RULEMAKING PROCESS AND THE UNITARY EXECUTIVE THEORY

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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MAY 6, 2008

RULEMAKING PROCESS AND THE UNITARY EXECUTIVE THEORY

TUESDAY, MAY 6, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in Room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Johnson, Cannon, and Keller.

Staff present: Susan Jensen, Majority Counsel; Daniel Flores, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing at any time.

I will recognize myself for a short statement.

A year ago last February, this Subcommittee held a hearing on President Bush's Executive Order 13422. This new order substantially amended President Clinton's Executive Order 12866, an order that had guided the OMB regulatory review process for the preceding 13 years.

Specifically, the order requires agencies to identify specific market failures or problems that warrant a new regulation. Furthermore, agency heads are now required to designate a presidential appointee as an agency policy officer to control upcoming rulemaking.

Many are very concerned that Executive Order 13422 would further politicize regulations, several of which were specifically created by experts to protect the health and safety of our citizens.

I am concerned that the main thrust of this new order appears to be intended to shift control of the rulemaking process from the agencies, the entities that have the most substantive knowledge and experience, to the White House.

The New York Times, for example, reported that President Bush's order strengthens the hand of the White House in shaping rules that have, in the past, often been generated by civil servants and scientific experts. Commentators observed that it represented just another clandestine power grab by the Administration. These

thoughts and concerns were not just expressed by the so-called "liberal media" or partisan operatives.

The independent fact finding arm of Congress, the Congressional Research Service, for example, says the revisions made by Executive Order 13422 represent a clear expansion of presidential authority over rulemaking agencies.

CRS also notes that the order can be viewed as part of a broader statement of presidential authority presented throughout the Bush administration from declining to provide access to executive branch documents and information to creating presidential signing statements indicating that certain statutory provisions will be interpreted consistent with the President's view of the unitary executive.

Under this theory, the President, and only the President, can and should make the final decision. That is a rather serious observation coming from a preeminently nonpartisan source.

Today, more than 1 year later, our concerns are even greater, as illustrated by the latest controversies involving the rulemaking process. These issues range from the Administration's overriding the EPA's proposed air quality standards for ozone levels to efforts by the Vice President to delay the promulgation of a rule protecting Wright whales from annihilation.

Accordingly, I very much look forward to hearing the testimony and appreciate the witnesses' willingness to participate in this hearing.

At this time I would now recognize my colleague, Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

I would like to extend a welcome to all of our witnesses today, including Ms. Dudley, and want to point out that this topic is really of great importance to our country. And I would like to thank you all for coming to share your ideas with us.

Before I start, I would like to invite everyone to take a step back and to take a look at the big picture with me. Seventy-five years ago, the modern administered state exploded upon us with Franklin Roosevelt's New Deal and continued to mushroom to the Fair Deal, the New Frontier, and the Great Society.

By the time we reached the late 1970's, Congress had enacted an enormous Federal bureaucracy, producing an equally enormous number of regulations. They had done this largely by delegating to that direction much of Congress' own legislative power. By the time of the Carter administration, Congress' ability to write broad framework statutes mandating that bureaucracy write legislative rules, filling in the details of Congress' decisions, had risen practically to the state of a very high arm.

What was the result? A weakened Congress, an immensely strengthened but wholly unaccountable Federal bureaucracy, a skyrocketing Federal budget and a staggering regulatory burden on our citizens and our economy, spreading in every direction as far as the eye could see or the mind could imagine.

It took the executive some time, but eventually it woke up to the need to restore sanity to this situation, and starting with the Reagan administration, the Executive Office of the President began

to assert increased presidential control over myriad rulemaking activities in the Federal agencies.

In 1981, through Executive Order 12291, President Reagan consolidated new regulatory review authority in the Office of Management and Budget. Much of this authority was housed in OMB's Office of Information and Regulatory Affairs.

In 1985, through Executive Order 12498, President Reagan also consolidated in OIRA White House review of agencies' regulatory development agendas. The administration of President George H. W. Bush continued this basic framework, and with some moderate adjustment, so did the Clinton administration. The Clinton administration's refinements occurred largely through Executive Order 12866, issued in 1993.

The administration of the current President Bush has followed substantially this same framework. It has also brought within that framework the agencies' burgeoning production of guidance; guidance often used by agencies to embellish their regulatory regimes while avoiding judicial review.

There are those who say 25 years into this reaction by the presidency that the Bush administration has gone too far. They claim that the current President has unduly cut into the authority of Federal agencies. They say that Congress should step in to curtail executive authority over the executive branch.

I see a very different picture in which over time Congress excessively delegated its authority to unelected officials in executive branch agencies, in which the executive wisely and consistently saw a need to restore order and accountability, and in which the solution to any overly zealous leadership of the executive branch by the executive is not the clipping of the executive's wings but the strengthening of Congress.

And on that point, I think we should have bipartisan agreement, because if a weak Congress foists off on the Nation a weak executive, all we will be left with is an uncontrolled Federal bureaucracy and no one, no one, can want that. If the executive is not within its rights in leading executive branch agencies, then what has become of the Constitution?

So how do we strengthen Congress? Easy. We just pick up the tools Congress already has at its disposal and we use them with vigor. We legislate instead of delegating our legislative rights to the Federal bureaucracy. That is, Congress should vote on regulations before they become law. We also ought to make our laws clear enough that they don't need vast amounts of interpretive regulations.

We vigilantly oversee the executive through our oversight and we legislate in response to what we find. The fact is, we have been woefully inadequate for many years in oversight staff and oversight activities. We emphasize our power of the purse, sending strong signals to the executive about how we want him to lead the executive branch. And we at long last realize the promise of the Congressional Review Act, to pick up and disapprove agency rules that we think violate the substantive laws we pass, the Administrative Procedure Act or other procedural laws.

What will the result of all of this be? A strong and accountable Congress pitted against a strong and accountable executive, and a

robust debate that can be only good for the country, which is precisely what the framers of the Constitution intended.

I thank you, Madam Chair, and I yield back.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

I'd like to extend a welcome to all of our witnesses.

This is a topic that is of great importance to our country. I'd like to thank you all for coming.

But before we start, I'd like to invite everyone to take a step back and look at the big picture with me.

Seventy-five years ago, the modern administrative state exploded upon us with Franklin Roosevelt's New Deal.

It continued to mushroom through the Fair Deal, the New Frontier, and the Great Society.

By the time we reached the late 1970s, the Congress had erected an enormous federal bureaucracy, producing an equally enormous number of regulations.

And they had done this largely by delegating to that bureaucracy much of Congress' own legislative power. By the time of the Carter Administration, Congress' ability to write broad framework statutes, mandating that the bureaucracy write legislative rules filling in the details of Congress' decisions, had risen practically to the state of high art.

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There are those who say, twenty-five years into this reaction by the Presidency, that the Bush administration has gone too far. They claim that the current President has unduly cut into the authority of the federal agencies. They say that Congress should step in to curtail the Executive's authority over the Executive Branch.

I see a very different picture in which, over time, Congress excessively delegated its authority to unelected officials in Executive Branch agencies; in which the Executive wisely and consistently saw a need to restore order and accountability; and in which the solution to any overly zealous leadership of the Executive Branch by the Executive is not the clipping of the Executive's wings, but the strengthening of Congress.

Because, after all, if a weak Congress foists off on the Nation a weak Executive, all we will be left with is an uncontrolled federal bureaucracy—and no one can want that.

And if the Executive is not within his rights in leading Executive Branch agencies, then what has become of our Constitution?

So how do we strengthen Congress? Easy. We just pick up the tools Congress already has at its disposal—and we use them with vigor.

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And we at long last realize the promise of the Congressional Review Act to pick up and disapprove agency rules that we think violate the substantive laws we pass, the Administrative Procedure Act, or other procedural laws.

What will the result of all this be? A strong and accountable Congress, pitted against a strong and accountable Executive, in a robust debate that can only be good for the country—which is precisely what the framers of the Constitution intended.

I yield back the remainder of my time.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

Without objection, other Members' opening statements will be included in the record.

I am now pleased to introduce the witness for our first panel of today's hearing. Our witness on the first panel is Susan Dudley.

On April 4, 2007, Ms. Dudley was appointed to serve as the administrator of the Office of Information and Regulatory Affairs, OIRA, of the Office of Management and Budget. Prior to her service at OIRA, Ms. Dudley served at the nonprofit Mercatus Center at George Mason University, where she directed the regulatory studies program from 2003 to 2006.

As an adjunct professor at the George Mason University School of Law, she designed and taught courses on regulations and led regulatory clinic. Ms. Dudley also served as a career civil servant, working as a policy analyst at the Environmental Protection Agency from 1984 to 1985, an economist at OIRA from 1985 until 1989 and an economist advisor to the Commodities Futures Trading Commission from 1989 to 1991.

From 1991 until 1998, she was a consultant to government and private clients at Economists, Incorporated.

Ms. Dudley has authored more than 25 scholarly publications on regulatory matters ranging from e-rulemaking to electricity, health care, the environment and occupational safety.

I want to thank you for your willingness to participate in today's hearing. Without objection, your written statement will be placed into the record, and we would ask that you limit your oral remarks to 5 minutes.

You will notice that we have a lighting system that starts with a green light. At 4 minutes, it will turn yellow, warning you that you have about a minute left. And at 5 minutes, the light will turn red. If you are mid-thought when your time expires, we will of course allow you to finish your last thought.

After you have presented your testimony, Subcommittee Members are permitted to ask questions subject to the 5-minute limit.

So, with that, I would invite Ms. Dudley to please proceed with her testimony.

TESTIMONY OF THE HONORABLE SUSAN E. DUDLEY, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, WASHINGTON, DC

Ms. DUDLEY. Thank you, Chairwoman Sánchez and Ranking Member Cannon. Thank you for inviting me to testify today.

As administrator of the Office of Information and Regulatory Affairs, and as you mentioned, Madam Chairman, as someone who has served as a career economist on the OIRA staff in the 1980's, I am pleased to be here today to talk with you about OIRA's role and the history of executive oversight of the regulatory process.

OIRA was created as part of the Office of Management and Budget by the Paperwork Reduction Act of 1980, more than 25 years ago. Staffed almost exclusively by career civil servants, OIRA has served Administrations both Democratic and Republican, for decades, by providing centralized oversight and interagency coordination of Federal information, regulatory and statistical policy.

Even before Congress created OIRA, though, Presidents had established regulatory oversight mechanisms within the executive office of the President. For example, President Carter relied on several EOP agencies, including OMB, to implement his executive order on improving government regulations.

Each President since then has built on that foundation and over the course of more than three decades, regulatory analysis has emerged as an integral part of government accountability, a valuable tool for understanding the likely effects of regulations.

The nonpartisan nature of this principled approach is reinforced by the fact that during the current Bush administration we have continued to operate under President Clinton's Executive Order 12866 with some minor amendments that I would be happy to discuss.

Over the last 7 years, the Bush administration has further built on these foundations to enhance the oversight and accountability of the regulatory process. First, we have enhanced OIRA's transparency. We have taken advantage of the Internet to list on our Web site all regulations under review. We also provide on our Web site lists of any meetings held with outside parties on rules under review.

Second, over the last 5 years e-rulemaking has transformed access to Federal Government rulemaking process. *Regulations.gov* has brought government-wide information together and made it searchable and accessible for anyone with access to the Internet.

Third, OIRA has undertaken several initiatives to improve the information and analysis on which new regulations are based. These are summarized in my written testimony, so today I will focus on two initiatives in which this Committee had expressed an interest in the past.

One, the first, is the final bulletin for Agency Good Guidance Practices. And the other is the January 2007 amendments to Executive Order 12866. While I was not at OMB when these were issued, I can provide you with an update on how they are being implemented.

In January 2007, after soliciting and responding to public and interagency comments, OMB issued a final bulletin for agency good

guidance practices to increase the quality, accountability and transparency of agency guidance documents. Most agencies have substantially complied with these requirements by updating their Web sites so the public can know what guidance applies to them and have the opportunity to provide feedback on significant guidance.

For example, EPA and the Department of Labor have done outstanding jobs of making their guidance documents available to the public. Other agencies have made a lot of progress, but have not met all of the bulletin's requirements, and we are continuing to work with the agencies. But overall, we are pleased with their progress.

On the same day that OMB released the final bulletin, the President issued Executive Order 13422, which amended EO 12866, to clarify OMB's authority to coordinate interagency review of agency significant guidance documents. Before issuance of these amendments, OMB reviewed some agency guidance documents, but the process was not as systematic.

EO 13422 also made several process amendments to EO 12866 to encourage good government practices, and I would be happy to discuss implementation of those if you would like.

But in conclusion, let me wrap up by observing that the executive oversight of agency rulemaking has a long history that transcends party lines. It is important for a well-functioning, accountable regulatory system that meets the needs of the American people.

Thank you.

[The prepared statement of Ms. Dudley follows:]

PREPARED STATEMENT OF THE HONORABLE SUSAN E. DUDLEY

SUSAN E. DUDLEY
ADMINISTRATOR,
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
UNITED STATES HOUSE OF REPRESENTATIVES

May 6, 2008

Chairwoman Sanchez, Ranking Member Cannon, and distinguished Members of this Subcommittee, thank you for inviting me to testify at today's hearing titled "Rulemaking Process and the Unitary Executive Theory."

As the Administrator of the Office of Information and Regulatory Affairs (OIRA), and as someone who served as a career economist on its staff in the 1980s, I am pleased to be here today to talk with you about OIRA's role in the rulemaking process and also the history of executive oversight of the regulatory process.

Role of OIRA

OIRA was created as part of the Office of Management and Budget (OMB) by the Paperwork Reduction Act of 1980, more than twenty-five years ago. In fact, our 27th anniversary was at the beginning of last month. Staffed almost exclusively by career civil servants, OIRA has served Administrations, both Democratic and Republican, for decades by providing centralized oversight and interagency coordination of federal information, regulatory, and statistical policy.

While OIRA's current regulatory oversight functions are authorized by Executive Order 12866, issued by President Clinton in 1993, every President since at least the early 1970s has established some form of executive oversight of the regulatory process within the Executive Office of the President. For example, before the formation of OIRA, President Carter issued Executive Order 12044, "Improving Government Regulations," which established general principles for regulating and required regulatory analyses for major regulations. The Council on Wage and Price Stability (CWPS), the Office of Management and Budget, and the Regulatory Analysis

Review Group chaired by the Council of Economic Advisors reviewed the regulatory analyses of major regulations. The Carter Administration helped to institutionalize regulatory review by the Executive Office of the President and the utility of benefit-cost analysis for regulatory decision makers.

President Reagan formalized the process in 1981 when he issued Executive Order 12291 that gave the newly created OIRA the mandate to analyze regulations. As part of a reorganization, the regulatory analysis staff of CWPS were transferred into OIRA. Executive Order 12291 required, to the extent permitted by law, that administrative decisions be based on adequate information concerning the need for and consequences of proposed government action, and that regulatory actions should maximize the net benefits to society. President George H. W. Bush continued the use of Executive Order 12291.

When President Clinton took office in 1993, he replaced Executive Order 12291 with Executive Order 12866. In many ways, Executive Order 12866 mirrors its predecessor, although it reduced the number of regulations reviewed by OMB from about 2,200 a year to about 600, a number that has remained relatively stable since Executive Order 12866 became effective. Executive Order 12866 reinforces the philosophy that regulations should be based on an analysis of the costs and benefits of all available alternatives, and that agencies should select the regulatory approach that maximizes net benefits to society, unless otherwise constrained by law.[1]

Over more than three decades, regulatory analysis has emerged as an integral part of government accountability – a non-partisan tool for understanding the likely effects of regulation. The principled approach to regulation articulated by Presidents Carter, Reagan, Clinton, and both Presidents Bush has withstood the test of time. The non-partisan nature of this approach is reinforced by the fact that, during the current Bush Administration, we have continued to operate under Executive Order 12866, with some minor amendments that I describe below.

Executive Order 12866

President Clinton's Executive Order 12866 established OIRA as the entity that reviews significant regulations, observing that "[c]oordinated review of agency rulemaking is necessary

[1] Section 1 of Executive Order 12866, as amended.

to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency."[2]

Executive Order 12866 embraces the regulatory philosophy that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people,"[3] and lays out regulatory principles to which agencies should adhere, to the extent permitted by law.[4] I note these principles below:

- "Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action . . . ."[5]
- "Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively."[6]
- "Each agency shall indentify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public."[7]
- "In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction."[8]

[2] Section 2(b) of Executive Order 12866, as amended.
[3] Section 1(a) of Executive Order 12866, as amended.
[4] Section 1(b) of Executive Order 12866, as amended.
[5] Section 1(b)(1) of Executive Order 12866, as amended.
[6] Section 1(b)(2) of Executive Order 12866, as amended.
[7] Section 1(b)(3) of Executive Order 12866, as amended.
[8] Section 1(b)(4) of Executive Order 12866, as amended.

- "When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. . . ."[9]
- "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[10]
- "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document."[11]
- "Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt."[12]
- "Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities..."[13]
- "Each agency shall avoid regulations and guidance documents that are inconsistent, incompatible, or duplicative with its other regulations and guidance documents or those of other Federal agencies."[14]
- "Each agency shall tailor its regulations and guidance documents to impose the least burden on society . . . ."[15]
- "Each agency shall draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."[16]

[9] Section 1(b)(5) of Executive Order 12866, as amended.
[10] Section 1(b)(6) of Executive Order 12866, as amended.
[11] Section 1(b)(7) of Executive Order 12866, as amended.
[12] Section 1(b)(8) of Executive Order 12866, as amended.
[13] Section 1(b)(9) of Executive Order 12866, as amended.
[14] Section 1(b)(10) of Executive Order 12866, as amended.
[15] Section 1(b)(11) of Executive Order 12866, as amended.

Pursuant to Executive Order 12866, OIRA oversees the regulatory process for the Executive Branch by coordinating interagency review of significant agency regulations. As the office that reviews all of the significant regulations of the Federal government, OMB is in the best position to ensure that the regulatory process flows smoothly, just as it is with its other central review functions with respect to the fiscal budget, legislative proposals, and program management.[17] Additionally, court decisions have recognized the legitimacy of executive branch regulatory review.[18]

Enhancements to the Transparency and Accountability of the Regulatory Process During the Bush Administration

Over the last seven years, the Bush Administration has built on the foundations laid by previous administrations to enhance the oversight and accountability of the regulatory process.

First, we have enhanced OIRA's transparency. As you know, the confidential nature of interagency deliberations is necessary to allow the Executive Branch to engage in open and candid discussions as policy decisions are debated. Over several administrations, OIRA has sought to strike a balance between this legitimate need to protect the deliberative process and the Congress's and the public's need for information from the Executive Branch. In this Administration, we have expanded public disclosure by providing on OIRA's website lists of all meetings held with outside parties on rules under review.[19] We also list on our website all regulations under review.[20] Additionally, once a rule has been published, the public has access to the OIRA docket which contains, among other things, a copy of the draft rule as originally submitted to OIRA by the agency and a copy of the draft rule once OIRA concluded review.

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[16] Section 1(b)(12) of Executive Order 12866, as amended.
[17] Previous OIRA Administrators are supportive of OMB's role in centralized regulatory review. See Sally Katzen, "A Reality Check on an Empirical Study: Comments on 'Inside the Administrative State,'" 105 Mich. L. Rev. 1497, 1505 (2007) ("[The agency] is pursuing its parochial interest; OIRA is tempering that with the national interest, as it should."); Christopher C. DeMuth & Douglas H. Ginsburg, "White House Review of Agency Rulemaking," 99 Harv. L. Rev. 1075, 1081-85 (1986) (OMB is well-suited to perform centralized regulatory review because, among other reasons, it has no program responsibility and is accountable only to the president, it subjects proposed rules to a "hard look" before they are issued and ensures that serious policy disagreements will be brought to a president's attention, and its staff is expert in the field of regulation itself).
[18] See, e.g., Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981) ("The Court recognizes the basic need of the President [in that case, President Carter] and his White House staff to monitor the consistency of executive agency regulations with Administration policy.").
[19] See http://www.whitehouse.gov/omb/oira/meetings.html.
[20] See http://www.reginfo.gov/public/do/eoPackageMain.

Second, we have made strides in making rulemaking more accessible to the public through the advent of e-Rulemaking. Over the last five years, e-Rulemaking has transformed access to the federal government rulemaking process. Regulations.gov has brought government-wide information together, and made it searchable. Users of regulations.gov can locate regulations on a particular subject, determine whether the rules are open for public comment, access supporting documents, file comments on proposed rules, and even read comments filed by others. Another e-Rulemaking advancement is the online publication of the Unified Agenda and Regulatory Plan. Last fall, for the first time, they became available in an electronic format that offers users an enhanced ability to obtain and search for information on upcoming regulations.

Third, OIRA has undertaken several initiatives related to rulemaking: (i) Circular A-4; (ii) Information Quality Guidelines; (iii) Peer Review Bulletin; (iv) the Final Bulletin for Agency Good Guidance Practices, (v) amendments to Executive Order 12866; and (vi) the Updated Principles for Risk Analysis. All serve to reinforce OIRA's emphasis on well-reasoned rulemakings and the use of high quality information when making regulatory decisions.

Circular A-4

For more than 20 years, OMB has reviewed the regulatory impact analyses produced by the agencies using economic "best practices," carefully developed through notice and comment procedures. OMB and the agencies currently use Circular A-4,[21] which was issued in 2003, after public comment, and interagency and peer review. OMB issued Circular A-4 to provide agencies with state-of-the-art guidance in complying with the requirements for regulatory analysis of economically significant rules as set forth in Executive Order 12866. This Circular advises agencies how to standardize the way that benefits and costs of Federal regulatory actions are measured and reported to ensure consistency and transparency across the Federal government. Circular A-4 refines OMB's "Best Practices" document of 1996, which was issued as a guidance in 2000 and reaffirmed in 2001. The 1996 Best Practices guidance reaffirmed guidance originally issued for notice and comment by OMB in 1988 as Appendix V of the Regulatory Program of the United States Government and issued in final form in the 1990 Regulatory Program.

[21] Circular A-4 is available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

Information Quality Guidelines

The Information Quality Act of 2001 required OMB to provide guidance to Federal agencies to ensure and maximize the quality, objectivity, and integrity of information they disseminate.[22] In 2002 after taking public comment, OMB issued Information Quality Guidelines that require agencies to establish basic standards of quality and administrative mechanisms to ensure such quality.[23] In turn, agencies issued their own information quality guidelines that can be located on their websites. In August 2004, OIRA issued a memorandum to agencies asking them to increase the transparency of the process by posting all Information Quality correspondence on agency websites.[24]

Peer Review Bulletin

OMB's Peer Review Bulletin became effective in 2005.[25] It established that important scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government. Peer reviews serve to enhance the quality and credibility of the Federal government's scientific information that often serves as the basis for rulemakings. Agencies are also posting their peer review agendas on their websites.

Final Bulletin for Agency Good Guidance Practices

In 2007, after soliciting and responding to public and interagency comment, OMB issued a Final Bulletin for Agency Good Guidance Practices, to increase the quality, accountability, and transparency of agency guidance documents.[26]

The impetus behind the Good Guidance Bulletin is that while guidance documents do not have the force of law, they can nevertheless have a significant impact on American businesses, workers, consumers, and State, local and tribal governments. Well-designed guidance documents serve many important functions in regulatory programs, such as advising and assisting individuals, small businesses and other regulated entities in their compliance with agency regulations, as well as furthering consistency and fairness in an agency's enforcement of

[22] Section 515 of the Treasury and General Government Appropriations Act for FY2001 (Pub. L. No. 106-554).
[23] See http://www.whitehouse.gov/omb/inforeg/iqg_oct2002.pdf.
[24] See http://www.whitehouse.gov/omb/inforeg/info_quality_posting_083004.pdf.
[25] See http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf.

its regulations. However, agency guidance that has an impact on society equivalent to that of a regulation should be subject to an appropriate level of review, within an agency, by other agencies with related missions, and by the public. Many of those providing public comments on the draft bulletin expressed support for OMB's issuance of it.[27]

To accomplish its goal, the Bulletin established policies and procedures for the development, issuance, and use of significant guidance documents by Executive Branch departments and agencies:

- In each agency, appropriate officials will review and approve the agency's issuance of significant guidance documents.
- Agencies will maintain on their websites current lists of their significant guidance documents that are in effect, so that the public can know what guidance applies to them.
- Agencies will provide the public with access to and the opportunity to provide feedback on the significant guidance documents of the agency. Agencies will advertise on their websites a means for the public to submit comments electronically on these guidance documents.
- For those guidance documents that are economically significant, agencies will publish notices in the Federal Register announcing that the draft documents are available (on the internet or in hard copy), invite public comment on them, and post on their websites response-to-comments documents.

Most agencies have substantially complied with these requirements by updating their websites. For example, the Department of Labor and the Environmental Protection Agency have done outstanding jobs of making their guidance documents available to the public. Other agencies have made a lot of progress but have not yet met all of the Good Guidance Practices Bulletin's requirements. For example, some have not completed cataloguing their existing guidance

[26] See http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf.
[27] See public comments on the draft Good Guidance Practices Bulletin, *available at* http://www.whitehouse.gov/omb/inforeg/good_guid/c-index.html.

documents and some have not yet provided adequate contact information for the public. We will continue to work with the agencies but are pleased with their progress overall.

Amendments to Executive Order 12866

Another significant improvement to the agency guidance document process is Executive Order 13422,[28] issued by the President in January 2007, which amended Executive Order 12866 to clarify OMB's authority to coordinate interagency review of agencies' significant guidance documents.[29] Before the issuance of these amendments, OMB reviewed some agency guidance documents but the process was informal.

Executive Order 13422 also made several process amendments to Executive Order 12866 to encourage good government practices. The first recognizes that a good regulatory analysis is more than a summation of benefits and costs. Both President Reagan's & President Clinton's Executive Orders directed agencies and OIRA first to identify the need for the regulatory action before undertaking benefit-cost analysis. President Clinton was more explicit than President Reagan regarding this first step, stating in Executive Order 12866, Section 1, in the Statement of Regulatory Philosophy and Principles:

> Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.

President Bush's recent amendments to Executive Order 12866 left that language in place, but made the "market failure" language more prominent in a subsequent subsection of Section 1:

> Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.

[28] See http://www.whitehouse.gov/omb/inforeg/eo12866/fr_notice_eo12866_012307.pdf.
[29] Section 9 of Executive Order 12866, as amended.

Increased emphasis on first identifying the compelling public need before launching into a benefit-cost analysis perhaps reflects a growing awareness that the best benefit-cost analysis in the world cannot improve upon an outcome if the agency has not first identified a core problem that cannot be addressed by other means.

The amended Executive Order also required agency heads to designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer (RPO), to advise OMB of the designation, and to update OMB annually on the status of this designation.[30] In testimony before this Subcommittee (see attachment) on February 13, 2007,[31] Steven Aitken, who was serving as the Acting OIRA Administrator when the Executive Order amendments and the Final Bulletin for Agency Good Guidance Practices were issued, explained the rationale behind the change to the Regulatory Policy Officer. I will not go over his testimony in detail but, in summary, he made five points that deserve emphasis:

- Regulatory Policy Officers are not new; in 1993, when President Clinton issued Executive Order 12866, he directed each agency head to designate an RPO;
- A Presidential Appointee is appointed by the President and should not be confused with "political appointees" appointed by the agency head;
- The amendments to the Executive Order place no restrictions on the agency head's discretion in choosing which Presidential Appointee within the agency to designate as the agency's Regulatory Policy Officer;
- The amendments to the Executive Order do not change the fact that the Regulatory Policy Officer reports to the agency head; and
- The chief advantage of having a Presidential Appointee serve as the Regulatory Policy Officer is that it ensures accountability. For example, the Regulatory Policy Officer can testify before Congress.

[30] Section 6(a)(2) of Executive Order 12866, as amended.
[31] See http://www.whitehouse.gov/omb/legislative/testimony/oira/aitken_02132007.pdf.

OMB has placed on its website a list of agency Regulatory Policy Officers, thereby making it quite transparent who is serving in this capacity for each of the agencies – for example, the General Counsel for the Department of Agriculture, the Deputy Secretary for the Department of Health & Human Services, the General Counsel at the Department of Housing & Urban Development, and the Assistant Attorney General for the Office of Legal Policy at the Department of Justice.

And to emphasize that these positions are not new, I would like to point out that there is substantial overlap between those serving as RPOs before the issuance of the Executive Order amendments and those serving as RPOs after. For example, those designations have not changed for the Departments of Commerce, Health & Human Services, Homeland Security, Justice, and Transportation. We do not know the extent of the overlap, however, because OIRA did not have an up-to-date listing of the RPOs when the Executive Order amendments were issued. The amendments provided us with an opportunity to get these important updates.

Updated Principles for Risk Analysis

Finally, in 2007, OMB and the Office of Science and Technology Policy jointly issued a memorandum to agencies on Updated Principles for Risk Analysis. This memorandum reiterates principles released by the Clinton Administration in 1995 and reinforced them with more recent guidance from the scientific community, Congress, and the Executive Branch.

The Memorandum reinforces generally-accepted principles for risk analysis articulated in 1995 related to environmental, health, and safety risks.[32] As a whole, the Memorandum endeavors to enhance the scientific quality, objectivity, and utility of Agency risk analyses and the complementary objectives of improving efficiency and consistency among the Federal family. For example, the Memorandum articulates the following principles: (i) the extent of analysis should be commensurate with the nature and significance of the determination; (ii) agencies should use the best reasonably available scientific information to assess risks; (iii) judgments

[32] While many of the principles presented in this Memorandum may be relevant to other fields, such as financial or information technology risk analyses, the focus of this Memorandum is on those risk analyses related to environmental, health, and safety risks.

used in developing a risk assessment should be stated explicitly; (iv) risk management goals should be stated explicitly; and (v) agencies should coordinate risk reduction efforts when feasible and appropriate.

Conclusion

Executive oversight of agency rulemaking has a long history that transcends party lines. It is important for a well-functioning, accountable regulatory system that meets the needs of the American people. Thank you very much for the opportunity to testify in today's hearing. I would be happy to answer any questions you may have.

ATTACHMENT

STATEMENT OF STEVEN D. AITKEN
ACTING ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

February 13, 2007

Chairman Sanchez, Ranking Member Cannon, and distinguished Members of this Subcommittee, thank you for inviting me to this hearing and for giving me the opportunity to testify before you today on the recently issued Executive Order 13422 and the related OMB Bulletin on Agency Good Guidance Practices.

I am Steven D. Aitken, the Acting Administrator of the Office of Information and Regulatory Affairs (OIRA), an office within the Office of Management and Budget (OMB). I have worked at OMB for nearly 18 years. Except for the past eight months when I have served as OIRA's Acting Administrator, I have served in the Office of General Counsel at OMB, first as an Assistant General Counsel and then as Deputy General Counsel.

A few weeks ago, on January 18th, the President issued Executive Order 13422, which made several amendments to Executive Order 12866 on "Regulatory Planning and Review." The most important of these amendments relate, not to the regulations that Federal agencies develop, but rather to the guidance that Federal agencies develop and provide to the public. In addition, also on January 18th, the OMB Director issued the OMB Bulletin for Agency Good Guidance Practices. This is the final version of the bulletin that OMB issued in proposed form for public comment in November 2005.[1]

As I will go on to explain, the Bulletin and the recent Executive Order share a common goal: namely, the good-government objective of improving the way that the Federal government does business – by increasing the quality, public participation, and accountability of agency guidance documents and their development and use. Moreover, as I will further explain, the Bulletin and the new Executive Order will operate in a complementary fashion to improve agency guidance documents. For this reason, in order to explain the Executive Order's guidance provision, it is first necessary to explain the common background for both the Bulletin and the

[1] Executive Order 13422 and the Final Bulletin are published in the Federal Register at, respectively, 72 FR 2763 (January 23, 2007), and 72 FR 3432 (January 25, 2007). OMB requested public comment on the proposed bulletin at 70 FR 71866 (November 30, 2005), and extended the comment period at 70 FR 76333 (December 23, 2005). These documents, along with the public comments that OMB received on the proposal and the OMB Director's memorandum issuing the Bulletin (Memorandum M-07-07), are available on OMB's website. The original version of Executive Order 12866, issued in 1993, was published in the Federal Register at 58 FR 51735 (October 4, 1993). Executive Order 12866 was previously amended once, in 2002, by Executive Order 13258, which was published in the Federal Register at 67 FR 9385 (February 26, 2002).

Executive Order and then to explain how the Bulletin is designed to improve the way that agency guidance documents are developed, issued and used. I will then provide a description and explanation of the Executive Order's guidance provision.

Following that, I will discuss the recent Executive Order's other non-guidance provisions. The first four that I will discuss are (1) its requirement that the already-existing Regulatory Policy Officer in each agency be designated by the agency head from among the agency's Presidential appointees (most of the agencies' Regulatory Policy Officers were already Presidential appointees, and also subject to Senate confirmation), and its typographical-error reference to a Regulatory Policy "Office" rather than "Officer"; (2) its requirement that an agency's commencement of a rulemaking either be authorized by the agency head or be approved by the agency's Regulatory Policy Officer (which will mean in practice that, in most if not all cases, an agency's commencement of a rulemaking will be authorized or approved by an agency official who is subject to Senate confirmation); (3) requirement that each agency aggregate the costs and benefits of the individual rules in the agency's section of the annual Regulatory Plan (Executive Order 12866 already required the agencies to include in the Regulatory Plan the estimated costs and benefits for each rule, and thus the only new feature is that the agency – rather than the public – will do the summing-up of the already-reported costs and benefits); and (4) its encouragement of agencies to consider using the Administrative Procedure Act's formal (rather than informal) rulemaking procedures for the agency's resolution of complex determinations.

