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## OIRA and Presidential Regulatory Review: A View from Inside the Administrative State

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# **OIRA and Presidential Regulatory Review: A View from Inside the Administrative State**

Donald R. Arbuckle\*

## **Summary**

Scholarly interest and political controversy have surrounded the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) since its creation on April 1, 1981. OIRA's role as guardian of presidential regulatory review has stimulated interest from Congress, the Courts, interest groups, the media, and, of course, scholars of the Executive Branch and presidency. In a 2006 study, published here in the Michigan Law Review, Professors Bressman and Vandenberg of Vanderbilt University Law School, took an in-depth look at regulatory review from the agency point of view. They concluded that the practice of OIRA regulatory review does not comport in several important ways with presidential control theory, and that scholars have underestimated the extent of White House involvement. They recommended increased transparency within the White House regarding regulatory review. In May 2007, Michigan Law Review published a response by Professor Sally Katzen, a

Faculty Fellow at the University of Michigan Law School; a former OIRA Administrator during the Clinton Administration; and an unabashed proponent of OIRA regulatory review. Her critique was accompanied by a response from Bressman and Vandenberg.

In this paper, I discuss presidential control and the regulatory review process from the perspective of an OIRA career official who served across four presidential administrations. I conclude that, while Bressman and Vandenberg’s recommendations follow a logical path from their survey data, this data is incomplete, sometimes misleading or inaccurate, and limited in its perspective. Increased White House transparency regarding OIRA regulatory review is unwarranted, and, in any case, infeasible and highly unlikely to be instituted.

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## Introduction

Scholarly interest and political controversy have surrounded the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), part of the Executive Office of the President, since its creation on April 1, 1981. OIRA has numerous responsibilities under its authorizing statute, the Paperwork Reduction Act,<sup>1</sup> but its role as guardian of presidential regulatory review has stimulated the most interest from Congress, the Courts, interest groups, the media, and, of course, scholars of the Executive Branch and presidency.<sup>2</sup> Unfortunately, that

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<sup>1</sup> Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.* This reauthorization of the PRA were enacted as Pub. L. 104-13 (May 22, 1995).

<sup>2</sup> OIRA and presidential regulatory review have been the subject of Congressional hearings, legislation, interest group concern, and media attention, both the main stream, national media as well as the trade press. A substantial academic literature on presidential regulatory review has also evolved since OIRA's inception. Examples include the following: Erik D. Olson, *The Quiet Shift in Power Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 Va J. Nat. Res. L 1 (1984); Susan Tolchin & Mark Tolchin, *Dismantling America: The Rush to Deregulate* (Oxford University Press, 1984); Jonathan Lasch et al., *A Season of Spoils: The Reagan Administration's Attack on the Environment* (Pantheon Books, 1984); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 Am. U. L. Rev. 443 (1987); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 Law & Contemp. Probs. 127 (Autumn 1991); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 Law & Contemp. Probs 1 (Spring 1994); Richard H. Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1 (1995); Peter L. Strauss, *Presidential Rulemaking*, 72 Chi.-Kent L. Rev. 965 (1997); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); James Blumstein, *Presidential Administration and Administrative Law: Regulatory Review By the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 Duke L.J. 851 (2001);

attention tends to be divided into two overly simplistic and diametrically opposed views: (1) OIRA's regulatory review is perhaps an illegal, and in any case an unwarranted, usurpation of legitimate agency regulatory authority and OIRA principally represents business and industry interests; or, (2) OIRA acts as a loyal servant of the president and a valuable guardian of rational rulemaking, which is otherwise skewed to the parochial interests of individual agencies, particularly those in the health, safety, and environmental areas.<sup>3</sup> While these two views may be convenient, they blur the nuance in OIRA's many functions and varied behavior, and overlook the complexity of its role within the White House. Ironically, these overly simplistic views are reinforced by OIRA itself. Aside from relatively infrequent testimony by the OIRA Administrator and occasional bulletins,

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Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, U. Chi. L. Rev. 821 (Summer 2003); Robert W. Hahn & Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, AEI-Brookings Joint Center Policy Matters 03-34 (October 2003); Lisa Heinzerling & Frank Ackerman, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press, 2004); William F. West, *The Institutionalization Of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 *Presidential Stud. Q.* 76 (2005); John D. Graham, Paul R. Noe, & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 *Fordham Urb. L.J.* 101 (2006).

<sup>3</sup> Two now classic expressions of the differing views of OIRA are Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write A Regulation*, 99 *Harv. L. Rev.* 1059 (1986), and Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 *Harv. L. Rev.* 1075 (1986). Over its twenty-seven year history, many interest groups have focused comment on OIRA. These include, for example, Public Citizen and OMB Watch, two organizations supportive of federal health, safety, and environmental regulation; see e.g., Public Citizen webpage on John D. Graham created during Graham's confirmation process in 2001, at <http://www.citizen.org/congress/regulations/graham.html>. Of the business interest groups, the U.S. Chamber of Commerce and National Association of Manufacturers have frequently commented on OIRA activities and responded to requests for comment. See e.g., letter from the Chamber of Commerce in support of the nomination of Susan Dudley to be OIRA Administrator in 2006, at [https://www.uschamber.com/issues/letters/2006/061101cmtehomelandsec\\_supportdudleyoiranom.htm](https://www.uschamber.com/issues/letters/2006/061101cmtehomelandsec_supportdudleyoiranom.htm).

OIRA staff members, like all OMB staff, assiduously seek anonymity and seldom speak publicly on behalf of the organization. Although this reticence provides ammunition to opponents of OIRA's role in regulatory review and frustrates its supporters, OIRA's relative obscurity is one of its important characteristics, as I discuss below.

In this article, I discuss OIRA's role in presidential regulatory review specifically in response to recent articles on the subject by Professors Bressman and Vandenberg and by Professor Katzen. I begin with a brief review of these articles.

In a 2006 study, Professors Bressman and Vandenberg of Vanderbilt University Law School, took an in-depth look at regulatory review from the agency point of view.<sup>4</sup> Choosing to concentrate on one regulatory entity, the Environmental Protection Agency (EPA), they conducted interviews with or surveys of thirty former EPA Senate-confirmed presidential appointees (PASs) from the administrations of President George H. W. Bush (hereafter Bush I) and President Bill Clinton.<sup>5</sup> Their purpose was to test presidential control theory against the experience of Executive Branch officials on the receiving end of presidential regulatory review.<sup>6</sup>

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<sup>4</sup> Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 47 (2006).

<sup>5</sup> *Id.* at 63, 64.

<sup>6</sup> *Id.* at 49.

In their article, the authors point out, with justifiable pride, that theirs is the first such study. They describe the interview data, and then draw conclusions and make recommendations about presidential regulatory review. In summary, they conclude that the practice of OIRA regulatory review does not comport in several important ways with presidential control theory, and that “scholars may have underestimated the complexity of White House involvement. Presidential control is a ‘they’ not an ‘it’.”<sup>7</sup> They also find that “OIRA is not the primary source of influence on many major rule-makings”<sup>8</sup>; that White House involvement and OIRA review are “unsystematic”<sup>9</sup>; and that “OIRA review does not achieve what might be called ‘inter-agency coherence’.”<sup>10</sup>

Their study leads them to “question whether presidential control facilitates political accountability,”<sup>11</sup> concluding that “agencies appear to better represent public preferences and resist parochial pressures, the asserted aims of political accountability.”<sup>12</sup> They identify six areas where they perceive problems in the regulatory review process and offer recommendations to begin to address these alleged problems.<sup>13</sup> They add as

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<sup>7</sup> *Id.* at 49.

<sup>8</sup> *Id.* at 49.

<sup>9</sup> *Id.* at 50.

<sup>10</sup> *Id.* at 50.

<sup>11</sup> *Id.* at 50.

<sup>12</sup> *Id.* at 51.

<sup>13</sup> *Id.* at 91.

a general comment to others interested in the study of presidential policy-making that scholars “can no longer rest satisfied with generalities about political accountability, faction resistance, and regulatory effectiveness. They must take steps to improve the presidential control model so that it better delivers these goods in practice as well as in theory.”<sup>14</sup>

Shortly after publication of this article, Professor Sally Katzen, a Faculty Fellow at the University of Michigan Law School and former OIRA Administrator during the Clinton Administration, responded.<sup>15</sup> Professor Katzen praises the study noting that not only is it “highly desirable to have the perspective of those who are subject to presidential control, but the information serves as a valuable counterpoint to the material presented by those who have studied the process from the perspective of the White House or OIRA.”<sup>16</sup> As a previous OIRA Administrator and an unabashed proponent of OIRA regulatory review,<sup>17</sup> she then offers a critique of the study on several grounds. She asks if there may be bias in the data resulting from EPA’s atypical nature as a regulator<sup>18</sup> and raises aspects of the survey methodology that lead her “to question whether it is appropriate to accept its data uncritically and to draw conclusions (and recommendations) from it

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<sup>14</sup> *Id.* at 99.

<sup>15</sup> Sally Katzen, *A Reality Check on An Empirical Study: Comments on “Inside the Administrative State*, 105 Mich. L. Rev. 1497 (May 2007).

<sup>16</sup> *Id.* at 1498.

<sup>17</sup> *Id.* at 1498.

<sup>18</sup> *Id.* at 1499, 1500.



without qualification.”<sup>19</sup> She then discusses her disagreement with the authors’ conclusion that White House/OIRA review of rules “may not sufficiently enhance political accountability” and “may not achieve regulatory efficacy.”<sup>20</sup>

Professors Bressman and Vandenberg respond with a rebuttal to Professor Katzen.<sup>21</sup> In it they defend their study’s methodology and address Professor Katzen’s critique, concluding, “Missing from Katzen’s account is the overarching importance of accountability and efficacy to executive branch decision-making. Our data suggest that there may be a problem on this front.”<sup>22</sup> The debate would have continued late into the night had not University of Michigan Law Review publication deadlines prevented Katzen from offering a sur-rebuttal to the Bressman and Vandenberg rebuttal to her reply.

In this paper, I hope to continue this useful exchange by commenting on these articles by Professors Bressman, Vandenberg, and Katzen and discussing the regulatory review process from a perspective that is different from theirs and different from that of the study respondents. Like Professor Katzen, I am another voice from inside OIRA, but while she was a PAS, as

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<sup>19</sup> *Id.* at 1501.

<sup>20</sup> *Id.* at 1502. Katzen quoting Bressman & Vandenberg, *supra* note 4, at 50, 83.

<sup>21</sup> Lisa Schultz Bressman & Michael P. Vandenberg, *Legitimacy, Selectivity, and the Disunitary Executive: A Reply to Sally Katzen*, 105 Mich. L. Rev. 1511 (May 2007).

<sup>22</sup> *Id.* at 1512.

were Bressman and Vandenberg's respondents, I was an OIRA career official who, unlike them, served across presidential administrations. I worked at OIRA for twenty-five years, and was OIRA Deputy Administrator during both the Clinton and George H.W. Bush (Bush II) administrations, as well as the Acting Administrator at times during these two administrations when there was no confirmed political Administrator.<sup>23</sup> While my observations, like Katzen's, are based on my own experience at OIRA (and thus provide yet more anecdotes from inside the White House), I nevertheless bring a point of view to the discussion that has been missing – that of a career professional who served in OIRA across four presidential administrations.

### **Discussion of the Bressman and Vandenberg Conclusions and Recommendations**

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<sup>23</sup> I served in OIRA from shortly after its creation on April 1, 1981 to June 2006, when I retired from Federal service. For more than ten years, from 1996 to 2006, I was OIRA's Deputy Administrator, that is, the career manager of the division. I worked closely with Professor Katzen in her various roles as OIRA Administrator, Deputy Assistant to the President for Economic Policy, and OMB Deputy Director for Management. I also worked with all five of her predecessors (James C. Miller 1981, Christopher C. DeMuth 1981-1984, Douglas H. Ginsburg 1984-1985, Wendy Lee Gramm 1985-1987, Jay Plager 1987-1989) and two of her successors (John Spotila 1998-2000 and John D. Graham 2001-2006). Additionally, I served as Acting Administrator for 18 months between Katzen's departure from OIRA and John Spotila's confirmation, and for six months between Spotila's departure and the confirmation of John Graham.

