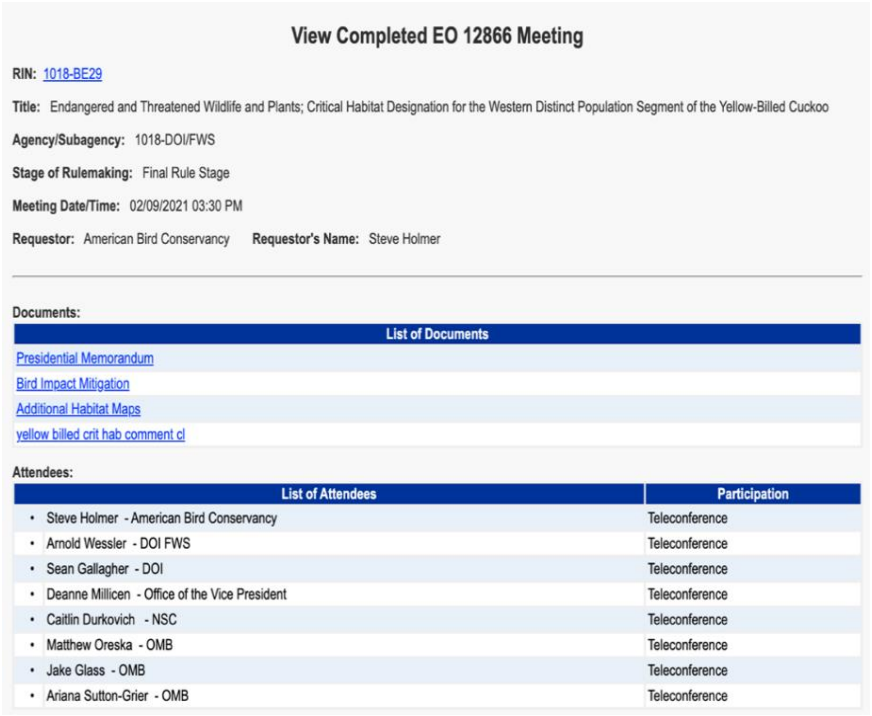
59. *See EO 12866 Meetings*, OFF. OF INFO. & REGUL. AFF., https://www.reginfo.gov/public/do/eom12866Search [https://perma.cc/HME6-VNYA].

60. *See id.*

61. *See id.*

62. There has been at least one account disputing the assertion that *all* meetings are put online. Peter L. Strauss, *Things Left Unsaid, Questions Not Asked*, 164 U. PA. L. REV. ONLINE 293, 301 n.42 (2016) (responding to Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587 (2016)). Professor Strauss alleges that documents on the rulemaking docket for a Department of Labor rule "clearly show[ed]" OIRA officials met with an interested party, yet the meeting was missing from OIRA's logs. *Id.* The meeting logs did include other 12,866 Meetings about the same rule. *Id.* Others have also disputed the accuracy and completeness of the information included in the OIRA logs. For example, in post-hearing questions for the record, Senator Gary Peters asked then-nominee for OIRA Administrator Paul Ray why several meetings that appear to have occurred "do not include information regarding who participated and what documents were left behind." *Nomination of Paul J. Ray: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 116th Cong. 110 (2019). Ray responded that "[t]he list of meeting participants and documents submitted are still [input online] by hand and [completing the logs] depend[s] upon resources available." *Id.* at 111.

12,866 Meetings since April 1, 2014,[63] including 4,665 completed meetings as of August 1, 2022.[64]



View Completed EO 12866 Meeting

RIN: 1018-BE29

Title: Endangered and Threatened Wildlife and Plants; Critical Habitat Designation for the Western Distinct Population Segment of the Yellow-Billed Cuckoo

Agency/Subagency: 1018-DOI/FWS

Stage of Rulemaking: Final Rule Stage

Meeting Date/Time: 02/09/2021 03:30 PM

Requestor: American Bird Conservancy **Requestor's Name:** Steve Holmer

Documents:

List of Documents
Presidential Memorandum
Bird Impact Mitigation
Additional Habitat Maps
yellow billed crit hab comment cl

Attendees:

List of Attendees	Participation
• Steve Holmer - American Bird Conservancy	Teleconference
• Arnold Wessler - DOI FWS	Teleconference
• Sean Gallagher - DOI	Teleconference
• Deanne Millicen - Office of the Vice President	Teleconference
• Caitlin Durkovich - NSC	Teleconference
• Matthew Oreska - OMB	Teleconference
• Jake Glass - OMB	Teleconference
• Ariana Sutton-Grier - OMB	Teleconference

Figure 1. Example database entry for a completed 12,866 Meeting. Each document provided by the outside group is available by clicking the hyperlinked title on the live page.[65]

There are a few additional points to note about the structure of 12,866 Meetings. OIRA has an open-door policy and "will take a meeting with any stakeholder who requests it," provided that the meeting involves a rule OIRA is formally reviewing.[66] The meetings focus on that specific rule,

63. *See EO 12866 Meetings*, *supra* note 59.

64. *See id.* (Search the Meeting Type field for "Completed Meeting" and enter the Date Range From "04/01/2014" and To "08/01/2022"). This returns 4,665 entries. *See id.*

65. *Completed EO 12866 Meeting: Endangered and Threatened Wildlife and Plants; Critical Habitat Designation for the Western Distinct Population Segment of the Yellow-Billed Cuckoo*, OFF. OF INFO. & REGUL. AFF. (Feb. 9, 2021), https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=1018 BE29&meetingId=14173&acronym=1018 DOI/FWS [https://perma.cc/Z6TK-4MMW].

66. Potter, *supra* note 30; *see also House Hearing on OIRA*, *supra* note 1, at 15, 18–19, 31–32; Sunstein, *supra* note 20, at 1860.

rather than offering a broad invitation for outside groups to discuss any issue.[67] The meetings are also designed to provide a one-way flow of information.[68] Outside groups often give a presentation and provide handouts to OIRA staff, who may ask clarifying questions; however, OIRA staff are not supposed to "volunteer information . . . about the rule under development."[69] These practices are not provided for by any particular EO; they have simply developed as strong norms.

12,866 Meetings can occur during a few stages in the typical[70] regulatory process: pre-rule, proposed rule, and final rule. During the pre-rule—or advance notice of proposed rulemaking—stage, agencies solicit public comment to gauge the need for and the possible direction for rulemaking.[71] This stage and the final rule review stage both involve 12,866 Meetings during the time in which OIRA is reviewing a *published* notice with opportunity for comment; thus, meeting participants have a sense of what the agencies are considering. Contrast this to the proposed-rule stage, when OIRA is typically reviewing an agency rule under development that has not yet been released to the public. 12,866 Meeting participants may meet with OIRA about those rules even though the participants are guessing as to what might be in the rule.

Anyone is theoretically able to meet with OIRA in a 12,866 Meeting, yet not all groups utilize them to the same degree. The Meetings are, unsurprisingly, dominated by businesses and trade associations representing particular industries.[72] Considering all interest-group lobbying at the federal level, corporations and trade associations are behind more than 84% of expenditures,[73] and they disproportionately submit written comments during rulemaking.[74] Many political scientists have attributed this to a

67. *See* Potter, *supra* note 30.

68. *See* Sunstein, *supra* note 20, at 1860.

69. *See* Potter, *supra* note 30.

70. There are also less-commonly used stages, such as notice, interim final rule, and direct final rule. *Frequently Asked Questions*, OFF. OF. INFO. AND REGUL. AFF., https://www.reginfo.gov/public/jsp/Utilities/faq.jsp [https://perma.cc/JHS4-79EB].

71. *See id.*

72. *See* Potter, *supra* note 30; Balla et al., *supra* note 25, at 154.

73. John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 ANN. REV. POL. SCI. 163, 165 (2014).

74. *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding that, in a review of 30 rules and nearly 1,700 comments, over 57% of comments came from business interests); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128 (2011) (finding that industry and industrial associations submitted more than 81% of comments on an EPA rule regulating hazardous air pollutants).

collective action problem: organizing individuals and firms to take action on any given issue is challenging, and thus, "the interest system will be biased in favor of small groups with significant [resources and] stakes in policy."[75] Indeed, Professor Rachel Potter's comparison of 12,866 Meetings in the first year of Trump's and Obama's presidencies found that trade associations accounted for just over half of the meetings during the Obama Administration, followed by businesses, and that public interest groups accounted for far fewer.[76] However, public interest and nonprofit lobbying increased in the first year of the Trump Administration, perhaps in response to an increase in regulatory actions adverse to those groups' interests.[77] This resource differential combined with the open nature of the 12,866 Meetings means that there is no guarantee that any given rulemaking will see a "balanced" set of groups presenting their cases to OIRA. Professor Sunstein has noted that in his experience at OIRA, "on environmental rules, the people who come in are well *over* half industry, and that environmental groups . . . are well *under* half."[78]

A few agencies also attract a disproportionate number of 12,866 Meetings. Between April 1, 2014, and August 1, 2022, the Environmental Protection Agency (EPA) and Department of Health and Human Services (HHS) garnered the most meetings, far outpacing every other agency.[79]

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75. David Lowery, *Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 POLITY 29, 32 (2007); *see also* Wagner et al., *supra* note 74, at 107 ("[W]hen the benefits of a policy are diffused across the population and the costs are concentrated on a small group of regulated parties, the agency is more at risk of capture. . . ." (quoting James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 367–70 (James Q. Wilson ed., 1980))); BRUCE M. OWEN, THE REGULATION GAME 10–13 (1978). For additional background from some of the canonical political science texts, *see generally* ELMER E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE (1960) (formulating a theory of political organization); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (analyzing the potential uses of public resources to improve the economic status of economic groups); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS (1982) (theorizing that political stability increases special-interest lobbies); William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512 (1991) (reviewing models of interest-group influence and discussing how interest groups influence policy).

76. *See* Potter, *supra* note 30.

77. *See id.* ("12866 [M]eetings are often concentrated on issues where the requesting group believes that the agency's rule is likely to impact their interests (often negatively) *and* where the group has reason to believe the sponsoring agency is unlikely to respond to their concerns without additional pressure.").

78. Cass R. Sunstein, *OIRA and the Public*, REGUL. REV. (Sept. 12, 2013), https://www.theregreview.org/2013/09/12/12-sunstein-oira-and-public/ [https://perma.cc/7RAD-XUZS].

79. *See* Table 1, *infra*.

These agencies do a significant amount of rulemaking,[80] and for several years, the rulemaking was quite controversial.[81] The amount of rulemaking does not necessarily correlate with the number of meetings, though; for example, the Department of Energy (DOE) completed about one-third the number of economically significant rulemakings as the Department of Agriculture (USDA), but had just 6% of the USDA's 12,866 Meetings.[82]

Department	**Number of Completed Meetings**
Environmental Protection Agency	1550
Health & Human Services	776
Labor	467
Education	396
Interior	371
Transportation	294
Agriculture	235
Treasury	90

80. *See Economically Significant Rules by Agency*, GEO. WASH. U. REGUL. STUD. CTR., https://regulatorystudies.columbian.gwu.edu/economically-significant-rules-agency [https://perma.cc/UKP7-CDNA]; *see also* Croley, *supra* note 53, at 846.

81. *See* Potter, *supra* note 30.

