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CSAS Working Paper 20-05

*Bureaucracy and Presidential Administration: Expertise and Accountability  
in Constitutional Government, February 6, 2020*



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## CENTRAL CLEARANCE AS PRESIDENTIAL MANAGEMENT

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Prepared for the Conference on Bureaucracy and Presidential Administration: Expertise and Accountability in Constitutional Government, C. Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School, George Mason University, February 6, 2020. Many thanks to participants in the September 2019 workshop where an earlier iteration of this paper was presented, especially Sally Katzen, Don Elliott, and Stuart Shapiro, as well as Jennifer Nou, Nicholas Parrillo, Dick Pierce, and Joseph Postell.

A century ago, in October 1919, Assistant Secretary of the Navy Franklin Delano Roosevelt testified to a House committee on the “machinery” needed by federal government executives. FDR argued that federal departments should have a central “inspection force... that we could send first to one bureau and then to another, with authority to...dig out the facts for us.” And the same principle, he argued, “applies in the case of the next higher step, the President,” who needed “machinery which he has not got at the present time.” For example, “he ought to have...someone who could come into my department at any time and see how I am running it” as well as some means of overseeing legislative and spending proposals sent by the departments to Congress. “No President of the United States, as an individual,” FDR observed, “has time to coordinate the hundreds of items of the different departments before they are sent to Congress.”<sup>1</sup>

In 1946, in a meeting with FDR’s successor as president, Harry Truman, Bureau of the Budget director Harold Smith put the same case in slightly different terms. Smith argued that

To help [the president] work out the program of the Government... it would be absolutely necessary to have a separate staff operating in a detached, objective atmosphere to supply him with information and to check all information that came in.... [N]either [Cabinet officers’] judgments nor their facts can be altogether trusted -- not because they are in any way dishonest men, but because their facts and their judgments are colored by personal ambitions and their operating experience in only a segment of the government. [The president] must be so well-equipped that [he] can direct the heads of departments and say, “here’s what I want done and here’s what I do not want done.”<sup>2</sup>

In between those two commentaries on the need for “equipment” or “machinery” centered in the presidential office itself came two important events: the creation of the Bureau of the Budget (BoB) via the Budget and Accounting Act of 1921, and its shift in 1939 from the Treasury Department to become the bulwark of a new Executive Office of the President (EOP).

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<sup>1</sup> Testimony to the Select Committee of the Budget, House of Representatives, October 1, 1919.

<sup>2</sup> Notes from February 8, 1946, Franklin D. Roosevelt Library, Smith Papers, *Conferences with President Truman* (1946).

BoB, dominated by civil service personnel even after its move into EOP – and indeed, after its 1970 reorganization into the Office of Management and Budget (OMB) as well -- has long been known for its “neutral competence,” its integration of careerist expertise and analysis with political leadership within the agency, all linked both to the wider executive branch and to the White House and its policy councils.<sup>3</sup> As former deputy director (and future Treasury Secretary) Paul O’Neill put it in remarks to agency staff in 1988, “it is of the greatest importance that there be a point of institutional memory and neutral competence – better yet, neutral brilliance – available to the President and the Presidency.... [that] can span the issues of partisan politics and survive the transition between parties in power.”<sup>4</sup> OMB’s position astride in the annual budget process gives it both unmatched information about the activities of the wider executive branch and real (though hardly omnipotent) leverage over departmental behavior.<sup>5</sup> This allows OMB to fulfill the role envisioned by FDR with the presidential vantage promoted by Smith: to serve as a centralized coordinator of departmental requests and actions, while at the same time utilizing departmental expertise to vet even White House proposals and preferences.

This paper discusses the key mechanism for doing so: the institution of “central clearance,” applied to legislative proposals and proposed executive orders as early as the 1930s, and to significant proposed regulations since the early 1980s. To be sure, the budget process itself is a key centralizing mechanism, and as just noted it provides the institutional connection between OMB staff and their agency counterparts. It can be used as a management device, too,

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<sup>3</sup> Larry Berman, *The Office of Management and Budget and the Presidency, 1921-1979* (Princeton University Press, 1979); Matthew J. Dickinson and Andrew Rudalevige, “Presidents, Responsiveness, and Competence: Revisiting the ‘Golden Age’ at the Bureau of the Budget,” *Political Science Quarterly* 119 (Winter 2004-05): 633-54.

<sup>4</sup> Remarks to agency staff, September 6, 1988. A copy of the text is in the OMB files held by the National Archives and Records Administration in College Park, Maryland [NARA]: Record Group [RG] 51, Records of the Director’s Office: Director’s Office Files, 1989-92, Entry 388, Box 14, folder entitled *Examiners Guide to the Federal Budget Galaxy*.

<sup>5</sup> In this paper I will use the abbreviation “OMB” when referring to BoB/OMB as a continuing institution, but “BoB” in direct references to personnel or specific events pre-1970 when that is the historically accurate designation.

for good or (as recent headlines suggest) for ill.<sup>6</sup> But while it overlaps with the processes discussed in this paper, and indeed infuses them, budgeting is distinct from central clearance in important ways; it is effectively conducted bilaterally between agency and OMB, while at the heart of central clearance is the ability of other relevant agencies to weigh in on a given proposal, ameliorating the informational disadvantages the president may have in his principal-agent relationship with the bureaucracy. Central clearance is a “governance structure” of the sort bruted by informational economists such as Oliver Williamson, internal organizations that can “attenuate incentives to exploit information impactedness opportunistically.”<sup>7</sup>

When conducted systematically and seriously, clearance is an important presidential managerial tool, helping to mesh analysis and politics, enhancing the president’s understanding of organizational and managerial concerns as well as the substance of policies and programs. The chokepoint on transactions between the White House, the executive branch, and Congress imposed by the central clearance process provides intelligence about what the departments are up to and also a substantive sense of the worth of those endeavors. In 1962, the BoB general counsel stressed that central clearance allowed for presidential policy (in this case executive orders) “can be issued more expeditiously, and with greater protection to the President, than one which is presented and processed outside the normal channels.”<sup>8</sup> After all, the fact of a far-from-unitary executive branch means that “protection” from departmental preferences is a key part of presidential management too.

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<sup>6</sup> Eloise Pasachoff, “The President’s Budget as a Source of Agency Policy Control,” *Yale Law Journal* 125 (2016): 2182-2290; Jeff Stein et al., “White House Hold on Ukraine Aid Violated Federal Law, Congressional Watchdog Says,” *Washington Post* (January 16, 2020).

<sup>7</sup> Oliver Williamson, *Markets and Hierarchies* (New York: Free Press, 1975), 35. Issues might include the principal’s bounded rationality, agents’ opportunism, and the ubiquity of uncertainty in any policy context (potentially from the “strategic non-disclosure, disguise, or distortion of information.”) See *ibid.*, and Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985), 35, 56, 63.

<sup>8</sup> Arthur Focke to Ted Sorensen, memo of April 19, 1962, NARA, RG 51, Executive Orders and Proclamations, 1961-1965, Box 4, *Preparation, Presentation, Filing and Publication of Executive Orders and Proclamations*.

### *Central Clearance: Finding Projects Worth the Price*

In 1935, Franklin Roosevelt – now president – was asked by his Labor Secretary, Frances Perkins, “Why should one refer to the Bureau of the Budget a question of policy? It seems a peculiar thing to do.” She went on: “You say the Director of the Budget passes upon the question as to whether the project is worth the price?”

Roosevelt quickly demurred. Non-budgetary items would be passed on to his Cabinet-level National Emergency Council, he said: “[If] it is a fiscal matter involving the expenditure of money, one way or the other, it clears through the Director of the Budget ... He gives me factual information about finances, that is all.”<sup>9</sup>

Yet he would soon change his mind about that. The administrative and budgetary landscape had been dramatically changed by the Depression and New Deal – as the Brownlow Committee would soon conclude, “the president needs help.”<sup>10</sup> This stood in stark contrast to the situation just thirty years earlier – when William McKinley prepared to take office in 1896, a contemporary observer commented that “the President has... so slight a share in initiating the legislative policy. His message to Congress is really an address to the country and has no direct influence upon Congress.”<sup>11</sup> Nor was there a consolidated executive budget; before 1921 departments and agencies sent their funding requests directly to Congress, giving little scope for centralized management or, for that matter, a coherent sense of how each program fit into national needs and priorities.

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<sup>9</sup> Quoted in Lester G. Seligman and Elmer E. Cornwell, Jr., eds., *New Deal Mosaic: Roosevelt Confers with his National Emergency Council, 1933-1936* (Eugene: University of Oregon Books, 1965), 492-93.

<sup>10</sup> Dickinson, *Bitter Harvest*, 86 and Ch. 3 generally.

<sup>11</sup> Mary Parker Follett, *The Speaker of the House of Representatives* (Longmans, Green, 1896), 325. For a good account of presidential involvement in the legislative process prior to and including FDR, see Lawrence Chamberlain, *The President, Congress, and Legislation* (Columbia University Press, 1946).

That changed with the Budget and Accounting Act of 1921, which charged the president with the annual presentation of a unified budget proposal. (Congress, of course, retained the ultimate power of the purse.) As noted, the BAA also created the Bureau of the Budget (BoB), residing within the Treasury but reporting directly to the president. Creating BoB was a nod towards the best principles of contemporary public administration, which (with a fair bit of wishful thinking) viewed the president as an analogue to a private sector chief executive. As a business journal put it at the time, the President must “successfully administer the biggest business in the world despite the interferences of Congress...” Yet “by the standards of business he cannot successfully do any such thing.... [A] dozen big business men combined into one could not do it -- because he hasn’t the instruments with which to work.”<sup>12</sup>

The first director of BoB, Charles Dawes, saw an opportunity for what he called “the reorganization of the routine business of government through the use by the president of the Budget Bureau as an agency of executive pressure, and the creation... of coordinating machinery out of the body of the existing business organization.”<sup>13</sup> In December 1921, a BoB Circular (#49 in a fast-burgeoning series) told executive branch agencies that any proposal, “the effect of which would be to create a charge upon the public Treasury..., should be first submitted” to BoB, which would determine whether it was “in accord with the financial program of the President.”<sup>14</sup> This was a power play, as the BAA did not specifically grant this

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<sup>12</sup> Quoted in Matthew J. Dickinson and Andrew Rudalevige, “‘Worked Out in Fractions’: Neutral Competence, FDR, and the Bureau of the Budget,” *Congress and the Presidency* 34 (Spring 2007), 3. For a broader discussion of the history leading to the Budget and Accounting Act, see Peri Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996*, 2nd rev. ed. (Lawrence: University Press of Kansas, 1998).