Bressman and Vandenberg highlight “six areas for improvement that emerge from the agency experience with presidential control. Three apply to both OIRA and other White House Offices: transparency, lines of responsibility, and selectivity. Three concern OIRA alone: focus on costs, timing of review, and entrenchment of career staff.”<sup>24</sup> They go on to state “we do not endorse specific changes. Rather, we focus attention on possible weaknesses. At a minimum, we believe that these weaknesses suggest an agenda for further empirical investigation.”<sup>25</sup>

The Bressman and Vandenberg article speaks largely to theoreticians of presidential control, and I hope to provide further information from another perspective for those scholars investigating presidential control. I will draw from my experience within OIRA to comment on the view of the regulatory review process presented by Bressman and Vandenberg’s interview and survey respondents and to respond to those aspects of the article identifying perceived weaknesses in, and recommendations for, the existing regulatory review process.

While Bressman and Vandenberg’s conclusions do follow a logical path from their survey data, my contention is that this data is incomplete, sometimes misleading or inaccurate, and limited in its perspective; and that,

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<sup>24</sup> Bressman & Vandenberg, *supra* note 4, at 91. .

<sup>25</sup> *Id.*

consequently, the basis for the conclusions and recommendations of the study is questionable. As a former practitioner of regulatory review, I am first interested in clarifying how the regulatory review process actually works and positing what I believe are well-grounded reasons for conducting regulatory review in this manner.

I have organized my discussion in six parts, consistent with Bressman and Vandenberg’s six perceived weaknesses, in what I believe is an approximately ascending order of the complexity of the issues raised.

### **A. Selectivity**

One of the findings of the Bressman and Vandenberg study is that “White House involvement, whether through OIRA or other offices, is uneven and unsystematic.”<sup>26</sup> The authors are not arguing against White House involvement, but rather that uneven, or what apparently appeared to their respondent pool as “sporadic”<sup>27</sup> involvement does not “enhance agency legitimacy.”<sup>28</sup> They argue that “[s]elf-selection of this sort does not ensure that even all significant rule-makings receive high-level political attention of

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<sup>26</sup> *Id.* at 94.

<sup>27</sup> *Id.* at 68.

<sup>28</sup> *Id.* at 94.

the sort that render them more accountable and faction-proof.”<sup>29</sup> In responding to Katzen’s assertion that “selectivity is an important and effective management tool”<sup>30</sup> in the existing review process, they state, “We might demand reassurance that such decisions . . . [by White House officials as to whether to participate in the review of an agency rule] are selected on the basis of some public-regarding criteria rather than the personal proclivities of individual officials.”<sup>31</sup>

I was one of the OIRA officials selecting which rules underwent presidential review, and I find the concerns of both the former EPA officials and Bressman and Vandenberg perplexing. On the one hand, I understand how some aspects of White House involvement in regulatory review may have made it appear “sporadic.” On the other hand, most aspects of the selection process were quite methodical. Specifically, the criteria by which rules were selected for review under both the Bush I and Clinton Administrations were, in fact, clearly defined and included what I would consider “public-regarding criteria.” The regulatory review regime was a presidential process and while executive orders charged OIRA with conducting the review, all rules submitted to OIRA were subject to involvement of White House officials, including the president or vice-

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<sup>29</sup> *Id.* at 95.

<sup>30</sup> Katzen, *supra* note 15, at 1509.

<sup>31</sup> Bressman & Vandenberg, *supra* note 21, at 1523.

president. Regarding the formal procedures, perhaps the former EPA PASs interviewed for the study did not know how OIRA selected rules for review. I believe some explanation of how the process worked would be useful.

During the Administration of President George H. W. Bush, regulatory review was conducted under Executive Order No.12,291,<sup>32</sup> signed by President Reagan in February 1981. Under this order, all rules, proposed and final, major and non-major, were to be submitted to OIRA for review,<sup>33</sup> with certain exceptions including emergencies and rules not included under the definition (*e.g.*, those associated with military or foreign affairs).<sup>34</sup> Almost immediately, in the spring of 1981, OIRA was inundated with draft rules submitted by agencies complying with the new order. In the first three months of its existence, from April 1 through June 30, 1981, OIRA reviewed 834 rules,<sup>35</sup> an annual rate of over 3,300 draft rules. (Of

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<sup>32</sup> Executive Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (2000). Executive Order No 12,291 was signed by President Reagan on Feb. 17, 1981, less than one month into his first term.

<sup>33</sup> *Id.* § (3)(c)

<sup>34</sup> *See Id.* § 1(a) (defining “rule” and “major rule”); *Id.* § 8(a)(1,2) (establishing exemptions for emergencies and statutory and judicial deadlines).

<sup>35</sup> The General Services Administration’s Regulatory Information Service Center (RISC) has kept accurate and comprehensive records and statistics related to OIRA regulatory review since such review began in 1981. This wealth of information is available at the RISC website <http://www.reginfo.gov/public/do/eoPackageMain>. These data include identifying information on each rule reviewed by OIRA under Executive Order No. 12,291 and Executive Order No. 12,866, as well as historical tables displaying number of rules reviewed and average review times by agency, by time period, by rule stage (*e.g.*, Notice of Proposed Rulemaking, Final Rule), by rule type (*e.g.*, Significant or Economically Significant under Executive Order No. 12,291, or Non-major or Major under Executive Order No. 12,866), and by OIRA action (*e.g.*, consistent without change, consistent with change, withdrawn, returned for reconsideration, etc.).

these 834 draft rules, 258, or 31%, were submitted by EPA.<sup>36</sup>) Soon thereafter, the OMB Director used his authority to exempt categories of rules from review<sup>37</sup> resulting in, during the Bush I Administration, OIRA review of, on average, 2,292 draft proposed and final rules per year. (This included an average of 180 EPA rules per year, about 8% of the total). Of these 2,292 draft rules, 75 on average, were major proposed and final rules.<sup>38</sup>

During this time, the Federal Register published roughly 8000 rulemaking documents per year.<sup>39</sup> Thus, even under an executive order that made all rules subject to review, in practice 2,300, or about 29% of rulemakings listed in the Federal Register, were reviewed. Of course, major rules were likely to be scrutinized more closely than non-major rules. A rough measure of this is the average review time devoted to major and non-major rules, which, for 1989 through 1992 averaged, respectively forty-nine and thirty days.<sup>40</sup> “Major rule” was clearly defined in the order<sup>41</sup> so that although arguments did arise about whether a draft rule should be considered

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<sup>36</sup> *Id.* at <http://www.reginfo.gov/public/do/eoHistReviewSearch>

<sup>37</sup> Executive Order No. 12,291, *supra* note 32, § 8(b).

<sup>38</sup> RISC, *supra* note 35 at <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init>.

<sup>39</sup> RISC has kept an accurate count of rulemaking documents published in the Federal Register since 1981. These statistics are not published, but are available upon request from RISC staff. The 8,000 rulemaking documents published by the Federal Register included documents related to rulemaking, such as announcements of public meets or changes of address for comment submission, as well as routine, ministerial rules related to administrative matters.

<sup>40</sup> RISC, *supra* note 35 at <http://www.reginfo.gov/public/do/eoCountsSearch>.

<sup>41</sup> Executive Order No. 12,291, *supra* note 32, § 1(b).

major, the criteria being argued about were nevertheless clear. This is not to say that agencies and OIRA did not argue about whether particular rules should be designated major. Since major rules required agencies to conduct a robust regulatory impact analysis that took time and resources, agencies had an incentive to find rules non-major. In some cases, agency officials divided potential major rules into two or more non-major components, and in other cases they might argue that the estimated costs or benefits were under the \$100 million threshold, in order to avoid a “major” designation. However, the order gave to the OMB Director,<sup>42</sup> and later the Congressional Review Act gave to the OIRA Administrator the final decision-making authority regarding whether a rule was major or not.<sup>43</sup> The major/non-major designation process worked smoothly at a relatively low staff level at both OIRA and the agencies and the PASs at the agencies or OIRA were seldom involved. In this sense, selectivity was hardly a problem under the Bush I Administration.

The Clinton Administration made significant changes to the review process in Executive Order No. 12,866.<sup>44</sup> Executive Order No. 12,866 made the review process much more selective, requiring OIRA review for

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<sup>42</sup> *Id.* at § 6(a)(1).

<sup>43</sup> Congressional Review of Agency Rulemaking, 5 U.S.C. chapter 8 § 804(2) (1996), passed in Title II, Subtitle E. of P.L. 104-121, March 29, 1996.

<sup>44</sup> Executive Order No. 12,866, 3 C.F.R. 638 (1993) *reprinted as amended in* 5 U.S.C.A. § 601 (West Supp. 2006). This order was signed by President Clinton on Sept. 30, 1993.



only “significant rules.” The criteria defining a significant rule were clearly articulated in the order<sup>45</sup> and included rules likely to result in the following: a \$100 million annual effect on the economy; interagency inconsistencies; budget impacts; or novel policy or legal issues.<sup>46</sup> This change reduced the number of rules OIRA reviewed annually to about 600, of which about 85 were economically significant<sup>47</sup> (a number virtually the same as the number of major rules reviewed annually under Executive Order No. 12,291). Of the 600, about 70, or roughly 12%, were submitted by EPA.<sup>48</sup>

In addition, the order created an explicit process for selecting significant rules. Agencies were to provide to OIRA at certain intervals a list of planned regulations indicating which ones it believed were significant within the meaning of the order.<sup>49</sup> (This was referred to by OIRA as “the listing process.”) The order further stated that “absent a material change in the development of a planned regulatory action, those not designated as significant will not be subject to review . . . .”<sup>50</sup> The order gave OIRA ten days within which to agree with the agency designation or to change it. The

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<sup>45</sup> *Id.* § 3(f).

<sup>46</sup> The first criterion in Executive Order No. 12,866 § 3(f)(1) is close to, though not exactly the same as the definition of “major rule” in Executive Order No. 12,291 § 1(b). The term “economically significant” was coined by OIRA and continues to be used to refer to rules that meet this criterion in Executive Order No. 12,866 § 3(f)(1). This term is, for most practical purposes, synonymous with Executive Order No. 12,291’s term “major rule.”

<sup>47</sup> RISC, *supra* note 35, at <http://www.reginfo.gov/public/do/eoCountsSearch>.

<sup>48</sup> *Id.*, at <http://www.reginfo.gov/public/do/eoCountsSearch>.

<sup>49</sup> Executive Order No. 12,866, *supra* note 44, § 6(a)(3)(A).

<sup>50</sup> *Id.* § 6(a)(3)(A).

order repeated this stricture in its instruction to OIRA in section 6(b)(1), stating, “OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.” In short, the order gave OIRA clear procedures for determining what to review, and just as clearly stated that these were the only agency rules that OIRA was permitted to review.

The transition from Executive Order No. 12,291 to Executive Order No. 12,866’s increased selectivity occurred from the fall 1993 and through the spring and summer of 1994. In May 1994, in a six-month anniversary report to the President on the implementation of Executive Order No. 12,866,<sup>51</sup> OIRA Administrator Katzen described the transition. While some agencies struggled with the new requirements more than Administrator Katzen had anticipated, she concluded that the new selection process and increased selectivity were working: “We believe that so far, the listing system that has been implemented contains both discipline and flexibility. Both OIRA staff and agency staff have worked to accommodate each other’s needs.”<sup>52</sup> As both OIRA and agencies became more familiar with the new system through 1994 and the years that followed, the listing process became

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<sup>51</sup> Office of Management and Budget, *Report to the President on Executive Order No. 12,866 Regulatory Planning and Review*, 59 Federal Register 24,276 (May 10, 1994).

