Statement of Curtis W. Copeland
Specialist in American National Government
Congressional Research Service

Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

May 6, 2008

on

"Federal Rulemaking and the Unitary Executive Principle"

Madam Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss federal rulemaking and the "unitary executive" principle. Although a wide range of views have been advanced regarding the proper role of the President in the rulemaking process, recent presidential administrations have exerted increasing day-to-day influence on agency rulemaking. The center of that influence during the past 25 years has been the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), which Congress created when it enacted the Paperwork Reduction Act of 1980 (44 U.S.C. §§3501-3520).

As requested, my testimony reviews the evolution of presidential involvement in the rulemaking process, and then focuses on several initiatives during the George W. Bush Administration that appear to have heightened the already influential role that OIRA and the President can play in that process. The details of that history and those initiatives are provided as an appendix to this statement, but I briefly summarize them below, describe three potentially competing perspectives regarding presidential power over rulemaking, and then discuss several options which would be available if Congress chose to act to curtail what some view as overreaching executive activity.

Presidential Oversight of Rulemaking

For more than 35 years, Presidents have attempted to influence the outcomes of agency rulemaking by establishing review organizations and procedures within the Executive Office of the President. In the 1970s, these organizations and procedures were relatively deferential and limited, with multiple entities at times "coordinating" and "advising" rulemaking agencies, and requiring them to "consider" alternative regulatory approaches.[1]

However, presidential review took on a more directive tone in 1981, when President Ronald Reagan issued Executive Order 12291.[2] The executive order required covered agencies (cabinet departments and independent agencies, but not independent regulatory agencies), among other things, to send a copy of each draft proposed and final rule to OMB before publication in the *Federal Register*, and authorized OMB to review each rule's compliance with the requirements of the order. Rules that were viewed as deficient were sent back to the issuing agencies. OMB's influence was centralized in OIRA, and the office's influence was also less transparent than that of its predecessor organizations.[3] In 1985, President Reagan further extended OIRA's influence over rulemaking by issuing Executive Order 12498, which required covered agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned, and allowed OIRA to return a draft rule to an issuing agency if the office did not have advance notice of the rule's submission.[4] The expansion of OIRA's authority in the rulemaking process via these executive orders was controversial, with some of the concerns focusing on whether OIRA's role violated the constitutional separation of powers.[5] President

---

[1] For example, during the Gerald Ford Administration, before a major rule was published in the *Federal Register*, the issuing agency was required to develop a statement certifying that the inflationary impact of the rule had been evaluated. The agency would submit the impact statement to the Council on Wage and Price Stability (CWPS), and CWPS would then either provide comments directly to the agency or participate in the regular rulemaking comment process. The agencies were responsible for ensuring their own compliance with these requirements. President Jimmy Carter established (1) a "Regulatory Analysis Review Group" (RARG) to review the analyses prepared for certain major rules (10 to 20 per year) and to submit comments during the comment period, and (2) a "Regulatory Council" to coordinate agencies' actions to avoid conflicting requirements and duplication of effort. For more on these initiatives, see John D. Graham, Paul R. Noe, and Elizabeth L. Branch, "Managing the Regulatory State: The Experience of the Bush Administration," *Fordham Urban Law Journal*, vol. 33, May 2006, pp. 953-1002.

[2] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

[3] For example, during the Carter Administration, the RARG filed comments on agency proposals during the formal public comment period. In the case of RARG filings, a draft of the comments was circulated to all RARG members, and the comments and any dissents were placed on the public record at the close of the comment period. In contrast, OIRA's reviews occurred before the rules were published for comment, and Executive Order 12291 did not require that OIRA's comments on the draft rules be disclosed.

[4] Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, Jan. 8, 1985.

[5] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Role of OMB in Regulation,* hearing, 97th Cong., 1st sess., June 18, 1981 (Washington: GPO, 1981). See also Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, vol. 80 (Dec.

(continued...)

George H. W. Bush continued the implementation of the Reagan executive orders during his Administration.

In September 1993, President Clinton issued Executive Order 12866, which revoked the two Reagan executive orders.[6] The new executive order continued the general framework of presidential review of rulemaking, but established what may be characterized as a more reserved regulatory philosophy and set of rulemaking principles (e.g., reaffirming the "primacy of Federal agencies in the regulatory decision-making process"); limited OIRA's reviews to "significant" rules; and put in place OIRA review time limits and transparency requirements. OIRA's role was described by the administrator as that of a "counselor" instead of a regulatory "gatekeeper."[7] On the other hand, Section 7 of Executive Order 12866 arguably went further than the Reagan executive orders in asserting presidential authority, stating that, to the extent permitted by law, unresolved disagreements between OIRA and rulemaking agencies "shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head."[8]

Presidential Oversight in the George W. Bush Administration

President George W. Bush retained Executive Order 12866 when he took office in 2001, but the implementation of that order has been significantly different during his Administration. By the end of 2002, OIRA was referring to itself in a report to Congress as the "gatekeeper for new rulemakings."[9] OIRA's new perception of its role has been manifested in several ways, including:

- the development of a detailed economic analysis circular and what agency officials described as a perceptible "stepping up the bar" in the amount of support required from agencies for their rules, with OIRA reportedly more

---

[5] (...continued)
1981), pp. 193-247.

[6] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Oct. 4, 1993. For an electronic copy of this executive order, see [http://www.whitehouse.gov/omb/inforeg/eo12866.pdf].

[7] William Niskanen, "Clinton's Regulatory Record: Policies, Process, and Outcomes," *Regulation*, vol. 19 (1996), pp. 27-28. See also U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Financial Management and Accountability, *Oversight of Regulatory Review Activities of the Office of Information and Regulatory Affairs*, 104th Cong., 2nd sess., Sept. 25, 1996 (Washington: GPO, 1997), where the OIRA administrator described the office's relationship with the agencies as "collegial" and "constructive."

[8] In 2002, the quoted language was changed by Executive Order 13258 to read "with the assistance of the Chief of Staff to the President ('Chief of Staff'), acting at the request of the President, with the relevant agency head." Other references to the Vice President were also changed to the Chief of Staff (e.g., that the resolution of the conflicts shall be informed by recommendations from the Chief of Staff, not the Vice President, and that the Chief of Staff (not the Vice President) may be charged with informing the agency and OIRA of the President's decision.

[9] Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Dec. 2002, available at [http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf].

often looking for regulatory benefits to be quantified and a cost-benefit analysis for every regulatory option that the agency considered, not just the option selected;[10]

- the issuance of 21 letters returning rules to the agencies between July 2001 and March 2002 — three times the number of return letters issued during the last six years of the Clinton Administration. However, OIRA returned only two rules in 2003, one rule in 2004, one rule in 2005, no rules in 2006, and one rule in 2007. OIRA officials indicated that the pace of return letters declined after 2002 because agencies had gotten the message about the seriousness of OIRA reviews;[11]

- the issuance of 13 "prompt letters" between September 2001 and December 2003 suggesting that agencies develop regulations in a particular area or encouraging ongoing efforts. However, OIRA issued two prompt letters in 2004, none in 2005, one in 2006, and none in 2007.;[12].

- the increased use of "informal" OIRA reviews in which agencies share preliminary drafts of rules and analyses before final decisionmaking at the agencies — a period when OIRA says it can have its greatest impact on the rules, but when OIRA says that some of the transparency requirements in Executive Order 12866 do not apply;[13]

- extensions of OIRA review for certain rules for months or years beyond the 90-day time limit delineated in the executive order;[14]

- using a general statutory requirement that OIRA provide Congress with "recommendations for reform" to request the public to identify rules that it believes should be eliminated or reformed;[15]

---

[10] Office of Management and Budget, "Circular A-4: Regulatory Analysis," Sept. 18, 2003, available at [http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf]. The perception of increased OIRA vigilance is discussed in U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, pp. 44-45.

[11] See [http://www.whitehouse.gov/omb/inforeg/return_letter.html] for copies of OIRA's return letters.

[12] See [http://www.whitehouse.gov/omb/inforeg/prompt_letter.html] for copies of OIRA's prompt letters.

[13] For a discussion of informal OIRA reviews, see U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, pp. 36-38.

[14] For a list of rules under OIRA review, including those in extended review, see [http://www.reginfo.gov/public/do/eoPackageMain] for information on regulations under review at OIRA.

[15] OIRA initially made this request in its May 2001 draft report to Congress on the costs and benefits of regulations, and reiterated it in its final report, which is available at

(continued...)

- a leadership role for OIRA in the development of electronic rulemaking, which has led to the development of a centralized rulemaking docket, but which some observers believe can lead to increased presidential influence over the agencies;[16]

- the development of an OMB bulletin on peer review that, in its original form, some believed could have led to a centralized system within OMB that could be vulnerable to political manipulation or control;[17]

- the development of a proposed bulletin standardizing agency risk assessment procedures that the National Academy of Sciences concluded was "fundamentally flawed," and that OIRA later withdrew;[18] and

- the development of a "good guidance practices" bulletin that standardizes certain agency guidance practices.[19]

In January 2007, President Bush issued Executive Order 13422, making the most significant changes to the presidential review process since Executive Order 12866 was issued in 1993.[20] Among other things, the new order required that agency regulatory policy officers (RPOs) be presidential appointees, eliminated the requirement that they report to the agency heads, and (unless the head of the agency objects) gave them the authority to control agency rulemaking in the agencies.[21] The executive order also expanded OIRA review to

---

[15] (...continued)
[http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf].

[16] See, for example, Richard G. Stoll and Katherine L. Lazarski, "Rulemaking," in Jeffrey S. Lubbers, ed., *Developments in Administrative Law and Regulatory Practice, 2003-2004* (Chicago: American Bar Association, 2004), p. 160. The authors note that the section of this article on e-rulemaking was adapted from materials provided by Professor Peter Strauss of Columbia Law School. For more information on the e-rulemaking initiative, see CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

[17] Office of Management and Budget, Executive Office of the President, "Proposed Bulletin on Peer Review and Information Quality," 68 *Federal Register* 54023 (Sept. 15, 2003). This proposed bulletin had been released to the public via OMB's website on Aug. 29, 2003. To view a copy, see [http://www.whitehouse.gov/omb/inforeg/peer_review_and_info_quality.pdf]. For more detailed information on this issue, see CRS Report RL32680, *Peer Review: OMB's Proposed, Revised, and Final Bulletins*, by Curtis W. Copeland and Eric A. Fischer.

[18] For more detailed information on this issue, see CRS Report RL33500, *OMB and Risk Assessment*, by Curtis W. Copeland.

[19] See [http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf] for a copy of this document.

[20] Executive Order 13422, "Further Amendment to Executive Order 12866 on Regulatory Planning and Review," 72 *Federal Register* 2763, January 23, 2007. For a more detailed discussion of this order, see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland.

[21] As originally published, Executive Order 12866 required agencies to have regulatory policy (continued...)

include "significant" agency guidance documents, and required agencies to identify in writing the specific problem or "market failure" that warrants a new regulation. Although OMB characterized Executive Order 13422 as a "good government" measure,[22] others said it was a "power grab" by the White House that undermines public protections and lessens congressional authority.[23]

Taken together, these Bush Administration initiatives represent the strongest assertion of presidential power in the area of rulemaking in at least 20 years.[24] Several of the regulatory management initiatives (e.g., stricter application of cost-benefit analysis, and standardization of peer review and risk assessment procedures) had been in legislation that Congress considered, but did not enact, at various times during the 1990's.[25]

Congressional and Judicial Influences on Rulemaking

In comparison to these presidential initiatives, congressional and judicial actions in relation to agency rulemaking during the past 25 years have been arguably less rigorous. Congress has enacted numerous statutes that require or permit executive branch agencies to develop rules, but many of these statutes — particularly in such areas as environmental and health policy — have been broad grants of rulemaking authority,[26] and courts tend to give

---

[21] (...continued)
officers (but did not require them to be presidential appointees), required them to report to the agency heads, and gave them relatively limited powers (e.g., to "be involved" at each stage of the regulatory process and to "foster the development of effective, innovative, and least burdensome regulations").

[22] Testimony of Steven D. Aitken, Acting Administrator, OIRA, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Amending Executive Order 12866: Good Governance or Regulatory Usurpation?*, hearings, 110th Cong., 1st sess., Feb. 13, 2007, available at [http://judiciary.house.gov/media/pdfs/Aitken070213.pdf]. Also, see Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, Jan. 30, 2007, p. A1.

[23] Public Citizen, "New Executive Order Is Latest White House Power Grab," available at [http://www.citizen.org/pressroom/release.cfm?ID=2361]. See also Margaret Kriz, "Thumbing His Nose," *National Journal*, July 28, 2007, pp. 32-34.