82. *See Economically Significant Rules by Agency*, *supra* note 80. From 2003 to 2020, the USDA completed 110 economically significant rulemakings and the DOE completed 40. *See id.*

Housing & Urban Development	82
Homeland Security	79
Commerce	70
Defense	57
Justice	47
State	20
Energy	20
Veterans Affairs	14

Table 1. Completed 12,866 Meetings by agency from April 1, 2014, to August 1, 2022, including the fifteen cabinet agencies and the EPA.

The number of rules that actually involve a 12,866 Meeting is generally small. One study of Bush and Obama Administration rules found that only 8.3% of those rules actually involved a 12,866 Meeting.[83] This is, of course, agency-specific. From April 1, 2014, to August 1, 2022, OIRA reviewed 295 EPA rules, and 187 (63%) involved at least one meeting.[84]

Although data exist on the agencies and outside groups involved in 12,866 Meetings, it can be difficult to draw meaningful insights from simplistic comparisons. The next Part evaluates the literature drawing on these data and other information to make conclusions about the nature of influence in the rulemaking process.

II. EMPIRICAL EVIDENCE OF (LACK OF) INFLUENCE

12,866 Meetings are one tool used by outside groups [85] to lobby the federal government and influence the development of regulations. Many have debated (1) whether there is any influence at all, and (2) whether such influence is positive, resulting in rules that produce net benefits to society, or negative, resulting in the kind of regulatory capture that EO 12,866 was designed to avoid. Some contend that 12,866 Meetings have little to no influence over the regulatory process,[86] or that such influence is

83. Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 513 (2015).

84. Calculated based on OIRA review of and meetings regarding unique regulations, determined based on RIN number. *See Historical Reports*, OFF. OF INFO. & REGUL. AFF., https://www.reginfo.gov/public/do/eoHistoricReport [https://perma.cc/8KJC-N9W8] (data compiled from years 2014–2022); *EO 12866 Meetings*, *supra* note 59.

85. Potter, *supra* note 30. ("[T]he sheer number of [12,866 Meetings] suggests that *lobbying groups* view them as valuable." (emphasis added)).

86. *See, e.g.*, Sunstein, *supra* note 78 ("[T]hey're generally not a big deal or decisive.").

not improper. This Part analyzes the empirical evidence linking outside group intervention to substantive development of rules via OIRA.[87] I conclude that even if such an influence does exist, it is far from clear that any influence is negative.

On one hand, some studies find little to no influence of outside groups on the rulemaking process. The broad consensus in the lobbying literature is that studies of interest group influence in democratic politics most often produce null findings.[88] Some researchers have found that in the rulemaking context, public comments have little influence on the outcome of rules: "[C]onsensus is that agencies carefully consider outside viewpoints, yet for the most part alter rules very little in response to comments and input provided by interested parties."[89] This is particularly true of studies from the 1980s and 1990s.[90] As to 12,866 Meetings, an analysis of OIRA review of Clinton Administration rules showed that there was no association between at least the *types* of interests represented at 12,866 Meetings and the propensity of the Clinton Administration to compel agencies to revise their submissions.[91] So even if there was some small impact, it was not in favor of any particular interest, especially the economically powerful groups that most concern OIRA skeptics.[92] Another study qualitatively examined the relationship between public land agencies (e.g., Department of the Interior) and OIRA and concluded that "OIRA is not always slow or influenced by undue interests[;] rather they can serve as an independent evaluator of an agency rule."[93]

87. There are few studies that speak directly to 12,866 Meetings. Studies more often analyze other aspects of the notice-and-comment process. Notably, no studies have examined the impact of 12,866 Meetings that occur while a proposed rule is at OIRA (i.e., before the agency accepts comments).

88. David Lowery, *Lobbying Influence: Meaning, Measurement and Missing*, 2 INT. GRPS. & ADVOC. 1, 1 (2013). *See generally* Paul Burstein, *The Determinants of Public Policy: What Matters and How Much*, 48 POL'Y STUD. J. 87 (2020) (noting that "variables hypothesized to influence policy more often than not have no effect" and commenting on the impact of this conclusion for policy research).

89. Balla et al., *supra* note 25, at 155.

90. *See, e.g.*, Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 262 (1998) (finding that only one of ten final rules studied was changed significantly from the notice of proposed rulemaking); WESLEY A. MAGAT ET AL., RULES IN THE MAKING 157 (1986) (finding public comments had no impact on effluent regulations by the EPA).

91. *See* Balla et al., *supra* note 25, at 157.

92. *See id.*

93. Sara Rinfret, *Public Land Agencies, OIRA, and Rulemaking*, 41 PUB. ADMIN. Q. 186, 204 (2017).

On the other hand, commenters and 12,866 Meetings have been associated with at least some changes in the substantive outcome of rules. This starts before a rule has even been issued in a proposed form. Agency representatives and OIRA can meet with outside groups during or after a public comment period or before the agency issues a notice of proposed rulemaking (NPRM). "Early-bird" groups that lobby agencies and OIRA during an advanced notice of proposed rulemaking—generally when an agency is collecting information and ideas for future regulation[94]—may be better positioned to frame policy choices and set the agenda from the outset.[95] Brian Libgober found that outside groups that met with the Federal Reserve Board before an NPRM was issued were far more likely to have their requests granted in rulemaking than their disengaged competitors.[96]Industry groups also tend to be the most frequent meeting requestors at agencies, particularly at these early, pre-NPRM or proposed-rule stages; for example, on one Dodd-Frank regulation, public-interest-oriented groups accounted for just 6.9% of meetings, and the other 93.1% were with financial institutions, industry trade groups, and law firms representing those groups.[97]

Once a proposed rule is published, agencies themselves have stated the immense potential value of written comments in altering a final rule: the GAO surveyed agencies that often receive a high volume of public comments and found that the public-comment process nearly *always* resulted in substantive changes.[98] Forty-nine of the fifty-two offices surveyed said public comments submitted during the study period resulted in at least some substantive changes to final rules.[99] These changes might be

94. *See generally* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 633–37 (2002) (providing more on advanced notices of proposed rulemaking).

95. *See* Keith Naughton et al., *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258, 258–59 (2009); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1383 (2010) ("Legal counsel for industry participants advise them to '[g]et involved during the preproposal phase of an Agency rulemaking. That is when the regulation writers want reliable technical information . . . and are thus most receptive to comments from interested persons.'" (alterations in original) (quoting Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NAT. RES. & ENV'T 9, 9 (1990)).

96. Brian Libgober, *Meetings, Comments, and the Distributive Politics of Rulemaking*, 449, 470 (Q.J. Pol. Sci. Working Paper, Paper No. 20–28, 2020).

97. Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 80 (2013).

98. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-383R, FEDERAL RULEMAKING: INFORMATION ON SELECTED AGENCIES' MANAGEMENT OF PUBLIC COMMENTS 7 (2020).

99. *Id.*

small, from tonal shifts[100] to dropping citations in the regulatory impact analysis,[101] or they might be much more substantive.[102] There is no inherent obligation for an agency to change its regulations in response to comments, though.[103]

In the context of 12,866 Meetings specifically, both time delays and substantive changes have been associated with interest in 12,866 Meetings. One study of 12,866 Meetings from 2002 to 2006 found that when there was no 12,866 Meeting, the average review time was shorter by nearly ten days,[104] and rules were more likely "to be altered or not approved at all" if there was contact with outside parties.[105]

The most famous study of the impact of 12,866 Meetings on rulemaking comes from Simon Haeder and Susan Webb Yackee.[106] They ex-

100. Andrei Kirilenko et al., *Do U.S. Financial Regulators Listen to the Public? Testing the Regulatory Process with the RegRank Algorithm* (Working Paper presented in Proc. of the Int'l Workshop on Data Sci. for Macro-Modeling, 2014); *see also* Steven J. Balla, *Measuring the Impact of Public Comments*, GEO. WASH. U. REG. STUD. CTR. (Apr. 7, 2014), https://regulatorystudies.columbian.gwu.edu/measuring-impact-public-comments (reviewing *id*.).

101. *See* Mia Costa et al., *Public Comments' Influence on Science Use in U.S. Rulemaking: The Case of EPA's National Emission Standards*, 49 AM. REV. PUB. ADMIN. 36, 43 (2019) (finding that when the outcome of a final rule was not markedly different from the proposed rule, one way for agencies to pacify commenters who took issue with the proposed rule was to strategically remove citations to controversial scientific studies in the final regulatory impact analyses).

102. *See, e.g.*, Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 103 (2006) (finding strong evidence that final regulations were changed to more closely match the ideal points of interest groups who submitted comments); Yackee & Yackee, *supra* note 74, at 128 (finding that comments led to substantive changes in rules, and that "business commenters, but not nonbusiness commenters, hold important influence over the content of final rules"); Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175, 175–76 (1992).

103. *See* BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979) ("The procedural rules were meant to ensure meaningful public participation in agency proceedings, not to be a straitjacket for agencies. An agency's promulgation of proposed rules is not a guarantee that those rules will be changed only in the ways the targets of the rules suggest.").

104. Balla et al., *supra* note 25, at 158–59. *But see* Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking*, 79 J. POL. 841, 841 (2017) (finding that agencies and the White House may delay or speed up rules to take advantage of favorable political climates, "and that delay is not simply evidence of increased bureaucratic effort").

105. Balla et al., *supra* note 25, at 160.

106. *See Influence and the Administrative Process*, *supra* note 83.

amined all final rules that OIRA reviewed between January 1, 2005 and June 30, 2011—approximately 1,500 rules.[107] Using automated content-analysis software, they compared the text of draft final rules submitted by agencies to final rules published in the Federal Register.[108] For each additional group that had a 12,866 Meeting during the review of a final rule, there was a 0.6% point increase in the rule text—and rules that involved more powerful lobbying groups (i.e., active political campaign donors) saw more changes.[109] Industry Meetings were more associated with changes to final rules than were public interest Meetings.[110] Overall, the authors concluded that the results indicate a "statistically and substantively meaningful association between interest group lobbying and regulatory policy change during [OIRA] review."[111]

There are two key limitations to consider, both of which apply broadly to this kind of analysis. First, the results are not causal; they are correlational.[112] Rules with more Meetings were associated with more changes during and after OIRA review, but identifying such a change as due to OIRA is challenging.[113]The study did not account for the content of public comments, which are often repetitive of information produced during 12,866 Meetings.[114] OIRA's position might be similar to an outside group's position.[115] Agencies are also inextricably involved. 12,866 Meetings often include agency regulators, who must be invited, and OIRA is required to forward the agency any written communications regarding that

107. *Id.* at 508, 512.

108. *Id.* at 513 (noting the software also allowed them to "look past minor punctuation, formatting, and reordering changes in the documents" and generate a score for the differences in the two documents).

109. *Id.* at 515.

110. *Id.* at 516.

111. *Id.* at 518.

112. *See id.*

113. For a theoretical assessment, *see* de Figueiredo & Richter, *supra* note 73, at 168 ("[U]nderstanding and quantifying how effective interest group lobbying [in general] is in obtaining policy or other outcomes . . . is an extraordinarily challenging question to tackle because econometric identification is problematic, and causal mechanisms are extremely difficult to isolate."); *cf. id.* at 169–170 (explaining further why causal mechanisms are challenging to isolate). Anecdotally, an article describing an alleged OIRA change to an EPA rule admitted "that while the changes resulted from the White House review process . . . it is unclear whether officials at OMB, EPA or perhaps another federal agency were responsible for the changes to the documents supporting the rule." Dave Reynolds, *Documents Show OMB Review Altered the Scope of EPA Nano Proposal*, 22 INSIDE EPA'S RISK POL'Y REP. 12, 13 (2015).