Finally, I will discuss the recent Executive Order's amendment regarding "market failure," and I will seek to correct the misunderstandings that have arisen regarding this amendment. In sum, as I will explain further, the recent Executive Order does *not* introduce the concept of a market failure into Executive Order 12866; that concept has been a prominent feature of Executive Order 12866 since it was originally issued by President Clinton in 1993. In addition, the recent Executive Order does *not* make the identification of a market failure the only basis on which a Federal agency can justify regulatory action. Rather, the recent Executive Order expressly states that an agency can justify a regulation by reference to an "other specific problem that [the agency] intends to address." Moreover, the recent Executive Order leaves untouched the provision in Executive Order 12866 that expressly directs Federal agencies to "promulgate . . . such regulations as are required by law, [or] are necessary to interpret the law." In many cases, when a Federal agency is issuing a regulation, the agency is doing so for just those law-based reasons, and this will continue to be the case; nothing in Executive Order 13422 changes this.

Having explained what the new "market failure" language does *not* do, I will then explain what it actually *does* do, which is two modest things.

First, Executive Order 13422 states that the agency "shall identify *in writing*" the problem -- whether it is a market failure "or other specific problem" – that the agency "intends to address" through regulatory action. Stating explicitly that Federal agencies shall identify "in writing" the problem that the agency is seeking to remedy through regulatory action does *not* impose a new requirement on rulemaking agencies. Even if an agency did not identify in writing the precise nature of the problem that the agency is seeking to remedy through regulatory action

(in order to assist the agency in *its own analysis* of whether regulatory action is warranted and, if so, which regulatory alternatives would best accomplish the agency's intended result), the agency should be doing so in the preamble to the proposed rule (to assist the public in understanding the agency's proposal and in offering their comments on it) and in the preamble to the final rule (to persuade the public, Congress, and the courts that the agency has exercised its regulatory authority in a reasonable and well-considered manner).

Second, in order to increase the transparency of Executive Order 12866, the recent Executive Order incorporates into Executive Order 12866 a reference to three classic examples of what constitutes a "market failure" – namely, externalities (which justify, e.g., the regulation of pollution), market power (which justify, e.g., the regulation of natural monopolies), and lack of information (which justify, e.g., the nutritional labeling of packaged foods). These three examples are *not* new to the implementation of Executive Order 12866. These examples were found in the discussion of "market failure" that was contained in the 1996 "Economic Analysis of Federal Regulations under Executive Order No. 12866" document that former OIRA Administrator Sally Katzen (working with the former Chairman of the Council of Economic Advisers, Joseph Stiglitz) issued to Federal agencies three years after President Clinton issued Executive Order 12866. Moreover, these three examples were contained in the draft Circular on regulatory cost-benefit analysis that OMB issued for public comment in 2003 and are contained in the final Circular A-4 that OMB issued later that year (and which remains in effect).

Background on the Good Guidance Provisions of the Bulletin and Executive Order:

As OMB has previously stated, agency guidance documents can have "enormous value."[2] As OMB explained in 2002: "As the scope and complexity of regulation and the problems it addresses have grown, so too has the need for government agencies to inform the public and provide direction to their staffs. To meet these challenges, agencies have relied increasingly on issuing guidance documents."[3] Guidance documents are issued by agencies throughout the Federal Government, and they address the wide range of societal activities that are affected, in one way or the other, by the Federal Government and its programs. Thus, it is not surprising that, depending on the situation, agency guidance can be addressed to individuals, businesses (both small and large), organizations, State, local, and tribal governments, and others.

For instance, guidance can take the form of an agency explaining to members of the public how they can participate in a Federal program. An example of this kind of guidance is the *Medicare and You* handbook that the Centers for Medicare and Medicaid Services (CMS) distribute to Medicare beneficiaries annually.

Guidance can also take the form of an agency providing advice and assistance to members of the public about recommended actions to ensure that they are in compliance with Federal laws and regulations. One element of this guidance can be explaining to the regulated community how the agency interprets or intends to enforce certain laws and regulations. In

[2] Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations* (2002), p. 72.
[3] Office of Management and Budget, Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations, 67 FR 15014, 15034 (March 28, 2002).

addition to providing advice and assistance to the regulated community on how to comply with the agency's regulations, such guidance also furthers consistency and fairness in an agency's enforcement of its regulations.[4] Depending on the context, the audience for this guidance can include individuals, small entities (such as small businesses and organizations, as well as local governments), large corporations, and/or State governments.

Examples of this type of guidance are the compliance-assistance guides that Federal agencies prepare and make available to small businesses. Congress has required Federal agencies to prepare and issue such guidance in the Small Business Regulatory Enforcement Fairness Act of 1996.[5] In addition, Congress in the Small Business Paperwork Relief Act of 2002[6] assigned to OMB the responsibility, which is carried out by OIRA, of publishing annually in the *Federal Register* a notice that refers to small business the internet site where they can locate the compliance assistance resources that Federal agencies have prepared for their use. OIRA published the 2006 notice last summer,[7] where OIRA explained that small businesses can go to one Internet address (www.business.gov/sbpra) and find the compliance-assistance resources that are available from the 15 Cabinet Departments and 25 other Federal agencies.

In sum, agency guidance documents are intended to -- and do -- have an impact on society. Depending on the situation, this impact can be relatively small or can be very substantial. As a result, while it is the case that guidance documents (unlike regulations) are not legally binding on the public, agency guidance documents nevertheless can potentially have an impact on society that is of comparable magnitude to the impact that regulations have on society.

In recognition of the impact that its guidance has on society, the Food and Drug Administration (FDA) in February 1997 issued a "Good Guidance Practices" document to govern how the FDA develops, issues, and uses its own guidance documents.[8] Later that year, and building on this FDA policy, Congress in the Food and Drug Administration Modernization Act of 1997[9] directed the FDA to follow several procedures in its development, issuance, and use of its guidance documents.

One of the principal congressional requirements in the 1997 Act is that FDA "develop guidance documents with public participation and ensure that information identifying the existence of such documents and the documents themselves are made available to the public both in written form and, as feasible, through electronic means."[10] To this end, Congress directed

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[4] "Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency by simplifying and expediting agency enforcement efforts, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties." Office of Management and Budget, Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations, id., 67 FR at 15034.

[5] P.L. 104-121, Title II, Subtitle A; 5 U.S.C. § 601 note.

[6] P.L. 107-198, Section 2(a); 44 U.S.C. § 3504(c)(6).

[7] 71 FR 39691 (July 13, 2006).

[8] 62 FR 8961 (February 27, 1997).

[9] P.L. 105-115, § 405; 21 U.S.C. § 371(h).

[10] 21 U.S.C. § 371(h)(1)(A). This direction was consistent with prior recommendations by the Administrative Conference of the United States and the American Bar Association that agencies provide the public with an opportunity to comment on guidance documents. See Administrative Conference of the United States, Rec. 92-2, 1 C.F.R. 305.92-2 (1992) (agencies should afford the public a fair opportunity to challenge the legality or wisdom of

FDA to provide the public with an opportunity to comment on its guidance, either *before* or *after* its issuance, depending on the level of significance of the particular guidance document.[11] "For guidance documents that set forth initial interpretations of a statute or regulation, changes in interpretation or policy that are of more than a minor nature, complex scientific issues, or highly controversial issues, [FDA] shall ensure public participation prior to implementation of guidance documents, unless [FDA] determines that such prior public participation is not feasible or appropriate. In such cases, [FDA] shall provide for public comment upon implementation and take such comment into account."[12] By contrast, "[f]or guidance documents that set forth existing practices or minor changes in policy, [FDA] shall provide for public comment upon implementation."[13]

Congress also directed FDA to follow several additional requirements. For example, FDA "shall ensure . . . uniform internal procedures for approval of [guidance] documents"[14] and "shall ensure that employees of [FDA] do not deviate from [FDA's] guidance without appropriate justification and supervisory concurrence."[15] In addition, FDA "shall maintain electronically and update and publish periodically in the Federal Register a list of guidance documents," and "[a]ll such documents shall be made available to the public."[16]

Finally, Congress directed FDA, following the agency's review of the effectiveness of its previously-issued Good Guidance Practices document, to promulgate a regulation in 2000 "consistent with [the statute] specifying the policies and procedures of the [FDA] for the development, issuance, and use of guidance documents."[17] Following this directive, FDA in early 2000 issued for public comment a proposed rule on Good Guidance Practices.[18] After it reviewed and considered the public comments, FDA finalized the rule later that year.[19]

The FDA's Good Guidance Practices regulation is found at 21 C.F.R. § 10.115. Following the congressional direction in the 1997 Act, the FDA regulation provides that FDA, among other things –

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policy statements and to suggest alternative choices); American Bar Association, Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting, August 10-11, 1993, Vol. 118, No. 2, at 57 ("the American Bar Association recommends that: Before an agency adopts a nonlegislative rule that is likely to have a significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoption comment and give notice of this opportunity.").

[11] For the legislative history of this provision, see "Food and Drug Administration Modernization and Accountability Act of 1997," S. Rep. No. 105-43, at 26 (1997) (raising concerns about public knowledge of, and access to, FDA guidance documents, lack of a systematic process for adoption of guidance documents and for allowing public input, and inconsistency in the use of guidance documents).

[12] 21 U.S.C. § 371(h)(1)(C).

[13] Id. § 371(h)(1)(D).

[14] Id. § 371(h)(2).

[15] Id. § 371(h)(1)(B).

[16] Id. § 371(h)(3).

[17] Id. § 371(h)(5).

[18] 65 FR 7321 (February 14, 2000) (proposed rule).

[19] 65 FR 56468 (September 19, 2000) (final rule).

- shall seek public comment on its guidance documents, either before or after their issuance (depending on their level of significance) and consider the comments;[20]

- shall make its guidance documents easily available to the public by posting it on the Internet;[21]

- "must not include [in its guidance documents] mandatory language such as 'shall,' 'must,' 'required,' or 'requirement,' unless FDA is using these words to describe a statutory or regulatory requirement";[22]

- "must have written procedures" in each FDA center and office "for the approval of guidance documents," which procedures "must ensure that issuance of all documents is approved by appropriate senior FDA officials";[23] and

- must provide members of the public with an opportunity to submit and seek resolution of a complaint "that someone at FDA did not follow the requirements in [the regulation] or . . . treated a guidance document as a binding requirement."[24]

These FDA regulations went into effect in October 2000, and therefore have now been in operation for six years.

In sum, as I have just outlined, the Congress and the FDA both recognized that, because of the impact that FDA's guidance can have on society, it was important that FDA's guidance be subject to public comment (before or after its issuance); be readily available to the public; be developed through agency procedures that ensure the review and approval of appropriate agency officials before it is issued; be followed in practice by agency employees; and avoid the inclusion of language that would suggest to the public that the document is mandatory rather than what it actually is – namely, guidance.[25] It should also be noted that these requirements, in particular the requirements for internal-agency review and approval and for public comment, help to ensure that guidance documents are of high quality.

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[20] 21 C.F.R. § 10.115(g).

[21] Id. This direction is consistent with the 2001 recommendation by the American Bar Association. 3 American Bar Association, "Recommendation on Federal Agency Web Pages" (August 2001) (agencies should maximize the availability and searchability of existing law and policy on their websites and include their governing statutes, rules and regulations, and all important policies, interpretations, and other like matters on which members of the public are likely to request).

[22] Id. § 10.115(i)(2).

[23] Id. § 10.115(j).

[24] Id. § 10.115(o).

[25] Congressional interest in, and concern about, agency guidance documents is also reflected in House Committee on Government Reform, "Non-Binding Legal Effect of Agency Guidance Documents," H. Rep. No. 106-1009 (106th Cong., 2d Sess. 2000) (criticizing "back-door" regulation), and the Congressional Accountability for Regulatory Information Act, H.R. 3521, 106th Cong., § 4 (2000) (proposing to require agencies to notify the public of the non-binding effect of guidance documents).

The FDA Good Guidance Practices regulation also addresses concerns that courts have raised about the improper development and use of agency guidance documents. In its 2000 decision in the Appalachian Power case, the United States Court of Appeals for the District of Columbia Circuit discussed these concerns:

> "The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule requiring notice and comment). See also Gen. Elec. Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as legislative rule requiring notice and comment); Chamber of Commerce v. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as legislative rule requiring notice and comment).

OMB's Issuance of the Proposed and Final Bulletin:

OMB believes that Federal agency guidance should be developed, issued and used through an agency's adherence to procedures that ensure quality, transparency, public participation, coordination, and accountability. For this reason, OMB developed (in consultation with Federal agencies) a draft OMB Bulletin that would establish as government-wide policy a set of "best practices" for achieving these goals.

As I earlier noted, OMB then sought public comment on this draft bulletin by issuing it in November 2005 as a proposal for public comment.[26] OMB received 31 public comments on the proposal, and these comments are available on OMB's website. As evidence of the diverse nature of Federal guidance documents, and of the groups in American society that are affected by them, below are examples of some of the associations that submitted comments (as noted below, these listed associations supported OMB's development of a bulletin on Good Guidance Practices, while also providing their suggestions for how OMB could improve the bulletin):

> **-- the Association of American Medical Colleges**, representing all 125 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, and 94 academic and scientific societies ("The AAMC commends the OMB for its proposal to establish consistent and appropriate standards for developing good guidance practices within federal agencies.");

[26] 70 FR 71866 (November 30, 2005).

-- **the National Association of Home Builders**, representing more than 220,000 members involved in home building, remodeling. multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction ("The National Association of Home Builders (NAHB) would like to thank the Office of Management and Budget (OMB) for proposing a process to bring transparency and consistency to Executive Branch activities that affect the public directly, but do not qualify as rules under the Administrative Procedure Act (APA).");

-- **the American Society of Safety Engineers**, representing 30,000 members ("ASSE commends OMB/OIRA for taking a proactive stance to ensure that agencies can readily provide interpretation and guidance of regulations, but still do so in a manner that affords due process to the regulated community and that is in accordance with the requisites of the Administrative Procedure Act, 5 USC 551 et seq.");

-- **the National Funeral Directors Association**, representing more than 11,000 funeral homes in all 50 states ("NFDA supports the Office of Management and Budget (OMB) proposal to establish standards to increase the quality and transparency of agency guidance practices and the guidance documents produced through them.");

-- **the Association of Metropolitan Planning Organizations** ("In general, AMPO strongly supports the Proposed Bulletin's intent and reliance on the guidance practices adopted by the Food & Drug Administration ('FDA') at 21 C.F.R. 5 10.115.");

-- **the Ornithological Council**, which consists of eleven leading scientific ornithological societies - the American Ornithologists' Union, Association of Field Ornithologists, CIPAMEX, Cooper Ornithological Society, Neotropical Ornithological Society, Pacific Seabird Group, Raptor Research Foundation, Society of Canadian Ornithologists/La Société des Ornithologistes du Canada, Society for Caribbean Ornithology, Waterbird Society, and Wilson Ornithological Society - that together have a membership of nearly 6,500 ornithologists ("we would like to express our gratitude to OIRA for its efforts to improve agency guidance practices");

-- **the Aircraft Owners and Pilots Association**, representing over 407,000 members ("AOPA shares OMB's concern that agency guidance practices should be more transparent, consistent and accountable. We also agree with OMB that the absence of procedural review mechanisms undermines the lawfulness, quality, fairness and accountability of agency policymaking.");

-- **the National Leased Housing Association,** which represents the interests of housing agencies, developers, lenders, housing managers and others in providing federally assisted rental housing, and whose members are primarily involved in the Section 8 housing programs and are involved with the operation of rental housing for over three million families ("we commend OMB for its efforts");

> **-- the American Road and Transportation Association,** whose membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country ("Once again, ARTBA is extremely supportive of the GGP and feels that it represents a significant step forward in the regulatory process. It will engender fairness and improved dialogue between agencies and those that have a vital stake in the guidance they issue. ARTBA and our members are eager to take advantage of the new opportunities for involvement in the guidance process offered by the GGP and help OMB make the GGP standard agency practice."); and
>
> **-- the Associated Equipment Distributors**, representing 1,200 construction equipment distributors, manufacturers and industry-service firms (" Our association thanks the Office of Management and Budget (OMB) for recognizing the impact that guidance material issued by federal regulatory agencies has on the regulated community. We agree with the OMB that transparency in the guidance drafting process is critical, as guidance should not be used for rulemaking.").

As I have indicated, the comment letters from these associations can be found on OMB's website, along with the other comment letters on the proposed bulletin.[27]

On January 18th of this year, after considering the public comments and after further consultation with Federal agencies, the OMB Director issued the Final Bulletin on Agency Good Guidance Practices.[28] The final version of the Bulletin is very similar to the proposal in its overall framework, but – as OMB explained in the preamble to the final Bulletin -- OMB made a number of improvements to the Bulletin in response to comments that we received from the public and during the interagency review process.

The following are a few of the noteworthy provisions of the Bulletin, which reflect the requirements of the FDA's Good Guidance Practices regulation and are designed to improve the quality, transparency, public participation, and accountability of agency guidance documents:

- Each agency will ensure (as agencies should be doing anyway, as a matter of good internal management) that appropriate officials within the agency have reviewed and approved the agency's issuance of "significant" guidance documents;

- Agencies will maintain on their websites current lists of their "significant" guidance documents that are in effect, so that the public can know what guidance applies to them;

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[27] OMB also received comments, some supporting and others opposing the proposed bulletin, from the following (in alphabetical order): the Aeronautical Repair Station Association, the American Bar Association, the American Chemistry Council, the American Composites Manufacturers Association, the American Petroleum Institute, AMGEN, C. Blake McDowell (Professor of Law), Citizens for Sensible Safeguards (OMB Watch), Coalition for Effective Environmental Information, Consumer Specialty Products Association, General Electric Company, Keller and Heckman LLP, McKenna Long & Aldridge LLP, Mercatus Center, National Mining Association, Natural Resources Defense Council, PIMA County (AZ) Wastewater Management Department. Regulatory Checkbook, Sanofi-aventis, Stuart Shapiro Ph.D. (Edward J. Bloustein School of Planning and Public Policy, Rutgers University), U.S. Chamber of Commerce.

[28] OMB Memorandum M-07-07 (January 18, 2007), which is found on OMB's website. The final Bulletin is published in the Federal Register at 72 FR 3432 (January 25, 2007).

- Agencies will provide the public with access to and the opportunity to provide feedback on their "significant" guidance documents. Agencies will advertise on their websites a means for the public to submit comments electronically on these guidance documents; and

- For those guidance documents that are "economically significant" (e.g., , a guidance document that "may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more"), agencies will publish drafts of the documents in the Federal Register, invite public comment on them, and prepare responses to the comments before finalizing the guidance.

In recognition of the potentially broad range of guidance documents that are issued by Federal agencies, the Bulletin also (1) includes certain express exclusions from the definition of "significant" and "economically significant" guidance document; (2) authorizes OMB to exempt "economically significant documents" (singly or by category) from the requirement for *prior* public comment before issuance; and (3) includes an express exception from the Bulletin's requirements for "emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow."

In light of concerns that have been raised about the final Bulletin and the Executive Order, this last point bears emphasis. The Bulletin does *not* stand in the way of a Federal agency responding appropriately to an emergency situation. In addition, the Bulletin does *not* override a Federal agency's obligation to comply with applicable laws.

Executive Order 13422

The Executive Order's Guidance Provision

In the furtherance of its goal to improve the guidance documents that Federal agencies develop and issue, the Bulletin is reinforced by the principal provision in Executive Order 13422, which the President issued, also on January 18th. Through an amendment to Executive Order 12866, which President Clinton issued in 1993, the recent executive order provides for a relatively informal process whereby *some* – but by *no* means all – of the "significant guidance documents" that are developed by Federal agencies will be submitted to OMB for interagency review.

It is important to underscore the point that this amendment provides for an *opportunity* for interagency review, and therefore that guidance documents are *not* treated the same as regulations. When he issued Executive Order 12866 in 1993, President Clinton directed agencies to submit the drafts of all of their "significant" regulations to OIRA for review (subject to certain limited exceptions). By contract, agencies are *not* required under the recent amendments to submit all of their "significant" guidance documents to OMB for review. Instead, the recent executive order requires agencies to *inform* OMB of upcoming significant guidance documents, which thereby provides an *opportunity* for interagency review to occur.

In this regard, just as the new Bulletin directs agencies to follow good guidance practices that, to a greater or lesser extent, are probably being followed by many agencies for many of their guidance documents (e.g., posting them on the agency's website), the recent Executive Order -- in recognizing the desirability of ensuring an *opportunity* for interagency review -- also reflects a practice that already happens in a number of situations.

In other words, interagency review of important guidance documents is *not* new. And, one reason why such review is desirable, and already happens, is because the programs and activities of one Federal agency often overlap or have implications for the programs and activities of one or more other Federal agencies. For example, in June of last year, the Department of Health and Human Services (HHS) issued a State Medicaid Director letter that provides guidance on the implementation of the provision in the Deficit Reduction Act of 2005 that requires individuals claiming U.S. citizenship to provide – when initially applying for Medicaid or upon the first redetermination – satisfactory documentary evidence of citizenship or nationality. Before HHS finalized and issued this guidance, OMB ensured that HHS consulted first with affected and interested agencies – the Departments of State and Homeland Security, and the Social Security Administration. This interagency consultation, which took place in a two-week period, ensured that HHS had the benefit of the expertise and experience of these other agencies and that the HHS guidance took into account the interests and programs of these agencies.

This *interagency* coordination, then, had the effect of improving the quality of the HHS guidance in the same way that the quality of guidance can be improved through *public participation* and *internal-agency review and approval*.[29] Thus, by ensuring that there is an *opportunity* for interagency review, this amendment made by Executive Order 13422 serves as a complement to the requirements in the OMB Bulletin for public participation and internal-agency review and approval.

In addition, as OMB explained in March 2002, interagency review of a guidance document is also justified because "interagency review can ensure that agency action is consistent with Administration policy and is beneficial from a broader, societal perspective."[30] This type of review during the development of agency *guidance documents* is entirely appropriate, for the same reason that the courts have held that it is appropriate to conduct this same type of review during the development of agency *regulations*. As the United States Court of Appeals for the District of Columbia Circuit explained in 1981 (in an opinion by Judge Wald):

> "The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in

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[29] OMB made this same general point in March 2002 when OMB asked the public to identify examples of "problematic guidance documents" that would be potential candidates for reform. Office of Management and Budget, Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations, 67 FR 15014, 15035 (March 28, 2002) ("problematic guidance might be improved by interagency review").

[30] Office of Management and Budget, Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations, id., 67 FR at 15035.

> 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.
>
> * * *
>
> "The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House."

Sierra Club v. Costle, 657 F.2d 298, 404, 405-06 (D.C. Cir. 1981). In that decision, the D.C. Circuit upheld the appropriateness of discussions between the White House and the Environmental Protection Agency, regarding a draft Clean Air Act rule. These discussions took place -- and EPA issued the rule -- in 1979, during the Administration of President Carter.

The Executive Order's Non-Guidance Provisions

In addition to providing an opportunity for interagency review of draft guidance documents, the recent Executive Order makes several (non-guidance related) process improvements. As is the case with the guidance amendments in the Executive Order and the new Bulletin, these process improvements are designed to encourage good-government practices. Because there has been some confusion in the press and elsewhere as to the meaning and impact of these changes, let me briefly go through them.

i. Regulatory Policy Officers

Concerns have been raised about the provisions in Executive Order 13422 regarding Regulatory Policy Officers. The initial point that should be made is that such officers are *not* new; when he issued Executive Order 12866 in 1993, President Clinton directed each agency head to designate a Regulatory Policy Officer within the agency. Nor is it new that, under the recent amendment, these Regulatory Policy Officers will be Presidential appointees. While the original EO 12866 did not require that agency heads choose a Presidential appointee to be the agency's Regulatory Policy Officer, the fact is that, in many departments and major agencies, the Regulatory Policy Officer has been a Presidential appointee.

And, I should note that the term "Presidential appointee" should not be confused with "political appointee." Presidential appointees are appointed by the President, whereas agency heads appoint "political appointees" who are in the non-career Senior Executive Service or are under Schedule C; these agency-head appointees are *not* Presidential appointees. Moreover, neither the President nor an agency head can create a Presidentially-appointed position in an

agency. Rather, only Congress can do so. And, when Congress does create a Presidentially-appointed position in an agency, Congress usually provides that this appointee shall be subject to Senate confirmation (a PAS official). Thus, by requiring that agency heads designate a Regulatory Policy Officer from among the agency's Presidential appointees, the President is actually ensuring that, in most cases, the Regulatory Policy Officer will be a PAS official.

In addition, concerns have been raised that Executive Order 13422 may require each agency to establish a new "Regulatory Policy Office" that would be headed by the agency's Regulatory Policy Officer. I would like to allay such concerns by explaining that this reference to a Regulatory Policy "Office" was a typographical error. The reference should have been to a Regulatory Policy "Officer" rather than "Office"; the Executive Order will be implemented accordingly.

ii. Commencement of a Rulemaking

Executive Order 13422 amends Executive Order 12866 to require that an agency's commencement of a rulemaking either be authorized by the agency head or be approved by the agency's Regulatory Policy Officer. As explained above, most if not all of the Regulatory Policy Officers will be -- as they generally have been over the years -- Presidential appointees who are subject to Senate confirmation. In practice, then, this will mean that, in most if not all cases, an agency's commencement of a rulemaking will be authorized or approved by an agency official who is appointed by the President and subject to Senate confirmation.

iii. Aggregation of annual costs and benefits in the Regulatory Plan

Section 4 of President Clinton's Executive Order 12866 established a "Planning Mechanism" that includes an annual *Regulatory Plan* that reports the most significant regulatory actions anticipated in the coming year and thereafter, along with the agency's estimate of each rule's anticipated benefits and costs. Executive Order 13422 amends this section to ask agencies, in addition, to aggregate the estimated costs and benefits of the individual regulations. While the interested public could always sum-up for themselves the cost and benefit estimates for each of the individual rules, this amendment enhances the transparency of the annual *Regulatory Plan* by requiring the agencies to do the aggregation.

iv. The Encouragement of Agencies to Consider Formal Rulemaking

Another of the amendments in Executive Order 13422 encourages rulemaking agencies to consider using the Administrative Procedure Act's formal – rather than informal – rulemaking procedures for the agency's resolution of complex determinations. Agencies already had the option of using the APAs' formal rulemaking procedures, and this amendment simply encourages them to consider the use of a tool that has been – and remains – available to them.

v. Market Failure

Executive Order 13422 amended Section 1(b)(1) of Executive Order 12866, which was – and remains – the first of that Order's "Principles of Regulation." As recently amended, Section

1(b)(1) now states that: "Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem." Before explaining what this amendment *does* do, I would like to explain first what it does *not* do.

First, the concept of market failure is *not* new to this amendment, but instead has been an integral part of Executive Order 12866 since President Clinton issued it in 1993. Indeed, the overarching "Statement of Regulatory Philosophy," in Section 1(a) of the original Executive Order 12866 (*unchanged* by EO 13422), states that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as *material failures of private markets* to protect or improve the health and safety of the public, the environment, or the well-being of the American people" (italics added). Furthermore, the first "Principle of Regulation" that was articulated in Section 1(b) of the original Executive Order 12866 reiterated the requirement that each agency "identify the problem that it intends to address (*including, where applicable, the failures of private markets or public institutions that warrant new agency action*) as well as assess the significance of that problem" (italics added).

Second, the recent Executive Order does *not* make the identification of a market failure the only basis on which a Federal agency can justify regulatory action. The revised section also encourages agencies to identify any "other significant problem it intends to address." For example, recent regulations to provide disaster assistance to victims of Hurricane Katrina provide important social benefits, but do not address a market failure, per se. Moreover, the recent Executive Order leaves untouched the provision in Executive Order 12866 that expressly directs Federal agencies to "promulgate . . . such regulations as are required by law, [or] are necessary to interpret the law." In many cases, when a Federal agency is issuing a regulation, the agency is doing so for just those law-based reasons, and this will continue to be the case; nothing in Executive Order 13422 changes this.

Having explained what the revised "market failure" language does *not* do, I would like to now explain what it actually *does* do, which is two relatively modest things.

First, Executive Order 13422 states that the agency "shall identify *in writing*" the problem -- whether it is a market failure "or other specific problem" – that the agency "intends to address" through regulatory action. Stating explicitly that Federal agencies shall identify "in writing" the problem that the agency is seeking to remedy through regulatory action does *not* impose a new requirement on rulemaking agencies. As an initial matter, an agency should already have been identifying in writing the precise nature of the problem that the agency is seeking to remedy through regulatory action, *in order to assist the agency in its own analysis of whether regulatory action is warranted and, if so, which of the available regulatory alternatives would best accomplish the agency's intended result.*

Thus, in order to comply with the original version of Section 1(b)(1) of Executive Order 12866, agencies as a practical matter would have had to make (or at least should have made) this identification in writing. However, even if an agency did not do so, the agency should still have

identified the problem that it was seeking to remedy through regulatory action in the preamble to the proposed rule (to assist the public in understanding the agency's proposal and in offering their comments on it) as well in the preamble to the final rule (to persuade the public, Congress, and the courts that the agency has exercised its regulatory authority in a reasonable and well-considered manner). In sum, the requirement that agencies identify the need for the regulation in writing is a good-government measure. It encourages greater transparency in rulemaking, by helping the public and others understand the problem the regulation is intended to address, enabling more informed comment on whether the proposed rule will likely meet its objectives and whether there are other, better alternatives to address the identified problem.

Second, in order to increase the transparency of Executive Order 12866, Executive Order 13422 incorporates into Executive Order 12866 a reference to three classic textbook examples of what constitutes a "market failure" – namely, externalities (which justify, e.g., the regulation of pollution), market power (which justify, e.g., the regulation of the rates charged by natural monopolies, such as local gas and electricity distribution services), and lack of information (which justify, e.g., the nutritional labeling requirements for packaged foods). These three examples of market failure are *not* new to the Executive Branch's implementation of Executive Order 12866. To the contrary, three years after President Clinton issued Executive Order 12866 in 1993, these examples were included in the discussion of "market failure" that was contained in the 1996 "Economic Analysis of Federal Regulations under Executive Order No. 12866" document that former OIRA Administrator Sally Katzen (working with former CEA Chairman Joseph Stiglitz) issued to Federal agencies for their use in meeting the analytical requirements of Executive Order 12866 (as well as those of the Unfunded Mandates Reform Act and the Regulatory Flexibility Act).[31]

In its Part I on "Statement of Need for the Proposed Action," the 1996 "Economic Analysis" document had a Section A on "Market Failure," which provided separate descriptions of "Externality", "Natural Monopoly," "Market Power," and "Inadequate or Asymmetric Information." The 1996 "Economic Analysis document also included the following introductory discussion:

> "I. STATEMENT OF NEED FOR THE PROPOSED ACTION
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> "In order to establish the need for the proposed action, the analysis should discuss whether the problem constitutes a significant market failure. If the problem does not constitute a market failure, the analysis should provide an alternative demonstration of compelling public need, such as improving governmental processes or addressing distributional concerns. If the proposed action is a result of a statutory or judicial directive, that should be so stated.

[31] Memorandum for Members of the Regulatory Working Group from OIRA Administrator Katzen, "Economic Analysis of Federal Regulations under Executive Order 12866 (January 11, 1996), available on OMB's website at http://www.whitehouse.gov/omb/memoranda/rwgmemo.html. As Administrator Katzen stated in her transmittal memorandum, the "Economic Analysis" document "represents the results of an exhaustive two-year effort" by an interagency working group chaired by Joseph Stiglitz of the Council of Economic Advisers and Steve Kaplan, the-then General Counsel of the Department of Transportation.

> "A. Market Failure
>
> "The analysis should determine whether there exists a market failure that is likely to be significant. In particular, the analysis should distinguish actual market failures from potential market failures that can be resolved at relatively low cost by market participants. Examples of the latter include spillover effects that affected parties can effectively internalize by negotiation, and problems resulting from information asymmetries that can be effectively resolved by the affected parties through vertical integration. Once a significant market failure has been identified, the analysis should show how adequately the regulatory alternatives to be considered address the specified market failure."

Moreover, the three examples of market failure that are now referenced in the amended Executive Order 12866 (i.e., externality, market power, and lack of information) were contained in the draft Circular on regulatory cost-benefit analysis that OMB issued for public comment and peer review in 2003, and they are contained in the final Circular A-4 that OMB issued later that same year (and which remains in effect).[32]

And, thus, the use of these three market failure examples in the implementation of Executive Order 12866 is *not* new. Moreover, Executive Order 13422 did *not* substantively change the first "Principle of Regulation" in Executive Order 12866 or how this Principle is implemented by the Executive Branch. Instead, all that happened as a result of Executive Order 13422, with respect to these three examples of market failure, is that they are now mentioned in Executive Order 12866 itself (rather than only in the implementation documents). In other words, the recent amendment has simply increased the transparency of Executive Order 12866.

