

# Presidential Rulemaking: An Empirical Analysis

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### **Abstract**

This paper uncovers the determinants of presidential intervention in agency rulemaking by analyzing a novel data set consisting of all economically significant rules that the Office of Information and Regulatory Affairs (OIRA), a unit in the Office of Management and Budget (OMB), reviewed between 1981 and 2008. I find that the president's incentives to control agency rulemaking are not constant: the probability of presidential intervention in rulemaking significantly increases with the president's time in office. I also find that OIRA review is a truly presidential instrument of control in the sense that it is put to use by all presidents, regardless of their partisanship. This empirical analysis has implications for understanding the politics of controlling the bureaucracy and the politics of the administrative state.

## Introduction

The rise of the administrative state, in which unelected bureaucrats routinely make policy choices, fits uncomfortably with the democratic presumption that policy choices must reflect the interests and desires of ordinary citizens. This tension between bureaucracy and democracy has lead scholars to explore how, and whether, public officials -the president, members of Congress, and judges-control bureaucratic decision-making (Moe 1982; McCubbins, Noll, and Weingast 1987; Epstein and O'Halloran 1999; Canes-Wrone 2003; Shipan 2004; Stephenson 2008; Wiseman 2009; Shotts and Wiseman 2010).<sup>1</sup>

This research has documented extensively that elected officials possess a variety of instruments to control, or at least shape, bureaucratic discretion. To this end, presidents have exerted considerable effort to influence administrative rulemaking, the process by which bureaucratic agencies adopt rules implementing the details of congressional statutes. Since Ronald Reagan issued Executive Order 12,291 in 1981, every president has required executive agencies to send their regulations for centralized presidential review to the Office of Information and Regulatory Affairs (OIRA), a unit in the Office of Management and Budget (OMB). OIRA reviews regulations to determine if they are consistent with the president's policies and if their expected costs exceed their expected benefits. If a rule fails on these criteria, OIRA can ask an agency to change the rule and the agency cannot publish the rule in the Federal Register until the agency makes the required changes.

Legal scholars have heatedly debated the effects of centralized presidential review on agency rulemaking and its role in improving the efficiency and accountability of the administrative state (Olson 1984; Percival 1991; Lessig and Sunstein 1994; Pildes and Sunstein 1995; Kagan 2001; Croley 2003; Bagley and Revesz 2006; Bressman and Vandenberg 2006). Political scientists have also emphasized the importance of centralized presidential review, mostly within the context of debating whether the Presidency or Congress has the upper hand in controlling the bureaucracy (West 1988; Moe and Wilson 1994).

All of these discussions have been speculative, and rest on explicit or implicit empirical assumptions about the incentives of the president to control agency rulemaking. Despite the importance that a variety of scholars attribute to presidential review of rulemaking, a rigorous empirical analysis to identify the determinants of presidential intervention in rulemaking is missing. Only when this task is completed can scholars adequately begin to assess and adjudicate among various normative and positive arguments about the effects of presidential review on administrative rulemaking. Also, basic empirical facts about the determinants of presidential intervention in administrative rulemaking are a necessary first step for future theoretical work on presidential control of administrative rulemaking.

In this paper, I provide a large-sample empirical analysis of presidential review of agency rulemaking. The analysis uses a novel data set consisting of all economically significant rules that OIRA reviewed between 1981 and 2008. It reveals some interesting and previously uncovered empirical

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<sup>1</sup>The literature on political control is extensive. The above citations represent only some of the works in this field.

findings that can increase our insights about the processes of rulemaking and regulatory review. I find that the president's incentives to control agency rulemaking are not constant. The probability of presidential intervention in rulemaking significantly increases with the president's time in office; the average probability of presidential intervention increases by 23% for a president in the eighth year of his administration as compared to the first year of his administration. This empirical finding is robust and holds across multiple specifications.

I also find OIRA review to be a truly presidential instrument of control in the sense that it is not solely a tool of Republican presidents trying to counter a regulatory-friendly bureaucracy, but, rather, is used by Democrat and Republican presidents alike, albeit for different purposes. The empirical estimation shows that there are no systematic differences in the level of OIRA intervention in rulemaking during the tenure of Republican presidents as compared to Democratic: the average probability of OIRA intervention is higher in the Clinton administration as compared to either the Reagan administration or the George H.W. Bush administration. On the other hand, the analysis shows systematic differences between the Republican and Clinton administrations in the type of intervention: OIRA is more likely to block rules during the tenure of Republican administrations compared to the Clinton administration.