114. *See* Sunstein, *supra* note 20, at 1862.

115. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 6 (2003).

agency's rule regardless of whether agency staff attend the meeting.[116] Outside groups routinely meet with both the agency and OIRA separately.[117] And because OIRA discloses meetings and agencies routinely do not,[118] isolating an agency's role is rarely possible.

Second, there are a few reasons not to extrapolate or infer improper influence from this study. The study did not evaluate *what* changed; it only evaluated that there *was* a change, so there is no evidence that particular outside groups had their requests granted. In general, studies often fail to consider that one of OIRA's main goals is helping to ensure agencies meet their burden under the APA, in part by checking that agencies have adequately addressed public comments in the final rule.[119] Agencies might make changes simply to ensure all comments are responded to properly, even if those comments are not actually integrated into the substantive decisions made in the rule.

The views expressed by an outside group may in fact be good for public welfare, too. Consider a battery manufacturer whose component materials are subject to environmental regulation, but whose products are currently the only ones compatible with a lifesaving medical technology in use by a small group of people. The company may advocate for less stringent regulation to save their business, and OIRA may adopt the company's position because the benefits to that small group of people are significant. Parsing an interest group's views from OIRA's endorsement of that view is extremely difficult. Without a more nuanced or qualitative understanding of the issues in any given rule, labeling a rule change, even if identical to a company's ask, as "improper influence" is too simplistic.[120]

All these uncertainties make it difficult to determine whether changes are the result of a fair and helpful process or not. The allegation that OIRA is improperly captured by industry groups has dogged OIRA for more than thirty years,[121] despite improvements in transparency. There

116. *See* Exec. Order No. 12,866 § 6(b)(4)(ii), 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 106 (2018).

117. Potter, *supra* note 30.

118. *See infra* Part IV.B.

119. *See* VALUING LIFE, *supra* note 46, at 12. The APA requires a "concise general statement of . . . basis and purpose" be included in the final rule. 5 U.S.C. § 553(c). Courts have interpreted this to require agencies to identify and respond to relevant, significant issues raised during the comment period. *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

120. Even accepting that a more socially harmful version of this change may happen, it is the very transparency of OIRA that allows the public to determine whether such a change is "harmful" or "improper."

121. *See* Haeder & Yackee, *supra* note 57, at 413; *see also* Sunstein, *supra* note 20, at 1860.

have been a few attempts to measure the magnitude and direction of influence, but the minimal empirical evidence linking 12,866 Meetings to industry is inconclusive. The Haeder and Yackee study—covering rules during some of the Bush and Obama Administrations—argued that there is evidence of regulatory capture from 12,866 Meetings. But as this section has argued, there is little reason to conclude that from the data. One other study also empirically refuted the finding for 12,866 Meetings specifically, but it is not directly comparable because it examined Clinton Administration rules.[122] Concluding that OIRA is captured is simply not possible from the data and analysis available to date, and it is equally as likely that OIRA's open-door 12,866 Meetings help to develop sound regulations by meaningfully involving a wide variety of stakeholders in the rulemaking process.

III. THEORETICAL MECHANISMS FOR (LACK OF) INFLUENCE

As the above discussion reveals, and as David Lowery has astutely described, one oversight in the literature on lobbying influence is a critical examination of what exactly "influence" means, given that it is highly complex and subject to deeper patterns than surface-level indicators tend to detect.[123] Influence might look like maintaining the status quo[124] or surviving a particularly adverse rulemaking, rather than advancing a particular goal.[125] While these more untraceable versions of influence are likely to be at play in any given rulemaking, Professor Steven Balla and his colleagues offer one useful way of construing influence in the context of rulemaking and 12,866 Meetings: "[O]utside communications operate as a forum for opponents of regulation to *delay*, *alter*, or *halt* agency actions."[126] Using this framing, this Part explores a variety of mechanisms for possible influence by outside groups on OIRA and what kind of effect—positive or negative, as defined in Part II—such mechanisms would likely have on the rulemaking process.[127] It concludes that, on balance, there are limited opportunities for undue influence.

122. *See* Balla et al., *supra* note 25 and accompanying text.

123. *See* David Lowery, *Lobbying Influence: Meaning, Measurement and Missing*, 2 INT. GRPS. & ADVOC. 1, 2 (2013).

124. *See id.* at 12.

125. *See id.* at 14.

126. Balla, et al., *supra* note 25, at 156 (emphasis added).

127. This analysis assumes that OIRA is open to being influenced. One could argue that the 12,866 Meetings are a formality that OIRA offers because such meetings are allowed under EO 12,866, and OIRA does not actually use Meetings as a way to determine

A. Elevating Comments

There are many ways for outside groups to express their views regarding rulemaking, not least of which is submitting oral or written comments during a notice-and-comment period. However, the comment process alone is not a guarantee that an agency will fully internalize or embrace a particular comment[128]—even if the agency is required to respond to it in the final rule. Thus, outside groups may use 12,866 Meetings to amplify their formal comments.[129]

First, it is important to note that the nature and specificity of comments in a 12,866 Meeting may determine the value of those comments in shifting OIRA or agency decisionmakers' views. Educating decisionmakers is one of the key benefits of lobbying in general and providing input to rulemaking is a particularized form of lobbying.[130] Rules are often improved when outside groups provide new data or empirical research,[131] novel arguments,[132] or as then-Senator John F. Kennedy put it, "explaining complex and difficult subjects in a clear, understandable fashion."[133]

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what, if any, changes should be made to rules. This would be disingenuous and seems unlikely given my discussions with former OIRA staff, so I assume it is not the case.

128. Wagner et al., *supra* note 74, at 105.

129. Some outside groups may have these mechanisms in mind when deciding to request a 12,866 Meeting, but it does not necessarily follow that all commenters enter a meeting with a broader strategy; they might just use OIRA because it is there and invites commenters in with its open-door policy. *See* Potter, *supra* note 30; Admin. Conf. of the United States, Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,988, 35,994 (June 25, 2014) [hereinafter ACUS Recommendation 2014-4]; *see also* Part III.A. Second, lobbying is a highly uncertain art. *See, e.g.*, Lowery, *supra* note 75, at 34 ("[T]he world of lobbying [is] lacking any of the certainty of a supermarket with its well-defined roles, goals, and prices. Rather, the lobbying environment is one governed by uncertainty in goals, means and, especially, the relationships between [them]." (citing JOHN P. HEINZ ET AL., THE HOLLOW CORE (1993))). Lastly, the number of rules that involve 12,866 Meetings is relatively small to begin with. *See Influence and the Administrative Process*, *supra* note 83 and accompanying text.

130. *See, e.g.*, Wagner, *supra* note 95, at 1382 ("What develops from the administrative process during the development of the actual rule . . . is a form of information symbiosis between the agencies and the most knowledgeable and resourceful groups.").

131. *See* Costa et al., *supra* note 101, at 47 (finding that industry groups were more likely to provide empirical research than other commenters, and that the EPA responded to adverse commenters such as industry and members of Congress by "changing the evidentiary basis of [a] rule to conform to the critiques levied by regulated interests").

132. *See, e.g.*, de Figueiredo & Richter, *supra* note 73, at 164.

133. John F. Kennedy, *To Keep the Lobbyists Within Bounds*, N.Y. TIMES (Feb. 19, 1956), https://www.nytimes.com/1956/02/19/archives/to-keep-the-lobbyist-within-bounds-many-lobbies-play-a-useful-role.html [https://perma.cc/R4RR-YUMM].

Technical information can be particularly valuable for rulemakings that rely on science or that have a highly quantified regulatory impact analysis.

Targeted comments that provide such a specific suggestions, useful facts for economic analysis, or a new legal opportunity or vulnerability, are often far more helpful to a decisionmaker than vague statements or general statements of support or opposition.[134] In a GAO study of agencies that often receive a high volume of public comments, nearly all of the offices rated the substantiveness of a comment to be "extremely important to their analysis."[135] By contrast, the fact that a comment was unique was "extremely important" only to a few offices, and some considered uniqueness to be wholly unimportant.[136] In its guide to participating in the rulemaking process, HHS encouraged commenters to provide "[c]onstructive, detailed comments," ideally with "[e]vidence-based information," that provides alternatives when a commenter disagrees with the agency.[137] Consider, for example, the difference between two comments the EPA received on its proposed Affordable Clean Energy (ACE) Rule. The Environmental Defense Fund (EDF) submitted 49,165 identical comment letters that all read:

> I am extremely disappointed in EPA's proposed plan to "replace" the Clean Power Plan. This watered-down version would not meet the agency's legal obligation to protect Americans from the devastating effects of climate change that we are already experiencing today, from super-charged hurricanes to seemingly unstoppable wildfires. We deserve better.[138]

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134. *See A Basic Guide to Federal Rulemaking and Small Business*, SMALL BUS. ADMIN. (2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/10/16151102/Basic-Guide-to-Rulemaking-and-SBs.pdf [https://perma.cc/Q8PZ-4RAZ]; Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,789, 48,791 (June 16, 2011) [hereinafter ACUS Recommendation 2011-2] (recommending that the General Services Administration "publish[] a document explaining what types of comments are most beneficial and list[] best practices for parties submitting comments").

135. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-383R, FEDERAL RULEMAKING: INFORMATION ON SELECTED AGENCIES' MANAGEMENT OF PUBLIC COMMENTS 6 (2020).

136. *See id.*

137. *How to Participate in the Rulemaking Process*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/sites/default/files/regulations/rulemaking-tool-kit.pdf [https://perma.cc/Z5WT-A9VG].

138. EPA, Mass Comment Campaign on Proposed Rule on Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Emission Guideline Implementing Regulations; New Source Review Program (Nov. 7, 2018), https://www.regulations.gov/comment/EPA-HQ-OAR-2017-0355-24690 [https://perma.cc/ZZD5-8MX2] [hereinafter *Mass Comment Campaign*].

Some research has noted that e-rulemaking has led to a proliferation of these insubstantial, mass comments, that provide little use to decisionmakers and act more like spam.[139] The EDF separately provided an eighty-nine-page comment letter with four attachments that addressed all of the specific legal, technical, and policy flaws with which the organization took issue.[140] The EPA responded to many of the EDF's specific points in the final rule, such as the fact that the EDF believed carbon capture and storage technologies were technically feasible and adequately demonstrated.[141] The EDF and others raised many of these same arguments in subsequent litigation.[142] By contrast, the general sentiments expressed in the mass comment letters were not part of the EPA's express consideration in the final rule.[143] Coming to OIRA with a comment like the EDF's mass comment letter is likely to be equally useless to OIRA in its review of a rule.

That specific comments are more helpful is a neutral fact in terms of influence; it does not mean industry has a monopoly on helpful comments. Industry may, in some cases, be able to provide specific facts about a regulation's impact on that industry, but if the EDF's eighty-nine-page comment letter is any indication, public interest groups can produce equally powerful information.

For those technical comments, a 12,866 Meeting might solidify, clarify, or highlight aspects of a commenter's position for OIRA and the relevant agencies, in the same way a lecture might clarify a textbook reading

139. Costa et al., *supra* note at 101, at 37; Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46, 47–48 (2007). Notice-and-comment gives the public—including non-experts—a unique and extraordinary opportunity to engage in the process in a meaningful way. *See* Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601 (2018). But that power only extends to the usefulness of such comments.