Some have expressed concern that this amendment to Executive Order 12866 could prevent agencies from issuing regulations to protect public health and safety, but this is not correct. Many of the most significant regulations that agencies issue are, in fact, driven by – and are in response to – market failures. As the 1996 OMB "Economic Analysis" document noted, "[e]nvironmental problems are a classic case of externality," and this Administration has issued a number of significant environmental regulations aimed at addressing environmental externalities, including EPA's Clean Air Interstate Rule (CAIR) and its Non-road Diesel Engines Rule. Similarly, regulations to protect homeland security, such as FDA's recent regulations under the Public Health Security and Bioterrorism Preparedness and Response Act, respond to inadequate private market incentives to respond to potential terror threats.

Another type of market failure that is mentioned in the amendment made by Executive Order 13422 stems from lack of information. An example of a regulation that is justified by the "lack of information" market failure was the Food and Drug Administration's recent regulation that requires the nutritional labels on packaged foods to display the amount of trans-fats in them. This labeling requirement is estimated to have considerable public health benefits, by providing consumers important information with which they can make purchasing decisions. Moreover,

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[32] Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations, 68 FR 5492, 5514-15 (February 3, 2003); *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulation* (2003), at pages 121-122 (available on OMB's website).

this rule was the subject of a "prompt letter" that former OIRA Administrator John Graham sent to HHS in 2001 encouraging the agency to issue a rule to require the labeling of trans-fats.[33]

Finally, in both the CAIR and trans-fats rules, identification of a market failure, rather than a specific directive from statute, was the driving force behind the issuance of regulations that are expected to have significant public health and quality of life benefits.

Moreover, as noted above, nothing in this amendment to EO 12866 precludes agencies from justifying regulations on grounds other than the failure of private markets. Nor does it preclude agencies from justifying regulations on the ground that Congress has required the agency to promulgate regulations to address a particular situation, on the grounds that the regulations are necessary to interpret the law, or are made necessary by other compelling public need.

* * *

Thank you again for this opportunity to testify. I would welcome any questions that the Subcommittee has.

[33] Letter from OIRA Administrator Graham to the Department of Health and Human Services regarding trans fatty acids (September 18, 2001) (available on OMB's website).

Ms. SÁNCHEZ. Thank you, Ms. Dudley.

We will now begin the questioning, and I will begin by recognizing myself for 5 minutes of questions.

I am interested in knowing, Ms. Dudley, what your view of the power of the President is to determine the substance of final rules? Do you think that that is appropriate?

Ms. DUDLEY. I am not a constitutional lawyer, but I believe the role of executive oversight, as they have been established by President Carter and subsequent Presidents.

Ms. SÁNCHEZ. Okay. If Congress says that an agency and not the President should promulgate regulations in a particular area, should the President be able to substitute his or her judgment for that of the agency to whom Congress has delegated the rulemaking authority?

Ms. DUDLEY. Executive Order 12866 that we operate under now that was issued by President Clinton in 1993, it gives the agencies primacy in writing their regulations. And my office's role is coordination, review, to ensure consistency with the principles in the executive order.

Ms. SÁNCHEZ. So if I am understanding your answer correctly, the agency would have the final determination of the rulemaking?

Ms. DUDLEY. That is how Executive Order 12866 is characterized, yes.

Ms. SÁNCHEZ. Okay. Because my understanding is that in Section 7 of Executive Order 12866 the President will resolve differences between the agencies and OIRA unless otherwise prohibited by law, and I am sort of interested in knowing how you view that restriction.

For example, could Congress prevent the President from making the final decision on an agency rule?

Ms. DUDLEY. I would probably have to defer that to a constitutional lawyer.

Ms. SÁNCHEZ. You don't have an opinion either——

Ms. DUDLEY [continuing]. In my long experience in this in the regulatory world, but that wouldn't be my expertise.

Ms. SÁNCHEZ. No opinion on the——

Mr. CANNON. She is asking can we limit the President's authority. We do that all the time.

Ms. SÁNCHEZ. I am asking somebody who has inside knowledge whether or not it—because there is this discussion whether Executive Order 12866 is significantly different from 13422. And I maintain that there is quite a large difference in the two executive orders, that they are—the point that I am trying to get at is that Executive Order 12866 gives agencies, I think, primary authority. And that Executive Order 13422, by the subtle changes, the changes that it has made, is trying to take away some of that agency power and put it into the hands of the executive office. And that is my concern. So I am interested in knowing——

Ms. DUDLEY. I could comment on that. Actually, that language in Executive Order 12866 is unchanged. So it is the same language in both, as is the appeals process.

There is a change in the appeals process that we can discuss if you like, but that language remains unchanged.

Ms. SÁNCHEZ. Okay. In your written statement, you mentioned the efforts of your predecessor, John Graham, to increase the transparency of OIRA reviews. Dr. Graham, however, also said that OIRA has its greatest impact on agency rules during information reviews and that agencies should not disclose the changes that are made to rules during this period, at OIRA's suggestion, even after the rules have been published in the Federal register.

How, then, can you say that OIRA is transparent when it is not transparent about the most important part of the process?

Ms. DUDLEY. Informal review of rules is something that agencies might initiate before they have a draft that is really ready for primetime. And so at their request we will begin to look at pieces of regulations before it is ready to be formally submitted.

As I understand it, that is not a new process that John Graham created. That is something that has been ongoing in the Clinton administration as well.

Ms. SÁNCHEZ. I understand that, but how can you say that the process should be more transparent if indeed there is a great amount of changes that happen during the informal process?

Ms. DUDLEY. During the informal process, that is a time when often the agency itself is also working on the regulation. I don't know when would be the bright line to draw and when any draft or idea should be made public.

A decision has been made that when a regulation is submitted formally for OMB review, we provide both that draft and we also provide the draft regulation as it leaves OMB, at the conclusion of review.

So that is something that I think it is quite a bit of transparency. There is always a struggle to balance the need for public to get information and the ability for frank discussions of a deliberative nature before something is complete. And I think that is the balance that has been made.

Ms. SÁNCHEZ. Final question before time runs out. In your written statement, you mentioned OMB Circular A4 and OIRA's increased emphasis on cost-benefit analysis. In your opinion, does OIRA apply that circular equally among the agencies?

Ms. DUDLEY. Circular A4 is actually a—it is based on best practices that were issued in the Clinton administration. It is applied to the extent that statutes permit, and there are some statutes that the full range of things discussed in A4 can be applied and others that cannot.

So, no, it would not be applied equally.

Ms. SÁNCHEZ. My last point was going to be that most of the rules from the Department of Homeland Security have not had monetized cost and/or benefits, yet they have been approved by OIRA, while at the same time rules from EPA have been rejected by OIRA because they hadn't fully monetized the costs or benefits.

And I think that there is—the question that I have is why would the two be treated differently, if the intent is that that circular would apply to all of them?

Ms. DUDLEY. I guess I am not sure I agree with the premise that EPA regulations have been rejected if they don't fully monetize costs and benefits. The fact of the matter is, EPA is very good at doing regulatory analysis. They have been doing it for longer, and

they do a very good job of their regulatory analysis, which includes cost-benefit analysis, but not exclusively.

Department of Homeland Security is a newer agency and we are working closely with them. There are struggles. Some of the benefits and costs of Homeland Security regulations are difficult to get a handle on.

Ms. SÁNCHEZ. But if the goal is to have everybody doing the cost-benefit analysis and some rules are being rejected because it is not adequate and others that are less forthcoming about information, about the costs and benefits, are being allowed to pass, there seems to me some disparate treatment of rules from different agencies.

Ms. DUDLEY. And that is where I can't agree with you. I don't think that you could find—maybe you could. I don't think that EPA rules are being rejected because the cost-benefit analysis is not adequate.

Ms. SÁNCHEZ. Okay. We will have to agree to disagree.

I will now recognize Mr. Cannon for 5 minutes of questions.

Mr. CANNON. Thank you, Madam Chair.

In your good guidance practices, you talked about transparency. Do you encourage agencies to create transparency in requests for guidance as well as the guidance that is given by the agency?

In other words, if a person says, "I need to know how you are going to implement the law in my case," he explains the case, is that going to be made available to other people who might have similar questions?

Ms. DUDLEY. So do you mean people might ask for clarification and a letter that provides clarification?

The good guidance practices applies to significant guidance. Significant in economically significant. That might not be classified as a significant guidance if it applied only to one company or a small group of entities. So it may not cover that.

Mr. CANNON. I have a problem with significant, a word that has some kind of content but it is hard to describe what it actually is. And in a world where Google makes information freely available, significant seems to me to plummet, and it actually bumps into the—it may irritate bureaucrats at some point in time, but if you—I am just going to give a little bit of counsel that I hope you will take kindly. And that is that I think that agencies should be much more transparent and open. And that if an individual has a question that is important to him or his company, the fact that a bureaucrat can say this is not significant, may be the basis for actual persecution, something that we have actually seen among my constituents, and I suspect everyone else's constituents has as well.

So I would hope that in the pursuit of transparency, we recognize the radically lowered cost of information.

And with that, Madam Chair, I appreciate your questioning, and I yield back the remainder of my time.

Ms. SÁNCHEZ. The gentleman yields back.

At this time I will recognize Mr. Keller, the gentleman from Florida, for 5 minutes of questions.

Mr. KELLER. Thank you, Madam Chairman.

Administrator Dudley, thank you for being here today.

Executive Order 13422 and its accompanying good guidance bulletin have now been in effect for 15 months. What, in your view,

has been the overall impact of this executive order and the bulletin?

Ms. DUDLEY. I would say the main impact of both is that guidance documents are—the public has a greater opportunity to see and comment on guidance documents. They should be placed on agencies Web sites with easy access so that the public can not only see what applies to them, but see comments on that.

And in terms of the executive order, it is the guidance provision, because those guidance documents, the most significant of them, OMB knows about them and when necessary we conduct interagency review.

Mr. KELLER. Aside from the public nature of the guidance documents, what in your view has been the chief practical differences in OIRA and agency practices since the executive order and the good guidance bulletin were issued?

Ms. DUDLEY. Of the non-guidance provisions, I would say the requirements for the regulatory policy officer. Regulatory policy officers were a component of the original executive order, and what the January 2007 amendment did is it made them—required that they be presidential appointees.

We now know who they are. It is posted on our Web site, the list of both the office as well as the individual serving in that capacity, for every agency. And I think that has made it more transparent for the public and for us.

Mr. KELLER. Mr. Copeland, who will testify in a little bit, suggests in his written testimony that Executive Order 13422 eliminated the requirement that regulatory policy officers report to their agency heads. Is that suggestion correct, in your view?

Ms. DUDLEY. No. We provided implementation guidance for the executive order and the good guidance and made very clear that the regulatory policy officer, it is a presidential appointee, but he is serving in an agency. So it is the general counsel of an agency, the deputy secretary, sometimes the assistant secretary for policy. So these are existing positions who have their existing reporting framework through the director of the agency.

So as always, it is the head of the agency that has that ultimate authority.

Mr. KELLER. Okay. Thank you.

Mr. Copeland also suggests, I think, that Executive Order 13422 amendments to the regulatory review process will somehow slow down the process. Are you aware of any evidence that that has happened?

Ms. DUDLEY. I don't have any evidence of that. We are reviewing the same number of regulations that we were before the executive order was passed. I have statistics. And we have been reviewing about 600 regulations a year since the nineties, since 1993.

Mr. KELLER. Okay. Thank you.

And Madam Chairman, I will yield back the balance of my time.

Ms. SÁNCHEZ. The gentleman yields back the balance of his time.

I want to thank Ms. Dudley. You may now be excused and we will take a short recess to allow our second panel of witnesses to be set up and to come forward to the dais.

[Recess.]

Ms. SÁNCHEZ. The Committee is now resumed.

I am pleased to welcome our second panel of witnesses.

Our first witness is Professor Peter Strauss. Professor Strauss is the Betts professor of law at Columbia Law School. A renown scholar of administrative law, Professor Strauss has taught that subject at Columbia for the past 36 years, just a short period of time.

Professor Strauss clerked for Associate Justice William Brennan and Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia.

It is an honor to have you testify before the Subcommittee again, Professor Strauss, and we want to welcome you.

Our second witness is Curtis Copeland. Dr. Copeland is a specialist in American national government at CRS. His expertise appropriately relevant to today's hearing, is Federal rulemaking and regulatory policy.

Dr. Copeland has previously testified before this Subcommittee and he is one of three CRS experts who are assisting the Subcommittee in the conduct of its administrative law project.

Prior to joining CRS, Dr. Copeland held a variety of positions at the Government Accountability Office over a 23-year period.

It is good to see you again, Dr. Copeland. Thank you for being here.

Our third witness is James Gattuso. Mr. Gattuso is a research fellow in regulatory policy for Roe Institute for Economic Policy Studies at the Heritage Foundation. Specifically, Mr. Gattuso handles regulatory and telecommunications issues. Previously, Mr. Gattuso served as a policy analyst for the Heritage Foundation with responsibility for a broad range of issues, including telecommunications, transportation and anti-trust policy.

Prior to joining Heritage, he was vice president for policy at the Competitive Enterprise Institute. In that position, he oversaw CEI's policy work and supervised the overall management of the organization.

Before joining CEI in 1997, Mr. Gattuso served as vice president for policy development with Citizens for a Sound Economy from 1993 to 1997, where he directed the research activities of that organization. From 1990 to 1993, he was deputy chief of the Office of Plans and Policy at the Federal Communications Commission.

So welcome to you, Mr. Gattuso.

Our final witness is Rick Melberth. Dr. Melberth joined OMB Watch in November 2006 as director of Federal regulatory policy, a program which works to protect and improve the government's ability to develop and enforce safeguards for public health, safety, environment and civil rights. He directs all activities related to policy, advocacy, analysis, research, monitoring and public education.

Prior to joining OMB Watch, Dr. Melberth was the director of internal planning and formerly the associate director of the environmental law center at the Vermont Law School. He helped design the curriculum and taught courses in the Master's program.

Dr. Melberth has written several pieces about decision-making in government and environmental issues during his academic career and while working as an independent consultant and policy analyst.

I want to thank you all for your willingness to participate in today's hearing. You have heard about the lighting system. I am just going to remind you, you have 5 minutes for your testimony and you will get a series of lights; green when you begin your testimony, yellow when you have a minute remaining, and red when your time has expired.

I am going to apologize because I am going to need to go to the floor to debate a bill of mine, and so we will have somebody else filling in in the Chairman position, and that will be Mr. Johnson.

But at this time I would invite Professor Strauss to begin his testimony.

TESTIMONY OF PETER L. STRAUSS, PROFESSOR, COLUMBIA LAW SCHOOL, NEW YORK, NY

Mr. STRAUSS. Chairwoman Sánchez, Ranking Member Cannon, Congressmen Keller and Johnson, I am deeply honored to be present today for this important hearing.

You have got my prepared testimony and it doesn't make much sense to read the bulk of it. You ought to appreciate from the excellent submissions of others and what your experience has also taught you, which is that presidential oversight of rulemaking has been with us for more than three decades. Indeed, the academic community and my impression as well is that Congress is in agreement that, within its limits, at least, the practice of executive oversight is a sound one.

At the same time, and responding to Ranking Member Cannon's remarks about delegation, it seems to me that Congress commits limited tasks to administrative agencies, and when it does so it expects them to be performed with fidelity to scientific judgment and observance of the limited factors that Congress may have made relevant.

The present difficulties in my judgment arise from presidential practices that threaten these limits. Maybe next year, with former senators in the White House, respect for Congress' work will return to a greater degree than one now sees.

We all do understand that the Constitution creates a single chief executive officer, the President, as the head of government. Congress defines the work that its statutes detail. We have a unitary executive. Disagreement is about what the President's function is.

But once Congress has created a government agency and said what its responsibilities are, we know that the roles of Congress and the court are to oversee the agency in its assigned work, not actually to perform that work.

When Congress authorizes the EPA to regulate pollution or OSHA to regulate workplace safety, can the President decide these matters? Or is he too only to oversee the agency's decision processes?

Our Constitution it seems to me is quite specific about this. It recognizes that departments will have duties. It permits Congress to assign duties to administrative agencies rather than the President. And when it does, the President is not the decider of these matters. Attorney General Wirt back in 1823 told President Monroe that the President's role is to give general superintendence to those to whom Congress has assigned executive duties as it could

never have been the intention of the Constitution that he should in person execute the laws himself.

Were the President to perform a statutory duty assigned to another, he would not only not be taking care that the laws were faithfully executed, but he would be violating them himself. That is, the assignment of decisional responsibility to others is a part of the laws to whose faithful execution the President is to see. And when agency officials treat the President as the person entitled to decide matters the Congress has committed uniquely to their judgment, they too fail in their obligations to the law.

They do have to consult with him. The Constitution is quite specific about that. But at the end of the day, they are the ones responsible for deciding any matters that Congress places in their charge.

I do want to be clear. These are not simple issues. We have a single chief executive. The President's politics stand behind appointments to high office and he properly claims opportunities to discuss his Administration's policy preferences with his appointees. Indeed, the Constitution's text is explicit that he can demand consultation, in writing, on matters within. But then this is the word the Constitution uses—the duties of their offices. They are the ones with the duties.

The right to discipline any appointee, even an independent regulatory commissioner who refuses to consult him and hear his views, is the President's. And insofar as it creates a framework for consultation, Executive Order 12866 reflects a sound view of executive authority, and it would do so even if it were fully extended to the independent regulatory commissions, as many of us have recommended.

The difficulties arise when the President reaches past consultation to demanding particular decisions. This is the subtle ground between hearing out the President and obeying him. And this is the issue that concerns me here.

Chairwoman Sánchez made some reference to the matters that have been in the papers in recent weeks. They are only examples, and I don't think my limited time permits me to go into them, but they do suggest that a fair amount of bending science is going on. Or to put it another way, that the President has been injecting into the decision process factors that Congress has specifically forbidden the agencies responsible for these decisions to take into account.

The courts have said, responding to your instructions, and on arguments from the solicitor general, that costs are not a part of the EPA's business. They have tolerated the delegation to the EPA of the vast authority that it has on the understanding that it won't be considering costs. But what is motivating the apparent interference with EPA's judgment about ozone standards?

Mr. JOHNSON. [Presiding.] Professor Strauss, your time has expired. If you would wrap up.

Mr. STRAUSS. Yes, absolutely. Just one other thing that I would like to say, if I may, which is to suggest that among the possible responses the Congress might have is the one that I heard Ranking Member Cannon mention, the power of the purse.

When the House attempted to exercise that power last summer in connection with the President's remarkable amendments to Ex-

ecutive Order 12866, I understand that OMB responded with the claim that a failure to appropriate funds for OIRA would be an unconstitutional intrusion on the President's constitutional authority, the power of the unitary executive. What a laughable claim that is.

The President, like the King of England in his battles with Parliament, has got to rely on you for the funds he desires, and if you find him abusing his authority, you can withhold those funds.

Thank you again for the privilege of testifying today.

[The prepared statement of Mr. Strauss follows:]

PREPARED STATEMENT OF PETER L. STRAUSS

Testimony of

PETER L. STRAUSS

Betts Professor of Law

Columbia Law School

before

U.S. House of Representatives

Committee on the Judiciary

Subcommittee on Commercial and Administrative Law,

on May 6, 2008

concerning

Rulemaking Process and the Unitary Executive Theory

Thank you very much for inviting me to testify before you today. I am a scholar of administrative law, who has had the privilege of teaching that subject at Columbia Law School for the past 37 years and who for two years in the 1970's had the honor of serving as the first General Counsel of the Nuclear Regulatory Commission. I was later Chair of the ABA's Section of Administrative Law and Regulatory Practice, a consultant to the ABA's Coordinating Committee on Regulatory Reform, and long-time chair of the Section's Rulemaking Committee. My 1984 analysis of agency relations with the President won its annual prize for scholarship. I have continued since then to write about separation of powers and, in particular, the President's constitutional relationship to the agencies on which Congress has conferred regulatory authority. My most recent writing on this subject, an essay that recently appeared in the George Washington Law Review entitled "Overseer or 'The Decider' – The President in Administrative Law,"[1] is squarely on point of today's subject.

We all understand that the Constitution creates a single chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail. We do have a unitary executive. Disagreement arises over what the President's function entails. Once Congress has created a government agency and specified its responsibilities, we know both Congress and the courts are just to oversee the agency in its assigned work, not actually to perform that work. But is it the same for the President? When Congress authorizes the Environmental Protection Agency to regulate pollution, the Occupational Safety and Health Administration to regulate workplace safety, or the Food and Drug Administration to regulate the safety of food, drugs, and medical devices, what is the President's role? May he *decide* these matters, or is he, too, only to oversee the agencies' decision processes?

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[1] 75 G.W.L.Rev. (2007).

Our Constitution is very clear, in my judgment, in making the President the overseer of all the varied duties the Congress creates for government agencies to perform, including rulemaking. Yet our Constitution is equally clear in permitting Congress to assign duties to administrative agencies rather than the President. When it does, our President is not "the decider" of these matters, but the overseer of their decisions. As Attorney General Wirt advised President Monroe in 1823, when the President fails to honor that admittedly subtle distinction, he fails in his constitutional responsibility:

> [the President's role is to give] general superintendence [to those to whom Congress had assigned executive duties, as] it could never have been the intention of the constitution . . . that he should in person execute the laws himself. . . . [W]ere the President to perform [a statutory duty assigned to another], he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself."[2]

That is, the assignment of decisional responsibility to others is a part of those laws to whose faithful execution the President must see. And when agency officials treat the President as the person entitled to decide matters Congress has committed uniquely to their judgment, they too fail in their obligations to the law. Consult with him they must; but at the end of the day, they are the ones responsible for deciding any matters placed uniquely in their charge.

Underlying today's inquiry, I imagine, are aspects of the Environmental Protection Agency's relationship with the White House and, in particular, Susan Dudley's Office of Information and Regulatory Affairs over recent rulemaking, in particular the rulemaking concluded this past March setting primary and secondary national standards for ozone. From a variety of elements that have come to light – in good part, I must say, due to the welcome transparency of OIRA in its administration of Executive Order 12866[3] – one can conclude that both the White House and the leadership of

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[2] The President and Accounting Officers, 1 Op. Att'y Gen. 624, 624-25 (1823).

[3] As I told this committee when I appeared before it in February of last year, among the elements that have (continued...)

EPA regard the White House as having the final voice of decision on rulemakings statutorily committed to EPA's responsibility. Thus, in his recent confirmation hearings, the nominee to be General Counsel of the EPA resisted the suggestion that EPA should take an independent view, remarking that "Ultimately, the [EPA] administrator works for the president of the United States." Recent writings, from Charlie Savage's brilliant account of the signing statement controversy, "Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy," to Jack Goldsmith's chilling "The Terror Presidency: Law and Judgment Inside the Bush Administration," have made clear the strength of our President's claim to be "the Decider" across the breadth of government, and without regard to the particular assignments of authority that Congress may have enacted.

Internal and external communications that have come to public attention in the ozone rulemaking show how this attitude has prevailed. Within EPA, it is clear, scientific indicators from both inside and outside the agency pointed unequivocably in the direction of a secondary national standard for ozone that would differ from the primary standard. OIRA, it is equally clear, dug in its heels. The agency responded to OIRA's March 6 signal of unhappiness with a detailed memorandum March 7 explaining the scientific basis for its preferred course and objecting to OIRA's apparent introduction of the cost concerns EPA is forbidden by law to rely upon in its decisionmaking. Not content, even after EPA's close consultation with the White House, to permit the agency

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[3] (...continued)
made the Executive Order regime acceptable to Congress, and I might add to much of the academic community, are the commitments it contains to a professionalized, unusually transparent and apolitical administration. Oral contacts with outside interests are limited to OIRA's senate-confirmed Administrator or his particular designee; agencies attend any meetings with outsiders; written communications from outsiders are also logged; and all of this information is publicly disclosed. My understanding is that Congress has properly insisted on these elements of transparency, as a condition of its acceptance of this generally valuable regime. The OIRA website, within a generally closed White House environment, has been a remarkable monument to the worth of this insistence, as is the revelation of the correspondence with EPA that I imagine to have helped prompt this hearing. I do understand that OIRA has not been fully as forthcoming as the Committee has wished, however.

to decide the matters Congress had left in its hands, OIRA then pushed the issue upstairs. The result was a remarkable letter from OIRA Administrator Dudley: "The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard" – an outcome that was never in doubt, although even following EPA's preference the strengthening would have been less than its scientific advisors had counseled – "and setting it to be identical to the new primary standard ... ." This, Administrator Dudley continued, would avoid "setting a standard lower or higher than is necessary."

While Administrator Dudley's letter gives the appearance of recognizing that "you intend to render your determination," all parties understood that she was communicating a presidential decision with an expectation of obedience. Under the current administration's notoriously strong theory of a unitary presidency, EPA had no choice; its obligation was to implement the President's conclusion. The reported reaction of the Solicitor General, that what the White House was doing ran afoul of positions his office had recently taken in the Supreme Court, only underscores the hazards these developments pose to the rule of law. As the Solicitor General had argued and the Court had agreed, EPA is forbidden to take costs into account in its Clean Air Act decisionmaking. One gets the strong sense that the Supreme Court sustained EPA's extraordinary range of authority over air quality issues, in good part, precisely because it concluded Congress had authorized that agency to act only on the basis of science, and not a broader array of political factors such a economic cost or impact. This makes it possible to regard the decision as one governed by law, and within the ambit of judicial review that can assure its legality. But if the President, relying on his strong theory of a unitary presidency, is issuing commands, and he and his appointees regard it as his right to do so – and, consequently, their duty to obey – any assurance we might have about legality disappears. Transparently, concern with economic impact and not with EPA's reasoning

from the scientific views in its rulemaking record, underlay the President's reported conclusion. And that, to my mind, sharply illuminates the deep problems of confusing the President's legitimate, indeed essential role as overseer of all executive government, with a right to decide matters that Congress has delegated to particular agencies. When a decision is taken out of the hands of the agency equipped to be expert about the science and constrained by Congress's instructions, and delivered to a White House motivated by a much larger array of essentially political considerations reaching well beyond those factors Congress has authorized, legality disappears and is replaced simply by power politics.

I should be clear that the issues here are not simple ones. Our Constitution does make clear that we have but a single chief executive. The President's politics stand behind appointments to high office, and he properly claims opportunities to discuss his administration's policy preferences with his appointees. Indeed, the Constitution's text is explicit that he may demand consultation, in writing, on matters within the duties of their offices. In my judgment, that makes clear his right to discipline any appointee – even one to an independent regulatory commission – who refuses to consult with him and hear his views. Insofar as it creates a framework for consultation, Executive Order 12866 reflects a sound view of executive authority. It would do so even if it were fully extended to the independent regulatory commissions, that it now reaches only in part. The difficulties arise when a President reaches past consultation, to demanding particular decisions. This is the subtle ground between hearing out the President and obeying him, and this is the issue that concerns me here.

In some contexts – for example, where Congress has empowered not one but two or three different agencies to deal with the same social issues – the government's practical need for coordination, for a view coherent across agency boundaries, can justify the President's assertion of

authority to decide. When the Occupational Safety and Health Administration acted to limit worker exposure to atmospheric benzene, for example, its authority to protect gas station attendants overlapped with the EPA's responsibility to protect citizens from the same hazard. It was the EPA's authority to protect citizens who might be pumping their own gas from the same fumes. Resolving that kind of conflict requires a central voice. But in the case of ozone, we really do not see that. Setting the secondary air quality standard for ozone is indisputably EPA's business, and the very same phrase of the Constitution that recognizes the President's right to consult with EPA also recognizes that the duty of *decision* lies with EPA. The President's right to an opinion is the right to an opinion about a matter within the *duty* of the Department.[4]

Finding the right balance between politics and law in our society, as any society, is achingly hard. I tell my Administrative Law students every year that this basically is what our subject is about. And clearly those who framed our Constitution understood that many of the constraints that operate on our government are properly those of politics, not law; yet where the constraints lie in politics, we ought to know politics is at work, not disguised as expertise. Moreover, law has its place, a place that is particularly important in the regulatory state with its enormous impacts on the economy and the public. Perhaps I can illustrate these points with two more vignettes from our early history.

The first is implicit in often-quoted passages from *Marbury v. Madison*,[5] Chief Justice Marshall's opinion that famously established the place of the courts in the constitutional order. Distinguishing between those acts that a court might control by law, and those that were not subject to

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[4] U.S. Const. Art. II. Sec. 2, Cl. 1: "... he may require the Opinion, in Writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."

[5] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803).

legal constraint, he denied any purpose to reach acts the President was entitled to *command* from his subordinates. When an official

> "is to conform precisely to the will of the President [h]e is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. ... The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

The thing to note is that we would *never* describe rulemaking decisions of the Administrator of the EPA about air quality in the way Chief Justice Marshall describes decisions of the Secretary of State about foreign affairs. The Secretary of State is exercising discretion in its largest sense, cases in which there is no law to apply and which "can never be examinable by the courts." The great Chief Justice Marshall was not addressing the mixed questions of law and politics that are the everyday focus of administrative law and of judicial review for "abuse of discretion" under the APA. For those acts we actually depend on the possibility of effective judicial review to justify their legality; if standards did not exist permitting a court to assess the legality of the Administrator's acts, we would say an unconstitutional delegation had been made. These are *not* matters to be decided by politics, and they *are* questions examinable by the courts. And that brings us right back to the difficulty of having the President purport to decide them.

The second of my vignettes underscores the political constraints that operate on a President who better understands the importance of keeping politics and law apart. President Andrew Jackson had risked his reelection to a second term in office in 1832 with his successful veto of the bill that would have reauthorized the Bank of the United States. When he was then reelected by a wide margin, he took that as political vindication of his position on the Bank. He asked his Secretary of the Treasury, Louis McLane, to remove the government's funds from the Bank and deposit them in state

banks.[6] But the Bank's authority ran until 1836, and the relevant statute provided that government funds were to be kept in it "unless the Secretary of the Treasury shall at any time otherwise order and direct."[7] When Secretary McLane decided against removing the funds, Jackson removed him and appointed William Duane as his successor. Duane also proved resistant to Jackson's persistent demands, responding that "[i]n this particular case, Congress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part." In September of 1833, after Duane had declined to remove the funds despite lengthy and fervent correspondence between them, Jackson removed him and appointed Roger Taney Acting Secretary. Almost immediately, Taney made the requested order. The result was a political furor. The Senate passed a Resolution of Censure and subsequently rejected Taney's nomination as Secretary—the first time in American history it had rejected a presidential nomination to the cabinet. When, in 1835, President Jackson nominated Taney to a seat as Associate Justice of the Supreme Court, that nomination, too, failed. Changes in Senate membership finally permitted his renomination and confirmation as Chief Justice months later, in 1836, and the eventual expungement of the Resolution of Censure.

The President thus did prevail, but only at the political cost of an open fight with Congress, that reacted by tightening controls over his appointments. If the President removes head of the EPA for not acting as he would prefer, that is likely to be a more public and politically costly act than having a subordinate write him "the President has concluded that ... " with the expectation of obedience on both sides. President Jackson's recognition that the discretion involved lay with the Secretary of the Treasury, not himself, gave the events high political visibility and animated the machinery of checks

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[6] This paragraph draws primarily on LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-61, at 34-35, 37, 44, 110 (1954).

[7] Act of April 10, 1816, ch. 44, sec. 16, 3 Stat. 266, 274.

and balances. Such visibility might lead a President simply to accept his official's contrary-to-advice decision. To underscore the legal understanding where authority over the bank funds lay, recall that Jackson was the President who at about the same time famously responded to the Supreme Court's decision in *Worcester v. Georgia*[8] with "John Marshall has made his decision, now let him enforce it."[9]

Twentieth Century events reflect the same distinctions and concerns. Justice Hugo Black wrote for the Supreme Court, in assessing one of the century's most striking events of presidential overreaching, that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[10] Surely he knew how frequently executive agencies adopt regulations (currently about ten times as often as Congress enacts statutes). Strikingly, no one has drawn any connection between this holding and rulemaking; in my judgment, they have not drawn it precisely because they understand that agencies, and not the President, are the ones empowered to make rules. Agencies *are* lawmakers; except as Congress has authorized it, the President is not.[11] Similarly, mid-century events emphasized the political constraints attached to the President's having to fire someone with whose actions he disagreed, rather than simply put his own decision in place. During run-up to World War II, a time surely as testing as the present day, Attorney General Robert Jackson would advise President Franklin Roosevelt that it was his Secretary of the Interior, Harold Ickes,

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[8] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[9] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 759 (rev. ed. 1926)).

[10] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[11] The influential essay of Harvard Law School's Dean, Elena Kagan, Presidential Administration, 114 Harv.L.Rev. 2245 (2001), celebrating actions by President William Jefferson Clinton that somewhat anticipated President Bush's claims, argues that congressional authorization of presidential decisionmaking in rulemaking should ordinarily be presumed. Section 7 of President Clinton's E.O. 12866 might be taken to embody the same view, that Congress must explicitly forbid rather than authorize presidential decision in rulemaking. My own judgment is that Justice Black's observation is a good deal closer to both constitutional text, and our political safety from an over-ambitious White House.

who had the legal authority to permit the sale of helium to Germany. Roosevelt earnestly wished to permit that sale while we were still formally a neutral country, prior to our entry into World War II. Ickes, following his own star, would not permit it[12] In the end, Roosevelt preferred keeping Ickes in place, and the helium undelivered, to the alternative of replacing him. A not dissimilar series of events and highly politicized outcomes—with, as for President Jackson, two resignations from cabinet positions and two reappointments before the President achieved his purposes—attended President Richard Nixon's effort to debarrass himself of special prosecutor Archibald Cox. In this case, the President ultimately did not prevail.