The paper continues as follows. Section 1 discusses some of the debates that centralized presidential review has ignited. Section 2 describes the data set. Section 3 discusses the estimation strategy and presents the empirical findings, followed by additional robustness checks in Section 4. Finally, I discuss the implications of the findings for theoretical discussions concerning the functioning of the administrative state and the design of judicial doctrines for reviewing agency rulemaking.

## 1 Presidential Control of Rulemaking

President Reagan established the institution of centralized presidential review of rulemaking. In his first months in office, he issued Executive Order 12,291, which required executive agencies to submit their regulations for centralized presidential review to OIRA. If OIRA did not clear the rule, the agency could not publish it in the Federal Register. In 1984, President Reagan followed up on his early effort and issued Executive Order 12,994, which mandated agencies to send an annual regulatory plan to OMB. The executive order gave OMB increased control over regulatory agenda-setting; if a rule was not listed on the annual agenda, the rule could not be considered for OIRA review (and, implicitly, on publication in the Federal Register) for that calendar year. President George H.W. Bush retained President Reagan's executive orders but assigned responsibility for overseeing OIRA work to a new body, the Council of Competitiveness, chaired by Vice-president Dan Quayle.

In 1993, President Clinton replaced Executive Order 12,291 with Executive Order 12,866. The new executive order retained OIRA as central reviewer of agency rulemaking but reduced the scope of centralized review from all rules under Executive Order 12,291 (approximately 2,000 a year)

to significant regulatory actions (approximately 500-600 a year) under the new order. President George W. Bush retained Executive Order 12,866 for most of his time in office. In 2007, President Bush issued Executive Order 13,422, which expanded the scope of centralized presidential oversight by including agency guidance documents along with rulemaking.<sup>2</sup>

Numerous works have documented the process of centralized presidential review and its various aspects (Lubbers 1998; Kerwin 2003; Wiseman 2009). I do not summarize their details here, but only note that, while different presidents have slightly altered the OIRA review processes with different executive orders, the core missions of the office have remained effectively unchanged since the Reagan era. Since 1981, OIRA has had two responsibilities: 1) to ensure that agencies base their regulatory decisions on a cost-benefit analysis and 2) to check that regulations are consistent with the president's agenda.

Both of these missions have generated important discussions. For more than two decades, scholars have raised questions about the role of cost-benefit analysis in reviewing regulations. Some Reagan-era critics of OIRA review argued that, because of its institutional focus on costs-benefit analysis, OIRA review is not a neutral tool for accurately assessing regulations, but rather a conservative institution used by Republican presidents to curb the regulatory state (Olson 1984; Percival 1991). On a related note, scholars have also pointed to the structural effects of presidential oversight on agency rulemaking (Bagley and Revesz 2006; Driesen 2006). In this view, the very existence of presidential oversight slows or even deters the rulemaking process because agencies have to pass one more important hurdle before they can publish their rules in the Federal Register (Farina 1998). And increasing the analytical requirements for regulations has a similar deterring effect on the agencies' rulemaking efforts (Bagley and Revesz 2006).

The politics of the Reagan-Bush period also illustrates this association of OIRA review with a conservative agenda. In the mid 80s, congressional Democrats were worried that Republican presidents used OIRA review to curb the regulatory state. Acting on these concerns, congressional Democrats threatened to terminate OIRA's funding and refused to confirm a politically appointed agency director during the Bush Administration (Friedman 1995). Political opposition to presidential review abated after Bill Clinton adopted Executive Order 12,866, an order in which he endorsed both the process of OIRA review and the requirement of cost-benefit analysis of regulations. As both Republican and Democratic presidents have affirmed the role of OIRA in overseeing agency rulemaking, "centralized presidential regulatory review has now taken center stage as an institutionalized part of the modern American presidency."<sup>3</sup>

This institutionalization of presidential review focuses the scholarly discussion on the role of the OIRA review in improving the accountability of agency rulemaking and the quality of regulations. Although not without critics, the dominant perspective is that centralized presidential oversight is a positive development (Pildes and Sunstein 1995; Kagan 2001; Croley 2003). The premise of this argument is that the president is situated, institutionally speaking, in the best position to oversee

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<sup>2</sup>Guidance documents are informal policy documents that do not have the force of law (like regulations), but reveal how an agency will interpret and enforce statutory or regulatory provisions.

