

C O M M E N T

# Optimizing OMB: Response to The President's Budget as a Source of Agency Policy Control

by Ali A. Zaidi

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No single value defines a budget. Rather, a budget is many values, competing and clashing over common currency, suspended for a moment to showcase a normative expression of where we intend to go as a nation—and how. In our government, the budget is also a proposal, the President's pitch deck to the holders of the purse strings. And until Congress acts, there is no billing to the budget. 'We the People' use this annual process to determine how we tax ourselves, pay off our debts, and invest in our future—how we come together as a one people around shared challenges and opportunities. In all of this, we have help: the Office of Management and Budget (OMB).

Despite the budget's existential tie to the administrative state and OMB's central role in the annual process surrounding the budget—from development to execution, legal literature devotes little attention to either. In her article, Prof. Eloise Pasachoff attempts to reverse this inattentiveness. The treatment is trenchant and thoughtful. Yet, perhaps borne of epistemological reasons rooted in the OMB-opacity her article bemoans, the treatment—at times—flattens context and complexity. With aim at adding more completeness by acknowledging context and complexity that the article either misses or minimizes, I offer three global comments regarding: (I) atomization, (II) accountability, and (III) agenda setting. The first focuses primarily on OMB's budget execution role, the last focuses on OMB's budget development role, and the comment on accountability has application across both.

## I. In the Atomized Administrative State, OMB Must Orchestrate Harmony

Today's administrative state is a bottom-up development; each new bill adds or subtracts, often with ambivalence about implementation impacts on the overall enterprise. The result is clear—an atomization of authorities. Yet, why

this comes to be remains unclear. Explanations range from cynical to optimistic to unintentional: perhaps, atomization exists because Congress seeks to inhibit rapid change or limit any one president's influence.<sup>1</sup> Maybe, Congress is motivated by the complexity of systemwide change and, as a result, is assembling—not atomizing—all hands on deck for our biggest problems.<sup>2</sup> Or possibly, the atomization is "mostly accidental," the fallout from "a legislative process that occurs on a rolling basis over time, producing inconsistencies, inefficiencies, and unintended consequences."<sup>3</sup>

Whatever the genesis story for our atomized administrative state, OMB must orchestrate harmony. The task is not easy, but it is increasingly important. The effects of the atomized administrative state are accentuated by the world we live in—one growingly defined by the ubiquity of data and connecting technology, decentralization of power and governance, and unpredictability of threats. If it were not enough that the administrative state developed in an atomized fashion, the world in which it operates is dominated by a centrifugal force, pulling each atom away from the center and making the problem worse.

To be sure, the full frenzy that furrows the OMB brow cannot be within scope for Professor Pasachoff's treatment. However, the atomized nature of our administrative state, the centrifugal force accentuating the effects of atomization, and the increasingly demanding task of harmonization all belong in a complete conversation about OMB's budget execution function for three reasons.

First, with similar or conflicting authorities placed at different agencies across government, OMB must—during the kinetic process of budget execution—attempt to orchestrate real-time harmonization. Second, OMB must complete its harmonization task in the face of non-linear

1. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) 1138-43.

2. *Id.*

3. *Id.* at 1143.

and stochastic challenges—complicating variables generated either by government or non-government actors. Third, OMB must advance the president’s vision for the overall enterprise through engagement at moments systematic and serendipitous, dealing with single agencies or authorities, and limited by constraints imposed by designers who were likely agnostic or ambivalent about how the pieces fit together.

When Professor Pasachoff raises concerns with the poorly defined or inconsistent ‘elevation’ of Resource Management Offices (RMOs) above Senate-confirmed agency officials, these three reasons become particularly salient: the poor, *ex ante* definition flows from the kinetic or real-time aspect of the task. The inconsistency flows from the non-linearity and stochasticity of the challenges to completing the task. And the ‘elevation’ is of the president’s overall vision rather than the RMOs’ policy preference. This context and complexity is critical for a complete conversation.

## II. Ends-Accountability Exists; Means-Accountability Could Be Bolstered

Atomization does not offer an out for accountability. More directly: OMB is a component unit within the Executive Office of the *President*, and the last word is key. Holders of the Oval Office own OMB’s decisions. For a President, there is no avoiding the ends that OMB pursues; accountability always attaches. That accountability holds both inside and outside the Executive Branch. Inside the Executive, appeals to OMB decisions are taken to the President and the President’s senior advisors. At that table, OMB is not an arbiter; it is a respondent. After that table, the parochial fades and each participant adopts the President’s—not necessarily OMB’s—view. This is the only view that leaves the Executive. And again, those dissatisfied hold the President accountable.

Clearly, I diverge from some of Professor Pasachoff’s observations on accountability, specifically on ends-accountability, but I agree with this: accountability around the means OMB that uses to carry its budget execution and budget development roles could be bolstered. In particular, I carry forward the conversation Professor Pasachoff begins on two approaches to bolster means-accountability.