[24] Stuart Shapiro, "An Evaluation of the Bush Administration Reforms to the Regulatory Process," *Presidential Studies Quarterly*, vol. 37 (June 2007), pp. 270-290. In this article, the author concludes (p. 287) that prompt letters, the Information Quality Act guidelines, and other reforms "inserts OIRA into the agency decision-making process at an earlier stage," and, as a result, "the influence of OIRA should grow." He also said that the "consistent trend of increased agency oversight by the executive" had "taken major steps forward under the Bush administration."

[25] For example, S. 981, as reported by the Senate Committee on Governmental Affairs in the 105th Congress, would have required agencies to conduct detailed economic analyses of proposed and final rules, and would have established government-wide requirements for risk assessments and peer reviews (including having OMB issue guidelines on cost-benefit analysis, risk assessment, and peer review). The bill also would have required agencies to review their economically significant rules every five years.

[26] David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (New York: Cambridge University Press, 1999).

the agencies discretion in the interpretation of those broad statutes.[27] The Congressional Review Act (CRA, 5 U.S.C. §§801-808) was enacted in 1996, and was thought by proponents to provide an effective counterweight to increased presidential authority, giving Congress expedited procedures to overturn final agency rules that it considers inconsistent with underlying statutory authorities or other rulemaking requirements. Overall, the CRA has not produced such results. Members of Congress have introduced nearly 50 resolutions of disapproval during the past 12 years, but only one rule (the Department of Labor's 2001 rule on ergonomics) has been disapproved through the CRA process — and that disapproval was the consequence of what many view as a unique set of circumstances.[28]

In June 2007, the House of Representatives voted to prevent the enforcement of Executive Order 13422.[29] However, that effort was ultimately not successful after OMB said the legislation would interfere with "the President's authority to manage the Executive Branch" and indicated that it would recommend that the President veto the bill.[30] Congress has enacted numerous provisions in recent appropriations bills that prevent particular rules from being developed or enforced, but those restrictions are typically narrow in scope, of relatively short duration, and of uncertain impact.[31] Finally, as Professor Jody Freeman testified before this subcommittee last year, judicial review of agency rules is relatively infrequent compared to the annual output of major rules and (contrary to popular opinion) rarely results in the invalidation of the agencies' rules.[32]

---

[27] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[28] CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After A Decade*, by Morton Rosenberg. The unique circumstances included an incoming President who was of the same party as the majority party in Congress and who also objected to an outgoing President's rule. However, as this CRS report indicates, the CRA may have had some subtle effects that are difficult to measure. For example, the possibility of congressional review may have prevented certain rules from being proposed, and the introduction of a resolution of disapproval may have prompted changes in a rule that otherwise may not have been made.

[29] Section 901 of H.R. 2829 as passed by the House, the Financial Services and General Government Appropriations Act, 2008, which funds OMB, among other agencies.

[30] On July 12, 2007, the Director of OMB sent a letter to the chairmen and ranking members of the House and Senate Appropriations Committees stating that "If the President were presented with a bill that contained a restriction on the implementation of Executive Order 13422, the President's Senior Advisors would recommend that he veto the bill." The Director urged the rejection of any provision that would interfere in any way with the implementation of the executive order "because it involves a matter that directly affects the operation of [OMB] and involves the President's authority to manage the Executive Branch."

[31] CRS Report RL34354, *Congressional Influences on Rulemaking Through Appropriations Provisions*, by Curtis W. Copeland.

[32] Testimony of Professor Jody Freeman, Harvard Law School, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *The Regulatory Improvement Act of 2007*, hearings, 110th Cong., 1st sess., Sept. 19, 2007, available at [http://judiciary.house.gov/media/pdfs/Freeman070919.pdf]. In her testimony, Professor Freeman said that only 2.6% of legislative rules are challenged each year, and that "only a tiny percentage are invalidated in whole (0.3%) or in part (1.1%)."

OIRA as the President's Representative

For more than 25 years, OIRA has played a central role in the federal rulemaking process. The office is uniquely positioned both within that process (reviewing and commenting on rules just before they are published in proposed and final form in the *Federal Register*) and within OMB (with its budgetary and management influence) to enable it to exert significant influence on agency behavior. Although some argued early in OIRA's history that the office's regulatory review role was unconstitutional, few observers continue to hold that view. No court has directly addressed the constitutionality of the OIRA regulatory review process, but in 1981 (the year that OIRA and Executive Order 12291 were created) the D.C. Circuit said the following:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared — it rests exclusively with the President.[33]

Executive Order 12866 states that coordinated review of agency rulemaking by OIRA is necessary to ensure that regulations are consistent with the law, other agencies' actions, and "the President's priorities." It goes on to say that OIRA is the "repository of expertise concerning regulatory issues, including . . . the President's regulatory priorities." Therefore, OIRA is the President's personal representative in the rulemaking process.[34] Some have suggested that advocation of the President's priorities may take precedence over other responsibilities of the office. For example, the current OIRA administrator Susan Dudley and a co-author wrote more than 10 years ago that "OIRA is supposed to simultaneously provide independent and objective analysis, and report to the president on the progress of executive policies and programs. When those functions conflict, the presidential agenda will most certainly prevail over independent and objective analysis."[35]

Variations in how OIRA operates are largely a function of the priorities and approaches of the President that the office serves. For example, Elena Kagan states in her widely cited 2001 article on "Presidential Administration" that, while it is generally acknowledged that President Reagan used OIRA's review function as a tool to control the policy and political agenda in an anti-regulatory manner, President Clinton did much the same thing to accomplish pro-regulatory objectives.[36] She also said that President Clinton exercised

---

[33] *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), at 405.

[34] For example, former OIRA administrator John Graham said, the office's actions "necessarily reflect Presidential priorities." John D. Graham, "Presidential Management of the Regulatory State," speech at the Weidenbaum Center Forum, National Press Club, Washington, DC, Dec. 17, 2001. Similarly, former OIRA administrator Sally Katzen was quoted by GAO as saying that "OIRA is part of the Executive Office of the President, and the President is the office's chief client." U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, p. 40.

[35] Susan E. Dudley and Angela Antonelli, "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight," *Regulation* (fall 1997), pp. 17-23.

[36] Elana Kagan, "Presidential Administration," *Harvard Law Review*, vol. 18 (June 2001), pp. 2245-

directive authority and asserted personal ownership over a range of agency actions, thereby making them "presidential" in nature. She characterized the emergence of enhanced methods of presidential control over the regulatory state as "the most important development in the last two decades in administrative process."

The Unitary Executive and Rulemaking

With regard to rulemaking, advocates of a "unitary executive" assert that, as part of his constitutional authority to supervise and direct the executive branch, the President should be able to make the final decision regarding the substance of agency rules — even when Congress has assigned rulemaking responsibilities to agency officials who are appointed by the President.[37] On the other hand, advocates of what has been called a more "traditional" or "conventional" perspective argue that, while the President can attempt to influence the decisions of agency heads with delegated rulemaking authority (including removing them from office if they continue to disagree), the President cannot dictate the substance of rules that Congress has entrusted to the agencies.[38] A third position was enunciated by Elena Kagan — that the President can (and should) ultimately determine the substance of agency rules, but not if Congress has specifically prohibited or limited presidential intervention (e.g., by allowing the agency head to be removed only "for cause").[39]

---

[36] (...continued)
2385.

[37] See, for example, Christopher S. Yoo, Steven G. Calabresi, Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," *Iowa Law Review*, vol. 90 (Jan. 2005), pp. 601- 731. At a symposium that CRS sponsored on "Conflicting Claims of Congressional and Executive Branch Legal Authority Over Rulemaking," T.J. Halstead of CRS's American Law Division said the unitary executive theory "maintains that the President's constitutional authority to see that the laws are faithfully executed vests the chief executive with the responsibility and substantive authority to control every aspect of the workings of the executive branch, to set priorities, allocate resources, balance competing policy goals and resolve conflicts over agency jurisdiction and responsibilities extending to the point of imbuing the President with inherent authority to direct the actions of subordinate executive branch officials and employees, even in instances where congressional enactments do not explicitly grant such authority to the President." To view a transcript of this symposium, see [http://www.american.edu/rulemaking/doc/PCJCRtrans1.doc].

[38] See, for example, Robert Percival, "Presidential Management of the Administrative State: The Not-So Unitary Executive," *Duke Law Journal*, vol. 51 (December 2001), pp. 963-1013; Peter L. Strauss, "Overseer, or 'The Decider'?: The President in Administrative Law," *George Washington University Law Review*, vol. 75 (2007), pp. 696-760; Harold J. Krent, "From a Unitary to a Unilateral Presidency," available at[http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1055901#PaperDownload]; and Thomas O. Sargentich, "The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration," *Administrative Law Review*, vol. 59 (2007), pp. 1-36.

[39] Elena Kagan, "Presidential Administration," *Harvard Law Review*, vol. 114 (June 2001), pp. 2245-2385. For example, she said (on p. 2251) that, although Congress has "broad power to insulate administrative activity from the President," "statutory delegation to an executive branch official — although not to an independent agency head — usually should be read as allowing the President to assert directive authority." The heads of independent regulatory agencies (e.g., the Federal Communications Commission and the Securities and Exchange Commission) typically have "for cause" removal protection, with "cause defined in various ways (e.g., inefficiency, neglect of duty,
(continued...)

This debate about whether the President (or his primary agent in rulemaking, OIRA) should make final policy decisions for the agencies is hardly a new issue to scholars of presidential power. For example, an 1823 Attorney General Opinion enunciated a strong traditionalist position, stating that if the laws

> require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be taking care that the laws were faithfully executed, but he would be violating them himself . . . . (I)t could never have been the intention of the constitution, in assigning the general power to the President to take care that the laws be executed, that he should in person execute them . . . . The constitution assigns to Congress the power of designating the duties of particular officers.[40]

On the other hand, an 1855 Attorney General opinion reflected an equally strong unitarian position when it concluded that

> the head of a department is subject to the direction of the President. I hold that no head of department can lawfully perform an official act against the will of the President. That will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the government and change it into a parliamentary despotism like that of Venice or Great Britain, with a nominal executive chief or President utterly powerless.[41]

Several provisions in Executive Order 12866 indicate that the agencies, not the President, are to make the final decisions regarding the substance of their rules. For example, the executive order says that "Nothing in this order shall be construed as displacing the agencies' authority or responsibilities as authorized by law," and the order affirms the "primacy of Federal agencies in the regulatory decision-making process." OIRA's responsibilities in the order are described as providing "guidance and oversight"; its comments on draft rules are described as "suggestions" and "recommendations." Finally, the order indicates that OIRA does not reject agencies' draft rules; it may only return them to the agencies for "reconsideration."

In practice, however, agencies that do not make the changes to their rules that OIRA "recommends" may do so at a risk.[42] OIRA's website indicates that about 60% of draft rules that have been submitted to OIRA thus far during the Bush Administration were "changed" while under OIRA review — a somewhat higher percentage than during the eight years of

---

[39] (...continued)
or malfeasance). In *Morrison v Olson* (487 U.S. 654, 1988), the Supreme Court held that Congress has broad, although not unlimited, authority to provide "for cause" removal protection to advice and consent officers.

[40] The President and Accounting Officers, 1 Op. Atty. Gen. 624, 625 (1823).

[41] 7 Op. Atty. Gen. 453, 470 (1855).

[42] For example, when EPA issued a regulation over the objections of OIRA during the Reagan Administration, an EPA official reportedly testified that an OIRA official told him that "there was a price to pay for doing what we had done and we hadn't begun to pay." Mary Thornton, "OMB Pressured EPA, Ex-Aide Says," *Washington Post*, Sept. 28, 1983, p. A-1.

the Clinton Administration (about 50%).[43] GAO's 2003 report found numerous occasions during 2001 and 2002 in which OIRA "suggestions" were later reflected in substantive changes to agencies' final rules. Also, that report indicated that rules returned to the agencies for "reconsideration" generally did not resurface in the same form, if they resurfaced at all. Finally, agency rules that remain under OIRA review for months or even years beyond the 90-day review period are not published in the *Federal Register* until OIRA completes its reviews. Failure to submit rules for informal review before the agency heads have approved them may also have consequences; former OIRA administrator Graham said that when agencies resist informal OIRA review of their rules, "well, in a sense, they're rolling the dice."[44]

Appeals to the President. Another indication of the President's current authority with regard to agency rulemaking is in Section 7 of Executive Order 12866. As noted previously, Section 7 generally allows an agency head or the OIRA administrator to appeal disagreements or conflicts to the President. The wording of the executive order suggests that, as a result of the appeals process, the President is to make the final decision on the substance of the rule (e.g., that OIRA-agency disagreements are to be "resolved by the President," and that the affected agency and the OIRA administrator are to be notified of "the President's decision with respect to the matter"). If this interpretation of Section 7 is correct, Executive Order 12866 gives the President authority over agency rulemaking that is consistent with the unitary executive model.