<sup>3</sup>Blumstein 2001.

the rulemaking process. The president is the only elected official by a national constituency and, therefore, accountable to a national constituency. If bureaucratic agencies are responsive to the president and, in turn, the president is responsive to a majority of the citizens, we can establish a direct accountability connection between agency rulemaking and the citizenry.<sup>4</sup>

The president is also in a better institutional position to manage regulatory externalities and to coordinate the rulemaking process, therefore improving the quality of regulations (DeMuth and Ginsburgh 1986). Regulations issued by one agency can substantially affect the regulations that fall within the jurisdiction of a different agency. For example, authority over the production, use, and transportation of hazardous chemicals is divided among the Environmental Protection Agency, the Food and Drug Administration, the Federal Aviation Administration, the Department of Transportation, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission. Centralized presidential review can serve a good-government function, because OIRA is uniquely situated to identify rules from one agency that either work at cross-purposes to, or are redundant with, rules of another agency.

The above discussions, however, rest on certain implicit or explicit empirical assumptions about the president's incentives (across and within presidential administrations) to control agency rule-making. We still don't know whether or not OIRA intervenes more in rulemaking during the tenure of Republican presidents. And we don't know when the president is more or less likely to intervene in rulemaking. Whether presidential review can improve the accountability and the quality of the rulemaking process is a normative discussion, but to carry this debate we need to know if and when the president has the incentives to intervene in rulemaking; that is, we need to know something about the president's incentives (across and within presidential administrations) to intervene in rulemaking.

## 2 Data and Measurement

To estimate the determinants of presidential intervention in rulemaking, I use an original data set consisting of all economically significant regulations that OIRA reviewed between 1981 and 2008. The data consist of 2,322 rules from 34 executive agencies.<sup>5</sup> There are two reasons for using the sample of the economically significant regulations. First, the definition of an economically significant rule and the criteria for reviewing such rules have remained constant since the initiation of centralized presidential review. The agencies have to accompany an economically significant rule (but not other rules) with a cost-benefit analysis and a regulatory impact analysis, or a cost effectiveness analysis. The regulatory impact analysis must identify several regulatory alternatives, their estimated costs and benefits, and a justification for why a certain regulatory alternative is preferred over others. Second, and more importantly, the president's attention is almost exclusively

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<sup>4</sup>On these accounts, the president appears to be in a better situation to solve the accountability problem of the administrative state than other individuals or institutions (including interest groups, congressional committees, and the agencies themselves) with far less direct connection to national majoritarian preferences.

<sup>5</sup>Regulations issued by independent agencies are not subject to OIRA review.

focused on economically significant regulations (Bressman and Vandenberg 2006) because these rules produce most of the costs associated with federal regulations (OMB 2004).

The source of these data is the Regulatory Information Services Center (RISC). RISC maintains, on behalf of OIRA, a computer log for the rules reviewed by OIRA since 1981. The RISC information for each rule review is sparse, but contains a crucial item: whether OIRA had or had not intervened in a rule review. For each rule in the sample, the outcome of centralized presidential review is one of the following categories: “consistent without change,” “consistent with change,” “returned,” “suspended,” or “withdrawn.”<sup>6</sup> If the review outcome is “consistent without change,” it means that the president did not intervene during the formal stage of OIRA review; the rule after OIRA review is exactly the rule sent by the agency. If the review outcome is not “consistent without change,” a presidential intervention occurs and the type of intervention can be either “consistent with change,” “returned,” “suspended,” or “withdrawn.”

To note one limitation of the data: The RISC coding of the category consistent with change contains no information on the changes made in a rule as a result of OIRA intervention. Although various public and private actors during the Reagan-Bush administrations sought to make publicly available the type of changes in a rule due to OIRA review, this kind of information has not been made publicly available mainly due to considerations for protecting the internal deliberations of the executive branch.<sup>7</sup> From a research perspective, this implies that we can only observe whether a presidential intervention occurs in a rule review or not.<sup>8</sup>

In addition, there is some important (rule-specific) heterogeneity in the sample. First, it contains both proposed and final rules. OIRA reviews agency rules at both the proposed rulemaking stage and the final rulemaking stage. Before the agency can publish a proposed or final rule in the Federal Register, OIRA reviews the rule, identifies changes (if necessary), and then notifies the agency about the necessary changes. The sample also contains both unfunded mandates and transfer rules, since OIRA reviews both types of regulations. For a transfer regulation, Congress specifies its costs in the yearly budget but leaves it to agencies to determine the content of the rule. For example, Congress specifies \$100 in subsidies for milk producers in the budget, but the Department of Agriculture writes the content of the rule. For an unfunded mandate regulation, Congress specifies the statutory goals but not the cost of the rule in legislation. Environmental regulation is an example.