Impressive recent contributions to the scholarly literature further underscore the importance for the integrity of rulemaking of keeping power politics out of it. Later this month two University of Texas Law School scholars, Thomas McGarity and Wendy Wagner, will be publishing "**Bending Science**" with Harvard University Press. It is a chilling account of the range of sophisticated legal and financial tactics political and corporate advocates use to discredit or suppress research on potential human health hazards. The economics-grounded political attack on the ozone regulation seems to fit right in. And it is hardly the only such episode in the newspapers today, as recent accounts about NOAA's efforts to secure protection for the right whale will attest;[13] they portray the Vice President's office delaying a final rule for more than a year by expressions of concern about the science involved. Of course the Vice President's office has no scientific expertise and responsibilities; the questions raised were quickly and emphatically answered; and the delays continue. Lisa Bressman and Michael Vandenbergh interviewed top political officials at the EPA during the

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[12] ROBERT JACKSON, THAT MAN (John Barrett, ed., 2003).

[13] E.g., Felicity Barringer, "Whale Protection Caught in Agency Rivalry, Files Show," http://www.nytimes.com/2008/05/01/washington/01whale.html?_r=2&ref=washington&oref=slogin&oref=slogin; Juliet Eilperin, "White House Blocked Rule Issued to Shield Whales," http://www.washingtonpost.com/wp-dyn/content/article/2008/04/30/AR2008043003189.html.

Bush I and Clinton administrations and found what is perhaps not surprising, that political interventions from the White House in the President's name on high-profile or high-stakes matters come from multiple voices and often enough in varying tones. One cannot always be sure that "the President has concluded" refers to the incumbent's decision, rather than a subordinate's or internal cabal's belief about what it ought to be. "According to EPA respondents, OIRA review and other White House involvement are unsystematic ... triggered in many cases not just by the need for centralized oversight of particular regulatory matters but also by the interest of the particular officials involved."[14] Professors Bressman and Vanderbergh also express skepticism that "presidential control facilitates political accountability. EPA respondents believed that they were more transparent and responsive than the White House. ... We conclude, somewhat paradoxically, that agencies, though not comprising elected officials, may better promote political accountability than the White House. ... If the White House shapes high-level issues, it ought to reveal in what manner and through which office or offices it does so. For now, agencies appear to better represent public preferences and resist parochial pressures—the asserted aims of political accountability."

You will likely hear arguments that the President is, after all, our chief executive, that our Constitution embodies the judgment that we should have a unitary executive, and so even if the result of OIRA's interventions is to convert agency judgments about rulemaking into presidential judgments, that only accomplishes what the Constitution commands. In my judgment it is not only an erroneous argument, but one dangerous to our democracy. The President is commander in chief of the armed forces, but not of domestic government. In domestic government, the Constitution is explicit that Congress may create duties for Heads of Departments – that is, it is in the heads of

[14] Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47 (2006).

departments that duties lie, and the President's prerogatives are only to consult with them about their performance of those duties, and to replace them, with senatorial approval required of their replacements, when their performance of those duties of theirs persuades him that he must do so. This allocation is terribly important to our preservation of the rule of law in this country. The heads of departments the President appoints and the Senate confirms must understand that their responsibility is to decide – after appropriate consultation to be sure – and not simply to obey. We cannot afford to see all the power of government over the many elements of the national economy concentrated in one office.

Professor Peter Shane, a highly respected scholar of the presidency and a former lawyer in the Office of Legal Counsel, put the matter this way in a recent discussion of President Bush's use of signing statements, which I know is not our subject today.

> The Bush administration has operated until recently against the backdrop of Republican-controlled Congresses and a Supreme Court highly deferential to executive power. ... Not only has it insisted, in theory, on a robust constitutional entitlement to operate free of legislative or judicial accountability, but it also has largely gotten away with this stance. And that success – the administration's unusual capacity to resist answering to Congress and to the courts – has fed, in turn, its sense of principled entitlement, its theory that the Constitution envisions a presidency answerable, in large measure, to no one.
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> Critics of the Bush 43 administration have not infrequently charged that the administration's unilateralism is antagonistic to the rule of law. After all, the ideal of "a government of laws, and not of men" seems on its face to contradict President Bush's expansive claims of plenary authority. Yet, no sane President claims to be above the law, and ... it is doubtful that President Bush thinks himself antagonistic to the rule of law. He and his legal advocates presumably have a specific idea of what the rule of law consists of. But what the administration seems to believe in is a version of the rule of law as formalism. It is a rule of law that claims to be no more and no less than law as rules. Under the Bush administration's conception of the rule of law, Americans enjoy a "government of laws" so long as executive officials can point, literally, to some formal source of legal authority for their acts. They would presumably count this as the rule of law even if no institution outside the executive were entitled to test the consistency of those acts with the source of legal authority cited.
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> ...
>
> The Bush 43 administration's repeated utterance of its constitutional philosophy shapes

> executive branch behavior by solidifying allegiance to norms of hostility to external accountability. Like the torture memo or the rationalizations for warrantless NSA wiretapping of domestic telephone calls, the Bush 43 signing statements embody both a disregard for the institutional authorities of the other branches – especially Congress – and a disregard for the necessity to ground legal claims in plausible law. They are best understood as an attempt to invent law and as an exploitation of Congress's unwillingness, at least while in Republican hands, to allow the administration's more extreme theories of presidential authority to go unchallenged.[15]

What might Congress do about the simple affront President Bush's strong "unitary executive" theory appears to me to be to Congress's authority to confer organization and authority on elements of government by enacting statutes? You might enact by statute the judgment that EPA preferred; that would not only freeze matters probably best left to flexible administration, but also risk a presidential veto – the price you pay whenever you delegate authority to the executive branch. Politically, you hold the power of the purse. When the House attempted to exercise that power last summer, in connection with the President's remarkable amendments to Executive Order 12866 on which I have previously testified before you, I understand that OMB responded with the claim that a failure to appropriate funds for OIRA would be an unconstitutional intrusion on the President's constitutional authority – the power of the unitary executive. What a laughable claim that is! The President, like the King of England in his battles with Parliament, must rely on Congress for the funds he desires and if you find him abusing his authority you can withhold those funds. My late colleague Charles Black once wrote "My classes think I am trying to be funny when I say that, by simple majorities, the Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence ... but I am not trying to be funny; these things are literally true."[16] Why should Congress tolerate the expenditure of government moneys to fund

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[15] Peter Shane, Presidential Signing Statements and the Rule of Law as an "Unstructured Institution" 16 Wm. & Mary Bill of Rights J. 231, 232-33, 251 (2007).

[16] Charles Black, The Working Balance of the American Political Departments, 1 Hast.Con.L.Q. 13 (1974).

politicized White House operations by which the President or the Vice President purport to divert agencies from the tasks it has given them, to substitute power politics for law? This too, of course, is a political control – and it is precisely the kind of political control the framers of our Constitution put in place as a safeguard, inter alia, against monarchical pretension in presidential office.

Thank you for the opportunity to address you today. I would be happy to answer any questions you might have.

Mr. JOHNSON. Thank you, Professor Strauss, and it has come to our attention that you have to depart early from this hearing, but your testimony has generated such interest that we would like to take the opportunity to question you prior to us hearing from the other witnesses. So I will begin.

Dr. Copeland says that there may be little difference in practice between the unitary executive position in which the President can and should make the final decision and the traditional or presidential oversight perspective since even in the traditional perspective, the President can have the last word if he is willing to fire someone and take the political heat.

How do you respond to that?

Mr. STRAUSS. Well, this goes in part to my concerns about the regulatory policy officers, which I expressed to this Committee at its hearing shortly after Executive Order 13422 was promulgated.

It is the regulatory policy officer who is going to be fired, the presidential appointee who is directly responsible to OIRA, and this is not necessarily a person in the position that the head of an agency is in political terms to take the political heat, would be involved in standing up to the President and saying, "If you want to displace my judgment, Mr. President, you are going to have to send me home."

That political heat has been felt on numerous occasions and it constrains Presidents. If they have to operate in public by firing someone, that is quite a different setting, at least in my judgment, from the psychology that attends and understanding that I have the legal obligation to do what the President tells me to do—if an administrator understands that at the end of the day it is her judgment and she has the right to make that judgment, it will often be the case that the President will not respond.

It may indeed often be the case that what she has heard about the President wants "X" from a member of the White House bureaucracy will not be anything that crossed the President's desk or the President's mind at all. There is a terrific piece in the recent law school literature by professors at Vanderbilt University Lisa Bressman and Michael Vandenbergh detailing conversations they had with senior officials at EPA during both the Clinton and the first Bush administrations. And what she reports was that they were hearing from many different groups in the name of the President in the White House and in many different ways. It is not just one person.

I think getting clarity—it is going to be the President who fires the administrator of the EPA if that is what happens—getting clarity and getting the political heat that will attend that—we can all think of occasions where the President has indeed let the administrator of EPA go. Ann Gorsuch comes to mind. And then in the wake of that, Congress' authority over who would replace her creates a decided restraint on the kind of environmental policy that the presidential administration is able subsequently to carry forward.

So I just don't agree with the proposition that these are equivalent.

Mr. JOHNSON. Thank you, Professor Strauss.

I will now yield the balance of my time and yield to Mr. Cannon for questions.

Mr. CANNON. Thank you.

I appreciate the fact you asked a question about firing, because it seems to me that as coarse as that is, that really is one of the clear authorities of the President and is now well-established historically.

So in considering your testimony, Professor Strauss, I find that we have very few differences. Hardly anything of substance. I would characterize the President's authority to fire exactly as you have. It is a heavy-handed kind of thing.

I think personally it would be wonderful if the President said I am going to change my administrators regularly and often, and allow people to come in with a fresh perspective and do something and then move on in their lives.

I mean, if you can shorten the time frame of getting a message from Washington to Boston and back as much as we have from horseback to e-mail, we ought to be able to move administrators back and forth. That would take the support of the Senate, I think, and that would be nice, if we could work together in that regard.

And I appreciate, by the way, your explanation. I was going to ask you about Article 2 and how that, the faithfully executed clause, how that works, and I think that your view—that you have dealt with those things quite well.

Probably the only place where we really disagree is in how this relates to the practice of this Administration or the last Administration. I am not sure it is a partisan thing, but what we have—in fact, I am intrigued by your last comment, when you were talking about many people talking with people at EPA in the name of the President. The problem is, the President can't possibly know what all those people think or what their personal agendas are. But it is the complexity of government that leads us to the point where we have that lack of clarity.

But the problem with many people and many ideas and one President's name is a problem that relates to the complexity of government. Aren't we better off focusing on how we can change that complexity, for instance taking agencies—I would not at this point suggest EPA, by the way, but something like, say, for instance, the Surface Coal Mining Administration—that is already operated by States, and turning that into an interstate compact and letting the States deal with that so that they can decide policy and not have the President and his minions or his delegates interfering?

Mr. STRAUSS. Well, I think that cooperative federalism is often a useful way to go. One has to be careful not to try to use it in situations where States will be attempting to take advantage of one another but where you can reliably see that all have the same interests, for sure.

Mr. CANNON. I suspect when you say taken advantage, are you suggesting that if they had an interstate compact instead of Federal control, some States might want to make it cheaper and easier to produce coal than other States?

I am joking here a little bit, because I actually was at Interior and oversaw the writing of those regulations, both for reclamation and enforcement.

But my point is that it may actually be healthy to have the debate in States. Do we want to have lower standards of reclamation or do we want to preserve the quality of our State. I think that the States are pretty much, in that particular case and generally speaking, going to demand a higher standard than I think even the Federal Government would demand.

Mr. STRAUSS. It is entirely possible.

The risk in interstate compacts that the framers foresaw and which has often come up in the past is that North Carolina apple producers will want to do something that puts Washington apple producers at a disadvantage. That is the matter against which you have to be——

Mr. CANNON. And hence the founders' requirement in the Constitution that we do it by Federal legislation. See, that is the context.

Mr. STRAUSS. Right.

Mr. CANNON. Thank you.

Let me just point out, I think that the other place where—I don't think that we have actually disagreed, but as a matter of emphasis, I think sort of the core of your statement goes to what is forbidden by Congress, is a term you used. Isn't that really our problem, to be clear in how we delegate? Because if we say the administrator of EPA will make this decision, we have the ability to limit the President, he is then left with the Constitutional context but with a stronger position as to the decision he makes, and ultimately fire me if he disagrees with the President.

Mr. STRAUSS. I think we are getting into here into what may seem a subtle disagreement between myself and the current dean at the Harvard Law School, Elena Kagan, who has taken the position, which is a respectable position in academic circles, that it ought to be presumed that when Congress passes a statute empowering the head of EPA or whomever to do something, that actually the President does have the right to call the shots, but that Congress could always say, "No, no, we mean explicitly the head of the EPA and, Mr. President, you stay out of it."

My position rather is when you pass a statute that says to the EPA you are to set Clean Air Act standards, and we want you to set Clean Air Act standards following the following criteria, which don't happen to include cost, that is enough, because if it once gets into the White House, you are never going to have that control over is it just the science, is it just the best available technology, or is somebody figuring out that, well, this would be less costly for the economy, which wisely or not you in Congress have taken out of EPA's consideration.

Mr. CANNON. I think that I probably agree with Ms. Kagan on that particular point, but it is narrow.

Thank you for your testimony.

I yield back.

Mr. STRAUSS. Thank you very much.

Mr. JOHNSON. Thank you.

And thank you for your testimony, Professor Strauss.

Mr. STRAUSS. I won't have to leave for another 45 minutes. I will stay at the table, if you don't mind.

Mr. JOHNSON. All right.

Dr. Copeland, please begin your testimony.

TESTIMONY OF CURTIS W. COPELAND, Ph.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. COPELAND. Thank you very much, Mr. Johnson, Mr. Cannon. Thank you very much for inviting me here to discuss Federal rulemaking and the unitary executive principle.

Since 1981, the center of presidential influence on rulemaking has been OMB's Office of Information and Regulatory Affairs, which must approve most significant rules before they are published in the Federal register.

OIRA's role has varied by presidential administration, but during the current Bush administration it has returned to the gatekeeper role that it had during the Reagan years. That gatekeeper role has been manifested in various ways, including an increased emphasis on cost-benefit analysis during OIRA reviews, an early increase in the use of return letters, the increased use of informal OIRA reviews of agency rules, extensions of OIRA reviews for months or even years beyond the 90-day time limit, the development of OMB bulletins on peer review, risk assessment and agency guidance practices.

Also, Executive Order 13422, among other things, eliminated the specific requirement that agency regulatory policy officers report to agency heads and gave those officers the general authority to control rulemaking activity in the agencies. The order also expanded OIRA's reviews to include significant agency guidance documents. And taken together, all of these actions by the Bush administration represent what appears to be the strongest assertion of presidential power in the area of rulemaking in at least 20 years.

There seem to be at least three perspectives regarding presidential power and rulemaking. One is the unitary executive principle position, which asserts that the President should be able to make the final decision regarding substantive agency rules, even when Congress has assigned rulemaking activities to the agencies.

Another is the traditional or classical perspective, which says the President cannot make the final decision on rules assigned to the agencies, but can attempt to influence agency officials up to and including firing them if they disagree.

The third position, as Professor Strauss just said, is one advocated by Dean Elena Kagan of Harvard University, in which the President can determine the substance of agency rules, but not if Congress has specifically prohibited or limited the presidential intervention.

Ultimately, though, these three positions may represent distinctions without a substantive policy difference, for in all three the President can ultimately dictate the outcome if he is willing to pay the political cost associated with the dismissal of an appointee.

One of the clearest examples of presidential power in the area of rulemaking occurred in relation to a recent EPA rule on ozone. It was clear from the memoranda and letters later released that EPA initially resisted but ultimately adopted OIRA's and the President's position on the rule.

Notably, the President's authority to make the final decision in agency appeals of OIRA decisions was established by executive order during the Clinton administration.

The EPA ozone case was somewhat unique in that it pulled back the curtain on how final regulatory decisions can be made under presidential review. However, in many cases it is very difficult for outsiders to know what effect OIRA or the various presidential initiatives have had on particular rules.

For example, although OIRA says it has its greatest impact on rules during informal reviews, it also says that agencies should not disclose the changes made during those reviews to the public, even after the rules are published in the Federal Register.

Also, it is currently unclear what effects recent changes in risk assessment, peer review, guidance documents and regulatory policy officers are actually having on agency rules.

Although all regulations start with an act of Congress, Congress has been arguably less active than the President in recent years in controlling the rulemaking agenda. If Congress decides it wants to asserts more authority in agency rulemaking, it would have a number of options.

For example, it could, one, ask nominees during the confirmation process how they would react to presidential rulemaking direction that was contrary to statutory requirements. Two, consider giving agency heads "for cause" removal protection. Three, consider restricting the ability of OIRA to review certain types of rules. Four, specifically indicate that the agency head, not the President, has final rulemaking authority in certain areas. Five, increase the transparency of OIRA's review process. And, six, be more specific in its delegations of rulemaking authority to the agencies.

Mr. Chairman, I am happy to conclude my prepared statement. I would be happy to answer any questions at this time.

[The prepared statement of Mr. Copeland follows:]

PREPARED STATEMENT OF CURTIS W. COPELAND

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

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[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.

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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

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[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]

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[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

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- 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

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[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

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[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]

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[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

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[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]

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[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,
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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

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[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

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[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

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[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

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[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;

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[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

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[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."

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[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

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[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.

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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.

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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).

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[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.

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[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]

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[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).

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[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

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[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]

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[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

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[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

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[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

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[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

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[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

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[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."

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[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.

Mr. JOHNSON. Thank you, Dr. Copeland.
Mr. Gattuso, please proceed.

TESTIMONY OF JAMES L. GATTUSO, ESQ., SENIOR FELLOW IN REGULATORY POLICY, ROE INSTITUTE FOR ECONOMIC POLICY STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, DC

Mr. GATTUSO. Mr. Chairman, Members of the Subcommittee, thank you for inviting me here today to discuss this important topic.

President John Kennedy is said once to have told a petitioner in his office, "I agree with you, but I don't know if the government will." And that statement encapsulates in many ways the questions being discussed today. To what extent can or should the President be able to ensure that his views and priorities are reflected in the decisions of the executive branch.

Charged in the Constitution with taking care that the laws be faithfully executed, Presidents often find their efforts frustrated by the machinery of the executive branch which they themselves head. Nowhere is the challenge greater than in the area of regulation. Over 50 agencies produce thousands of new rules each year, and some 70,000 pages in the Federal Register.

That is why starting a generation ago Presidents began to establish systematic review processes for the promulgation of regulations.

Since the first review processes were established, seven Administrations, five Republican and two Democratic, have built upon them. Each has changed the system in various ways, most improving upon that of its predecessor, but none has challenged its basic utility or legitimacy.

The debate over the Constitutional status of the system is joined, however, when that system conflicts with congressional assignments of responsibility or discretion to others within the executive branch. In such cases, some have argued, including the earlier witnesses today, that the President may not substitute his judgment for the judgment of the officer selected by the President to perform a particular duty. In other words, the President is not the "decider" but merely the "overseer" of decisions by others.

In my view, the problem with this contention is that the Constitution invests executive power in a President of the United States of America, not in plural Presidents, not in a President and other officers designated by Congress, but in a President. The idea that the executive power is shared or can be unbundled is contrary to the common sense meaning of the language of Article 2.

It also would be a surprise to millions of people voting today in Indiana and North Carolina to hear that their votes are not for a President who can decide issues, a President who can set policy, but merely an overseer of decisions by others, a consultant, someone who guides but does not lead. I think that is contrary to the common understanding of our political system.

That said, I believe also that the theoretical differences in the debate over the unitary executive may not come down to much in practical application. There may be less here than meets the eye.

Critics of the unitarian executive concept largely recognize the President's power to articulate priorities and views, request adherence to them and dismiss those that do not help carry out his agenda. Conversely, most proponents of the unitary executive view accept Congress' power to assign initial responsibility and duties to other officers in the executive branch as long as the President has ultimate authority over the policies that are set.

In practice, executive branch officers, being appointees of the President, in the vast majority of cases accept the articulated priorities of the President, and when they do not, resignation or dismissal is the next likely option.

When that resignation or dismissal is not on the table explicitly, it is always on the table implicitly. As I think anyone who has served in the executive branch would realize, that if they explicitly contest a specific decision of the President or someone who is representing or speaking for the President, they can do that, but they had better have their bags packed just in case.

And frankly, this is as it should be for many reasons. The most important of these, and perhaps counter-intuitively, is the check that clear responsibility provides over presidential power. A President cannot simply mumble, "My hands are tied," when he is ultimately responsible for decisions. I think that limits presidential power and is good for our political system.

Critically, however, none of this means that Congress has no authority in regulatory policy. In fact, it still has primary authority. This can be exercised in several ways. Congress can simply make a statute more explicit. Or, even better, make its intent clear in the first instance when legislating. Secondly, under the Congressional Review Act of 1996, a particular regulatory decision may be specifically disapproved by Congress under expedited rules of procedure.

Thirdly, Congress' influence over regulatory policy could be expanded through the creation of institutions within Congress, such as a congressional regulation office. Such an office, which would be similar to the Congressional Budget Office, could review the regulatory impact of legislative proposals and report on the effects of rules adopted by agencies. In this way, a congressional regulation office could act as both a complement to and a check on the power of OIRA.

Thank you for your time. I will be glad to answer any questions.

[The prepared statement of Mr. Gattuso follows:]

PREPARED STATEMENT OF JAMES L. GATTUSO

Madam Chairman and Members of the Subcommittee: thank you for inviting me here today to discuss this important topic.[1]

"I agree with you, but I don't know if the government will," President John Kennedy is said to have once told a visitor."[2] Kennedy's lament encapsulates in many ways the questions being discussed today. To what extent can—or should—a president be able to ensure that his views and priorities are reflected throughout the executive branch?

It's not just a matter of constitutional principle. Perhaps the greatest challenge faced by presidents in this regard is a practical one. Charged by the constitution with "tak[ing] care that the laws be faithfully executed," they often find their efforts frustrated by the machinery of the executive branch which they head. Reflecting

[1] The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

[2] Quoted in Elena Kagan, "Presidential Administration," 114 Harvard L. Review 2245 (2001).

this frustration, Harry Truman predicted difficulties for his successor, the former general Dwight Eisenhower: "[H]e'll say, 'Do this! Do That!' And nothing will happen."[3]

Nowhere is the challenge been greater than in the area of regulation. More than 50 agencies, ranging from the Animal and Plant Inspection Service to the Bureau of Customs and Border Protection, have a hand in federal regulatory policy. With nearly 250,000 employees, they produce over 4,000 new rules—and some 70,000 pages in the Federal Register—each year.

Managing this regulatory machinery in a way that not only reflects the president's priorities but faithfully executes the will of Congress and the mandates of the courts is no easy task. That is why, starting a generation ago, presidents began to establish systematic review processes for the promulgation of regulations.

The first such process was created in 1971, when President Richard Nixon required regulatory agencies to perform "quality of life" analyses of significant new regulations. Supervised by the Office of Management of Budget, the analyses were to outline regulatory analyses and their costs.[4]

Gerald Ford expanded on this process, making control of regulatory growth part of his war on inflation, requiring agencies to prepare "Inflation Impact Statements," which were reviewed by the White House Council on Wage and Price Stability. Ford also set up a cabinet-level group to focus on other initiatives to control the cost of regulation.

Despite a different party affiliation, Jimmy Carter continued—and even expanded—regulatory review mechanisms during his Administration, continuing the practice of conducting economic analyses of proposed regulations and setting up a cabinet-level Regulatory Analysis Review Group to review proposed new rules.

Upon taking office, Reagan established a "Task Force on Regulatory Relief," chaired by Vice President George Bush, to oversee review of the regulatory process. In addition, he issued an executive order—E.O. 12291—detailing the review system. And perhaps most importantly from an institutional point of view, he charged the newly created Office of Information and Regulatory Affairs with oversight of that process.

The Reagan executive order on regulation continued in place during President George Bush's term, with a cabinet-level Council on Competitiveness headed by the Vice President taking the place of the Task Force on Regulatory Relief. OIRA continued to manage the review process, although no permanent OIRA chief was ever confirmed.

In 1993, President Bill Clinton replaced the Reagan-era Executive Order on regulatory review procedures with one of his own, E.O. 12866. Among the changes in the Clinton order were greater transparency requirements and a limitation of review requirements to "significant" rules. But the basic structure of the review system was kept in place.

Further reflecting the continuing stability of the review system, President George W. Bush has kept the Clinton executive order in place. During his tenure, however, OIRA has issued a series of guidance documents for agencies—rather from a "best practices" guide for regulatory impact analyses, to expanded requirements for peer review—to improve the consistency and quality of reviews under the executive order. Most recently, the Administration amended the executive order in several, relatively minor, ways——including expanding the role of agency "regulatory policy officers."

Today—37 years after the first requirements were imposed, and 28 years after the creation of OIRA—centralized regulatory review is an almost universally accepted part of regulatory landscape. Since the first review processes were established, seven Administrations—five Republican and two Democratic—have built upon them. Each changed the system in various ways, most improving upon that of its predecessor, but none has challenged its basic utility or legitimacy.

As six former OIRA Administrators—including Sally Katzen, the administrator under Bill Clinton—wrote in a 2006 joint letter: "All of us . . . recognize the importance of OIRA in ensuring that federal rules provide the greatest value to the American people. In our view, objective evaluation of regulatory benefits and costs, and open, transparent, and responsive regulatory procedures, are necessary to avert policy mistakes and undue influence of narrow groups."[5]

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[3] Ibid.

[4] See, Murray Weidenbaum, "Regulatory Process Reform: From Ford to Clinton," Regulation (1997).

[5] James C. Miller III, Christopher DeMuth, Wendy L. Gramm, Sally Katzen, John Spotila and John D. Graham, letter the Honorable Susan M. Collins and Joseph Lieberman, September 20, 2006.

And, despite early questions by some, the constitutionality of the idea of centralized White House review of rulemaking is today not seriously challenged. As early as 1981, in fact, the D.C. circuit recognized "the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy."[6]

Moreover, it could be argued that some type of review is constitutionally required in order for the president to reasonably meet his constitutional duty to "take care that the laws are faithfully executed".

To the extent there is any debate over the constitutional legitimacy of the process, it is when it conflicts with congressional assignments of responsibility or discretion to inferior officers within the executive branch. In such cases, some have argued, the president may not substitute his judgment for the judgment of the officer selected by Congress to perform a particular duty. As argued by Peter Strauss of Columbia Law School in previous testimony, the president is not "the decider," but merely the "overseer of decisions by others."[7] While the chief executive oversees the performance of other executive branch officers, it is argued, he may not assume the decisional responsibility granted to them by Congress. Thus, in this view, the executive order's provision that disagreements between a regulatory agency head and the OIRA administrator be decided by the president is unconstitutional.

The problem is that this theory flies in the face of the principle that executive power under the constitution is not shared—the concept of a "unitary executive." Article II of the constitution flatly states that, "[t]he executive power is vested in a President of the United States of America." Not in plural "presidents," or "a president and other officers designated by Congress," but in "a President."

The unitary executive concept is not an exotic theory, but one of the most commonly-held tenets of our constitutional system. As Steven Calabresi and Saikrishna Prakash have observed: "[T]hat the President must be able to control the execution of federal laws is easily understood and resonates strongly with the very earliest lessons we learn about our constitutional system."[8] And, consistent with those lessons, the framers of the constitution clearly rejected the idea of a shared executive—rejecting proposals for a multiple presidency and for a decision-sharing council.

In modern America, there are of course many examples of non-unitary executives. Most states, for example, have one or more elected statewide executive officers besides the governor, ranging from attorneys general to insurance commissioners. Christopher Berry and Jacob Gerson of the University of Chicago, in a forthcoming article, write in favor of a similar system for the federal government, suggesting the possibility of a "directly elected War Executive, Education Executive, or Agriculture Executive."[9] However, even to outline the idea of an "unbundled executives" underscores the fact that that is not the system we currently have.

Of course, the differences between the sides in the current debate over the president's powers are not that stark. The unitary executive concept does not deny to Congress the assignment of duties to individual officers within the executive branch, as long as the president is able to exercise ultimate responsibility.

Conversely, few advocate a fully unbundled executive for the federal government. For the most part, even critics of the unitary executive concept recognize the president's power to articulate priorities and views, request adherence to them, and to dismiss those who do not help carry out his agenda.[10]

This is important, since in practice the president almost never needs to issue an "order" to a regulatory officer make a particular decision. Even in cases where the president serves as the final arbiter in a dispute under regulatory review process, the officers involved—being appointees of the president—almost always accept the articulated priorities of the president. And when they do not, resignation or dismissal is the next likely option.

In this sense, the theoretical differences in the debate over the unitary executive may not come down to much in practical application. Under most any view, the president can legitimately exercise control over the rulemaking process.

And this is as it should be, for many reasons. The most important of these—perhaps counter-intuitively—is the check that clear responsibility provides over presidential power. Were authority shared among multiple persons in the executive

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[6] Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

[7] Testimony of Peter Strauss before he Subcommittee on Investigations and Oversight, Committee on Science and Technology, April 26, 2007.

[8] Steven G. Calabresi and Saikrishna B. Prakash, "The President's Power to Execute the Laws," 104 Yale L.J. 541 (1994).

[9] Christopher R. Berry and Jacob E. Gersen, "The Unbundled Executive," forthcoming, University of Chicago Law Review.

[10] With Congress in turn, having some ability to prevent such dismissals, the limitations of which are themselves a matter of debate.

branch, it would be relatively easy for the chief executive to avoid accountability for his actions. He would always be able to point his finger to some other officer, and mumble "my hands were tied." But with ultimate authority vested in the president, he is held to account for decisions, enabling voters—as well as other policymakers—to assign blame or credit.

It should also be noted that a strong, system of centralized regulatory review, anchored in presidential authority, does not necessarily imply either more or less regulation. It simply means that the president's priorities—whatever they are—will be more accurately represented in decision making.

Lastly, none of this means that Congress has no role—or indeed does not have the primary role—in the regulatory policy. Just as the constitution provides the president with executive power, Congress has ultimate legislative authority. If Congress disagrees with how the terms of a statute are applied in rules promulgated by the executive branch, it can simply make the statute more explicit (or even better, make its intent clear in the first instance).

Moreover, under the Congressional Review Act of 1996, a particular regulatory decision may be specifically "disapproved" by Congress. The statute—though so far rarely used—provides for expedited consideration by both Houses of a resolution of disapproval of a specific rulemaking. If approved by Congress, the resolution can take effect, even over a presidential veto, given sufficient support in Congress.

More generally, Congress's influence over regulatory policy could also be expanded through institutional changes within Congress, including the creation of a "Congressional Regulation Office." While Congress today receives detailed information from the Congressional Budget Office on the state of the budget and on proposals that would affect the budget, it has no similar source of information on regulatory programs. A Congressional Regulation Office would help to fill this gap. Such an office could review the regulatory impact of legislative proposals and report on the effects of rules adopted by agencies. In this way, it could act as both a complement to and a check on OIRA.

Lastly, to minimize the need for White House intervention in agency decisionmaking, policymakers should strengthen the ability of agencies themselves to evaluate the effects of their own regulations. Review and analysis need not be an adversarial process. Ideally, critical examination of the purpose and effects of proposed rules begins within the agency itself. To facilitate this, policymakers should ensure that each agency has sufficient analytical resources, and well as well-designed internal review office to ensure that those resources are used meaningfully.

Systematic and centralized regulatory review of federal regulations is not only a legitimate use of presidential power, but—given the vast scope of rulemaking—virtually essential to taking care that the laws are faithfully executed. Congress nevertheless retains a primary role in regulatory policy—which can be exercised through more explicit legislation, review of specific rulemakings, and by expanding its own institutional capability to review and analyze the effects of rules.

Thank you for your time. I would be glad to answer any questions.

Mr. JOHNSON. Thank you, Mr. Gattuso.

Dr. Melberth, would you grace us with your testimony, please.

TESTIMONY OF RICK MELBERTH, DIRECTOR OF REGULATORY POLICY, OMB WATCH, WASHINGTON, DC

Mr. MELBERTH. Mr. Johnson, Mr. Cannon, thank you for the opportunity to appear today.

OMB Watch has monitored Federal regulatory policy and changes for the last 25 years. It is our view that today's regulatory process goes far beyond centralizing regulatory authority and instead gives the President unique and unparalleled authority, thus subordinating agency responsibility to implement statutory requirements.

The application of the unitary theory gives the President control over substantive decision-making of agencies. This has the perverse impact of injecting and elevating politics into decisions where science and rational judgment should prevail.

In the end, we believe the public is poorly served by applying this unitary theory to regulatory decision-making and it threatens the Constitutional separation of powers.