140. *See* EDF, Comment on Proposed Rule on Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program (Nov. 6, 2018), https://www.regulations.gov/comment/EPA-HQ-OAR-2017-0355-24419 [https://perma.cc/5UL4-JLJ2] [hereinafter *Comment on Proposed Rule*].

141. *Id.* at 61 (noting the EDF's comments regarding carbon capture and storage); Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,547 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

142. *See* Brief for Petitioner at 7, Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021) (No. 19-1140).

143. *See Comment on Proposed Rule*.

assignment.[144] This process could benefit outside groups in two ways. First, the in-person mode might lend itself better to communicating complicated material or allow the presenter to unpack information in a new, more digestible way.[145] This simultaneously benefits OIRA's goal of gathering information from many sources, including the public, in order to inform and improve rules through a sort of "government by discussion."[146] If this is the true nature of the exchange, then it reflects a much more idealized, positive relationship between OIRA and outside groups.

Second, displaying the information in a new, more dynamic medium could impress upon OIRA or agency staff the importance of the comment or make them more likely to remember a particular idea. Researchers have demonstrated that in-person access often makes particular positions more salient such that policymakers are more likely to consider those preferences in decision-making.[147] Impressing upon staff the importance of a comment is not regulatory capture per se. This mechanism may seem more ripe for influence than others, since it benefits those with the resources to devote to 12,866 Meetings. However, Meetings are open to all groups, and memorable comments could come from industry or interest groups equally.

A meeting might also serve to distinguish or extract a certain comment when there are many comments on a rulemaking. The proposed ACE Rule, for example, received more than 1.5 million comments.[148] The advent of e-rulemaking has generally allowed the public to be more involved in rulemaking,[149] and some groups may have to or want to fight harder to be "heard." Particularly with these large dockets, agencies do not always review every comment themselves, and instead they sometimes

144. *Cf.* ESA L. SFERRA-BONISTALLI, ADMIN. CONF. OF THE UNITED STATES, EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING 17 (2014) (noting that "[a]mplifying [and] clarifying information" can be a key purpose of meetings between agencies and outside groups).

145. *See* David Ryan Miller, *The President Will See Whom Now?: Presidential Engagement with Organized Interests* 11 (Working Paper, Oct. 1, 2022), https://www.david ryanmiller.com/files/WH_Engagement_DRM.pdf [https://perma.cc/4GWH-VD7D].

146. *See, e.g.*, Sunstein, *supra* note 20, at 1838; VALUING LIFE, *supra* note 46, at 14–15 (citing AMARTYA SEN, DEVELOPMENT AS FREEDOM (1990)).

147. *See* Miller, *supra* note 145, at 15.

148. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,523 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

149. *See* David M. Shafie, *Participation in E-Rulemaking: Interest Groups and the Standard-Setting Process for Hazardous Air Pollutants*, 5 J. INFO. TECH. & POL. 399, 399 (2008).

hire private contractors to summarize and analyze public comments for them.[150] 12,866 Meetings could prevent details of comments from being lost among the masses. The openness of the Meetings counteracts any potential gaming.

Relatedly, some groups may wish to stress to OIRA that their comments should take precedence, or are somehow more valuable, as compared to other commenters. One way to do this is simply to comment the most; industry sometimes drowns out public interest groups and private citizens in the rulemaking process.[151] But industry has also explicitly noted in comments that regulators should give its views more import than other commenters. For example, on a proposed Department of Transportation (DOT) rule that set standards for state departments of transportation, the American Association of State Highway and Transportation Officials (AASHTO) commented:

> We . . . note at the outset that AASHTO is providing substantive comments that have been developed by seasoned professionals who understand both the breadth and depth of the issues surrounding performance measures. Simply put, the comments provided by AASHTO and the State DOTs should be given more weight than web-based "check the box" comments generated by advocacy organizations that do not have experience delivering transportation programs and projects.[152]

This example relates more to the substance of AASHTO's comments in comparison to other *comments* than to AASHTO's precedence over other types of *commenters*. It would not be a stretch to imagine an industry group arguing in a 12,866 Meeting that OIRA should listen to that group over the concerns of public interest organizations participating in the rulemaking process. Industry may be more likely to use these kinds of arguments, but the persuasiveness of the argument will likely be determined by the specificity of the comments, as discussed above.

150. *See* ACUS Recommendation 2011-2, *supra* note 134, at 48,794 (noting that in some instances, government contractors' work can take on or approach "inherently governmental functions," such as developing agency policy and regulation); *Policy and Regulatory*, ICF, https://www.icf.com/work/regulatory policy (last visited Mar. 2, 2021) [https://perma.cc/L33Z-WWAR].

151. *See* Shafie, *supra* note 149, at 399.

152. AASHTO, Comment on Proposed Rule on Nat'l Performance Mgmt. Measures; Assessing the Performance of the Nat'l Highway Sys., Freight Movement on the Interstate Sys., and Congestion Mitigation & Air Quality Improvement Program, at 3 (Aug. 15, 2016), https://www.mdt.mt.gov/pubinvolve/docs/federal-program/system-performance-aashto-comments.pdf [https://perma.cc/B6XA-64UY].

"[W]eb-based 'check the box' comments[,]" often from public interest groups, are not particularly beneficial to OIRA or agencies, but there is no reason to think "substantive comments" from "seasoned professionals" can only—or even mostly—come from industry.[153]

Finally, there is no guarantee that re-presenting information or scheduling a 12,866 Meeting in addition to filing a written comment will yield any beneficial results. Presenting old information in a new way can be valuable if it clarifies or expands on written comments as described above. More often, though, Meetings provide no new information beyond what is already available in public comments.[154] Speakers sometimes parrot comments or speak in such vague terms that there is no real value-added for OIRA or agency staff.[155] Meeting attendees may also provide a perspective that is already well understood by OIRA and the agency because of other written comments or anticipation by government officials.[156]

In sum, using 12,866 Meetings to build on existing public comments can nudge OIRA to pay more attention to a group's position or integrate those comments into a rule. But there is nothing inherently pro-industry in this mechanism, since both comments and 12,866 Meetings are universally accessible. Having more resources is likely to permit groups to spend time at 12,866 Meetings reaffirming their comments. Ultimately, though, this is not a critique of 12,866 Meetings, but an imbalance in funding available for the public and private sectors.

B. Highlighting New or Additional Information

12,866 Meetings can also provide a vehicle for outside groups to submit information to the rulemaking process that is not already available in public comments. There are two points in the rulemaking process when new information could come in: when there is or has been an active comment period or while OIRA is reviewing a rule that has not yet been published in any form. Both could subvert the comment process in some way and produce improper influence, though we might be more concerned about groups pressuring OIRA to make changes to a rule still under development.

153. *See id.*

154. Sunstein, *supra* note 20, at 1862 ("When rules change as a result of review, it is usually because of interagency or public comments, not because of meetings. . . . Some meetings have no effect at all, because the presentations supply no new information.").

155. *Id.*; Sunstein, *supra* note 78; *see also* text accompanying notes 135–142.

156. Sunstein, *supra* note 20, at 1862.

1. When Public Comments Are Available

12,866 Meetings can be a vehicle for providing new analysis not already discussed in a written comment. As Professor Sunstein has described:

> Many of the most useful meetings are specific and technical. For example, presenters might emphasize potential unintended consequences, legal difficulties, unexpectedly high costs, or international trade implications—and suggest a concrete way of handling the relevant problems, perhaps by changing one or two provisions while nonetheless achieving the agency's basic goals. Suggestions of this kind can be valuable and informative.[157]

However, providing truly new information after the comment period has begun is likely to be a rare occurrence.[158] If new information is disclosed that is central to questions in the rule, that information is required to be disclosed under the APA.[159]

Another way to bring in new perspectives is to make a technical comment more "real" with personal stories or experiences. Although this would seem to go against the guidance that substantive, technical comments are more valuable, personal stories that demonstrate the real-world effects of a rulemaking—such as a doctor speaking to OIRA about the effect of a complicated healthcare regulation on their practice—may encourage OIRA to take certain technical comments more seriously. These kinds of "constituent" conversations influence congressional staffers. In a series of surveys by the Congressional Management Foundation, more than 94% of participating congressional staffers said that an in-person visit from a constituent would have "some" or "a lot" of influence on an undecided legislator.[160] Congress is likely to be more influenced by their particular

157. *Id.* at 1863.

158. *Id.* ("I cannot recall a single case in which a meeting offered entirely novel information."). Outside groups meeting with OIRA almost always submit a written comment that includes all of their concerns. Even if there is genuinely new information disclosed in a 12,866 Meeting, that information will likely become publicly available later.

159. *See, e.g.*, Ober v. EPA, 84 F.3d 304, 313–14 (9th Cir. 1996) (holding that new, outside information core to the question at issue in the rule had to be disclosed before final action was taken).

160. Press Release, Cong. Mgmt. Found., At Peak of Citizen Activism, New Congressional Management Foundation Report Details Most Effective Means of Contacting Congress (Feb. 13, 2017), https://www.congressfoundation.org/news/press-releases/1325-at-peak-of-citizen-activism-new-congressional-management-foundation-report-details-most-effective-means-of-contacting-congress [https://perma.cc/C3YA-ECB2] (surveying staffers in 2004, 2010, and 2015).

constituents than the White House, which has a national constituency, but OIRA may benefit in the same way from hearing about on-the-ground impacts and personal stories related to particular regulatory decisions. Public interest groups may be even better positioned than industry to provide these kinds of comments. Between this fact, the APA's requirement to disclose substantive comments relied on in the final rule, and the rarity of new information disclosure, the risk of undue industry influence through this mechanism is likely to be low.

2. When Public Comments Are Not Yet Available

Novel information might become available through a 12,866 Meeting when an NPRM is under review and comments have not yet been formally accepted. At this point in the process, outside groups cannot provide specific suggestions for rules because there is no public-rule text to respond to, and OIRA cannot disclose such information in advance. Despite those limitations, some groups do successfully utilize the process. For example, in an NPRM on unmanned aircraft systems, the Federal Aviation Administration noted that it had received new information during a 12,866 Meeting that part of the existing fleet of unmanned aerial systems could be retrofit to comply with certain requirements "with relative ease and minimal cost . . . within the first year . . . of [a] final rule[.]"[161]

As noted in Part II, the empirical evidence shows that early engagement in the process can have a significant effect on the outcome of final rules and is often utilized most by industry. The regulated industry might be more aware of rules under development than public interest groups or have more resources to engage in 12,866 Meetings or meetings with agencies before the comment period. This early engagement is also more opaque, since agencies do not generally require disclosure of meetings before an NPRM has been published.[162] Here, OIRA's transparency helps to mitigate the black-box effect and its open-door policy in theory permits all groups to engage in this proposed rule stage of the process. Still, one might be concerned that, like in the unmanned aircraft systems example, industry is more likely to successfully take advantage of these early 12,866 Meetings. Even with OIRA's thorough disclosures, the contents of proposed-rule-stage 12,866 Meetings are not automatically made public, even though information may be used in the development of the rules.

161. Remote Identification of Unmanned Aircraft Systems, 84 Fed. Reg. 72,438, 72,489 (Dec. 31, 2019) (to be codified in scattered sections of 14 C.F.R.).

162. *See infra* Part IV.C.