<sup>52</sup> *Id.* at 24,286.

an administrative function that worked smoothly and was seldom an issue of debate.<sup>53</sup>

It is important to note here that White House participation has always been part of regulatory review, and that both the Bush I and Clinton Administrations established OIRA's review function squarely within the White House itself. In both administrations, the vice president served as the president's designated overseer of regulatory review. The Reagan Administration established the Task Force on Regulatory Relief, chaired by then Vice President George H.W. Bush. Executive Order No. 12,291 provided authority to the Director of OMB to conduct regulatory review, "subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President."<sup>54</sup> President George H.W. Bush designated Vice President Dan Quayle as head of the Competitiveness Council,<sup>55</sup> which, though it became a lightning rod

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<sup>53</sup> Both regulatory review executive orders provided others means by which agency managers could participate with EOP in the selection of the rules upon which the agency would concentrate. Both orders required a semi-annual publication called the Unified Agenda of Federal Regulatory and Deregulatory Actions (the Agenda) – a compilation of all regulatory activities agencies were planning during the next 12 months. See Executive Order No. 12,291, *supra* note 32, § 5; and Executive Order No. 12,866 *supra* note 44, § 4(b). The latter also created the annual Regulatory Plan, an administration-wide report, coordinated by OIRA, on agencies' "most important significant regulatory actions." See Executive Order No. 12,866, *supra* note 44, § 4(c). Finally, Executive Order No. 12,866 created an interagency coordinating forum, the Regulatory Working Group, where agency regulatory policy officers met with the OIRA Administrator and White House officials to discuss regulatory issues, including the OIRA review process. See Executive Order No. 12,866, *supra* note 44, § 4(d).

<sup>54</sup> Executive Order No. 12,291, *supra* note 32, § 3(e)(1).

<sup>55</sup> For a Bush I Administration description of the Competitiveness Council, see Executive Office of the President, Office of Management and Budget, *The Regulatory Program of the United States Government*

for controversy, served an analogous function to that of the Task Force on Regulatory Relief - a White House regulatory review oversight body. In the Clinton Administration, Vice President Al Gore served as the overseer of regulatory review under an explicit provision of Executive Order No. 12,866 that designated the vice president as the authority to hear appeals when conflicts between OIRA and an agency could not be resolved.<sup>56</sup> In all three administrations, Reagan, Bush I, and Clinton, White House participation in regulatory review was routine.

While the OIRA Administrator served as the “Regulatory Czar” within the administration, part of the Czar’s role included coordination among White House officials. Such coordination existed from the beginning of regulatory review in 1981 and, particularly in the Clinton and Bush II administration, became an everyday function in the conduct of regulatory review by OIRA staff. In all administrations, however, the demands on the time and attention of White House staff are relentless and often overwhelming. Because of this inevitable characteristic of their work, White

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*April 1, 1990 – March 30, 1991*, 5 (1990); and *The Regulatory Program of the United States Government April 1, 1991 – March 30, 1992*, vii, 2-3 (1991). Vice President Quayle’s role was analogous to that of Vice President George H.W. Bush during the Reagan Administration, where he was in head of that administration’s Task Force on Regulatory Relief.

<sup>56</sup> Executive Order No. 12,866 *supra* note 44, § 2(c) and § 7. In February 2002, the Bush II Administration amended Executive Order No. 12,866 making the President and Chief of Staff the authorities for resolving disputes between agency heads and OIRA; *see* Executive Order No. 13,258, 67 Federal Register 9385 (February 28, 2002).

House officials sometimes participate in EPA rules and sometimes do not; they may drop in and out of reviews; or they may become distracted by other issues. Bressman and Vandenberg, label this aspect of participation by White House officials as “self-selection”<sup>57</sup> and call it “idiosyncratic.”<sup>58</sup> They fear that such selectivity is not “reasonably methodical”<sup>59</sup> or logical enough to ensure that White House involvement “reliably reaches matters of public importance as well as political interest.”<sup>60</sup>

My experience across four administrations was that the combination of OIRA conducting regulatory reviews and coordinating participation by the White House was both methodical and reasonable. White House involvement was not governed by formal administrative procedures, with their attendant meetings, memos, and expenditure of time and energy. But this did not mean that White House coordination by OIRA was haphazard or random. OIRA staff became extremely skilled at ensuring the level of White House involvement desired by the administration.<sup>61</sup> I think it is fair to say that both the Clinton and Bush II Administrations encouraged a broader and

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<sup>57</sup> Bressman & Vandenberg, *supra* note 4, at 95.

<sup>58</sup> *Id.* at 70.

<sup>59</sup> *Id.* at 94.

<sup>60</sup> *Id.*

<sup>61</sup> This particular expertise was provided by a small but stable corps of senior career officials, myself included, who worked at OIRA from its beginnings to well into the Bush II Administration. Although shamelessly self-serving, I will add that we were extraordinarily good at serving needs of the White House regarding regulatory review to their evident satisfaction.

more extensive White House coordination than did their predecessors. Undoubtedly any White House can improve its relationship with agencies. But in my experience, no important EPA regulatory issue escaped high level White House attention. A significant part of my job at OIRA, particularly during my more than eleven years as Deputy or Acting Administrator, was to make sure that EOP participation in regulatory review met the White House's expectations.

## **B. Entrenchment of Career Staff**

The former EPA officials who contributed to Bressman and Vandenberg's study paint a picture of an entrenched OIRA staff where "careerism diminished political responsiveness and converted OIRA into a virtual government unto itself."<sup>62</sup> They note that "many OIRA career staffers had been there "since Reagan" and often took positions adverse to those of political officials, including the president."<sup>63</sup> The solution according to the respondents is "more turn-over in the career OIRA staff."<sup>64</sup> Professors Bressman and Vandenberg find these charges interesting. They suggest further investigation, raising a series of questions about the OIRA

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<sup>62</sup> Bressman & Vandenberg, *supra* note 4, at 98.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* quoting respondent cited at note 236.

career staff. They conclude, “These questions seek to determine whether OIRA career staffers served to minimize politicization of the regulatory review process or skewed that process and the resultant agency decision-making in a deregulatory direction.”<sup>65</sup> Professor Katzen, who worked with the OIRA staff throughout her long tenure in the Clinton EOP, praises the OIRA staff and describes the respect she has for the quality of the OIRA civil servants.<sup>66</sup>

\_\_\_\_ Like Professor Katzen, I am hardly objective regarding the heroic quality of OIRA’s staff. Nevertheless, I can certainly speak to the assertion that OIRA staff may have acted as rogue civil servants pursuing a course at odds with the president. First, we need to keep in mind the miniscule number of individuals being discussed by the frustrated former EPA officials. The number of OIRA career staff members to whom the EPA respondents were referring was, for any given EPA draft rule, between two and four. The Deputy Administrator (usually involved much less in the details of a particular EPA rule), a branch chief, a desk officer (the lead analyst), and, sometimes, an economist constituted the OIRA virtual government that was creating a barony all their own.

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<sup>65</sup> *Id.* at 99.

<sup>66</sup> Katzen, *supra* note 15, at 1510.

The argument that veteran career bureaucrats create kingdoms of their own, impervious to influence by political management, is a lament heard from political officials and an hypothesis debated by scholars throughout the latter half of the twentieth century. Concerning the OIRA career staff, however, this hypothesis is not borne out by the facts. Let's ask the question why, in the early months of 1993, did the Clinton Administration not move, replace, or simply ignore the OIRA (or for that matter all the OMB) senior staff who had just spent twelve years assisting two republican presidents? Or, in 2001, why did the Bush II Administration not find a way, as surely it could have, to rid itself of those ossified OIRA and OMB career civil servants who had just served President Clinton for eight years? Or, if an administration had given the OIRA staff the benefit of the doubt at inception, but came to believe the career staff members were not serving the president, why did it not reassign or replace, or severely reprimand, or, the worse possible punishment for EOP staff, simply ignore the offenders? One hypothesis would be that the president's senior staff, in different administrations and in spite of information conveyed to them by agency officials, either did not know what the OIRA career staff was doing or were unable to do anything about it. This singular ineptness would have had to occur across several administrations. This is not a reasonable



conclusion. The answer is much more obvious - the OIRA career staff was serving the president to the evident satisfaction of the White House.

One value that OIRA senior career officials provide for a White House is the experience they have to offer the new administration about the operation of the executive branch, having served not only its predecessor, but its predecessor's predecessor. Some OMB staff members during my tenure at OIRA, even to the summer of 2006, had served the OMB when it was still the Bureau of the Budget prior to 1970. Likewise, when I left OIRA, the office still included two senior managers who had served since the creation of OIRA in 1981, and had served OMB since the Ford and Carter Administrations. The continuity in OIRA's career management has been noted as an unusual, stabilizing quality for the office as it has evolved across the Reagan, Bush I, Clinton, and Bush II Administrations.<sup>67</sup> This breadth of experience across administrations of different parties, along with an obsession with discretion, is part of what makes the senior career staff of OMB so helpful to their new employers.

\_\_\_\_\_ This is coupled with a characteristic that made (and continues to make) it possible for OMB career civil servants to serve successfully in the

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<sup>67</sup> See William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 *Presidential Studies Quarterly* 76 (March 2005).

White House. That characteristic is that the OMB career staff members are extraordinarily sensitive to their role as staff of the president and to the ever present risk of losing the trust of EOP political officials. Particularly during a new administration's first year, the potential for appearing to be allied to the previous administration is a risk that senior career managers must carefully manage. But one of the characteristics for which the OMB and OIRA career staff is well known within the EOP is that they serve an outgoing president at 11:59 a.m. on inauguration day and are serving his successor just as vigorously at 12:01 p.m. Of course, this is true of all federal civil servants. But while other executive branch career staff serves the agency or department through the departmental secretary or agency head, OMB career staff has as both its legal and administrative responsibility serving the president directly.<sup>68</sup> This creates an intimacy with the president and the White House staff the intensity of which is difficult to describe, and is the subject for another essay. Suffice it to say here that the OIRA and OMB career staff members have an unusual sensitivity to their

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<sup>68</sup> The fundamental identity of OMB staff as servants of the President is illustrated in the simple statement of OMB's mission in its strategic plan:

The Office of Management and Budget (OMB) *assists the president* in overseeing the activities of the Federal Government. Specifically, OMB's mission is *to assist the President* in meeting his policy, budget, management, and regulatory objectives. [emphasis added]

See Office of Management and Budget Strategic Plan, May 2006. Available at [www.whitehouse.gov/omb/organization/strategicplan2006.pdf](http://www.whitehouse.gov/omb/organization/strategicplan2006.pdf).

responsibilities to the president and to the care that needs to be exercised serving within, as one OMB veteran was fond of putting it, “the seventeen most political acres on the face of the earth.”

What the EPA respondents saw and identified as OIRA freelancing likely came from the admittedly messy process of White House officials arguing and negotiating with one another, with OIRA, and with the agency itself. It is understandable that EPA managers would find this frustrating, and that Bressman and Vandenberg would find it indicative of poor White House management and perhaps a dangerous loss of presidential control. But in my experience this lack of clarity was a common characteristic of how coordination and decision-making worked at the presidential level. What the former EPA officials described was part of the cluttered, frenetic environment in which important decisions - and EPA rules almost always fall into that category – were made in the vicinity of the ultimate decision maker, the president. The EPA respondents and the authors seem to believe that this process is unsatisfactory and that decision-making undertaken by anyone other than the president himself should be documented to make it transparent. I disagree – I believe the process works as it should and I discuss my reasons below in my discussion of transparency and lines of responsibility.

### **C. Timing of Review**

Some of Bressman and Vandenberg’s respondents commented that “OIRA review occurs too late in the rule-making process.”<sup>69</sup> Respondents noted that rules may be in development at an agency for many years, and are then submitted to OIRA at the end of this lengthy process only to have OIRA raise issues that may have been resolved at the agency years before. Bressman and Vandenberg suggest that earlier involvement by OIRA would be preferable and “would waste less agency time and breed less agency frustration.”<sup>70</sup> However, they also point out that such early involvement by OIRA would not be subject to the current disclosure requirements. Consequently, “Early intervention without firm steps to ensure greater transparency might exacerbate accountability and faction concerns.”<sup>71</sup> Bressman and Vandenberg suggest that modified transparency requirements could extend the current disclosure requirements to early OIRA review, as well as “require that OIRA docket contacts not only with outsiders but with other White House offices and federal agencies.”<sup>72</sup> Katzen responds stating, “I generally agree with the authors

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<sup>69</sup> Bressman & Vandenberg, *supra* note 4, at 97.