A more "traditional" reading of this section is also possible. It could be argued that, in this appeal process, the President is offering his opinion regarding how the OIRA-agency impasse should be resolved, and that the agency head retains final rulemaking authority. It is the agency head who signs the rule that is published in the *Federal Register*, not the President. If the agency head continues to disagree with the President regarding the substance of a rule, the agency head could refuse to sign the rule — in which case, the agency head might resign or be dismissed by the President, and be replaced by someone more in line with the President's views.

As this scenario illustrates, the distinction between the unitarian and the traditional views regarding presidential authority over agency rulemaking may be a distinction without a substantive difference in public policy outcomes. If the agency head's only options are to (1) yield to the President's point of view, or (2) be fired or resign and then be replaced by someone who will do the President's bidding, then — even in the "traditional" perspective — the President has the ultimate decision-making authority. At the end of the day, the agency's rule will reflect the President's point of view and — although signed by the agency head — will be no different in substance than if the President had issued it.[45] Dismissing an

---

[43] OIRA's "consistent with change" code in its database does not differentiate between rules substantively changed at OIRA's suggestion, and minor typographical errors that are corrected by the rulemaking agencies themselves. Therefore, some of these rules may have been changed by the agencies, not OIRA, and some of the changes may have been clerical in nature.

[44] Rebecca Adams, "Regulating the Rule-Makers: John Graham at OIRA," *CQ Weekly*, vol. 60 (Feb. 23, 2002), pp. 520-526.

[45] For example, in Thomas O. Sargentich, "The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration," *Administrative Law Review*, vol. 59 (2007), p. 8, the (continued...)

agency head for refusing to go along with the President's decision on a regulation is not without some political cost to the President, and may be an incentive for the President not to insist on his way. But care in selecting agency heads with a unitary perspective can help ensure that such incidents are relatively rare, and when they do occur, they can be cloaked in other terms.[46]

The third (Kagan) perspective of presidential power may also be seen in the appeals process under Section 7 of Executive Order 12866, but that perspective may also be substantively undifferentiated from the other two in terms of its policy outcome. Section 7 appears to give the President decisional authority, but qualifies that authority with the phrase "unless otherwise prohibited by law." Therefore (as in the Kagan perspective), if Congress prohibits the President from resolving disagreements between an agency and OIRA, or specifically requires that the agency head make the final decision with regard to a particular rule, the President could respect those prohibitions, but would still be able to adopt a more "traditional" perspective and attempt to persuade the agency head to his position — which, again, could include replacement of the official. Ultimately, then, this third perspective regarding presidential power may be only marginally different from the other two, for the outcome of the policymaking process may be the same.

EPA's Ozone Rule. The recently reported case of the President's involvement in the promulgation of an EPA rule setting a limit on ozone is an example of an appeal under Section 7 of Executive Order 12866.[47] Section 109 of the Clean Air Act (42 U.S.C. §7409) directs the administrator of EPA to promulgate "primary" (public health) and "secondary" (public welfare) national ambient air quality standards for pollutants listed under section 108 of the act. On March 6, 2008, the OIRA administrator notified EPA of her "concerns" regarding a part of a draft final rule setting the secondary ozone standard lower than the primary standard. Among other things, she said that EPA had not considered or evaluated the effects of the standard on "economic values."[48] On March 7, EPA responded to the OIRA administrator, noting the statutory requirement that the ozone standard reflect the most current science,[49] and noting case law indicating that EPA cannot consider costs in setting

---

[45] (...continued)
author says, "Even if an appointee is tempted to negotiate strongly with the White House on a particular issue, the reality is that the President can remove an executive agency head for any reason."

[46] Ibid., p. 21, where the author says that "studies of the presidency have recognized that the distinction between presidential influence, supervision, advice, and persuasion on the one hand, and controlling, displacing, commanding, and directing on the other, can be subtle in practice."

[47] Juliet Eilperin, "Ozone Rules Weakened at Bush's Behest; EPA Scrambles to Justify Action," *Washington Post*, Mar. 14, 2008, p. A-1; and Steven D. Cook, "White House Defends Intervention in EPA Decision on Ozone Standard," *BNA Daily Report for Executives*, Mar. 17, 2008, p. A-34.

[48] To view a copy of this memorandum as well as related material, see [http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf].

[49] EPA's Clean Air Scientific Advisory Committee had unanimously recommended that the secondary ozone standard be different than the primary standard.

the secondary standard.[50] Subsequently, EPA appealed to the President under Section 7 of Executive Order 12866. In a March 12, 2008, letter to EPA, the OIRA administrator said that "the President has concluded" that the secondary ozone standard should be set at the same level as the primary standard.[51] This directive language notwithstanding, the preamble to the final rule that was published in the *Federal Register* on March 27, 2008, indicated that the EPA administrator made the final decision[52] — although the correspondence between OIRA and EPA, as well as subsequent statements by the EPA administrator, indicate that the EPA administrator was adopting the President's and OIRA's position on the matter.[53]

Rulemaking Process Changes. Although more subtle than presidential direction or OIRA "recommendations" about particular rules, the changes that the Bush Administration has proposed and implemented regarding the federal rulemaking process (e.g., the proposed and final circulars and bulletins on economic analysis, peer review, risk assessment, and guidance documents; the increased use of informal OIRA reviews; and the changes in Executive Order 13422) represent attempts to weave OIRA's and the President's perspective into the substance of agency rules.[54] Opponents of these procedures have expressed concerns that strict adherence to the requirements may add considerably to the

---

[50] To view a copy of this memorandum as well as related material, see [http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf]. EPA cited the case of *Whitman v. American Trucking Association, Inc.* (532 U.S. 457, 471 n. 3, 2001).

[51] To view a copy of this letter as well as related material, see [http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf].

[52] Environmental Protection Agency, "National Ambient Air Quality Standards for Ozone; Final Rule," 73 *Federal Register* 16497, Mar. 27, 2008. For example, the preamble stated that "While the Administrator fully considered the President's views, the Administrator's decision, and the reasons for it, are based on and supported by the record in this rulemaking." Other portions of the preamble stated that "the Administrator judges" that the secondary standard should be the same as the primary standard, that the "Administrator believes" that the standard would protect public welfare from adverse effects, and that this "judgment by the Administrator appropriately considers the requirement for a standard that is neither more nor less stringent than necessary for this purpose."

[53] For example, in an interview with *National Journal*, the EPA administrator was asked, "Did the White House force you to change the ozone standard?" In response, he said, "Well, the health protective standard was my decision and my decision alone. The only issue [that the White House changed] was the form of the secondary standard [to protect 'public welfare,' including animals, vegetation, and crops]. It was a policy judgment, not an issue of protectiveness of the environment. The form of the standard, that policy decision, went all the way to the president. And certainly, I agree with that policy direction." Margaret Kriz, "The President's Man," *National Journal*, April 12, 2008, p. 24.

[54] See, for example, James W. Harlow, "Fulfilling a Policy Agenda: Presidential Influences on the Federal Rulemaking Process, 1993 – 2006," in *A Dialogue on Presidential Challenges and Leadership: Papers of the 2006-2007 Center Fellows*, available at [http://www.thepresidency.org/pubs/fellows2007/Section2.pdf], who said (on p. 86) "since 2001 OMB has issued several memoranda, bulletins and circulars to agencies directing them on what the supporting analysis should entail. The Bush administration has therefore sought less to change the essential structure of regulatory review than the end product by influencing internal agency rulemaking fact-finding and deliberations."

amount of time needed to issue rules.[55] On the other hand, failure to perform the required analyses or adhere to the required procedures can result in the rules being returned to the agencies for "reconsideration" or reviewed by OIRA indefinitely. For example, an EPA proposed rule on "Federal Radiation Protection Guidance for Exposure of the General Public" has been under review at OIRA since October 21, 2005. An EPA final rule on "Amendment of the Standards for Radioactive Waste Disposal in Yucca Mountain, Nevada" has been under review at OIRA since December 15, 2006. OIRA's website does not indicate why these and other rules that have been under OIRA review for more than 90 days have not been approved or returned to the agency.

Transparency and the Unitary Executive. As the roles of the President and OIRA have grown in recent decades, their participation has arguably been less transparent than other, more longstanding elements of the rulemaking process. During the George W. Bush Administration, OIRA made some improvements in the transparency of the review process.[56] In a few cases (e.g., the recent EPA ozone rule), the effects of OIRA's or the President's actions are made public as a result of court decisions or through documents that surface in the press.[57] Also, those willing to review thousands of pages of material in agency rulemaking dockets may be able to discover what role OIRA or the President has played in the development of particular rules. But in many cases, OIRA's influence on agency rules is difficult to discern even after the proposed or final rule is published because key parts of the agency and OIRA review process are not transparent (e.g., the changes that are made to rules at OIRA's direction during "informal" reviews).

Similarly, it is difficult for anyone outside the agencies or OIRA to determine the impact of most of the Bush Administration's regulatory management initiatives. For example, it is currently unclear whether:

- agency RPOs have stopped any agency regulatory initiatives before they became draft rules, or, if so, whether there has there been an increase in such stoppages since the RPOs' authority was enhanced by Executive Order 13422;

---

[55] Some opponents have contended that these efforts were intended to have that effect. For example, in its comments on the proposed peer review bulletin, Public Citizen suggested that the proposal was "an exercise in regulatory obstructionism" that was intended to "introduce potentially massive costs and delay." See [http://www.whitehouse.gov/omb/inforeg/2003iq/150.pdf].

[56] For example, OIRA placed information about the rules under review and OIRA's contacts with outside parties on the office's website, and the administrator decided that OIRA would disclose those outside contacts even if they occurred during informal review. See John D. Graham, "Presidential Review of Agency Rulemaking by OIRA, Sept. 20, 2001, available at [http://www.whitehouse.gov/omb/inforeg/oira_review-process.html].

[57] See, for example, *Public Citizen, Inc., v. Mineta*, No. 02-4237 (2d Cir. Aug. 6, 2003), in which it was revealed that OIRA returned a rule on tire pressure monitoring systems to the National Highway Traffic Safety Administration because, in the office's opinion, the agency's analysis did not adequately demonstrate that NHTSA had selected the best available regulatory alternative. However, the U.S. Court of Appeals concluded that the rule as revised to address OIRA's concerns was contrary to the intent of the underlying tire safety legislation and arbitrary and capricious under the Administrative Procedure Act.

- OIRA has declared certain scientific information "highly influential," therefore requiring the rulemaking agencies to use detailed peer review procedures;

- OIRA is using the general principles for risk assessment (e.g., that agencies use the "best reasonably obtainable scientific information") to stop agency rules;

- OIRA has used its authority in Executive Order 13422 to require "additional consultation" before agencies can issue significant guidance documents; and

- the January 2007 "good guidance practices" bulletin has changed the nature of the guidance that agencies give to regulated entities.

In some cases, basic information about the current degree of presidential influence is lacking. For example, it is currently unclear how many "significant guidance documents" OIRA has reviewed since Executive Order 13422 was issued in January 2007. Although OIRA is required to disclose when agency rules are submitted for review, when the reviews are complete, and the results of the reviews, no such requirements pertain to agency guidance documents.[58]

Congress and Presidential Rulemaking Authority

As noted previously, there have been some congressional efforts to assert more authority in the area of federal rulemaking and to resist increased presidential influence. These efforts appear to have been relatively limited or ineffective (e.g., the disapproval of one rule in 12 years under the Congressional Review Act, and the unsuccessful effort to prevent the implementation of Executive Order 13422). Over the years, Congress has maintained oversight of federal rulemaking activities by holding hearings and making inquiries into particular agency rules as well as presidential initiatives in this sphere. On rare occasions, it has intervened in the regulatory process through budgetary means. Congress may continue to find this an acceptable and practical approach to these issues.

Of course, if Congress decided to take other actions in this area, it would have a number of options. The following list of alternatives is not intended to be exhaustive, and some of the options may be used in combination with each other.

Confirmation of Agency Officials. As part of the confirmation process, the Senate could directly ask nominees to agency head and other influential positions in rulemaking agencies (e.g., agency RPOs) for their views regarding presidential authority over agency rulemaking. For example, a nominee might be asked how he would react if the President directed him to issue a rule that was inconsistent with legal or scientific standards that Congress had established for the agency. The Senate could then take the nominee's answers

---

[58] Although agencies are required to put copies of their significant guidance documents on their websites (e.g., [http://www.epa.gov/regulations/guidance/byoffice.html]), the listings do not speak to OIRA review.

to such questions into consideration as it decided whether to confirm the individual to a leadership position in the agency.[59]

Removal Protection. Congress could consider giving certain agency heads "for cause" removal protection. Under such an arrangement, the President would arguably be less able to influence the substance of the agency's rules, since the protected agency head presumably would be less likely to face removal by the President because of a rulemaking disagreement.[60] However, such a step by Congress has several potential drawbacks or limitations. First, although Congress appears to have wide latitude in establishing limits on the President's removal power, Congress may not be able to institute such limits for positions that are closely associated with the President's constitutional responsibilities.[61] Second, the President could use other levers of influence to punish an agency head who is protected from removal, such as his control over the agency's budget, communications with Congress, and appointment of sub-cabinet officials. Finally, protection from removal — or from the other levers of presidential influence — for the purpose of blocking presidential influence over the substance of rules might also impede the President's ability to supervise and direct the non-rulemaking activities of his appointees, such as law enforcement.