C. Attracting Political Attention

Elevating comments, providing new analysis of impacts, and attaching comments to personal stories are aimed at making an outside group's perspective more attractive to OIRA or agency decisionmakers. Another strategy may be to change which decisionmakers hear those comments. Flagging controversy for OIRA can increase the attention paid to a rule and encourage consideration of changes. Policymakers often respond to political controversy with rule changes, however small.[163] Engagement of White House staff on key issues may inject "dynamism or energy in administration, which entails both the capacity and the willingness to adopt, modify, or revoke regulations[.]"[164]

Getting OIRA *political* staff involved can have even more significant implications. Small changes are likely attributable to career staff,[165] but political appointees can often direct larger changes. OIRA has around forty-five full-time career civil servants,[166] and significantly fewer political appointees.[167] Political appointees may take more subjective concerns into account,[168] and disagreement among career staff may be resolved by political appointees, as directed by EO 12,866.[169] In the "overwhelming ma-

163. Costa et al., *supra* note 101, at 47 (citing Mia Costa et al., *Science Use in Regulatory Impact Analysis: The Effects of Political Attention and Controversy*, 33 REV. POL'Y RSCH. 251 (2016)).

164. Kagan, *supra* note 2, at 2339.

165. One study found that agencies could pacify commenters who took issue a proposed rule by strategically removing citations to controversial scientific studies in final regulatory impact analyses, even though the rule itself did not change. Costa, et al., *supra* note 101, at 47.

166. *Information and Regulatory Affairs*, WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs/ [https://perma.cc/H8XR-YXM7]; VALUING LIFE, *supra* note 46, at 16. OIRA has generally maintained an average of sixty full-time equivalent employees, though actual staffing may be lower, and numbers have fallen in recent years. *See* Alexander Bolton et al. *Organizational Capacity, Regulatory Review, and the Limits of Political Control*, 32 J. L. ECON. & ORG. 242, 250 (2016).

167. *See* ANDERSON ET AL., *supra* note 18, at 20.

168. OIRA is subject to presidential supervision, and it is alert to the concerns and priorities of the President and will "act accordingly." Sunstein, *supra* note 20, at 1873–74. However, policy choices based on political considerations still have to be consistent with the relevant statute. *See, e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1742 (2012).

169. Exec. Order No. 12,866 § 7, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 90 (noting that any conflicts that "cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head"); *see* VALUING LIFE, *supra* note 46 at 28–30 (noting that issues can be "elevated" to political review, but even then, the discussion tends to remain substantive and technical, rather than truly political). Although it was

jority of cases," senior and political staff are not involved in 12,866 Meetings,[170] but attendance by the OIRA Administrator or other high-level appointees can be significant.[171] The presence of the OIRA Administrator at 12,866 Meetings has been associated with more lengthy review times and more revisions during the clearance process.[172] Thorny political issues raised through 12,866 Meetings may allow OIRA to get more involved in the process to help work through those issues, thus giving more power to OIRA to guide the direction of policy.

Getting OIRA political leadership to a meeting is difficult but potentially game changing. EO 12,866 suggests more involvement by political appointees in 12,866 Meetings than there currently is. Section 6(b)(4)(A) states that "[o]nly the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review[.]"[173] "Only" and "particular designee" create a strong presumption in favor of the Administrator attending the Meetings. Other EOs[174] and statutes[175] often refer simply to a Secretary (or other position) "or his designee" when permitting tasks to be delegated. In a study of 12,866 Meetings from 2002–2006 (during Administrator John Graham's tenure), researchers from The George Washington University found that the OIRA Administrator attended 12,866 Meetings for 59 of 202 rules, or about 30%.[176] Today, there is far less en-

later revoked, President Bush's EO 13,258 amended EO 12,866 to shift the responsibility for resolving conflicts from the Vice President to the Chief of Staff. Exec. Order No. 13,258 § 12, 3 C.F.R. §§ 204–05 (2003).

170. FUTURE OF GOVERNMENT, *supra* note 5, at 31.

171. *See* Balla et. al., *supra* note 25, at 163. The same may not be true for an Acting OIRA Administrator—usually a career civil servant—who may "possess much of the same *formal authority* as a Senate-confirmed one, he or she may lack the *political authority* or even the managerial skills to undertake potentially controversial actions." Bolton et al., *supra* note 166, at 249 (emphasis added).

172. Balla et al., *supra* note 25, at 163. Delay is often the result of technical specialists working through technical questions. VALUING LIFE, *supra* note 46, at 14. But additional time could be attributed to a need for OIRA to "hammer out policy disagreements and negotiate policy concessions." Bolton et al., *supra* note 166, at 252.

173. Exec. Order No. 12,866 § 6(b)(4)(A), 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 90.

174. *See, e.g.*, Exec. Order No. 12,597 § 3(d), 52 Fed. Reg. 18,335, 18,335 (May 15, 1987) ("The Secretary of State and the Secretary of Defense, or their designees shall review the decisions[.]").

175. *See, e.g.*, 42 U.S.C. § 11225(c) ("The Secretary of Health and Human Services, or the Secretary's designee . . . ."); 37 U.S.C. § 556.

176. Balla et al., *supra* note 25 at 163.

gagement from the OIRA Administrator and other high-level staff,[177] perhaps due to time constraints or a new interpretation of the Administrator's role under EO 12,866. Securing a listening session with someone of that level may indicate a commenter's position—or simply that the rule at issue—requires more political attention. OIRA Administrator Paul Ray (2019–2021) noted that during his time as Associate Administrator, he attended meetings involving six rules,[178] and these rules had, on average, 7.7 meetings.[179] By comparison, OIRA hosted fifteen 12,866 Meetings on a controversial Department of Labor (DOL) rule and twelve meetings on the Clean Power Plan,[180] the predecessor to the ACE Rule that received 1.5 million comments.[181] Ray's meeting attendance likely reflects a level of controversy and political attention to the rules at issue.[182]

Attracting political attention from OIRA is valuable and prone to improper influence, since politics could supersede technical analysis and result in a rule capitulating to an outside group's request. Again, however, this could benefit any group. Whether White House political engagement in a rulemaking is permissible or desirable is a different question than whether 12,866 Meetings lead somehow to regulatory capture.[183]

177. *See* Potter, *supra* note 30 (noting that there has been a decline in the number of OMB participants in 12,866 Meetings in recent years, regardless of the entity requesting the meeting).

178. In post-hearing questions for the record for his confirmation hearing to become OIRA Administrator, the Associate OIRA Administrator Paul Ray noted that he had attended just five 12,866 Meetings (involving six rules) during his approximately nineteen months with OIRA. *Nomination of Paul J. Ray: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 116th Cong. 110 (2019). Ray's nomination hearing was in December 2019, *id.*, and he had served as Associate Administrator since May of 2018. Christopher J. Walker, *Paul Ray Has Been Nominated to Serve as OIRA Administrator*, NOTICE & COMMENT (Oct. 2, 2019), https://www.yalejreg.com/nc/paul-ray-has-been-nominated-to-serve-as-oira-administrator/ [https://perma.cc/2JNA-3Q5X].

179. Calculations are on file with the author.

180. *See* Potter, *supra* note 30, at 6.

181. *See* text accompanying note 148.

182. One of Ray's Meetings involved three Congressmen. *Completed EO 12866 Meeting: Non-Energy Solid Leasable Mineral Royalty Rate Reduction*, OFF. OF INFO. & REGUL. AFF. (June 21, 2019), https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=1004-AE58&meetingId=4971&acronym=1004-DOI/BLM [https://perma.cc/SG4D-AP95] [hereinafter *12,866 Meeting June 21*]. Even if the rulemaking did not inspire many Meetings, meeting attendance could reflect the importance of other meeting attendees or the political importance generally.

183. *See, e.g.*, ANDERSON ET AL., *supra* note 18.

D. Appealing to a Different Perspective

Agencies' priorities do not always align with the White House;[184] "agencies are pulled in many directions—not only toward presidential priorities, but also toward congressional, constituency, and bureaucratic goals and interests."[185] The kinds of arguments that are attractive to an agency may not be as attractive to the White House. The White House must be responsive to all industries and constituencies and may be able to counteract the kinds of factional pressures placed on agencies.[186] Maeve P. Carey has posited that regulated entities "seem to view [OIRA] as a 'court of second resort' if they are unable to influence regulatory agencies to their position directly."[187] Outside groups might find more sympathetic ears at OIRA than at a rule's issuing agency.

This kind of "venue shopping" by lobbyists and other advocates is a well-documented phenomenon.[188] Professor Thomas Holyoke has shown that interest groups tend to concentrate their lobbying in venues with more sympathetic players, and by contrast, in unfriendly venues, interest groups may only engage in pro-forma lobbying.[189] Hypothetically, an outside group might file a written comment on an ideologically unfriendly agency's rulemaking and put more effort into convincing a more ideologically-friendly OMB.[190] Researchers have argued that even the simple exist-

184. *See supra* note 169 and accompanying text.

185. Kagan, *supra* note 2, at 2334.

186. *Id.* at 2335–36.

187. CAREY, *supra* note 24, at 29.

188. *See, e.g.*, FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 35 (2d ed. 2003); Thomas T. Holyoke et al., *Shopping in the Political Arena: Strategic State and Local Venue Selection by Advocates*, 44 STATE & LOCAL GOV'T REV. 9, 9 (2012).

189. Thomas T. Holyoke, *Choosing Battlegrounds: Interest Group Lobbying Across Multiple Venues*, 56 POL. RSCH. Q. 325, 335 (2003).

190. *See* Mark D. Richardson et al., *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303, 305, 307 (2018) (demonstrating that agencies have a range of perceived ideologies—for example, the Consumer Financial Protection Bureau is perceived as very liberal, and the Department of Homeland Security is perceived as more conservative—and that the OMB is perceived as neutral). Some research has shown, however, that OIRA is not any more likely to change an agency's proposal when the submitting agency's political ideology simply *differs* from the President's, though a rule from a more liberal agency is more likely to be changed during OIRA review. *See* Simon F. Haeder & Susan Webb Yackee, *Presidentially Directed Policy Change: The Office of Information and Regulatory Affairs as Partisan or Moderator?*, 28 J. PUB. ADMIN. RSCH. & THEORY 475, 475 (2018).

ence of an alternative venue is important in conferring advantage to groups that take advantage of that venue.[191]

Venue shopping benefits those groups with resources to devote to lobbying in multiple venues, and it benefits groups that are more ideologically aligned with OIRA than with a rule's issuing agency. As previously discussed, resources are generally on industry's side, but that does not mean that OIRA's process is necessarily coopted, nor that changes to OIRA's process could fix the underlying imbalance. Ideological alignment can work to any group's favor, depending on the alignment of the issuing agency relative to OIRA, the administration's policy preferences,[192] or other factors.

E. Flagging Potential Litigants and Their Arguments

One goal of the rulemaking process is "mollify[ing] litigious stakeholders" to craft a rule that can deter or withstand legal challenge.[193] Particularly as polarization has deepened in Congress and cooperation among state governments and the federal government has faltered, some parties have increasingly turned to the courts to resolve policy differences.[194] Above and beyond the requirements imposed on agencies by the APA, litigation risk creates a strong incentive for regulators to amend rules or regulatory impact analyses[195] or explain in more detail why certain positions were not adopted. Litigation may be inevitable, but if an outside group can clearly demonstrate a strong legal argument against a given rule, then the agency—encouraged by OIRA—may adapt the rule in anticipation.