<sup>70</sup> *Id.* at 96.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

about . . . the timing of review. The earlier the consultation process begins the better.”<sup>73</sup> OIRA managers also have long been advocates of earlier involvement in agency rulemaking. End-of-the-pipeline review, as created first by Executive Order No. 12,291, then by Executive Order No. 12,866, presents problems for the agency, but it also presents problems for the OIRA staff. As noted by Bressman and Vandenberg’s respondents, draft rules, whether proposals and finals, may arrive at OIRA after years of development at an agency, sometimes across several agency heads and across administrations. The agency has invested significant energy and resources in the rule and has negotiated sensitive provisions within itself and among affected parties. Agency officials are, thus, understandably not enthusiastic about considering new options or new analytic approaches suggested by OIRA. OIRA reviewers, faced with this investment of agency time and resources, as well as statutory, legislative, or policy deadlines, may be forced to perform only a cursory review in the limited time they have. Ninety-days may appear a lengthy timeframe to those anxious for publication of the rule; however, EPA rules are frequently accompanied by 500 to 800 page preambles and lengthy Regulatory Impact Analyses, and

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<sup>73</sup> Katzen, *supra* note 15, at 1509.

nearly all involve complex legal, technical, and economic issues that are not easily given careful attention in less than ninety days.

The Reagan Administration recognized the problem with end-of-the-pipeline review soon after Executive Order No. 12,291 was issued. That Administration's concern was that such review was not successfully reducing what it believed to be the flood of regulations still being issued by the federal government. OIRA Administrator Douglas Ginsburg and Deputy Administrator Robert Bedell worked with OMB Director David Stockman and the White House to devise a plan that would extend presidential review further back into the regulatory development process. Their plan was to establish OIRA review of the agency regulatory planning process, and thus the individual rules that would eventually be submitted to OIRA for review. On January 4, 1985, the president issued Executive Order No. 12,498, "Regulatory Planning Process."<sup>74</sup> This order created a regulatory planning process requiring agencies to submit to OMB annually,

An overview of the agency's regulatory policies, goals, and objectives for the program year and such information concerning all significant regulatory actions of the agency, planned or under way, including action taken to consider whether to initiate rulemaking; requests for public comment; and the development of documents that may

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<sup>74</sup> Executive Order No. 12,498 *Regulatory Planning Process*, 3 C.F.R. 323 (1986). This order was signed by President Reagan on January 4, 1985. For discussion of this order and its context see James F. Blumstein, *Regulatory Review By the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, Duke L.J. 851, 866-867 (December 2001) and Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 Law & Contemp. Probs. 127, 153 (Autumn, 1991).

influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date.<sup>75</sup>

OIRA would review an agency's draft Regulatory Program, as it was called, examining each draft entry for compliance with, among other things, the administration's regulatory principles. Upon completion of this review, OIRA would publish each agency's submission as the administration's Regulatory Program for that year.<sup>76</sup> The theory was that OIRA would be able to use this process to oversee and coordinate the rulemakings that agencies were planning to issue. The sanction provided in the order was that OMB could return for reconsideration under Executive Order No. 12,291 any significant rule that was not included in the Regulatory Program or any significant rule that was "materially different from those described in the Administration's Regulatory Program for that year."<sup>77</sup>

Executive Order No. 12,498, in theory, provided tremendous authority to OIRA – that of overseeing what rules agencies would be putting into the pipeline, thus controlling what would eventually be submitted for OIRA review. The process, however, never worked as it was designed, and is an excellent case study in agency-EOP management. First, too many of the

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<sup>75</sup> *Id.* § 2(a).

<sup>76</sup> Office of Management and Budget, *The Regulatory Program of the United States Government* April 1, 1985 to March 31, 1986 (Washington D. C.: Government Printing Office, 1985). The Regulatory Program should not be confused with the Unified Agenda required by Executive Order No. 12,291, *supra* note 32, § 5 and Executive Order 12,866, *supra* note 44, § 4(b). Nor should it be confused with the Regulatory Plan required by Executive Order No. 12,866 *supra* note 44, § 4(c).

<sup>77</sup> Executive Order No. 12,498, *supra* note 74, § 3(d).

important rules that agencies were pursuing were required either by statute or by circumstances (for example, crop planting seasons or weather; or incidents or emergencies that required a federal response). When it came down to individual rules, OIRA was seldom able to persuasively argue that a rule should be dropped from the agency agenda. Furthermore, the sanction proved unworkable. In theory, it allowed the OIRA Administrator to return a rule to an agency simply because the rule had not been included in the Regulatory Program. This proved not to be a workable sanction because it permitted OIRA to return a rule (a highly controversial action), based on a purely procedural violation, without consideration of an argument on the merits of the draft rule. However, no OIRA Administrator wanted to return a rule for merely a procedural violation. Such an action would inevitably be appealed to a higher level White House official and OIRA's action would appear to be a petty procedural dispute. The debate would immediately turn to the merits of the rule, placing the process squarely back in the Executive Order No. 12,291 framework. The sanction, as far as I know, was never used.<sup>78</sup>

The end-of-the-pipeline review system continued under Executive Order No. 12,866. Administrator Katzen too recognized a problem in such

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<sup>78</sup> Regulatory Programs were published annually 1985 through 1992, with the exception of the 1989 – 1990 program year (seven volumes in all). Executive Order No. 12,498 was revoked by Executive Order No. 12,866, *supra* note 44, § 11 on September 30, 1993.



late interaction between OIRA and agency staff, though she saw a different problem than that seen by the Reagan Administration. The regulatory review philosophy of the Clinton Administration was to improve regulation, to create a regulatory system that “works for [the American people], not against them.”<sup>79</sup> Administrator Katzen described the goal as “more sensible regulation.”<sup>80</sup> OIRA review was established as a means of developing better regulations and having OIRA enter the development process in the final ninety days of an often multi-year process did not make sense. Katzen, as OIRA administrator, encouraged the OIRA staff to become involved early in regulatory development, and encouraged agencies to seek OIRA assistance early in the process. In a 1994 report to the president, Katzen noted,

OIRA has encouraged agencies to consult early in the development of a regulatory action. This brings the perspective of both the reviewer and the agency to bear on the rule early in the process, informing the regulatory development and permitting early identification and resolution of any major policy differences.<sup>81</sup>

Administrator Graham adopted a similar strategy during the Bush II Administration, encouraging early communication between OIRA staff and agency staff to discuss rules. This led to criticism along the same lines

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<sup>79</sup> Executive Order No. 12,866, *supra* note 44, at Preamble.

<sup>80</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, A Report to the President on the Third Anniversary of Executive Order 12866: More Benefits Fewer Burdens: Creating a Regulatory system that Works for the American People (December 1996) at v.

<sup>81</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, *supra* note 51, at 24,289.

suggested by Bressman and Vandenberg that, while early consultation could be useful, OIRA might be performing most of its substantive review prior to formal submission of the rule, thus avoiding its own disclosure procedures. The General Accounting Office (GAO, now the Government Accountability Office) raised this concern in a report on the OIRA regulatory review process. OIRA had labeled the period after OIRA starts discussions with an agency on a rule, but before the rule's submission under Executive Order No. 12,866, as "informal" review<sup>82</sup>. In a 2003 Report, GAO recommended that OIRA modify its transparency requirements so that "they include not only the formal review period but also the informal review period when OIRA says it can have its most important impact on agencies' rules."<sup>83</sup> Graham had acknowledged this concern well before the GAO report by agreeing that communications with outside parties during this "informal" review period should be subject to the disclosure procedures.<sup>84</sup> However, he declined to require disclosure of internal, staff to staff communications during informal review, stating in a reply to the GAO recommendation what could serve as a response to Bressman and

Vandenberg:

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<sup>82</sup> John D. Graham, Memo to OIRA Staff: OIRA Disclosure (October 18, 2001), § (1)(A)(3) available at [http://www.whitehouse.gov/omb/inforeg/oira\\_disclosure\\_memo-b.html](http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html).

<sup>83</sup> U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (September 2003) at 115.

<sup>84</sup> See John D. Graham, *supra* note 82, § (1).

GAO's draft report recommends that OMB disclose changes that the rulemaking agencies make to their draft rules during OIRA's "informal" review of a draft rule . . . . We do not believe that it would improve the rulemaking process to disclose these deliberations. As the courts have noted repeatedly over the years, and as Congress recognized in the Freedom of Information Act's protection for deliberative information (in FOIA Exemption 5), it is important for the deliberative process that Executive Branch officials and staff do not operate "in a fishbowl" but instead can explore options and carry on discussion in a confidential manner.<sup>85</sup>

Participants in and observers of the regulatory review process agree that early involvement by OIRA with agencies in the drafting of important regulations is beneficial to the review process. The sticking point for observers such as GAO and Bressman and Vandenberg is their belief that disclosure of early communications between OIRA and the agency is necessary, presumably to document OIRA influence on agency thinking. Though communications with outside parties are disclosed during informal review, as agreed to by former Administrator Graham, further disclosure is both impractical and, in any case, unlikely to be instituted. Several practical problems arise with extending such disclosure. First, Bressman and Vandenberg, and others, in general, underestimate the continuous nature of OIRA–agency communication. An OIRA analyst may talk with agency counterparts several times daily, sometimes hourly. Although contention does arise, interactions between agency and OIRA staff may also be

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<sup>85</sup> John D. Graham letter to Victor Rezendes, U.S. General Accounting Office (September 2, 2003), reprinted in U.S. General Accounting Office, *supra* note 83, at 214.

collegial and mutually reinforcing. In this environment, “informal review” is really a misnomer, since such early communications between OIRA and EPA staff are likely to be general discussions about policy direction, data collection, alternatives, and analytic approaches long before the rule is drafted. This is indeed beneficial early consultation, but hardly constitutes “review” of an agency product. Unless one believes that any communication between OIRA and an agency constitutes review, then a significant definitional problem will exist separating “consultation” from “informal review” from “formal review.” Furthermore, documents created internally during the pre-formal review period are not disclosed under the current disclosure practices for formal review. OIRA has consistently resisted disclosing inter-staff communications during formal review for the reasons articulated by former Administrators Katzen and Graham. Consequently, such disclosure during informal review would be inconsistent with twenty years of practice applied to formal review and it is unlikely to occur during any pre-formal review for the same reasons.

#### **D. Focus On Costs**

Professors Bressman and Vandenberg report that their respondents criticized OIRA for concentrating on costs during regulatory review, adding, “These respondents did not recommend jettisoning cost-benefit analysis, but requested that OIRA fairly analyze both components rather than just one.”<sup>86</sup> Professor Katzen replies that since EPA has many high cost rules, it is “legitimate to focus on the projected costs and see if they can be reduced while still meeting the projected objectives.”<sup>87</sup> Responding, Bressman and Vandenberg note that OIRA has often been criticized in the past for its focus on costs: “OIRA often is said to press the cost side with less attention to the benefits side in order to slant regulation in a deregulatory direction.”<sup>88</sup> They state that respondent comments “do not reflect even-handed treatment of costs and benefits at OIRA. OIRA is a much different beast if performing a neutral role that rationalizes and legitimates agency regulatory decision-making rather than simply reducing regulatory costs.”<sup>89</sup> They draw the somewhat cryptic conclusion that even though there may be value in OIRA’s use of benefit cost analysis to force more careful decision making, “we question whether this role justifies the cost and delay of OIRA review.”<sup>90</sup>

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<sup>86</sup> Bressman & Vandenberg, *supra* note 4, at 96.

<sup>87</sup> Katzen, *supra*. note 15, at 1507.

<sup>88</sup> Bressman & Vandenberg, *supra*. note 21, at 1518.

<sup>89</sup> *Id.* at 1519.

<sup>90</sup> *Id.*

(The cost and delay of OIRA review itself are not otherwise noted as concerns.)