I would like to focus my testimony on one aspect of the changes to the regulatory process created by President Bush, specifically the changes made by Executive Order 13422 to the concept of the regulatory policy officer.

The role of the RPO as envisioned by EO 12866 was to coordinate and implement agency responsibilities regarding regulatory planning and review. The RPO's role, in practice, was somewhat different across agencies, but the essential points are that the RPOs were appointed by agency heads, reported to these agency heads, and were participants in the regulatory process within the agency, not the driver of that process.

The final responsibility for agency rulemaking rested with a politically-appointed agency head confirmed by the Senate.

Two of President Bush's amendments to EO 12866 impact the RPO. First, agencies are now required to designate a political appointee as their RPO. Second, the officer's responsibilities are increased. The RPO is now charged with approving an agency's regulatory plan, a responsibility previously given to the agency head.

The responsibilities of these agencies have been substantially increased, yet they are not subject to Senate confirmation in their role as RPOs and their actions are not public. Subsequently, the RPOs are not likely to be accountable to Congress or to the American people.

We have also expressed concern that the point at which a rulemaking shall commence is unclear. This ambiguity could allow the RPO to exert influence at any stage in the rulemaking process and could prevent important scientific research or analysis from taking place. Nor do we know when or whether an RPO has prevented a rulemaking from taking place or the hurdles that may exist to begin or continue a rulemaking.

What remains among our greatest concerns, however, about the RPO structure is the opportunity for unprecedented interference in the information that goes into those regulatory decisions. The RPO structure has the potential to allow interference in the collection and analysis of all types of information necessary to make important public health and safety, environmental and workplace regulatory decisions.

Having been given the power to initiate regulations, we fear the RPO will further decrease agency rulemaking discretion and increase the trend toward OIRA dictating agency rulemaking. OIRA's involvement in agency decision-making is already well documented. For example, in September 2003, GAO issued a report on OMB's role in reviewing agency health safety and environmental rules and among the findings are that OIRA's greatest influence, by its own admission, is over rules in the period before draft rules are submitted to OIRA for review.

OIRA made changes to rules regarding tire pressure safety, control of air omissions, hazardous air pollutant listings, and minimizing adverse environmental impacts from cooling water intake structures.

Currently, various White House officials are interfering in a National Oceanic and Atmospheric Administration rule to extend protections to the North Atlantic Right Whale. In April 2008, documents obtained by the Union of Concerned Scientists and released by the House Oversight and Government Reform Committee show that not only is OIRA delaying the Right Whale rule, but it is actively working to undermine the scientific basis for the regulation.

The documents show that two offices, the Council of Economic Advisors and the Office of Science and Technology Policy, reanalyzed aspects of the regulatory science and attempted to use their analyses to question NOAA's findings. Another document shows the office of the Vice President questioned the validity of published studies NOAA is using as the basis for the rule and contended the agency lacks "hard data."

This certainly appears to be a situation in which political appointees are attempting to change the result of rigorous scientific analysis by altering data to fit a political result where science and rational judgment should prevail. Today's regulatory structure allows political appointees to have greater control over the substance of regulations. Politics supersedes scientific and technical information that is critical to protecting our environment and health and safety.

This concludes my remarks. Thank you.

[The prepared statement of Mr. Melberth follows:]

PREPARED STATEMENT OF RICK MELBERTH

Thank you for the opportunity to testify before you today. I am Rick Melberth, Director of Regulatory Policy for OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in 1983 to remove the veil of secrecy from the White House Office of Management and Budget, OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public.

It is in the context of OMB Watch monitoring federal regulatory policies for the past 25 years that I appear before you today. My testimony focuses on 1) a brief history of centralized review of agency regulations, 2) the changes to the regulatory process made by the Bush administration, 3) issues of concern with requiring Regulatory Policy Officers (RPOs) to be presidential appointees, and 4) a few examples of executive branch intrusions into agency decision making processes. It is our view that today's regulatory practices go far beyond "centralizing" regulatory review and give the president unique and unparalleled authority, thus subordinating agency responsibility to implement statutory requirements. The application of the unitary theory gives the president and a cadre of employees that represent the president control over the substantive decision making of agencies. This has the perverse impact of injecting and elevating politics into decisions where science and rational judgment should prevail. In the end, we believe the public is poorly served by applying this unitary theory to regulatory decision making, and it threatens the constitutional separation of powers.

I. History of Centralized Review

The 1980 Paperwork Reduction Act, among other things, created a small office within the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (OIRA), to coordinate the information collection activities of federal agencies. Designed as a good government law, the PRA was used as a vehicle by the Reagan administration to reduce government red tape, a Reagan campaign promise. It gave OIRA the power to approve any collection of information from 10 or more people, including paperwork associated with implementing regulations.

In February 1981, a few weeks after taking office, President Reagan issued Executive Order 12291 (E.O. 12291) which established a major role for OMB—and OIRA in particular—in the review and approval of proposed rules put forth by federal agencies. Under the order the Director of OMB "is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order." [1] The other notable condition imposed by this order was the requirement that agencies use a cost versus benefits analysis to be reviewed by OIRA as an important factor justifying the need for regulatory action.

There have been a number of reports and congressional hearings demonstrating how E.O. 12291 shifted the balance of power, giving the White House OMB new leverage over agencies. OMB was known to have changed the substance of agency rules and for agencies that bucked the tide, OMB would keep rules under review forever, a type of hostage taking. This led to OMB being nicknamed the "black hole." Moreover, E.O. 12291 and the PRA gave OIRA several bites of the same apple. It reviewed an agency's proposed rule, its paperwork to carry it out, and its final rule. At any time, OMB could force the agency to do what it wanted. And in the backdrop was always fear that OMB also controlled the agency's budget. OMB carried a big stick.

Still not satisfied that it had enough control over agency rulemaking, in January 1985, President Reagan issued a second executive order (E.O. 12498) that created a regulatory planning process to coordinate the agencies' regulatory plans with the administration's regulatory objectives. An agency was now to "submit to the Director of the Office of Management and Budget (OMB) each year, starting in 1985, a statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned." [2] One effect of this order was to provide OMB with access to agency decision making before proposed rules were submitted to OMB for review under E.O. 12291, and before the public's right to comment on proposed rules as set out in the Administrative Procedure Act (APA).

As noted at the time, OMB felt it was too hard to change the substance of rules when it did its E.O. 12291 review. They argued that various constituencies and advocacy efforts were already in place. As OIRA Administrator Douglas Ginsburg said in December 1984: "Agencies have been working on proposed regulations long before they come to notice and comment. Then we get ourselves in a confrontation with the agency over the end product." [3] Accordingly, OMB wanted to intercede in the agency process as early as possible. Hence, the idea for E.O. 12498 was born.

These two orders, combined with the statutory authority granted under the PRA, created what we now recognize as centralized regulatory review, i.e., White House review of regulations for consistency with the president's policy priorities. The power to coordinate information collection and to review proposed and final regulations in a policy office of the White House, made OMB the equivalent of a political censor over agency actions. Even if it did not censor, its authority to subordinate agency decision making was clear.

As Christopher DeMuth and Douglas Ginsburg, both OIRA administrators, wrote in the *Harvard Law Review* (March 1986), White House centralized review of regulations was an "appropriate response to the failings of regulation." [4] They noted that regulation tends "to favor narrow, well-organized groups at the expense of the general public" [5] and that centralized review, on the other hand, "encourages policy coordination, greater political accountability, and more balanced regulatory decisions." [6] Yet our perspective is exactly opposite. Centralized review, as epitomized by the role of OIRA, has further politicized the rulemaking process, brought less accountability, and produced less protective rules.

During the presidency of George H. W. Bush, the Quayle Council on Competitiveness emerged to further politicize the regulatory process by giving the Vice President's office authority to oversee OIRA's actions. The Quayle Council also provided greater access to campaign contributors and business interests concerned with regulatory burdens—and none of its activities were required to be disclosed. The Quayle Council interfered with numerous health, safety, and environmental regulations to

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[1] Executive Order 12291, Sec. 3(e)(1). *Federal Register* Vol. 46, p. 13193, February 19, 1981.
[2] Executive Order 12498, Sec. 1(a). *Federal Register* Vol. 50, p. 1036, January 8, 1985.
[3] OMB Watch, *Through the Corridors of Power: A Citizen's Guide to Federal Rulemaking, (Washington, DC: OMB Watch, 1987), p. 26.*
[4] DeMuth, Christopher C.and Douglas H. Ginsburg, "Commentary: White House Review of Agency Rulemaking" in *Harvard Law Review,* Vol. 99, (1986) p. 1081.
[5] Ibid., p. 1080.
[6] Ibid., p. 1081.

the benefit of regulated businesses.[7] It even imposed an extended moratorium on regulations in 1992. All this contributed to a highly centralized reviewing authority cloaked in secrecy. To the public, Congress and the courts, the agency issuing the regulation was held accountable; yet the White House, through OMB and the Quayle Council, was pulling the strings.

On the first day that President Clinton took office in 1993, he ended the Quayle Council and called for a more accountable and transparent rulemaking process. Several months later, in September, he revoked the Reagan orders but consolidated their requirements in Executive Order 12866. This is the executive order, with amendments, that provides the framework for the current regulatory process.

Most of the elements of centralized review as defined by the Reagan orders remained intact, including the use of cost-benefit analysis, annual regulatory planning, the preparation of regulatory impact analyses, and the prohibition on any agency action on a rule until after it has been reviewed by OIRA. The biggest change was in limiting the regulations to be reviewed to the most significant rules, whereas the Reagan orders required all regulations to be reviewed by OIRA. In addition, the order requires greater transparency on the part of OIRA regarding communications about proposed rules with those outside of government. It also requires each agency head to establish a regulatory policy officer "who shall report to the agency head."[8] Note the requirement that it is the agency head who shall appoint the RPO and the agency head to whom the RPO reports.

II. Bush Administration Regulatory Changes

President George W. Bush has made two amendments to E.O. 12866 during his presidency. The first, in February 2002, received little public attention and only had a minor impact on the regulatory process. E.O. 13258 removed from the Clinton order the roles assigned to the Vice President and reassigned those duties to the Director of OMB and other senior policy advisors. E.O. 12866 had the Vice President playing the role of mediator between the agency heads and OMB when disputes arose over a regulatory policy decision.

Even though the Vice President's role was removed by the Bush order, it turns out that Vice President Cheney has played an active role in shaping selected regulations. In a *Washington Post* series about the Vice President, the paper recounted his personal involvment in overturning an Endangered Species Act decision affecting the Klamath River basin in Oregon, among others.[9] Later in this testimony, I provide more evidence of the Vice President's involvement.

The second change came on January 18, 2007, when President Bush issued amendments to E.O. 12866 which continued the shift toward further centralizing regulatory power in OIRA. These amendments, prescribed in E.O. 13422, shift power away from the federal agencies, which are given regulatory power by legislative enactments, and usurp congressional powers. It is another brick in the foundation this administration has been building for a unitary theory of the presidency, one in which not only the executive branch is superior to the other branches in our constitutional system but that the White House exhibits significant control over the agencies.

After E.O. 13422 was issued, OMB Watch issued an analysis of the changes and expressed our concern about this continued accretion of power in OIRA. We wrote that among the changes:

- *The executive order shifts the criterion for promulgating regulations from the identification of a problem like public health or environmental protection to the identification of a "specific market failure (such as externalities, market power, lack of information . . . that warrant new agency action."*
- *It makes the agencies' Regulatory Policy Officer a presidential appointee and gives that person the authority to approve any commencement or inclusion of any rulemaking in the Regulatory Plan, unless specifically otherwise authorized by the agency head.*

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[7] Bass, Gary D., "Executive Management" in *Changing America: Blueprints for the New Administration,* edited by Mark Green. New York: Newmarket Press, 1992.

[8] Executive Order 12866, Sec. 6(a)(2). *Federal Register* Vol. 58, p. 51735, September 30, 1993.

[9] Becker, Jo and Bart Gellman, "Leaving No Tracks." *The Washington Post,* June 27, 2007. "Because of Cheney's intervention, the government reversed itself and let the water flow in time to save the 2002 growing season, declaring that there was no threat to the fish. What followed was the largest fish kill the West had ever seen, with tens of thousands of salmon rotting on the banks of the Klamath River."

- *It requires each agency to estimate the "combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities."*
- *It requires "significant" guidance documents to go through the same OMB review process as proposed regulations before agencies can issue them.*
- *It also requires "economically significant" guidance documents (those that are estimated to have at least a $100 million effect on the economy, among other criteria) to go through the same OMB review process as "significant" regulations.*[10]

I want to focus my testimony at this point on one aspect of these changes created by E.O. 13422, the regulatory policy officer.

III. The Regulatory Policy Officer (RPO)

As noted above, the regulatory policy officer is a creation of the Clinton era executive order. Under Section 6 of E.O. 12866, *Centralized Review of Regulations,* the responsibilities of the agencies and of OIRA are outlined. Section 6(a)(2) states:

> Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

The role of the RPO as envisioned was to coordinate and implement agency responsibilities regarding regulatory planning and review of regulations. These responsibilities are described in the preceding paragraph of the order and include: 1) allowing "meaningful" public participation in the regulatory process, 2) informing stakeholders of pertinent regulations, 3) providing OIRA with a list of planned regulatory actions, 4) providing OIRA with cost-benefit analyses for significant regulatory actions, and 5) making available to the public information on proposed and final regulations.

The RPO's role in practice was somewhat different across agencies. Not every agency maintained one designated RPO. The Department of Agriculture (USDA), for example, had various officials serving as de facto RPOs. Issue expertise determined where responsibilities rested on a specific regulation. In the Department of Energy, the RPO functioned as an agency counselor. The RPOs were not necessarily political appointees in all agencies, but the final regulatory decisions within agencies were in the hands of political appointees ultimately, usually the agency head or his or her designee. The essential points are that RPOs were appointed by agency heads, reported to those respective agency heads, and were participants in the regulatory process within the agency, not the driver of that process. The final responsibility for agency rulemaking rested with the politically appointed agency head, confirmed by the Senate.

Two of President Bush's amendments to E.O. 12866 impact the RPO. First, agencies are now required to designate a *political appointee* as their RPO, and were to do so within 60 days of the issuance of the amendments. New text also requires OMB to verify this designation.

Second, in addition to changing the requirements of the designated RPO, the Officer's responsibilities are increased. The RPO will now be charged with approving an agency's Regulatory Plan, a responsibility previously given to the agency head. The amendments state that "no rulemaking shall commence nor be included" for consideration in the agency's regulatory plan without the political appointee's approval. The Regulatory Plan includes the most important regulations which an agency plans in a given year.

In OMB Watch testimony in April 2007, we expressed concern about the increased politicization these changes may have introduced into agency decision making:

> By requiring the Officer to be a political appointee, the amendments suggest a further politicization of the regulatory process. OMB Watch is concerned that by installing a political appointee as the RPO and increasing the responsibilities, that appointee will significantly affect an agency's ability to regulate in a fair and nonpartisan fashion.[11]

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[10] OMB Watch, *A Failure to Govern: Bush's Attack on the Regulatory Process,* March 2007, p. 3. Available at *http://www.ombwatch.org/article/articleview/3774*

[11] Testimony of Gary Bass, Executive Director of OMB Watch before the House Committee on Science and Technology, Subcommittee on Investigation & Oversight, April 26, 2007, on

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In late July, 2007, OMB released a list of RPOs for each agency. Of the 29 RPOs on the list, 27 have been confirmed by the Senate in their agency roles but not in their role as RPOs. The remaining two are political appointees who did not require any Senate confirmation. Nine of the sixteen cabinet level RPOs are General Counsel positions.

OIRA Administrator Susan Dudley framed this as a good government measure because one person will be accountable for major regulatory decisions in each agency.[12] This could not be further from the truth. The responsibilities of these officials have been substantially increased, yet they are not subject to Senate confirmation in their role as RPOs and their actions are not public. Subsequently, the RPOs are not likely to be accountable to Congress or the American people. Given the ability to significantly impact regulatory outcomes, these people should be confirmed by the Senate for these additional job responsibilities—responsibilities not foreseen when they were confirmed for their current positions.

We also have expressed concern that the point at which "a rulemaking shall commence" is also unclear. OIRA has provided a vague and unhelpful definition and has acknowledged the commencement of a rulemaking may differ from agency to agency.[13] This ambiguity could allow the RPO to exert influence at any stage in the rulemaking process and could prevent important scientific research or analysis from taking place. Nor do we know when or whether an RPO has prevented a rulemaking from taking place or the hurdles that may exist to begin and continue a rulemaking. If the current RPO approach is not changed by the next president, we encourage Congress to investigate how RPOs perform their responsibilities, and to establish disclosure policies to close the gap in transparency of this aspect of the rulemaking process.

In some agencies, the amendments related to the RPO may have little effect on regulatory development. In the case of the Department of Energy, the RPO is already a political appointee albeit without the sole responsibility to initiate regulations and without final decision making authority over regulations (unless one or both powers have been delegated to the RPO by the agency head). The White House is unlikely to have a greater or lesser impact on the way in which regulations are formulated within that agency. Similarly, the process in the Department of Labor is likely to go unchanged.

In other agencies, however, the RPO change will likely centralize the regulatory process and create OIRA-like structures within agencies even though OIRA has been criticized over the years for exerting political influence. In the case of USDA, this change, if followed, will end the process of dividing regulatory authority based upon experience and expertise. Instead, the RPO will ultimately be responsible for all regulatory decision making and be involved in regulatory discussions from the beginning of agency considerations. Furthermore, installing a political appointee where one did not previously exist will facilitate White House input into agency regulatory matters.

We acknowledge that a president has the right to oversee agency decision making and hold accountable those agency heads to whom he has delegated responsibility. Professor Peter Strauss has pointed out in his testimony before this Subcommittee and in other testimony and writings—and others have addressed as well—the distinction between making that decision and delegating that decision to accountable political appointees. This debate is an important one to have and to constantly revisit as each president makes his or her mark upon the institution of the presidency.

When Congress, however, explicitly legislates that a regulatory decision shall be made by an agency head and that decision shall be based on specific criteria, there is virtually no basis for reasonable people to disagree that the president does not have the authority to make the decision. The instance of President Bush overriding

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"Amending Executive Order 12866: Good Governance or Regulatory Usurpation?" Available at: *http://www.ombwatch.org/article/articleview/4096/1/360?TopicID=7*

[12] Skrzycki, Cindy, "Bush, Congress Battle to Control Bureaucracy," Bloomberg News, July 17, 2007.

[13] In an April 25 memo instructing agencies on how to comply with the E.O. and the *Final Bulletin,* OIRA included the following definition of "commence" as it pertains to agency rulemaking: "The point at which a rulemaking commences may vary from one agency to the next, depending on each agency's procedures and practices, and may vary from rulemaking to rulemaking. As a general matter, a rulemaking commences when the agency has decided as an institutional matter that it will engage in a rulemaking. At the latest, the rulemaking will commence when the rulemaking receives a Regulation Identification Number (RIN)." *M-07-13, Implementation of Executive Order 13422 (amending Executive Order 12866) and the OMB Bulletin on Good Guidance Practices* (April%, 2007), available at: *http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf*

the EPA decision in the ozone rulemaking that Prof. Strauss discusses is one such example of constitutional overreaching.

What remains among our greatest concerns, however, about the RPO structure as required by E.O. 13422 is the opportunity for unprecedented interference in the information that goes into those regulatory decisions before policy makers are rightfully involved in the final agency decision. For agency experts to do their jobs as mandated by Congress in statutory delegations to agencies, information critical to those policy decisions must be free from political interference. The RPO structure has the potential to allow interference in the collection and analysis of all types of information necessary to making important public health and safety, environmental, and workplace safety regulatory decisions.

But, of course, the public will never know the extent to which RPOs have stopped, delayed, or interfered with the quality of decision information because there is no transparency and accountability imposed on the RPOs. There are numerous documented instances where OIRA has interfered in agency decisions and in the information used to make those decisions, as this testimony documents below.

To what extent will the RPO be a *de facto* OIRA official sitting in the agency coordinating and carrying out the responsibilities of the OIRA desk officers during the pre-rulemaking stage? Having been given the power to initiate regulations, we fear the RPO will further decrease agency rulemaking discretion and increase the trend toward OIRA dictating agency rulemaking. Transparency can prove our fear is groundless.

IV. Executive Office of the President Intrusions into Agency Decision Making

As I mentioned above, the involvement by OIRA in agency decision making is well-documented. For example, in September 2003, the General Accounting Office (GAO) (as the Government Accountability Office was then known) issued a report on OMB's role in reviewing agency health, safety, and environmental rules.[14] Among the findings are that OIRA's greatest influence over rules is in the period before draft rules are submitted to OIRA for review, and that rules from EPA and the Department of Transportation were the rules most significantly changed and returned. Among the changes OIRA made were to rules regarding:

- tire pressure safety (mostly to do with changing the cost-benefit analysis),
- control of air emissions rules (by changing language that EPA was "considering" adoption of standards from "proposing" the adoption of standards, thus affecting the cost-benefit analysis)
- hazardous air pollutants from wood product coatings (by delaying the compliance dates of the rule from 2 to 3 years after the date of the final rule)
- proposed nonconformance penalties for heavy-duty diesel emissions (by changing EPA's choice of discount rates, fuel prices, and changing language regarding assumptions)
- listing manganese as a hazardous waste (OIRA deferred action on listing manganese thus killing the rule outright) and
- minimizing adverse environmental impacts from cooling water intake structures (by making changes to which industries would be covered by the rule by changing scientific and engineering standards).[15]

More recently, we have seen many more examples of OIRA's work to delay, weaken, or override agency regulations proposed by agencies, and continued interference in generating the information that goes into these decisions. The ozone decision is but one instance, although perhaps the most blatant, of executive branch interference at the decision making level.

A. Interference in Regulatory Standards

Although the Vice President was removed from the regulatory process by E.O. 13258, OMB Watch has documented instances in which representatives from Vice President Cheney's office have been involved in high profile environmental and national security regulations during OIRA's meetings with industry representatives, especially in 2007. Not only did someone from the Office of the Vice President (OVP) attend meetings about setting the ozone standard, but also attended four meetings

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[14] General Accounting Office, *OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews.* September 2003. Available at: *www.gao.gov/cgi-bin/getrpt?GAO-03-929.*

[15] This case was challenged in court. The Supreme Court has recently granted certiorari and will hear this case in its new term.

about Department of Homeland Security (DHS) chemical security regulations. The final rules were actually weaker in their reporting thresholds than what DHS proposed. According to information posted on the OMB website, as of November 2007, OIRA had held more than 540 regulatory review meetings since E.O. 13258 was issued in 2002. A representative from OVP has been present at only 11, about two percent. However, eight of those 11 meetings have occurred since February 2007, including the four meetings on the DHS chemical security rule.[16]

Currently, various White House offices are interfering in a National Oceanic and Atmospheric Administration (NOAA) rule to extend protections to the North Atlantic right whale. OIRA is serving both as a party to the interference and as a conduit through which other offices can exert pressure.

After initiating the rulemaking in 1998, NOAA's National Marine Fisheries Service published a notice of proposed rulemaking in June 2006 which, if finalized as written, would impose a speed limit of 10 knots on large shipping vessels traveling in the Atlantic Ocean during seasons when the right whale is most active. NOAA decided to take this course of action because collisions with ships are one of the leading causes of death for the North Atlantic right whale. The agency estimates the right whale population has dwindled to about 300 with at least 19 deaths caused by ship strikes in the past 22 years.[17]

In February 2007, NOAA sent a draft of the final rule to OMB for review. Under E.O. 12866, OIRA is to review proposed rules within 90 days with one possible extension of 30 days. The rule remains under review 440 days later.

In April 2008, documents obtained by the Union of Concerned Scientists and released by the House Oversight and Government Reform Committee show that not only is OIRA delaying the right whale rule, it is actively working to undermine the scientific basis for the regulation.[18]

The documents show that two offices, the Council of Economic Advisors and the Office of Science and Technology Policy, reanalyzed aspects of the regulatory science and attempted to use their analyses to question NOAA's findings. The CEA recalculated statistical models and questioned the validity of published literature in an attempt to undermine NOAA's finding that ship speed bears a relationship to whale mortality. Another document shows the Office of the Vice President questioned the validity of published studies NOAA is using as the basis for the rule and contended the agency lacks "hard data."

Nowhere in any of the documents does a White House official express an opinion on the rule or present alternative policy options. However, the scientific opinions the officials are advancing would weaken NOAA's scientific argument and allow opponents to more easily assail the rule. Ultimately, this kind of scientific interference can lead to weaker protections, or a complete absence of protections.

B. Interference in Generating Information

Curtis Copeland from the Congressional Research Service (CRS) has provided testimony to the Subcommittee addressing the numerous ways in which OIRA has used administrative mechanisms to interfere with the generation of information important to setting standards. I do not wish to repeat Dr. Copeland's testimony, but only to reiterate there have been many mechanisms employed by OIRA to impact the quality of information produced by agency experts. Among those mechanisms are directives on the use of cost-benefit analysis, peer review guidelines, data quality challenges, and an unsuccessful attempt to impose a one-size-fits-all risk assessment process on agencies. What follows are a few examples of this interference in health and safety standards.

OIRA and other political staff have increasingly waded into the scientific aspects of decision making, even before that science becomes relevant for any particular rulemaking. Most environmental, public health, and safety standards are based on rigorous scientific research and findings. By controlling the scientific information behind these standards, politics can erode the very foundation upon which regulations are built.

One example is EPA's Integrated Risk Information System (IRIS). IRIS is a publicly searchable database for studies and information on the human health effects of chemical substances. EPA scientists and policymakers use the information in the database to make determinations about the risk of various substances. EPA studies

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[16] OMB Watch, *Vice President Reemerging in Regulatory Review Meetings.* November 6, 2007. Available at: *http://ombwatch.org/article/articleview/4067/1/85/?TopicID=2.*

[17] National Oceanic and Atmospheric Administration, *Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, Federal Register*, Vol. 71, p. 36299,June 26, 2006.

[18] The documents are available on the committee's website at: *http://oversight.house.gov/story.asp?ID=1921.*

both the carcinogenic and noncarcinogenic effects of substances and determines safe or tolerable exposure thresholds when possible. IRIS assessments can inform regulatory action intended to protect humans from the harmful effects of certain substances.

In 2004, according to a GAO report, OMB directed EPA to begin routinely submitting draft assessments to OMB for an interagency review. Previously, the need for reviews had been determined on a case by case basis.[19] At two points in the current IRIS process, EPA must submit drafts of chemical assessments to OMB for review. OMB does the bulk of its interfering during these review periods. OMB voices its own opinions on the chemical assessment and solicits the opinions of other federal agencies such as the Department of Defense, the Department of Energy, and NASA. EPA is prohibited from proceeding with the assessment until it receives explicit approval from OMB.[20]

OMB may interfere with the chemical assessments by suggesting to EPA its own scientific judgments or by forcing EPA to consider scientific studies that fit OMB's policy preferences. Alternatively, or additionally, OMB can delay work on an assessment. The IRIS process contains no time limits for the OMB review period.

In April 2008, EPA announced changes to its IRIS procedures which now involve OMB at even more stages in the process. The changes emanated from a working group comprised of officials from EPA, OMB, the Pentagon, and other federal agencies. All comments from OMB or other agencies will continue to be considered deliberative executive branch proceedings, allowing any incidences of scientific manipulation to evade public scrutiny.

In another example, in March 2007, a Department of Interior investigation found Julie A. MacDonald, the deputy assistant secretary for fish, wildlife and parks, allowed political considerations to taint a number of decisions in which the Fish and Wildlife Service (FWS) decided not to consider certain species endangered. Among the transgressions, MacDonald leaked internal agency documents to industry lobbyists and intimidated agency staff in order to manipulate scientific evidence. MacDonald resigned in April 2007 as a result of the scandal. In response to public pressure and the scrutiny of the House Natural Resources Committee, FWS decided to review eight endangered species decisions by MacDonald. In November, FWS announced it had confirmed impropriety in seven of the eight decisions and is now reviewing them.

Another example of scientific interference this time coupled with censoring government officials came to light in October 2007. Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, had her testimony about the threat global warming poses to public health substantially cut by OMB before Dr. Gerberding was allowed to testify before the Senate Environment and Public Works Committee on October 23rd. Seven pages, about half, of the testimony was deleted from the draft submitted for OMB's review. The removed sections included information on extreme weather events and food and water-borne disease, among other things. Climate Science Watch obtained a copy of the draft as submitted and the censored version and posted the two on its website the day after the hearing.[21]

Lastly, I would like to recommend to the committee two reports recently issued by the Union of Concerned Scientists that have broadly documented examples of political interference in scientific information.[22] The first of these, *Federal Science and the Public Good: Securing the Integrity of Science in Policy Making,* documents interference across federal agencies providing specific examples, like the above, of misrepresenting science and the results of research, deleting and editing scientific information, and suppressing science, among other examples.

The second of these reports has received much greater public attention because the voices in the report are those of EPA scientists whose work has been made much more difficult by political interference at the agency. *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency,* contains the results of surveys of almost 5500 EPA scientists. Almost 30 percent of the EPA scientists from across the country responded to the surveys with devastating results.

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[19] Government Accountability Office, *Chemical Assessments: Low Productivity and New Interagency Review Process Limit the Usefulness and Credibility of EPA's Integrated Risk Information System,* March 2008. GAO-08-440. Available at: *http://www.gao.gov/new.items/d08440.pdf.*

[20] Ibid.

[21] See these postings at Climate Science Watch's website, available at: *http://www.climatesciencewatch.org/index.php/csw/details/censored__*cdc__testimony/

[22] Union of Concerned Scientists, Science Integrity Program, *Federal Science and the Public Good: Securing the Integrity of Science in Policy Making.* February 2008. Available at: *http://www.ucsusa.org/scientific__*integrity/restoring/scientificfreedom.html. And *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency*. April 2008. Available at: *http://ucsusa.org/scientific__*integrity/interference/interference-at-the-epa.html.

Nearly 60 percent of the respondents experienced political interference in their work and that this interference has been higher in the last five years than previously. In the essays accompanying the surveys, the respondents generally cite OMB as the source of the external interference.

V. Conclusions

It is unlikely that centralized regulatory review will end any time soon. Many have argued that it is needed in such a vast and complicated federal government. It can provide inter-agency coordination, ensure that regulations are not in conflict with existing or other proposed rules, and provide a valuable planning and coordination function. We believe, however, that today's regulatory practices go well beyond the benefits of centralized review. Current practices give the president unique and unparalleled power to alter the collection and dissemination of information and to shape the substance of agency rulemakings—all behind the scenes. Even more striking is that a small number of OIRA staff have controlled this process all in the name of the president. In doing so, the implementation of agency statutory requirements may become secondary to the policies and priorities of the president as interpreted by the OIRA staff.

The application of the unitary theory as it is practiced in this administration and framed in executive branch directives gives the president, and a cadre of employees that represent the president, control over the substantive decision making of agencies. As a result, politics is injected and elevated into decisions where science and rational judgment should prevail. Political appointees have greater control over the substance of regulations; politics supersedes scientific and technical information that is critical to protecting our environment and health and safety at home and in the workplace. Even if this were not empirically true, the appearance would still exist, thereby tainting the public's perception of the regulatory process.

The current structure of the rulemaking process has several costs. There is now the potential for even greater conflict between the statutory authority delegated to the agencies by Congress and executive priorities. When the president has the ability to override this statutory delegation of authority, the balance of power between Congress and the Presidency is altered. There is the perception, if not the reality, that special interests are favored heavily over the needs of the public. This process does not lead to better rules and public protections. When the president makes a substantive regulatory decision based on political considerations, scientifically-based protective standards are vitiated. Finally, we can be assured that if Congress does not act, OIRA will remain the equivalent of a political censor over congressional mandates and agency decisions.

Admittedly, there are grey areas where "coordination" ends and "substantive interference" begins. When OIRA changes a word in a proposed rule, it may help to make the regulation more understandable. On the other hand, it may intentionally change the very meaning of the rule. While it may be appropriate for OIRA to coordinate, we believe it is wrong to interfere with substantive agency decisions.

We believe there are solutions Congress can pursue. First, Congress can review the role the White House plays in this review process with an eye toward removing or limiting OIRA's powers. Congress could define the powers it is willing to give to OMB regarding regulatory review. Since the 1981 Reagan Executive Order, Congress has chosen not to legislate in this area; hence OMB operates through the extension of presidential constitutional authority. Congress could also restrict in legislation OIRA's ability to review certain rules promulgated under a statute. This would require, of course, the ability of Congress to overcome a presidential veto or some other administrative recourse the president might exercise.

Second, Congress could place the statutory responsibility for agency decisions in the Senate-approved agency heads, not regulatory policy officers and not OIRA. If the review of an agency action is judged to be inconsistent with the priorities of the president, the president then should exert influence on the appointed agency head. This would also permit Congress to hold the ultimate policy maker accountable by removing the authority for regulatory decisions from an unaccountable agency subordinate. Similarly, Congress could choose to move centralized regulatory review out of OIRA and into another agency outside the Executive Office of the President. This would likely reduce OIRA's clout and influence over the substantive work of agencies.

Third, to the extent that centralized review of agency regulations remains lodged in OIRA or some other presidential office, Congress could seek mechanisms to hold that office accountable. One mechanism for this, we believe, is subjecting OIRA to the requirements of the Administrative Procedure Act. If OIRA makes substantive regulatory decisions, it should be subject to the accountability provisions of the APA

including subject to court actions. Coupled with this increased accountability, Congress could expand the requirements for defining what must be disclosed in agency regulatory dockets. Transparency requirements such as this would allow Congress, the courts, and the public to know the extent to which the executive has taken control over substantive agency regulatory outcomes.

Finally, regardless of the extent of partisan control over the legislative and executive branches, we urge Congress to exert its constitutional oversight control and restore the historical separation of powers balance so that unitary expansion of the executive branch is held in check.

Thank you for the opportunity to appear before you. This concludes my testimony. I'm happy to answer your questions.

Mr. JOHNSON. All right. Thank you, Dr. Melberth.

At this time I will recognize Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I am intrigued by the testimony. Professor Strauss and I have largely agreed with a very tiny disagreement. But I am actually going to ask the panel to go in a little different direction, here, because what I am really concerned about is not this issue that is before us today, because I think academically Professor Strauss has really nailed it down and it has come down to a fairly close issue.

But I am wondering what we do in the future in America, because—particularly, Dr. Melberth, in your role—using the Internet could be an incredibly attractive way to help focus on government. But the way to do it, it seems to me, is to get people more involved. Not just in responding to things that they may feel urgent, but actually in overseeing what government does.

In others words, you have all seen Wikipedia. You have got millions of people that have contributed to articles and there are dozens, millions, of articles on Wikipedia, not all correct, but awfully good, frankly, at least in my experience. And it has a self-regulating process for deciding what is good.

I looked at the Web site for OMB Watch, Mr. Melberth, and you tend to be—is it fair to say left in the political spectrum?

Mr. MELBERTH. Progressive might be the word we would choose.

Mr. CANNON. Would that mean, like, Socialist? I am just kidding, here, although that is historically where I think it would come down.

It seems to me that this issue is not a left or right issue. In fact, frankly, it is a more academic issue.

Are you familiar, Mr. Melberth, with a Jim Harper, who has a site called Washington Watch? He would call himself I think right and conservative. But are you familiar with his site at all?

Mr. MELBERTH. No, sir. I am not.

Mr. CANNON. Take a look at it. Because my point is, left or right is not very important. Actually knowing what government does is. So you are sitting here and talking about things that bother you and using Union of Concerned Scientists, which has a political agenda, and very clearly has a political agenda, and doesn't want the funding of its agenda changed, is not so helpful as to say rather than conclude, I think the term is—science and rational judgment is a term that has been used a couple of times in this discussion. Well, that is often used to cover over a political and financial agenda.

Much better, it would seem to me—and I am lecturing a little bit here, but I would like your response in particular, Dr. Melberth—much better to get the American people involved in what OMB

does, in the guts of it, like with Wiki. You have got somebody that has an interest in a particular rule, let him take a look at it.

We asked Ms. Dudley earlier about this, but if you have transparency in the rulemaking process, and transparency means electronic access to anybody with a computer, anywhere with access to the Internet, can we not create the new world that I think Mr. Obama is showing us with a couple of million donors, that the Wikipedia shows up with millions of people participating in sharing knowledge? Is this not a noble goal, instead of causing people to react to something, that you characterize OMB has done, but rather to guide them into actually helping you look at what is going on in the regulatory process in America?

Mr. MELBERTH. We certainly agree that this process should be far more transparent than it is. There is far too much of this that is out of the eye of the public and so they don't know what is going on. And the role of the RPO exacerbates that. It doesn't enlighten it. Because no one knows what the RPO is doing.

It is the decision-making process that the RPO goes through and the agency is not required to disclos it. We don't have knowledge of when an agency rulemaking commences. We don't know when that decision might be or how often——

Mr. CANNON. Let me interject, because my time is expiring.

I would really love for you guys at OMB Watch to engage people, left or right, progressive or conservative, I don't care, in the process of pushing for transparency and then looking at the data that we have. Take a look at the—I think it is called Washington Watch. Again, different political persuasion, but I think the goal ought to be similar to what you are looking at.

Is there any reason that you or others see why we shouldn't be using modern Google-type technology to allow us to have virtually complete access to everything that happens in government?

I see Dr. Strauss has a comment, but maybe we can just go down the panel.

Mr. MELBERTH. Mr. Cannon, we have actually been a leader in transparency and the use of technology for the 25 years that OMB Watch has existed.

Mr. CANNON. I think you—I have a yellow light. Let me suggest that you have done—I am not criticizing you at all. But I am hoping that you will go to the next step, which is draw people into the review, the citizen review process, instead of just energizing a base. Because I think that what happens, the energized base comes to the middle, everybody comes to the middle, and we have a better run country.

Mr. MELBERTH. We are indeed trying to do that, yes.

Mr. STRAUSS. I couldn't agree more with the gentleman. At some point during your questioning of Administrator Dudley, I was reminded of what has been for a long time my favorite Internet site for demonstration to my students, at least, which is a site maintained by the National Highway Transportation Safety Administration, on which they post all their general counsel letters advise. Somebody, Mercedes Benz, Volkswagen, whomever, writes in, asks for some advise about the meaning of a rule.

Every one of those letters is on this Web site, is immediately searchable. What you would have had to pay $5,000 to a Wash-

ington law firm to go through those records and find 10 years ago you now get in 30 seconds.

This is the stunning transformation of the field that is occuring and whatever the Congress can do to encourage it, it ought to do. I know there have been difficulties between Congress and OMB in particular over the past few years about the funding of electronic rulemaking development that have tended to put the brakes on that development. It looks in exactly the direction the Congressman is suggesting, and I hope those difficulties can be resolved.

Mr. CANNON. I thank the gentleman. I am certainly looking forward to that.

Mr. Chairman, I ask unanimous consent to speak for an additional minute.

Mr. JOHNSON. Without objection.

Mr. CANNON. And I just want to follow up on what you said, Professor Strauss.

I have a constituent that has a problem with the IRS. I have gotten involved. I have spoken with the—you have the general counsel and then you have got several other deputy general counsel. I have spoken with the next senior person in the legal system in the IRS, and the system that they use for deciding what to decide is more complicated than the decisions they issue.

It is appalling and it is—the subject in this particular case, I am comfortable saying, it is obviously skewed by the desires of individuals instead of by the desire for policy. And if we had transparency there—now, that is a lot more difficult than it may be with the Transportation Department in one area of their oversight. Nevertheless, if we had that kind of transparency, bureaucrats would be much more responsible for what they do and also how they affect not just broad policy but individual businesses.

And in addition to that, all businesses could operate with more clarity, because they would have at least the answers that have been given by guidance to other people.

And so you understand that I am on a mission here. It is not a partisan mission, not at all critical of OMB Watch, except I would like you to draw more people in, because I think more people will draw you away from progressive and toward the middle, not that progressive is bad or that conservative is good, but if we are in the middle, we get a lot more done. And this is an area where we actually really do desperately need to progress, without biting into the left meaning of the term, but to progress in America. And it is all there and the technology is available.

So I thank you, Mr. Chairman, for allowing me to pontificate here, but this is what this Committee should do and this is the major jurisdiction of this Committee that we ought to be expanding and ought to be pushing. There is no place else in Congress that they look at these issues as we do.

Thank you and I yield back.

Mr. JOHNSON. Thank you, Congressman Cannon.

I have a couple of questions.

Would anyone wish to comment on Administrator Dudley's testimony? If not, then Mr. Copeland, I would like to ask you, one of the Bush administration initiatives that you discussed is increased

use of informal OIRA reviews. Can you describe what informal OIRA reviews are and why they are important?

Mr. COPELAND. Sure. Essentially, the formal process is that after the agency head has signed off on a rule, the agency will send it to OMB for formal review. That is when the 90-day clock starts. The executive order says that OIRA has 90 days, essentially, to review the rule.

Informal review is when the agency will send over drafts of the rule, either at OIRA's request or at the agency's initiative, for a pre-submission discussion. So it is essentially while they are formulating the rule.

And OMB has said they have their biggest impact on agency rulemaking during this informal, pre-formal submission process.

The problem in terms of transparency is that OMB has interpreted the requirement—there is a requirement in Executive Order 12866 that says the agency is to disclose the changes made at OMB's suggestion or recommendation. OMB has interpreted that to mean only during formal review. I have seen rules that have gone back and forth between OMB and the agency several times over a several week or even several month process, during informal review, get submitted to OMB, have a 1-or 2-day formal review process, and under OMB's interpretation, the only thing that has to get disclosed is what happens in that 1 or 2 days.

So the problem is that there is little transparency during the informal review process, and that is the period in which OMB says they have their greatest impact.

Mr. JOHNSON. Is the Bush administration the first Administration to use this informal review process?

Mr. COPELAND. No, sir. The Clinton administration used it. Other Administrations back to the start of OIRA in 1981 have used it.

I would say that both the previous OIRA administrator and other observers, agency people, have said that it seems to have been ratcheted up during this Administration, that there is greater use of informal review and that as a consequence there is less transparency about the effects that OIRA has on the agencies' rules.

Mr. JOHNSON. All right. Thank you.

Mr. Gattuso, do you think it is appropriate for the Vice President, who has no scientific expertise or responsibilities, to delay a final rule for more than a year that would provide protection for Right Whales?

Mr. GATTUSO. Well, first off I would point out—and thank you for raising that, since it was one of the witnesses earlier who referred to the Vice President as a political appointee, and we do have to remember that the Vice President is not a political appointee. He is an elected official, one of two individuals in the country elected nationwide. I think that in that status, the Vice President certainly has every right to ask questions, to ask executive branch officials to justify their actions, to convey his own views.

The question of how long something would be delayed, what kind of questions are asked, I think depends entirely upon the subject at issue. I am not going to defend every action every Vice President has ever taken, but in terms of the Vice President's right to ask

these questions and receive answers as to the activities of the executive branch, I think that is entirely appropriate.

We hear a lot about politicization of the process. It reminds me a little bit of the movie *Casablanca.* Politics. Politics going on in the rulemaking process. Much of this is a political process in the sense of getting information out, balancing between the unelected officials carrying out their responsibilities, the elected officials with responsibility to their voters and the country in terms of ensuring certain policies and priorities. And those elected representatives, by the way, include Congress.

So short answer, yes, the Vice President has a role.

Mr. JOHNSON. Thank you. And I will yield the balance of my time to Congressman Cannon.

Mr. CANNON. Thank you.

I just have one other question I can't resist asking this panel, and let me ask Mr. Gattuso in particular, but if anyone else would like to answer, I know that, Dr. Copeland, we have talked about these issues in the past, but if Congress were to make lively use of the Congressional Review Act, including our ability to review rulemaking agencies' case by case compliance with the Administrative Procedure Act and other administrative law, don't you think that would go a long way to policing the roles of the bureaucracy and the President in Federal rulemaking?

Mr. GATTUSO. I agree. The Congressional Review Act is probably one of the most under-used mechanisms that the Congress has in its quiver. I believe it has only been used once in its 10-year history, at least been all the way through the process once, and it is tailor-made.

It was specifically enacted in order to let Congress voice its will, to implement its well as to regulations when a regulatory body has, in Congress' view, misinterpreted what Congress had in mind.

And by the way, it can be used both to further regulation or to hinder it. It is not specific as to which direction that pendulum goes.

Mr. STRAUSS. I am going to have to disagree.

The principle place, I think, for expressing the disagreement is to point out that before you can get a regulation under the Congressional Review Act, it must have survived this process. That is to say it will have presidential approval at some level or another.

And consequently, any resolution of disapproval that the Congress might vote is subject to the possibility of presidential veto. It is not at all accidental that the one opportunity you have had to use the Congressional Review Act was an opportunity that fell between Administrations, a rule issued by Democratic administration that was then vetoed by the Congress after the Democratic administration had ceased to exist and had been replaced by a Republican administration whose head agreed with what the Congress did in disapproving OSHA's ergonomics rule.

Mr. CANNON. We are actually, of course, considering some adjustments to the Congressional Review Act. We have a bill that has been passed out of Subcommittee and another one that we think will come along fairly soon that would, we hope, change that.

If we changed it so that we at least had a more political role in reviewing regulations, would that change your view? In other words, does Congress have a role here?

Mr. STRAUSS. There have been serious suggestions made by my friend and at least area colleague, Paul Verkuil, notably that one ought to replace the current technique for rulemaking by something more or less analogous to what I think is done in many European countries, where rulemaking proposals would essentially be fast-tracked legislation and would not take effect unless enacted by Congress.

This would dramatically change the landscape generally, whether—is an occasion for a different meeting than today.

Mr. CANNON. I think we have actually dealt with that, of course, in the past, as you know. And there was a large consensus that the current act does not work. And so if other panelists would like to comment on the possibility of more congressional involvement in regulatory processes, I would be quite interested to hear either Dr. Copeland or Mr. Melberth.

Mr. MELBERTH. Well, we do have some suggestions for what Congress can do to be more involved and take some control. We don't believe the Congressional Review Act is an appropriate vehicle to do that. But we would look forward to working with Congress to find a way in which Congress could be more involved in that process.

Mr. CANNON. We have actually been working on this, as I think Dr. Copeland knows and Professor Strauss, for the last 6 years. Actually, no, we are almost 8 years now into this process. And so we have had a lot of academic water under the bridge here and we are actually trying to hope we can do something in the short-term.

Dr. Copeland, did you want to comment at all?

Mr. COPELAND. I would just agree that it would essentially take two-thirds of both houses to overturn a rule that the President agrees with. And so you do have this really high hurdle to jump.

I would point out, though, that there are a number of other options that Congress does have. Greater specificity in their delegations of rulemaking authority to the agencies would make it less likely that Congress would object, because the agencies would be constrained in their discretion. To the extent that, you know, the agencies are regulating separate from what Congress intended.

Mr. CANNON. Of course, I believe the academic momentum has been toward the question that Professor Strauss is close to stating, although it was not the point of his comment, which is that it would not be an overturning of a regulation, but rather voting on regulations before they become law, in which case you don't have a two-thirds majority problem.

Mr. COPELAND. Correct.

Mr. CANNON. Now, we are not at a point of making that leap yet or jumping into a rubicon that might be too swift for us, but it is my view and I think the view of the Chairman of the full Committee and other Members of the Committee that this is an area that we ought to be much more aggressively involved in.

And that, of course, is a very long discussion, and we probably should end the hearing since we have a vote.

So thank you, Mr. Chairman, for your indulgence, and I yield back.

Mr. JOHNSON. Thank you, Mr. Cannon.

I would like to thank all of the witnesses for their testimony today. Without objection, Members will have 5 legislative days to submit any additional written questions, which we will then forward to the witnesses and ask that you answer as promptly as you can to be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

Again, thanks for your time and for your patience.

This hearing on the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 3:33 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

ARTICLE SUBMITTED BY THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

REG-MARKETS CENTER

The Rhetoric and Reality of Regulatory Reform

Cary Coglianese*

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* Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Law School; Director, Penn Program on Regulation. The author is grateful for research support provided by Jocelyn D'Ambrosio and Tim Von Dulm and comments on an earlier draft from Matthew Adler, Jocelyn D'Ambrosio, Stuart Shapiro, Natalya Shnitser, and Christopher Yoo.

The Rhetoric and Reality of Regulatory Reform

Cary Coglianese

Executive Order 13,422[1] leaves in place most of the existing review process established earlier under Presidents Reagan through Clinton.[2] But it makes several controversial changes to Clinton's Executive Order, such as requiring that agencies specify in writing the regulatory problems they seek to solve, giving presidential appointees certain gatekeeping functions as regulatory policy officers, and imposing new review requirements on certain guidance documents.[3] Although these amendments add to or modify only a very small amount of the text in the pre-existing Executive Order on regulatory review, the changes have provoked a firestorm. Critics charge that the new Order solidifies presidential control over rulemaking and will hamper agencies' ability to issue timely regulations in the service of social welfare.

In this essay, I focus specifically on the concern that the Order will burden and delay the regulatory process. I compare the criticisms of 13,422 with criticisms of past procedural changes to the regulatory process, and I juxtapose the perennial concern about administrative burdens and delay with the growth in federal regulation over the past half-century. If procedural controls, such as those in 13,422, really do impose on regulatory agencies a "paralysis by analysis," then why is the federal government still producing so many high-impact regulations? This essay raises possible explanations for the disjunction between the rhetoric and reality surrounding regulatory reform, including the possibility that the ultimate impact of the Bush amendments will be largely symbolic.

I. Rhetoric Reacting to Executive Order 13,422

For a short presidential decree on administrative rulemaking, Executive Order 13,422 has received a remarkable degree of public attention, including a front-page story in

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[1] Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (hereinafter referred to in the text as "the Order" or "13,422").

[2] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), 58 Fed. Reg. 51,735 (Sept. 30, 1993), *reprinted in* 5 U.S.C. § 601 (2000).

[3] In addition to these changes, 13,422 also includes provisions about reporting cumulative regulatory benefits and costs as well as about the use of formal rulemaking procedures.

The New York Times,[4] a broadcast on MSNBC,[5] and two congressional hearings[6]—not to mention the passage of a House appropriations bill blocking its implementation.[7] In the course of the highly visible debate over 13,422, critics have advanced two rhetorical arguments. The first emphasizes the balance of power between Congress and the President, tapping into broader critiques of the Bush Administration's positions on executive authority in domestic and foreign affairs.[8] The second, and the one on which I focus here, is a variation on what economist Albert Hirschman calls the "rhetoric of jeopardy."[9]

Executive Order 13,422, the argument goes, "deals a body blow to the ability of our agencies to do their jobs."[10] Its requirement that agencies state the problem they seek to solve imposes "another hurdle for agencies to clear" before they can adopt good public policies "protecting public health and safety."[11] Its provisions on guidance documents give the Office of Management and Budget (OMB) the ability "to keep the agencies in an

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[4] Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1 (reporting that "[c]onsumer, labor, and environmental groups denounced the executive order" and feared that it "would hinder agencies' efforts to protect the public").

[5] *Countdown with Keith Olbermann: Executive Order 13,422* (MSNBC television broadcast Jan. 30, 2007), *available at* http://olbermannnation.com/index.php/2007/01/30/executive_order_13,422 *and* http://www.youtube.com/watch?v=Sz6NEoKZRMY (conversation between host Keith Olbermann and guest John Dean highlighting potentially "outrageous" consequences of 13,422, including its "hurdles" for new regulatory actions).

[6] There have been at least two congressional hearings *so far*. The House Science and Technology Committee's Subcommittee on Investigations and Oversight held hearings on February 13, 2007 and April 26, 2007. *See Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Parts I and II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007), *available at* http://democrats.science.house.gov/publications/hearings_markups_details.aspx?NewsID=1269 *and http://democrats.science.house.gov/publications/hearings_markups_details.aspx?NewsID=1777*.

[7] Financial Services and General Government Appropriations Act 2008, H.R. 2829, 110th Cong. § 901 (2007). The Senate did not pass similar legislation.

[8] *See, e.g.*, Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 732-38 (2007).

[9] ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 84 (1991). Although Hirschman focuses most of his attention on the rhetoric of conservatives, he readily acknowledges that progressives make parallel rhetorical moves. *Id.* at 149-54 (labeling the progressives' parallel to the jeopardy argument the "imminent danger thesis"). Conservatives' rhetoric of jeopardy emphasizes the dangers of *action*, while progressives' parallel rhetoric of imminent danger focuses on the dangers of *inaction*. *Id.* at 153.

[10] *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation?: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007) (Statement of David C. Vladeck, Associate Professor, Georgetown University Law Center), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/13feb/vladeck_testimony.pdf.

[11] Pear, *supra* note 4, at A19 (quoting Gary D. Bass, Executive Director of OMB Watch).

endless loop of analysis and [will] lead to endless regulatory delays."[12] The Order's relatively obscure, if somewhat puzzling, provision on formal rulemaking procedures causes at least one prominent administrative law scholar to wonder if its purpose is "[j]ust to help one's friends slow things down—throw a good dose of sand into the gears of rulemaking."[13]

According to critics, 13,422 generates "gridlock"[14] or "a new bureaucratic bottleneck."[15] It "codifies regulatory delay"[16]—and hence "lead[s] to the further ossification of an already overburdened administrative process."[17] One member of Congress claims 13,422 provides "another avenue for special interests to slow down and prevent agencies from protecting the public."[18] Still another declares that it "make[s] it harder for agencies to take virtually any action."[19] A former OMB regulatory policy administrator predicts that due to 13,422, along with recent OMB bulletins and standards, "fewer regulations can be issued."[20]

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[12] OMB WATCH, A FAILURE TO GOVERN: BUSH'S ATTACK ON THE REGULATORY PROCESS 22 (2007), *available at* http://www.ombwatch.org/regs/PDFs/FailuretoGovern.pdf. Even an otherwise supportive treatment of 13,422 expresses concern that the revised "process could slow or stop the issuance of some guidance that serves a useful social purpose." *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 4 (2007) (statement of Robert W. Hahn, President, AEI-Brookings Joint Center for Regulatory Studies), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/hahn testimony.pdf.

[13] *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 12 (2007) (Statement of Peter L. Strauss, Professor, Columbia University School of Law) *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss_testimony.pdf.

[14] Union of Concerned Scientists, Presidential Mandate Centralizes Regulatory Power, Endangers Citizens, http://www.ucsusa.org/scientific_integrity/interference/executive-order.html (last visited Nov. 18, 2007).

[15] Public Citizen, Latest White House Power Grab Puts Public at Risk: Problems of the Jan. 2007 Executive Order and Bulletin on Guidance (Jan. 2007), http://www.citizen.org/documents/new-eo-and-guidance-overview.pdf.

[16] OMB WATCH, UNDERMINING PUBLIC PROTECTIONS: PRELIMINARY ANALYSIS OF THE AMENDMENTS TO EXECUTIVE ORDER 12,866 ON REGULATORY PLANNING AND REVIEW 3 (2007), *available at* http://www.ombwatch.org/regs/EO12866_amendments_analysis.pdf.

[17] Vladeck, *supra* note 10, at 19.

[18] Press Release, Subcomm. on Investigation and Oversight, H. Comm. on Science and Technology, Miller Leads Subcommittee Hearing into White House Exec. Order that Gives More Political Control Over Public Health, Safety Regulations (Feb. 13, 2007), *available at* http://democrats.science.house.gov/press/PRArticle.aspx? NewsID=1328 (quoting Hon. Brad Miller).

[19] 153 CONG. REC. E 1438 (June 28, 2007) (statement of Rep. Waxman).

[20] *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation?: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 9 (2007) (Statement of Sally Katzen, Adjunct Professor, University of Michigan Law School), *available at*

II. Rhetoric and Reaction in Administrative Law

The kinds of criticisms that have been leveled against 13,422 are hardly new. Burdens and delays have figured prominently in the rhetoric against a variety of administrative law reforms. When President Reagan first established formal White House review of rulemaking under Executive Order 12,291,[21] critics raised separation of powers questions[22]—but they also complained that OMB review would impede agencies' ability to make new regulations.[23] A widely cited article published in the *Harvard Law Review* during the Reagan years declared that "OMB control imposes costly delays that are paid for through the decreased health and safety of the American public."[24] Even after President Clinton changed the Reagan Order to reserve OMB review for a more limited set of significant rules and to place time limits on the review process,[25] scholars continue to

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http://democrats.science.house.gov/Media//File/Commdocs/hearings/2007/oversight/13feb/katzen_testimony.pdf.

[21] Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

[22] *See, e.g.*, Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

[23] Felicity Barringer, *If Rules Are Made To Be Broken, So Are Rulemakers*, WASH. POST, June 25, 1981, at A21 (describing the Reagan Order as "requiring further delays and studies of all pending rules"); Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES, Nov. 7, 1981, at 28 (noting that the Reagan Administration had issued only about thirty new major regulations compared with "100 to 200 such major regulations" in previous years, and quoting observers who suggested that OMB review was "stemming regulation" and serving as a means to "obstruct regulations"). *See also* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1087-88 (1986) ("[M]ost criticism has focused . . . on the delay that OMB review entails."); OMB Watch, OMB Control of Rulemaking: The End of Public Access 13 (Aug. 1985) (on file with author) ("The required cost/benefit analyses impose[ ] often heavy burdens on the regulatory agencies"). Even earlier efforts of presidential oversight were said to obstruct rulemaking. *See* OMB Watch, *supra* at 3 (stating that Nixon's "[h]ighly controversial" review process stood "accused of delaying the already lengthy environmental regulatory process").

[24] Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986). Publishing in the same issue of the *Harvard Law Review*, Christopher DeMuth and Douglas Ginsburg lauded OMB review because it "encourages policy coordination, greater political accountability, and more balanced regulatory decisions." DeMuth & Ginsburg, *supra* note 23, at 1081. DeMuth and Ginsburg both served as Administrators of the Office of Information and Regulatory Affairs within OMB. DeMuth & Ginsburg, *supra* at 1075. Their claims, and those of other supporters of OMB review, can and should be scrutinized along with the claims of critics—especially since empirical studies generally "have failed to show that economic analysis and OMB review have significant effects on the cost-effectiveness of government regulations." Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1123 (2002). *See also id.* at 1123 nn.54-57 (citing studies of the impact of economic analysis on regulatory decisions).

[25] The Reagan Executive Order required agencies to submit *all* rules to OMB for review. Exec. Order No. 12,291, §§ 3(c)(3), 3(e)(2)(C), 3(f)(2). In contrast, the Clinton Executive Order only required agencies to submit *significant* rules to OMB. Exec. Order No. 12,866 §§ 6(a)(3)(A), 6(a)(3)(B), 6(b)(1). Furthermore, unlike the Reagan Order, the Clinton Order stated that when reviewing proposed and final rules "OIRA shall

claim that OMB review slows down the regulatory process, and even grinds it to a halt in certain instances.[26]

OMB review is not the only procedure to stand accused of obstruction. What critics say about OMB generally, and 13,422 specifically, mirrors the charges leveled against many other administrative procedures. For example, environmental impact statements required by the National Environmental Policy Act purportedly postpone many federal actions.[27] The Freedom of Information Act allegedly imposes high costs on federal agencies.[28] Critics of recent proposals for peer review and other checks on information quality claim that they will unduly delay regulatory policy-making.[29] It has become widely accepted that judicial review under the arbitrary and capricious standard has "burdened, dislocated, and ultimately paralyzed" certain agencies' rulemaking.[30]

. . . notify the agency in writing of the results of its review . . . within 90 calendar days." Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. 638, 642 (1993), *reprinted in* 5 U.S.C. § 601.

[26] *See, e.g.*, Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 447 (2003) ("OMB regulatory analysis and other forms of regulatory impact review have also contributed to 'paralysis by analysis.' Agencies increasingly turn to less formal, less accountable, and more opaque methods of making regulatory policy."). It has even been said that "OMB's review of agency rulemaking has proved far more intrusive during the 1980s and early 1990s than either judicial or congressional review." Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1429 (1992).

[27] *See, e.g.*, Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 52 (2003) ("Some critics blame the NEPA process for delay and inefficiency."); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 906-7 (2002) (NEPA "demands the impossible" and "places extreme demands on agency resources"); James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 75 (2003) ("[C]ommentators and the agencies bound by [NEPA's] requirements have often decried the Act as a time- and resource-consuming annoyance.").

[28] *See, e.g.*, Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 15, 16 (FOIA requests "have greatly burdened investigative agencies"). Scalia's argument against FOIA, along with criticisms of delays caused by NEPA, suggest how arguments about the burden of administrative procedures can cut across ideological lines.

[29] *See, e.g.*, Thomas O. McGarity, *Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 KAN. L. REV. 897, 935 (2004) (arguing that "the result [of the Information Quality Act] can only be added expense and delay in the decisionmaking process"); J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1, 6 (2006) (quoting a critic of peer review who predicted that regulatory peer review will "introduce potentially massive costs and delay, thus injecting paralysis by analysis into the regulatory process").

[30] Jerry L. Mashaw & David Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 443 (1990). *See also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 932 (2003) ("[Judicial] review has contributed to the 'ossification' of notice-and-comment rulemaking, which now takes years, in part as a result of the effort to fend off judicial challenges. In light of the risk of invalidation, many agencies have turned away from notice-and-comment rulemaking altogether.").

"Paralysis by analysis" has become a cliché in regulatory circles today.[31] This appealing rhyme, though, is itself far from new, dating at least to the first half of the twentieth century when it appeared in religious sermons and writings.[32] The underlying concern the rhyme conveys about administrative process also dates back to the early part of the last century. In an article published in the *Harvard Law Review* in 1938, an administrative law scholar asked whether New Deal changes in rulemaking procedures would lead at least to "a partial paralysis . . . by reason of excessive formality and litigation."[33]

At the time of the New Deal, proposals for government-wide procedural reform triggered the "fear of unduly hampering" agencies."[34] Of course, today the informal rulemaking provisions of the Administrative Procedure Act (APA) of 1946 are held up as a model of administrative simplicity and efficiency,[35] only to have been spoiled by developments in judicial and regulatory oversight in the last several decades.[36] It is little known that the APA was itself once viewed as a major source of ossification. Scholars in the 1940s feared that its uniform procedures would "severely cramp the style of

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[31] *See, e.g.*, Daniel A. Farber, *Rethinking Regulatory Reform After* American Trucking, 23 PACE L. REV. 43, 51 (2002) ("Environmentalists respond that cost-benefit analysis is a recipe for 'paralysis by analysis.'"); Thomas O. McGarity, *The APA at Fifty: The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996) (noting the "fear that many of the cognitive regulatory reforms . . . will lead to 'paralysis by analysis'"); Chris Mooney, *Paralysis by Analysis*, WASH. MONTHLY, May 2004, at 23, *available at* http://www.washingtonmonthly.com/features/2004/ 0405.mooney.html.

[32] *See, e.g.*, ELI STANLEY JONES, THE CHRIST OF EVERY ROAD: A STUDY IN PENTECOST 40 (1930). Although the phrase appears to have been employed most commonly by Christian writers and preachers during the early part of the twentieth century, it came into more general usage after Martin Luther King, Jr. made it part of his call for racial justice. *See* MARTIN LUTHER KING, JR., STRENGTH TO LOVE 17 (1963). The rhyme appeared within the pages of the *Federal Register* as early as in 1952, used by a Republican appointee to the Federal Communications Commission. *See* Dissenting Opinion of Comm'r Robert F. Jones, 17 Fed. Reg. 4093, 4094 (1952) ("The Commission has had the paralysis of analysis for 1 year, not consumed in drafting the general rules and standards [for television service], but consumed in a search for a city-to-city allocation plan which it can freeze on the country by rule-making proceedings.").

[33] Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 280 (1938).

[34] *Administrative Law—Developments 1940-45*, 44 MICH. L. REV. 797, 803 (1946).

[35] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 283 (1970) (describing informal rulemaking under the APA as being among the "greatest inventions of modern government"). This phrase of Davis's continues to be quoted today.

[36] McGarity, *supra* note 26, at 1385 ("Professor Kenneth Culp Davis captured the prevailing sentiment . . . when he called informal rulemaking 'one of the greatest inventions of modern government.' Twenty years later, the bloom is off the rose. . . .[The] rulemaking process has become increasingly rigid and burdensome [due to an] assortment of analytical requirements . . . and evolving judicial doctrines . . . .") (citation omitted).

government regulation."[37] The right to file a rulemaking petition under § 553(e) was of "doubtful value," especially since agencies could be "swamped by frivolous requests having delay as their sole objective."[38] It is hard to imagine now, but at the time of the APA's adoption some academic observers forecasted "disastrous" effects from the law, characterizing the Act as nothing short of a "sabotage of the administrative process."[39]

III. The Reality of Regulatory Growth

So we have heard complaints about procedural burdens many times before. What, then, should we make of the rhetorical similarities between criticisms of 13,422 and of administrative procedures more generally? The perennial nature of the refrain about delay and obstruction might well make anyone suspicious that the criticisms of 13,422 are nothing more than the rhetorical ploy trotted out by the opponents of any reform. But as Hirschman reminds us, the mere fact that a rhetorical argument is repeated or even overused does not necessarily make it wrong.[40] The impact of OMB review, with or without 13,422, is ultimately an empirical question that requires looking at what agencies have actually done in terms of rulemaking.[41]

Yet here is where suspicions about the rhetoric of paralysis grow strongest, because the regulatory state has increased considerably in size and impact since the establishment of the APA and subsequent reforms, including OMB review. The sheer volume of rules, as measured by pages in the Code of Federal Regulations (CFR), has increased about five times since 1946 and has continued to grow since the advent of OMB review. For the past couple of decades, the federal government has issued an average of about 4,000 new rules each year in the *Federal Register*. The 2006 CFR contains about 33% more pages than did the 1980 volume of the CFR.[42]

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[37] Fritz Morstein Marx, *Some Aspects of Legal Work in Administrative Agencies*, 96 U. PA. L. REV. 354, 354 n.2 (1948).

[38] Foster H. Sherwood, *The Federal Administrative Procedure Act*, 41 AM. POL. SCI. REV. 271, 279 (1947).

[39] Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213, 213 (1946).

[40] HIRSCHMAN, *supra* note 9, at 166.

[41] *See generally* Coglianese, *supra* note 24.

[42] The values reported in this paragraph draw on data on file with the author that were collected by and obtained from the Office of the Federal Register. A recent study by Anne Joseph O'Connell similarly "calls into question much of the existing debate on regulatory 'ossification'" and reports data on rulemaking frequency that "strongly suggest that the administrative state is not ossified." Anne Joseph O'Connell,

Pages of rules are only one way to measure regulatory activity. When estimated monetarily, the impact of federal regulation has also increased. Not only do new rules deliver substantial benefits to society, they also impose substantial costs. According to the estimates collected by OMB during its review process, government regulations issued since 1981 have imposed $127 billion in annual costs on the economy.[43] According to a retrospective study conducted by the National Highway Traffic Safety Administration, the annual costs attributable to mandatory federal auto safety standards have increased from $255 per car during the 1968-78 period to $760 per car in the 1991-2001 period, even controlling for inflation.[44] An independent study has reported that the annual costs associated with environmental regulations more than quadrupled between 1972 and 1992, roughly a decade before and a decade after the establishment of OMB review.[45]

Given the overall increase in pages of regulation and their costs, government regulators have clearly not been paralyzed. Have they nevertheless been hobbled? Is it possible that regulatory growth would have been greater still in the absence of OMB review? Several empirical studies have tried to determine whether OMB review slows down the rulemaking process, thus making it harder for agencies to issue as many rules as they otherwise would. Although it might seem intuitive that OMB review would increase the time and expense of issuing new rules, researchers have not found systematic evidence that OMB review imposes any significant delay on the regulatory process, notwithstanding careful analysis of both large-sample datasets and matched case studies. For example, political scientists Cornelius Kerwin and Scott Furlong published a regression analysis of the determinants of EPA rulemaking duration in which they found little by way of any

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Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 VA. L. REV. (forthcoming June 2008).

[43] OFFICE OF MGMT. & BUDGET, DRAFT 2007 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 34 (2007), *available at* http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_draft_cb_report.pdf. The same report indicates that annual average regulatory costs have tended to be lower during the second Bush Administration than during previous administrations, although of course these data precede the issuance of Executive Order 13,422. *Id.*

[44] Marcia J. Tarbet, Cost and Weight Added by the Federal Motor Vehicle Safety Standards for Model Years 1968-2001 in Passenger Cars and Light Trucks, NHTSA Report No. DOT HS 809 834 at 145, Table 5A, *available at* http://www.nhtsa.dot.gov/cars/rules/regrev/Evaluate/809834.html (reporting all data on unit costs in 2002 dollars).

[45] Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. ECON. LIT. 132, 140 (1995).

statistically significant effect from OMB review.[46] Stuart Shapiro, another social scientist, analyzed a series of matched *state* agencies and found that even seemingly cumbersome rulemaking procedures, like economic analysis review, did not affect the rate of regulatory change, although the partisan control of the political branches did.[47] More recently, political scientist Steven Balla and his colleagues studied the determinants of the duration of OMB review and found that, contrary to claims that special interests try to capture OMB review to delay rules, reviews were actually shorter when only narrow sets of businesses were in contact with OMB.[48] To be sure, no broad-based empirical study can rule out that OMB review might have the effect of slowing the issuance of an individual rule now and then. The existing work does fail, though, to find clear evidence of any *general* effects consistent with the *general* rhetorical claims made about OMB review.[49]

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[46] Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992). The Kerwin and Furlong study analyzed determinants of the duration of 150 non-routine U.S. Environmental Protection Agency (EPA) rules issued during the period October 1, 1986 through September 30, 1989, drawing on data collected from the EPA's internal regulatory management system. *Id.* at 122. The authors reported results from three separate regression models. In two of these models, the OMB review variable was not significant at all. *Id.* at 130. In the model of duration between proposed and final rules, OMB review was statistically significant, but only had an effect that for every day a rule was under OMB review, the duration of the process was lengthened by two days. *Id.* Even with this one apparent statistical relationship, the variable for OMB review could be serving as at least a partial proxy for the overall complexity or political salience of rules. *Id.* at 132. In other words, at least part of any statistically observed delay may stem from the fact that rules that go to OMB for review are simply more complex and controversial to begin with than the ordinary rule.

[47] Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change*, 12 J. PUB. RES. & THEORY 29 (2002). Shapiro studied day care regulation in eight states, selecting states in pairs that otherwise were geographically and economically similar. He chose to study day care regulation because it is a domain that has largely escaped federal preemption, thus helping to maximize the possibility of variation across states. Contrary to prior expectations, Shapiro found that regulators in states with purportedly cumbersome regulatory procedures were not deterred from issuing new regulations. Instead, he found that the key determinant of the level of regulatory activity was the political environment within the states. When the political alignment in the legislature and executive branch favored regulatory change, change generally occurred, even in states with higher procedural hurdles. *Id.*

[48] Steven J. Balla et al., Outside Communication and OMB Review of Agency Regulations, presented at the 2006 annual Midwest Political Science Association meeting, Chicago, Illinois. The authors examined nearly 2,000 OMB reviews undertaken from 2002 through 2004 to determine whether contacts between OMB and outside parties over specific rules tended to correspond with the duration of OMB review of those rules. *Id.* at 6. Based on OMB logs of staff contact with outside parties, the authors reported that contacts took place in only about 7% of the rules. *Id.* Although reviews where contacts occurred did take longer on average than reviews without any contacts, once other variables were controlled for, contacts with business groups were not associated with a lengthening of the OMB review process. As Balla et al. state, "contrary to widely held expectations, . . . outside communications do not operate in a way that particularly advantages business firms and trade associations seeking to derail prospective agency regulations." *Id.* at 15.

[49] *See* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 87 (2006) (noting that "existing evidence and the political economy of rulemaking call into question the claim that [cost-benefit analysis] produces substantial incremental delay"). In one recent paper, two political scientists

IV. Explaining the Rhetoric-Reality Divergence

How, then, can the bold rhetoric about 13,422 and OMB review be reconciled with the stark reality of continued and substantial outflows of regulation from the federal government? Perhaps additional research is needed to uncover the real, but more subtle effects that procedures like these have on regulatory behavior. Or perhaps OMB review truly has failed to delay rulemaking so far, but the implementation of 13,422 will take the administrative process past a tipping point to where rulemaking does finally begin to slow down, if not grind to a standstill. Or perhaps ultimately the rhetoric surrounding 13,422 and OMB review is just that, rhetoric.[50]

These are all certainly possibilities. But I find more interesting three other possible explanations that might offer theoretical insights about the relationship between administrative procedures and regulatory decision-making. The first possibility might be that administrative procedures like 13,422 are epiphenomenal, or at least so highly malleable to make them merely symbolic. That is, rulemaking procedures may look like they impose burdens on agencies, but the real burdens depend entirely on whether or how they are implemented—not on the existence of procedure *qua* procedure. As a result, an administration that wants to regulate a lot will regulate a lot, and an administration that wants to slow down regulation will slow down regulation—regardless of what procedures are on the books.[51]

A second possible account is that the behavioral effect of a law or procedure is real, rather than illusory, but just simply trivial (at least for certain effects of interest). For

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report results suggesting that OMB review can "actually speed up agency rulemaking—a finding directly contrary to what ossification theory predicts." Jason Webb Yackee & Susan Webb Yackee, Is Federal Agency Rulemaking "Ossified"? The Effects of Procedural Constraints on Agency Policymaking, paper presented at the 2007 meeting of the Midwest Political Science Association, at 24 (on file with the author).

[50] *See* CURTIS W. COPELAND, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13,422, at 5 (Congressional Research Service No. RL33862, Feb. 5, 2007) (noting that "concerns about the usurpation of congressional standards for rulemaking and unnecessary delay may be exaggerated"). *See also* Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 697 (2007) (describing the limited, even symbolic, role of various procedural steps in the development of OSHA's ergonomics rule in the 1990s).

[51] Stuart Shapiro has suggested as much, concluding that "the new regulatory procedures [put in place during the Bush-II administration] may either be irrelevant to regulatory outcomes or may be used by future pro-regulatory presidents to achieve their own regulatory goals." Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process under the Clinton and Bush (43) Administrations* 22, (AEI-Brookings

example, even if state laws requiring consumers to pay a five-cent deposit for soda bottles and cans reduce roadside litter and increase recycling, it is hard to see that these so-called bottle bills place any meaningful barrier in the way of the purchase of soda, and hence it seems unlikely they would lead to any discernible decline in soda sales in states after these laws are adopted.[52] In a similar vein, some administrative procedures probably have only trivial effects on rulemaking because agencies can satisfy them by publishing boilerplate language in their *Federal Register* notices. If agencies come to satisfy 13,422's new written problem statement requirement using boilerplate language or by creating check-boxes on a form, the requirement's impact will surely be inconsequential in terms of the pace and cost of rulemaking.

A third possibility is that procedures do have both real and consequential effects, but these effects are drowned out by other behavioral factors moving in the same direction. For instance, on the assumption that Reagan's regulatory review order was truly more burdensome than Clinton's Order,[53] the additional burden may not have had much of an effect on agency behavior in an administration where appointees were already less inclined to regulate. If it turned out that agencies issued fewer or less costly rules during the Reagan Administration than the Clinton Administration, these results may well have stemmed not so much from procedure than from the ideology of the political appointees heading the agencies.

For much the same reason, if other legal rules, professional norms, or political exigencies already are pushing agencies to take benefit-cost analysis seriously—something Cass Sunstein has suggested[54]—then any additional, incremental stringency of a regulatory review order may yield at best only a small and diminishing behavioral return. In other words, if agencies are already, for other reasons, engaging in exactly the kind of analysis called for by the new Executive Order, the Order will impose no (or negligible) additional

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Joint Center for Regulatory Studies, Working Paper No. 06-30), *available at* http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/RP06-30_topost.pdf.

[52] In other words, while a price increase can have real effects on purchasing behavior, it would be hard to imagine the demand for soda is so highly elastic that a five-cent deposit has anything but the most trivial effect on overall sales.

[53] *See supra* note 25. For a further discussion of some of the differences between the Reagan and Clinton Orders, see Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 827-29, 849-50 (2003).

[54] CASS R. SUNSTEIN, THE COST-BENEFIT STATE (2002).

costs and delays. To predict the extent of any delay from 13,422's provisions on guidance documents, for example, we need to know more about what analysis of these non-binding documents agencies conduct anyway. It would not be surprising to discover that many agencies already conduct analysis of their most significant guidance documents, precisely the ones covered by the new Executive Order. If this is true, the additional time and effort needed to satisfy OMB review under 13,422 will most certainly turn out to be much smaller than has been widely imagined.[55]

Conclusion

For these reasons, scholars and policy decision makers should exercise caution before concluding that Executive Order 13,422 will have anything more than the most minor effects on actual agency operations. The Order's requirement for a written problem statement and its provisions calling for OMB review of guidance documents, for example, may well be easily met or add only superfluously to what agencies already do. Such an outcome would be consistent with the longstanding disjunction between the rhetoric and reality of regulatory reform. Alarms of delay and paralysis have sounded in response to nearly every major regulatory reform since the establishment of the Administrative Procedure Act of 1946—and yet the regulatory state has nevertheless marched rather dramatically onward over the last six decades.

As it applies to the operation of government bureaucracies, administrative law is embedded within a complex web of politics, institutions, and organizational behavior. Within this web, law is but one factor influencing behavior in government agencies among a variety of institutional, professional, social, financial, and political factors that interact with each other, and even adapt and change over time. Social scientists who have devoted their careers to the empirical study of bureaucracy have yet to create a parsimonious theory

[55] Moreover, OMB's review of significant guidance documents may turn out to be much more limited than critics apparently assume it will be. *See* OMB Regulatory Policy Chief Anticipates New Draft of Risk Assessment Guidance, BNA Daily Report for Executives, May 10, 2007, at A-24 (quoting OMB regulatory director, Susan Dudley, as anticipating review of guidance documents will be "a quick turnaround thing. . .not the same as [reviewing] a regulation."). If so, it seems still more conceivable that agencies' pre-existing level of analysis behind guidance documents will often satisfy OMB, thus rendering 13,422's new requirement largely superfluous.

of bureaucratic behavior.[56] Their failure to do so, combined with the obvious expansion of regulation in the face of repeated warnings to the contrary, should make both institutional designers and their critics more circumspect about their predictions—and their rhetoric—concerning the impact of regulatory reform.

[56] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT xi (1989) ("After all these decades of wrestling with the subject, I have come to have grave doubts that anything worth calling 'organization theory' will ever exist.").

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE SUSAN E. DUDLEY, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, WASHINGTON, DC

Questions for Susan Dudley
From Linda T. Sanchez, Chair
Subcommittee on Commercial and Administrative Law

1. What is your view of the power of the President to determine the substance of final rules? (If necessary, please consult with constitutional experts in OMB or elsewhere in developing your answers to this or other questions.)

> Specifically, if Congress says that an agency must promulgate regulations in a particular area, can the President substitute his or her judgment for that of the agency to whom Congress has delegated rulemaking authority? If so, under what authority is that action permitted?

ANSWER: When President Reagan in 1981 issued Executive Order 12291 (which was the predecessor to Executive Order 12866), the Justice Department's Office of Legal Counsel (OLC) issued a legal opinion concluding that the regulatory review framework established in Executive Order 12291 was constitutional. The OLC opinion is found at 5 Op. O.L.C. 59 (1981). The OLC opinion addresses the constitutional foundation for the President's role in the rulemaking process. There is also a discussion of the constitutional basis for the President's role in the rulemaking process in the opinion, also from 1981, of the Court of Appeals for the District of Columbia Circuit in Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981). Rather than my seeking to paraphrase the D.C. Circuit and OLC opinions, or to apply their legal analyses to your question, I would respectfully refer you to the two opinions.

> If Congress specifically states that the President shall not be involved in developing the rules, can the President still make the final decision? If so, under what authority?

ANSWER: See the answer to the previous question.

2. Section 7 of Executive Order 12866 says that the President will resolve differences between the agencies and OIRA "unless otherwise prohibited by law."

> How do you view that restriction?

ANSWER: In my view, that provision of Executive Order 12866 states that the President will not take actions that are prohibited by law.

> If Congress enacts legislation stating that the President shall not make the final decision on certain types of agency rules, would OMB view that as triggering the restriction in section 7, and therefore prevent the President from resolving differences between OIRA and the agency?

ANSWER: This is a hypothetical question, and I am not in a position to say now what OMB's view would be. If any such legislative proposals were introduced in Congress, the Executive Branch would review the proposal and provide its views on the proposal at the appropriate time.

> If Congress enacts legislation stating that certain rules shall not be reviewed by OIRA before publication in the Federal Register, would OMB view that as triggering the restriction in section 7 and therefore prevent the President from resolving differences between OIRA and the agency?

ANSWER: See the answer to the previous question.

As a policy matter, I am in a position to say generally that such a restriction on OIRA review would not be in the public interest, for the reasons that the Court of Appeals for the District of Columbia Circuit explained in its decision in Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981):

> "The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers 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.
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> * * *
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> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House."

3. For a number of years, Congress has said that OMB's appropriation could not be used to review agricultural marketing orders.

> Has OMB consistently heeded that restriction?

ANSWER: I have been informed by OMB staff that OMB has complied with this restriction, at least as a matter of comity, without resolving whether the provision is constitutionally effective.

In your view, can Congress prevent OIRA from reviewing other types of rules (e.g., all rules under the Clean Air Act)?

ANSWER: This is a hypothetical question, and I am not in a position to say now what OMB's view would be. If any such legislative proposals were introduced in Congress, the Executive Branch would review the proposal and provide its views on the proposal at the appropriate time.

As a policy matter, I am in a position to say generally that such a restriction on OIRA would not be in the public interest, for the reasons that the Court of Appeals for the District of Columbia Circuit explained in its decision in Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981), as set forth in the answer to Question 2, above.

Are there any restrictions on Congress' ability to restrict OIRA review?

ANSWER: See the answer to the previous question and the answers to Questions 1 and 2, above.

4. In your written statement, you mentioned the efforts of your predecessor, Dr. John Graham, to increase the transparency of OIRA reviews. Dr. Graham, however, also said that OIRA has its greatest impact on agency rules during informal reviews and that agencies should not disclose the changes that are made to rules during this period at OIRA's suggestion, even after the rules have been published in the Federal Register.

Do you also believe that OIRA can have its greatest impact on rules during informal reviews?

ANSWER: Agencies often prefer to conduct interagency consultation before their internal drafting process is complete, particularly when they are under tight deadlines or are seeking consultation on analytical issues. Informal review, which also took place under E.O. 12866 in the previous Administration, allows OIRA to learn about significant upcoming regulatory actions and provide comments to agencies on how to structure a robust regulatory analysis before they make regulatory decisions.

Do you also believe that changes made at OIRA's suggestion or recommendation during informal reviews should not be disclosed? If so, why?

ANSWER: I believe that OIRA's current disclosure practices, as governed by Executive Order 12866, strike the appropriate balance between making OIRA's regulatory review activities transparent (and thereby ensuring accountability) and preserving the ability of OIRA staff to participate in policy deliberations in a candid and open manner. By its terms, the disclosure requirements of Section 6(b)(4) of Executive Order 12866 apply to OIRA's review of regulatory actions that are subject to the review procedures described in Section 6(b) of Executive Order 12866.

> Executive Order 12866 says that agencies are to disclose the substantive changes made to their rules at the suggestion or recommendation of OIRA. The restriction is not confined to "formal" OIRA reviews. How, then, does OIRA read that requirement to apply only to formal reviews?

ANSWER: See the answer to the previous question, above.

5. In your written statement you mentioned OMB Circular A-4 and OIRA's increased emphasis on cost-benefit analysis.

> Does OIRA apply that circular equally among the agencies? Specifically, are all agencies equally required to adhere to the circular's requirements?

ANSWER: All executive agencies subject to Executive Order 12866 are expected to follow the guidance in Circular A-4 "to the extent permitted by law and where applicable."[1]

> In its 2003 report to Congress on the costs and benefits of regulations, OIRA reported that 50 of 69 regulatory actions related to homeland security that were reviewed by OIRA from September 2001 through May 2003 had no cost information, and 67 of the 69 regulatory actions provided no information on regulatory benefits. How many EPA rules did OIRA review during the same period, and how many of them had no cost or benefit information? How many EPA rules during this period were changed by OIRA or returned to the agency because of insufficient cost or benefit information?

ANSWER: From September 1, 2001, through May 31, 2003, OIRA concluded Executive Order 12866 review of 78 EPA regulatory actions. While I have not reviewed the dockets of these 78 rules, I am aware that the majority of EPA's

[1] Section 1 of President Clinton's EO 12866 states: "...In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."

regulatory analyses include quantified costs and benefits. Of those, one proposed rule, titled "Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards," was returned to EPA for reconsideration in October 2001. As noted in the return letter, OIRA took this action so that EPA could improve its analysis of the costs and consult with States on the rule's Federalism implications.

6. Do you believe that the transparency requirements placed on the agencies and OIRA in Executive Order 12866 should also apply to significant guidance documents that are submitted to OIRA?

> Specifically, should OIRA list on its website the guidance documents that it has under review?

ANSWER: The review of guidance documents is generally less formal and briefer than the review of regulation. By its terms, the disclosure requirements of Section 6(b) of Executive Order 12866, regarding OIRA's review of regulatory actions, do not apply to OIRA's review of draft guidance documents under Section 9 of Executive Order 12866, as amended.

> Should agencies identify in their dockets the changes made at OIRA's suggestion?

ANSWER: By its terms, the disclosure requirements of Section 6(a) of Executive Order 12866, regarding OIRA's review of regulatory actions, do not apply to OIRA's review of draft guidance documents under Section 9 of Executive Order 12866, as amended.

7. You said in your written statement that agency regulatory policy officers (RPOs) still report to the agency heads. If so, why did Executive Order 13422 remove the language in Executive Order 12866 stating that the RPOs would report to the agency heads?

ANSWER: Nothing in Executive Order 13422 says that RPOs should not report to their agency heads. The removal of this language was immaterial because the Regulatory Policy Officer (RPO) reports to the agency head, regardless of whether this fact is explicitly stated in the Executive Order.

8. Can you tell me how many rules have been stopped by agency RPOs in the 16 months that they have had new authorities under Executive Order 13422?

ANSWER: I am not aware of any rules that agency RPOs have stopped pursuant to Executive Order 13422 authorities.

If Congress enacted legislation requiring OMB to report annually on RPOs' actions that affected agency rulemaking, what elements do you believe could be included in that report?

ANSWER: This is a hypothetical question, and I am not in a position to say now what OMB's view would be. If any such legislative proposals were introduced in Congress, the Executive Branch would review the proposal and provide its views on the proposal at the appropriate time.

9. Is OMB systematically collecting any information on the implementation of the peer review bulletin? You said in your statement that agencies are "posting their peer review agendas on their websites."

Are all covered agencies posting those agendas in the same way?

ANSWER: Yes. OMB's Information Quality Bulletin for Peer Review requires that agencies report to OMB annually on their use of peer review for influential scientific information. The information received from the agencies during this annual data call is published in OMB's report on the Cost and Benefits of Federal Regulations.

The Report to Congress includes the URLs to all of the agency peer review agendas. Most of the agencies that regularly produce influential scientific information have active peer review agendas. There are still a few agencies with whom we are working on compliance.

The URLs published annually in our report to Congress provide an interested person with access to required information at each agency. Although the information provided on each agency's agenda is similar, agencies have the flexibility to format their agenda in a way that works for them. This flexibility allows agencies whose peer review processes are part of a larger process to find the best ways to integrate their systems.

If not, wouldn't an OMB requirement that they do so facilitate transparency of those reviews?

ANSWER: See the answer to the previous question, above. Having identical agendas would not increase transparency; indeed we think all of the agency agendas are quite transparent.

10. On May 1, 2008, the *Washington Post* published an article reporting that a Department of Commerce rule designed to protect the endangered right whales has been stalled for more than a year at OIRA allegedly because of objections from the Vice President's office.

Is the *Washington Post* article accurate with respect to the involvement of the Vice President's Office regarding this rule?

ANSWER: Interagency review under Executive Order 12866 is an inclusive process that engages other agencies, as well as other offices within the Executive Office of the President (including the Vice President's Office, the Office of Science and Technology Policy, the Council on Environmental Quality, and others). This interagency review process brings together different expertise and a broad perspective (i.e., scientists, statisticians, economists, lawyers, and other professionals), which leads to higher quality regulation.

Under what authority is the Vice President involved in decisionmaking regarding a Department of Commerce regulation?

ANSWER: See the answer to the previous question, above.

Why has this rule been under OIRA review for so long?

ANSWER: For most of the approximately 600 regulations annually subject to Executive Order 12866, interagency review is completed within 90 days; however some regulations involve more complex issues. Review of this Department of Commerce regulation was extended at the Department's request.

11. A review of the OIRA website indicates that some rules – including several from EPA – have been under review at OIRA for even longer; one since 2006 and one since 2005.

Isn't OIRA required under Executive Order 12866 to return rules to the agencies for "reconsideration" within 90 days or let them be published in the Federal Register?

ANSWER: This is not correct. When President Clinton issued Executive Order 12866 in 1993, he included a provision in the Executive Order under which OIRA's review may be extended beyond the 90-day period. The extension provision is at Section 6(b)(2)(C) of Executive Order 12866.

Why have each of the rules currently under "extended review" at OIRA exceeded the 90-day deadline?

ANSWER: As noted in my previous answer, Section 6(b)(2)(C) of Executive Order 12866 provides for the extension of OIRA's review of regulations beyond 90 days. For example, the review process may be extended at the request of the agency, which is the case for the rules currently under extended review. OIRA's regulatory reviews are extended whenever additional time is required to resolve issues that arise during OIRA's review.

Please provide information, by calendar year, of the number of rules that have exceeded the 90-day deadline for OIRA review. Has the number of "extended reviews" gone up since John Graham left OIRA?

ANSWER: The table below shows the number of extended reviews as of the end of each month from 1997 through 2007. Please note that these are end-of month values and do not reflect variability at other points in time. They should not be cumulated as that would count the same regulation several times. John Graham served as OIRA Administrator from 2001 to 2006, and for many months during that period fewer regulations were extended than in other years. Note that the number of regulations for which review has been extended in 2008 is less than the comparable month in 2000, the last year of the previous Administration.

Number of Extended Reviews

(end of month snapshot)

Calendar Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
January	14	2	14	15	50	0	2	0	6	8	12	11
February	10	5	17	21	2	1	2	0	8	9	9	11
March	10	6	15	28	2	1	1	0	5	8	10	19
April	6	4	10	19	4	0	1	0	5	11	12	11
May	6	6	11	23	4	0	1	2	5	8	11	9
June	8	7	13	27	13	0	3	1	5	7	11	n/a
July	10	11	11	24	21	1	1	1	7	8	12	n/a
August	4	7	14	28	24	1	1	3	5	6	11	n/a
September	11	11	14	29	7	1	1	6	5	7	12	n/a
October	13	7	15	41	1	0	1	15	6	7	11	n/a
November	10	9	18	59	2	1	1	13	7	17	13	n/a
December	2	13	18	60	0	0	0	9	6	11	10	n/a

12. One of the stated reasons why the January 2007 "good guidance" bulletin was needed was because agencies were issuing new requirements as "guidance" instead of "rules" under the Administrative Procedure Act. Less than one month after the bulletin took effect, the Centers for Medicare and Medicaid issued an August 2007 letter on the State Children's Health Insurance Program (SCHIP) that both CRS and GAO have now said should have been submitted as a rule under the Congressional Review Act. Several states have sued CMS asserting that the letter violated the APA.

Did OIRA review that letter pursuant to the requirements in Executive Order 13422?

ANSWER: OMB reviewed the August 2007 SCHIP letter.

If not, why?

ANSWER: See the answer to the previous question, above.

If so, did OIRA agree that it was just "guidance" and not a rule? Does OIRA still believe that it was just "guidance?"

ANSWER: We cannot comment on legal issues regarding the August SCHIP letter because the Department of Health and Human Services is a party to two separate lawsuits generally challenging the letter, and because it is also conducting an administrative hearing on reconsidering the disapproval of a New York State Medicaid plan amendment that involves the SCHIP letter review strategy.

13. In 1997, you wrote an article in Regulation magazine stating that OIRA is supposed to: (1) simultaneously provide independent and objective analysis of agency rules, and (2) promote the President's priorities. When those two goals conflict, you said "the presidential agenda will most certainly prevail over independent and objective analysis."

Do you still hold to that view? If so, why should the President's views take precedence over independent and objective analysis?

ANSWER: I did not say a president's views "should" take precedence over independent and objective analysis. The above question paraphrases a 1997 letter responding to an article in *Regulation* magazine. The letter observed:

> The problem is, OIRA review has always had necessarily conflicting roles. At the same time that OIRA is supposed to provide independent and objective analysis, it must also advance the president's policies and programs. When those functions conflict, the presidential agenda nearly always trumps independent and objective analysis.

This Administration's commitment to independent and objective analysis is evident in the initiatives it has taken to improve the rigor and transparency of analysis supporting public policy. Of particular importance within the context of regulatory analysis is OMB's Circular A-4, "Regulatory Analysis," which OMB issued in 2003—after public comment, interagency review, and peer review. It defines good regulatory analysis and standardizes the way benefits and costs of Federal regulatory actions are measured and reported. This guidance is available at: http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

Additional OMB initiatives that are designed to improve the objectivity of regulatory analyses are listed below:

- In 2002, OMB issued Government-wide guidelines, providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality of the information disseminated by Federal agencies. These guidelines define "quality" in terms of objectivity, utility, and integrity. Agencies must meet basic information quality standards, including an evaluation of the quality of information prior to dissemination to the public. This guidance is available at: http://www.whitehouse.gov/omb/fedreg/reproducible2.pdf.

- In 2004, OMB issued the Information Quality Bulletin for Peer Review, providing further guidance for pre-dissemination review of the influential scientific information. More rigorous review is required of information that is likely to have the greatest impact on public policy or private sector decisions. This guidance is available at: http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf.

- In 2007, OMB and the Office of Science and Technology Policy (OSTP) published Updated Principles for Risk Analysis. This memorandum reiterates the risk analysis principles released by OMB in 1995 and reinforces them with more recent guidance from the scientific community, Congress, and the Executive Branch. These principles are available at: http://www.whitehouse.gov/omb/memoranda/fy2007/m07-24.pdf.

- In 2007, OMB promulgated the Final Bulletin for Agency Good Guidance Practices, establishing policies and procedures for the development, issuance, and use of significant guidance documents by Executive Branch departments and agencies. It is intended to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them. This guidance is available at: http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf.

14. In your written statement, you compared OIRA review of rules to OMB review of agency budget submissions. There is, however, one critical difference between the two; in the appropriations process, Congress gets the last say.

> Would you support a system in which agency rules would have to be approved by Congress to take effect, just like in the budget process?

ANSWER: The Congressional Review Act of 1996 requires agencies to submit a new rule to both houses of Congress before it is published, along with a concise summary and supporting documentation. It allows Congress to review every new federal regulation issued by the government agencies and, by passage of a joint resolution, overrule a regulation.

RESPONSE TO POST-HEARING QUESTIONS FROM PETER L. STRAUSS, PROFESSOR, COLUMBIA LAW SCHOOL, NEW YORK, NY

PETER L. STRAUSS
BETTS PROFESSOR OF LAW
435 West 116th Street
New York, N.Y. 10027
Phone:212-854-2370
Fax: 212-854-7946
Email:strauss@law.columbia.edu

May 6, 2009

Hon. Linda T. Sanchez, Chair
Subcommittee on Commercial and Administrative Law
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chair Sanchez:

I am sorry to be late in responding to your kind letter of June 2 concerning my testimony before your committee May 6, but I have been out of town until this past Saturday. Below, I set out your questions and my responses:

1. In your written testimony, you said that "in some contexts... the government's practical need forcoordination.... can justify the President's assertion of authority to decide." The example you give is when Congress empowers two agencies with authority in a single area (e.g., exposure to benzene).

Is not coordination necessary on virtually every policy, where someone must balance off competing interests? Therefore, by that logic, would not the President always have the "authority to decide?"

Congress often gives unique responsibilities to agencies – for example, only EPA has authority to set NAAQS under the Clean Air Act – and when it does, those duties are *the EPA's* and not the President's. The President might prefer to have decision inject considerations the statute does not permit, for example in this case "cost." But that is not legally relevant, and thus falls outside the bounds of the "coordination" I was speaking to. In my example, OSHA had the duty to regulate benzene in the workplace, and EPA to regulate benzene exposure of citizens generally. This created a legal overlap having to be resolved, and here the President can play a helpful role. But in general, the only "competing interests" to be balanced are those Congress has made relevant, and Congress has generally named the person – the EPA Administrator in this instance – empowered to do any balancing it authorizes.

2. Section 7 of Executive Order 12866, which was established by President Clinton, gives the President the authority to resolve disputes between rulemaking agencies and

OIRA "unless otherwise prohibited by law."

Do you believe that Congress can prohibit presidential involvement in regulatory decisionmaking?

If so, how specific does that prohibition have to be?

Can Congress do so in a blanket fashion for all rules, or does it have to be statute-by-statute?

"Prohibit involvement" is too strong. The Constitution in terms empowers the President to seek the written report of any responsible administrator on those matters Congress has committed to her responsibility. In my judgment, this provision reaches independent regulatory bodies (the SEC, the Federal Reserve) as well as cabinet departments and free standing executive bodies like EPA. What the Constitution does *not* do is empower the President to "resolve disputes" about domestic administration, as his authority as Commander in Chief of military forces clearly does empower him to do in that sphere. He can reason, and he can express preferences for those with statutory responsibilities for decision to consider, within the framework of their particular legal authority. But they decide.

In particular, asserting the power "to resolve disputes" between OIRA and an agency seems to be little more than a reiteration of the argument that the President has inherent power to decide. With few exceptions, OIRA's authority is wholly derived from the President's responsibilities to see to the faithful execution of the laws. A dispute with OIRA *is* a dispute with the President. Matters are different when legal responsibilities Congress has delegated to differing agencies – responsibilities, not preferences – overlap. The case for ultimate presidential resolution of this kind of conflict is stronger, and would reach cases in which the conflict arose between OIRA's occasional *statutory* responsibilities (for e-government, say) and some agency's views.

In my judgment, Congress could appropriately require the President publicly to identify cases in which he was resolving interagency disputes, explain the basis on which he was doing so, and make those decisions judicially reviewable. It could even provide for public participation in the procedures for reaching decision, although I am not sure it would be wise to do so. One sort of model is provided by the Act Congress passed in 1977, I believe, giving the President structured authority to override certain judgments of the USNRC that could have foreign policy consequences. (I am sorry that the need for speed in responding to you has prevented my finding the statute for citation.) But a dispute with OIRA ordinarily is not, in itself, an interagency dispute, since in most contexts OIRA lacks decisional responsibilities Congress has conferred.

3. At the end of your testimony, you mention two types of actions that Congress can take in response to President Bush's assertion of rulemaking authority. One is to enact in statute the regulatory alternative that is preferred by a rulemaking agency, but not the President. The other is the use of "the power of the purse," which is essentially what the House tried to do last year when it enacted legislation prohibiting the implementation of Executive Order 13422.

What do you think about giving the heads of certain agencies "for cause" removal protection? Would that limit the President's ability to influence rulemaking?

What are your thoughts about restricting the ability of OIRA to review certain types of rules?