The data have a multilevel structure. The unit of analysis is an OIRA review (the level at

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<sup>6</sup>56.42% of the reviews are in the category “consistent with change,” 36.65% of the reviews are in the category “consistent without change,” 4.82% in the category “withdrawn,” 0.86% in the category “returned,” and 1.25% in the category “suspended.”

<sup>7</sup>The District of Columbia in *Wolfe versus the Department of Health and Human Services* held that deliberative process privilege protects “inter-agency or intra-agency memorandums and letters which would not be available to a party other than the agency in litigation with the agency” (D.C. Circuit 1988).

<sup>8</sup>Also, to the extent that there is informally review of rules before submitted to OIRA, such informal intervention is not captured by the data. Informal reviews reportedly became more common when Executive Order 12,866 was adopted in 1993 (Copeland 2006, page 1280). As I will discuss in the empirical section, this informal review is likely to underestimate the magnitude of OIRA intervention during the presidencies of Clinton and George W. Bush in comparison to the presidencies of Reagan and the George H.W. Bush

which the review outcome is measured,)<sup>9</sup> but these units are clustered by agency, year-of-review outcome, and presidential administration.

The dependent variable in the analyses reported below is *Presidential Intervention*. A binary variable, it measures whether or not an intervention occurs in a rule review, where 1 designates intervention and 0 designates nonintervention<sup>10</sup> The variation in sample is the following: no intervention in 36.69% and intervention in 63.31% of the reviews performed.

### 3 Empirical Analysis

In this section, I describe the estimation method and the empirical results.

#### 3.1 Estimation Method and Empirical Results

To analyze presidential intervention empirically, I use a latent variable transformation. That is, the variable of interest is continuous, but the observed variable is binary: whether or not an intervention occurs as a result of an OIRA review.

Because the rules reviewed are clustered by agency, by year and by presidential administration, it might seem reasonable to estimate a traditional fixed effect model to control for individual unit heterogeneity. However, such an approach is not entirely feasible for these data. We need to control for both presidential administration and year heterogeneity, but a model with fixed effects for both groups cannot be estimated since years are nested within presidential administrations. To take into account the nested structure of the data, I estimate a multilevel logistic regression model that includes administration and agency fixed effects and varying intercepts for years.<sup>11</sup> This multilevel modeling strategy accommodates variables that are measured at the rule review (the lowest level of analysis) and the year-of-review (the macro-level of analysis).<sup>12</sup>

The individual-level logistic regression is the following:

$$Pr(y_i = 1) = \text{logit}^{-1}(\alpha_0 + \alpha_{j[i]}^{\text{year}} + X_i\beta) \quad (1)$$

where  $j[i]$  indicates the year associated with observation  $i$ ,  $X$  is a matrix of individual-level covariates, and  $\beta$  is the related vector of coefficients. The year-level model is the following:

$$\alpha_j \sim N(V_j\kappa, \sigma^2) \quad (2)$$

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<sup>9</sup>The rules are identified by their regulatory information number (RIN). Since the unit of analysis is an OIRA review, some of the rules might be reviewed more than once if, for example, OIRA returns the rule to the agency the first time.

<sup>10</sup>The non-intervention category consists of those reviews for which outcome is “consistent without change” and the intervention category consists of those reviews for which the outcome is not “consistent without change.”

<sup>11</sup>This multilevel model estimates year random effects. For a discussion on the terminology of varying versus random intercepts see Gelman and Hill 2007.

<sup>12</sup>I use the R package lmer to estimate the multilevel logistic regression model.



where  $V$  is a matrix of year-level covariates,  $\kappa$  is the vector of coefficients for the year-level regression, and  $\sigma$  is the standard deviation of the unexplained year-level errors.