Review Restrictions. Congress could consider restricting the ability of OIRA or the President from reviewing particular rules or sets of rules (as Congress has done through provisions added to OMB's appropriation bills with regard to agricultural marketing orders for the past 25 years).[62] Executive Order 12866 seems to contemplate and recognize this kind of limitation on presidential power when it states in Section 7 that the President will resolve disputes between OIRA and rulemaking agencies "to the extent permitted by law."

---

[59] For example, during an April 10, 2008, confirmation hearing for the position of general counsel at EPA, the nominee was reportedly asked how he would react if the President asked EPA to pursue something illegal, or if the President overruled the agency administrator's decision. The nominee reportedly said that the unitary executive precedent is for the White House to have significant involvement in agency decisions, and that, "Ultimately, the [EPA] administrator works for the president of the United States." Anthony Lacey, "EPA General Counsel Nominee Faces Major Concerns From Democrats," *InsideEPA.com*, April 10, 2008, available at [http://www.insideepa.com/secure/docnum.asp?docnum=CLEANAIR-19-8-20&f=epa_2001.ask].

[60] Some observers, however, might argue that the refusal of an agency head to agree with the President constitutes insubordination, and therefore would constitute "good cause" for dismissal. On the other hand, CRS is not aware of any instance during the past 70 years in which an agency head with "for cause" removal protection has been fired by the President.

[61] The Supreme Court's opinion in *Morrison v. Olson* suggests that Congress has substantial, but not unlimited, authority to establish statutory limits on the President's removal power. The Court stated, "The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II. . . . [T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty . . . ." (*Morrison* v. *Olson*, 487 U.S. 654. 689-691 (1988) (Footnotes omitted.))

[62] For example, the Consolidated Appropriations Act, 2008 (P.L. 110-161, 121 Stat. 1982) states that "none of the funds appropriated by the Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §601 et seq.)."

Therefore, if Congress prohibited OIRA review of particular rules or types of rules, then the appeals process in Section 7 would seem to be inapplicable, as there could be no dispute between OIRA and the rulemaking agency for the President to settle. On the other hand, enactment of restrictions on the President's or OIRA's authority may be resisted by the President through presidential veto or a signing statement. Also, if Congress indicated that OIRA shall not be involved in the review of an agency's rule, the President might try to counter that action by designating some other part of the Executive Office of the President (e.g., the Council of Economic Advisers) or some other agency (e.g., the Department of Agriculture) as the reviewing office for the rule.

Final Rulemaking Authority. Congress could specifically indicate in legislation authorizing or requiring regulation that the agency head, not the President, has final rulemaking authority. While the Bush Administration appears to have accepted and abided by congressional provisions limiting OIRA review of agricultural marketing orders, the President has objected to statutory language that delegates final authority to subordinate officials, even those officials who have been appointed by the President with the advice and consent of the Senate.[63] It is unclear to what extent such objections might have influenced the implementation of such laws.

Budget, Appointment, and Other Restrictions. Other congressional options are possible. For example, Congress could constrain the portion of OMB's budget that is provided to OIRA. Congress could reduce the number of politically appointed officials in particular agencies or policy areas. In the appropriations process, Congress could prohibit the use of OMB or agency funds for certain purposes — as it attempted to do with regard to the use of funds to implement Executive Order 13422. Those funds limitations could be government-wide, OMB specific, or particular to certain agencies. However, limitations on the use of appropriations are fiscal-year specific, and may be ineffective if the agency has other sources of revenue. Such limitations would likely be opposed by the President.

Transparency Requirements. Congress could also increase the visibility of presidential involvement in the rulemaking process. Doing so might have the secondary effect of reducing such involvement. For example, Congress could legislatively require that, after the rules are published, all changes that the agencies made at OIRA's suggestion or recommendation be reflected in the agencies' regulatory dockets — regardless of whether the changes occurred during formal or informal reviews by OIRA. Congress could require documentation of changes made to significant guidance documents that are reviewed by OIRA, and require that OIRA reveal when such documents are submitted for review and when the office's reviews are completed — just as OIRA does now for agency rules. Increased transparency is also possible within rulemaking agencies. For example, Congress could require agencies to report annually on the actions of agency regulatory policy officers to stop or alter the development of rules.

Specific Delegations of Authority. Agency regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are imposed. Although some observers have expressed concerns that congressional

---

[63] For examples, see Harold J. Krent, "From a Unitary to a Unilateral Presidency," available at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1055901#PaperDownload], pp. 16-22.

delegations of rulemaking authority are sometimes too specific,[64] others have concluded that Congress often writes overly broad laws that provide too much discretion to regulatory agencies.[65] Greater specificity in underlying statutory requirements or authorizations for rulemaking — while sometimes difficult for Congress to achieve — could limit the ability of agencies, OIRA, or the President to substitute their judgments for those of Congress. Also, if Congress determined that congressional requirements placed on OIRA have been misinterpreted or misused by OIRA (possibly the requirement that OIRA provide "recommendations for reform"), Congress could be more specific in those requirements as well.

- - - - -

Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

---

[64] Committee for Economic Development, *Modernizing Government Regulation: The Need for Action*, April 1, 1998, available at [http://www.ced.org/docs/report/report_regulation.pdf]. The committee concluded that some statutes are so specifically written that they preclude the agencies from considering the most cost-effective approaches.

[65] David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993).

Appendix I: Presidential Review of Rulemaking from 1981 to 2008

Since 1981, each President has had his own approach to presidential review of rulemaking. Three of the four Presidents during this period have issued executive orders either establishing new review procedures or amending existing procedures. Each presidential initiative has had both its supporters and its critics.

President Reagan's Executive Orders

In 1981, President Ronald Reagan established a "Presidential Task Force on Regulatory Relief"[66] and issued Executive Order 12291[67] within the first month of taking office. In brief, the executive order required covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to:

- prepare a "regulatory impact analysis" for each "major" rule (which was defined as any regulation likely to result in, among other things, an annual effect on the economy of $100 million or more)[68] containing (among other things) a description of the potential benefits and costs of the rule;
- refrain from taking regulatory action "unless the potential benefits to society for the regulation outweigh the potential costs to society," select regulatory objectives to maximize net benefits to society, and select the regulatory alternative that involves the least net cost to society; and
- send a copy of each draft proposed and final rule to OMB before publication in the *Federal Register*.

The order authorized the Office of Management and Budget (OMB) to review "any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order." Executive Order 12291 indicated that OMB's review of rules and impact analyses should be completed within 60 days, but allowed the director to extend that period whenever necessary. As a result, the Office of Information and Regulatory Affairs (OIRA) could delay a regulation at the proposed or final rulemaking stage until the issuing agency had adequately responded to its concerns. Also, in contrast to earlier efforts at presidential review, regulatory oversight functions were consolidated within the newly created OIRA, whose influence is underscored by its organizational position within

---

[66] The task force was formally headed by Vice President George H. W. Bush and composed of Cabinet officers, although the bulk of the task force's work was reportedly performed by OMB staff. According to President Reagan's statement creating the task force in January 1981, its charge was to "review pending regulations, study past regulations with an eye toward revising them, and recommend appropriate legislative remedies." See [http://www.reagan.utexas.edu/archives/speeches/1981/12281c.htm].

[67] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

[68] The issuing agency was to make the initial determination of whether a rule was "major," but the executive order gave OMB the authority to require a rule to be considered major.

OMB — the agency that reviews and approves agencies' budget and staffing requests on behalf of the President. OIRA's influence was also less transparent than its predecessor organizations.[69]

In 1985, President Reagan extended OIRA's influence over rulemaking further by issuing Executive Order 12498, which required covered agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned.[70] Executive Order 12291 had required each of those agencies to publish a semiannual "regulatory agenda" of proposed regulations that the agency "has issued or expects to issue," and any existing rule that was under review.[71] The new executive order went further, saying that OIRA could return a draft rule to an issuing agency if the office did not have advance notice of the rule's submission, even if the rule was otherwise consistent with the requirements in Executive Order 12291. The regulatory agenda and program requirements in these executive orders also permitted OIRA to become aware of forthcoming agency actions well in advance of the submission of a draft proposed rule, allowing the office to stop or alter a rule it considered objectionable before the rulemaking process developed momentum.

Reaction to the Reagan Executive Orders. The expansion of OIRA's authority in the rulemaking process via Executive Order 12291 and Executive Order 12498 was controversial. A number of the concerns raised by Members of Congress, public interest groups, and others focused on whether OIRA's role violated the constitutional separation of powers and the effect that OIRA's review had on public participation and the timeliness of agencies' rules.[72] Some believed that OIRA's new authority displaced the discretionary authority of agency decision makers in violation of congressional delegations of rulemaking authority, and that the President exceeded his authority in issuing the executive orders. Others indicated that OIRA did not have the technical expertise needed to instruct agencies about the content of their rules. Another set of concerns focused on the lack of transparency in OIRA's regulatory reviews, and specifically questioned whether the office had become a clandestine conduit for outside influence in the rulemaking process. Critics pointed out that, in the first few months after the executive order was issued, OIRA met with representatives from dozens of businesses and associations seeking regulatory relief and returned dozens of

---

[69] For example, during the Carter Administration, the Regulatory Analysis and Review Group (RARG) filed comments on agency proposals during the formal public comment period. In the case of RARG filings, a draft of the comments was circulated to all RARG members, and the comments and any dissents were placed on the public record at the close of the comment period. In contrast, OIRA's reviews occurred before the rules were published for comment, and Executive Order 12291 did not require that OIRA's comments on the draft rule be disclosed.

[70] Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, Jan. 8, 1985.

[71] President Carter first required the use of these agendas in 1978. Also, the Regulatory Flexibility Act of 1980 (5 U.S.C. §§601-612) requires that agencies publish regulatory agendas describing upcoming rules that are likely to have a significant economic impact on a substantial number of small entities.

[72] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Role of OMB in Regulation,* hearing, 97th Cong., 1st sess., June 18, 1981 (Washington: GPO, 1981). See also Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, vol. 80 (Dec. 1981), pp. 193-247.

rules to the agencies for reconsideration.[73] Still other concerns focused on OIRA's ability to carry out its many responsibilities. For example, in 1983, the General Accounting Office (GAO, now the Government Accountability Office) concluded that the expansion of OIRA's responsibilities under Executive Order 12291 had adversely affected the office's ability to carry out its statutory responsibilities under the Paperwork Reduction Act, and recommended that Congress consider amending the act to prohibit OIRA from carrying out other responsibilities like regulatory review.[74]

OIRA's role in the rulemaking process remained controversial for the next several years. In 1983, Congress permitted the office's appropriation authority to expire (although the office's statutory authority under the Paperwork Reduction Act was not affected and it continued to obtain appropriations via OMB).[75] In 1985, five House committee chairmen filed a friend-of-the-court brief in a lawsuit brought against the Department of Labor regarding the department's decision (reportedly at the behest of OIRA) not to pursue a proposed standard concerning exposure to ethylene oxide, a sterilizing chemical widely used in hospitals and suspected of causing cancer.[76] The chairmen claimed that OIRA's actions represented a usurpation of congressional authority.

Congress reauthorized OIRA in 1986, but only after making the administrator subject to Senate confirmation. Congress also began considering legislation to restrict OIRA's regulatory review role and to block OIRA's budget request. In an attempt to block that legislation, in June 1986, the then-OIRA administrator issued a memorandum for the heads of departments and agencies subject to Executive Order 12291, describing new procedures to improve the transparency of the review process.[77] For example, the memorandum said that only the administrator or the deputy administrator could communicate with outside parties regarding rules submitted for review, and that OIRA would make available to the public all written materials received from outside parties. OIRA also said that it would, upon written

---

[73] Letter from James C. Miller III, Administrator of OIRA, to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, April 28, 1981.

[74] U.S. General Accounting Office, *Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain*, GAO/GGD-83-35, April 20, 1983.

[75] OIRA's authorization for appropriations under the Paperwork Reduction Act also expired in 2001, and has not been reestablished.

[76] *Public Citizen Health Research Group v. Tyson*, 746 Fed. 2nd 1479 (D.C. Cir., 1986). See also Morton Rosenberg, "Regulatory Management at OMB," in *Office of Management and Budget: Evolving Roles and Future Issues*, prepared for the Committee on Governmental Affairs, United States Senate, Feb. 1986, p. 218.