There are nearly always fewer 12,866 Meetings than written comments on a proposed rulemaking. The list of groups that choose to meet with OIRA may provide a useful indication of those groups likely to sue.[196] One study of comments on rules issued by four financial regulators

191. *See* BAUMGARTNER & JONES, *supra* note 188, at 35.

192. *Cf.* Potter, *supra* note 30 (noting that there was a surge in nonprofit lobbying of OIRA in response to the Trump Administration's deregulatory agenda).

193. *See* Wagner et al., *supra* note 74, at 110; Wagner, *supra* note 95, at 1382 ("The agency appreciates that the only way to get its rule through the process is to work closely with its fiercest allies early in the rulemaking."); McGarity, *supra* note 168, at 1676 ("When the agency publishes the final rule, the regulated industry often challenges the action in court as arbitrary and capricious, ultra vires, or both.").

194. *See* Albert C. Lin, *Uncooperative Environmental Federalism: State Suits Against the Federal Government in an Age of Political Polarization*, 88 GEO. WASH. L. REV. 890, 890 (2020).

195. Costa et al., *supra* note 101, at 39.

196. Meetings on the ACE Rule, for example, included at least two groups that went on to be petitioners in the litigation challenging the rule. The EDF and the American Lung

found that actual threats of litigation were rare,[197] but that in 93% of lawsuits studied, the plaintiff preceded a legal challenge with a comment.[198] The groups meeting with OIRA likely have more interest in the final outcome of the rule than other groups and more resources to devote to both lobbying and litigation. For those groups, demonstrating a keen interest in the rule could encourage OIRA to make additional changes in anticipation of litigation.

A corollary to ameliorating the concerns of litigious stakeholders is ensuring that all relevant comments are raised and addressed during the rulemaking process. 12,866 Meetings provide another outlet for commenters to raise issues with proposed rules before any litigation might commence. Outside groups are incentivized to raise every issue because many courts have imposed so-called issue exhaustion requirements, which encourage courts to bar litigants from raising issues for the first time in lit-

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Association both met with OIRA about the rule. *Completed EO 12866 Meeting: Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program*, OFF. OF INFO. & REGUL. AFF. (May 31, 2019), https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=2060-AT67&meetingId=4007&acronym=2060-EPA/OAR [https://perma.cc/Q853-HJ2K] [hereinafter *12866 Meeting May 31*] (concerning the EDF); *Completed EO 12866 Meeting: Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program*, OFF. OF INFO. & REGUL. AFF. (May 29, 2019), https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=2060-AT67&meetingId=4013&acronym=2060-EPA/OAR [https://perma.cc/YMZ8-P77D] [hereinafter *12866 Meeting May 29*] (concerning the American Lung Association). Both groups petitioned for review of the final rule. *See* Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021). This is not always the case, though. For example, the only 12,866 Meeting regarding the National Highway Traffic Safety Administration's rule about changes to the civil penalty rate for violations of fuel economy standards was with the auto industry. *Completed EO 12866 Meeting: 49 C.F.R. Part 578, Civil Penalties*, OFF. OF INFO. & REGUL. AFF. (Nov. 28, 2018), https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=false&rin=2127-AL94&meetingId=3743&acronym=2127-DOT/NHTSA [https://perma.cc/BTK3-E8QY] [hereinafter *12866 Meeting Nov. 28*]. Sixteen comments were filed on the proposed rule, including from several major environmental groups. Civil Penalties, 84 Fed. Reg. 36,007, 36,013 (July 26, 2019) (to be codified at 49 C.F.R. pt. 578). Despite not seeking a 12,866 Meeting, several environmental groups—all commenters on the proposed rule—petitioned for review of the final rule in the Second Circuit and won. *See* New York v. Nat'l Highway Traffic Safety Admin., 974 F.3d 87, 101 (2d Cir. 2020).

197. Brian Libgober & Steven Rashin, *What Public Comments During Rulemaking Do (and Why)* 29 (Working Paper, Aug. 2018), https://libgober.files.wordpress.com/2018/09/what-comments-do-and-why-libgober-rashin.pdf [https://perma.cc/4ETR-94NH].

198. *See id.* at 30.

igation if they did not raise the same issues during the comment period.[199] This is not a hard-and-fast rule; there are "some inconsistently applied exceptions[,]"[200] and not all courts enforce the rule to the same degree.[201] A report for the Administrative Conference of the United States (ACUS) noted that increasing use of the issue exhaustion doctrine by courts might lead to additional "shotgun" comments on rules to preserve a litigant's right to seek judicial review.[202] Perhaps it might also encourage would-be commenters to make their case to OIRA instead or in addition.

OIRA's regulatory role is largely centered on improving the quality of rules and ensuring proper procedures are followed throughout the rulemaking process. So, it is natural for OIRA to ensure that compelling arguments raised in 12,866 Meetings are acknowledged and addressed in final rules. It is also natural for OIRA to help agencies avoid litigation risk and make rules more legally defensible by ensuring proper procedural steps are taken and substantive arguments are strengthened. This process is unlikely to have disproportionate benefits for any particular type of outside group.

F. Epistemic Capture

Professor Sunstein has conceded that 12,866 Meetings might be a vector for *some* influence via a process he terms "epistemic capture."[203] 12,866 Meetings are self-selecting, and OIRA staff may be influenced to a greater degree by the voices they hear most often:

> Even if the officials want to be neutral and are seeking merely to obtain relevant information, their own perspectives might well be shaped by the limited class of people to whom they are listening. From a neutral starting point, and with all the good will in the world, they might be subject to ep-

199. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) ("To entertain comments made for the first time before this court would be destructive of a meaningful administrative process."). *See generally* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, ADMIN. CONF. OF THE UNITED STATES 1 (2015), https://www.acus.gov/sites/default/files/documents/Final%20Issue%20Exhaustion%20Report%2005052014_1.pdf [https://perma.cc/TBB4-7XEQ] (describing the issue exhaustion doctrine and its applicability in informal rulemaking).

200. Lubbers, *supra* note 199, at 21.

201. *Id.*

202. *Id.*

203. VALUING LIFE, *supra* note 46, at 32.

> istemic capture in the sense that they will ultimately form a view that fits with what they learn from the particular people with whom they speak.[204]

The result of repeatedly hearing from a specific viewpoint, or extreme viewpoint, might be that OIRA subconsciously promotes the views of those groups they listen to the most.[205] 12,866 Meetings are often dominated by industry, which would raise concern about whether OIRA might be somehow biased in favor of particular, often monied, interests. This may be the impact of greater resources deployed in service of other mechanisms described in the preceding parts. But again, OIRA's process is open to all, and any differential ability of groups to take advantage of the open-door policy is reflective of a broader societal imbalance.

* * *

To summarize, the theory aligns with empirical evidence in support of a showing that OIRA is not improperly influenced. There are many ways outside groups may attempt to exert influence over OIRA, including elevating paper comments, highlighting new or additional information, attracting political attention, or appealing to a different perspective. All of this pressure could result in OIRA being influenced to some extent, either by being convinced explicitly to make a change or being subject to epistemic capture. However, there are no mechanisms that clearly benefit industry to the detriment of other groups. The underlying inequities are often resource-driven, theoretically allowing wealthier groups to attend more meetings. OIRA's process is not to blame; the open-door policy means that OIRA will not turn groups away. Perhaps because the open-door policy is becoming better known, 12,866 Meetings are less dominated by industry than they once were.[206] Competing perspectives and large numbers of Meetings may even the playing the field and reducing the influence of any group or type of group.

The most concerning use of 12,866 Meetings is when groups attempt to influence the development of rules in the proposed-rule stage because industry may have more information and incentive to intervene early, and the contents of Meetings are not public, even though information may be used in the development of the rules. But even then, OIRA's process is at least somewhat transparent since it discloses the fact of Meetings during this stage of the process along with the other information provided in the

204. *Id.* at 33.

205. *Id.*

206. *See, e.g.*, Potter, *supra* note 30.

public logs. By contrast, agencies are not required to disclose any meetings at this stage.

IV. 12,866 MEETINGS AND THE ADMINISTRATIVE PROCEDURE ACT

12,866 Meetings are part of the broader process of informal rulemaking governed by the APA.[207] Some of the goals of informal rulemaking include producing high-quality decisions informed by expertise, data, and congressional priorities; operating with transparency and fairness; and producing clear decision processes that facilitate judicial review. As the previous sections have shown, the same anxieties about influence that arise in the context of 12,866 Meetings also arise throughout the rulemaking process.[208] Concerns about improper influence have captivated political scientists and legal scholars, with the latter largely advocating for proper procedures to counterbalance the risk of improper influence.[209] Administrative law monitors improper ex parte communications with agency officials as one way to ensure the rulemaking process adheres to its goals. Regardless of the actual level and source of influence from outside groups discussed in Parts II and III, there are legal standards designed to ward against such influence. This Part describes the disclosure requirements for ex parte communications in the informal rulemaking process and how 12,866 Meetings are consistent with the APA's safeguards. I then demonstrate how OIRA provides more disclosure than the APA requires and more than nearly every agency.

A. Ex Parte Communications in the Notice-and-Comment Rulemaking Process

The informal rulemaking process relies on both formal and informal channels for outside parties to assist agencies in gathering relevant infor-

207. The APA governs formal and informal rulemaking. 5 U.S.C. §§ 553, 556–557. The majority of federal rulemakings are informal. *See* SFERRA-BONISTALLI, *supra* note 144, at 7. Particularly for informal rulemaking, many courts have added procedural requirements not formally in the language of the APA, although the Supreme Court has frowned on this practice. *See* Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) ("[5 U.S.C. § 533] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.").

208. *See, e.g.*, Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1178 (2019) ("[A]ttack[s] depict[] government bureaucrats as 'captured' by special interests—often the industry or sector those bureaucrats are supposed to regulate.").

209. *See, e.g.*, MANNING & STEPHENSON, *supra* note 19, at 749.

mation. Ex parte communications are defined in the APA as "oral or written communication[s] not on the public record with respect to which reasonable prior notice to all parties is not given[.]"[210] Although the APA prohibits these ex parte communications in formal adjudications and formal rulemakings,[211] there is no statutory bar for informal rulemaking, which makes up the vast majority of rules involved in 12,866 Meetings. Since ex parte communications often connote impropriety, "ex parte" is somewhat of a misnomer in the informal rulemaking context. ACUS defines ex parte communications for informal rulemakings as: "(i) [w]ritten or oral communications; (ii) regarding the substance of an anticipated or ongoing rulemaking; (iii) between the agency personnel and interested persons; and (iv) that are not placed in the rulemaking docket at the time they occur."[212] For the purposes of this Article, I adopt this definition and use the term "ex parte communications," for simplicity, recognizing that some agencies have their own term (e.g., "public contacts") and the D.C. Circuit has expressed some skepticism at using this broad language.[213] Like 12,866 Meetings, most ex parte communications with agencies are in the "form of oral communications during face-to-face meetings."[214]

On one hand, ex parte communications are the "'bread and butter' of the process of administration":[215] They facilitate getting information to government officials who need it and further "good government" by opening the agency to outside groups.[216] But on the other hand, ex parte communications—particularly oral communications—can be harmful for the integrity of the rulemaking process. The meetings permit greater real or perceived access to agency staff that "may be exacerbated if agency personnel do not have the time and resources to meet with everyone who requests a face-to-face meeting."[217] There is also a risk that agency decisionmakers could receive information at a meeting that is not on the public docket, which undermines the goal of transparency, potentially deprives other interested parties an opportunity to vet the information and reply to it

210. 5 U.S.C. § 551(14).