As mentioned, the rules reviews are clustered by agency. Therefore, I include fixed effects for agency to control for any unobservable agency factors that might be relevant for the review outcome. The agency of rulemaking origin is important, and the inclusion of agency fixed effects provides control for any agency-invariant characteristics that might produce differences in the likelihood of intervention for the rules reviewed. For example, the president may be more interested in controlling certain agencies because the rules they produce are more important for the president's policy agenda.

To analyze the determinants of presidential intervention in rulemaking, I include the following variables that may affect intervention in rulemaking: presidential administration indicators, presidential time in office divided government, presidential approval and presidential reelection year.

First, I include presidential administration indicators to assess the effect of presidential partisanship on OIRA intervention in rulemaking across presidential administrations. The indicator for president Clinton was dropped from the analyses so that the sign of the coefficients for the Republican administrations indicators could be interpreted relative to the level of OIRA intervention during the Clinton years (a positive sign implies that OIRA intervened more in rulemaking during the tenure of that particular Republican administration as compared to the Clinton administration).

Second, the president's incentives to use tools of unilateral administrative action may vary inversely with his legislative opportunities (Howell 2003). Given that congressional opposition to a President's program will generally increase across his administration (Bond and Fleisher 1990; Krehbiel 1999; Rudalevige 2002; Barrett and Eshbaugh-Soha 2007), it is plausible that the president may be more likely to use other governing tools such as intervention in agency rulemaking. Thus I include a variable: *Presidential Time*, a discrete variable, taking as its values the presidents year in office when the outcome of a review is announced. I also use another operationalization, a variable *Presidential Term*, which takes the value 1 to designate the presidents first term and the value 0 to designate the second term. I will report estimated coefficients for both variables, and the reader can decide which operationalization is preferable.

Third, it is plausible that presidents are more likely to turn to and increase their intervention in rulemaking during times of divided government because presidential-congressional divergence of preference is greater during periods of divided government and therefore the president has fewer legislative opportunities. Thus, I include an indicator variable, *Divided Government* that takes the value 1 if different parties control the Congress and the Presidency, and 0 otherwise.

Fourth, reelection year could have an impact on the president's incentives to use administrative rulemaking since the president is interested in being reelected for a second term, and thus to increase his reelection chances he would be more likely to pay attention to the distributive aspects of rulemaking for his core constituencies. I include an indicator variable, *Reelection Year* that takes the value 1 if the president is in a reelection year and 0 otherwise.

Fifth, presidential approval may also affect the likelihood of presidential intervention in rule-

making. Although the effect of presidential approval on bureaucratic control has not yet been explored, many studies indicate that presidential popularity increases a president's influence with Congress (Edwards 1989; Canes-Wrone and de Marchi 2002). It is difficult to imagine that these features of presidents' public relations have no bearing on administrative politics and, therefore, it may be reasonable to control for the effect of presidential popularity. I include a variable, *Presidential Approval* that measures the average Gallup presidential approval rating for the year in which OIRA reviewed a rule.

I also include a set of (rule specific) control variables: the stage of the rulemaking process and the type of rule review. First, OIRA reviews agency rules at both the proposed rulemaking stage and the final rulemaking stage, and there could be systematic differences between reviewing a proposed rule and a final rule. I include an indicator variable *Proposed Rule* that takes the value 1 if the rule review is at the proposed rulemaking stage and the value 0 otherwise. Second, OIRA reviews both unfunded mandate regulations and transfer regulations. The agencies have more discretion in the case of unfunded mandate regulations (since their costs are not specified in congressional legislation), and thus there could be systematic differences between transfer and unfunded mandate regulations. To control for these potential differences, I include an indicator variable *Transfer Rule* that takes the value 1 if the rule review is a transfer regulation and 0 otherwise.<sup>13</sup>

The rulemaking data set includes 2,322 rules, but some agencies either had only one rule review during this time period or produced review outcomes that did not vary. Since I estimate an agency-fixed effect model, I exclude all rules coming from agencies with either only one review or no variation in the review outcomes. The trimmed data set has 2,262 observations.

Table 1 presents the results of the multilevel estimation of the average probability of presidential intervention in rulemaking. Standard errors are in parentheses.

–Table 1 about here–

Table 1 contains four models. Model 1 estimates the average probability of presidential intervention by controlling for the data structure and including only the variables presidential time and presidential administration indicators. Model 2 also includes all variables. Model 3 is identical to model 2 but uses presidential term rather than presidential time. Finally, model 4 includes all variable as well as interactions between presidential time and presidential administration variables.