[77] Memorandum from Wendy L. Gramm, OIRA administrator, "Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12291 and 12498," June 13, 1986, reprinted in U.S. Office of Management and Budget, *Regulatory Program of the United States Government, April 1, 1992 - March 31, 1993*, p. 585. For an examination of OIRA at that point in time, see Morton Rosenberg, "Regulatory Management at OMB," in *Office of Management and Budget: Evolving Roles and Future Issues*, prepared for the Committee on Governmental Affairs, United States Senate, Feb. 1986, pp. 185-233.

request after a rule had been published, make available all written correspondence between OIRA and the agency head regarding the draft submitted for review.[78]

In 1987 and 1988, respectively, the National Academy of Public Administration (NAPA) and the Administrative Conference of the United States (ACUS) issued reports generally supporting the concept of presidential review, but also recommending that certain steps be taken to ensure transparency.[79] For example, the NAPA report recommended that regulatory agencies "log, summarize, and include in the rulemaking record all communications from outside parties, OMB, or other executive or legislative branch officials concerning the merits of proposed regulations." ACUS recommended public disclosure of proposed and final agency rules submitted to OIRA under the executive order, communications from OMB relating to the substance of rules, and communications with outside parties, and also recommended that the reviews be completed in a "timely fashion." ACUS also said that presidential review "does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law."

President George H. W. Bush and the Competitiveness Council

President George H. W. Bush continued the implementation of Executive Order 12291 and Executive Order 12498 during his Administration, but external events significantly affected OIRA's operation and, more generally, the federal rulemaking process. In 1989, President Bush's nominee to head OIRA was not confirmed — in part because of lingering concerns about the office's actions. Later, in response to published accounts that the burden of regulation was once again increasing, President Bush established the President's "Council on Competitiveness" (also known as the Competitiveness Council) to review regulations issued by agencies. Chaired by Vice President Dan Quayle, the council oversaw and was supported by OIRA, and reviewed particular rules that it believed would have a significant impact on the economy or particular industries. In essence, the Competitiveness Council took on the functions of OIRA in the absence of a confirmed political head of OIRA.[80]

Many of the Competitiveness Council's actions were controversial, with critics assailing both the effects of those actions (e.g., rolling back environmental or other requirements) and

---

[78] For further information on this policy, see Judith Havemann, "No 'Shade-Drawn' Dealings for OMB; Congress Gets Disclosure of Regulation-Review Procedures," *Washington Post*, June 17, 1986, p. A-21.

[79] National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies* (Jan. 1987); and Administrative Conference of the United States, *Presidential Review of Agency Rulemaking,* Conference Recommendation 88-9 (1988). The Administrative Conference was established in 1968 to provide advice regarding procedural improvements in federal programs, and was terminated by Congress in 1995.

[80] Former OIRA Administrator John D. Graham said, "President George Herbert Walker Bush, when frustrated by his inability to confirm a nominee to the post I now hold, created an entirely new structure in the White House to serve roughly the same function. I refer to the Council on Competitiveness run by Vice President Dan Quayle." John D. Graham, "Presidential Management of the Regulatory State," speech at the Weidenbaum Center Forum, National Press Club, Washington, DC, Dec. 17, 2001.

the manner in which the council acted.[81] The council was described in the press as having attempted to maintain strict secrecy regarding both its deliberations and the identity of those in the private sector with whom it communicated or consulted.[82] Critics decried what they believed to be "backdoor rulemaking" by the Competitiveness Council,[83] but the council continued its operations until the end of the Bush Administration in January 1993. Meanwhile, OIRA continued its operations under Executive Order 12291, reviewing between 2,100 and 2,500 proposed and final rules each year from 1989 through 1992.

President Clinton's Executive Order

In September 1993, President William J. Clinton issued Executive Order 12866 on "Regulatory Planning and Review," which revoked Executive Order 12291 and Executive Order 12498, and abolished the Council on Competitiveness.[84] Although different from its predecessors in many respects, Executive Order 12866 (which is still in effect) continues the general framework of presidential review of rulemaking. For example, it requires covered agencies (again, Cabinet departments and independent agencies, but not independent regulatory agencies) to submit their proposed and final rules to OMB before publishing them in the *Federal Register*. The order also requires agencies to prepare cost-benefit analyses for their "economically significant" rules (essentially the same as "major" rules under Executive Order 12291). However, Executive Order 12866 established a somewhat new regulatory philosophy and a new set of rulemaking principles, limited OIRA's reviews to certain types of rules, and also put in place new transparency requirements.

In its statement of regulatory philosophy, Executive Order 12866 says, among other things, that agencies should assess all costs and benefits of available regulatory alternatives, including both quantitative and qualitative measures. It also provides that agencies should select regulatory approaches that maximize net benefits (unless a statute requires another approach). Some of the stated objectives of the order are "to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public." The "primacy" of the agencies provision signaled a significant change in regulatory philosophy, which appeared to vest control of the rulemaking process with regulatory agencies and take away authority from OIRA. Also, the requirement that the benefits of a

---

[81] Christine Triano and Nancy Watzman, *All the Vice President's Men: How the Quayle Council on Competitiveness Secretly Undermines Health, Safety, and Environmental Programs* (Washington: OMB Watch/Public Citizen, 1991).

[82] See Bob Woodward and David Broder, "Quayle's Quest: Curb Rules, Leave 'No Fingerprints,'" *Washington Post*, Jan. 9, 1992, p. A1.

[83] See, for example, Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy, Third Edition* (Washington: CQ Press, 2003), pp. 176-177. The author said the council's "review criteria were vague" and it "operated without the benefit of the procedural restrictions that were imposed on the OMB." He also said that "[i]t became common to refer to the operation of the council as a form of regulatory pork barrel politics in which the White House doled out economic benefits in the form of reduced compliance costs. Nevertheless, the council won major battles with intransigent agencies that persisted in their views."

[84] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Oct. 4, 1993. See [http://www.whitehouse.gov/omb/inforeg/eo12866.pdf] for a copy of this order.

regulation "justify" its costs is a noticeably lower threshold than the requirement in Executive Order 12291 that the benefits "outweigh" the costs.

In contrast to the broad scope of review under Executive Order 12291, the new order limited OIRA reviews to "significant" regulatory actions, which are defined in section 2(f) of the order as the following:

> Any regulatory action that is likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

By focusing OIRA's reviews on significant rules, the number of draft proposed and final rules that OIRA examined fell from between 2,000 and 3,000 per year under Executive Order 12291 to between 500 and about 700 rules per year under Executive Order 12866.

Executive Order 12866 also differed from its predecessors in other respects. For example, whereas rules sometimes disappeared into OIRA for months during the Reagan Administration, the executive order generally requires that OIRA complete its review of proposed and final rules within 90 calendar days. The order also requires both the agencies and OIRA to disclose certain information about how the regulatory reviews were conducted. Specifically, agencies are required to identify for the public (1) the substantive changes made to rules between the draft submitted to OIRA for review and the action subsequently announced, and (2) changes made at the suggestion or recommendation of OIRA. OIRA is required to provide agencies with a copy of all written communications between OIRA personnel and parties outside the executive branch, and a list of the dates and names of individuals involved in substantive oral communications. The order also instructs OIRA to maintain a public log of all regulatory actions under review and of all of the above-mentioned documents provided to the agencies.[85]

Most of these provisions have been viewed as a reduction of direct presidential influence on agency rulemaking (e.g., recognizing the primacy of rulemaking agencies, limiting the scope and timing of OIRA review), but arguably the overall thrust of Executive Order 12866 was a continuation and solidification of presidential review. In at least one area, the executive order was different from (and, in some ways, went further than) the Reagan executive orders. Section 7 of the Clinton order ("Resolution of Conflicts") stated that, "to the extent permitted by law," unresolved disagreements between OIRA and rulemaking agencies "shall be resolved by the President, or by the Vice President acting at

---

[85] For a discussion of the differences between the transparency requirements under Executive Order 12291 and Executive Order 12866, see William D. Araiza, "Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking," *Administrative Law Review*, vol. 54 (Spring 2002), pp. 611-630, and Peter M. Shane, "Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking," *Arkansas Law Review*, vol. 48 (1995), pp. 161-214.

the request of the President, with the relevant agency head."[86] The order further stated that the review of related issues must be completed within 60 days, and at the end of this process, "the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter." In contrast, Executive Order 12291 did not give an explicit decisional role to the President.[87] Sally Katzen, OIRA administrator during most of the Clinton Administration and a primary author of Executive Order 12866, told CRS that the phrase "to the extent permitted by law" at the beginning of this section signaled the same type of limitation on presidential authority that was later enunciated by Elena Kagan in her 2001 article — that the President has ultimate decisional authority, unless Congress indicates otherwise.[88]

OIRA Review and Regulatory Policy During the George W. Bush Administration

President George W. Bush retained Executive Order 12866, making some minor changes in 2002 and some more significant changes in 2007. Therefore, the formal process by which OIRA reviews agencies' draft rules has changed little since 1993. There have been, however, several subtle yet notable changes in OIRA policies and practices during the Bush Administration — particularly after John D. Graham became OIRA administrator in July 2001. In October 2002, then-administrator Graham said, "the changes we are making at OMB in pursuit of smarter regulation are not headline grabbers: No far-reaching legislative initiatives, no rhetoric-laden executive orders, and no campaigns of regulatory relief. Yet we are making some changes that we believe will have a long-lasting impact on the regulatory state."[89] Graham served as OIRA administrator until February 2006. His successor, Susan E. Dudley (who was recess appointed in April 2007), appears to have continued many of the OIRA policies that he initiated.

Return of the OIRA "Gatekeeper" Role. During both the Reagan and Clinton Administrations, OIRA was criticized by some observers for its mode of operation relative to rulemaking agencies. As noted previously, OIRA was often described during the Reagan years as acting as a regulatory "gatekeeper," actively overseeing and recommending changes to agencies' rules. During the Clinton Administration, other observers criticized OIRA for not overseeing the actions of the rulemaking agencies more aggressively.[90] In September

---

[86] In 2002, the cited language was changed by Executive Order 13258 to read "with the assistance of the Chief of Staff to the President ('Chief of Staff'), acting at the request of the President, with the relevant agency head." Other references to the Vice President were also changed to the Chief of Staff (e.g., that the resolution of the conflicts shall be informed by recommendations from the Chief of Staff, not the Vice President), and that the Chief of Staff (not the Vice President) may be charged with informing the agency and OIRA of the President's decision.

[87] Section 3(e)(1) of Executive Order 12291 stated that the Task Force on Regulatory Relief "shall resolve any issues raised under this Order or ensure that they are presented to the President."

[88] Telephone conversation with Sally Katzen, April 4, 2008.

[89] John D. Graham, "Presidential Oversight of the Regulatory State: Can It Work?," speech at the Heinz School, Carnegie Mellon University, Oct. 4, 2002, available at [http://www.whitehouse.gov/omb/inforeg/graham_cmu_100402.html].

[90] See, for example, James L. Gattuso, "Regulating the Regulators: OIRA's Comeback," Heritage

(continued...)

1996, Sally Katzen, then the administrator of OIRA, testified that "we have consciously changed the way we relate to the agencies," and described OIRA's relationship with the rulemaking agencies as "collegial" and "constructive."[91] She also reportedly agreed with an article that said OIRA functioned during that period "more as a counselor during the review process than as an enforcer of the executive order."[92]

Shortly after the start of the George W. Bush Administration, OIRA described itself in one of its annual reports to Congress as the "gatekeeper for new rulemakings."[93] OIRA Administrator Graham said one of the office's functions is "to protect people from poorly designed rules," and said OIRA review is a way to "combat the tunnel vision that plagues the thinking of single-mission regulators." [94] He compared OIRA's review of agencies' rules to OMB's role in reviewing agencies' budget requests.[95] This return to the gatekeeper perspective of OIRA's role has implications for an array of OIRA's functions, and underlies many of the other changes in the office's operations during the Bush Administration.

For example, in an in-depth examination of OIRA's effect on agency rulemaking, GAO reported in 2003 that OIRA's reviews during 2001 and 2002 had significantly affected at least 25 draft rules.[96] OIRA returned seven of the rules to the agencies for "reconsideration," and in other rules, OIRA recommended the revision, elimination, or delay of certain regulatory provisions, or the revision of agencies' cost-benefit estimates. Most of the affected rules were from the Environmental Protection Agency (EPA) and the Department of Transportation (DOT). In several instances, GAO reported that the changes that OIRA recommended were consistent with the suggestions offered by outside parties with whom OIRA officials and staff had met. For example, after hearing concerns from representatives of steel manufacturers and a chemical company about the cost implications of listing manganese as a hazardous constituent, OIRA recommended that EPA eliminate manganese from a list of hazardous constituents. Nevertheless, GAO said "it is impossible to determine the extent to which the suggestions made by the regulated parties might have influenced

---

[90] (...continued)
Foundation, Executive Memorandum 813, May 9, 2002, available at [http://www.heritage.org/Research/Regulation/EM813.cfm].

