ment, and agencies with independent litigating authority will exercise that authority without OMB or OIRA review. In fact, Congress has given Cabinet departments independent litigating authority in limited circumstances, *see, e.g.*, 29 U.S.C. § 216(e)(3)(B) (Department of Labor), yet those agencies have long been subject to EO 12866.

3. *OMB Bypass Authority*. Congress has given some independent regulatory agencies the authority to bypass OMB by submitting reports, budgets, or testimony directly to Congress without prior OMB review. For the CFPB, for example, Congress provided that

> [n]o officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress[.]

12 U.S.C. § 5492(c)(4); *see also, e.g.*, 12 U.S.C. § 250 (similar provision covering the "the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, . . . the Director of the Federal Housing Finance Agency, [and] the National Credit Union Administration"); 49 U.S.C. § 1303(d) (Surface Transportation Board). Although these statutes do not mention OMB by name, OMB has long operated the executive branch clearance processes that these statutes allow agencies to bypass. *See* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (2017); OMB Circular No. A-19, *Legislative Coordination and Clearance* (1979). In other instances, Congress has effectively prohibited advance OMB review by directing that an independent regulatory agency's budget requests, prepared testimony, or legislative proposals be submitted concurrently to Congress whenever they are submitted to OMB. *See, e.g.*, 7 U.S.C. § 2(a)(10)(A) (Commodity Futures Trading Commission); 15 U.S.C. § 2076(k)(1) (Consumer Products Safety Commission); 42 U.S.C. § 7171(j) (Federal Energy Regulatory Commission).

The Executive Branch has long objected to efforts to minimize presidential supervision of the agencies in testifying and submitting proposed legislation to Congress, treating those restrictions as an infringement of the President's Article II authority, including his Article II, Section 3

authority to recommend to Congress "such Measures as he shall judge necessary and expedient." *See, e.g.*, *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007,* 32 Op. O.L.C. 27, 28 (2008) ("For decades, the Executive Branch has consistently objected to direct reporting requirements . . . on the ground that such requirements infringe upon the President's constitutional supervisory authority over Executive Branch subordinates and information."); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 34, 36 (1984) ("[T]he Special Counsel has proposed legislation authorizing him to submit directly to Congress legislative recommendations that he 'deems necessary to further enhance the ability of the office to perform its duties.'"; "The Special Counsel's proposal would severely impair the President's ability to perform his constitutional obligation to 'recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient.'"); *see also Separation of Powers*, 20 Op. O.L.C. at 174–75; *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 254–55 (1989); *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 639–42 (1982). But even if these bypass statutes are constitutional, none of them speaks to OMB or OIRA review of an agency's proposed rulemakings; all of them apply only to budget requests, to proposed legislation and testimony, or to some combination thereof.

Congress's decision to enact such bypass statutes is further evidence that independent regulatory agencies are not, merely by virtue of tenure protection, entirely free from presidential supervision (contra the dictum in *Humphrey's Executor*). Congress has expressly sought to limit OMB's authority to coordinate the interagency clearance process in various respects, but has not imposed any statutory restrictions on OMB's authority to conduct regulatory review. This only underscores that Congress left the latter untouched. We must presume that Congress "says what it means and means what it says" in these statutes. *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016). By their plain terms, these statutes do not purport to forbid requiring independent regulatory agencies to participate in the EO 12866 centralized review process.

Congress has also required two agencies to submit certain financial operating plans and forecasts to OMB, but then provided in a "rule of con-

struction" that those requirements "may not be construed as implying" that OMB has "any jurisdiction or oversight over the affairs or operations" of the agencies. 12 U.S.C. § 1827(c)(3) (Federal Deposit Insurance Corporation); *see also id.* § 5497(a)(4)(E) (CFPB). By its own terms, that rule of construction simply precludes the inference that the agencies' submission of required documents otherwise implies OMB supervision. The rule of construction, like OMB bypass statutes generally, does not speak to or limit the President's authority under Article II to require an agency to participate in centralized regulatory review of the agency's proposed rulemakings.

4. *Sunshine Act*. Congress has required multi-member agencies to comply with the Government in the Sunshine Act, 5 U.S.C. § 552b, but the requirements of that law do not preclude application of EO 12866. The Sunshine Act applies to any "agency . . . headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." *Id.* § 552b(a)(1). The Act requires that "every portion of every meeting" of such an agency "be open to public observation," subject to various exceptions, *id.* § 552b(b), and it defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business," *id.* § 552b(a)(2). The public is entitled to at least one week's advance notice of any such meeting. *Id.* § 552b(e)(1). The Act's requirements do not apply to formal rulemakings, *see id.* § 552b(c)(10); *Time, Inc. v. U.S. Postal Serv.*, 667 F.2d 329, 334 (2d Cir. 1981), but there is no comparable exception for informal rulemakings—the kind of rulemakings to which EO 12866 applies, *see* EO 12866, § 3(d)(1). Thus, the Act requires covered agencies, such as the SEC and FTC, to meet in public whenever a quorum of agency members convenes to engage in notice-and-comment rulemaking.