First, despite the heterogeneous composition of OMB’s task, the use of an evidence-based decisionmaking framework, where appropriate, is commendable and presents an opportunity to bolster means-accountability. As Professor Pasachoff notes, recent presidents advanced a series of initiatives to leverage evidence-based decisionmaking, albeit without sufficiently engaging the public. Although the engagement may have been more involved than what Professor Pasachoff portrays, there is certainly headroom. Not only would such engagement benefit the public, which

would be presented with an opportunity to shape a key OMB heuristic, or means, but the engagement would also benefit OMB by stoking the interest of academics to build out this fledgling field.

Second, Professor Pasachoff rightfully draws a comparison between OMB’s Office of Information and Regulatory Affairs (OIRA) and the RMOs regarding disclosure of public meetings. When OIRA meets with stakeholders regarding a rule under review, it posts publicly the names of attendees as well as any material the attendees shared with OIRA. Until the Obama Administration, this type of transparency did not exist at all for RMO meetings. This changed when the Administration instituted a policy of disclosing White House visitor records on a regular basis.<sup>4</sup> Even so, materials marshaled by attendees were still not made public. A future administration may consider that opportunity to bolster means-accountability. Just as OIRA posts materials from nongovernmental stakeholders for meetings taken on live rules under review, the RMOs might post materials from nongovernmental stakeholders for meetings on live matters of budget development.

Ultimately, both of these approaches seeks to expand the awareness that ‘We the People’ possess about OMB’s means—how the agency helps us determine how we tax ourselves, pay off our debts, and invest in our future.

## III. OMB’s Agenda Setting and Administrative Functions Materially Differ

Increased awareness can aid in bolstering means-accountability for RMOs. However, the RMOs’ dual function—budget development and budget execution—suggests different levels of awareness may be appropriate for different aspects of the RMOs work. Professor Pasachoff draws many comparisons between OMB’s OIRA and RMOs; while some are apt, others are overextended. This overextension results because Professor Pasachoff appears to conflate the RMOs’ dual functions and apply a common, heightened awareness expectation across the board.

To be sure, where the RMOs act like OIRA—where the baton is not handed to Congress and authority is concentrated in the Executive—more awareness is necessary. This is not budget development. In budget development, RMOs develop a proposal that Congress scrutinizes on behalf of ‘We the People.’ After receipt of the proposal, Congress can hold hearings; ask for specific analyses, such as *impact statements*, which present the Executive Branch with what-if hypotheticals regarding different funding scenarios; or demand answers to *questions for the record*. And Congress does so. By comparison, in budget execution, RMOs exer-

4. White House, *White House Voluntary Disclosure Policy Visitor Access Records* (2017), <https://obamawhitehouse.archives.gov/VoluntaryDisclosure>.

cise discretion within the degrees of freedom Congress has provided. Here, RMOs act like rulemakers. They both propose and execute. Authority is concreted. And appropriately, the need for awareness is heightened.

Already, RMOs use traditional rulemaking processes, such as those governed by the Administrative Procedures Act (APA), to carry out certain budget execution functions; this can be expanded. Take for example, federal credit programs like the direct loans offered by the Department of Agriculture or the loan guarantees offered by the Department of Energy. These programs—the operation of which clearly constitutes budget execution—are already governed by rules that run through APA's notice and comment requirements. Similarly, APA or APA-lite processes also often govern procurement, the process by which the federal government buys goods and services. Certainly, there must be other aspects of the RMOs work that could be governed by processes that resemble processes already associated with federal credit programs and aspects of procurement. Where RMOs predictably and regularly exercise discretion within the degrees of freedom Congress has provided, I am certain we would find candidates for application of APA or APA-lite processes. Surely, such an effort could bolster means-accountability in the RMOs' work.

Yet, the same effort applied to budget development could be deleterious. Although Professor Pasachoff is quick to dismiss the importance of 'policy consistency' or of protecting the 'deliberative process,' these concepts are

not pretexts for opacity—they represent the real struggle of a president to present one coherent vision for the country. Remember, a budget is many values, competing and clashing over common currency, suspended for a moment to showcase a normative expression of where we intend to go as a nation and how. To ask the president to decompose that budget is to take away the power to present that coherent vision and preemptively negotiate against it, rather than seek to persuade the Congress of its merits. In this way, OMB's agenda setting and administrative functions materially differ. The implications for awareness and accountability follow.

#### **IV. Conclusion**

Professor Pasachoff attempts to reverse the legal literature's inattentiveness to the budget's existential tie to the administrative state and OMB's central role in the annual process surrounding the budget. The treatment starts an important conversation about how 'We the People' might strengthen the processes and institutions we use to determine how we tax ourselves, pay off our debts, and invest in our future. Taking this hard look makes more sense now than ever before: the atomized nature of our administrative state, the centrifugal force accentuating the effects of atomization, and the increasingly demanding task of harmonization make OMB's task today both more difficult and more important.