[91] U.S. Congress, Senate Committee on Governmental Affairs, Subcommittee on Financial Management and Accountability, *Oversight of Regulatory Review Activities of the Office of Information and Regulatory Affairs*, 104th Cong., 2nd sess., Sept. 25, 1996 (Washington: GPO, 1997).

[92] William Niskanen, "Clinton's Regulatory Record: Policies, Process, and Outcomes," *Regulation*, vol. 19 (1996), pp. 27-28.

[93] Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Dec. 2002, available at [http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf].

[94] John D. Graham, "Remarks to the Board of Directors, The Keystone Center," June 18, 2002, available at [http://www.whitehouse.gov/omb/inforeg/keystone_speech061802.html].

[95] However, some observers have pointed out that the budget process has a final step that the OIRA regulatory review process lacks — approval of the budget by Congress.

[96] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, pp. 76-92.

OIRA's actions, if at all."[97] Although GAO was able to identify certain changes to agencies' rules, it also said that some types of OIRA influence may be imperceptible. For example, officials in one agency said they do not even propose certain actions when they believe that OIRA will not find them acceptable.[98]

Increased Emphasis on Economic Analysis. Although OIRA has always encouraged agencies to provide well-developed economic analyses for their draft rules, OIRA Administrator Graham expressed greater interest in this issue than his predecessors. According to agency officials, there was a perceptible "stepping up the bar" in the amount of support required for their rules, with OIRA reportedly more often looking for regulatory benefits to be quantified and a cost-benefit analysis for every regulatory option that the agency considered, not just the option selected.[99]

In September 2003, OIRA published revised guidelines for economic analysis under the executive order — updating "best practices" guidance issued in January 1996.[100] The new guidelines were generally similar to earlier guidance, but differed in several key areas — e.g., encouraging agencies to (1) perform both cost-effectiveness and cost-benefit analyses in support of their major rules,[101] (2) use multiple discount rates when the benefits and costs of rules are expected to occur in different time periods,[102] and (3) use a formal probability analysis of benefits and costs when a rule is expected to have more than a $1 billion impact on the economy (unless the effects of the rule are clear).

Although OIRA during the Bush Administration has emphasized the importance of economic analysis to support regulatory decisionmaking, it does not appear to have required all agencies to meet the same standards. In November 2005, OIRA Administrator Graham said "[h]omeland security regulations account for about half of our major-rule costs in 2004 but we do not yet have a feasible way to fully quantify benefits."[103] He also said that cost-benefit analysis may not be appropriate for homeland security rules, and that a more practical

---

[97] Ibid., p. 91.

[98] Ibid., p. 28.

[99] Ibid., p. 44.

[100] This guidance (OMB Circular A-4) is available at [http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.].

[101] Cost-benefit analysis involves the identification and (where possible) quantification of all costs and benefits associated with a forthcoming regulation. Any future costs or benefits are usually discounted back to present value. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and analyzing the costs of alternatives to reach that goal (e.g., dollars per life saved).

[102] The choice of discount rates used (e.g., 7% versus 3%) can have a significant effect on present value estimates. Discounting the value of future health benefits is also controversial. For example, in a February 2003 speech, the OIRA administrator noted that the present value of 1,000 lives saved 50 years in the future is only 34 lives in present value when evaluated at a 7% discount rate. See [http://www.whitehouse.gov/omb/inforeg/rff_speech_feb13.pdf], p. 4.

[103] John Graham, "The Smart-Regulation Agenda: Progress and Challenges," speech before the AEI-Brookings Joint Center for Regulatory Studies, Nov. 7, 2005.

"soft" test was being used for them.[104] In its 2003 report to Congress, OIRA reported that 50 of 69 regulatory actions related to homeland security had no cost information, and 67 of the 69 regulatory actions provided no information on regulatory benefits.[105] During approximately the same period of time, OIRA returned several draft rules to EPA and DOT and requested changes in other rules from the agencies because of inadequate cost or benefit information. Some critics have questioned why OIRA treated homeland security rules differently from health, safety, and environmental rules.[106]

Use of Return Letters. During the Clinton Administration, OIRA rarely returned rules to the agencies for reconsideration. According to OIRA's database, of the more than 4,000 rules that OIRA reviewed from 1994 through 2000, it returned only seven rules to the agencies — three in 1995 and four in 1997.[107] OIRA administrators during that period said they viewed the use of return letters as evidence of the failure of the collaborative review process, since both OIRA and the rulemaking agencies were part of the same presidential administration.[108]

In contrast, OIRA Administrator Graham referred to "the dreaded return letter" as the office's "ultimate weapon," and viewed such letters as a way to make clear to the agencies and the public that the office was serious about the presidential review process.[109] In the first eight months after he took office in July 2001, OIRA returned 21 draft rules to the agencies for reconsideration. DOT had the most rules returned during 2001 and 2002 (eight), followed by the Social Security Administration (five) and the Department of Veterans Affairs (four).[110] The letters commonly indicated that OIRA returned the rules because of concerns about the agencies' economic analyses (e.g., whether the agencies[111] had considered all reasonable alternatives or had selected the alternative that would yield the greatest net benefits).

---

[104] Nancy Ognanovich, "Head of OMB Regulatory Office Says Analyzing Homeland Security Rules Difficult," *BNA Daily Report for Executives*, Nov. 8, 2005, p. A39.

[105] Office of Management and Budget, Office of Information and Regulatory Affairs, *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, September 2003, pp. 68-78, available at [http://www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf].

[106] For example, former OIRA administrator Sally Katzen said "when it matters to them to get rules out quickly, they wink and blink. But in the areas of public health and safety, where they have longstanding relations with the business communities involved, they're insistent on satisfying these standards," in Rebecca Adams, "Graham Leaves OIRA With a Full Job Jar," *CQ Weekly*, Jan. 23, 2006, p. 226.

[107] See [http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init] for information on the results of OIRA's reviews.

[108] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, p. 42.

[109] John D. Graham, "Stimulating Smarter Regulation: OMB's Role," speech before the American Hospital Association, July 17, 2002, available at [http://www.whitehouse.gov/omb/inforeg/graham_ama071702.html].

[110] Copies of OIRA's return letters are available on OMB's website at [http://www.whitehouse.gov/omb/inforeg/return_letter.html].

[111] See [http://www.reginfo.gov/public/do/eoPackageMain] for information on regulations under review at OIRA.

Since 2002, the pace of OIRA's return letters has slowed. Although the average number of rules that OIRA reviewed each year stayed about the same, OIRA returned only two rules in 2003, one rule in 2004, one rule in 2005, no rules in 2006, and one rule in 2007 — a dramatic decline from the 21 returns during Administrator Graham's first eight months in office.[112] OIRA officials attributed the decline in return letters to the improved quality of agencies' regulatory submissions after the initial flurry of returns — an indication that the agencies had gotten the message about the seriousness of OIRA review during the Bush Administration.

Extended Reviews. Although fewer rules have been formally returned by OIRA in recent years, the number of rules that have been under review at OIRA for more than 90 days has increased recently. As of March 2008, OIRA's website indicated that 16 draft rules (including nine from EPA) had been under review for more than 90 days.[113] Although Executive Order 12866 permits the review period for rules to be extended once by no more than 30 days upon the written approval of the OMB director and at the request of the agency head, one EPA draft rule (on radiation protection guidance for the general public) had been under OIRA review for two and one-half years (since October 2005), and another EPA rule (on standards for radioactive waste disposal in Yucca Mountain, Nevada) had been under review for 15 months (since December 2006). Some of these delays at OIRA have prompted some recent congressional efforts to require agencies to issue the underlying rules.[114]

Advent of Prompt Letters. OIRA has traditionally been a reactive force in the rulemaking process, commenting on draft proposed and final rules that are generated by the agencies. Although OIRA occasionally suggested regulatory topics to the agencies during previous Administrations, the practice was relatively uncommon and the discussions were not made public. In contrast, OIRA Administrator Graham was more publicly proactive, sending several agencies "prompt letters" (and posting them on the OIRA website) suggesting that they develop regulations in a particular area or encouraging the agencies' ongoing efforts.[115] For example, one such letter encouraged the National Highway Traffic Safety Administration to give greater priority to modifying its frontal occupant protection standard, and another letter suggested that the Occupational Safety and Health Administration make the promotion of automatic external heart defibrillators a higher priority. Other prompt letters recommended that the agencies better focus certain research or programs. Between September 2001 and December 2003, OIRA sent a total of 13 prompt letters to regulatory agencies, and several of the agencies took action in response to the letters. Since then, however, the number of prompt letters has diminished substantially. Only two prompt letters were issued in 2004, none in 2005, one in 2006, and none in 2007.

---

[112] Two of the returns during this period (one in 2003 and one in 2004) involved the same DOT rule.

[113] See [http://www.reginfo.gov/public/do/eoPackageMain] for information on regulations under review at OIRA.

[114] One Department of Commerce rule that was designed to reduce ship collisions with right whales has been under review at OIRA since February 2007. Legislation has been introduced in the Senate (S. 2657) and the House (H.R. 5536) to require the Secretary of Commerce to issue the regulations by June 2008.

[115] Copies of these prompt letters are available on OMB's website at [http://www.whitehouse.gov/omb/inforeg/prompt_letter.html].

Informal Reviews and Transparency. The formal OIRA review process begins when agencies submit their draft rules to OIRA along with a Form 83-R, which provides general information about the rules and contains sections in which agency officials certify compliance with Executive Order 12866.[116] However, some rules (particularly those from EPA and the Departments of Agriculture, Health and Human Services, and Transportation) also often undergo "informal" OIRA review in which the agencies share preliminary drafts of rules and analyses before the agency formally sends the rule to OIRA. Although informal reviews occurred during previous Administrations, both the agencies and OIRA have indicated that informal reviews have been more common during the George W. Bush Administration — in part because of the threat of a returned rule.[117] As former OIRA Administrator Graham said, "an increasing number of agencies are becoming more receptive to early discussions with OMB, at least on highly significant rulemakings."[118] OMB also said "It is at these early stages where OIRA's analytic approach can most improve on the quality of regulatory analyses and the substance of rules."[119]

The extent of OIRA influence during informal reviews is difficult for outsiders to detect. Executive Order 12866 requires agencies to disclose the substantive changes made to their draft rules during OIRA's review and the changes made at the suggestion or recommendation of OIRA. OIRA takes the position that these transparency provisions apply only to the period of formal review — which may be as short as one day following weeks or months of informal review.[120] In response to this position, GAO said that "real transparency regarding the substantive changes made to agencies' draft rules during OIRA's reviews requires disclosure of those changes *whenever* they occurred. Excluding the portion of the review process when OIRA has said it can have its most significant effect seems to seriously call into question the transparency of that process."[121]

---

[116] To view a copy of this form, see [http://www.whitehouse.gov/omb/inforeg/83r.pdf].

[117] In this regard, the former OIRA administrator reportedly said that by issuing return letters the office was trying "to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us — well, in a sense, they're rolling the dice." Rebecca Adams, "Regulating the Rule-Makers: John Graham at OIRA," *CQ Weekly*, vol. 60 (Feb. 23, 2002), pp. 520-526.

[118] John D. Graham, "Stimulating Smarter Regulation: OMB's Role," speech before the American Hospital Association, July 17, 2002, available at [http://www.whitehouse.gov/omb/inforeg/graham_ama071702.html].

[119] Office of Management and Budget, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, March 2002, available at [http://www.whitehouse.gov/omb/inforeg/8stevensdraftmemoMarch18.pdf]. The former OIRA administrator made similar statements in his speeches. See, for example, John D. Graham, "Presidential Oversight of the Regulatory State: Can It Work?," speech at the Heinz School, Carnegie Mellon University, Oct. 4, 2002, available at [http://www.whitehouse.gov/omb/inforeg/graham_cmu_100402.html].

[120] OIRA objected to a GAO recommendation that changes during informal reviews be disclosed. For the recommendation and the objection, see U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 22, 2003, p. 117.

[121] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules* (continued...)