"For cause" removal can restrain the influence of raw politics on administration, as Congress proved well over a century ago in passing the initial civil service laws. Of course that particular restraint only applies to the person thus protected. As I testified to your committee last year, when EO 13422 sidestepped agency heads in the rulemaking process by so empowering "regulatory policy officers," it threatened substantial movement in the direction of "will," raw politics, rather than reasoned judgment in rulemaking. Congress needs somehow to reassert the integrity of the civil service – perhaps by limiting (the power of the purse again) the size of the presidential office concerned with political clearances for appointees. A thorough study of the uses and effects of the Senior Executive Service, which seem at least possibly responsible for the politicization of administration, would be an interesting project.

Like, I believe, the majority of scholars, I accept the wisdom of a centralized mechanism for assuring agency thoughtfulness about their most important rules. There are certainly issues arising from the false promises of economic analysis. An interesting paper recently written by two North Carolina law professors, Sidney Shapiro (Wake Forest) and Christopher Schroeder (Duke) explores a more common-sense approach. I'd be in favor of limiting the number of rules OIRA could choose to review, making its processes more transparent, and moderating the ostensibly precise "cost-benefit" approach recently taken. But any limits should recognize the virtues of OIRA review for the truly important rules, when openly and common-sensibly performed.

4. I understand that the American Bar Association is developing advice to the incoming President on a variety of issues, including some related to the "unitary executive" theory.

Have you been involved in this effort?

Can you characterize the ABA's position on this issue?

Yes, I have been involved in the effort, but the position is continuing to evolve and in my judgment the appropriate time for characterization of the ABA's position will be after it has been finalized.

Thank you again for affording me the privilege of appearing before you.

Yours truly,

/s

Peter L. Strauss
Betts Professor of Law

RESPONSE TO POST-HEARING QUESTIONS FROM CURTIS W. COPELAND, PH.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Memorandum August 8, 2008

TO: Honorable Linda Sánchez
Attention: Adam Russell

FROM: Curtis W. Copeland
Specialist in American National Government
Government and Finance Division

SUBJECT: Post-Hearing Questions from the Subcommittee

This memorandum responds to your request that I provide answers to questions posed by the majority and minority of the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary for inclusion in the record of the May 6, 2008, hearing on the "Rulemaking Process and the Unitary Executive Theory." If you have any questions about my responses, please do not hesitate to call me at (202) 707-0632.

Majority Questions

Question 1 — Can you describe what "informal" OIRA reviews are and why they are important? Is the Bush Administration the first to use them?

Answer 1 — As I mentioned in my written testimony, informal reviews are when agencies share preliminary drafts of rules and analyses with OIRA before final decisionmaking at the agencies. Formal review begins when an agency head or other official has signed off on a draft rule and formally submitted it to OIRA for review. Informal reviews can last weeks or even months before a rule is formally submitted, and OIRA says it can have its greatest impact on rules during this informal review period. However, OIRA has said that some of the transparency requirements in Executive Order 12866 do not apply during informal reviews (e.g., the requirement that agencies disclose the substantive changes made at the suggestion or recommendation of OIRA). Although the Bush Administration has used informal reviews extensively, such reviews have been used by OIRA to some extent since the office began regulatory reviews in 1981.

Question 2 —Please describe the significance of prompt letters. What is your understanding as to why there has been a significant drop in the number of these letters that have been issued by OIRA in recent years?

Answer 2 — Prompt letters have been sent by OIRA to regulatory agencies in an attempt to encourage agencies to initiate or complete rulemaking with regard to a particular issue.

Although OIRA has previously encouraged agencies in this regard, the Bush Administration is the first to have done so in writing, and to have placed those letters on the OIRA website. According to Professor Sidney Shapiro, the use of prompt letters "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."[1] As I noted in my written testimony, OIRA issued 13 prompt letters between September 2001 and December 2003, but issued two prompt letters in 2004, none in 2005, one in 2006, and none in 2007. The reasons for this decline in the use of prompt letters is unclear, but they may have become less necessary as agencies engaged in more informal reviews and came to understand more clearly what OIRA wanted them to do.

Question 3 —What are the ramifications if the 90-day OIRA review period is extended for months or even years beyond this period?

Answer 3 — Executive Order 12866 requires OIRA to review all significant proposed and final rules before they are published in the *Federal Register*. Therefore, the primary effect of an extension of OIRA review is that the agencies do not publish their rules in the *Federal Register*, and therefore they do not take effect, until the review is completed.

Question 4 —Some would say that a centralized rulemaking docket is a good idea. Others claim that it could lead to increased presidential influence. Please explain the basis for such concerns.

Answer 4 — As I noted in my written statement, one set of authors 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.[2] The authors also said that the dockets would make the agencies "more transparent to the President" (i.e., better allowing those in the administration to keep track of regulatory initiatives). 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."[3]

Question 5 —Administrator Dudley argues that OIRA is more transparent than in prior years. You, however, stated that OIRA's role in many cases "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." Please elaborate on your statement.

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[1] Stuart Shapiro, "An Evaluation of the Bush Administration Reforms to the Regulatory Process," *Presidential Studies Quarterly*, vol. 37 (June 2007), pp. 270-290.

[2] 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.

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

Answer 5 — Several of the changes made by former OIRA Administrator John Graham have made OIRA more transparent than it was in the past. For example, OIRA now posts on its website the rules that are under review and those that recently completed review, along with the dates that the reviews began and ended. However, several aspects of the agency and OIRA review processes remain out of public view. For example, rulemaking agencies typically will not reveal any aspects of their rule development process until the rule is published in the *Federal Register*. Also, although Executive Order 12866 requires agencies to disclose the substantive changes made to their rules at the suggestion or recommendation of OIRA, OIRA has taken the position that this requirement only applies to the period of formal review, not to the increasingly frequent informal review period when OIRA has said it has its greatest impact on agency rules.

Minority Questions

Question 1 — To the extent that you are concerned with the White House's involvement in the rulemaking process, do your concerns apply regardless of which party may hold the White House?

Answer 1 — Although my testimony at the May 6, 2008, hearing noted several areas of concern that have been expressed by Members of Congress and others regarding OMB's and the President's involvement in agency rulemaking, I was attempting to characterize the views of others — not concerns that I held personally. Some of these concerns vary by presidential administration. For example, while OIRA has been criticized for being too involved in agency rulemaking during the Reagan Administration and the current Bush Administration, OIRA was criticized for not being more forceful during the Clinton Administration.[4] Other concerns are more constant. For example, in every presidential administration since it started regulatory review in 1981, OIRA has been criticized for a lack of transparency.[5]

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[4] James L. Gattuso, "Regulating the Regulators 2," Heritage Foundation, Exec. Memo. No. 813 (2002).

[5] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, September 22, 2003; and U.S. General Accounting Office, *Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented*, GAO/GGD-98-32, January 8, 1998.

RESPONSE TO POST-HEARING QUESTIONS FROM JAMES L. GATTUSO, ESQ., SENIOR FELLOW IN REGULATORY POLICY, ROE INSTITUTE FOR ECONOMIC POLICY STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, DC

Answers to Additional Questions Submitted by Members of the Subcommittee on Commercial and Administrative Law

To

James L. Gattuso
Senior Fellow
The Heritage Foundation

A. Answers to questions submitted by Rep. Linda Sanchez, Subcommittee Chair

1. **Professor Strauss states:**

   "Our Constitution is very clear, in my judgment, in making the President the overseer of all the varied duties the Congress creates for government agencies to perform, including rulemaking. Yet our Constitution is equally clear in permitting Congress to assign duties to administrative agencies rather than the President."

   Do you agree with this analysis? If not, explain why?

I have no disagreement with this statement. While the Constitution vests executive power in the President, it also contemplates subsidiary officers to whom duties can be assigned. Such assignment of duties does not necessarily – and in most cases does not – conflict with the executive power of the president. For instance, merely requiring a particular officer to sign a document does not conflict with presidential power. But the president must retain ultimate responsibility for the execution of the laws, and that responsibility can not be shifted to another individual. In my view, that requires ultimate decisionmaking authority regarding rulemaking to remain with the president.

2. **With respect to the controversy over the EPA ozone regulation, do you think it was appropriate for the President to intervene in a matter that Congress had specifically delegated to the agency?**

Yes. The president, in fact, is constitutionally required to intervene in such matters to the extent necessary to ensure that the laws be faithfully executed.

If Congress specifically stated that the President should not be involved in the development of certain rules, should the President obey that requirement?

Under the Constitution, the president is not only permitted, but is required to ensure that the laws are faithfully executed. It would be beyond Congress' power to forbid the president from fulfilling that responsibility, and the president would be remiss in his duties if he acceded to attempts to shift that constitutional responsibility to others.

Are there any circumstances in which presidential intervention would be inappropriate?

Yes, there are many situations where it would be inappropriate for the president to intervene. To take a military example, if he has good generals it may be inappropriate for him to interfere with tactical decisions. But he still has the power to do so. The same principle applies in domestic matters.

3. **Is the EPA forbidden to take costs into account in establishing health standards under the Clear Air Act? Do you believe that costs were taken into consideration in setting either the primary or secondary ozone standards?**

Congress is of course empowered to set out the criteria by which specific rules are to be promulgated. My expertise, however, is not in environmental policy, and I am not familiar with the factual details of the ozone rulemaking.

4. **What is your reaction to the following statement by Prof. Strauss?**

"When a decision is taken out of the hands of the agency equipped to be expert about the science and constrained by Congress's instructions, and delivered to a White House motivated by a much larger array of essentially political considerations reaching well beyond those factors Congress has authorized, legality disappears and is replaced simply by power politics."

The essential issue here is whether ultimate responsibility for policy decisions should rest with "expert" agencies or with the elected president of the United States. Prof. Strauss argues that agencies are better equipped than the president to make rulemaking decisions involving science. But if "expertise" is the goal, why should responsibility be left with agency heads? Why not lower officials within the agency, who are more expert in the particular subject at issue? Or why not by the staff scientists who know the most of all about science?

In truth, most rulemakings are not black-and-white issues of science: judgment calls need to be made. Even if the science is clear (which it often is not), policy decisions need to be made as to how to apply that science in crafting rules that best meet the goals of the underlying statute and the needs of the American people.

Ultimate responsibility for such policy decisions should be in the hands of individuals who are accountable to the American people. Yet Prof. Strauss disparages such accountability. The White House, he says, "is motivated by a much larger array of essentially political considerations." But that is precisely the reason the Constitution vests such executive power in the president. Within the scope of discretion permitted by statute he *should* consider the big picture, including the policy (or "political") considerations involving the attitudes of and impact on the Americans who elected him.

5. **Do you think it is appropriate for the Vice President, who has no scientific expertise or responsibilities, to delay a final rule for more than a year that would provide protections for right whales? If so, on what basis?**

Yes. The vice president – as one of only two individuals elected nationally by the American people -- has every right to make his views known and express his concerns on policy matters. Constitutionally, he does not have power to "delay" any rulemaking. That power is ultimately held by the president, who may act based on advice from the vice president or any other officer.

6. **May Congress –via the power of the purse – limit the expenditure of monies to fund politicized White House operations by which the President or Vice President purport to divert agencies from the tasks Congress has given them?**

The Constitution grants Congress sole power to appropriate funds. However, this power is limited: Congress cannot use the power of the purse to enact bills of attainder, for example. Similarly, most legal scholars argue that Congress cannot use its appropriations power to prevent the president from fulfilling his duties under the Constitution: it cannot broadly bar the expenditure of funds to negotiate treaties, for instance. The same principle would seem to apply to rulemaking: Congress could not broadly ban the president from fulfilling his constitutional responsibilities in this area. The legality of more specific and targeted limits would depend upon the facts of the particular case.

7. **Do you know if any regulatory policy officers (RPOs) have stopped any agency regulatory initiatives before they became draft rules? Do you believe that the actions of RPO's should be more transparent?**

I do not know of any specific instances in which RPOs have stopped regulatory initiatives.

I would be cautious as to steps to make actions of RPOs more transparent. While transparency can be a good thing, it could also hinder intra-agency deliberation as to policy options, and foster an overly formalized, adversarial relationship

between the RPO and other members of the agency. One purpose of having regulatory policy officers within agencies – rather than simply relying solely on external regulatory review procedures -- is to ensure that potential problems are identified and addressed early on in the process in a collaborative fashion, avoiding delays and disruptions in rulemaking. Restrictions on interaction between RPOs and other staff could interfere with that important function.

8. I note in footnote 1 to your prepared statement that the views expressed in your testimony are your own and not on behalf of the Heritage Foundation. Please explain why your statement is printed on Heritage Foundation testimony.

The disclaimer on my testimony states that "[m]embers of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees".

The Heritage Foundation rarely adopts any policy positions or views as an institution. This is common for many research institutions, as well as for universities and other organizations.

My testimony was printed on Heritage Foundation letterhead simply to indicate my affiliation with Heritage. Again, this is a common practice for many organizations. For example, I believe the chair of a congressional committee may issue statements or write letters using letterhead of that committee, although the views expressed are not necessarily the official views of the committee as a whole.

B. Answers to questions submitted by Rep. Chris Cannon, Subcommittee Ranking Membe

1. One reason the Constitution vests executive power in a single executive is to ensure accountability. Ultimately this serves as a check on executive power, preventing the president from "passing the buck" for unpopular decisions.

2. The Constitution clearly vests executive power in the president. That power is not unlimited of course, and Congress may enact limited restrictions in certain cases. But Congress may not, in my view, assume or shift to others ultimate responsibility for executive functions.

3. Congress' constitutional powers are clear and wide-ranging – including the sole power to legislate and appropriate money. While not unlimited, these powers are more than sufficient to check executive authority.

4. Yes, it would. In addition, Congress could exercise greater control over rulemaking simply by enacting more specific statutes, leaving less discretion to the executive in promulgating rules.

5. The specific benefits are hard to quantify. It is probably impossible to measure the unnecessary burdens avoided or the increased regulatory effectiveness achieved due to the process. But I believe those benefits have been substantial. These benefits are attested to by the continued use of the Executive Order's review process by presidential administrations of both parties over the past 28 years.

6. As explained above, I believe that accountability is critical to our constitutional system. For that reason, it is critical that the president be clearly responsible for the executive of the laws, and that the Congress take responsibility for legislating, delegating only when necessary.

7. Regulatory burdens are among the largest costs imposed on the American people, comparable to that of the federal income tax. Ensuring that these burdens are no larger than necessary, and that regulations imposed are as effective as possible, is of very practical interest to every American.

8. Many U.S. states have unbundled executive power – with separately elected attorney generals and other statewide officials. Such system have clear drawbacks, in that they can lead to confusion regarding the division of responsibilities among the officials, and conflicting policies. But, even within these systems, each official is elected and ultimately accountable to voters. Under the de facto unbundled executive system suggested by many at the federal level, executive power would be distributed to non-elected agency heads. This is not only contrary to our existing Constitution, but virtually eliminates accountability.

9. No, scientists do not always agree. Moreover, even where there is a scientific consensus, there is a substantial role for policy judgment – in determining the initial assumptions, the range of options, and choosing among potentially multiple solutions. Science, by itself, can not dictate policy results.

10. I do agree that in most circumstances, there is little difference between the president having authority to "order" an action, and just having authority to fire an official that did not do so. In either case, the president is able to exercise control over the policy. Yet, there may in fact be cases where there the lack of direct authority may make a difference. Suppose, for example, that an official approves a rule, although it is not the outcome he preferred. If the relevant statute requires the official to exercise his own judgment, can the rule then be challenged as not properly promulgated? The resulting litigation then could turn on the question of whether the decision in fact represented the agency official's judgment or the president – with the rule being thrown out if it is shown that the decision represented the views of the president (a constitutionally bizarre result, in my view.) Such a result, while unlikely, would possible in the absence of recognition of direct presidential authority.

11. Yes. Alternatively, Congress could make clearer its intent when enacting the original legislation.

12. Yes.

13. Yes.

14. While Congress may – under existing case law – allow certain officials to be removed only for cause, such authority is limited. In Morrison v. Olsen (487 U.S. 684 (1988)) the Supreme Court upheld limits on the president's power to remove an independent counsel, but in so doing made clear that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." Which officers are included in this class – and how "cause" may permissibly be defined – is unclear. But any attempt by Congress to prevent the president from exercising his constitutional role in the rulemaking process is bound to meet constitutional challenge.

15. For the reasons stated above, any attempt to prohibit the president from fulfilling his constitutional duties would be subject to constitutional challenge.

16. Since neither the term "decider" nor "overseer" appears in the Constitution, it is difficult to say precisely what the constitutional implications of the terms are. However, as used by Prof. Strauss, the difference seems to be primarily that between be able to exercise direct control over decisionmaking and merely having the power to dismiss officials, as discussed in the response to question #10.

17. In my view, although in most situations there would be little practical difference, the president cannot *fully* perform his responsibilities as merely an "overseer" as defined by Prof. Strauss, for the reasons explained in the response to question 1.

18. If I understand the question directly, I do not believe it can.

19. As explained above, I believe accountability would be undermined.

20. Under either scenario, I believe accountability on the part of Congress is weakened. The question here seems to go to the question of delegation, which is a separate, but related and equally significant issue.

RESPONSE TO POST-HEARING QUESTIONS FROM RICK MELBERTH, PH.D., DIRECTOR OF REGULATORY POLICY, OMB WATCH, WASHINGTON, DC

June 20, 2008

Hon. Linda T. Sánchez, Chair
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Sánchez:

Thank you for the opportunity to testify before the Subcommittee at the hearing on the *Rulemaking Process and the Unitary Executive Theory* on May 6th. This letter provides our responses to Members' questions sent to us June 2, 2008. I am happy to answer any other questions Members might have or any questions related to the transcript.

QUESTIONS FROM LINDA T. SÁNCHEZ, CHAIR

1. In your prepared statement, you cite various concerns about regulatory policy officers (RPOs). Administrator Dudley, on the other hand, made several points that she and her predecessor, Acting Administrator Aitken, apparently share. I would like you to comment on each of these points as follows:

a) RPOs are not new; President Clinton, when he issued EO 12866, directed each agency head to designate an RPO.

Ms. Dudley and Mr. Aitken are correct that President Clinton's regulatory executive order called for each agency head to designate an RPO. Section6(a)(2) of EO 12866, *Centralized Review of Regulations*, states:

> Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

In their respective testimonies before the Subcommittee, neither Ms. Dudley nor Mr. Aitken addressed the responsibilities of these RPOs to any great extent. In Mr. Aitken's testimony before the Subcommittee on February 13, 2007, he only addressed the functions of the RPOs in a paragraph. He noted:

> Executive Order 13422 amends Executive Order 12866 to require that an agency's commencement of a rulemaking either be authorized by the agency head or be

1742 Connecticut Ave. NW
Washington, DC 20009
tel: 202.234.8494
fax: 202-234.8584
email: ombwatch@ombwatch.org
web: http://www.ombwatch.org

> approved by the agency's Regulatory Policy Officer. . . In practice, then, this will mean that, in most if not all cases, an agency's commencement of a rulemaking will be authorized or approved by an agency official who is appointed by the President and subject to Senate confirmation.[1]

It is the functioning of the RPOs that is cause for concern, not their mere presence. In my testimony, I described how the RPOs functioned under EO 12866 before it was amended. The role of the RPO as envisioned was to coordinate and implement agency responsibilities regarding regulatory planning and review of regulations, make information available to the public, and provide for meaningful public participation.[2] Rules would commence when agency experts, with a congressional mandate, began the important work of collecting data and analyzing regulatory problems and solutions.

Dr. Copeland in his testimony before the Subcommittee also described how the RPOs functioned before their responsibilities were expanded by President Bush's amendments. He noted that under Section 6 of EO 12866 quoted above, RPOs were to "be involved" in the rulemaking process "to foster the development of effective, innovative, and least burdensome regulations."[3]

President Bush's EO 13422 changed the responsibilities and functions of the RPOs. They are now charged with approving an agency's Regulatory Plan, a responsibility previously given to the agency head. EO 13422 states that "no rulemaking shall commence nor be included" for consideration in the agency's regulatory plan without the RPO's approval, *unless specifically otherwise authorized by the agency head.*[4] It takes an affirmative act on the part of the agency head to reclaim powers he or she once had under EO 12866.

Definitions matter. Changing the responsibilities and functions of RPOs, and changing who can be ascribed that role, is significant. To claim that nothing is new because RPOs already existed while ignoring their changed capacities is rather disingenuous.

b) A presidential appointee should not be confused with "political appointees" appointed by the agency head.

As Mr. Aitken noted in his testimony, "Presidential appointees are appointed by the President, whereas agency heads appoint 'political appointees' who are in the non-career Senior Executive Service or are under Schedule C; these agency-head appointees are *not* Presidential appointees."[5]

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[1] Testimony of Steven D. Aitken, Acting Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, February 13, 2007, p. 19-20.

[2] Executive Order 12866, Sec6(a)(1). *Federal Register* Vol. 58, p. 51740, September 30, 1993.

[3] Testimony of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service, before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, May 6, 2008, on the "Rulemaking Process and the Unitary Executive", p. 5-6, Footnote 21.

[4] Executive Order 13422, Sec4(b) amending Sec4(c)(1) of EO 12866. *Federal Register* Vol. 72, p. 2764.

[5] Aitken, op. cit., p. 19.

This change requiring RPOs to be presidential appointees does two things: 1) it decreases the discretion of the agency head by changing the pool of potential agency employees from which the RPO is selected, and 2) it ties the RPO more directly to the president and diminishes that person's connection to the agency. This is clearly an attempt to increase White House control over regulatory outcomes and to diminish the discretion the regulatory agency wields over those outcomes. So rather than increasing accountability of the RPO, as the administration argues, it decreases accountability in the agency by placing regulatory responsibility in the hands of a White House appointee – who presumably may have a greater interest in seeing the president's political agenda carried out than in promoting sound public protections – rather than a professional expert who is less likely to be appointed based on political loyalties.

In addition, the presidential appointees who are named as RPOs have not been confirmed by the Senate for the regulatory responsibilities EO 13422 now gives them. Subsequently, the RPOs are not likely to be accountable to Congress or the American people. Given the ability to significantly impact regulatory outcomes, the RPOs should be confirmed by the Senate for these additional job responsibilities – responsibilities not foreseen when they were confirmed for their current positions. Installing a presidential appointee where one did not previously exist will facilitate White House input into agency regulatory matters. This is particularly true, as Professor Peter Strauss notes, in an administration with a "notoriously strong theory of a unitary presidency."[6]

c) EO 13422 places no restrictions on the agency head's discretion in choosing which presidential appointee in the agency to designate as the agency's RPO.

Indeed, there is no language in EO 14322 which restricts the agency head's discretion in choosing among a pool of politically appointed officials – the presidential appointees. The problem is that the agency head has no discretion to choose anyone from any other pool of employees, regardless of how qualified for the position someone might be. The agency head is under orders to select only from a pool of politically acceptable employees, as determined by the White House, and must communicate that choice to OMB, as explained in my next comment. Thus it may look like the agency head has discretion to choose freely, but in the context of his or her previous powers, that discretion is now more limited.

d) EO 13422 does not change the fact that the RPO reports to the agency head.

This is debatable and disingenuous again. The offices that have been selected as the office in which the RPO responsibilities reside, such as a general counsel's office, are organizationally responsible to the agency heads. Thus the people filling these offices do report, in their roles as General Counsel, for example, to the agency head. However, EO13422 specifically removed explicit language which formerly required *the RPO* to report to the agency head in the amended Section 6(a)(2):

> (2) ~~Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency~~

[6] Testimony of Peter L. Strauss, Betts Professor of Law, Columbia Law School, before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, May 6, 2008, on the "Rulemaking Process and the Unitary Executive", p. 4.

> ~~head.~~ *Within 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation.* The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

Not only does EO 13422 remove the explicit organizational reporting function from within the agency (to the agency head), but it acknowledges the importance of identifying that person designated as the RPO to OMB. Any reasonable person reading the changed construction of this paragraph would recognize the clear line of communication between OMB and the RPO.

e) The chief advantage of having a Presidential Appointee serve as the RPO is that it ensures accountability.

Indeed, having a presidential appointee serve as an agency's RPO ensures accountability – to the president and his executive office employees. Not to the public, not to the agency head, and certainly not to the Congress. Because of the lack of transparency in the regulatory process, the public will not know the extent to which RPOs have stopped, delayed, or interfered with the quality of regulatory information and decisions. The direct communications channels between OIRA and the RPOs have the potential to allow even further examples of interference in the information and/or the decisions of regulatory agencies than those examples cited by GAO that were outlined in my written testimony. Having been given the power to initiate regulations, we fear the RPOs will further decrease agency rulemaking discretion and increase the trend toward OIRA dictating agency rulemaking.

It is our position that accountability of the RPOs can only be achieved if 1) the RPOs are confirmed by the Senate in keeping with their status as presidential appointees, 2) the work of the RPOs is transparent – both the process and the results of their work, 3) Congress exerts its oversight function, requires RPOs to testify before it, and that the White House allows RPOs to testify at these hearings, and 4) Congress passes legislation requiring all pre-decisional information regarding agency rulemakings to become part of the rulemaking docket fully accessible to the public.

2. With regard to the right whale rule that has been delayed for more than a year, you claim that OIRA is not only complicit in this delay, but is "actively working to undermine the scientific basis for the regulation." Please elaborate on this statement.

Initially, OMB Watch viewed the right whale rulemaking as simply an incidence of delay. We thought OIRA was refusing to let NOAA go forward with the rule by using its position as regulatory gatekeeper to keep the rule under review indefinitely, perhaps because the shipping industry opposed the rule. (See the World Shipping Council's May 3, 2007 letter to OIRA.[7])

[7] See the letter from Donald L. O'Hare of the World Shipping Council, an industry trade group, to OIRA Administrator Susan Dudley, May 3, 2007, opposing the adoption of ship speed limits. Available online: http://www.whitehouse.gov/omb/oira/0648/meetings/591.pdf

The documents released by Rep. Henry Waxman, however, show that OIRA is "actively working to undermine the scientific basis for the regulation." In one of the documents released, a four-page memo dated November 20, 2007, NOAA responded to several questions "from the White House." The questions address scientific or technical details of the justification for the rule and attack details of the rule as unnecessary. These questions are typical of those offered by OIRA during the centralized review process. (The White House Office of Science and Technology Policy, though referred to in the memo in the third person, may have prepared some or all of the questions for NOAA. The White House Council on Environmental Quality is another possibility.)

In one line of questioning, the White House argues the published literature does not take into account a recent uptick in the right whale population, and that NOAA may be assuming too grim a situation regarding the species' survival. NOAA responds that, as required by law, it "used the latest, peer-reviewed, scientific data when developing the rule." The agency added, "NOAA closely monitors calf counts but is unaware of any recent scientific publications that provide more recent information on more recent calving." Attempting to persuade NOAA to include data and/or studies that NOAA has judged to be outside the scope of legitimate science is a clear effort to create questions about the certainty of the science used in developing the rule. That uncertainty could provide the justification for weakening the rule.

Even if OIRA posed none of the questions responded to in the November 20 memo, OIRA's role as a coordinator of other opinions can and should be viewed as active interference. In the case of the right whale rule, the Vice President's office – not OIRA – questioned the presence of "hard data" in support of the shipping vessel speed limit. The Council of Economic Advisors – not OIRA – questioned the validity of NOAA's findings by rerunning one of the agency's statistical models with different assumptions. But the CEA would only be involved in the rulemaking at OIRA's request.

But while OIRA may not be constructing these analytical hoops, it is still holding them out for NOAA to jump through. Only OIRA – or, in rare instances where the president himself decides the outcome of a regulatory standard as happened in the ozone rulemaking – can give the final stamp of approval on a rule before the issuing agency prepares it for publication in the *Federal Register*.[8] OIRA also has the discretion to allow an agency to proceed with a rulemaking without addressing concerns expressed by other agencies or White House offices.

In the case of the right whale rule, OIRA chose to involve other White House offices. If the kinds of correspondence outlined in the released documents are still occurring, regardless of the source of the complaints, OIRA continues to be guilty of actively undermining the science used to justify the agency's regulatory decisions.

3. Does not centralized review provide some important benefits with respect to the Federal rulemaking process?

[8] OIRA has no legal authority to prevent agencies from publishing in the *Federal Register*. However, if an agency chooses to publish a rule without OIRA approval, it may face some retribution from a very powerful OMB in subsequent budget reviews, regulatory reviews, etc.

Students and practitioners of the rulemaking process have varying opinions about costs and benefits of centralized regulatory review.[9] It is our opinion that the question of whether centralized review should be a part of the rulemaking process is well beyond the point of debate. It is hard to imagine a president willing to roll back this well-evolved executive power and cede power back to agencies or the congressional branch unless legally required to do so. Centralized review of agency decision-making, then, is likely a permanent fixture in the process.

The question that concerns us the most is the practice of this centralized review. As many of the witnesses before the Subcommittee testified and scholars have documented, there has been a gradual, continual accumulation of power through centralized review in the executive branch and specifically OIRA. That power has shifted from review and coordination by OMB to executive branch determinations of how agencies should assess and make decisions (for example, by requirements for cost-benefit analysis and net benefits calculations) to a current system in which even the information that agencies use in rulemaking is now subject to executive branch approval if not outright control in some instances. Increasingly, these powers are being wielded out of public view by unaccountable executive branch officials without subject matter expertise. In my testimony, and that of others, we have attempted to document many of these examples of interference in agency information collection, assessment, and decision-making.

Current practices give the president unique and unparalleled power to alter the collection and dissemination of information and to shape the substance of agency rulemakings – all behind the scenes. Even more striking is that a small number of OIRA staff have controlled this process all in the name of the president. In doing so, the implementation of agency statutory requirements may become secondary to the policies and priorities of the president as interpreted by the OIRA staff.

As I noted in my testimony, this structure imposes several costs. There is now the potential for even greater conflict between the statutory authority delegated to the agencies by Congress and executive priorities. When the president has the ability to override this statutory delegation of authority, the balance of power between Congress and the Presidency is altered. There is the perception, if not the reality, that special interests are favored heavily over the needs of the public. This process does not lead to better rules and public protections. When the president makes a substantive regulatory decision based on political considerations, scientifically-based protective standards are vitiated. Finally, we can be assured that if Congress does not act, OIRA will remain the equivalent of a political censor over congressional mandates and agency decisions.

4. If OIRA makes substantive regulatory decisions, you say it should be subject to the accountability provisions of the APA, including subject to court actions. Would not the exposure to litigation make OIRA's regulatory process even more cumbersome?

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[9] See for example, McGarity, Thomas O., "Some Thoughts on 'Deossifying' the Rulemaking Process" in *Duke Law Journal*, Vol. 41, No. 6, (1992) p. 1428-1436; DeMuth, Christopher C. and Douglas H. Ginsburg, "Commentary: White House Review of Agency Rulemaking" in *Harvard Law Review,* Vol. 99, (1986); Testimony of David Vladeck, Associate Professor of Law, Georgetown University Law Center before the Committee on Science and Technology Subcommittee on Investigations and Oversight, February 13, 200, on Amending Executive Order 12,866: Good Governance or Regulatory Usurpation?

Subjecting OIRA to court action for its regulatory decisions may very well have the effect of further slowing the regulatory process and making that process even less responsive to public health, safety, civil rights and environmental concerns. It may be that the courts are the only resort to determine the appropriate balance between the executive and legislative branch conflict currently reflected in the existing regulatory process. And there may be real dangers in opening the APA to amendments. These are issues better left to administrative law experts; we merely suggest this might be an avenue worth exploring.

In our view, however, OIRA should not be exempt from such APA provisions if it functions as the equivalent of a super level executive branch regulatory agency, including deciding what information is appropriate to regulatory decision-making in other agencies and determining outcomes. If the concern is that subjecting OIRA to the rules and procedures that agencies must follow in promulgating regulations creates additional problems for centralized review, then perhaps a better solution is to confront the ossification of the rulemaking process for all federal agencies and restructure it entirely. That is what we hope to see from a new Congress and presidential administration.

QUESTIONS FROM CHRIS CANNON, RANKING MEMBER

OMB Watch is committed to a government that is democratically accountable and transparent. Whatever your concerns about OMB involvement in agency rulemaking, how is a rulemaking process in which the democratically accountable President is cut out, and Executive Branch agencies are sealed off, likely to be more democratically accountable and transparent?

OMB Watch does not now hold, nor has it ever held, the opinion that the President is or should be cut out of the rulemaking process. Nor have we ever proposed that agencies should be "sealed off" somehow in a rulemaking process. Any reading of our materials, including my written and oral testimony, that draws that conclusion is a misunderstanding of our positions regarding executive branch responsibilities.

OMB Watch's perspective is that regulatory expertise exists in our federal agencies and should not be subordinated to political pressure from the White House. Given that the president appoints agency heads, there is already significant political pressure and allegiance to the president to shape regulations in a manner consistent with the president's policies and priorities. We argue there needs to be even greater transparency in the process to ensure that these pressures are documented and put in the rulemaking record regardless of the source of this political pressure. Regulations should be based on quality science and sound judgment, not politics. These actions should be able to withstand public and judicial scrutiny.

Again, I wish to thank the Subcommittee for the opportunity to respond to Members' questions, and for the opportunity to testify.

Sincerely,

Rick E. Melberth, Ph.D.
Director of Regulatory Policy
OMB Watch