I have several points to make regarding this issue. First, Bressman and Vandenberg are certainly correct that the issue of OIRA's evenhandedness regarding the two sides of the benefit cost analysis equation has been a source of controversy since OIRA was created. This is relatively easy to understand in the context of the Reagan Administration, one of whose primary presidential policies was deregulation and regulatory cost reduction.<sup>91</sup> This policy evolved through the Bush I and into the Clinton and Bush II Administrations to a philosophy of "more sensible regulation"<sup>92</sup> or "smart regulation,"<sup>93</sup> under Administrators Katzen and Graham, respectively. Under this philosophy, regulation itself was considered neither good nor bad, but a policy tool with the potential to provide cost effective benefits to society. More recently, under Administrator Graham, OIRA devoted significant energy and time not only to benefits calculation,<sup>94</sup> but to encouraging agencies to regulate where gaps in protections existed (for

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<sup>91</sup> See e.g., Executive Order No. 12,291, *supra* note 32, at Preamble (delineating as the first reason for issuing the Executive Order, "to reduce the burdens of existing and future regulations. . . .")

<sup>92</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, *supra* note 80, at v.

<sup>93</sup> See John D. Graham, *Stimulating Smarter Regulation: OMB's Role*, speech given at Policy Symposium organized by North Carolina State University (May 3, 2002), available at [http://www.whitehouse.gov/omb/inforeg/nc\\_speech050302.html](http://www.whitehouse.gov/omb/inforeg/nc_speech050302.html).

<sup>94</sup> See e.g., John D. Graham, *Memorandum to President's Management Council: Benefit Cost Methods and Lifesaving Rules* (May 30, 2003) available at [http://www.whitehouse.gov/omb/inforeg/pmc\\_benefit\\_cost\\_memo.pdf](http://www.whitehouse.gov/omb/inforeg/pmc_benefit_cost_memo.pdf).

example, labeling of trans fats in food nutrition labeling).<sup>95</sup> In a recent AEI-Brookings Working Paper, John D. Graham describes how, in addition to its work to “stop bad rules and find less costly ways for regulators to achieve worthy public objectives,” OIRA “also plays a powerful pro-regulation role when agency proposals address market failures and are supported by benefit-cost analysis.”<sup>96</sup>

The task of verifying the observation, or accusation, that OIRA focuses more on costs than benefits is made difficult by the complex nature of OIRA review. OIRA’s review of a particular rule is guided by many factors: the nature of the statutory mandate, the quality of the draft rule and its analysis, the magnitude of its impacts, the amount of time available for review, and the lengths to which OIRA’s meager personnel resources can be stretched. Bressman and Vandenbergh note that OIRA’s role would be different if it was a neutral arbiter of benefits and costs rather than a more single minded reducer of costs.<sup>97</sup> The truth is that OIRA is both and neither.

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<sup>95</sup> Recommendations from OIRA to agencies regarding candidates for further regulation were called “prompt letters.” Prompt letters were issued, “to suggest an issue that OMB believes is worthy of agency priority. Rather than being sent in response to the agency’s submission of a draft rule for OIRA review, a “prompt” letter is sent on OMB’s initiative and contains a suggestion for how the agency could improve its regulations.” RISC, *supra* note 35 at “Prompt Letters,” available at <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp>.

<sup>96</sup> John D. Graham, *The Evolving Role of the U.S. Office of Management and Budget in Regulatory Policy* (February 2007). Working Paper 07-04. AEI-Brookings Joint Center for Regulatory Studies.

<sup>97</sup> Bressman & Vandenbergh, *supra* note 21, at 1519.

OIRA is not an isolated, academic office assessing benefit cost analyses independent of its other responsibilities or of the dynamics of an intensely political atmosphere. Though located deep in the heart of EOP and a close sibling to other White House offices, it is not an arm of the White House Office of Political Affairs.

OIRA's role, particularly that of its career staff, was much broader and more difficult than simply that of a technical assessor of agency Regulatory Impact Analyses. A significant proportion of the review, to be sure, was devoted to a neutral assessment of the agency's compliance with the analytic requirements of Executive Order No. 12,866, including an analysis of benefits and costs, both quantitative and qualitative.<sup>98</sup> At the same time, the OIRA analyst was assessing the agency's compliance with other principles of regulation articulated in section 1(b) of the Executive Order, "The Principles of Regulation."<sup>99</sup> For example, agencies are to "avoid regulations that are inconsistent, incompatible, or duplicative with its

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<sup>98</sup> Executive Order No. 12,866, *supra*. note 44, § 1(b)(6) and § 6(a)(C). It is a common misconception that OIRA conducts benefit cost analyses. This is not the case. Executive Order No. 12,866 requires agencies to prepare benefit cost analyses to inform their regulatory decision making. These analyses, called Regulatory Impact Analyses or RIAs, accompany the draft preamble and regulatory text, as well as other materials, as part of the agency submission to OIRA under the order.

<sup>99</sup> Professor Steven Croley makes this point in his study, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 842 (Summer 2003).



other regulations or those of other Federal agencies.”<sup>100</sup> This principle memorializes in the order what is one of OMB’s most fundamental functions, coordination of policy across departments and agencies. Agencies often, but not always, consult with their colleagues in other departments when developing important rules. EPA rules usually are of interest to the Departments of Energy, Transportation, Agriculture, and Interior, for example. OIRA experience, however, was that while agency staffs may have consulted with their program counterparts in other departments, upper level political officials had often not been consulted. Ensuring that such coordination took place occupied much of the time and energy of all OIRA staff members and made significantly more complex the evaluation of agency benefit cost analyses.

In addition, the OIRA analyst must coordinate review within the EOP. With this aspect of review comes attention to issues that are in addition to the more strictly economic issues that many believe define benefit cost analysis. These may include, for example, legal, technological, scientific, risk, Federalism, small business, distributive, and equity issues.<sup>101</sup>

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<sup>100</sup> Executive Order No. 12,866, *supra*. note 44, § 1(b)(10). See also, Executive Order No. 12,866 § 6(b), “The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency’s regulatory actions . . . do not conflict with the policies or actions of another agency.”

<sup>101</sup> All of these factors are incorporated into the Principles of Regulation, Executive Order No, 12866, *supra*. note 4 § 1(b)(1-12). While it can be argued that all these factors should be incorporated in a good

This host of issues that may be raised in the course of OIRA review is described, with some frustration, to Bressman and Vandenberg by their former EPA PAS respondents. For example, it is relatively common for legal issues to be raised either by the OIRA analyst, OMB general counsel, White House offices, or counsel offices in other agencies. The sometimes byzantine complexity of many EPA statutes makes it difficult to avoid argument about what the law is actually requiring of the agency and what degree of discretion is given to the EPA Administrator.

Technical or scientific debates also arise. Bressman and Vandenberg quote an incredulous former EPA PAS as asking an OIRA analyst sarcastically, “When did [you] get a PhD in epidemiology? I must’ve missed that”<sup>102</sup>. My response would have been, “Where did you get yours?” The EPA PAS, in doing his or her job, was not serving as epidemiologist in charge, and, if doing a proper job, was questioning the staff expert to understand the science and apply it in to policymaking. The skill of an adept senior public servant, whether career or political, lies at least in part in being able to understand the logic of the arguments in technical and scientific disciplines and being able to apply them in a larger, policy, decision making

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benefit cost analysis, they often became a focus of their own, outside the confines of the agency’s formal RIA.

<sup>102</sup> Bressman & Vandenberg, *supra* note 4, at 97.

context. This includes the self-discipline of knowing the limits of your own knowledge and how to evaluate the experts' knowledge. Questioning the expert is the OIRA analyst's job and, as Deputy Administrator, my assumption was that no subject was off-limits to the OIRA staff with the sole exception of partisan or electoral politics. This understandably may have seemed presumptuous or arrogant to the expert being questioned, particularly if such questioning was not done with the appropriate respect for the expertise of others and humility for the difficulty of the task of interpreting specialists' expertise. Perhaps it was the absence of this civility that so irked the EPA respondent. If such was the case, the OIRA analyst was behaving improperly and unprofessionally. The impropriety, however, lay in the manner of the analyst's questioning, not the fact or substance of it.

My point in outlining these additional aspects of OIRA's regulatory review is to suggest that consideration of traditional benefits and costs, while an important component of regulatory review, is only part of the wide variety of factors that OIRA analysts must assess and, when issues arise, resolve during executive order review. These factors may dominate the review and, in any particular case, skew focus away from benefits or costs, or both.

In addition to the above description of the multi-faceted nature of regulatory review, some explanation is needed of several characteristics of the culture of OMB and its role in the White House that contribute to the understandable sense that OIRA is anti-regulation and cost obsessed. First, OMB, since it was created in 1970, has played the role on behalf of the president of institutional skeptic of agency programs and plans. Agencies approach the White House, as pointed out by respondents in the study, as appointees of the president with the strongly held belief that they are working to implement both their statutory missions and the president's policies. They seek White House approval, believing they have the president's best interests in mind, after lengthy internal development of proposals, and often after having consulted with the Hill and the affected public. From the point of view of those of us who were inside the EOP, however, each agency's officials represented only one among the host of missions for which the president is responsible. In order to obtain White House approval, for legislation, budget, or regulations, agencies made the best argument they could for why their choice was the best alternative to pursue within the statutory mandate. Because of the number and breadth of such proposals from across the executive branch, the president has needed a part of his staff to give a hard-nosed look at these proposals. Agencies are,

obviously, advocates of their proposed action. In addition, certain members of the White House staff tend to support the agency's work; in the case of EPA, a specific EOP agency has this function, CEQ. In my experience, OMB's job, regardless of administration and regardless of policy type (budget, legislation, regulations) was to thoroughly analyze agency proposals to offer a counterbalance to that advocacy. Agencies undoubtedly saw this as a lack of sympathy for their expertise and mission for the president. But presidents have continued to rely on OIRA to give them answers to the question: how does this proposal fit with others across the executive branch and how much does it cost?

The second reason why it is not surprising that OIRA might be seen as focusing on the cost side of the benefit cost equation is that OMB is primarily a budget organization. It has many responsibilities, including coordination and overseeing implementation throughout the executive branch of the president's policy agenda. But it does this by being institutionally concerned about how much public money the federal government is spending on its programs. The primary process managed by OMB, with this in mind, is the annual creation of the president's budget. The focal point for OMB, when developing the presidential budget between September and early February, is: how much money can be allocated to this

policy? Or, what are the benefits to the American public from the expenditure of this money?<sup>103</sup> This cost based evaluation strategy has been the primary institutional mission of OMB since the Bureau of the Budget was created in 1920. It is in this general context that OIRA conducts regulatory review.

Why this focus on costs? Theoretically at least, OMB could be an advocate for new programs instead of a cost skeptic. The general dynamic that creates this focus is relatively simple, at least from the view point of the OMB staff. The federal government is faced with the same essential constraint that all governments everywhere face: potentially limitless benefits, but decidedly limited resources. Faced with this inevitability, every president needs someone to carefully review the myriad proposals by agencies on his behalf, and ask how can we achieve the same end at less cost, and, sometimes, simply to say, No. OMB is that someone. Unless one wishes to argue that individual agencies, by themselves or in aggregate, request only what the nation can afford, or that in fact the nation's resources can accommodate the sum of individual agency wishes, then it

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<sup>103</sup> The Bush II Administration program assessment program, called the PART for the questionnaire used to help agencies and OMB evaluate program effectiveness, is designed to provide data on individual programs that can be used to help address this question. See the OMB Management website at <http://www.whitehouse.gov/omb/part/index.html>, which states: "The Program Assessment Rating Tool (PART) was developed to assess and improve program performance so that the Federal government can achieve better results. A PART review helps identify a program's strengths and weaknesses to inform funding and management decisions aimed at making the program more effective."

must be acknowledged that the president has limited national resources he must divide up among various needs. This is where, so to speak, the policy “rubber hits the road,” and it is one of the most difficult tasks for any presidency.

\_\_\_\_\_ OMB is the EOP institution whose primary responsibility is to help make these fundamental decisions. This happens quite explicitly in the budget process. An analogous regulatory budget process has been proposed in the past, for exactly the same reason – to allocate social resources that are going to be spent to achieve regulatory benefits. However, the concept is fraught with both theoretical and practical problems and has never advanced beyond the discussion phase.<sup>104</sup> The benefit cost approach is the process that has been accepted over the past twenty-six years as, among other things, a way to ensure that the benefits of regulations justify their costs.

A final comment about costs. Professors Bressman and Vandenberg equate OIRA’s interest in regulatory costs with “its own institutional bias in favor of business interests ....”<sup>105</sup> There is an important

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<sup>104</sup> See discussion of the concept of a regulatory budget in two consecutive issues of Executive Office of the President, Office of Management and Budget, Regulatory Program of the United States Government April 1, 1990 – March 31, 1991, 11-13 (1990); and Regulatory Program of the United States Government April 1, 1991 – March 31, 1992, 3-7 (1991). For a recent discussion of regulatory budget *see* D. Roderick Kiewiet, *The Regulatory Budget*, Paper to be delivered at the Conference on Fiscal Challenges: An Interdisciplinary Approach to Budget Policy, University of Southern California (Feb. 10–11, 2006).

<sup>105</sup> Bressman & Vandenberg, *supra*. note 4, at 97

distinction to be made here. OIRA's concern about the costs of regulation is often mistaken for political support for the business community. But the OIRA analyst reviewing an agency rule is not looking to support the business sector; nor is he or she looking to support any other constituency interested in the particular rulemaking. The analyst's interest is directed at maximizing net benefits by using the most rigorous analysis possible.

Although certain affected businesses may be beneficiaries of OIRA efforts to reduce costs, it is not the case that OIRA seeks to reduce costs in order to benefit those business interests. Furthermore, every OIRA analyst learns that "business" is hardly a monolithic interest group that uniformly opposes EPA and other agency regulation. In fact, individual businesses are happy to use regulation to either promote their own goods or services or burden their competitors. OIRA is a skeptical reviewer, particularly interested in costs but also in benefits, and in a number of additional factors as well. All are integral to the complex process by which the president meets his Constitutional duty to manage the executive branch.

#### **E. Transparency and Lines of Responsibility**



Transparency is like fairness. Everybody agrees there should be more of it. But the interested parties have much more trouble agreeing on exactly what would make things more appropriately fair, or more appropriately transparent. It is probably the case that no public policy decision can be identified that is not seen as unfair by some individuals, nor any change to that decision that would not be seen as unfair in the eyes of others. The same is true with transparency of government activities. Reasonable people realize that there are limits to transparency and they can have a reasonable discussion about where these limits should be. But exactly where those limits lie can also be a subject of intensely political debate. In the case of regulatory review, Bressman and Vandenberg, after evaluating the responses of former EPA PASs, argue that more transparency regarding OIRA and White House involvement in EPA rulemaking is necessary. I believe that expansion of the current disclosure requirements (beyond minor tinkering perhaps) is unnecessary and infeasible. The current OIRA disclosure requirements provide an already unusual degree of transparency into the EOP regulatory review process. Furthermore, I would argue that the basis for further White House disclosure advanced by Bressman and Vandenberg, derived from their former EPA PAS

respondents, is founded on a misconception of how presidential Administrations operate within the EOP.

Transparency and lines of responsibility and, in particular, disclosure of who in the White House is responsible for or contributes to regulatory policy decisions, play a central role in Bressman and Vandenberg’s argument regarding political accountability and responsiveness. They recognize that such transparency as docketing White House contacts with OIRA, other EOP staff, or EPA officials, or requiring the White House to comment formally on the record may “inhibit truly beneficial guidance that, for benign reasons, requires confidentiality”<sup>106</sup>

\_\_\_\_\_ Seeking to balance more transparency with an acknowledgement of limits to disclosure, Bressman and Vandenberg suggest that an appropriate degree of White House transparency may depend “on the willingness of the president to insist that non-OIRA White House offices voluntarily document their interactions with the EPA and with interest groups regarding EPA rulemaking”;<sup>107</sup> and on “whether White House policy advisors are willing or can be directed by the president to

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<sup>106</sup> Bressman & Vandenberg, *supra* note 4, at 92.

<sup>107</sup> *Id.*

submit to more media coverage.”<sup>108</sup> Nevertheless, Bressman and Vandenberg conclude that “White House involvement should be more transparent,”<sup>109</sup> noting that White House policy advisors, not the president himself, are the officials most frequently influencing agency decision-making. They observe that, “The multiplicity of voices through which presidential control speaks inhibits it from speaking authoritatively or effectively.”<sup>110</sup> They also argue that one of the advantages of presidential control is that it “promises more specific lines of responsibility.”<sup>111</sup> They conclude that

Transparency and responsiveness should be taken as entitling voters to understand the *actual basis* for agency decision-making and to evaluate whether such decision-making represents their interests. Thus, the public should have knowledge of precisely who among those clamoring for credit (including the agency) are responsible for particular policies.<sup>112</sup> [Emphasis added].

Katzen makes two major points in responding to these arguments. First, OIRA and other White House Offices are all operating on behalf of the president and, as she says, “we were all in it together.”<sup>113</sup> Second, she argues that accountability (and thus the need for transparency) rests not in the process of decision-making within the White House, but in

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<sup>108</sup> *Id.* at 93.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 94.

<sup>112</sup> *Id.*

<sup>113</sup> Katzen, *supra* note 15, at 1504.

the final decision itself, for which the president is ultimately responsible.<sup>114</sup> She then asks a cheerfully inflammatory rhetorical question, “Why then do [Bressman and Vandenberg] devote so much effort to trying to determine whether it is OIRA or the White House offices that are the true Wizard of Oz behind the curtain?”<sup>115</sup> Bressman and Vandenberg pounce on this metaphor, pointing out that it is not just one wizard, but many, “all vying for the controls while conveying the impression that it is the great and powerful unitary executive calling the shots.”<sup>116</sup> They go on to explain their concern that if the White House staff influencing agency action does not share the president’s philosophy and agenda, which they conclude from their interview data may be the case, then the unitary executive is not unitary and a set of unelected officials who disagree not only with the president but among themselves on policy is presiding over the federal government.<sup>117</sup> They state that the multiplicity of voices coming out of the White House leaves them wondering, “‘who is on top’ and ‘who has the ball’” and, in the vast majority of cases that do not reach the president or vice-president, “who is responsible for the final decision?”<sup>118</sup> They are concerned with the answer to this question because the unitary executive thesis depends, they argue, on

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<sup>114</sup> *Id.* at 1503

<sup>115</sup> *Id.*

<sup>116</sup> Bressman & Vandenberg, *supra*. note 21, at 1519-1520.

<sup>117</sup> *Id.* at 1520.

<sup>118</sup> *Id.* at 1521.

the notion that “the president’s advisors reflect presidential preferences, not their own preferences.”<sup>119</sup> They then offer the following advice to the president: “We believe the president should care who represents him because democracy is on the line. Thus, we believe that the president is obligated to set up a system for ensuring that his advisors are faithful agents.”<sup>120</sup> While acknowledging that this may be primarily an issue of presidential management of the White House,<sup>121</sup> Bressman and Vandenberg nevertheless conclude their response stating: “In sum, we believe that it matters who behind the curtain is pulling the levers . . . . We are unprepared to conclude without further information that EPA presidential appointees are less reflective of presidential preferences on environmental issues than any other official.”<sup>122</sup>

The Wizard of Oz metaphor is an unfortunate one to apply to presidential regulatory decision making. Rulemaking is not a yellow brick road, and the president is neither a colorful character in a contemporary fairy tale, nor is he behind a curtain. It surely cannot come as a surprise that he has a number of officials working for him in the EOP whose responsibility is to serve him in meeting his duties as president and managing his policy

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<sup>119</sup> *Id.* at 1523.

<sup>120</sup> *Id.* at 1521-1522.

<sup>121</sup> *Id.* at 1522.

<sup>122</sup> *Id.*

agenda, and who thus have significant decision making authority. Every head of a department or agency has the same assistance for the same reason. If an agency finds it difficult and frustrating to extract decisions from a dynamic White House, this does not mean that the president is not in control. It means that he chooses to give his White House staff significant authority to guide agency decision making on his behalf, and that those officials may disagree with one another on the appropriate course of action. While the process might appear more organized if all of the interested parties within the White House coordinated a single response to an agency proposal, a dialog among all interested parties within the White House and the agency is more efficient and effective. Bressman and Vandenberg may suggest that EPA presidential appointees best reflect presidential preferences; however, Presidents Reagan, Bush I, Clinton, and Bush II disagreed. All four of these presidents established systematic oversight of agency rulemaking by the White House, managed by OIRA, part of whose job was to ensure wide coordination across the EOP.

Finally, to those of us inside the EOP year after year, there was no mystery as to who was ultimately in control of the process. It was the president, and as interesting as it might be to know who said what to whom, when and why, these data would not lead to accountability. To the contrary,

they would confuse accountability by giving the appearance that staff members rather than the president were accountable. If the Chief of Staff, or head of the DPC or CEA, resolved a controversy between OIRA and the agency, they did so on behalf of the president and accountability remained with him. Presidents did care who represented them, and they organized their White Houses to ensure this. The White House itself is a large institution with a large staff. The president has every incentive to insist that this staff appropriately represents him. It is hard to see that public disclosure of who in the White House talked with EOP colleagues or EPA officials when, and about what, regarding EPA regulatory review, would have a salutary effect on improving White House staff integrity as representatives of the president. Within the EOP, staff members went to remarkable lengths to ensure that the accountability and the ultimate authority of the president were not diluted by his staff using authority without his consent. Ultimate responsibility always resided with the president himself. Thus, disclosure of internal White House communications would serve neither the public nor the presidency, and, consequently, is unlikely to be either adopted or seriously considered by any future administration.

I will now discuss at some length two issues related to transparency as it related to regulatory review and the OIRA and other EOP staff. First, the

current disclosure requirements prescribed by Executive Order No. 12,866 have long been in effect, have worked reasonably well, and have established a remarkably high level of transparency within EOP related to regulatory review. They need to be clearly explicated since any discussion of transparency must begin with an understanding of the current disclosure regime. Second, I will describe, based on my experience between 1981 and 2006, the daily decision making environment of different Administrations as it relates to regulatory review and transparency. In the reality of White House life, at least as I experienced it at OIRA over twenty-five years, searching for the “actual basis” for changes made during decision making is akin to a search for the philosopher’s stone. “Actual basis” is a concept that may exist in the abstract, but it does not exist in any meaningful way in the daily operations of the White House. Decision making is usually a process taking place over a period of time, rather than a single discrete action or moment in time. Many different officials might be involved in regulatory decision making, but they were always part of an effort to serve the president and to keep accountability where it belonged, with him.

### 1. Current Transparency Requirements



Transparency has an explicit focus in the regulatory review regime of Executive Order No. 12,866 that is underlined in the order's preamble. Among the many purposes of the order, one is "to make the [regulatory review] process more accessible and open to the public."<sup>123</sup> The "more" in this case refers specifically to criticism of White House regulatory review as conducted by Vice President Quayle's infamous Competitiveness Council,<sup>124</sup> which was terminated soon after the inauguration of President Clinton. It also refers to longstanding criticism of OIRA's regulatory review practices that had arisen with the implementation of President Reagan's Executive Order No. 12,291 in February 1981,<sup>125</sup> and that resulted in an agreement in 1986 between Congress and OIRA that the office would adhere to a set of disclosure practices.

The resulting transparency requirements were a set of self-imposed procedures instituted by then OIRA Administrator Wendy Gramm in a memorandum to heads of departments and agencies on June 13, 1986.<sup>126</sup>

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<sup>123</sup> Executive Order No. 12,866, *supra* note 44, Preamble.

<sup>124</sup> For an explanation of the role of the Competitiveness Council, *see* Office of Management and Budget *supra* note 55.

<sup>125</sup> A rich literature critical of the Executive Order No. 12,291 and OIRA regulatory review developed during the 1980's and early 1990's. For three early examples see Jonathan Lasch et al., *A Season of Spoils: The Reagan Administration's Attack on the Environment* (Pantheon Books, 1984); Erik D. Olson, *The Quiet Shift in Power Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 Va. J. Nat. Res. L 1 (1984); and Robert V. Percival, *Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget*, 17 *Envtl. L Rev.* 10,017 (1987).

<sup>126</sup> Wendy L. Gramm, *Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12291 and 12498 [Revised]*, Memorandum to Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498 (June 13, 1986), *reprinted in* Appendix III of Executive Office of the

These procedures outlined in detail then current OIRA disclosure and record keeping requirements and additional, new procedures. These Gramm procedures formed the basis for regulatory review transparency requirements when the Clinton Administration drafted Executive Order No. 12,866 in September 1993. In the order, disclosure requirements are clearly spelled out for both the agencies<sup>127</sup> and OIRA.<sup>128</sup>

Katzen enforced these disclosure procedures vigorously during her tenure as OIRA Administrator. In a report on the first six months' implementation of Executive Order No. 12,866, she noted that she was "making available a daily list of draft agency regulations under review at OIRA," as well as a variety of other lists, logs, and statistics designed to make OIRA review more transparent.<sup>129</sup> Although Bressman and Vandenberg's study ends with the Clinton Administration, it bears noting that John D. Graham, OIRA Administrator from 2001 to 2006 during Bush

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President, Office of Management and Budget, *The Regulatory Program of the United States Government April 1, 1988 – March 30, 1989* 529-531 (1988). The Gramm procedures had been preceded by an earlier set of disclosure provisions instituted between OIRA and EPA. See Robert P. Bedell, *Memorandum for OIRA Staff: Subject: OIRA Procedures # 3* (May 30, 1985) reprinted in Executive Office of the President, Office of Management and Budget, *The Regulatory Program of the United States Government April 1, 1988 – April 1, 1989* 537-539 (1988).

<sup>127</sup> Executive Order No. 12,866, *supra* note 44, § 6(a)(3)(E).

<sup>128</sup> *Id.* § 6(b)(4).

<sup>129</sup> Office of Management and Budget, *supra* note 51 at 24,285.

II, adopted with equal enthusiasm, and expanded, the OIRA disclosure practices that were in effect at the beginning of his tenure.<sup>130</sup>

A significant part of my job as the Deputy for Administrators Katzen and Graham was ensuring compliance with the Executive Order No. 12,866 disclosure requirements by the OIRA staff. The OIRA staff was well aware of the procedures, and we all took them seriously. These provisions were extensive; specifically, they established limits on communications by OIRA with outsiders and required disclosure of materials related to regulatory review. Here are the basics of the disclosure regime:<sup>131</sup>

#### Regulatory Review Information Available

- An OIRA website provides information about regulatory reviews:<sup>132</sup>  
<<http://www.whitehouse.gov/omb/inforeg/regpol.html>>
- The website makes available identifying information on all rules under review at OIRA, beginning the day they are logged in at OIRA. The list is updated daily, and includes all rules on which review has been concluded within the past 30 days.

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<sup>130</sup> On October 18, 2001, Administrator Graham issued a memorandum to OIRA staff outlining his expectations regarding transparency and reaffirming its importance for the new administration. He was adamant about strict adherence to OIRA disclosure procedures: “As I have described for you on several occasions, I believe that the transparency of OIRA’s regulatory review process is critical to our ability to improve the nation’s regulatory system. Only if it is clear how the OMB review process works and what it does will Congress and the public understand our role and the reasons behind our decisions . . . .”

John D. Graham, *supra* note 82.

<sup>131</sup> See Executive Order No. 12,866, *supra* note 44, § 6(b)(4). See also an explanation of these procedures by OIRA Administrator John D. Graham at *supra* note 82.

<sup>132</sup> In addition, the OMB website includes hyperlinks to the Regulatory Information Service Center (RISC), where interested parties can find information on individual rules in the Unified Agenda and Regulatory Plan. See General Services Administration, *supra* note 35. A more recent electronic development is a function that permits the public not only to locate all Federal rules open for public comment, but to submit comments to them electronically. See [www.regulations.gov](http://www.regulations.gov).

- An electronic archive makes historical, summary, and statistical information available about rules reviewed from the beginning of OIRA regulatory review in 1981 to the present.
- All letters returning rules to an agency for reconsideration; and all prompt and post-review letters to agencies are available electronically.
- OIRA policies and procedures, as well as testimony and speeches by the OIRA Administrator are available.

#### Contacts With Outsiders During Review

- Only the OIRA Administrator or a specified designee (in practice, usually the Deputy Administrator or a Branch Chief) may talk to or meet with parties outside the executive branch concerning rules under review.
- OIRA keeps an up-to-date log of all meetings with outside parties (including with members of Congress or their staffs) indicating the date and subject of the meeting and all the participants. OIRA also keeps a log and makes copies available of any material exchanged during such meetings.
- OIRA discloses meetings with outsiders and makes public correspondence received from outsiders when a rule is under “informal” review.
- OIRA makes available copies of substantive communications with parties outside the Executive Branch regarding rules under review. These include telephone calls and incoming correspondence and other documents.
- OIRA makes the relevant regulatory agency aware of these communications by invitations to meetings, logs of communications, or copies of correspondence submitted to OIRA by outside parties.

#### Post-publication Availability Review Materials

- OIRA makes certain materials available after the publication of a rule that has been reviewed. Upon request, OIRA will provide:
  - the draft regulation as originally submitted;
  - any agency analyses (e.g. a Regulatory Impact Analysis not published with rule) and other material submitted by the agency during the review;

- correspondence between OIRA and the agency (at the branch chief level or above) exchanged during the review;
- Any correspondence or other materials received from outside parties during review.

The Executive Order also outlines disclosure procedures applicable to agencies regarding regulatory review. After publication of a rule in the *Federal Register*, the agency shall:

- Make available the materials submitted to OMB for review;
- Identify clearly “the substantive changes between the draft submitted to OIRA for review and the action subsequently announced”;
- Identify “those changes in the regulatory actions that were made at the suggestion or recommendation of OIRA.”<sup>133</sup>

These transparency requirements provide strong restrictions on OIRA’s communications with outside parties, and a wealth of information about regulatory review. Perhaps the most significant provision of the disclosure procedures is the requirement that OIRA make available “all documents exchanged between OIRA and the agency during review.”<sup>134</sup>

This provision is important because, unlike the others, it requires disclosure of internal EOP materials that would otherwise be considered deliberative and would likely be withheld under exemption (b)(5) if requested under the Freedom of Information Act. This provision permits a remarkable, public

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<sup>133</sup> Executive Order No. 12,866, *supra* note 44, § 6(a)(3)(E).

<sup>134</sup> *Id.* § 6(b)(4)(D).

view into a presidential review process. In particular, the draft rule submitted to OIRA for review and the version of the draft cleared by OIRA for publication are available to anyone who wishes to compare them. Comparison of the two drafts (particularly easy with modern word processing software) shows in bold relief exactly what modifications resulted from review. Viewers can examine every change and make their own judgments about the significance of the modifications, and thus the role played by the EOP in the development of the rule.

#### Why Require OIRA Disclosure?

The disclosure requirements described above are extraordinary procedures for the White House to levy and enforce upon itself. No other office in either OMB or EOP voluntarily provides a public view of its internal, deliberative processes. OMB's budget divisions do not make public the draft budgets submitted by agencies each fall; nor do draft legislative proposals become public after they have been subject to agency-wide legislative coordination by OMB. Other EOP offices do not keep public logs listing those outside the executive branch with whom they meet or talk; and they certainly do not log discussions they have with others in EOP. The question arises then, why are such procedures thought to be appropriate for OIRA's regulatory review? What is so different about this

particular EOP function? A short digression to address this question will help clarify the history and role of transparency in the White House environment as they relate to regulatory review.

The historical explanation for regulatory review disclosure lies in battles over OIRA's very existence in the mid-1980's. President Reagan's Executive Order Nos. 12,291 and 12,498 stimulated a vigorous response from Congress, which saw in presidential regulatory review, among other things, a process giving inappropriate influence to the business community, a review process with no deadlines for OIRA, and a process that appeared to intrude upon authority given by statute to agency heads.<sup>135</sup> The argument came to a head in 1986, after Congress had refused to reauthorize the Paperwork Reduction Act (which created OIRA), and then threatened to "defund" OIRA.<sup>136</sup> This stalemate was eventually settled, at least in part, by the promise of disclosure procedures that would permit Congress and the public to see what was happening inside what had come to be referred to as the OIRA "black box."

The historical answer to the question, why disclosure procedures for OIRA is, thus, that disclosure was the price to pay for appropriations. But

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<sup>135</sup> See Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 *Law and Contemp Problems* 127, 151-152 (Autumn 1991).

<sup>136</sup> For a discussion of this aspect of OIRA's history see Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 *Law and Contemporary Problems* 39-40 (Spring 1994). See also Percival, *supra* note 135, at 154.

this is not a satisfactory answer. The question still remains, why was disclosure, and voluntary disclosure by OIRA at that, a successful compromise? And why has it been more or less accepted by post-Reagan Congresses and presidents? The answer, I believe, lies in the fact that, after the conclusion of OIRA review, the rule does not make a trip through Congress. Herein lies the difference between regulations and other major OMB policy making processes. When the president's budget is being fashioned by the agencies and OMB in the fall of each year, important policy decisions are made that affect the disposition of billions of dollars. But no Executive Branch budget decision is final until it has been incorporated by Congress into appropriations law. The same is obviously true of any legislative initiative desired by the Executive Branch. But it is not true of regulatory decision making, which makes this policy making process significantly different from others. The current level of transparency is a means of restoring a measure of balance between the legislature and the executive that has been grudgingly accepted by Congress and the president since 1993. At least in the exercise of the discretionary authority granted by Congress to the executive, regulatory review disclosure opens the process enough for others to keep a careful eye on EOP influence without unduly interfering with necessary deliberative privilege within the EOP.



On the other hand, OIRA is not so different from other OMB or EOP offices that protection of deliberative candor is unnecessary.

Recommendations for the expansion of the Executive Order No. 12,866 disclosure procedures have been vigorously contested by OIRA

Administrators and both Clinton and Bush II White Houses. Although my view is hardly that of an uninterested outsider, my experience developing, defending, and implementing these procedures across twenty-five years leads me to believe that the current system has the balance about right.

The disclosure procedures have served a useful function by making the effects of OIRA review public. But, by limiting disclosure of both intra-OIRA and OIRA-agency staff communications, they have served to protect the ability of OIRA's civil servants to provide frank analytic advice to White House officials. The OMB/OIRA career staff is the only body of policy professionals in the EOP complex who can provide analytically based advice to the White House political appointees that is designed to serve the president, but which carries with it the experience of previous administrations. This is an extraordinary role, and it is hard to convey to those who have not been in this position just how difficult a role it is to fulfill. This responsibility includes providing (and knowing how to provide) EOP policy makers with information and recommendations that they may

not want to hear. In order to serve an administration, and its successors, OMB's civil servants must have the freedom to be, at times, brutally candid. This is a necessary and difficult job, and is possible only if (1) the career analysts do not take their analysis and advice outside of the EOP; and (2) the outside is not invited in to look at their analysis and advice, even after the fact. Under the klieg-light scrutiny that is applied to White House matters, OIRA staff communications with agency staff and EOP officials on rules would become part of the political battles that rage over virtually every document and pronouncement issued by the White House. Disclosure of internal career staff interchanges would place the career analysts' work in the same political arena as all the other public, policy-related material associated with the White House. The function and value of an internal group of analysts would be lost. In short, the current disclosure requirements provide much information about regulatory review, including the unusual public view of the changes made during review, all of which provides the public with the information to oversee OIRA's work. At the same time, the limits on disclosure for both career and political EOP staff regarding agency rulemaking make it possible for the OIRA career staff to function in a manner that serves the president, and the presidency.

## 2. White House Operations and Transparency

Even if disclosure of internal White House communications related to regulatory review was deemed to be necessary, such transparency would be virtually impossible to institute because of the manner in which information and influence flows within the EOP. White Houses can always be better managed in a way that more efficiently develops White House policy and more clearly communicates it to agencies. But in my experience over seven terms with four presidents as I have noted above, I found White Houses, in spite of their best efforts, to be untidy places. No matter how organizationally efficient a White House desires to be, the enormity of its responsibilities requires a variety of presidential advisors assigned wide ranging, overlapping responsibilities across the presidential policy making arena. In addition, these officials operate in an always intense and often frenzied atmosphere. Every president constructs an internal structure to coordinate policy making and to control the overwhelming tide of people, policies, and problems that flood into the White House every day. All are, at best, only partially successful. The cacophony of advocates' voices, Congressional demands, emergencies, and the voracious needs of the media constantly wreak havoc on schedules, planning, and agendas. In this atmosphere, in order for issues to be carefully vetted within the EOP, a

relatively large number of presidential aides and experts and some redundancy of systems are necessary to organize and handle the tide of information, questions, demands, and issues that inundate the White House. All these must be pulled into a system where they cannot easily escape without scrutiny.