The Sunshine Act's requirements would not preclude compliance with EO 12866, because most discussions between a covered agency and OIRA would likely not qualify as a "meeting." As the Supreme Court explained in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), Congress was cognizant in drafting the Sunshine Act that "the administrative process cannot be conducted entirely in the public eye." *Id.* at 469. The Act is therefore limited to "meetings" as defined above. *See id.* at 471

(holding that a "meeting" must involve deliberations "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions" (internal quotation marks omitted)). Many of the consultations that occur in the EO 12866 process likely would not meet that standard. As the Court explained, "'informal background discussions that clarify issues and expose varying views' are a necessary part of an agency's work," and the Act was not intended to "prevent such discussions." *Id*. at 469–70 (brackets omitted). A "meeting" also must involve "at least the number of individual agency members required to take action on behalf of the agency." 5 U.S.C. § 552b(a)(2). An exchange of views between OIRA and the staff of an agency (or its Chairman) during the EO 12866 process would not qualify. Thus, the Sunshine Act would be consistent with applying EO 12866 to independent agencies.

* * * * *

We thus conclude that none of the common statutory hallmarks of independent agencies would stand in the way of applying EO 12866 to such agencies. Nothing in the centralized regulatory review process is inconsistent with their traditional "independence." EO 12866 expressly preserves the substantive rulemaking discretion afforded to independent agencies, just as it preserves the substantive discretion enjoyed by non-independent agencies. It does so, however, within the framework of presidential supervision and OIRA administrative expertise that has promoted good administrative governance since the earliest days of the Reagan Administration.

Finally, we note that our conclusion is consistent with those of the Administrative Conference of the United States and the American Bar Association, both of which have long endorsed the President's authority to extend EO 12866 to independent agencies.[15] A 2017 report by the House

[15] *See, e.g.*, Section of Administrative Law and Regulatory Practice, ABA, *Improving the Administrative State: A Report to the President-Elect of the United States* at 10 (2016); Letter for Ron Johnson, Chairman, and Thomas R. Carper, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, from Thomas M. Susman, Director, Governmental Affairs Office, ABA, *Re: Support for S. 1067, the "Independent Agency Regulatory Analysis Act of 2015"* (July 23, 2015); House of Delegates, ABA, *Recommendation: Presidential Review of Rulemaking* (Aug. 7–8,

Committee on Oversight and Government Reform similarly opined that the President "has always had the authority to extend OIRA review to independent agencies." *OIRA Insight, Reform, and Accountability Act*, H.R. Rep. No. 115-19, at 7 (2017). As a matter of practice, OMB advises that "[a] number of 'independent' agencies, including the SEC, CFTC, the FCC, and others have consulted with OIRA regarding best practices for regulatory reform and cost-benefit analysis," OMB Letter at 7, and as noted above, the SSA has formally complied with the regulatory review process. We do not suggest, of course, that separation of powers questions may be decided by popular vote, but the views of congressional committees, administrative law experts, and practitioners confirm our view that extending EO 12866 to independent regulatory agencies would not compromise the appropriate and lawful performance of their statutory responsibilities.

IV.

For the foregoing reasons, we conclude that the President may require independent regulatory agencies to comply with the centralized regulatory review process prescribed by EO 12866. There is nothing in the statutory composition of independent agencies or in their other generally shared attributes that would preclude the full application of EO 12866 to them. We have not reviewed the organic statute of each independent agency and therefore do not rule out the possibility that a particular statutory provision of a particular agency—if constitutionally valid and sufficiently

---

1990), https://www.americanbar.org/content/dam/aba/directories/policy/1990_am_302.authcheckdam.pdf; *Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure*, 54 Fed. Reg. 5207, 5208 & n.2 (Feb. 2, 1989); Strauss & Sunstein, *Role of the President*, 38 Admin. L. Rev. at 206–07 (reprinting recommendation of the Administrative Law Section of the ABA). Former officials from independent agencies have offered the same view. *See* Letter for Ronald H. Johnson, Chairman, Senate Committee on Homeland Security and Governmental Affairs, from Nancy Nord, Former Commissioner, Consumer Product Safety Commission, et al., at 1 (June 17, 2015) (letter from eight former members of independent agencies). A number of academics have done the same. *See also, e.g.*, Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 837; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1535 (2002); Kagan, *Presidential Administration*, 114 Harv. L. Rev. at 2324–25 & n.311; Strauss & Sunstein, *Role of the President*, 38 Admin. L. Rev. at 200.

clear—may conflict with certain requirements of EO 12866. EO 12866 expressly contemplates, however, that it would yield to such a provision, and such a potential conflict would therefore pose no barrier to the general extension of EO 12866.

Should an independent agency identify a specific statutory provision that it believes requires modification of the processes and procedures of EO 12866, we would be happy to examine the matter. Please let us know if we may be of further assistance in that or in any other regard.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel