THE | C. BOYDEN | GRAY | CENTER

OIRA Past and Future

Susan Dudley

Working Paper 19-17
"The Future of White House Regulatory Oversight and Cost-Benefit Analysis", September 13, 2019

Antonin Scalia Law School
C. BOYDEN GRAY CENTER
FOR THE STUDY OF THE
ADMINISTRATIVE STATE
George Mason University

OIRA Past & Future

Susan Dudley*
The George Washington University Regulatory Studies Center
sdudley@gwu.edu

The Office of Information and Regulatory Affairs (OIRA) is responsible for reviewing executive branch agencies' draft proposed and final regulations, coordinating the federal government's regulatory agenda, approving government collections of information from the public, and developing and overseeing the implementation of government-wide policies related to information policy, information quality, peer review, privacy, and statistical policy. While some of those functions are statutorily granted, others—notably those related to regulatory policy—derive from presidential executive orders. Since presidents can, and do, rescind their predecessors' executive orders with ease, it is striking that these regulatory oversight functions, and the economics-based framework underlying them, have not changed significantly through six very different presidential transitions. This paper reflects on OIRA's evolution over the almost 40 years since the Paperwork Reduction Act created it in 1980 to understand what has made it so durable. Part I begins with an examination of executive oversight of regulatory practice before the creation of OIRA. Part II looks at how presidents from Reagan through Trump have used OIRA to achieve their regulatory goals. Relying in part on the author's experience, Part III explores the durability of OIRA's procedures and guiding principles and briefly comments on proposals for changes to these practices. Part IV concludes.

I. Before OIRA

Congress created the first regulatory agency, the Interstate Commerce Commission (ICC) in 1887 to constrain railroad rates. Other agencies followed to regulate interstate trade, water and power, communications, commodity exchanges, etc. (Dudley 2015). In the 1930s, President Franklin D. Roosevelt's New Deal expanded the jurisdiction of these agencies and added new responsibilities (OMB 1997), but their sweeping authorities led to concerns about the constitutionality of Congress's apparent delegation of its Article I powers to a "fourth branch." Years of debate led to passage of the Administrative Procedure Act (APA) of 1946, which attempted to balance the competing goals of bureaucratic expertise and legislative accountability (Shepherd 1996). Its requirements—that regulations be grounded in statutory law and an

* I am grateful for support from the C. Boyden Gray Center for the Study of the Administrative State and feedback on an early draft from participants in a workshop it hosted. I also appreciate constructive comments from my GW Regulatory Studies Center colleagues, Bridget Dooling, Jerry Ellig, Mark Febrizio, Brian Mannix, Daniel Pérez, and Zhoudan Xie. Any errors are my own.

administrative record that is informed by public notice and comment—continue to guide rulemaking today.

The regulatory agencies formed during the New Deal and earlier generally issued "economic regulations," relying on economic controls such as price ceilings or floors, quantity restrictions, and service parameters (Weidenbaum 2004). Most were established as independent commissions to avoid political influence (Humphrey's Executer v. United States 1935), however, observers noted that they seemed to get "captured" by the industries they regulated. By the early 1970s, scholarship in the fields of economics, antitrust, and law generally recognized that economic regulation of prices, entry, and exit tended to keep prices higher than necessary, benefiting regulated industries at the expense of consumers (Stigler 1971). This awareness motivated bipartisan deregulatory efforts across all three branches of government that eventually led to the abolition of some agencies and removal of unnecessary regulation in several industries (Derthick & Quirk 1985). The deregulation of transportation and telecommunications that occurred in the 1970s and 1980s succeeded in increasing competition, which lowered consumer prices and increased choices, providing tens of billions of dollars per year in consumer benefits (Crandall 2016).

While economic forms of regulation were declining, a new type of "social" regulation began to emerge, aimed at protecting consumers, environmental quality, and workplace safety (Weidenbaum 2004). Many of these new regulatory agencies were established as part of the executive branch, either in departments, such as the newly formed Department of Transportation (DOT, created in 1967), or as standalone agencies, such as the Environmental Protection Agency (EPA, formed in 1970) (OMB 1997).

A. Richard M. Nixon

The activities of these new agencies, particularly EPA, generated concerns that their regulations and reporting requirements were overly burdensome, leading presidents, beginning with Richard Nixon, to take steps to exert some control over them.

> It was the Nixon administration that first began to grapple seriously with the problems of controlling the federal regulatory apparatus. White House concern over proliferating federal regulations and their costs surfaced in 1971, when senior officials in the Nixon administration grew concerned over regulations being churned out by the recently formed Environmental Protection Agency (EPA). (Eads & Fix 1982, p. 134).

In 1971, Nixon established a "Quality of Life Review" (QLR) program that required agencies to submit for Office of Management and Budget (OMB) review agendas of regulatory actions, and certain proposed and final rules along with their supporting analysis before publication in the *Federal Register* (Schultz 1971). Although the QLR officially applied to all social regulations

from executive branch agencies, Eads & Fix observed that "in practice only EPA was singled out for examination" (1982, p. 134).

According to an OMB official at that time:

> The QLR set the template for actions taken by the Ford, Carter, and Reagan Administrations since it: 1) required that proposed and final regulatory documents, including but not limited to rules, be submitted to OMB for review; 2) required economic analyses of regulations including a cost-benefit analysis and comparison to regulatory alternatives; and 3) established a regulatory calendar subject to OMB review (Tozzi 2011, p. 47).

Rather than offering independent review, OMB's role in the QLR process was to coordinate review among agencies, in much the way OMB conducts legislative clearance (Tozzi 2011, p. 48).

B. Gerald R. Ford

President Gerald Ford maintained the QLR for social regulations. In November 1974, via Executive Order (E.O.) 11821, he required agencies to develop an "inflation impact statement" for each major legislative or regulatory proposal (Ford 1974). He also gave OMB a role in coordinating implementation of the order via its "budget preparation, legislative clearance, and management evaluation functions," directing "each Federal department and agency … to the extent permitted by law, [to] cooperate with the [OMB] Director…, furnish him with such information as he may request, and comply with the procedures prescribed pursuant to this order" (Ford 1974). In determining what constituted a "major" proposal, OMB and the agencies were to consider the:

a) cost impact on consumers, businesses, markets, or Federal, State or local government;
b) effect on productivity of wage earners, businesses or government at any level;
c) effect on competition; and
d) effect on supplies of important products or services (Ford 1974).

OMB's January 1975 Circular A-107, which provided guidance to agencies for implementing E.O. 11821, directed them to submit to the Council on Wage and Price Stability (CWPS) "a copy of the proposed rule or regulation, the accompanying certification, and a brief summary of the agency's evaluation" of costs, benefits, and alternatives considered (OMB 1975). In December 1976, President Ford extended the inflation-focused review with E.O. 11949, which changed the name of the required analysis to the Economic Impact Statement (Ford 1976).

According to Murray Weidenbaum, who later chaired President Reagan's Council of Economic Advisors (CEA), "the driving force behind Ford's review process was the Review Group on

Regulatory Reform, a subcommittee of the Domestic Council, which was a policy-coordinating mechanism used in the Ford White House" (Weidenbaum 1997). Under Ford's executive orders and procedures, "many burdensome regulatory proposals became subject to critical review and some were deferred, revised, or abandoned" (Weidenbaum 1997).

Ford also focused on removing economic forms of regulation, issuing "presidential messages calling for the deregulation of the airline, railroad, and trucking industries and introduced legislation designed to increase rate-setting flexibility and to reduce barriers to entry," and supporting enactment of the 1976 Railroad Revitalization and Regulatory Reform Act (Eads & Fix 1982, p. 135).

C. Council on Wage and Price Stability

In 1974, Congress passed, and President Ford signed, a bill establishing CWPS in the executive office of the president to, among other things, "review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation" (Council on Wage and Price Stability Act, Pub. L. 93-387. (1974)). Amendments in 1975 added the authority to "intervene and otherwise participate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings" (Council on Wage and Price Stability Act Amendments of 1975 Pub. L. 94-78).

CWPS continued in the Carter administration and, pursuant to this authority, its "regulatory review staff … operated as a relatively freewheeling analytical group that selectively and publicly critiqued regulatory proposals from a wide array of federal agencies" (Hopkins 2011, p. 71). CWPS economists filed comments (called "filings") on proposed regulations during their public comment periods. James C. Miller III, who served as Ford's Assistant Director of the CWPS Government Operations and Research Unit,[1] acknowledged that CWPS's "authority was limited to filing statements with the agencies involved and embarrassing them in the press…[b]ut by doing this with confidence and skill, and with some support from the White House staff and members of the Council [of Economic Advisors], we had a modicum of success" (Miller 2011, p. 95).

Another senior economist involved, Thomas Hopkins, observed that CWPS economists "offered a novel form of oversight and White House influence," that, especially when reinforced by other commenters and the media, "rais[ed] the cost to regulators of ignoring the messages conveyed" (Hopkins & Stanley 2015, p. 401). According to him, "the statutorily granted tool of public interventions in particular rulemakings was used to raise the banner of economic efficiency, which realistically had at best a tenuous connection to inflation fighting but a clear link to each President's views of the role that regulation should play" (Hopkins 2011, p. 272).

D. Jimmy Carter

President Jimmy Carter discontinued the controversial QLR but retained the CWPS economists' role in filing comments on the public record of agency rulemakings. He also pursued economic deregulation, especially in the transportation sector. According to economists involved, Carter's "program had three principal objectives: improved regulatory management, economic deregulation, and the adoption of less-intrusive regulatory techniques" (Eads & Fix 1982, p. 135). He set up the cabinet-level Regulatory Analysis Review Group (RARG) as an "expert regulatory 'watchdog'" (Fix & Eads 1985, fn. 19), with responsibility for reviewing the most important regulatory proposals. CWPS economists provided the analytical support, backed up by senior officials in the White House, OMB, and the CEA (Weidenbaum 1997).

Establishment of the Regulatory Council in 1978, with representatives from both executive and independent regulatory agencies, further centralized the coordination of executive oversight and encouraged the use of more flexible and cost-effective forms of regulation (Fix & Eads 1985).

Carter issued E.O. 12044, which required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome approach (Carter 1978). E.O. 12044 also required agencies to make regulatory analyses available to the public when proposing new rulemaking (Weidenbaum 1997). It called on the Regulatory Council to prepare a semi-annual schedule of proposed regulations that was a forerunner to today's annual *Unified Agenda of Regulatory and Deregulatory Activities*. The Council also prepared an

> agenda of regulatory reform proposals which stressed: (1) enhancement of presidential oversight; (2) institutionalization of cost-benefit regulatory assessment procedures; (3) adoption of flexible regulatory alternatives and market mechanisms in lieu of traditional command and control regulation; and (4) further examination of non-governmental solutions (such as greater insurance availability) to problems previously viewed as primarily regulatory in character (Fix & Eads 1985, fn. 19).

Carter also signed two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA) required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts (Regulatory Flexibility Act of 1980 Pub. L. 96-354). The Paperwork Reduction Act (PRA), which he signed over the objections of his cabinet (Tozzi 2011), established OIRA in OMB to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information (Paperwork Reduction Act of 1980 Pub. L. 96-511).

E. Controversies surrounding oversight and analysis

These early efforts to control regulatory impacts provoked controversy. Regulatory agencies, especially EPA, which received the most oversight from Nixon's QLR program, chafed at the

procedures and analytical requirements imposed (Carroll 1972). Writing in the early 1980s, two observers commented that "the program's opponents considered it an arbitrary and intrusive arrogation of power by the White House—a criticism that has haunted all subsequent White House oversight efforts" (Eads & Fix 1982, p. 134).

The Natural Resources Defense Council criticized in a 1976 paper the

> alarming level of difficulty and confoundment to [EPA's] efforts to achieve the nation's environmental goals. Through close control of the budget preparation and allocation process and through an unusual regulatory review procedure—created by the Nixon Administration and ironically dubbed 'the quality of life review'—OMB has managed to stall EPA progress in a number of critical areas (Speth et al. 1976, p.1).

Criticisms of executive oversight continued into the Carter administration, and in Sierra Club v. Costle, plaintiffs charged that meetings with White House and OMB staff were illegal *ex parte* communications (Sierra Club v. Costle 1981). However, the court disagreed, opining:

> 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 1981).

The Court's decision, coming in 1981 after President Ronald Reagan took office, had important implications for his more muscular review (Sohn & Litan 1981).

II. OIRA 1981 – 2019

When President Carter signed the PRA in December 1980, it called for the creation of OIRA within OMB to oversee agencies' efforts to reduce the federal government's information collection and reporting requirements, and to coordinate information management activities across the government. Since then, the office has taken on additional responsibilities.

A. Ronald Reagan

President Reagan made "regulatory relief" one of four pillars of his economic policy (along with tax cuts, spending restraint, and stable monetary policy) (Niskanen 1992). Soon after he took office in 1981, he issued E.O. 12291, giving the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs (Reagan 1981b). Contemporary observers noted that, "on its face the order did not constitute a major departure from [Carter's E.O. 12044] ... The differences lay elsewhere—in practice and in the two administrations' underlying philosophies" (Fix & Eads 1985).

E.O. 12291 required that for new and existing regulations, as well as legislative proposals concerning regulation:

> (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
>
> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
>
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
>
> (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and
>
> (e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future (Reagan 1981b).

Congress did not reauthorize CWPS in 1981 (Hopkins & Stanley 2015), and soon after taking office, Reagan abolished the wage and price program (Reagan 1981a). He moved the group of CWPS economists responsible for filing comments on regulation to the new OIRA along with the budget analysts who had reviewed regulations under Ford and Carter. The heads of the OMB and CWPS units that combined to staff OIRA became deputies to the OIRA administrator (Hopkins 2011; Tozzi 2011). These staff continued their prior roles, with the budget staff serving as "desk officers" assigned to specific agencies and responsible for transactional reviews and the PRA, and the CWPS group of economists focusing on economic efficiency and the quality of agencies' regulatory impact analyses (RIAs).

While the CWPS team of regulatory economists had reviewed independent regulatory agency regulations, and the PRA gave OIRA responsibility for reviewing independent agencies' information collections, Reagan chose to limit E.O. 12291 review to executive branch agencies' rules. It required executive agencies to submit all proposed and final regulatory actions to OIRA

for review at least 10 days prior to publication. For regulations classified as "major"—defined as those likely to have an annual effect on the economy of $100 million or more, cost or price increases, or significant effects on competition, employment, investment, productivity, innovation, or international competitiveness (Reagan 1981b, Sec.1.b.)—agencies were to prepare RIAs and transmit them, along with draft regulations, to OIRA at least 60 days before publication for proposed rules and 30 days for final rules (Reagan 1981b, Sec. 3). Notably, however, the order directed agencies, if asked by the OMB director, to refrain from publishing their rules or accompanying analysis until OIRA concluded review.

To coordinate and oversee this process, Reagan established the Presidential Task Force on Regulatory Relief chaired by Vice President George H. W. Bush. It was staffed by C. Boyden Gray (Counsel to Vice President Bush), Richard Williamson (Deputy Assistant to the President), and James C. Miller (OIRA Administrator). Like the RARG in the Carter administration, it served to bring regulatory issues for discussion among the cabinet-level Task Force members. It was a vehicle to "raise the profile of important regulatory issues and help ensure that they would not be buried within a recalcitrant bureaucracy" (Gramm 2011, p. 31). It also set forth guidelines for regulatory agencies, including a list of ten principles that were colloquially known as the "Ten Commandments" (OMB 1985, fn. 3).

E.O. 12498 (Reagan 1985) established a *Regulatory Program* of the most significant upcoming regulations, published annually to "improve the management of regulatory activity within the Executive branch," and "provide the public and the congress with a greater opportunity to learn about and evaluate … regulatory priorities and procedures" (OMB 1986). OIRA economists authored the introduction each year, and these "Regulatory Program in Brief" sections offered treatises on principles for regulatory analysis. The 1998 Program included, as an appendix, the first RIA Guidelines (OMB 1998).

During Reagan's second term, Congressional opponents of the OIRA process, led by Rep. John Dingell, voted to defund the office. Wendy L. Gramm, the administrator at the time, recalled the negotiations and resulting agreement leading to a memorandum she signed in 1986 (Gramm 1986) setting out "[i]nternal procedural guidelines concerning meetings with outside interests, the logging of visits, and the disposition of materials received from outside interests" (Gramm 2011 p. 29).[2] "[T]o give the Senate reassurance that [the future administrator] would abide by the [memo's] guidelines" (Gramm 2011, p. 30), the 1986 legislation that reauthorized OIRA appropriations and amended the PRA expanded the disclosure requirements related to paperwork proposals, and for the first time required Senate confirmation of future OIRA administrators (CRS 2007).

In addition to procedural concerns, controversy over E.O. 12291's focus on benefit-cost analysis dogged the Reagan administration's program:

> First, the uncertainty and difficulty of the process may render it especially vulnerable to manipulation in service of predetermined outcomes. Second, it tends to be biased against regulation because the direct costs of a rule are likely to be more visible and quantifiable than are its benefits. Third, cost-benefit analysis is usually the province of economists, whose professional orientation favors private ordering and clashes with that of health scientists, who are more risk-averse to possible threats to public health. (Bruff 1989, p. 555)

Throughout the 1980s, groups charged OIRA with improperly interfering in agency decisions and providing inappropriate access for special interests (Dudley 2009). However, in an article originally prepared for the Administrative Conference of the United States and subsequently cited by the American Bar Association, Bruff (1989) observed that by the end of the Reagan administration the regulatory oversight program had "evolve[d] and mature[d] … with early controversies leading to procedural compromise and improved regularity. A program that had a distinctly experimental flavor in 1981 has achieved tentative acceptance in the executive branch" (p. 562).

B. George H. W. Bush

George H. W. Bush (Bush 41), Reagan's Vice President and director of his Task Force on Regulatory Relief, was elected to follow him as president, thus continuing—at least on paper—the policies and practices of the previous eight years. However, as one of Bush 41's chief regulatory advisors observed, "the Bush administration lost the deregulatory momentum of the Reagan years" largely due to "the relaxed commitment to oversight in the Executive Office of the President" (Gray 1993, p. 31).

The agreement that future OIRA administrators would require Senate confirmation definitely had an impact on the office. Bush 41's nominee for administrator was never confirmed, and OIRA was headed by a career civil servant serving in an "acting" capacity for his entire administration (Blumstein 2001).

Perhaps to add some political support for OIRA's review in the absence of an administrator, Bush 41 established the Competitiveness Council in 1989, replacing the Task Force on Regulatory Relief (McIntosh 1993). Vice President Dan Quayle chaired the Council, which was set up as a cabinet subcommittee responsible for coordinating White House review to ensure regulatory agencies' actions reflected the president's policies (McIntosh 1993). Not subject to the disclosure procedures agreed to in the Gramm memo, it soon gained a reputation as "a back-door conduit through which industry can influence the way laws are implemented" (Priest 1991). "What particularly irks members of Congress is that they know little about how the council operates, who the council meets with and what the council suggests or forces agencies to do to regulations they are writing" (Priest 1991).

C. William J. Clinton

When William J. Clinton defeated Bush in 1992, some hoped that the days of OIRA oversight and a net-benefit approach to regulation were over (Katzen 2018a). But in September 1993, President Clinton put those hopes (or fears) to rest. While he rescinded Reagan's executive orders, he replaced them with E.O. 12866 (Clinton 1993). The Clinton order retained the key features of OIRA regulatory review[3] and reinforced the philosophy that regulations should only be issued if required by law or a "compelling public need" (Clinton 1993, Sec.1.a). It directed agencies to base rules on an analysis of the costs and benefits of all available alternatives, and to select regulatory approaches that maximize net benefits to society unless otherwise constrained by law (Clinton 1993, pp. 638–40). The rhetoric was softer than in E.O. 12291, with the preamble emphasizing "planning and coordination," reaffirming "the primacy of Federal agencies in the regulatory decision-making process," promising to "restore the integrity and legitimacy of regulatory review and oversight," and to "make the process more accessible and open to the public" (Clinton 1993, Sec. 1a.). It spoke of the importance of understanding non-quantifiable effects and incorporated the transparency provisions adopted by the Gramm memo. It replaced the *Regulatory Program* required by E.O. 12498 with a semi-annual *Unified Regulatory Agenda*, listing "all regulations under development or review," (Clinton 1993, Sec. 4.b.) and an annual *Regulatory Plan* providing more detail on "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter" (Clinton 1993, Sec. 4.c.). Unlike the Reagan order, Clinton included independent regulatory agencies in this planning process (Blumstein 2011), though not in the requirement to submit individual regulations to OIRA for review.

President Clinton's first OIRA administrator recalled that the procedure for developing the new order focused on gaining acceptance from various groups.

> We marked up E.O. 12291 in-house at OIRA and then—contrary to how Executive Orders are normally developed—we convened a series of separate meetings for agency regulatory officials; public interest groups—representatives from labor, enviros, public health, safety, and civil rights groups; the business community—Business Roundtable, Chamber of Commerce, NAM, NFIB; the Big 7 State and local groups—National Governors' Association, Conference of Mayors, National Conference of State Legislatures, and perhaps others (Katzen 2018b).

After several iterations and repeat consultations, President Clinton signed the new order on September 30, 1993. More than 25 years and several presidential administrations later, E.O. 12866 remains in effect today.[4]

D. George W. Bush

President George W. Bush (Bush 43), who took office in January 2001, retained E.O. 12866 but, at least in some respects, his OIRA administrator implemented it more aggressively. John Graham began to return draft regulations to agencies for reconsideration pursuant to Sec. 6(b)(3) of E.O. 12866, something that had not occurred in the Clinton administration. In 2001 alone, OIRA sent 14 regulations back to agencies with public letters detailing the ways in which the rule or supporting analysis failed to comply with the principles of E.O. 12866 (RegInfo.gov). After this initial flurry, the rate of return letters declined, with four in 2002 and two or fewer in subsequent years of the Bush 43 administration.

Administrator Graham also initiated "prompt letters," not envisioned in the order. Rather than being sent in response to an agency's submission of a draft rule for OIRA review, these prompt letters suggested priority actions agencies might take to improve their regulations. OIRA sent four prompt letters in 2001, three each in 2002 and 2003, and then one in 2004 and one in 2005 (RegInfo.gov).

After notice and comment—and building on guidance drafted in the Reagan and Clinton administrations—the Bush 43 administration issued OMB Circular A-4 on Regulatory Analysis (OMB 2003), as well as bulletins articulating good practices for guidance documents (OMB 2007a), data quality (OMB 2002), peer review (OMB 2005), and principles for risk analysis (OMB 2007b).

During his eight-year term, President Bush issued two executive orders that amended E.O. 12866. The first modified Section 7 of E.O. 12866, which assigned responsibility for resolving disputes between agencies to the president or "the Vice President acting at the request of the President." After September 11, 2001, Vice President Cheney had other things on his mind, so in February 2002 E.O. 13258 reassigned the vice president's responsibility for resolving conflicts to the president's chief of staff (Bush 2002) and made other clerical changes to positions listed as regulatory policy advisors.

The second—E.O. 13422, issued in January 2007—made several amendments and received much more attention. First, it reversed the order of the E.O. 12866 language directing agencies to "identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action)" (Clinton 1993, Sec.1(b)(1)). The amended Order directed agencies to "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" (Bush 2007). Second, it expanded the order's coverage to include guidance documents. The director of OMB issued related guidance aimed at increasing the transparency and availability of agency guidance documents in January 2007 (OMB 2007a). Third, it suggested that "in consultation with OIRA, each agency may also consider whether to utilize

formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations" (Bush 2007, Sec. 5(a)). Finally, in what was apparently a typo, it prohibited inclusion in the *Regulatory Plan* any rulemaking that had not been approved by the agency's "Regulatory Policy Office." E.O. 12866 had established Regulatory Policy Officers in each agency and the reference was reportedly meant to be to that individual, not a new office.

E. Barack H. Obama

One of President Barack Obama's first regulatory actions was to revoke President Bush's E.O.s 13258 and 13422, returning E.O. 12866 to its original form. In a memorandum for the heads of executive departments and agencies signed just 10 days into his first term, the new president directed the OMB Director to work with agencies to "develop recommendations for a new Executive Order on Federal regulatory review," including on "the relationship between OIRA and the agencies," public participation, disclosure and transparency, benefit-cost analysis, distributional effects and equity, among other things (Obama 2009).

While these actions pleased progressives who had long been concerned about OIRA's authority (Gumm 2009), President Obama's memo also indicated an appreciation for OIRA's role, noting that it can serve to "ensure consistency with Presidential priorities, to coordinate regulatory policy, and to offer a dispassionate and analytical 'second opinion' on agency actions" (Obama 2009). It said "[w]hile recognizing the expertise and authority of executive branch departments and agencies, I also believe that, if properly conducted, centralized review is both legitimate and appropriate as a means of promoting regulatory goals" (Obama 2009).

Some progressives were alarmed and disappointed by his nomination of Cass Sunstein as OIRA administrator (Applegate et al. 2009). Sunstein's past support for centralized review and benefit-cost analysis appeared to signal President Obama's intention to continue the principles embodied in E.O. 12866 and to maintained OIRA's central oversight role.

Two years later, when the executive order promised in January 2009 was finally issued, it did not reflect a dramatic change in practice. E.O. 13563 explicitly reaffirmed E.O. 12866 and updated it by directing agencies to make their regulations accessible in open, searchable, and downloadable formats on the Regulations.gov platform (Obama 2011a). The 2011 order also raised concerns over "redundant, inconsistent, or overlapping" regulations, and encouraged greater "coordination, simplification, and harmonization" (Obama 2011a, Sec. 3). It directed agencies to ensure the integrity of scientific information used to support actions, to identify regulatory approaches that "promote innovation," and to "maintain flexibility and freedom of choice for the public" (Obama 2011a, Sec. 3, 4, and 6). It also put more emphasis on retrospective evaluation of regulations, directing each agency to make plans to "periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives" (Obama 2011a, Sec. 6).

In issuing E.O. 13579, "Regulation and Independent Regulatory Agencies," a few months later, President Obama tackled something both Reagan's and Clinton's orders had avoided. It *encouraged* independent regulatory agencies to comply with E.O. 13563's provisions for "public participation, integration and innovation, flexible approaches, and science … to the extent permitted by law" (Obama 2011b). It then *directed* them to release public plans within 120 days regarding how they would periodically review their existing significant regulations.

E.O. 13610, "Identifying and Reducing Regulatory Burdens," further emphasized retrospective review, stating that "during challenging economic times, we should be especially careful not to impose unjustified regulatory requirements" (Obama 2012). It directed agencies to "promote public participation … and to institutionalize regular assessment of significant regulations" by setting priorities, and reporting progress to OIRA twice a year (Obama 2012).

F. Donald J. Trump

Donald J. Trump's 2016 presidential campaign rhetoric was decidedly deregulatory. Within days of taking office in January 2017, he signed E.O. 13771, "Reducing Regulation and Controlling Regulatory Costs," which required agencies to remove two regulations for every new one they issue, and to offset the costs of new regulations by removing or modifying existing rules (Trump 2017a). A few weeks later, he signed E.O. 13777, "Enforcing the Regulatory Reform Agenda," directing agencies to establish Regulatory Reform Officers to lead agency task forces in implementing his regulatory initiatives and policies (Trump 2017b).

In his first few months, he signed 14 congressional resolutions disapproving regulations issued toward the end of the Obama administration (GW Regulatory Studies Center). Together, these actions dramatically slowed the pace of new regulation (Dudley 2018), although whether they succeeded in removing existing regulations is disputed (Mulligan 2019; Dudley 2019).

The Trump administration's emphasis on reducing regulatory costs certainly departs from previous administrations' focus on net benefits. Yet despite the rhetorical differences, Trump has not abandoned Clinton's and Obama's executive orders requiring agencies to make decisions on an understanding of regulatory benefits and costs. Instead, he has overlaid a budget constraint on these existing requirements and policies.

G. Controversies and Budget

If, by the end of the Reagan administration, OIRA's review procedures had gone from having a "distinctly experimental flavor" to "tentative acceptance in the executive branch" (Bruff 1989, p. 562), their continuation through both the Clinton and Obama administrations has conferred a bipartisan status that is quite rare in Washington (DeMuth 2011; Kagan 2001). Nevertheless, controversy over OIRA review remains. Critics argue that its reviews are not transparent, that it usurps agencies' statutory authority and expertise, and that it represents industry interests in

weakening agencies' rules (Steinzor 2011b). They point to the fact that OIRA meets more frequently with regulated entities when regulations are under review as evidence that they are influenced by those views (Haeder & Yackee 2015), but as Sunstein points out, "OIRA, with its open-door policy, is not responsible for this asymmetry; [it] cannot and does not pick and choose the parties with whom it meets" (Sunstein 2013, p. 1861). Based on my personal experience, any observed correlations between meetings and outcomes do not reflect causality; Sunstein is correct that critics' assertions regarding the effect of these meetings are "greatly exaggerated." "When rules change as a result of review, it is usually because of interagency or public comments, not because of meetings" (2013, p. 1861).

Further, regulatory impact analysis, especially benefit-cost analysis, is not universally supported (Ackerman & Heinzerling 2004), despite its adoption by all recent presidents. Critics focus on the limitations involved in assigning monetary values to non-market goods, arguing that regulatory analysis undervalues benefits, particularly those expected in the future (Ackerman & Heinzerling 2002).

Nevertheless, benefit-cost analysis is increasingly accepted as a valuable tool to inform policymaking, regardless of ideology or views regarding the role of government regulation (Revesz & Livermore 2008; Sunstein 2017). Although many enabling statutes are silent on whether regulatory decisions should be based on benefit-cost analysis, the Supreme Court is increasingly interpreting silent statutes in favor of analysis (Graham & Noe 2016). In 2009, the Court found that EPA's consideration of costs was "eminently reasonable" (Entergy Corp. v. Riverkeeper, Inc., 2009). It went a step further in 2015, rejecting an EPA regulation as arbitrary because EPA had not weighed both the costs and the benefits (Michigan v. EPA, 2015). Writing for the majority, Justice Scalia said, "against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost" (Michigan v. EPA, 2015). The dissenting opinion in this case adamantly "agree[d] with the majority … that EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*,'" but disagreed that was the case with the rule in question.

Another criticism is that requirements to conduct regulatory analysis are resource-intensive and delay needed regulatory action, leading to "paralysis by analysis" (Stewart 2003). But Coglianese points out that such concerns precede OIRA; decades ago, critics of the New Deal and the APA raised concerns with regulatory ossification and paralysis (Coglianese 2008). Despite the increase in analytical requirements, the *Code of Federal Regulations* "has increased about five times since 1946 and has continued to grow since the advent of OMB review" (Coglianese 2008, p. 91). Further, "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,

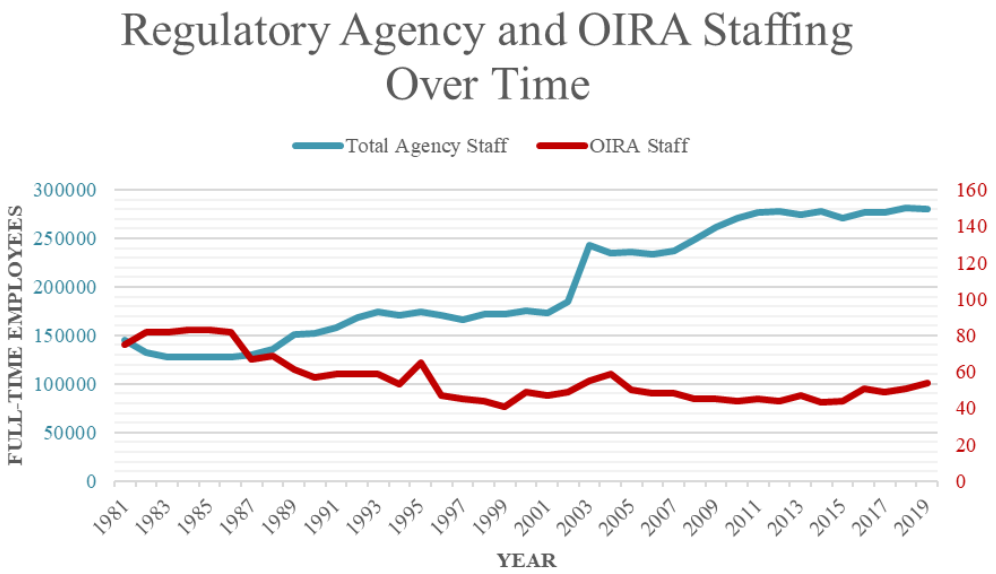
notwithstanding careful analysis of both large-sample datasets and matched case studies" (Coglianese 2008, p. 91).

The average length of OIRA review for all regulations reviewed since January 1993 is just under 60 days. Since OIRA reviews most regulations twice, once at the proposed stage and again at the final stage, this suggests the review process itself could add 120 days on average to a regulation's development. To the extent that this interagency review addresses problems that might arise in public comment, or in judicial review after a rule is issued, the net effect may be smaller.

On the other hand, this average does hide some very long reviews, which have extended beyond a year for some particularly controversial regulations. There have also been periods when the OIRA review process was unusually long. In particular, in 2012 the number of rules reviewed declined dramatically, while the length of review increased (averaging over 130 days for the next two years). A study prepared for the Administrative Conference of the United States attributed this to political "concerns about the agencies issuing costly or controversial rules prior to the November 2012 election," and to new White House policies that limited agencies to only issue rules "deemed absolutely necessary (e.g., a judicial deadline) or if it could be shown they were not controversial (e.g., clear net benefits)" (Copeland 2013).

Perhaps contributing to long reviews, OIRA analysts handle a large throughput of regulations—roughly 600 proposed and final rules each year. While every president has embraced its regulatory oversight role and expanded its responsibilities, OIRA's budget and staffing have not received corresponding attention. In 1982, observers worried that OIRA's roughly 90 staff positions were inadequate to handle the "formidable set of responsibilities" associated with E.O. 12291, the PRA, and the Regulatory Flexibility Act (Eads & Fix, p. 138). Today, OIRA has about 50 full-time staff, yet it has those same responsibilities, plus those related to E.O. 13771, privacy, statistical policy, small business impacts, information quality, international regulatory cooperation, and more. Over this same period, regulatory staff at agencies have increased, as the figure below shows.

Variation in Number of Rules Reviewed and Length of Review



Derived from annual Regulators' Budget analyses, the George Washington University Regulatory Studies Center and the Weidenbaum Center, Washington University in St. Louis.

III. The Durability of OIRA's Procedures and Principles

What accounts for the durability of OIRA's procedures and principles over the course of almost 40 years and six presidents? DeMuth suggests it is because they address "a problem that is in significant respects apolitical … the growth of the size, scope, and power of administrative regulation due to the increasing delegation of lawmaking authority from Congress to the Executive Branch" (2011, p. 16). Kagan argues that "presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism" (Kagan 2001, p. 2246).

Procedurally, OIRA gives the democratically elected president some control over the diverse agencies that comprise the executive branch. Presidents can and do assign political staff in the White House roles in overseeing regulatory policy but OIRA complements and supports those officials with its transparent procedures and cadre of career regulatory experts. Furthermore, the principles expressed in E.O. 12866, and E.O. 12291 before it, are consistent with longstanding economic principles.

While some have expressed dismay that OIRA has done little to slow the growth in new regulation (DeMuth 2011), most would agree that its review has focused attention on understanding the effects of regulations, and some have claimed it has resulted in "smarter regulation" that produces more benefits than costs (Graham et al. 2015; Sunstein 2011).

This section reviews OIRA's procedures and its guiding principles to shed light on its longevity. It offers modest recommendations for ensuring the continued durability of regulatory analysis and executive review.

A. Overview of OIRA Procedures

OIRA's regulatory oversight role has several functions, including coordinating interagency disputes on regulation, liaising with White House officials to ensure regulations are consistent with presidential policies, and reviewing regulations through an analytical economic lens to offer a "dispassionate and analytical second opinion" (Obama 2009) on agencies' actions. After serving as administrator from 2009-2012, Sunstein emphasized OIRA's role as a "convener and aggregator of information" from specialists across the government (Sunstein 2013).

When an agency submits a proposed or final regulation (now done through an electronic docket system), the appropriate OIRA desk officer accepts it for review. Depending on the significance and nature of the rule, the desk officer will share it with relevant officials in other agencies (such as the Small Business Administration Office of Advocacy and agencies with overlapping jurisdiction), the budget examiner in the corresponding OMB resource management office (RMO), and specialists within OIRA (economists, statisticians, and scientists). They will also share it with interested officials in White House policy offices (such as the Domestic Policy Council, CEA, Council on Environmental Quality, etc.). For many rules, these reviewers raise no concerns, but when they do, the desk officer coordinates comments and hosts meetings with the issuing agency and others in the executive branch to resolve them.

As soon as a rule is docketed at OIRA, its title is automatically posted on RegInfo.gov, a public website maintained by the General Services Administration (GSA) and OIRA. This signals to the public that a regulation is under review, during which time OIRA will accept a request for a meeting. OIRA always invites the relevant agency to attend these "12866 meetings," which serve as listening sessions where OIRA staff explicitly refrain from sharing information on the regulation under review. Often, representatives from the relevant RMO and White House offices attend as well. While minutes of these meetings are not kept, OIRA posts lists of attendees and any written material provided.

Most issues that arise during OIRA review are resolved at the staff level and, on average, reviews are concluded within about 60 days (RegInfo.gov). Since it was issued, the review timeframes in E.O. 12866—90 days with the possibility of a 30-day extension—have been interpreted as being non-binding as long as the agency (as opposed to the OMB director) requests an extension (Sunstein 2013). When reviews take significantly longer than 90 or 120 days, it is usually a sign of policy conflict within the administration (or as in the unusual period between 2012 and 2015, a White House policy to limit the number of regulations issued).

Upon concluding review (OIRA is careful not to refer to its role as "approving" or "disapproving" a regulation), OIRA identifies whether the regulation was consistent with E.O. 12866 as submitted, or if changes were made during the review process. RegInfo.gov provides the disposition of all OIRA reviews. Most regulations (more than 65%) are coded as "consistent with change." As GAO notes, "OIRA only codes rules as 'consistent with no change' if they are exactly the same at the end of the review period as the original submission. Even editorial changes made at the rulemaking agency's initiative can cause a rule to be coded 'consistent with change'" (2003, p. 31).

OIRA codes few regulations as having been "withdrawn" by the submitting agency (6%), and even fewer are "returned" (less than 1%). In the rare event that OIRA returns a regulation, it accompanies the return with a public letter explaining the reasons the draft is inconsistent with specified elements of E.O. 12866. Agency heads are understandably reluctant to receive such a public rebuke and often prefer to withdraw a regulation (author's experience). OIRA may also code its review as "subject to statutory or judicial deadline" which allows it to conclude without opining on whether the action is consistent with E.O. 12866 principles.

B. Procedural Criticism: Lack of Transparency

Perhaps the biggest procedural criticism OIRA faces is that the content of its reviews are not transparent. For all regulations that are subsequently published, interested parties may request a redline copy that shows the changes made during the review, though not the source of the changes. This has been a source of friction. Since its creation, OIRA has faced calls to docket its communications with agencies and record the source and reason for any changes to regulations under review (Sierra Club v. Costle 1981). These demands for "transparency" in intra-executive branch communications, however, misunderstand a key purpose of OIRA review. OIRA has multiple roles—analytical reviewer, convener and aggregator of information across agencies, and liaison with White House policy officials. Interagency coordination requires different parts of an administration to be able to engage in frank discussion on the merits of actions. Agencies are ultimately responsible for issuing final regulatory actions and, even if they are subject to some "jawboning" along the way, they must base them on the administrative record (Verkuil 1980). The relevance of who said what to whom is questionable when what matters is the final determination and the record's support for it.

What are the alternatives to the deliberative review conducted by OIRA? E.O. 12866 requires disclosure of discussions between OIRA and entities outside of the executive branch, and the Internet has made those disclosures more accessible. Abolishing OIRA would not reduce the "presidentialization of administration" that Justice Kagan discusses; White House officials would continue to engage in regulations to achieve policy goals, but they would be subject to none of the disclosure requirements that guide OIRA review. Recall the concerns raised over the

Competitiveness Council, which led interagency review in the absence of a confirmed OIRA administrator during Bush 41.

Some have suggested that OIRA publicly share its reviews and include them in the rulemaking record (DeMuth 2011). This would be similar to how CWPS operated in the Ford and Carter administrations before OIRA was formed. While CWPS's public filings had success in "embarrassing" agencies (Miller 2011) to consider more economically-efficient approaches, it is not clear such a strategy could be compatible with OIRA's current collaborative role as interagency convener. Could agencies work in good faith with an office that, after negotiating on a regulation's details, would still publicly critique the final rule? As discussed below, perhaps a legislative branch office (parallel to the Congressional Budget Office) could constructively play the role of outside reviewer without jeopardizing the candor and collaborative nature of intra-executive branch discussions.

The modern executive branch generally speaks with one voice. Just as agency heads do not publicly lobby for more budget authority than agreed to in the president's official budget, they rarely publicly dispute regulatory decisions. One exception to this occurred 2008, when EPA had drafted an advance notice of proposed rulemaking (ANPRM) exploring the regulation of greenhouse gas emissions using existing provisions of the Clean Air Act. The timeline for review was short and EPA appeared reluctant to address other agencies' concerns. Rather than try to achieve consensus, OIRA chose to allow publication of the draft ANPRM without review. However, in addition to EPA's draft, the *Federal Register* notice printed letters to the OIRA Administrator from four cabinet secretaries and four heads of other executive offices[5] raising concerns with the EPA approach (EPA 2008). This unusually transparent approach that revealed intra-executive branch disagreements would be unwieldy on a routine basis (and probably create undesirable incentives) but may be useful in certain situations, particularly for advance notices, where agencies are soliciting public input on a range of options and issues.

C. Overview of Analytical Principles

OIRA's guiding philosophy and principles reflect well-established regulatory practices (see, for example, OECD 2008). Regulatory analysis, particularly benefit-cost analysis, has emerged over the course of four decades as "an integral part of government accountability—a non-partisan tool for understanding the likely effects of regulation" (Dudley 2009). Woods finds that "more extensive regulatory analysis requirements are associated with decreases in the amount of perceived influence" of political actors (2018, 310).

It is important to appreciate that benefit-cost analysis is but one component of regulatory impact analysis. At an event commemorating the 25th anniversary of E.O. 12866, a former government economist summarized the principles enumerated in the order:

> The 12 principles tell federal agencies to 1) identify the problem, 2) see if existing regulations cause the problem, 3) look at alternatives to regulation as ways to solve the problem, 4) consider risks when setting regulatory priorities, 5) make regulations cost-effective, 6) assess the costs and benefits of regulation, 7) base decisions on the best available scientific, technical, and economic information, 8) evaluate different ways to regulate, 9) seek the views of state, local, and tribal governments, 10) avoid regulations that duplicate or contradict other regulations, 11) tailor regulations to impose the least burden, and 12) write rules clearly to minimize uncertainty (Nardinelli 2018).

He called the first principle, that "[e]ach agency shall 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," the most important and obvious. After identifying the problem and determining that regulation is the best solution, the remainder of the principles "shine a light on how to write a good regulation, [using] tools that include benefit-cost analysis, the best obtainable scientific and technical information, consideration of existing regulations, and finding the least burdensome way to craft the regulation" (Nardinelli 2018).

OIRA has issued several guidelines that developed these principles further. Circular A-4 (OMB 2003) is a detailed guide to conducting regulatory impact analysis, originally issued in the Bush 43 administration and reinforced with FAQs (OMB 2011a) and a Primer (OMB 2011b) in the Obama administration.

D. Don't Fix What Isn't Broken

In today's hyper-partisan climate, it is worth marveling over the bipartisan nature of the principles and procedures for regulatory review. For this reason, future presidents should avoid the temptation to replace E.O. 12866 with a new order. Advisors will always be able to identify modifications that could improve the order (for example, to include independent regulatory agencies or agency guidance documents), but any gains from replacing it to make those changes would likely be outweighed by a loss in bipartisan support that removing the long-standing order would cause. Instead, any new policies should follow the precedent of Bush 43's E.O. 13422, Obama's E.O. 13563, and Trump's E.O. 13771, which all supplemented E.O. 12866 without rescinding or replacing it. Recall that President Obama's revocation of E.O. 13422 left E.O. 12866 intact.

Congress should codify the bipartisan principles embodied in these orders. The successful regulatory reform of 1970s and 1980s, which the above history touched upon briefly, was also bipartisan. A difference then was that all three branches of the federal government supported and enabled the economic deregulation of transportation, telecommunications, and energy. In contrast, OIRA's oversight and analysis of social regulations is purely an executive branch

initiative. To ensure the durability of the analytical requirements and oversight procedures, Congress could legislatively require that new regulations consider a range of reasonable alternatives and attempt to maximize net benefits to society. Several bipartisan bills in recent Congresses would have codified the language of E.O.s 12866 and 13563, but none of these have passed. Such codification would lend congressional support to the orders' nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to society. Ideally, such a requirement would override authorizing statutes that ignore or explicitly prohibit analysis of tradeoffs (Dudley & Mannix 2018). It could also apply to independent regulatory agencies, which have traditionally performed lower quality analysis than executive branch agencies (Fraas & Lutter 2011).

Congress would benefit from establishing its own regulatory oversight office to complement OIRA's reviews. An office modeled on the Congressional Budget Office could review agencies' RIAs and the cumulative effects of existing regulations. A legislative office could serve as an independent check on the analysis and decisions of OIRA and regulatory agencies—including independent agencies—and provide Congress and the public estimates of the non-budget impacts of proposed legislation (Dudley 2015).

E. More effective ex post evaluation of regulations' impacts

Since Carter's E.O. 12044, presidents have directed agencies to apply regulatory impact analysis retrospectively to be sure existing rules are having their intended effects. These directives have met with limited success, however, largely because they did not change underlying incentives (Dudley & Mannix 2018). Unlike other government programs that are reassessed each time their funds are appropriated, regulations, once created, tend to exist in perpetuity.

Legislation to require agencies to plan for *ex post* review when they issue new regulations has bipartisan support in Congress (S.1420). Trump's E.O. 13771, by requiring agencies to offset the costs of new actions by revisiting existing regulations, may motivate agencies to evaluate existing rules to identify those that are less cost-effective while retaining those that are achieving their goals. Fichtner, McLaughlin, & Michel suggest that Congress establish a legislative branch office to conduct "legislative impact accounting" to measure the non-budgetary costs of proposed legislation, and the actual costs of existing regulations (2018).

IV. Conclusions

Both OIRA's regulatory oversight procedures and the principles undergirding its review of regulations have endured through six very different presidents. This remarkable durability is due to several factors. As Kagan observes, presidents confront a principle-agent problem; "In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no

President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy" (Kagan 2001). OIRA serves this role of monitor and representative of the president's priorities on regulatory matters and is sometimes portrayed as political for that reason. But that is not its only role. As an aggregator of information and perspectives across the executive branch, it serves an essential coordinating function in an expansive bureaucracy made up of myriad narrow-mission entities. With its staff of regulatory experts, OIRA also provide a "dispassionate and analytical 'second opinion'" on agencies' analysis (Obama 2009), presenting arguments for economic efficiency as did its CWPS predecessor in earlier administrations. Finally, since it is staffed largely by career civil servants, it is a source of institutional knowledge that endures across administrations. White House staff certainly engage in regulatory policy but OIRA's cadre of career professionals with their expertise, knowledge, and cross-cutting perspective bring useful insights and experiences to presidential decisions.

While it has been dogged since its inception by claims that its reviews lack transparency, it discloses more information on interactions with individuals outside of the executive branch than most agencies (Clinton 1993). Because it coordinates regulatory reviews, that transparency extends to other parts of the White House. As Justice Kagan explains, presidents and their White House staff have strong reasons to engage in setting regulatory policy (2001). If OIRA did not exist, political actors would not cease to be involved in regulatory decisions, but their influence would likely be much less transparent.

To maintain the lasting bipartisan support for the principles and procedures for regulatory oversight, future presidents should resist the temptation to replace E.O. 12866 with a new order. While new innovations may be beneficial, including Obama's and Trump's efforts to encourage greater emphasis on evaluating existing regulations, introducing them through supplemental actions minimizes the risk of unraveling the longstanding consensus behind the order. The legislative and judicial branches also have opportunities to solidify the good government principles behind OIRA's authorities.

---

[1] This was the smaller of the two CWPs divisions. The other focused on private sector wage and price behavior.

[2] Gramm later noted that the memo described practices that were "already being implemented in virtually all respects," saying "On balance, the procedures outlined in the memorandum did not alter practice as the procedures had already been implemented on a trial basis" (Gramm 2011).

[3] Exec. Order 12866 limited OIRA review to "significant" regulations but left the designation of significant to OIRA (Clinton 1993, p. 641–42, 645–46).

[4] See Forum Celebrating 25 Years of Executive Order 12866: https://regulatorystudies.columbian.gwu.edu/node/916

[5] The Secretaries of Agriculture, Commerce, Transportation, and Energy signed one joint letter, and the Chairman of the Council on Environmental Quality, the Director of the Office of Science and Technology Policy, the Chairman of the Council of Economic Advisors, and the Chief Counsel for Advocacy at the Small Business Administration wrote separate letters.

REFERENCES

Ackerman, Frank & Lisa Heinzerling (2002) *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. Pa. L. Rev. 1553 (2002).

Ackerman F, Heinzerling L (2004) Priceless: On Knowing the Price of Everything and the Value of Nothing. The New Press, New York.

Applegate, John S., Robert L. Glicksman, Tom O. McGarity, Sidney A. Shapiro, Amy Sinden, Rena I. Steinzor, and Robert R.M. Verchick, and James A. Goodwin. "Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein." Center for Progressive Reform White Paper. January 2009. http://www.progressivereform.org/articles/SunsteinOIRA901.pdf

Blumstein, James F., "Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues," *Duke Law Journal* VOLUME 51 DECEMBER 2001 NUMBER 3

Bruff, Harold H. (1989) "Presidential Management of Agency Rulemaking"

Bush, George W. Exec. Order No. 13258

Bush, George W. Exec. Order No. 13422

Carter, Jimmy. Exec. Order No. 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978).

Carroll, Thomas E. Letter to Donald Crabill. December 11, 1972.

Clinton, William J. Exec. Order No. 12866, 3 C.F.R. 638 (1993).

Coglianese, C. (2008). The rhetoric and reality of regulatory reform. Yale Journal onRegulation, 25(1), 85-96.

Congressional Research Service (2007) Paperwork Reduction Act Reauthorization and Government Information Management Issues.

Copeland, Curtis (2013). "Length of Rule Reviews by the Office of Information and Regulatory Affairs," Report prepared for the Administrative Conference of the United States.

Crandall, Robert W. Extending Deregulation: Make the U.S. Economy More Efficient. *Opportunity 08.* Washington, DC: Brookings Institution.

DeMuth, Christopher C. & Douglas H. Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L. REV. 1075 (1986).

DeMuth, Christopher C. "OIRA at Thirty," Administrative Law Review. 2011 Special Edition, Vol. 63

Derthick, Martha; Quirk, Paul J. (1985). The Politics of Deregulation. Washington, DC: Brookings Institution Press.

Dudley, Susan E., (2009) Lessons Learned, Challenges Ahead (June 21, 2009). Regulation, Vol. 32, No. 2, pp. 6-11, Summer 2009.

Dudley (2015) "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future" 65 *Case Western Reserve Law Review* 4 (summer 2015).

Dudley (2018). "Regulatry Year in Review," *Forbes*.

Dudley (2019) "A Two-Year Lookback on Trump's Deregulatory Record" GW Regulatory Studies Center.

Dudley, Susan E. & Brian F. Mannix (2018) Improving Regulatory Cost-Benefit Analysis. 2018. J. Law & Politics

Eads, George C. and Michael Fix. "Regulatory Policy," in John L Palmer and Isabel V. Sawhill. The Reagan experiment: an examination of economic and social policies under the Reagan administration. Urban Inst. 1982.

Fichtner, Jason J., Patrick A. Mclaughlin, And Adam N. Michel (2018) "Legislative Impact Accounting: Incorporating Prospective and Retrospective Review into a Regulatory Budget." *Public Budgeting & Finance*

Fix, Michael & George Eads. "The Prospects for Regulatory Reform: The Legacy of Reagan 's First Term." *Yale J. Reg.* Vol.2 Issue 2 Article 5 (1985). Available at: 5

Ford, Gerald. Executive Order 11821, "Inflation Impact Statements," 39 Federal Register 41501, November 29, 1974.

Ford, Gerald. Executive Order 11949, **"**Economic impact statements," Federal Register 42 FR 1017; Signed: December 31, 1976 (FR date: January 5, 1977)

Fraas, Arthur and Randall Lutter (2011), "On the Economic Analysis of Regulations at Independent Regulatory Commissions," Administrative Law Review. 2011 Special Edition, Vol. 63

GAO (2003) OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews. GAO-03-929

Graham, John D., Paul R. Noe, and Elizabeth L. Branch (2005), *Managing the Regulatory State: The Experience of the Bush Administration,* Fordham L. Rev 33.

Gramm, Wendy L. OIRA Administrator, Memorandum to Heads of Dept's and Agencies Subject to Executive Order Nos. 12,291 and 12,498 on Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 [Revised] (June 13, 1986), in Office of Mgmt. & Budget, Exec. Office of the President, Regulatory Program of the United States Government: April 1, 1992- March 31, 1993 at 585 (1992).

Gramm, Wendy L. REGULATORY REVIEW ISSUES, OCTOBER 1985-FEBRUARY 1988. Administrative Law Review. 2011 Special Edition, Vol. 63

Gray, C. Boyden (1993). "Lessons," *Regulation.*

Gumm, Brian, OMB Watch Applauds Obama's Revocation of Bush-Era Executive Order on Regulatory Review. OMB Watch Press Release. 2/4/2009

GW Regulatory Studies Center https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/CRA%20Tracker%2011-01-2017.pdf).