The empirical analysis suggests that the average probability of OIRA intervention is higher in the Clinton administration as compared to either the Reagan administration or the George H.W. Bush administration. On the other hand, the average probability of OIRA intervention is higher during the George W. Bush administration than the Clinton administration. Holding all other variables constant to their mean values, the average probability of OIRA intervention is 27% higher in the Clinton administration as compared to the Reagan administration. and the average probability of OIRA intervention is 11% higher in the Clinton administration as compared

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<sup>13</sup>I only include the transfer rule variable in the statistical analyses on the full (rulemaking) data set and on the type of intervention data set.

to the George H.W. Bush administration. Moreover, the differences between the Clinton and the Republican administrations are statistically significant at conventional levels. These results show that OIRA review is not a conservative instrument more likely to be activated by Republican presidents. There is no systematic correlation between the level of OIRA intervention in rulemaking and a president's partisan affiliation since the level of OIRA intervention is higher during the tenure of the Clinton administration compared to the tenure of (some) Republican administrations.<sup>14</sup>

Also, the effect of presidential time variable is positive and highly significant. Model 1 shows that the effect of presidential time holds regardless of any other control variables. In fact, there is little difference in the point estimate (and the standard error) for the presidential time variable in the model with or without control variables. Model 3 uses presidential term for the president's time in office and shows that this measure is also significant and in the expected direction. For model 2, holding all other variables constant to their mean values, the average probability of presidential intervention increases by 23% for a president in the eighth year of his administration as compared to the first year of his administration. Model 4 estimates the interaction effects between the presidential time variable and presidential administration indicators. The rationale for this analysis is that we want to check whether the estimated effect of presidential time is a product of the idiosyncrasies of a particular presidential administration or not. Model 4 shows that it is not.

Also, the average probability of OIRA intervention is higher in a presidential reelection year, and this association is statistically significant at conventional levels. For model 2, holding all other variables constant at their mean values, the average probability of OIRA intervention increases 7.5% in a presidential reelection year. The average probability of OIRA intervention is positively associated with presidential approval<sup>15</sup> while it seems that divided government does not have much effect of the likelihood of OIRA intervention in rulemaking.

The average probability of OIRA intervention increases if the rule review is an unfunded mandate regulation rather than a transfer regulation, and this association is statistically significant at conventional levels.<sup>16</sup> The result is intuitive since agencies have more discretion in deciding the distributive consequences of unfunded mandate regulations and, therefore, intense political conflict surrounds these regulations. Also, the average probability of OIRA intervention increases if the rule review is a proposed rule rather than a final rule, and this association is statistically significant at conventional levels.

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<sup>14</sup>In fact, it is likely that the empirical analysis underestimate the difference between Clinton and George W. Bush administrations, on the one hand, and Reagan and the George H.W. Bush administration, on the other hand. OIRA may review some rules informally before they are submitted for OIRA review and such informal intervention is not captured by the empirical analysis. However, the literature suggests that such informal review since the Clinton Presidency (Copeland 2006, page 1280).

<sup>15</sup>The variable is borderline statistically insignificant.

<sup>16</sup>In the case of a transfer regulation, Congress specifies the costs of the rule in the budget but leaves to agencies to determine how to distribute the money. For example, Congress specifies Medicare or Medicaid costs in the budget but the HHS writes rules about who qualifies for the benefits. In the case of a unfunded mandate regulation, Congress does not specify the costs of the rule in the budget, only the statutory goals. For example, environmental regulation, or any social regulation, is an unfunded mandate regulation.

I also find that there is almost no difference between years in terms of the average probability of presidential intervention.<sup>17</sup> The analysis shows that all of the year intercept estimates closely approximate the overall mean (their value is almost 0), indicating the lack of an overall trend over the time of the study.<sup>18</sup>

## 3.2 Additional Empirical Estimation

In this section, I present empirical results from two additional estimations. This estimation allows us to assess whether there is an association between presidential partisanship and the type of OIRA intervention, specifically whether OIRA is more likely to block rules from publication during the tenure of Republican administrations compared to the Clinton administration. Second, the above empirical analysis shows that presidential time is positive and strongly significant. This empirical pattern may be consistent with the story that presidents increasingly turn to rulemaking because of decreased legislative opportunities later in his term; however, other mechanisms may produce the result. The rulemaking data contain information that allows us to further explore in more detail whether alternative mechanisms may be more likely to generate the empirical pattern of later presidential intervention in rulemaking.