The OIRA analyst's job conducting regulatory review involves coordinating that review among other OIRA and OMB officials, numerous White House offices, and officials from other federal agencies. Particularly in the case of EPA rules, internal EOP coordination includes CEQ staff and perhaps DPC, NEC, OSTP, CEA, and OVP staff as well. Depending on the issue, other White House offices may participate: the Chief of Staff, Legislative Affairs, Communications, and White House Counsel, for example. Some of these individuals serve as consultants regarding particular aspects of the rule - WHC for legal issues; Leg Affairs for congressional relations; CEA for macro economics; OSTP for science issues. Others, senior members of White House councils or the Vice President's staff, for example, might serve as adjudicators.

Just as important is coordination of review, particularly for EPA rules, among other federal agencies. This brings into the review additional, strongly held points of view. For example, officials from DOE, DOT,

USDA, and DOI often participate in reviews of EPA rules. These officials are highly protective of their statutory missions and sensitive to any conflict between their mandates and policies and those of EPA. Negotiating resolution to these interagency conflicts is one of OIRA's primary functions.

Many, if not most, arguments associated with regulatory review are resolved at the OIRA and EPA staff level. But with almost every major EPA rule, some intractable arguments inevitably arise, resolution of which involves consultation and negotiation among OIRA, White House offices, and policy officials from other agencies. As conflicts arise in specific cases, issues work their way from high level EOP officials to even higher level officials, the heads of the policy councils or the chief of staff, for example. Although Executive Order No. 12,866 provides a mechanism for formal appeal and resolution of issues,<sup>137</sup> these processes are virtually never used. Instead, White Houses construct a more informal means of resolving disputes.<sup>138</sup>

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<sup>137</sup> Exec. Order No. 12,866, *supra* note 44 § 7 as modified by Exec. Order No. 13,258 Amending Executive Order 12866 on Regulatory Planning and Review § 12(a), 67 Federal Register 9385 (February 26, 2002) (providing that disputes among agency heads or between an agency and OMB that cannot be resolved by the OIRA Administrator shall be "resolved by the President, with the assistance of the Chief of Staff to the President.")

<sup>138</sup> In a recent dispute between EPA and OIRA regarding review of a draft Ozone rule, the section 7 procedures of Executive Order No. 12,866 were used, to my knowledge, for the first time. See Susan E. Dudley, OIRA Administrator, Letter to Honorable Steven L. Johnson (March 12, 2008), *available at* [http://www.reginfo.gov/public/postreview/Steve\\_Johnson\\_Letter\\_on\\_NAAQs\\_final\\_3-13-08\\_2.pdf](http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf).

It is this apparent disorder that the EPA respondents saw and reported to Bressman and Vandenberg, and from which they drew their conclusions about presidential control. What is particularly difficult from the agency point of view is that the process described above goes on while discussion and negotiations continue with the agencies' staff and officials about a rule under review. Thus, they experienced a White House in a state of active deliberation rather than a deliberative body speaking with a stately, measured, judicial voice. Within EOP, officials might be at odds over policy matters; they might be engaged but have other more pressing issues to deal with; they might be talking to different officials at EPA who may also disagree with one another and be hoping that their White House contact could help their policy preference advance. Presidents may manage this process more or less effectively, but in my experience, some version of dynamic deliberation took place in the White House regardless of who was the president.

A related point is that presidents and upper level White House officials were used to seeing agency managers confused and unhappy. Though particular agency officials may feel that they are being held hostage by a group of unresponsive and distracted White House staff, these EOP officials are faced, day in and day out, with an onslaught of agency demands

for attention, in addition to demands from Congress, the media, state, local, and tribal governments, and the public in all its protean forms. The needs of everyone who petitions the White House, from their points of view, are of crucial importance and demand immediate attention. In this atmosphere, familiar to anyone who has worked in the White House for any length of time, officials simply became accustomed to and tolerant of a higher degree of stress and disorder than those suing for attention. While uncertainty and disorder are not generally seen as characteristic of a well managed enterprise, they are nonetheless part of the environment in which all White Houses operate.

What can we reasonably conclude about transparency in this White House environment? First, the recommendations for more transparency focus on the regulatory review relationship between EOP and agencies. However, it is difficult to conceive of a convincing logic for why, if the White House is agreeing to disclose internal and external conversations regarding rulemaking, it should not disclose internal and external communications regarding other important policy issues and processes. Thus, EOP transparency recommendations focused on regulatory review have far broader implications for the White House than regulatory review alone.

Second, in the fast-paced decision making environment of the White House, keeping track of who said what to whom, and when, about a rule would be virtually impossible. If it were to be attempted, I do not see how it could be an accurate record. Administrator Katzen made this point during Congressional testimony discussing why attributing specific changes in agency draft rules to OIRA was impractical and counterproductive:

The informal exchange and interplay of ideas and suggestions in which we and agencies engage does not lend itself to a formal presentation of arguments, counter-arguments, rebuttal, and sur-rebuttal - - with each position locked up and labeled as to source and authority.<sup>139</sup>

The implementation history of the Executive Order No. 12,866 provision that requires that agencies note changes made at the “suggestion or recommendation of OIRA,”<sup>140</sup> reveals the problematic nature of attribution of modifications made during regulatory review. The difficulty of such attribution applied only to OIRA staff gives a sense of the difficulty applying an attribution provision, as recommended by Bressman and Vandenberg, to all of EOP. Within the first few months of the Order, Administrator Katzen expressed her skepticism of the utility of this provision. Her argument was simply that it was a provision that, for all

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<sup>139</sup> *Office of Information and Regulatory Affairs and Its Implementation of Executive Order No. 12866, Regulatory Planning and Review: Hearing Before the Committee on Governmental Affairs: Subcommittee on Financial Management and Accountability*, 104<sup>th</sup> Cong. (1996)(testimony of Sally Katzen, Administrator Office of Information and Regulatory Affairs 5 (September 25, 1996).

<sup>140</sup> Executive Order No. 12,866, *supra* note 44 § 6(a)(3)(E)(iii).



practical purposes in the day to day work of regulatory review, could not be addressed with any certainty. In a report to the president in May 1994 she stated:

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....After an extended process, it is not clear that identifying changes made at the suggestion of OIRA is accurate (if the only choice is OIRA suggestions or agency proposals) or meaningful (if OIRA suggestions are only those suggestions originating at OIRA rather than at another agency.<sup>141</sup> [59FR24289, May 10, 1994]

In this statement, Katzen notes the involvement of other EOP offices and other agencies in regulatory review, and points out that in the iterative, non-hierarchical manner in which review takes place, trying to attribute OIRA ownership to changes made during regulatory review is not realistic.

Finally, I can testify that part of my job for ten years as OIRA's deputy administrator was to ensure that the OIRA staff was serving the president, as defined by the OIRA Administrator, the OMB Director, and the Vice President or Chief of Staff. I described above in the section on OIRA staff, how sensitive we were to earning and maintaining the trust of the White House. To do this, we communicated with EOP officials frequently, as they did with us. In this way, we ensured that we were moving in a

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<sup>141</sup> Office of Management and Budget, *supra* note 51, at 24,289.

direction or taking a position that supported the president's agenda. My experience was that the White House officials with whom we worked were highly sensitive to this same proscription – that we all served the president. This did not mean that we did not argue with White House officials or that they did not argue with one another. But it did mean that we believed ourselves (and received confirmation from White House officials and occasionally the president himself) to be making decisions on behalf of the president in the service of his program. In sum, the description of White House regulatory decision making behavior that Bressman and Vandenberg's respondents relate was to a large extent accurate. But its meaning was not indicative of the absence of presidential control or accountability and thus leaves little rationale for an extended, internal White House disclosure.

## **CONCLUSION**

Bressman and Vandenberg provide an important addition to the scholarship of presidential regulatory review. I believe their conclusions are misdirected. Nevertheless, they have ventured where few before them

have gone – that is, in a rigorous and methodical way, back to persons with ground level experience in the regulatory review process. In this study, the conclusions are constrained in their general applicability by the limitations of the study’s data source. My contribution here is as one member of the group at the center of regulatory review. My own thoughts are certainly subject to the same need for further empirical corroboration as those of Bressman and Vandenberg’s EPA respondents.

As Professors Bressman and Vandenberg note, there exists a potentially rich field of data about centralized review through a systematic collection of data from participants in the process. I join them in hoping that others will expand this avenue of inquiry. Any study of agency experience with OIRA and regulatory review would benefit tremendously from, first, the addition of the views of political appointees from other agencies. Scores of agencies have been subject to regulatory review over the past twenty-seven years, for example, other sub-agencies in HHS and DOL (besides FDA and OSHA, respectively); and the many regulatory sub-agencies in the Departments of Agriculture, Commerce, Homeland Security, Transportation, Interior, Housing and Urban Development, and Energy. The views of White House political appointees would also be essential to a complete view of regulatory review, in the case of EPA regulations, for example, former

officials from CEQ, DPC, NEC, OSTP, and CEA. Also important to a view of White House involvement in EPA or other agency regulations would be the Office of the Vice President and the Chief of Staff's Office. In addition, for such study it would be critical to include the views of senior agency career staff. It is these public servants who, like the OIRA career staff, experience regulatory review across the tenures of departmental and agency heads, political staff, and presidents and their administrations, and who would thus be able to speak to longer term practices of regulatory review, including changes over time and between administrations. Many of these senior career civil servants have served their agencies across multiple presidential terms. Finally, a systematic view from the regulatory review "horse's mouth," the OIRA career staff, is an obvious source of future data for a more rounded picture of regulatory review.<sup>142</sup> The systematic collection of the experience of others with involvement in regulatory oversight, for example, congressional staff and interest group representatives, would also help develop a more complete and accurate picture of this complex aspect of modern American governance.

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<sup>142</sup> William West analyzes OIRA based in part on interviews with sixteen former and then-present OIRA staff and four officials from line agencies, see William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 *Presidential Studies Quarterly* 76-93 (March 2005).

## ACRONYMS

Acronyms are the source of jokes and scorn; held by many as examples of how far out of touch with its citizens the government has become, that it can only speak in an indecipherable alphabet soup. Nevertheless, acronyms are part of any discussion of the federal government's organization and processes, and in some cases are more familiar to the public than the names they represent. Below is a list of the acronyms used in this essay.

ANPRM	Advance Notice of Proposed Rulemaking
APA	Administrative Procedure Act
CEA	Council of Economic Advisors
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
COS	Chief of Staff
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DPC	Domestic Policy Council
ED	Department of Education
EEOB	Eisenhower Executive Office Building
EOP	Executive Office of the President
EPA	Environmental Protection Agency
FDA	Food and Drug Administration
FOIA	Freedom of Information Act
FR	Federal Register

FR	Final Rule
GAO	Government Accountability Office (formerly General Accounting Office)
GSA	General Services Administration
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
NEC	National Economic Council
NEOB	New Executive Office Building
NPRM	Notice of Proposed Rulemaking
NSC	National Security Council
OHS	Office of Homeland Security
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
ONDCP	Office of National Drug Control Policy
OSHA	Occupation Safety and Health Administration
OSTP	Office of Science and Technology Policy
OVP	Office of the Vice President
PAS –	A presidentially appointed, Senate confirmed executive branch official
Reg Flex	Regulatory Flexibility Act
RISC	Regulatory Information and Service Center
SBA	Small Business Administration
SNPRM	Supplemental Notice of Proposed Rulemaking
State	Department of State
Treas	Department of the Treasury
USDA	Department of Agriculture
VA	Department of Veterans Affairs
WH	White House
WHC	White House Counsel