Haeder, Simon F; Yackee, Susan Webb. (2015) "Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget," The American Political Science Review; **Washington** Vol. 109, Iss. 3, (Aug 2015): 507-522. DOI:10.1017/S0003055415000246

Hopkins, Thomas D. THE EVOLUTION OF REGULATORY OVERSIGHT--CWPS TO OIRA. Administrative Law Review. 2011 Special Edition, Vol. 63, p71-77.

Hopkins, T., & Stanley, L. (2015). The Council on Wage and Price Stability: A Retrospective. *Journal of Benefit-Cost Analysis, 6*(2), 400-431. doi:10.1017/bca.2015.41

Kagan, Elena (2001) *Presidential Administration*, 114 HARV. L. REV. 2245

Kargman, Steven T. (1986) Note, OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review, 95 YALE L.J. 1789, 1792-93

Katzen, Sally. (2018a) Benefit-Cost Analysis Should Promote Rational Decisionmaking The Regulatory Review.

Katzen, Sally. (2018b) Tracing E.O. 12866's Longevity to its Roots, GW Regulatory Studies Center

McIntosh, David (1993). "Breaking the Iron Triangle," *Regulation.*

Miller, James C. III, THE EARLY DAYS OF REAGAN REGULATORY RELIEF AND SUGGESTIONS FOR OIRA'S FUTURE. Administrative Law Review. 2011 Special Edition, Vol. 63, p93-101.

Mulligan, Casey (2019). https://caseymulligan.blogspot.com/search/label/President%20Reagan

Nardinelli, Clark (2018) Praising the Principles of E.O. 12866. GW Regulatory Studies Center

Niskanen, *William A. (1992). "*Reaganomics*". In David R. Henderson (ed.). Concise Encyclopedia of Economics (1st ed.). Library of Economics and Liberty.*

OECD (2008) Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA). Organisation for Economic Co-operation and Development

Obama, Barack H. (2009) "Regulatory Review." Memorandum for the Heads of Executive Departments and Agencies. January 30, 2009.

Obama, Barack H. (2011a) Executive Order 13563 "Improving Regulation and Regulatory Review," January 18, 2011

Obama, Barack H. (2011b) Executive Order 13579, "Regulation and Independent Regulatory Agencies," July 11, 2011

Obama, Barack H. (2012) Executive Order 13610 "Identifying and Reducing Regulatory Burdens" May 10, 2019.

OMB and GSA, prompt letters https://www.reginfo.gov/public/jsp/EO/promptLetters.myjsp

OMB and GSA, return letters https://www.reginfo.gov/public/do/eoReturnLetters

OMB, Circular A-107 (1975)

OMB 1997 https://obamawhitehouse.archives.gov/omb/inforeg_chap1

Office of Management and Budget, (1985) REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, April 1, 1985 – March 31, 1986.

Office of Management and Budget, (1986) REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT, April 1, 1986 – March 31, 1987.

OMB (2002) Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002)

OMB (2003) OMB Circular A-4, *at* http://www.whitehouse.gov/omb/circulars_a004_a-4.

OMB (2005) OMB Memo. M-05-03, *at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf.

OMB (2007a) Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).

OMB (2007b) OMB Memo. Updated Principles for Risk Analysis M-07-24, *at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/ m07-24.pdf

OMB (2011a) Circular A-4, "Regulatory Analysis" Frequently Asked Questions (FAQs) (February 7, 2011) (12 pages, 201 kb)

OMB (2011b) Circular A-4, "Regulatory Impact Analysis: A Primer" (August 15, 2011)

Priest, Dana (1991). "COMPETITIVENESS COUNCIL UNDER SCRUTINY," Washington Post. November 26, 1991 https://www.washingtonpost.com/archive/politics/1991/11/26/competitiveness-council-under-scrutiny/387bfd64-a8d6-4a99-a8fa-9ea43c1696d3/?utm_term=.0b9a5b85041d

President's Council on Jobs and Competitiveness (2011) Roadmap to Renewal: Invest in Our Future, Build on Our Strengths, Play to Win.

Presidential Task Force on Regulatory Relief

Reagan, Ronald. (1981a) Executive Order 12288 -- Termination of the Wage and Price Regulatory Program. January 29, 1981

Reagan, Ronald. (1981b) Executive Order 12291

Reagan, Ronald. (1985) Executive Order 12498

Revesz, Richard L. and Michael A. Livermore (2008) *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health,* Oxford University Press, Apr 16, 2008. 262 pages

Schultz, George (1971). Memorandum to Heads of Departments and Agencies. "Agency regulations, standards, and guidelines pertaining to environmental quality, consumer protection, and occupational and public health and safety" October 5, 1971.

Shepherd, George B. (1996) *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1559 (1996).

Sohn, Michael & Robert E. Litan. "Sierra Club v. Costle Regulatory: Oversight Wins in Court," The American. August 7, 1981

Speth, J Gustave, Khristine L. Hall, J. Perrin Quarles, "OMB and EPA: Who Sets Environmental Policy?" 1976 http://www.thecre.com/pdf/QualLifeReview6.PDF

Steinzor, Rena (2017a). "Private: Cass Sunstein and the Obama Legacy," Expert Forum Law and Policy Analysis. American Constitution Society. June 27, 2011

Steinzor, Rena (2017b) Centralized Review Politicizes Protection of Public Health, Worker Safety, and the Environment

Stewart, R. B. (2003). Administrative law in the twenty-first century. New York University Law Review, 78(2), 437-460.

Stigler, George (1971). *The Economic Theory of Regulation*, Bell Journal of Economics, 1971:3.

Sunstein Cass R. (2011), *Smarter Regulation: Remarks from Cass Sunstein,* AdLawRev 63 (2011)

Sunstein, Cass R. (2013) "The Office of Information and Regulatory Affairs: Myths and Realities 126 Harv. L. Rev. 1838

Sunstein, Cass R. (2017) "Cost-Benefit Analysis and Arbitrariness Review." 41 Harv. Envtl. L. Rev. 1

Tozzi, Jim. OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding. Administrative Law Review. 2011 Special Edition, Vol. 63, p37-69

Trump, Donald J. (2017a) https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling

Trump, Donald J. (2017b) E.O. 13777

Verkuil, P. R. (1980). Jawboning administrative agencies: Ex parte contacts by the White House. Columbia Law Review, 80(5), 943-989.

Weidenbaum, Murray (1997) Regulatory Process Reform from Ford to Clinton. *Regulation*

Weidenbaum, Murray. BUSINESS AND GOVERNMENT IN THE GLOBAL MARKETPLACE. 7th ed. Pearson Prentice Hall. 2004.

Woods, N. D. (2018), Regulatory Analysis Procedures and Political Influence on Bureaucratic Policymaking. Regulation & Governance, 12: 299-313. doi:10.1111/rego.12139

V. Cases Cited

Humphrey's Executor v. United States, 295 U.S. 602, 625 (1935)

Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009).

Michigan v. Envtl. Prot. Agency, 576 U.S. ___ (2015)

Sierra Club v. Costle. 657 F.2d 298 15 ERC 2137, 211 U.S.App.D.C. 336, 11; Envtl. L. Rep. 20,455 1981

VI. Laws Cited

Council on Wage and Price Stability Act, Public Law 93-387. 1974

http://uscode.house.gov/statutes/pl/93/387.pdf

Council on Wage and Price Stability Act Amendments of 1975 http://uscode.house.gov/statutes/pl/94/78.pdf Pub.L. 94-78

Regulatory Flexibility Act of 1980 P.L. 96-354

Paperwork Reduction Act of 1980 Pub. L. No. 96-511, 94 Stat. 2812 (Dec. 11, 1980) Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501- 3520) (1982)

Sinema, Kyrsten & James Lankford. S.1420 - Setting Manageable Analysis Requirements in Text Act of 2019