### 3.2.1 The Type of Presidential Intervention

The RISC coding contains some additional information regarding the type of presidential intervention in a rule review. Presidential intervention on a rule review could be one of two types. On the one hand, if the outcome of centralized review is “consistent with change,” the rule is altered during the review process and then published in the Federal Register. On the other hand, if the outcome of centralized review is either “returned,” “suspended,” or “withdrawn,” the rule is not published in the Federal Register and thus is blocked from taking legal effect.

I create an intervention data set by excluding all reviews from the original sample for which the review outcome is “consistent without change.” Using this data set, I create a new binary dependent variable: *Presidential Blocking of a Rule* by separating the rules into two categories: the first category includes those rules for which the intervention outcome is “consistent with change,” and the second category consists of those rules for which the intervention outcome is not “consistent with change,” i.e. those rules that are rejected.

I use this intervention data set to estimate the likelihood of OIRA blocking a rule.<sup>19</sup> This estimation serves two purposes. First, it allows us to explore whether there is any systematic

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<sup>17</sup>The estimated standard deviation of the unexplained year-level errors is almost zero.

<sup>18</sup>I also fitted a simple multilevel model controlling only for the data structure: fixed effects for agency and presidential administration and varying intercepts for years. This simple estimation shows that presidential intervention was more common in the last two years of Reagan than in the first two years of Bush I, more in the last two years of Bush I than in the first two years of Clinton, and the last year of Clinton saw more interventions than the first year of Bush II. This additional estimation also shows no trend over the period since it is not the case that each new president simply picks up where the prior one leaves off.

<sup>19</sup>In this subsection, I am interested in estimating a reduced form logit model: conditional on an intervention, what is the probability that a rule is blocked from publication in the Federal Register?

association between presidential partisanship and the probability of OIRA blocking a rule. Since blocking a rule has the (de facto) effect of a veto (or at least a temporary veto), the expectation is that Republican presidents rather than Democratic presidents are more likely to block rules.

Second, when OIRA blocks a rule, it tells us something about the divergence of preference between the president’s policy views and the content of the rule reviewed. Because blocking a rule has the (de facto) effect of a veto, such type of intervention reveals a bigger divergence of preference. In other words, we can explore whether the divergence of preference between the executive agencies and the president decreases or increases over time. This information is useful because a potential alternative explanation for the observed pattern of increased presidential intervention over time is simply that the divergence of preference between the executive agencies and the president increases with the president’s time in office.<sup>20</sup> Simply, OIRA could be more likely to intervene later because it is then reviewing rules that diverge from the presidents ideal preferences. On the other hand, if we observe that the divergence of preference decreases over the president’s time in office, we obtain some empirical evidence that this alternative story is less plausible as an explanation for the observed pattern.

This intervention data set contains 1,471 rules, and I code the dependent variable as 1 if a rule is blocked and 0 otherwise. I estimate the same statistical model (same multilevel method and control variables) as the one estimated on the (full) rulemaking data set. Just as in the previous estimations, I exclude agencies from the sample that have only one rule or that lack variation in their review outcomes. This trimmed data set contains 1,415 rules. Table 2 presents the results of the estimation. Standard errors are in parentheses.

–Table 2 about here–

Table 2 contains 2 models. Model 1 estimates the average probability of blocking a rule by controlling for the data structure and including only the variables of theoretical interests: presidential time and presidential administration indicators. Model 2 includes the control variables as well. Both models render empirical support to the hypothesis that there is a positive association between presidential partisanship and the type of OIRA intervention. Specifically, as expected, the probability of OIRA blocking a rule is higher during Republican administrations than during the Clinton administration. Also, both models show that the average probability of the president blocking a rule decreases with the president’s time in office. The empirical estimation shows that the divergence of preference between the president and the agencies decreases with the president’s time in office, thus perhaps rendering some empirical evidence that the pattern of increased presidential intervention over time is not a result of the (unobserved) divergence of preference between the president and the agencies.

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<sup>20</sup>I did not control for the divergence of preference between the president and the agency on a rule review because such a measure is not available.