211. *Id.* §§ 556–57.

212. ACUS Recommendation 2014-4, *supra* note 129, at 35,993.

213. *See* SFERRA-BONISTALLI, *supra* note 144, at 9 (citing Sierra Club v. Costle, 657 F.2d 298, 391 (D.C. Cir. 1981)).

214. ACUS Recommendation 2014-4, *supra* note 129, at 35,994.

215. Home Box Office v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977).

216. *See* SFERRA-BONISTALLI, *supra* note 144, at 17; *infra* notes 228–231 and accompanying text.

217. ACUS Recommendation 2014-4, *supra* note 129, at 35,994.

effectively, and may limit a reviewing courts' ability to meaningfully evaluate the agency's action.[218]

At one time, the D.C. Circuit was more concerned about the risks of ex parte communications in informal rulemaking than the benefits.[219] In *Home Box Office v. FCC*,[220] the D.C. Circuit considered whether the Federal Communications Commission (FCC) violated the APA when it met with interested parties after the comment period for a rulemaking had closed and attempted to negotiate an outcome that all parties would find acceptable.[221] The court was troubled by industry and FCC creating a secret record beyond the reach of the courts on judicial review,[222] as well as the apparent unfairness for those commenters left out of the post-comment-period negotiations.[223] Resolution did not involve a categorical bar on ex parte communications; rather, the court suggested that communications received *prior* to issuance of an NPRM do not need to be placed in a public docket, and communications during or after a comment period should be avoided, or at the very least, described in the public docket.[224]

The decision did not last long. Just four years later, the D.C. Circuit reversed itself in *Sierra Club v. Costle*,[225] the court's last substantial case on ex parte communications.[226] The court considered allegations that the EPA engaged in significant post-comment-period communications and succumbed to political pressures in promulgating a final rule.[227] The case

218. *See id.*; SFERRA-BONISTALLI, *supra* note 144, at 19–20.

219. *See* Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 225 (D.C. Cir. 1959).

220. 567 F.2d 9 (D.C. Cir. 1977).

221. *See id.* at 53 ("[Between the close of the comment period and the final decision,] broadcast interests met some 18 times with Commission personnel, cable interests some nine times, motion picture and sports interests five times each, and 'public interest' intervenors not at all.").

222. *Id.* at 54 ("Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable.").

223. *See id.* at 56.

224. *See id.* at 57.

225. Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981).

226. SFERRA-BONISTALLI, *supra* note 144, at 33. The D.C. Circuit has since decided two additional, though less-precedential, cases. *Id.* at 36; *accord* Iowa St. Com. Comm'n v. Off. of the Fed. Inspector, 730 F.2d 1566, 1576–77 (D.C. Cir. 1984) (finding no improper communications); Bd. of Regents of the Univ. of Wash. v. EPA, 86 F.3d 1214, 1222 (D.C. Cir. 1996) (finding no improper communications).

227. *See Sierra Club*, 657 F.2d at 398 n.493 ("Our own analysis of the communications between EPA and outside sources during the post-comment period persuades us . . . that

was not governed by the APA, but the Clean Air Act's administrative rulemaking record requirements, which stated that "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability."[228] Writing for the majority, Judge Patricia Wald held that there was no statutory prohibition on ex parte communications nor any formal requirement to log the details of those communications.[229] She resisted the "easy temptation to look askance at all face-to-face lobbying efforts"[230] and argued pragmatically that providing outside groups with access improves the rulemaking process and that agency accountability is improved by having such access.[231] Since there has been no additional guidance from the D.C. Circuit or Supreme Court,[232] the resulting rule that governs today is that agencies must follow procedures dictated by their relevant authorizing statute and any of their own internal procedures,[233] but that the APA's only requirement is a sufficient record for judicial review.[234]

Judicial flexibility has led to each agency addressing ex parte communications in their own way.[235] Some codify policies in rulemaking, others use a written or even unwritten policy.[236] Some have mandatory disclosure requirements;[237] others have non-mandatory ones.[238] Some

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the agency was not victimized by any 'ex parte blitz' from coal and utility industry advocates[.]").

228. *Id.* at 397 (quoting 42 U.S.C. § 7607(d)(4)(B)(i)).

229. *See id.* at 402.

230. *Id.* at 401.

231. *See id.* at 400–01.

232. *See* McGarity, *supra* note 168, at 1733 ("The Supreme Court has yet to decide a case on point[.]").

233. *See* Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion[.]").

234. *See* SFERRA-BONISTALLI, *supra* note 144, at 72 (noting that due process and ensuring the sufficiency of the administrative record are legal requirements particularly for post-NPRM ex parte communications).

235. In 2014, ACUS recommended that each agency that conducts informal rulemaking develop a written policy governing ex parte communications if they did not have one already. ACUS Recommendation 2014-4, *supra* note 129, at 35,994.

236. SFERRA-BONISTALLI, *supra* note 144, at 13 (summarizing the practices of several federal agencies).

237. *See id.* at 42 (noting that the Federal Emergency Management Agency's policy is mandatory).

238. *See id.* at 41 (noting that the Department of Justice's policy is non-mandatory).

welcome ex parte communications;[239] others are neutral[240] or restrict[241] ex parte communications. Disclosure policies differ on who is covered, the types of communications that must be disclosed, the timing of disclosure, and repercussions for failure to disclose.[242] OIRA's process of meeting with all groups and disclosing a significant amount of information regarding each meeting seems to be more than *Costle* would require.

B. Ex Parte Communications Policies for the Department of Transportation and the Environmental Protection Agency

To better understand where OIRA falls among the agencies and what agencies' rules are with respect to 12,866 Meetings, this section compares the policies of two agencies: the DOT, which has historically been conservative and wary of ex parte communications,[243] and the EPA, which has been more welcoming of such communications.[244] Since 1981, the DOT and the EPA have also been some of the most active in producing economically significant rules reviewed by OIRA.[245]

The DOT has been a leader among agencies regarding standards for public disclosure of ex parte communications during the rulemaking process.[246] In October 1970—several years before the *Home Box Office* case raised concerns about potential impropriety in the informal rulemaking context and before OIRA was even created—the DOT issued internal policies for public contacts in rulemaking in DOT Order 2100.2.[247] Order 2100.2 noted the tension between wanting to be open to additional information in the rulemaking process and wanting to give notice to members

239. *See id.* at 41–51 (describing the FCC, Consumer Financial Protection Bureau, EPA, and Consumer Product Safety Commission policies as welcoming ex parte communications).

240. *See id.* at 51–52 (describing the Federal Election Commission and Nuclear Regulatory Commission policies as neutral with respect to ex parte communications).

241. *See id.* at 53–64 (describing the DOL, DOT and several of its operating administrations, U.S. Coast Guard, Transportation Security Administration, Department of Education, Food and Drug Administration, Department of the Interior, and Federal Trade Commission policies as taking a restrictive stance on ex parte communications).

242. *Id.* at 64–65.

243. *See id.* at 53–64 (mentioning that the DOT was known to be conservative when it came to ex parte communications, and far more so than other agencies).

244. *See id*. at 41–51.

245. *See Economically Significant Rules by Agency*, *supra* note 80.

246. *See* Costa et al., *supra* note 101, at 37 (stating that as early as 1998 the DOT created the government's first electronic rulemaking docket system); *see also* SFERRA-BONISTALLI, *supra* note 144, at 98.

247. U.S. DEP'T OF TRANSP., ORDER 2100.2, POLICIES FOR PUBLIC CONTACTS IN RULE MAKING 1–2 (Oct. 5, 1970).

of the public about information exchanges happening outside the written comment process.[248] It set out a few key guidelines to balance that tension. First, once the comment period for a rule was closed, it required that any meetings "should, if possible, be announced publicly or all persons who have expressed an interest in the rule-making action should be invited to participate."[249] Second, it required that any time after an NPRM had been issued, meetings with interested members of the public had to be reported—much like 12,866 Meetings—and disclosure had to provide, at a minimum, a: (a) "list of participants;" (b) "summary of the discussion; and" (c) "specific statement of any commitments made by any [DOT] personnel."[250]

The same policies remained in place for nearly half a century,[251] until the Trump Administration revised them in 2018[252] and codified the changes in 2019.[253] The revisions eliminated the requirement to docket ex parte communications *except* for communications that occur through 12,866 Meetings.[254] The revisions also provided more formalized requirements for which DOT staff should attend 12,866 Meetings and how staff should conduct themselves during the Meetings.[255]

The Biden Administration reversed the changes and strengthened ex parte communication guidance.[256] Like DOT Order 2100.2, the regulations direct the DOT to be "open to giving other interested persons a similar opportunity to meet" if the agency meets with interested persons on the

248. *See id.* at 2. The 2022 guidance also emphasizes this. Memorandum from John E. Putnam, Deputy General Counsel to Secretarial Officers and Heads of Operating Administrations, on Guidance on Communication with Parties Outside of the Federal Executive Branch (Ex Parte Communications), at 1–4 (Apr. 19, 2022), https://www.transportation.gov/sites/dot.gov/files/2022-04/Guidance-on-Communication-with-Parties-outside-of-the-Federal-Executive-Branch-%28Ex-Parte-Communications%29.pdf [hereinafter 2022 Ex Parte Communications Guidance].

249. U.S. DEP'T OF TRANSP., ORDER 2100.2, *supra* note 247, at 2.

250. *Id.* at 3.

251. *See, e.g.*, BUREAUCRACY, *supra* note 41, at 91–101 (noting the norms and culture of disclosure created by the longstanding policy are likely to continue to have an effect on the agency's processes; also noting that agency culture is persistent, and tasks that fit within agency's culture typically benefit from greater attention and resources).

252. *See* U.S. DEP'T OF TRANSP., ORDER 2100.2, *supra* note 247, at 1, 3.

253. *See* Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71,714 (Dec. 27, 2019) (to be codified in scattered parts of 14 and 49 C.F.R.).

254. 49 C.F.R. § 5.19(b)(4).

255. *Id.*

256. Administrative Rulemaking, Guidance, and Enforcement Procedures, 86 Fed. Reg. 17,292 (Apr. 2, 2021) (to be codified in scattered parts of 14 and 49 C.F.R.); U.S. DEP'T OF TRANSP., ORDER 2100.2, *supra* note 247; 2022 Ex Parte Communications Guidance, *supra* note 248.

rulemaking after the close of the comment period.[257] The 2022 guidance heightens disclosure beyond DOT Order 2100.2, requiring a record of *all* ex parte communications and that information about and gained from any ex parte communication be included in the docket.[258] The guidance provides that for communications that occur prior to publication of a proposed informal rule, the docket must include disclosure of the date of any communication, the participants, and the name of the rulemaking.[259] And to complement the 12,866 Meeting disclosures, the 2022 guidance requires additional disclosure by DOT personnel in the rulemaking docket if a party meeting with OIRA provides information at the meeting that is not already in the rulemaking docket.[260] This level of disclosure is unprecedented for an agency.