<sup>13</sup> Charles A. Dawes, *The First Year of the Budget of the United States* (New York: Harper & Brothers, 1923), ix.

<sup>14</sup> Richard E. Neustadt, “Presidency and Legislation: The Growth of Central Clearance,” *American Political Science Review* 48 (September 1954), 644-46. Budget Circular 49 (December 19, 1921) and related materials can be found at NARA, RG 51, Entry A1-27, General Records (Additional Series), 1921-40: Records regarding the Clearance of Legislation and Executive Orders, 1929-39, Box 1, *Procedures for Handling Clearance of Proposed and Pending Legislation and Executive Orders*.

authority. But Congressional leaders did not object, as their chief concern was departmental end-runs around the new act's provisions.

Under the Republican administrations of the 1920s, the Circular 49 process was utilized mainly to keep down expenditures, but it took on broader meaning with the flurry of policy proposals that marked the start of the New Deal.<sup>15</sup> In late 1935, Roosevelt directed that the Bureau should receive copies of *all* executive branch legislation, prompting the pushback from Secretary Perkins cited above.<sup>16</sup> And when the Cabinet-level National Emergency Council was phased out in 1937, BoB took over not only its records but its coordinating functions.<sup>17</sup> Indeed, it created a Division of Coordination in 1938. Such a development was consonant with Dawes's focus on the Bureau's use as "an agency of executive pressure" and the importance of the administrative "machinery" FDR had coveted since his 1919 testimony.<sup>18</sup>

The scope of BoB's duties would greatly expand thereafter, especially with its shift from the Treasury Department into the new Executive Office of the President (EOP) and the appointment of Harold Smith as budget director in 1939. Executive Order 8248, which formally created the EOP, confirmed that BoB's job included "assist[ing] the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential action on legislative enactments, in accordance with past practice" (as well as the "consideration and clearance and, where necessary, in the preparation of proposed Executive orders and proclamations," as discussed below.)<sup>19</sup>

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<sup>15</sup> Neustadt, "Growth of Central Clearance," 648; he notes that FDR's first budget director, Lewis Douglas, was not fully versed in the "old orders," which went unenforced in 1933, but that Roosevelt himself revived the issue in 1934.

<sup>16</sup> Budget Circular 336 (December 21, 1935). Note that in 1934 FDR had already reinforced the mandate that BoB receive copies of all fiscally-related legislative proposals.

<sup>17</sup> EO 7709-A (September 16, 1937).

<sup>18</sup> See Dickinson and Rudalevige, "Worked Out in Fractions," 8-9.

<sup>19</sup> EO 8248 (September 8, 1939).



Smith, a professional public administrator and aggressive advocate of executive-centered leadership in government, replaced the Division of Coordination with a Legislative Reference Division (LRD). “Legislative Reference” sounded unthreatening to legislators, Smith thought, but the idea was for the new LRD to be more powerful, not less.<sup>20</sup> In 1939 it processed departmental comments on some 2,400 pending bills (up from 300 in 1935), and on over 400 drafts of proposed legislation (up from 170). As Smith reminded Roosevelt several years later, “recognition of the necessity for coordination was the basic reason for transferring” BoB into the EOP, enhancing presidential leverage “in all fields of governmental activities.”<sup>21</sup>

### *Central Clearance and the Legislative Program*

One of those activities was in the legislative arena, linked to the new institution of an annual presidential legislative program: what Richard Neustadt called “a comprehensive and coordinated inventory of the nation’s current legislative needs, reflecting the President’s own judgements, choices, and priorities in every major area of Federal action.”<sup>22</sup> In the wake of FDR’s tidal wave of New Deal bills, the president was dubbed “chief legislator” (one of the “hats” Clinton Rossiter’s influential textbook said the president wore).<sup>23</sup> Congress might or might not be inclined to dispose, but the President was now expected to propose.

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<sup>20</sup> For more detail on this evolution, see Andrew Rudalevige, “Inventing the Institutional Presidency: Entrepreneurship and the Rise of the Bureau of the Budget, 1939-1949,” in *Formative Acts: American Politics in the Making*, ed. Stephen Skowronek and Matthew Glassman, (Philadelphia: University of Pennsylvania Press, 2007). Note that over time LRD has also been called the Office of Legislative Reference (OLR) and the Division of Legislative Reference (DLR), so I will generally refer to “Legislative Reference” below.

<sup>21</sup> Harold Smith to the President, “Section 4 of August 28 Draft of Executive Order,” September 1, 1942, NARA, RG 51, Entry 24-A, Division of Legislative Reference: History of Executive Orders, 1939-1946, Box 14, EO 9250.

<sup>22</sup> Richard E. Neustadt, “Presidency and Legislation: Planning the President’s Program,” *American Political Science Review* 49 (December 1955), 980. See also Andrew Rudalevige, *Managing the President’s Program: Presidential Leadership and Legislative Policy Formulation* (Princeton University Press, 2002), Ch. 3.

<sup>23</sup> Clinton Rossiter, *The American Presidency* (New York: Harcourt Brace, 1956), 14.

It took some time to sell departments on the idea. As Smith told Harry Truman, as late as 1946 “clearances – if at all – were more by accident than by design.”<sup>24</sup> Further, BoB was not the only institutional actor competing for this role: reprising Perkins’s critique, trusted Truman aide John Steelman, then director of the EOP’s Office of War Mobilization and Reconversion (OWMR), said “I simply do not see why [legislative] *policy* is any business of the *Budget Bureau*.”<sup>25</sup> But when in December 1945 Truman asked Steelman “to coordinate the whole administration program on legislation,” the assignment was fumbled: OWMR was good at resolving interagency complaints, but not at developing a systematic positive program.<sup>26</sup> So when the 1946 Employment Act required the president to present an agenda for governmental action across the economy – harmonized with the State of the Union and Budget messages -- BoB director Jim Webb lobbied the president to do the job. BoB’s success in this endeavor was cemented after the (disastrous for Democrats) 1946 elections when Webb named Roger Jones to head Legislative Reference. Jones was a BoB careerist, but as Jones recalled in an oral history, given the new congressional majority, “quite naturally [Webb] looked for someone who was known to be a Republican. Through sheer accident, I was known to be a Republican.... This was the start of what... became a rather substantially institutional type of channel.”<sup>27</sup> Since no White House legislative affairs staff yet existed (that began under Eisenhower), Jones said, “we established for the first time a formal office for legislative analysis,” expanding BoB’s ability to conduct legislative monitoring, tracking program items’ status, learning of forthcoming Congressional plans, and even mobilizing what one staffer called “spot salvage operations” on

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<sup>24</sup> On clearance statistics and the process in general, see Neustadt, “Growth of Central Clearance,” 641-71; Harold Smith, notes of February 8, 1946, Harry S. Truman Library (HSTL), Smith papers, *Conferences with President Truman*; Don K. Price, “Staffing the Presidency,” *American Political Science Review* 40 (December 1946), 1160-61.

<sup>25</sup> Rudalevige, “Inventing the Institutional Presidency,” 327-36; Steelman in Neustadt, “Central Clearance,” 658.

<sup>26</sup> Herman Somers, *Presidential Agency: OWMR* (Cambridge, MA: Harvard University Press, 1950), 75; Luther Gulick, “War Organization of the Federal Government,” *American Political Science Review* 38 (December 1944), 1174.

<sup>27</sup> Roger W. Jones, Oral History Interview of August 14, 1969, Harry S. Truman Library, p. 6.

troubled legislative proposals.<sup>28</sup> This, Neustadt (then himself at LRD) argued, was “the only way to do a good job on this thing and keep our own hand in properly.”<sup>29</sup> Budget staffers – only a handful at this stage were political appointees, none Senate-confirmed -- had to be sensitive to Truman’s political interests. This played out in identifying items as part of the president’s legislative program, compiling the proposals made by each department, and in making substantive and strategic assessments of each.<sup>30</sup>

As Truman’s inherited term ebbed, and election loomed, legislative proposals became presidential strategy: White House counsel Charlie Murphy later said that in 1948 “we wanted to have a special message ready to go to Congress every Monday morning” to highlight the administration’s contrasts with the so-called Do Nothing Congress.<sup>31</sup> As the campaign progressed, Legislative Reference produced a check-list of items to be considered for messages; BoB Budget Circular A-19 of October 25, 1948, detailed the requirements for coordination and clearance procedures.<sup>32</sup> Then, with Truman reelected, in 1949 departments and agencies were asked both for a preliminary legislative program and a “final” program in conjunction with the president’s annual messages. With this, a call for legislative proposals for the president’s program became an annual ritual.<sup>33</sup> A decade after the Coordination Division came into being, coordination – in the form of legislative clearance -- was routine and institutionalized.

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<sup>28</sup> Jones, oral history, 14; more broadly see Rudalevige, “Inventing,” quoting Richard Neustadt to Roger Jones, “Weekly Reports on Anticipated Congressional Schedules,” memo of May 15, 1950, NARA, RG 51, Series 39.39, Box 4, *Legislative Program -- 82nd Congress, 1st session*.

<sup>29</sup> MacPhail and Neustadt to Jones, “Bureau Procedure For Utilizing Agency Legislative Programs Submitted Under Sec. 86,” September 6, 1949, NARA, RG 51, Series 39.39, Box 4, *Legislative Program -- 81st Congress, 2nd session*.

<sup>30</sup> Dickinson and Rudalevige, “Golden Age,” 641-42; Neustadt, “Planning the President’s Program,” 1003-07.

<sup>31</sup> Quoted in Francis H. Heller, ed., *The Truman White House: The Administration of the Presidency, 1945-1953* (Lawrence: Regents Press of Kansas, 1980), 90. See also Neustadt, “Planning the President’s Program,” 999-1000.

<sup>32</sup> Neustadt, “Growth of Central Clearance,” 642n4. This codified earlier directives such as those discussed above. Note that the process for clearing enrolled (i.e., ready to be signed) bills was in Circular A-9. The two circulars were merged in 1960 into a revised Circular A-19.

<sup>33</sup> Frank Pace, Jr., to Heads of Executive Departments and Establishments, “The Preliminary Legislative Program Requested in the 1951 Call for Estimates,” Bureau of the Budget Bulletin 50-5, August 31, 1949. See Rudalevige, *Managing*, 46; Neustadt, “Planning the President’s Program,” 1008.

As sporadic recommendations became a systematic agenda, both Congress and the executive agencies adapted to new expectations. When in 1953 the new Eisenhower administration was slow in producing its program, a House committee chair took offense: "Don't expect us to start from scratch on what you people want. That's not the way we do things here -- *you* draft the bills and *we* work them over."<sup>34</sup> The clearance side hardened as well, as seen most loudly (in the archival record, at least) via the exceptions that proved the rule – such as when in 1954 Budget Director Joseph Dodge wrote to White House chief of staff Sherman Adams to complain that the Department of Agriculture was evading the process and allowing constituency groups to draft presidential legislation. Agriculture's bill "to cover the President's agriculture program... had been drawn without prior consultation or review by the White House staff or the Bureau and without clearance with other departments at interest." Adams then wrote sharply to the Secretary of Agriculture: "We are concerned about recurring difficulties in connection with the preparation and introduction of legislation related to the President's agricultural program. Some of this appears to arise from a practice of drafting legislation with more emphasis on consultation with elements outside the Executive Branch of the Government than within it... [I]t is of the utmost importance that all legislation so drafted shall be finalized in conjunction with existing procedures for review and clearance." USDA's reply – a full month later – weakly claimed that while, yes, "the various wool interests" had helped develop the bill, "at the very last, apparently there was White House clearance on the major points involved without the knowledge of the Bureau of the Budget." That Bureau thought not. As a handwritten note appended to the correspondence observed: "They have missed the point obviously and completely."<sup>35</sup> And where the point continued to be missed,

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<sup>34</sup> Neustadt, "Planning the President's Program," 1015.

<sup>35</sup> See Rudalevige, *Managing*, 55-56.

BoB continued to tell higher-ups. “It should be called to your attention,” Roger Jones informed director Percival Brundage in 1958, “that [BoB] did not participate in any way in... the coordination and clearance of the [Reciprocal Trade] bill that was sent to the Congress by the Secretary of Commerce.... [S]uch handling is clearly contrary to the President’s instructions.”<sup>36</sup>

In a 1959 self-study, BoB concluded that “of the major Bureau functions, legislative coordination is second only to budget review in terms of demands upon division staff time.” No wonder: the same study reported that in 1958, Legislative Reference had to clear 385 draft bills, more than 3000 agency reports on legislation, and nearly a thousand congressional requests for information on bill status -- as well as more than 1100 enrolled bills en route to the president’s signature or veto.<sup>37</sup> LRD designated legislation as “in accord” with, “consistent with” (or “not consistent with”), or “not in accord” with the president’s own priorities.

OMB Circular A-19 is still in effect, most recently revised in 1979, and continues to detail clearance procedures for pending, proposed, and enrolled substantive legislation.<sup>38</sup> That is, besides administration-proposed legislation it includes departmental testimony on any legislation pending before Congress, bills approved by Congress and awaiting presidential action, and bills in between. On the last OMB may coordinate the language of Statements of Administration Policy (SAPs) informing members of Congress about how the president feels about a pending floor vote.

Longtime OMB careerist Bernard Martin, who headed the LRD for a time, wrote in 2008 that “the process is essentially the same for each type of proposal”:

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<sup>36</sup> Jones to Director, untitled, memo of February 7, 1958, NARA, RG 51, Legislative Reference Division Subject Files, 1939-70, Box 5, *Legislative Program 85th [Congress]*.

<sup>37</sup> *Staff Study Group Report to the Director: A Self-Study of the Bureau of the Budget*, May 1, 1959, and attached material, NARA, Records Relating to the Administrative Management of the Bureau of the Budget, 1952-60, Box 6, B1-13/2. See especially pages 31 and 37A.

<sup>38</sup> A-19 does not apply to independent regulatory agencies, nor to budget and appropriations testimony, which is governed by circular A-11 and managed by different OMB staff.

LRD sends the document for comment to other agencies and to offices in OMB and the EOP that have a substantive interest in the document. It circulates the comments received to all relevant parties, identifies issues, and seeks to resolve them, ... frequently under short deadlines. Finally, LRD assures that disputes are resolved either by negotiation among the various parties, or by decisions from politically appointed policy officials.<sup>39</sup>

As the OMB's 1993 manual on clearance notes, the issues raised by the process "can be policy, program, management and organization, technical, financial, legal, or constitutional in nature."<sup>40</sup> This requires significant horizontal integration across OMB's different program divisions (Resource Management Offices, or RMOs), which are nearly entirely staffed by civil servants.

Agencies are bound by the substance approved by the process, which can put them in hot water with their authorizing committees. Generally, though, the process *assists* the agencies -- one reason that central clearance was able to gain traction and (mostly) cooperation across the executive branch. Agencies receive the chance to give input and give OMB the opportunity to reconcile divergent views. But it is also an early warning system. As the examples given in the next section (on executive order clearance) make clear, this informational service helps agencies find out what their peers are up to -- and to protect themselves against any self-aggrandizement those peers might attempt. This in turn helps OMB protect the president.

Despite this continuity some things have shifted over time. One important change is that far fewer legislative drafts are produced by the executive branch overall these days -- and beginning with George W. Bush, administrations transmitted far fewer draft bills as specific manifestations of their legislative programs. In 2001 George W. Bush did not send Congress a full draft of his No Child Left Behind education reform but instead a "blueprint," nor did

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<sup>39</sup> Bernard Martin, "The Legislative Clearance Process," Standing Panel on Executive Organization and Management, National Academy of Public Administration, August 2008, 5.

<sup>40</sup> OMB, "Legislative Clearance," 5.

Barack Obama do so for the legislation that became the Affordable Care Act.<sup>41</sup> Donald Trump's version of the 2017 Tax Cuts and Jobs Act was a one page outline of his statutory goals.

This shift led to another: in about 2012 a long series of periodic reports compiled by Legislative Reference keeping tabs on the progress presidential program items were making in Congress came to an end, at least temporarily. This document, entitled "Status of Administration Legislative Proposals," had served as a valuable real-time catalog of the White House view of what constituted its program. Current LRD director Matt Vaeth notes that though the division continued to compile the underlying data, the shift made the system "very different from what we'd done for years and years and years."<sup>42</sup> Tracking this change are beyond the scope of this paper, but it is presumably linked to changes in the external political environment over time. Political scientist Frances Lee, for instance, has noted that given the rise of partisan polarization, presidential association with specific legislative proposals can actually harm a bill's prospects, even when legislators have supported similar legislation in the past.<sup>43</sup>

On the flip side, even as the drafting function has ebbed, the tracking side of the process has become more extensive. As noted above, the BoB had stepped into the role of legislative liaison back in the 1940s and 1950s, before a bespoke White House staff specialized in that function. The periodic reports on the status of administration legislation kept broad tabs on the progress of the president's program as it moved through Congress, but as former staffer Bruce Johnson notes, Legislative Reference and budget analysts "often learned the outcome of subcommittee deliberations from agency officials."<sup>44</sup> That changed under Reagan OMB director

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<sup>41</sup> Jeffrey A. Weinberg, "The View from the Oval Office: Understanding the Legislative Presidency," *Journal of Legislative Studies* 24 (2018), 397; Steven Brill, *America's Bitter Pill* (New York: Random House, 2015), 90.

<sup>42</sup> Quoted in Samuel Kernell, Roger Larocca, Huchen Liu, and Andrew Rudalevige, "New Data for Investigating the President's Legislative Program," *Presidential Studies Quarterly* 49 (published online January 19, 2019), 9.

<sup>43</sup> Frances Lee, *Beyond Ideology* (Chicago: University of Chicago, 2009), Ch. 4.

<sup>44</sup> Bruce Johnson, "Analyst to Negotiator: OMB's New Role," *Journal of Policy Analysis and Management* 3 (1984), 502.

David Stockman, when OMB staffers began to return to following the labyrinthine legislative process in real time. In the summer of 1982, Stockman formed bill-tracking teams that attended the subcommittee and committee markups of appropriations bills. As the Reagan administration progressed, “demand from the OMB Director for more sophisticated bill statements grew” at every stage of the appropriations process, and the range of alerts to troublesome bills expanded. As Stockman reacted to those alerts, SAPs became the new formal means of communication, requesting specific changes to legislation or issuing a veto threat at various levels of severity.<sup>45</sup> As with other cleared items, SAPs reflect comments from across the executive branch and ensure an unambiguous transmission of presidential preferences to members of Congress. A clear signal is important given the “noise” often involved in such negotiation, as Charles Cameron’s work on “veto bargaining” stresses -- indeed, recent White House-legislative engagement has sometimes foundered on Trump administration staffers’ inability to speak definitively on behalf of the president.<sup>46</sup>

At the conclusion of the legislative process comes one more round of review: this time for enrolled legislation. As those head to the president’s desk, Legislative Reference elicits recommendations as to whether a bill should be signed into law or vetoed (and asks agencies, too, for draft texts of potential signing statements and veto messages.) An OMB analyst – normally, whoever has helped track the bill through the legislative process – is responsible for surveying the relevant departments (and other parts of OMB), compiling their input, and drafting the “enrolled bill memo.” That memo to the president describes the substance of the bill and summarizes his recommendation and those of the departments surveyed.

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<sup>45</sup> The OMB manual noted that “particular attention is focused on Administration-sponsored legislation and on bills that deviate substantially from Administration policy.” See “Legislative Clearance,” 7.

<sup>46</sup> Charles Cameron, *Veto Bargaining* (New York: Cambridge University Press, 2000). On Trump, see, e.g., Amber Phillips, “Five Tough Lessons Congress Learned in the Year of Trump,” *Washington Post* (December 27, 2017); Jonathan Swan, “Trump Dressed Down Mulvaney in Front of Congressional Leaders,” *Axios.com* (January 13, 2019).



### *Central Clearance and Executive Orders*

Executive orders (EOs) are also subject to the clearance process. EOs have been used since the Washington administration as an implication of “the executive power” vested in the presidency by Article II. They are aimed within (and binding on) the executive departments and agencies, thus relating directly to presidential management of the bureaucracy.<sup>47</sup>

Of course, even an indirect impact can be important. When changing how stringently cost-benefit analysis is applied to regulatory review, for example, or when requiring that government contractors and subcontractors provide a minimum wage to their employees, EOs can influence the private sector economy. The scale of that influence varies with the scope of the federal government. It is perhaps not surprising, then, that recent studies have found an upswing in the number of “significant” EOs issued by presidents over time. After all, these days federal contracts alone contribute some \$500 billion to the economy annually.<sup>48</sup>

Given the importance of executive orders, especially as government itself grew in scope and scale, presidents needed to manage their formulation and issuance too. EO 8248, cited above, actually codified existing practice: in August 1933, Roosevelt had issued EO 6247, requiring that “the draft of an Executive order or proclamation shall first be submitted to the Director of the Bureau of the Budget,” and if approved at BoB, to the Attorney General. The latter was given the job of analyzing the order “for form and legality.” In 1936, FDR directed drafters of EOs to cite the statutory or constitutional authority justifying their issuance. And he strengthened the veto points at Budget and Justice: “If [the proposed order] is disapproved by

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<sup>47</sup> As a widely-cited 1957 congressional study puts it: “Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.” House Committee on Government Operations, 85th Cong., 1st Sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers*, December 1957.

<sup>48</sup> For studies of significant orders over time, see Mayer, *Stroke of a Pen*; William Howell, *Power without Persuasion* (Princeton Univ. Press, 2003). For contracting data see Daniel Gitterman, *Calling the Shots: The President, Executive Orders, and Public Policy* (Washington, DC: Brookings Institution, 2017), 10.

the Director of the Bureau of the Budget or the Attorney General, it shall not thereafter be presented to the President unless it is accompanied by the statement of the reasons for such disapproval.”<sup>49</sup>

This basic process remains largely in place today, updated by several additional executive orders. The most crucial is John F. Kennedy’s EO 11030, “Preparation, Presentation, Filing and Publication of Executive Orders and Proclamations,” issued in 1962. This order is the governing authority now cited for the clearance process. Other changes have been largely cosmetic.<sup>50</sup>

EO 11030 was issued because executive orders frequently come from departments – they almost never spring complete from the pen of the president, despite the way we often think of “unilateralism.”<sup>51</sup> And BoB, as it told the White House in 1962, frequently did not have “from the agencies adequate information in support of the proposed order.... Such information has frequently been meager and has necessitated requests for additional material...”<sup>52</sup> Thus, to Roosevelt’s “machinery,” Kennedy codified the requirement that those seeking issuance of an order explain “the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.” The BoB’s argument for an orderly process that would allow all aspects of an

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<sup>49</sup> EO 7298 (February 18, 1936).

<sup>50</sup> In 1987, Ronald Reagan finally removed the term “Bureau of the Budget” from operative executive orders, replacing it with “Office of Management and Budget” (OMB) a mere seventeen years after the agency changed its name. It was not until 2006 that George W. Bush removed the requirement that items be “typewritten,” and allowed them to be submitted on standard legal-size paper. The only shifts in the formulation procedure were in 1978, when OMB was authorized to send commemorative proclamations (honoring “National Safe Boating Week” and the like) directly to the President without requiring the Attorney General to sign off, and in 2014, when preparation of the highly-technical trade proclamations issued under the 1974 Trade Act was vested in the office of the United States Trade Representative rather than OMB.

<sup>51</sup> See Andrew Rudalevige, “Executive Branch Management and Presidential Unilateralism,” *Congress and the Presidency* 42 (Winter 2015): 342-65.

<sup>52</sup> Arthur Focke to Director, “Proposed Executive Order,” memo of February 4, 1962, and Arthur Focke to Ted Sorensen, memo of April 19, 1962, NARA, RG 51, Executive Orders and Proclamations, 1961-1965, Box 4, *Preparation, Presentation, Filing and Publication of Executive Orders and Proclamations*.

issue to be considered in order to provide “greater protection to the President, than one which is presented and processed outside the normal channels” has already been noted. It is an argument repeated across administrations: in early 1969, likewise, the BoB general counsel was at pains to explain to the incoming Nixon administration the value of clearing orders rather than issuing them direct from the White House. The clearance process, he told new chief of staff H.R. Haldeman, would help the president learn of budgetary, management and organization implications raised by a draft order, and provide “the best judgment of the Administration as a whole.” It would also avoid “the confusion and embarrassment” which could result from endorsing a request without wider coordination and consultation. Haldeman, always nervous that the bureaucracy would try to put one over on Nixon (not wrongly, in light of Aberbach and Rockman’s famous conclusion that “even paranoids have real enemies”), tersely noted in reply that “the procedure outlined... should become standard procedure immediately.”<sup>53</sup>

That procedure in practice is similar to legislative clearance, though it is normally overseen by the OMB general counsel’s office instead of its Legislative Reference Division. As a 2001 template utilized by the George W. Bush administration lays out, it normally follows several basic steps, tracked by the documents supposed to be included in the OMB’s file for any given proposed order. Those include the:

- (1) White House Office or Executive Agency Request for Executive Order;
- (2) Memorandum Requesting White House and Agency Comments on the Proposed Executive Order;
- (3) White House and Agency Comments on the Proposed Executive Order;
- (4) Department of Justice (Office of Legal Counsel) ‘Form and Legality’ Documents for the Order; and finally an
- (5) OMB Executive Order Package Containing: Abstract of OMB officials approving the order, Memorandum from OMB Director to the President describing the order and requesting signature of the order, Letter from OMB

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<sup>53</sup> Focke, “Pending Executive Orders,” memo of January 17, 1969 and H.R. Haldeman to Ken Cole, memo of January 27, 1969, Richard Nixon Library, White House Central Files, Box 7, EX FE6: *Executive Orders*. See too Joel Aberbach and Bert Rockman, “Clashing Beliefs in the Executive Branch,” *American Political Science Review* 70 (June 1976), 466.

General Counsel to Attorney General requesting review and approval of the proposed Executive Order, and a copy of the order.<sup>54</sup>

A brief discussion of this sequence highlights some of the managerial issues involved, and the ways in which career expertise and political acumen are merged therein (at least when the process works as intended). That starts at the outset, when a proposed EO is received in OMB, from whatever source (some 60%+ of EOs come from the agencies, the remainder from EOP.)<sup>55</sup> The general counsel's office will often ask civil service personnel in the RMOs for feedback. Front-line RMO staffers (known as "examiners") may already have caught wind of the order from day-to-day work with "their" agencies.<sup>56</sup>

Some proposals wind up rejected out of hand. Late in the Carter administration a White House aide sent OMB a "draft EO that Stu would like to have signed as soon as possible," referring to top domestic policy adviser Stuart Eizenstat. An OMB counsel recorded subsequent contacts with passive-aggressive pleasure: "Told him this doesn't look, smell, or read like an Executive order.... [He] said he would talk to 'Stu' (sic) and call back." When he did, he said "'Stu' still wants an Executive order. I told him to dream up something to put in it..."<sup>57</sup> The first question, in short, is whether a proposal should *be* an executive order.

A second aspect of a sort of pre-clearance process deals with drafting: the general counsel's office drafts some orders, and seeks to edit others. One common effort is to rein in departmental efforts at self-promotion. In 1963, for example, complaining about this tactic, a BoB attorney observed that "the occupancy of a proper foreign policy role by the Department of

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<sup>54</sup> "Executive Order Process - Documents," no date [January 2001], Washington National Records Center (Suitland, Maryland) [hereafter WNRC], OMB: OGC: Ex. Orders/Proc. 2001-2004, *MR 2001: Faith-based Initiatives*.

<sup>55</sup> Rudalevige, "Executive Branch Management."

<sup>56</sup> As of 2019 there are five RMOs, organized around groups of related executive branch agencies and led by career "branch chiefs" and Deputy Associate Directors (DADs) under political Policy Associate Directors (PADs).

<sup>57</sup> William Nichols, memoranda for the record, December 9 and 12, 1980, NARA, RG 51, Executive Order Files FY81, Box 3, *Small Business Conference Commission*.

State should not be dependent upon constant reiteration of statements of that role.”<sup>58</sup> Another common edit attempts to cut down on florid preamble language more suitable to a press release. Of course, as the long preambles to some Trump administration EOs suggest (see for instance the 8-page lead-in to EO 13880, regarding the Census), OMB has to pick its battles, on style as well as substance. With the latter, OMB has an eye out for the ramifications of an order on presidential power, following from its focus on “greater protection to the president” noted above. Regarding one Kennedy administration draft EO to create a Water Resources Council, for instance, BoB argued that “as a matter of policy, we believe it is preferable for such interagency coordinating bodies to be created by Executive Order rather than by statute.... [The] legislative route has no advantage over an Executive Order, but it has the major disadvantage of tying the President’s hands with respect to establishing the most appropriate method for coordinating executive agencies and revising the method as need arises without resort to Congress.”<sup>59</sup>

As with legislative clearance, the heart of EO clearance is OMB’s request for input on the draft order from any executive agencies (including separate offices within the EOP) with a potential interest in its issuance. Even White House-driven orders are subject to this process. Comments returned by the agencies are then tabulated and assessed, recording everything from fierce opposition to solid support to a sort of baffled apathy. Sometimes agencies will stress they have no *formal* objection, while making clear their true feelings in other ways. Other times they troll for additional information on the stakes involved. For instance, the Commerce Department was curious about the political forces behind a 2002 order proposed by the Advisory Council on

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<sup>58</sup> F.E. Levi, “Foreign Policy Role of the Secretary of States,” notes of January 9, 1963, NARA, RG 51, Series 61.4, Box 12, EO 11077/R6-5.65.2.

<sup>59</sup> Schwartz and Seidman to Elmer Staats, “Proposed Executive Order Creating a Water Resources Council,” memo of May 3, 1962, and attached material, NARA, RG 51, Series 61.4, Box 18, *Creating a Water Resources Council*.

Historic Preservation (linked to the Interior Department). “Our econ[omic] development people say this isn’t needed,” Commerce told OMB (according to the latter’s handwritten notes), careful to note this was an “unofficial” view. As the OMB notetaker put it, Commerce wanted to know how the winds were blowing. “Is there some *W[hite] H[ouse]* interest[?] They will go if *White House* staff wants it. But if it’s [Council] staff ... then we are much less concerned.”<sup>60</sup>

Clearance allows political and careerist input on both the department and EOP side of the process. The comments received can lead to rapid internal sign-off of the EO; to more edits; or to a request that the originator defend the extant draft against criticism, perhaps with a revised draft sent out once more for repeated review. OMB has generally centered on gaining consensus -- on ensuring that the wider executive branch agrees, to the extent possible, on the text of an order moving forward. That leads to substantial negotiation and sometimes what seems like a long process of sequential appeasement. Consider Bill Clinton’s issuance of EO 13045 on children’s health on April 21, 1997, requiring agencies to “make it a high priority to identify and assess” environmental risks to children and to “ensure” those risks were addressed by “its policies, programs, activities, and standards” – crucially, adding this requirement as a hook to the regulatory review function conducted by OMB’s Office of Information and Regulatory Affairs (OIRA).<sup>61</sup> (See the next section for more on regulatory review.) The EO began life in an August 1996 memo from the Environmental Protection Agency (EPA), which sent a draft order to OMB in January 1997. During the clearance process, some seventeen executive agencies and EOP staff offices became involved, as EPA lobbied to “generat[e] support within

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<sup>60</sup> The OMB general counsel’s office said that “there is senior WH staff interest.” See John L. Nau, III, to Mitch Daniels, letter of May 9, 2002, and additional notes and documents in WNRC, OMB: OGC: Ex. Orders/Proc. 2001-2004 Box 4, *EO 13287 – Preserving America’s Heritage*. Emphasis in original.

<sup>61</sup> This case is drawn from Andrew Rudalevige, “Executive Orders and Presidential Unilateralism,” *Presidential Studies Quarterly* 42 (March 2012): 138-60. See the cites therein, referencing Elena Kagan’s Domestic Policy Council and Counsel files, available online at the William J. Clinton Presidential Library.

the White House” for its text. Agencies uniformly claimed to support the idea of protecting children from environmental hazards, of course, but raised many objections to the mechanisms anticipated by the draft order. A series of negotiations ensued over four months of meetings; “we have made significant drafting changes to accommodate concerns,” Domestic Policy Council (DPC) staffers reported. Those concerns came from within the EOP as well as the wider bureaucracy; indeed, a DPC memo to White House chief of staff Erskine Bowles that same month noted that DPC, NEC, CEQ, and OSTP were all involved. It was not until late March that staff could note that “I think we have resolved all the kids e.o. issues *among WH offices*.”<sup>62</sup> And then, “serious last-minute objections” from the agencies remained. (Notes from an April 1 meeting tally EPA’s objections to Treasury “nervousness” and to others’ continued queries: “we’ve redone [the order] to address concerns. Weakened already.”) Clinton himself requested still more changes aimed at addressing continuing departmental objections – “might want to ease burden a bit,” he scrawled, with regard to the scope of the analysis of the alternative routes not taken. Yet another revision thus ensued before the order was finally issued. All this seemed reminiscent of the goal of clearance as summarized by BoB director Percival Brundage nearly five decades earlier. In the preparation of a given EO, he said in 1954, “the comments of the various affected agencies with respect to earlier drafts of these documents have been taken into consideration and have been accommodated as far as appears to be practicable, bearing in mind particularly the sum total of agency views and the sometimes opposed views of agencies upon the same point.”<sup>63</sup>

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<sup>62</sup> Emphasis added. Even at this point, CEA and NEC were at best unenthusiastic.

<sup>63</sup> Percival Brundage to nine agency heads, letter of August 25, 1954, NARA, RG 51, Executive Orders and Proclamations, 1953-1961, Box 25, *EO 10560*.

There is one more review, this time by the Justice Department as it assesses a proposed order's "form and legality." That task is normally delegated to the Office of Legal Counsel (OLC), which prepares a memorandum certifying the order. The memo can consist of one substantive sentence ("the proposed Executive order is acceptable as to form and legality") or, in the case of Ronald Reagan's weighty 1981 EO formalizing regulatory review in OMB, eighteen single-spaced pages.<sup>64</sup> "Form" simply means the EO adheres to stylistic norms and standards and that it makes correct reference to the statutes or constitutional authorities relied upon in the order.<sup>65</sup> But questions of "legality" are far less standardized. Technically, as acting attorney general Sally Yates put it in 2017, "OLC's review is limited to the narrow question of whether, in OLC's view, a proposed Executive Order is lawful on its face and properly drafted."<sup>66</sup> Still, as Clinton administration OLC attorney Beth Nolan notes, almost all orders, other than those that are "kind of copying another executive order," have "some legal issue that goes beyond the form part." These issues may arise far earlier than their allotted slot in the sequence would imply. Indeed, according to Charles Cooper, who headed OLC in Reagan's second term, "typically executive orders don't make it even to the drafting stage unless legal issues have been identified and pretty well-thought through."<sup>67</sup>

Finally, with agency feedback and OLC sign-off in hand, OMB writes a memo parallel to the "enrolled bill" memo discussed above. This memo summarizes the order's text and

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<sup>64</sup> Larry Simms (Assistant Attorney General, OLC) to David Stockman, "Proposed Executive Order on Federal Regulation," memo of February 12, 1981, NARA, RG 51, Records of the Office of the General Counsel - Executive Order Files FY81, Box 1, EO 12291.

<sup>65</sup> Tobias T. Gibson, "The Office of Legal Counsel and the Presidency: The Legal Strategy of Executive Orders," Ph.D. dissertation (Washington University, St Louis, MO, May 2006), 62.

<sup>66</sup> Sally Yates, letter of January 30, 2017, reprinted in Jonathan Adler, "Acting Attorney General Orders Justice Department Attorneys Not to Defend Immigration Executive Order," Volokh Conspiracy blog, *Washington Post* (January 30, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/30/acting-attorney-general-orders-justice-department-attorneys-not-to-defend-immigration-executive-order/>

<sup>67</sup> Interviews of Beth Nolan and Charles Cooper by Tobias Gibson, quoted in "Office of Legal Counsel and the Presidency," 63-64.



background, provides the views of affected agencies and staff, and justifies why any continuing objections are not dispositive. The director's endorsement can be fervent or lukewarm.<sup>68</sup> But since under EO 11030 an order that does not receive OMB approval is not supposed to make its way to the president, at this stage the formal recommendation is invariably favorable. Even so the president may decide not to issue the proposed order or request additional changes.

### *Central Clearance and Rulemaking*

The final category of central clearance discussed here is a later addition to the presidential toolbox, developed as bureaucratic rulemaking became a more expansive (and expensive) part of the administrative state. The most visible extension came in 1981, with President Ronald Reagan's EO 12291 imposing cost-benefit analysis-driven regulatory review on all agency rulemaking; that action flowed from a decade of previous presidential experimentation. Nixon's creation of the Environmental Protection Agency (and its subsequent regulations) had spurred creation of a White House Quality of Life Committee requiring cross-department consultation as rulemaking progressed and tasked with ensuring that "suitable analyses of benefits and costs" were conducted en route.<sup>69</sup> In October 1971 OMB director George Shultz wrote to department and agency heads extending central clearance to "proposed agency regulations, standards, guidelines and similar materials" where those had "a significant impact on the policies, programs, and procedures of other agencies" or "impose significant costs on, or negative benefits to, non-Federal sectors." That "quality of life review" (QLR)

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<sup>68</sup> For instance, Harold Smith complained to FDR in 1944 that time pressures had curtailed analysis: "Under the existing circumstances I think the draft is reasonably satisfactory. Under other circumstances the concept... might have been more fully developed and the delineation of its functions more fully matured before the issuance of the Order." Smith to President, "Reemployment and Retraining of Veterans and War Workers," memo of February 24, 1944, NARA, RG 51, Series 39.1a, Box 17, EO 9427.

<sup>69</sup> Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," *Administrative Law Review* 63 (2011): 37-69.

remains the general template for regulatory review today. It was extended in various directions by both the Ford and Carter administrations before Reagan's more aggressive formalization of the process in early 1981.<sup>70</sup>

While similar procedurally, regulatory review has important differences from the clearance of legislation or, even more so, of executive orders. The power to promulgate regulations does not generally rest in the president; Congress normally vests that authority directly in the department head responsible for implementing a given statute. Depending on how that statute is written, departments and agencies have discretion over a variety of substantive aspects of regulation, from scope to timing. In developing EO 12291 in early 1981, Peter Shane, then in the OMB general counsel's office, wrote "our policy aim is to give the Director some measure of leverage over the regulatory process without purporting to authorize OMB to disapprove regulatory officials' exercise of their statutory discretion."<sup>71</sup> Still, presidents needed to find a way to align agency outputs with presidential preferences; regulatory review, conducted explicitly "to the extent permitted by law," provided what one scholar calls a "matching grant" to help agencies develop politically- (or at least presidentially-) acceptable regulations.<sup>72</sup> As former EPA general counsel E. Donald Elliott suggested, "OMB review is like God: if it did not exist, we would need to invent it."<sup>73</sup>

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<sup>70</sup> For detailed accounts of those and other developments beyond the scope of the present paper, see Andrew Rudalevige, "Regulation Beyond Structure and Process," *National Affairs* 34 (Winter 2018): 93-108; Rudalevige, "Beyond Structure and Process: The Early Institutionalization of Regulatory Review," *Journal of Policy History* 30 (October 2018): 577-608; Rudalevige, "Institutionalizing Regulatory Review, From Reagan to Trump," paper presented at the Annual Meeting of the American Political Science Association, Boston, September 2018.

<sup>71</sup> Peter M. Shane to James C. Miller III, "Draft Executive Order on Federal Regulation," memo of January 29, 1981. NARA, RG 51, Office of the Director: Deputy Director's Subject Files: Ed Harper, 1981-82, Box 3, *Regulatory Relief*; see also Richard Willard to Fred Fielding, "Executive Order on Regulatory Reform," memo of February 6, 1981, which notes that "a recurring question in regulatory review programs is the power of the President to control the actual content of rulemaking entrusted by statute to particular agencies." Ronald Reagan Library [RRL], White House Office Record Management [WHORM] Subject Files: FG - Federal Government Organizations, Box 1, FG 000089 (2).

<sup>72</sup> Janna Rezaee, "Power and the Administrative Presidency," working paper of May 22, 2015, p. 5; available at [https://s18798.pcdn.co/fas-pepl2015/wp-content/uploads/sites/1915/2015/05/Rezaee\\_Power-and-the-Administrative-Presidency.pdf](https://s18798.pcdn.co/fas-pepl2015/wp-content/uploads/sites/1915/2015/05/Rezaee_Power-and-the-Administrative-Presidency.pdf).

<sup>73</sup> E. Donald Elliott, "TQM-ing OMB," *Law and Contemporary Problems* 57 (Spring 1994), 168.

The 1981 invention – or renovation, really – did strike the agencies as a surprise bolt from heaven. The text of EO 12291 was tightly-held among a small group of OMB and White House staff. The first draft distributed for wider review – as per the central clearance of executive orders, after all -- went to the departments around 8 pm on Friday, February 13. Comments were due by 11 am on Monday: but Monday was Presidents' Day, and more than one Cabinet secretary had trouble tracking down staff over the three-day weekend.<sup>74</sup> Department lawyers, summoned to the White House on Tuesday, assumed the text was a draft still ripe for revision. When they reached the last page, though, they found President Reagan's signature already affixed.<sup>75</sup> There was reason for the power play -- as word spread about the new order, agency hackles raised fast. They complained that the EO would lead to lengthy delays, that OMB was not competent to conduct such reviews anyway, and that it represented "over-centralization."<sup>76</sup>

But the president saw the centralization the agencies decried as the only way to encourage policy coordination, "greater political accountability, and more balanced regulatory decisions."<sup>77</sup> As issued, EO 12291 required all executive branch agencies (though not the independent regulatory commissions) to submit both proposed and final draft regulations to OMB. The EO directed that "regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society" and the choice of

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<sup>74</sup> For an early draft, see Richard Darman, White House Staffing Memorandum, Document 000089S, February 3, 1981. RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, FG 000089 (2). For agency comment see *Ibid.*, FG (000067 (1)), e.g., Samuel Pierce to Craig Fuller, "Proposed Executive Order/Federal Regulation," memo of February 17, 1981.

<sup>75</sup> Peter Behr, "OMB Now a Regulator in Historic Power Shift," *Washington Post* (May 4, 1981); James Miller III, *Fix the U.S. Budget!: Urgings of an 'Abominable No-Man'* (Hoover Institution Press, 1994).

<sup>76</sup> Craig Fuller notes of telephone call from John Fowler, February 16, 1981, 10:45 a.m.; see also Richard Lyng to the Secretary, "Proposed Executive Order on Regulatory Management," memo of January 27, 1981; Jeane J. Kirkpatrick to Members of the Cabinet, "Executive Order on Federal Regulation," memo of 16 February 1981. All in RRL, WHORM Subject Files: FG – Federal Government Organizations, Box 1, FG (Begin-000066) and FG (000067 (1)).

<sup>77</sup> Christopher C. DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," *Harvard Law Review* 99 (1986), 1081.

regulation maximized the “net benefits to society.” Major regulations required formal “Regulatory Impact Analyses” to be completed.<sup>78</sup> Existing rules were also subject to review, if the director designated them as “major.” All this was vested in the new Office of Information and Regulatory Affairs (OIRA) created inside OMB by the 1980 Paperwork Reduction Act, and piggybacked on the fact that regulations create paperwork. While the limits noted above meant OIRA couldn’t override a firm departmental decision (except on purely paperwork matters), the order did give it the power to use a delay-based variant of veto bargaining. Meanwhile the rest of the review infrastructure, as institutionalized over the next several years, gave it the power to withstand the immediate, and fierce, opposition that arose from members of Congress and their affiliated interest groups. As part of OMB, OIRA could piggyback on long-standing relationships with every agency in the executive branch. During debate over the PRA, OMB had opposed creating a new statutory office, testifying that doing so “would isolate these functions from other OMB responsibilities [and] prevent the balancing of competing interests.” But in practice there was not much isolation. As longtime OMB cost-benefit analysis evangelist Jim Tozzi said, the new order made OMB “sort of a full-service bank.... The government works using three things: money, people, and regulations.” And now, “the agency must get all three through OMB.”<sup>79</sup>

To make that coordination effective, OIRA leadership reached out to the RMOs very early on; as one analyst (in a memo wonderfully entitled “Response to Request for Material for OIRA’s ‘We Need More \$\$’ Briefing Book”) pointed out, regulations “often contain significant budget issues.” OIRA was happy to hold up rules in ways that built intra-OMB capital: an

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<sup>78</sup> This was defined as those with annual economic effects of at least \$100 million. The OMB director could also define other regulations as “major.”

<sup>79</sup> Quoted in Barry D. Friedman, *Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence* (University of Pittsburgh Press, 1995), 60, 35.

Education rule, for instance, received an extension “requested by OMB budget staff... [who] wish to consult with their [division head]. They believe the rule...is unnecessary and programmatically unsound.” In another case, “by refusing to find regulations consistent with EO 12291 until EPA had satisfied [the Office of Federal Procurement Policy] and [the Budget Review Division], we in effect gave teeth to” an OMB management directive.<sup>80</sup> Agencies certainly tried to game the process.<sup>81</sup> So OIRA managed up, too: as its first administrator, James C. Miller III, told his staff in May 1981, “while I gather that most agencies have been very cooperative.... please provide me with the names of recalcitrant officials, dates, and, preferably, written evidence of their lack of cooperation. I will take this matter to higher levels.”<sup>82</sup> Soon there were regular “Status Report on Regulatory Relief” memos from Miller to the Vice President and the OMB director, along with “regulatory activity highlights” and “regulatory news bulletins.”<sup>83</sup> (Later, when Miller himself became OMB director, he in turn got weekly reports from OIRA giving him less formal updates. In January 1987, for instance, Wendy Gramm noted a meeting with someone she thought of as a Reagan ally, but who was working with a group opposing administration policy. “I did not punch Bob,” she reported. “Good!” replied Miller.)<sup>84</sup>

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<sup>80</sup> Geoff White to Jim Tozzi, “Extension of EPA Regulations Implementing the Uniform Relocation Act,” March 26, 1982. NARA, RG 51, OMB Program Records: Records of Regulatory Policy (OIRA), Box 1, *General (#2) OIRA-RP-EPA 1980-84*.

<sup>81</sup> See Rachel Potter, *Bending the Rules* (Chicago: University of Chicago Press, 2019).

<sup>82</sup> Jim Miller to Jim Tozzi, “Ideas Stimulated by Desk Officer Responses,” May 27, 1981, NARA, RG 51, Entry 411, OIRA Information Policy Branch, FY1981-82, Box 1, *2.20.15 IP 1981-82 Operating Procedures*.

<sup>83</sup> See the materials in NARA, RG 51, Office of the Director: Deputy Director’s Subject Files: Ed Harper, 1981-82, Box 3, *Regulatory Relief*; “OMB Regulatory News Bulletin,” October 29, 1982 [item 107789], and “Regulatory Activity Highlights: Significant Regulations Under Review at OMB, Week Ending November 5, 1982” [item 109305], RRL, WHORM Subject Files, FG 006-11, Box 2, *FG 006-11 107600-107813*.

<sup>84</sup> Wendy Gramm to Director and Deputy Director, “Activities for the Week of January 19, 1987,” January 22, 1987. NARA, RG51, Records of the Office of the Director, Director’s Office Files: James C. Miller III and Joseph R. Wright, 10/15/85 - 1/10/89, Box 13, *Director’s Weekly Reports, 12/86-1/87*. “Bob” is economist Robert Ekelund.

Empowering OIRA's version of central clearance was congruent, of course, with Reagan's political preferences. Agencies unclear on that fact learned that the vice president and White House "troika" were very much in the loop. Reagan counselor Ed Meese jumped in more than once to fight "significant backsliding" from "the President's strong deregulatory philosophy." Indeed, when an OSHA regulation was sent to the Federal Register without clearance, Joe Wright complained to Meese of a "run on E.O. 12291" and warned that "a premeditated attempt to circumvent a Presidential Order should not be allowed to go unnoticed. I would strongly suggest that you bring in [OSHA] and [the Secretary of Labor] and that we have a very serious discussion." He reminded Meese that "last year, we brought in several administrators... to have 'religious sessions' - I certainly think another one is required in this case."<sup>85</sup> The ability to summon West Wing deities made clear to agencies that the regulatory review process was here to stay -- in practice, not just on paper. Future presidents of both political parties would affirm that over time. Who got to decide where "the extent permitted by law" varied by administration and by the agency concerned; in some cases it was the general counsel of the agency (who were appointed with significant White House input), in some cases the OLC, in some cases the OMB's general counsel.<sup>86</sup>

However careful the legal analysis, central clearance of regulations spilled over onto a larger political battlefield far more frequently and visibly than that of legislative proposals (only occasionally questioned by Congress) and executive orders (which never was). Legislators - mostly, but not exclusively, Democrats -- questioned the very legitimacy of presidential review of, and intervention in, the regulatory process, and were concerned that the ostensibly neutral

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<sup>85</sup> Joseph R Wright, Jr. to Edwin Meese III, "Run on E.O. 12291," October 3, 1983. RRL, WHORM Subject Files, FG 006-11 (OMB), Box 3, [208300-226737].

<sup>86</sup> Thanks to Don Elliott and Sally Katzen for input on this point.

process of cost-benefit analysis was harnessed to presidents' desire for widespread deregulation and in thrall to industry preferences rather than the public good.

Three of the resulting battles are worth brief discussion here, organized around three actions by different presidential administrations, all aimed at protecting central clearance.<sup>87</sup>

(1) Reagan: The Gramm Memo. The first came when Miller and OIRA chief Wendy Gramm cut a deal with Congress trading de facto legislative acceptance of regulatory review in return for additional oversight. OIRA had not been reauthorized since fiscal 1983, except in annual appropriation bills. This gave congressional critics a regular vehicle to block its funding. In 1986 Miller and Gramm agreed that Gramm would issue a memo detailing "additional procedures concerning OIRA reviews," locking in place new internal guidelines expanding disclosure of OIRA staff contacts with and materials received from outside interests. Further, the appointment of future OIRA administrators would be subject to Senate confirmation. In return, OIRA was funded and reauthorized for three years, and legislative efforts to impose time limits and even wider disclosure of review operations were dropped.<sup>88</sup>

(2) George H.W. Bush: An Unintended Shield. The second deal was less straightforward; indeed, it resulted from two failed negotiations along the 1986 lines. The George H.W. Bush administration was immediately concerned about departmental desires for expanded regulation. Both substantive and procedural issues existed, OIRA deputy administrator Jim MacRae told new OMB director Richard Darman: "our previous success in regulatory reform and restraint has had an unfortunate legacy: substantial pent-up demand by

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<sup>87</sup> Obviously this is simplified – each bargain had various moving pieces that did not necessarily shift concurrently, as a direct transaction might.

<sup>88</sup> Wendy Gramm, "Regulatory Review Issues, October 1985 – February 1988," *Administrative Law Review* 63 (2011): 27-36; Friedman, *Regulation in the Reagan-Bush Era*, 114-16.

Congress and special interest groups," partly because budget constraints made regulatory activity a tempting alternative to legislative initiatives. McCrae attached a long list of departmental initiatives was attached. Some involved cases "in which departments and agencies have evaded OMB review by using ostensibly technical 'guidance documents' to hide far-reaching regulatory policy decisions" and others by negotiating deadlines with courts under consent decrees that became "weapons... to restrict Executive Office oversight."<sup>89</sup>

Darman for his part used his stature as one of the leading domestic policy players in the administration to weigh in to protect the regulatory review process. When, for example, OIRA administrator Plager warned him that the Department of Transportation "has increasingly attempted to short-circuit the OMB review process, particularly on major decisions, and has shown a rather cavalier attitude toward the regulatory principles established by EO 12291," Darman agreed that "a more direct Directorial approach is called for" -- "draft a letter to [DOT Secretary] Skinner," he ordered.<sup>90</sup>

Meantime, Bush also named his vice president, Dan Quayle, to run a new Council on Competitiveness that (like a Reagan task force Bush had chaired) would oversee the regulatory review process. One advantage to the set-up was that the Council could piggyback on presidential claims of "deliberative privilege" to keep its communications out of the public eye and safe from freedom-of-information queries.<sup>91</sup> But that seemed to congressional Democrats to

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<sup>89</sup> Jim MacRae to Director Darman, memo and attached material of December 8, 1989. NARA, RG 51, Records of the Director's Office: Director's Office Files, 1989-92, Box 5, *Darman Notes Aug-Dec 1989*. To be sure, the rise in regulatory activity was also helped along by Bush's advocacy for new Clean Air Act amendments and the Americans with Disabilities Act. Indeed, Darman was moved to scrawl on one memo on regulatory reform that "Clean Air and ADA increased regulatory burden by more than all that Bush Task Force cut in 80's!" See handwritten notation on C. Boyden Gray and Michael Boskin to the President, "Proposed Regulatory Reform Initiative," December 23, 1991. NARA, RG 51, Records of the Director's Office: Director's Office Files, 1989-92, Box 5 *Darman Notes 1991*.

<sup>90</sup> Plager to Director, "OIRA unease over DOT's current approach," memo and handwritten note of June 6, 1989. NARA, RG 51, Records of the Director's Office: Director's Office Files, 1989-92, Box 5, *Darman Notes January-July 1989*.

<sup>91</sup> See Malcolm D. Woolf, "Clean Air or Hot Air? Lessons from the Quayle Competitiveness Council's Oversight of EPA," *Journal of Law and Politics* 10 (Fall 1993): 97-146.



undercut the 1986 Gramm memo, which had promised the release of information used to reach regulatory decisions. This led to Darman negotiating a new deal with the House Government Operations Committee, assuring Congress that OMB would disclose OIRA's contacts from outside government and with regulatory agencies – only to see it vetoed by White House counsel Boyden Gray. Negotiations continued into the fall of 1990, this one substituting an executive order – a more binding administration statement of intent – for the Gramm memo, and strengthening the language of the prior memo by requiring time limits, publication of additional material in the *Federal Register*, and new availability of analytic material once a decision on a regulation had been reached.<sup>92</sup> The Senate in turn would remove the even stronger statutory and pre-decisional mandates then in the PRA reauthorization bill, give OIRA a five year reauthorization, and help quash floor revolts: “administration to work with Senate staff to secure Senate passage of bill with only agreed Committee amendments.” Further, “if such a bill passes the Senate, Senate to confirm [nominee for OIRA administrator James] Blumstein in October,” even if the House failed to act.<sup>93</sup>

Blumstein did receive a Senate hearing in October, but he would later complain that senators who did not like the bargain – notably Carl Levin (D-MI) – “used my confirmation hearings as an (unsuccessful) attempt to have me repudiate the deal...”<sup>94</sup> OIRA was not reauthorized in 1990,<sup>95</sup> and in 1991 competing bills by Senators John Glenn (D-OH) and Sam

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<sup>92</sup> Suggesting that the earlier dispute between White House and OMB had lasting effects, the outline of this new “OIRA – Administration/Senate Deal” came with the following handwritten notation: “OK’d by B. Gray, 9:05 am, 9/27/90 Sr. Staff Meeting. B. Kristol = witness. Sr. Staff = witness.” (Emphasis added.) See “OIRA – Administration-Senate Deal,” and “OIRA – Substantive Concessions,” both dated September 26, 1990, with handwritten notations. NARA, RG 51, Records of the Director’s Office: Director’s Office Files, 1989-92, Box 5, *Darman Notes 1990*.

<sup>93</sup> “OIRA – Substantive Concessions.”

<sup>94</sup> James F. Blumstein, “Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues,” *Duke Law Journal* 51 (December 2001), 863.

<sup>95</sup> Interestingly, the administration blamed a hold placed on the bill by “two or three Republican senators .... on the last day of the 101<sup>st</sup> Congress.” See “OIRA Reauthorization and the Paperwork Reduction Act – Options,” no author, draft of June 3, 1991, and other material covered by Frank Hodsoll to Director, no title, memo of June 8, 1991. NARA, RG 51, Entry 388, Box 5, *Darman Notes 1991*.

Nunn (D-GA) complicated matters further. “Overall, we have a standoff,” staffers noted. And “it is clear that Glenn will not permit the confirmation of any OIRA administrator prior to the reauthorization of OIRA.”<sup>96</sup>

The upshot was that OIRA was not formally reauthorized, Blumstein was never confirmed, and OIRA careerist James MacRae served as acting administrator from November 1989 to the end of the administration. Yet this provided an unintended shield for the agency: OIRA’s work under MacRae’s lower-key leadership damped down provocation, even as the Quayle Council became the focal point for legislative anger. In the spring of 1992, for instance, Bush held a White House ceremony extending a regulatory freeze announced in his State of the Union address and praising “our three generals in the war for regulatory reforms: our Vice President, Dan Quayle, Boyden Gray, and [CEA head] Dr. Michael Boskin.”<sup>97</sup> OIRA head MacRae and even Darman (who was in attendance) were, for the moment stripped of rank – which for OIRA and the ultimate survival of the clearance process, proved a useful concession.

(3) Bill Clinton: Bipartisan Endorsement. As Bill Clinton came to office, his OIRA administrator Sally Katzen would later note, “There were considerable voices [saying] that, ‘now that we’ve elected a Democrat, we can get rid of this monstrosity of OIRA that the Reagan/Bush people have foisted off on us. Hopefully, he [Clinton] will kill it.’”<sup>98</sup> But in fact,

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<sup>96</sup> Ibid.

<sup>97</sup> “Remarks on Regulatory Reform,” April 29, 1992, <http://www.presidency.ucsb.edu/ws/?pid=20893>

<sup>98</sup> She went on to clarify that by “OIRA” here, she means regulatory review; since OIRA was a statutory office, it would still have a role (in paperwork and information-gathering matters) even without its regulatory review function. Sally Katzen, oral history conducted by the Modern Regulatory Governance Oral History Project at the Kenan Institute for Ethics, Duke University, October-November 2012, p. 61. Available at <https://sites.duke.edu/regulatoryoralhistoryhub/perspectives-on-modern-regulatory-governance-oral-history-project/>. Again, for much more on the Clinton (and Bush) material presented here, see Rudalevige, “Institutionalizing Regulatory Review.”

she went on, “that was not even a real option.”<sup>99</sup> While Clinton had fiercely attacked the Competitiveness Council during the 1992 campaign, he had run more generally as a “New Democrat” bent on technocratic reform. And as Katzen put it, “What OIRA was doing in conducting an interagency process would have been the essence of good government, so we couldn’t scrap it. There we were.... If we hadn’t had an OIRA, we’d have had to invent one.”<sup>100</sup> More formally, as Katzen wrote in a report to the President in May 1994, “Few really challenge the notion that it is appropriate for the President to provide an opportunity for an appraisal – detached from the originating agency’s legitimate focus on its programmatic goals – as to whether the agency’s regulatory activities are consistent with and further the President’s overall objectives and regulatory philosophy” or to coordinate agency actions across the whole government to avoid taking internally-contradictory actions.<sup>101</sup>

The Clinton administration did, however, redraft EO 12291; it would be replaced in September 1993 by EO 12866. The process of drafting the new order involved a good deal of outreach from Clinton officials to the career staff in the agencies and other stakeholders. Starting in the spring of 1993, Katzen met with regulatory agencies, pro-regulation interest groups, business and industry groups, and the “Big 7” group of state and local officialdom, all the while keeping in close touch with the White House. The final order produced a statement of regulatory philosophy and principles broadly consistent with the extant EO 12291 template (“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

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<sup>99</sup> Katzen oral history, 81. Even among congressional Democrats it seems to have been assumed that some sort of review would continue. See, e.g., the memo by Levin staffer Linda Gustitus to John Podesta, “Regulatory Review,” March 12, 1993, in the William J. Clinton Library [WJCL]: White House Staff and Office Files [WHSOF]: Counsel: Elena Kagan, Box 26, Folder 4 (*Counsel: Regulatory Working Group 1994 [1]*); see also Friedman, *Regulation*, 119.

<sup>100</sup> Katzen oral history, 81.

<sup>101</sup> Katzen, “Report,” 17.

the regulatory objective”). One key change was that only “significant” rules – those with an impact of \$100 million or more on the economy, or meeting other thresholds of importance -- would now undergo the OIRA process.<sup>102</sup> The order also required additional records to be made publicly available (not so far from what the Bush OMB had agreed to back in 1990), imposed time guidelines on the review process, included the president and vice president directly involved only for purposes of appealing unresolved disputes, stressed the importance of coordination across agencies (that is, of central clearance), and broadened the non-quantitative factors that could be considered as part of the cost-benefit equation. The order’s language was careful to stress agency primacy.<sup>103</sup>

Katzen argued to Clinton that even six months in there was a “vastly improved relationship... between OIRA and the agencies,” as “serious efforts to improve communications, cooperation, and coordination have now been institutionalized.”<sup>104</sup> These efforts included her tour of the agencies in October and November 1993, discussing the new order and stressing OIRA’s desire for teamwork in its implementation; riffing on one of President Reagan’s classic tropes, she recalled joking that “I’m from OMB and I’m here to help!” She also took pains to congratulate each new agency deputy on their confirmation and buy them lunch in the White House mess – good for agency morale, individual ego, and future lines of communication.<sup>105</sup> More formal was the creation of a Regulatory Working Group, which she took pains to attend so as to encourage agencies to send high-level representation, doing the

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<sup>102</sup> More specifically, “significant” regulatory actions had an annual effect on the economy of \$100 million or more; had a material effect on the economy, public safety, the environment, federalism, etc.; raised “novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive order”; or were actions inconstant with actions proposed or taken by other agencies.

<sup>103</sup> To the point of repeating it more often in the order than Katzen thought made for well-written prose. (Author interview with Sally Katzen, August 22, 2018.)

<sup>104</sup> Katzen, “Report,” p. 25.

<sup>105</sup> Author interview with Katzen.

same for meetings with outside industry groups. Some bureaucrats were even embedded in OIRA, bringing agency detailees into a new Regulatory Training and Exchange Program.<sup>106</sup>

A final piece involved OIRA unilaterally dropping one of the order's requirements in the name of OIRA-agency relations. Part of the new transparency regime the EO trumpeted was the identification of changes made in a regulatory action during OIRA review and to specify those made at OIRA's behest. But in practice this made the agency lose face, especially if OIRA was simply correcting careless grammar or logic. (Plus, as one agency general counsel has noted, "most of the good stuff is done orally.") In a memo to the President reporting on progress at the EO's six-month mark, Katzen noted that "from our perspective... changes that result from regulatory review are the product of collegial discussions, involving not only OIRA and the agency, but frequently other White House Offices --such as OVP, DPC, NEC, CEA, OEP, OSTP and other agencies as well." In fact much of the benefit of the process was in the interagency collaboration and central clearance, which agencies themselves valued because it gave them information about the doings of their counterparts.<sup>107</sup> Katzen noted she would review the process, meaning that she would drop it. Here, making the managerial process work resulted in informal channels trumping formal structure.<sup>108</sup>

Even so, regulations clearly have political ramifications; presidents receive direct credit or blame for decisions made in the agencies. Thus clear emphasis is placed on "presidential administration," as Elena Kagan would later put it.<sup>109</sup> In 1995, for instance, as administration officials discussed the implementation of EO 12866, agency complaints were swiftly shut down.

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<sup>106</sup> Katzen, "Report," pp. 25-28.

<sup>107</sup> Katzen, "Report," p. 48. Katzen stressed this even more strongly in a follow-up memo at EO 12866's first anniversary; see "The First Year of Executive Order No. 12866," n.d. (October 1994). WJCL: WHSOF: Counsel: Elena Kagan, Box 27, Folder 2. On this point more generally, see Cass R. Sunstein, "The Office of Information and Regulatory Affairs: Myths and Realities," *Harvard Law Review* 126 (2013): 1838-78.

<sup>108</sup> Author interview with Katzen.

<sup>109</sup> Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (June 2001): 2245-2385.

According to none other than Kagan's notes,<sup>110</sup> an EPA representative at the meeting argued that there were "big concerns w/EO." The process was "too centralized.... Review allows political decisions - instead of sci[entific], expert decisions." The reader can nearly hear Katzen's shrug in reply: "[We] made this general decision (pro centralized review) long ago."<sup>111</sup>

### *Central Clearance and Presidential Management*

Clark Clifford, a fixture of 20<sup>th</sup> century Washington, D.C., wrote in his memoir that "if a president did not control the bureaucracy, the bureaucracy would control him."<sup>112</sup> Central clearance is not always a mechanism of presidential *control* - but it is certainly one of presidential management. Political scientists often downplay or even assume away the collective action difficulties facing the executive branch (usually in comparison to the emphasis of those costs in the legislative branch.) But the executive branch is a "they," not an "it"; and that fact generates transaction costs for presidents as they seek to formulate a coherent policy agenda on the legislative and administrative fronts. Again, this prompts the creation of governance structures that help presidents manage the friction associated with their interactions with the wider executive branch. Such structures arise to constrain opportunism in the face of uncertainty and bounded rationality, and to take advantage of bureaucratic expertise.<sup>113</sup>

Central clearance provides just that sort of structure: an institution in which recurring transactions between the president and the agencies can be embedded and mediated. As OMB director Darman briefed his incoming successor Leon Panetta in late 1992 (on the legislative

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<sup>110</sup> Before heading to Harvard Law School, the Obama Administration, and the Supreme Court, Kagan served in the Clinton White House as a Domestic Policy Council staffer and in the Office of the White House Counsel.

<sup>111</sup> Kagan notes headed "EO Anniversary Event," n.d. (September 1995), WJCL: WHSOF: Counsel: Elena Kagan, Box 27, Folder 1.

<sup>112</sup> Clark Clifford, with Richard Holbrooke, *Counsel to the President: A Memoir* (Random House, 1991), 325.

<sup>113</sup> Williamson, *Economic Institutions of Capitalism*, 35, 56-63.

side of things), it allows political-career coordination as well as substantive reconciliation across “divergent agency views.” Indeed, it ensures

the coordinated development, review, and approval of legislative proposals needed to carry out the President’s legislative program; provides a mechanism for reviewing agency legislative proposals which the president may wish to include in his legislative program; helps the agencies develop draft bills that are consistent with and that carry out the president’s policy objectives; identifies for Congress those bills that are part of the President’s program and the relationship of other bills to that program; assures that Congress receives coordinated and informative agency views on legislation which it has under consideration; assures that bills and position statements submitted to Congress by one agency properly take into account the interests and concerns of all affected agencies; [and] provides a means whereby divergent agency views can be reconciled.<sup>114</sup>

This is hardly a foolproof mechanism. There are certainly cases where central clearance is (as a BoB staffer put it in 1957) “a rather pro forma ratification of action already announced,” or where it is rushed to meet a real or artificial deadline for PR or other purposes.<sup>115</sup> There are others where it is evaded entirely, by negligence or by craft. In 2001, vice president Dick Cheney famously obtained President Bush’s signature on a four-page directive concerning enemy combatants “with emphatic instructions to bypass staff review.” Secretary of State Colin Powell, one of those bypassed, found out about the order from CNN.<sup>116</sup> Back in 1962, Secretary of Defense Robert McNamara did much the same thing; the entirety of the Budget Bureau file for EO 11058 consists of a single index card, which notes that the order was not cleared by the Bureau – or anyone else.<sup>117</sup>

Central clearance is designed to avoid just that outcome. It aims to shield the president from being tempted or pressured into the “oh, by the way” decision made on the fly in informal

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<sup>114</sup> Richard Darman, “General Outline: OMB Roles and Responsibilities,” transition briefing book provided by Darman to Leon Panetta, December 16, 1992, Panetta Institute Archives, OMB Files, Box 28, File 10.

<sup>115</sup> Titus to Ellington, handwritten note of December 17, 1957, NARA, RG 51, Executive Orders and Proclamations, 1953-1961, Box 22, EO 10747.

<sup>116</sup> Barton Gellman and Jo Becker, “A Different Understanding with the President,” *Washington Post* (June 24, 2007), A1 (see [http://voices.washingtonpost.com/cheney/chapters/chapter\\_1/](http://voices.washingtonpost.com/cheney/chapters/chapter_1/) )

<sup>117</sup> Memorandum for the file of October 27, 1962, JFKL, Box 599, ND 4-1 Manpower.

bilateral encounters with administration officials.<sup>118</sup> Presidential decision-making is about information; and information is about setting up advising informations that, as Neustadt observed long ago, “protect both President from agencies and agencies from one another.”<sup>119</sup> Indeed, the exceptions that prove the rule suggest the value of doing just that. The Trump “travel ban” issued in early 2017 received little in the way of clearance – Sen. Lindsey Graham (R-SC) reportedly told the president that it appeared that “some third grader wrote it on the back of an envelope” -- and proved to be substantively unworkable.<sup>120</sup> (It was the third iteration that, after much bureaucratic intervention, was upheld by the Supreme Court in 2018.)

Presidents benefit from the expertise and reality checks clearance provides; agencies, of course, also benefit from getting advance information about their peers’ activities and plans. We might include Congress here too as a beneficiary: “Although Congress periodically questions OMB’s central clearance role,” OMB staff noted in the 1980s, “its continued endurance and success may be attributed to the fact that it meets Congress’s needs as much as the President’s or the agencies” by ensuring legislators get coordinated agency views across different legislative vehicles.<sup>121</sup> Interestingly, though past presidents backed away from including independent regulatory agencies in the mandated clearance process – more to assuage congressional concerns than because they thought such agencies were exempt from their reach – the Trump OMB created an innovative mechanism for doing so, at least in part. Since rules (and in some cases the agency guidance flowing from them) have to be designated as “major”

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<sup>118</sup> Something that Cheney in other circumstances once strongly warned against. Quoted in Terry Sullivan, ed., *The Nerve Center: Lessons in Governing from the White House Chiefs of Staff* (College Station: Texas A&M Press, 2004), 104.

<sup>119</sup> Neustadt, “Growth of Central Clearance,” 650.

<sup>120</sup> Quoted in Bob Woodward, *Fear* (New York: Simon & Schuster, 2018), 100. See too the longer discussion in Julie H. Davis and Michael Shear, *Border Wars* (New York: Simon & Schuster, 2019).

<sup>121</sup> “OMB’s Legal Authority to Review Transcripts of Agency Testimony,” NARA, RG 51, OMB General Counsel Subject Files, Box 4, *Weinstein Files: OMB Authority to Review Transcripts and Legislation*.



for the purposes of the Congressional Review Act, a 2019 OMB memorandum required independent agencies to provide those materials to OIRA for review.<sup>122</sup>

Do these varying forms of utility -- or responsiveness -- risk the "neutral competence" OMB has worked to cultivate across close to a century? After all, central clearance does lead to decisions with clear political implications, and since the 1970s, at least, political appointees -- notably the Program Associate Directors (PADs) layered above the substantive program divisions -- have played a larger role in decisionmaking. As Martin notes, "all recent administrations, regardless of party, have clearly decided that positions on legislation pending before Congress are the exclusive province of political appointees."<sup>123</sup> Certainly the process is potentially subject to manipulation -- in providing *analysis* that does less to inform decisionmaking than to justify or simply enforce pre-fabricated decisions. This has perhaps been especially true in the arena of regulatory review, where rent-seeking politics of various sorts have always come in conflict with the pure theory of cost-benefit analysis. When EPA sought to regulate coal-fueled power plants in the late 1970s, for instance, Jimmy Carter needed Sen. Robert Byrd's vote for the SALT II treaty more than he needed a new rule on clean air. The Reagan administration avoided a high-salience clash by siding with Labor's rulewriters over OIRA in a dispute over worker exposure to cotton dust in 1983. The Obama EPA's Clean Power Plan was delayed until the 2012 election was safely past. The Trump administration has provided multiple examples of its own.

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<sup>122</sup> Russell Vought to Heads of Departments and Agencies, "Guidance on Compliance with the Congressional Review Act," Memorandum M-19-14 (April 11, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>

<sup>123</sup> Martin, "Legislative Clearance," 9. But he argues strongly that OMB remains an analytic arbiter rather than a partisan tool: "Though the visibility of OMB's engagement in the political process may have increased, nothing substantive has changed about the institution's involvement." See 8-9.

In general, as OIRA officials have rightly observed – in an insight that applies to OMB’s clearance role more generally -- where presidential politics or preferences conflict with analysis, politics will win.<sup>124</sup> How much good government of that sort do presidents want to buy? The answer may vary with how much they feel they receive in return. If rational analysis becomes a partisan cause, it cannot long survive – however well institutionalized in the past. It is important that OMB function to avoid just that. The value of the agency, and of central clearance, rests on the basis of Paul O’Neill’s lofty evocation of its mission: “to serve the institution of the Presidency with the objective of living up to a standard which says – in every decision the President has to make, he has from you, when he needs it, the best and clearest exposition of the facts and arguments on every side of the issue that it is possible for a human mind to muster.”<sup>125</sup> What presidents do with that exposition, of course, is up to them.

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<sup>124</sup> Donald R. Arbuckle, “The Role of Analysis on the 17 Most Political Acres on the Face of the Earth,” *Risk Analysis* 31 (June 2011), 886; Stuart Shapiro, “OIRA Inside and Out,” *Administrative Law Review* 63 (2011), 146.

<sup>125</sup> O’Neill, remarks to agency staff, cited above (fn. 4).