Targeting Rules for Review. On several occasions since the start of the George W. Bush Administration, OIRA has requested the public to identify rules or other regulatory materials that should be reviewed. Opponents have characterized these efforts as the development of regulatory "hit lists" in which regulated entities can seek the elimination of troublesome rules.[122]

Section 628(a)(3) of the FY2000 Treasury and General Government Appropriations Act required OMB to submit "recommendations for reform" with its report on the costs and benefits of federal regulations. Although this provision could have been interpreted differently (e.g., requiring OIRA to identify possible procedural changes to the rulemaking process), OIRA cited it as a reason to ask the public in May 2001 to identify "specific regulations that could be rescinded or changed."[123] OIRA subsequently received 71 suggestions (44 from the Mercatus Center at George Mason University, which was then headed by current OIRA administrator Dudley), which OIRA later placed into "high," "medium," and "low" priority groups. In 2002, OIRA again asked the public to identify regulations in need of reform, and received recommendations for reform of 267 regulations and 49 guidance documents in response to that request.[124] In 2004, OIRA asked the public to suggest specific reforms to regulations, guidance documents, or paperwork requirements that would improve manufacturing regulations. OIRA received 189 recommendations, and later determined that 76 of them should be priorities with milestones and deadlines. By August 2006, OIRA reported that agencies had completed action on 39 of the 76 priority reforms.[125]

Electronic Rulemaking. Electronic rulemaking is one of about two dozen e-government initiatives launched as part of the Bush Administration's President's Management Agenda.[126] One phase of the initiative involves the creation of a government-wide docket system that can allow the public to review rulemaking materials (e.g., agencies' legal and cost-benefit analyses for their rules) and the comments of others. The executive committee overseeing the initiative has representatives from both OIRA and OMB's Office of Electronic Government and Information Technology (often referred to as OMB's "E-government" office).

---

[121] (...continued)
and the Transparency of Those Reviews, p. 117.

[122] See, for example, OMB Watch, "The Problems With Any OIRA Hit List," Jan. 10, 2005, available at [http://www.ombwatch.org/article/articleview/2596/1/309?TopicID=3].

[123] OIRA initially made this request in its May 2001 draft report to Congress on the costs and benefits of regulations, and reiterated it in its final report, which is available at [http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf].

[124] To view these 316 recommendations for reform, see [http://www.whitehouse.gov/omb/inforeg/summaries_nominations_final.pdf]. As discussed later in this testimony, guidance documents (e.g., compliance guides or policy statements) differ from rules in that they are not binding on the public, but can provide information that is helpful in understanding and complying with regulations.

[125] To view this report, see [http://www.whitehouse.gov/omb/inforeg/reports/reg_reform_nominations_2006.pdf].

[126] For more information on this initiative, see CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

Electronic rulemaking has been characterized as a way to permit greater public participation in rulemaking,[127] although some have questioned whether the effort in general or the Administration's initiative in particular will have that effect.[128] Other observers have commented on the effect that a centralized e-rulemaking system can have on presidential power. For example, one such commentary said a centralized rulemaking docket developed with OMB oversight would "dramatize and enhance OMB's and OIRA's already central role" in the rulemaking process.[129] The authors further concluded:

> As agencies become more transparent, they become more transparent to the President as well as to the public. It used to be that the number of copies of materials in the docket was limited, and it was physically located at the agency. Now the docket is immediately available on equal and easy terms to all who want it, including the President, and politics will give him the incentive to use it.[130]

Similarly, Stuart W. Shulman of the University of Pittsburgh said, "many of the tools employed by the OMB when it exerts control over federal rulemaking (e.g., monitoring, prompting, or early collaboration in drafting proposals) are likely to be enhanced by seamless IT systems for eRulemaking."[131] When President Bush signed the 2002 E-Government Act, which provides the statutory basis of e-rulemaking, he said "the executive branch shall construe and implement the Act in a manner consistent with the President's constitutional authorities to supervise the unitary executive branch."[132]

Peer Review Bulletin. In September 2003, OMB published a proposed bulletin on "Peer Review and Information Quality" that sought to establish a process by which all "significant regulatory information" would be peer reviewed.[133] The scope of the proposed

---

[127] Stephen Johnson, "The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet," *Administrative Law Review*, vol. 50 (1998), pp. 277-337.

[128] Cynthia Farina, Claire Cardie, Thomas R. Bruce, and Erica Wagner, "Better Inputs for Better Outcomes: Using the Interface to Improve e-Rulemaking," in *eRulemaking at the Crossroads*, [http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf], pp. 13-14. The authors said that "there is virtually no chance that the interface constructed at www.regulations.gov will make regulatory government more transparent or accountable, and little chance that it will enable the public to participate in rulemaking more effectively." See also Cary Coglianese, "Citizen Participation in Rulemaking: Past, Present, and Future," *Duke Law Journal*, vol. 55 (2006), pp. 943-968; and Stuart M. Benjamin, "Evaluating E-Rulemaking: Public Participation and Political Institutions," *Duke Law Journal*, vol. 55 (March 2006), pp. 893-941.

[129] Richard G. Stoll and Katherine L. Lazarski, "Rulemaking," in Jeffrey S. Lubbers, ed., *Developments in Administrative Law and Regulatory Practice, 2003-2004* (Chicago: American Bar Association, 2004), p. 160. The authors note that the section of this article on e-rulemaking was adapted from materials provided by Professor Peter Strauss of Columbia Law School.

[130] Ibid.

[131] Stuart W. Shulman, "E-Rulemaking: Issues in Current Research and Practice," *International Journal of Public Administration*, vol. 28 (2005), p. 628.

[132] To view a copy of this December 2002 signing statement, see [http://www.whitehouse.gov/news/releases/2002/12/20021217-5.html].

[133] Office of Management and Budget, Executive Office of the President, "Proposed Bulletin on Peer

(continued...)

bulletin was broad, covering virtually all agencies (including independent regulatory agencies) and defining regulatory information as "any scientific or technical study that . . . might be used by local, state, regional, federal and/or international regulatory bodies." Such information would be subject to peer review if the agency could determine that it could have a "clear and substantial impact on important public policies or important private sector decisions" when disseminated. The proposed bulletin placed additional peer review requirements on "especially significant regulatory information," and said agencies were required to notify OMB in advance of any studies that might require peer review and how any such reviews would be conducted.

The proposed bulletin aroused controversy, with some observers expressing concern that it could create a centralized peer review system within OMB that would be vulnerable to political manipulation or control by regulated entities. OMB received nearly 200 comments on the proposal,[134] and published a "substantially revised" peer review bulletin in April 2004 that was broader in scope than the proposed bulletin in that it applied to "influential scientific information" (which includes, but is not limited to, regulatory information) and "highly influential scientific assessments."[135] However, agencies were given substantial discretion to decide whether information was "influential" and therefore required a peer review. The revised bulletin also allowed agencies to use the National Academy of Sciences for peer reviews or to use other procedures that had been approved by OMB. It also provided exemptions for certain classes of information, such as information related to national security, products by government-funded scientists that are not represented as views of a federal agency, and routine statistical information. However, OMB retained significant authority to decide when information was "highly influential" (and, therefore, required more specific peer review procedures) and to approve alternative peer review procedures. Comments on the revised bulletin varied widely. In May 2004, 12 Members of Congress provided OMB with comments stating that the revision did not address previously expressed concerns that the proposal was "unjustified, overly broad, burdensome, and did not appropriately guard against appointment of reviewers with conflicts of interest," and that it would provide OMB with "excessive authority over the production and dissemination of government information."[136]

---

[133] (...continued)
Review and Information Quality," 68 *Federal Register* 54023 (Sept. 15, 2003). This proposed bulletin had been released to the public via OMB's website on Aug. 29, 2003. To view a copy, see [http://www.whitehouse.gov/omb/inforeg/peer_review_and_info_quality.pdf].

[134] To view a summary of these comments and OMB's response, see [http://www.whitehouse.gov/omb/inforeg/peer_review_comment.pdf].

[135] Office of Management and Budget, Executive Office of the President, "Revised Information Quality Bulletin on Peer Review," 69 *Federal Register* 23230 (April 28, 2004). This revised bulletin had been released to the public via OMB's website on April 15, 2004. To view a copy, see [http://www.whitehouse.gov/omb/inforeg/peer_review041404.pdf].

[136] For a copy of these Members' comments, see [http://www.whitehouse.gov/omb/inforeg/peer2004/25.pdf].

In January 2005, OMB published a final version of the peer review bulletin with what it described as "minor revisions" to the version published in April 2004.[137] One new requirement was that agencies provide OMB with an annual report containing (1) the number of peer reviews conducted during the previous fiscal year; (2) the number of times alternative procedures were invoked; (3) the number of times waivers or deferrals were invoked; (4) any decisions to use exceptions in appointing reviewers; (5) the number of panels conducted in public and the number that allowed public comments; (6) the number of public comments provided on review plans; and (7) the number of reviewers recommended by professional societies. Several issues regarding the implementation of the bulletin remain unclear, including how much discretion OIRA gives the agencies to decide when and what kind of peer review is required, and the effect of the bulletin's requirements on the time required to issue health or safety standards.[138]

Proposed Risk Assessment Bulletin. On January 9, 2006, OIRA released a proposed bulletin on risk assessment for comment by the public and peer review by the National Academy of Sciences (NAS).[139] Risk assessment is used by federal agencies to determine whether a potential hazard exists and to determine the extent of possible risk to human health, safety, or the environment. In a regulatory context, risk assessment can help agencies identify issues of potential concern (e.g., whether exposure to a given risk agent will cause cancer, reproductive and genetic abnormalities, or ecosystem damage), select regulatory options, and estimate a forthcoming regulation's benefits. The OMB bulletin proposed to establish six general risk assessment and reporting standards (e.g., that they summarize the scope of the assessment, provide a qualitative and quantitative characterization of risk, be based on the best available data, explain the basis for critical assumptions, and contain an executive summary). It also proposed to establish a seventh general standard for assessments produced in relation to analysis for a rule with annual economic effects of $1 billion or more (e.g., comparison of baseline risk to alternative mitigation measures) and nine special standards for "influential" risk assessments that go beyond those general standards. The bulletin was written in a prescriptive manner, but also appeared to give agencies discretion in its implementation.

In January 2007, the NAS committee reported that the proposed bulletin was "fundamentally flawed" and should be withdrawn.[140] The committee criticized OIRA for failing to identify the problem its guidance sought to address, and said the proposed bulletin's "most glaring omission" was the "absence of criteria and information for gauging the benefits to be achieved by implementing the bulletin (that is, a benefit-cost analysis)." Instead of this prescriptive bulletin, the committee said that OMB should issue a bulletin that

---

[137] Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, 70 *Federal Register* 2664 (Jan. 14, 2005), available at [http://www.whitehouse.gov/omb/fedreg/2005/011405_peer.pdf].

[138] For more detailed information on this issue, see CRS Report RL32680, *Peer Review: OMB's Proposed, Revised, and Final Bulletins*, by Curtis W. Copeland and Eric A. Fischer.

[139] Office of Management and Budget, "Proposed Risk Assessment Bulletin," Jan. 9, 2006, available at [http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf].

[140] National Research Council, Committee to Review the OMB Risk Assessment Bulletin, *Scientific Review of the Proposed Risk Assessment Bulletin from the Office of Management and Budget*, Jan. 11, 2007.

outlines goals and general principles of risk assessments that federal agencies could use to develop their own guidance. On September 19, 2007, OIRA withdrew the proposed bulletin and, with the Office of Science and Technology Policy, instead issued a memorandum reiterating and reinforcing general principles for risk assessment that were originally written in 1995.[141] Reaction to these principles has been generally positive, although their impact will likely depend on how they are implemented. For example, provisions stating that agencies should use the "best reasonably obtainable scientific information to assess risks," and that those analyses should be based on the "best available scientific methodologies, information, data, and weight of the available scientific evidence" may be used to stop agency rulemaking, or alternatively may be interpreted as general suggestions and therefore have little substantive effect.[142]

Good Guidance Practices Bulletin. In November 2005, OMB released a draft bulletin on "Agency Good Guidance Practices" for public comment,[143] and on January 18, 2007, OMB issued the final version of the good guidance practices bulletin.[144] Guidance documents (e.g., compliance guides, policy statements, and circulars), unlike regulations, are not binding on the public, but can provide information to the public that is helpful in understanding and complying with regulations. However, some agencies' guidance documents have been criticized as "backdoor rulemaking" in that they appear to establish new requirements that have not been reviewed by senior agency officials or OIRA.[145]

In essence, the OMB bulletin requires each covered agency (all except independent regulatory agencies) to have written procedures for the clearance of "significant" guidance documents, establish certain standard elements for each such document (e.g., not include mandatory language such as "shall" or "must"), allow electronic access to and public feedback on such documents, and publish "economically significant" guidance documents (i.e., those with a $100 million or more impact on the economy) in the *Federal Register* and solicit comments on the documents. The bulletin indicates that the definition of a "guidance document" includes all such material "regardless of format," and says that guidance may be "significant" if it "may reasonably be anticipated to" have certain effects (e.g., raise novel legal issues, or create an inconsistency with another agency's actions). Although some observers welcomed the issuance of this bulletin and suggested ways to make it stronger (e.g., judicial review), others said it represented a "power grab" by the White House, and could lead to less responsive government action.[146] As was the case with the previously

---

[141] See [http://www.whitehouse.gov/omb/memoranda/fy2007/m07-24.pdf] for a copy of this memorandum.

[142] For more detailed information on this issue, see CRS Report RL33500, *OMB and Risk Assessment*, by Curtis W. Copeland.

[143] See [http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf] for a copy of this document.

[144] See [http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf] for a copy of this document.