The EPA's processes also arose out of a written internal policy. Then-EPA Administrator William Ruckelshaus established principles in a 1983 memo to agency staff known as the "Fishbowl" Memo.[261] For informal rulemaking, the memo required all written comments to be entered in the rulemaking docket and "that a memorandum summarizing any significant new factual information or argument likely to affect the final decision received during a meeting or other conversations [be] placed in the rulemaking docket."[262] Unlike the DOT policies, the EPA did not need to disclose every meeting, and agency staff were permitted to meet with a single interest group without inviting other interested groups to participate.[263] The memo did not explicitly describe procedures for 12,866 Meetings. Several subsequent EPA administrators have issued their own "Fishbowl Memos,"[264] most recently Biden Administration Administrator

257. 49 C.F.R. § 5.19(a)(4).

258. 2022 Ex Parte Communications Guidance, *supra* note 248, at 4–5, 10–14 (referring to informal rulemaking).

259. *Id.* at 11.

260. *Id.* at 14.

261. Memorandum from William Ruckelshaus, Administrator, EPA, to All EPA Employees (1983), https://archive.epa.gov/epa/aboutepa/ruckelshaus takes steps improve flow agency information fishbowl policy.html#memo [https://perma.cc/4BDN-776B]; SFERRA-BONISTALLI, *supra* note 144, at 47.

262. *Id.*

263. *Id.*

264. *See* SFERRA-BONISTALLI, *supra* note 144, at 47; *see, e.g.*, Kevin Bogardus, *Wheeler Writes His 'Fishbowl' Memo*, E&E NEWS (July 30, 2018), https://www.eenews.net/eenewspm/stories/1060091647?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1060091647 [https://perma.cc/LTM5-A32L].

Michael Regan.[265] The Regan Fishbowl Memo contained essentially the same simplistic requirements for informal rulemaking.[266]

C. OIRA's Transparency Leadership

Reflecting on the DOT and EPA procedures for ex parte communications, "OIRA's disclosure procedures make it one of the most transparent offices in the Executive Office of the President[,]" as well as across the federal government.[267] OIRA is one of the only offices, if not *the* only one, to maintain an open-door policy, even with a small staff.[268] And for all of those meetings, OIRA discloses a significant amount of information in a digital, easily digestible way.[269]No agency maintains a comparable log of all ex parte communications, although many place summaries of oral communications on the relevant rulemaking dockets. The DOT, despite a brief pause during the Trump Administration, is possibly the only agency to docket all meetings that take place after publication of an NPRM with details comparable to those disclosed in OIRA's logs.[270]

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265. Memorandum from Michael Regan, Administrator, EPA, to All EPA Employees (Apr. 12, 2021), https://www.epa.gov/sites/default/files/2021-04/documents/regan-message ontransparencyandearningpublictrustinepaoperations-april122021.pdf [https://perma.cc/B8 3R-VJHJ].

266. *See id.* ("EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion with a member of the public or an interested group that contains significant new factual information regarding a proposed rule.").

267. Arbuckle, *supra* note 2, at 134.

268. The Department of Education, for example, discourages any ex parte communications after an NPRM has been published. SFERRA-BONISTALLI, *supra* note 144, at 60. In its recommendations for agencies about developing ex parte communications policies, ACUS suggested that agencies consider "[l]imitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings." ACUS Recommendation 2014-4, *supra* note 129, at 35,994.

269. OIRA's logs have been praised by political scientists who study influence in the regulatory state because the logs provide consistent, easily accessible information; although there are still certain data limitations such as broken links or meeting files. *See Out of the Public's Eye?*, *supra* note 57, at 414 n.2.

270. The DOL has a similar docketing requirement to the DOT's. SFERRA-BONISTALLI, *supra* note 144, at 53 ("The DOL Memorandum requires disclosing all oral *ex parte* communications that 'express an opinion about the rule or otherwise go to its substance.' The disclosure should identify: the rulemaking, the stage of rulemaking, the parties present or represented, the date of the discussion, whether the discussion was via telephone or in-person meeting, a description of the factual materials or information presented, and the identity of agency personnel participating.").

Further, only rarely do agencies require simultaneous disclosure of 12,866 Meetings in rulemaking dockets, despite the fact that 12,866 Meetings often involve agency representatives. The DOT has a requirement to docket these meetings when new information is presented, and some other agencies have done so in particular instances.[271] However, most agencies, including the EPA, find acknowledging the meetings unnecessary. The level of transparency OIRA offers goes above and beyond.

Few agencies have any disclosure requirements for the period before an NPRM is published, including while it is under review at OIRA.[272] Professor William West has characterized the pre-NPRM processes at agencies as "unstructured and idiosyncratic" and "lack[ing] the assurances of openness that characterize the comment phase of the process."[273] This stage of the process is enormously important. Empirical evidence has demonstrated the immense power of outside groups to set an agency's agenda early in the NPRM development process.[274] An agency's process of developing a rule requires this kind of "bread and butter" assistance from outside groups, which the D.C. Circuit has endorsed,[275] and EO 12,866 encourages agencies to solicit the views of outside groups when developing rulemaking.[276] Given the importance of the pre-NPRM stage in defining the outcome of rules and the disproportionate use of this stage by industry, a lack of transparency at agencies is problematic for assessing undue influence.[277] The new DOT requirement to docket pre-NPRM meetings is an outlier, though it takes the agency much closer to OIRA's level of disclosure. OIRA discloses all meetings while the draft NPRM is under review. Although this is a shorter, more defined window than when the agency is developing the rule in the first instance, it is far more disclosure than any agency provides, other than the DOT, as of April 2022.

271. *See, e.g.*, *Ex Parte Communications*, DEP'T OF ENERGY, https://www.energy.gov/gc/legal-resources/ex-parte-communications [https://perma.cc/67LM-7BHY] (providing documentation of several 12,866 Meetings).

272. *See* McGarity, *supra* note 168, at 1735; Heikkinen, *supra* note 7 ("Conversations with agencies that occur before rules are proposed aren't public.").

273. William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 576 (2009).

274. *See supra* notes 94–95 and accompanying text.

275. *See, e.g.*, SFERRA-BONISTALLI, *supra* note 144, at 69 ("Pre-NPRM ex parte communications are generally beneficial and do not implicate administrative and due process principles the way post-NPRM ex parte communications do.").

276. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 102 (2018).

277. *See* West, *supra* note 273, at 591–95.

V. OIRA AS INFLUENCER?

Despite being criticized as a "conduit, funneling information that does not end up on the public rulemaking record[,]"[278] OIRA joins only a few agencies in having transparent practices for ex parte communications. There is no formal requirement in the APA that OIRA or the agencies engage in a particular form of disclosure, and the Supreme Court had indicated a lack of interest in urging more opportunities for comment and disclosure.[279] EO 12,866 and OIRA's internal practices have set a strong example for how the federal government can—without judicial or legislative intervention—promote transparency in the rulemaking process. The DOT has just recently followed in OIRA's footsteps.

One of OIRA's key roles is to make the public-comment system work well.[280] OIRA should follow and help agencies to follow the requirements of the APA and do what is right to promote "good government."[281] OIRA seems to be doing that, at least as compared to agencies. Members of Congress have suggested OIRA do even more by, for example, *inviting* groups to 12,866 Meetings in addition to the open-door policy.[282] OIRA's 12,866 Meetings already encourage transparency, and greater citizen participation has been shown, in part, to boost the perceived fairness of the rulemaking process.[283]

Transparency might be improved across the federal government if OIRA's 12,866 Meeting process could formally become a model for agencies' ex parte communications policies. President Biden has tasked OMB with developing recommendations to make interagency review more transparent, and this is one promising solution. The President should issue an executive order directing rulemaking agencies to develop ex parte communications policies that are at least as transparent as OIRA's, including requirements to publicly log all meetings. The DOT's 2022 guidance could also be used as a model.

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278. William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611, 615 (2002).

279. *See* Kristin E. Hickman, *Did* Little Sisters of the Poor *Just Gut APA Rulemaking Procedures?*, NOTICE & COMMENT (July 9, 2020), https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/ [https://perma.cc?23KQ-9RJV] ("Justice Thomas's opinion for the Court turns APA notice-and-comment rulemaking procedures into a pro forma exercise of procedural box-checking that will allow agencies to curtail meaningful public participation in the agency rulemaking process.").

280. *See* FUTURE OF GOVERNMENT, *supra* note 5, at 31.

281. *See id.*

282. *See House Hearing on OIRA*, *supra* note 1, at 19.

283. Alexander I. Ruder & Neal D. Woods, *Procedural Fairness and the Legitimacy of Agency Rulemaking*, 30 J. PUB. ADMIN. RSCH. & THEORY 400, 400 (2020).

Like with OIRA's public logs, more disclosure may help the public to better understand who is lobbying the agencies. iI might provide additional data for researchers studying lobbying influence in the regulatory state, who could then shed light on the amount and type of influence at agencies. Standardizing ex parte communications policies across the federal government is also likely to lead to better and more fair outcomes. The reality is that agencies rarely have open-door policies, and often meet with "friendly" groups whose ideology is aligned with the agency or administration. During the pre-NPRM stage, it is even more important to know who is meeting with the agencies so that there can be a greater understanding of the rule development process. Transparency at this stage could also encourage agencies to engage unfriendly groups earlier in the process.

Of course, modeling OIRA's process at agencies could be time-consuming and, depending on the agency, might be a bigger lift for agencies than for OIRA because of the number of rules and meetings involved. Agencies have limited resources and have raised concerns even in the existing system about the time and resource burden of disclosure.[284] OIRA has a small staff, yet has been able to maintain the log, and it seems likely that agencies could provide uniform disclosure—at least during the comment period for proposed rules—without much added effort. And like what has happened with OIRA, more disclosure may invite questions or criticism. If the purpose of disclosure is to promote transparency and educate the public, then negative perceptions resulting from that data is not a reason to avoid such disclosure; it is simply a reason to question whether the process, as it currently stands, is fair.

CONCLUSION

"*Ironically, one reason for the attention is that OIRA has a high degree of transparency*."[285]

This Article assesses and critiques concerns that OIRA is somehow improperly *influenced* by 12,866 Meetings. By examining OIRA's policy of disclosure of ex parte communications in context, it becomes clear that it is one of the most transparent and accessible policies in the federal government. OIRA's transparency about 12,866 Meetings has permitted researchers to study the impact of outside groups on the development of rules. Despite research in other contexts that concludes there is industry capture of the rulemaking process, there is in fact only minimal and mixed

284. SFERRA-BONISTALLI, *supra* note 144, at 21.

285. VALUING LIFE, *supra* note 46, at 32.

evidence of capture due to OIRA's meetings with outside groups. It is equally likely that the 12,866 Meetings in fact properly benefit the development of rules, as they are intended to.

There is no standard operating procedure for the disclosure of ex parte communications in informal rulemaking. Agencies have instead set their own vastly different policies, few of which rise to the level of disclosure OIRA provides, and none of which have yet to do so in a centralized, easily-studied format like OIRA's 12,866 Meeting logs. 12,866 Meetings have been targeted as an improper influence in the rulemaking process, but perhaps only because examining and rigorously testing such influence at other points in the process is currently impossible. The disclosure policies for OIRA can serve as a model, or *influencer*, for agencies, which might force transparency improvements throughout the federal government. OIRA's goals are to improve information access and make the comment process more effective. By comparison to federal agencies, OIRA is leading in both areas, and agencies would do well to move in OIRA's direction.