[145] U.S. Congress, House Committee on Government Reform, *Non-binding Legal Effect of Agency Guidance Documents*, 106th Cong., 2nd sess., H.Rept. 106-1009 (Washington: GPO, 2000), p. 9.

[146] See [http://www.whitehouse.gov/omb/inforeg/good_guid/c-index.html] to view comments on the proposed good guidance practices bulletin.

issued peer review and risk assessment bulletins, it is unclear how much discretion OIRA will give the agencies in the implementation of this bulletin.

Changes to OIRA Review by Executive Order 13422

On the same day that the final good guidance practices bulletin was issued (January 18, 2007), President George W. Bush issued Executive Order 13422, making the most significant amendments to Executive Order 12866 since it was published in 1993. The changes made by this new executive order are controversial, characterized by some as a "power grab" by the White House that undermines public protections and lessens congressional authority,[147] and by others as "a paragon of common sense and good government."[148] The most important changes made to Executive Order 12866 by Executive Order 13422 fall into five general categories: (1) a requirement that agencies identify in writing the specific market failure or problem that warrants a new regulation; (2) a requirement that each agency head designate a presidential appointee within the agency as a "regulatory policy officer" (RPO), who can control upcoming rulemaking activity in that agency; (3) a requirement that agencies provide their best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in the coming year; (4) an expansion of OIRA review to include significant guidance documents; and (5) a provision permitting agencies to consider whether to use more formal rulemaking procedures in certain cases.[149] With regard to guidance documents, the new executive order builds on the good guidance bulletin and requires agencies to provide OIRA with advance notification of any upcoming significant guidance documents and, when requested by the OIRA administrator, to provide "the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need." The order went on to say that the OIRA administrator would notify the agency when "additional consultation will be required before the issuance of the significant guidance document."

Although the changes made by Executive Order 13422 are generally agreed to be significant, the characterizations of the changes by interested parties are dramatically different. Jeffrey Rosen, general counsel at OMB, reportedly characterized the new executive order as "a classic good-government measure that will make federal agencies more open and accountable."[150] On the other hand, a press account quoted one Member of Congress as saying that the order "allows the political staff at the White House to dictate

---

[147] Public Citizen, "New Executive Order Is Latest White House Power Grab," available at [http://www.citizen.org/pressroom/release.cfm?ID=2361]. See also Margaret Kriz, "Thumbing His Nose," *National Journal*, July 28, 2007, pp. 32-34.

[148] Attributed to William Kovacs, Vice President of Environment, Energy, and Regulatory Affairs, U.S. Chamber of Commerce, in John Sullivan, "White House Sets Out New Requirements for Agencies Developing Rules, Guidance," *Daily Report for Executives*, Jan. 19, 2007, p. A-31.

[149] For descriptions of each of these five changes, see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland.

[150] Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, Jan. 30, 2007, p. A1.

decisions on health and safety issues, even if the government's own impartial experts disagree. This is a terrible way to govern, but great news for special interests."[151]

These changes also led to three congressional hearings on the order — two by the House Committee on Science and Technology's Subcommittee on Investigations and Oversight,[152] and one by this subcommittee.[153] During House floor consideration of H.R. 2829, the Financial Services and General Government (FSGG) Appropriations Act, 2008 (which funds OMB, among other agencies), an amendment was added to the bill stating that "None of the funds made available by this Act may be used to implement Executive Order 13422." In the wake of this action, the director of OMB sent a letter to the chairmen and ranking members of the House and Senate Appropriations Committees stating that, "If the President were presented with a bill that contained a restriction on the implementation of Executive Order 13422, the President's Senior Advisors would recommend that he veto the bill."[154] The director urged the rejection of any provision that would interfere in any way with the implementation of the executive order "because it involves a matter that directly affects the operation of [OMB] and involves the President's authority to manage the Executive Branch."

As reported by the Senate Subcommittee on Financial Services, the FSGG appropriations bill contained a provision stating that no funds in the measure could be used to implement either Executive Order 13422 or the OMB bulletin on guidance documents. However, one of the "manager's package" amendments to the legislation that was adopted when the bill was reported by the full Senate Appropriations Committee on July 12, 2007, deleted this provision from the legislation. The FSGG appropriations bill was later folded into the Consolidated Appropriations Act, 2008 (H.R. 2764), and President Bush signed the bill into law on December 26, 2007 (P.L. 110-161). The final appropriations act did not contain any language regarding Executive Order 13422.

Several Issues Are Unclear. Although observers have taken very different positions on the desirability of the changes made by Executive Order 13422, several things about the order are not clear. First, it is unclear why the changes to the existing regulatory review process were made. Notably, although Executive Order 13422 requires agencies to provide written rationales for why they are issuing regulations, no such rationale was offered in conjunction with this or any of the other new requirements in the order. For example, it is unclear what "market failure" or other specific problem led to the issuance of the requirements that agencies have RPOs who are presidential appointees, or that agencies submit significant guidance documents to OIRA for review. Although the acting OIRA administrator indicated that the executive order's guidance provisions were intended to improve the quality of agency guidance documents through interagency review, he did not

---

[151] Ibid.

[152] To view the February 2007 hearing charter and the witnesses' prepared statements, see [http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1269]. To view the April 2007 hearing and obtain copies of the witnesses' prepared statements, see [http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1777].

[153] To view this hearing and obtain copies of the witnesses' prepared statements, see [http://judiciary.house.gov/oversight.aspx?ID=269].

[154] Letter from OMB Director Rob Portman to Senators Robert C. Byrd and Thad Cochran, and Representatives David Obey and Jerry Lewis, July 12, 2007.

describe any recent instances of poor quality guidance that led to this provision in the order. His comments indicating that other parts of the executive order did not change existing practices (e.g., provisions regarding "market failure" and formal rulemaking) also raised questions regarding why the provisions were believed necessary. Neither the President nor OMB is required to explain why executive orders are issued, or why OIRA's review processes are changed. Sound public policy rationales can be envisioned concerning why the changes were made. Providing those rationales might have quieted some of the concerns that have been voiced regarding the changes.

Also unclear is the effect of the changes made by Executive Order 13422 on federal rulemaking agencies, on the rules that emerge from the rulemaking process, and on the transparency of that process to the public. In some cases, that lack of clarity is because of the discretion given to agencies and OIRA in the review process (e.g., that agencies take certain actions "to the extent possible" or "where applicable"). In other cases, the effects are unclear because the order does not appear to change existing practices (e.g., that agencies be allowed to use formal rulemaking). In still other cases, the new requirements seem to be based on questionable presumptions (e.g., that agencies' regulatory plans contain estimates of costs and benefits that can be aggregated, when most do not contain such estimates) or seem to have an indefinite scope (e.g., what qualifies as a "guidance document" or a "significant guidance document"). Ultimately, the degree to which Executive Order 13422 changes existing practices will likely depend on how the order is implemented by OIRA and the agencies. For example, will OIRA insist that agencies identify a "specific market failure" before issuing proposed or final rules, or will that provision be interpreted more broadly to require simply a clear statement of the rules' intentions? Will agency heads continue to have discretion in the appointment of RPOs (albeit less than before since they must now select from current presidential appointees), or will the White House direct the agency heads in those appointments? Will these policy officers continue to report to the agency heads (as OMB says they should), or will they now report to the White House or OMB (since the new executive order eliminated the requirement that they report to the agency heads)? Will the requirement that agencies provide estimates of aggregate costs and benefits be used as a prelude to greater control and the development of constraints such as regulatory budgets,[155] or will such estimates be relatively easy to develop and reveal cumulative effects that have

[155] Under a "regulatory budget," the costs associated with an agency's rules could be capped, and no new rules could be issued unless other costs were reduced or eliminated. See, for example, testimony of Rick Melberth, Director of Regulatory Policy, OMB Watch, in U.S. Congress, House Committee on Science and Technology, Subcommittee on Investigations and Oversight, *Amending Executive Order 12866: Good Governance or Regulatory Usurpation?*, hearings, 110th Cong., 1st sess., Feb. 13, 2007, available at [http://www.ombwatch.org/regs/PDFs/Melberth_testimony.pdf]. For a lengthy discussion of regulatory budgets, see [http://www.thecre.com/ombpapers/regbudget.html].

heretofore been hidden? Will the requirement that OIRA be notified of forthcoming significant agency guidance documents prove to be a major expansion of presidential influence over regulatory agencies, or will "significant guidance document," as defined in the order, be a contradiction in terms resulting in virtually no such documents being covered by the order's requirements?[156] Finally, will OIRA require agencies to enter into more formal rulemaking procedures, or will agencies continue to have the discretion to use such procedures only in rare circumstances?[157]

Third, it is unclear what impact the changes brought about by Executive Order 13422 will have on the balance of power between the President and Congress in this area. Congress has a direct interest in the regulations that emerge from the rulemaking process, having created each regulatory agency, confirmed agency heads, and enacted the legislation authorizing or requiring the promulgation of each proposed and final rule. Therefore, presidentially initiated changes that may affect these congressional directives (e.g., the requirement that each agency identify a specific "market failure" or "problem" before issuing a rule) are naturally of interest to Congress. Another area of the executive order that may affect the presidential-congressional balance of power involves the RPOs, particularly (1) their new authority to control regulatory planning and output (unless the agency head objects), (2) the fact that the order no longer requires them to report to the agency head, and (3) the lack of clarity as to whether RPOs in Senate confirmed positions must be reconfirmed because of their new authorities.[158] Finally, OMB's statements notwithstanding, it is unclear whether independent regulatory agencies will have presidential appointees as RPOs.[159] Doing so would extend the reach of the President and presidential review into agencies that had not previously been subject to such scrutiny.

Finally, it is unclear whether the effects of the executive order will be discernable to anyone outside OMB or the rulemaking agencies. For example, the order says that, "Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the (Regulatory) Plan without the approval of the agency's Regulatory Policy Office." Therefore, because an agency regulatory policy officer can prevent the first public indication of rulemaking activity from occurring, the public may never know that rulemaking was ever contemplated by the agency. Also, the transparency requirements regarding regulatory review that were included in Executive Order 12866 and broadened in 2001 do

---

[156] By definition, a guidance document cannot have a binding effect on the public, so it is unclear how a guidance document alone could have a $100 million impact on the economy.

[157] Compared to the more common "notice and comment" rulemaking, formal rulemaking is a much more rigorous, trial-like, on-the-record procedure in which interested persons testify and cross-examine witnesses, and the agency may take depositions and issue subpoenas. It is generally considered a more time-consuming and expensive process than informal rulemaking. Also, according to 5 U.S.C. §556(d)(1), "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Formal rulemaking was widely criticized in the 1970s, and has fallen into disuse since then.

[158] For a 1995 Department of Justice opinion concluding that Senate confirmed officials need not be reconfirmed if their duties change, see [http://www.usdoj.gov/olc/dol.app.25.htm].

[159] OMB's April 2007 guidance on the executive order says that independent regulatory agencies are not required to have presidential appointees as RPOs, but goes on to "encourage" the heads of the agencies to do so voluntarily. To view a copy of this guidance, see [http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf].

not appear to apply to significant guidance documents that are submitted to OIRA. Therefore, the public may never know that a particular guidance document was under review by OIRA, that meetings and correspondence with affected parties took place, or what changes were made to the guidance at OIRA's recommendation. The 90-day regulatory review time limits in Executive Order 12866 also do not seem to apply to significant guidance documents.[160]

These areas of uncertainty notwithstanding, the issuance of these amendments to Executive Order 12866 are important if for no other reason than that the President deemed them necessary. The changes made by Executive Order 13422 — particularly the expansion of OIRA review to significant guidance documents and the requirement that RPOs be presidential appointees with enhanced power — represent a clear expansion of presidential authority over rulemaking agencies. In that regard, the executive order can be viewed as part of a broader statement of presidential authority presented throughout the Bush Administration — from declining to provide access to certain executive branch documents and information to presidential signing statements indicating that certain statutory provisions will be interpreted consistent with the President's view of the "unitary executive."[161] For example, in his February 2007 testimony before this subcommittee on the executive order, the acting OIRA administrator cited the "basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy" as justification for the extension of OIRA review to agency guidance documents. Also, in his July 2007 letter conveying the Administration's objections to legislation restricting the implementation of the executive order, the OMB Director said he was doing so because the legislation "involves the President's authority to manage the Executive Branch."

---

[160] Amena H. Saiyid, "Guidance on Wetlands, 'Blending' Policies Said to be Held Up in White House Review," *BNA Daily Report for Executives*, May 8, 2007, p. A-19. At the time this article was published, one of these documents had been under review at OIRA for 11 months, and the other for six months.

[161] For a discussion of the Bush Administration's use of signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T.J. Halstead. More generally, see Adriel Bettelheim, "Executive Authority: A Power Play Challenged," *CQ Weekly*, Oct. 30, 2006, p. 2858.