### 3.2.2 Presidential Intervention in Transfer Regulations

The empirical analysis shows a very robust positive relationship between presidential time in office and the likelihood of intervention in rulemaking. A plausible story for this relationship may be that the president is more likely to turn to administrative rulemaking when he faces decreased legislative opportunity and as a result may be more likely to turn to administrative rulemaking. For example, Light (1982, 108) states the following: “The President must decide between legislative and administrative action. If the legislative channel is foreclosed, executive action may be the only acceptable alternative.” And scholars working on the executive-legislative interactions have detected that the president’s influence in Congress decreases over the time of a presidential administration regardless of the Congress’ partisanship composition (Bond and Fleisher 1990; Krehbiel 1999; Light 1999; Rudalevige 2002; Barrett and Eshbaugh-Soha 2007).<sup>21</sup>

Of course, there may be other plausible stories that may account for this positive relationship. It is beyond the scope of this paper to estimate which causal mechanism is at work, however, the data contains information that may allow us to assess the plausibility of several alternative mechanisms that could produce the observed pattern of increased presidential intervention in rulemaking over the course of a presidential administration. One possibility is that unobservable features of the rulemaking environment create heterogeneity in the samples of rules reviewed earlier and later. In other words, there could be procedural or strategic processes that systematically determine when rules are reviewed, thus creating a positive bias in the baseline estimation: the likelihood of presidential intervention is higher on the sample of rules reviewed later.

For example, a plausible strategic process that could create a positive bias is the following. The president’s agents have some control over the rulemaking agenda, and if they could strategically select the timing of reviews, they could also strategically select the rules that are more important for the president’s agenda for a later review in anticipation of more presidential attention at that point in time. In this case, the likelihood of intervention may be higher in the sample of rules reviewed later because of this strategic selection. Another plausible process that could create positive bias is the procedural delay commonly associated with unfunded mandate rules. For example, if the president is more likely to intervene on rules coming out of his own legislation,<sup>22</sup> the procedural delay associated with unfunded mandate rules<sup>23</sup> could create a higher likelihood of intervention in the rules reviewed later.

To explore whether these alternative mechanisms are driving the later presidential intervention in rulemaking, I re-estimate the effect of presidential likelihood of intervention on a sample of rules that are less likely to be subject to strategic manipulations or procedural delays such those noted

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<sup>21</sup>Mayhew (1991) shows that on average 3.5 fewer major laws are enacted during the second and third years than during the first year of a president’s initial term. The president achieves even less legislatively in his second-term when congressional members increasingly view him as lame-duck (Grossman, Kumar, and Rourke 2000). Jones (1994) identified twenty-one landmark laws initiated by presidents between 1947 and 1990, and, found that second-term presidents have launched only three of these laws.

<sup>22</sup>We also need to assume that the president passes legislation earlier in his time in office.

<sup>23</sup>It takes on average more than 3 years for an unfunded mandate rule to come through the regulatory pipeline after legislation is passed (Kerwin 2003).

above. This sample of rules is a subset of the full data set and consists of transfer regulations only.<sup>24</sup> Transfer regulations usually have their timetable and costs set by congressional legislation and thus are less likely to be manipulable on these dimensions by executive branch officials. In addition, transfer rules are less likely to be subject to the procedural delays associated with unfunded mandate rules. In a way, transfer rules are the president’s own rules since the president participates in the budgetary process and has a say on the content of transfer regulations. Overall, executive branch agents have less say on the content and timing of transfer rules (than on unfunded mandate rules). Re-estimating the statistical model on the sample of transfer rules allows us to control to some extent for various unobservable features of rulemaking under the control of executive branch agents or associated with unfunded mandate rules.

The transfer regulations dataset consists of 877 rules. Just as in the previous estimation, in order to estimate agency fixed effects, I exclude from the sample agencies that had only one rule review or that lacked variation in their review outcomes. This trimmed data set contains 861 rules. The statistical estimation is exactly the same as the estimation on the (full) rulemaking dataset (same dependent variable and control variables except the transfer rule variable). I also estimate the exact same models as the ones in Table 1. Table 3 presents the results. Standard errors are in parentheses.

–Table 3 about here–

The estimation shows that the coefficient for presidential time has the expected sign and is statistically significant. In fact, the estimated effect of presidential time is similar to the estimated effect on the full rulemaking sample. Also, using the alternative dichotomous measure for president’s time in office leads to a similar conclusion: the average probability of presidential intervention is greater in a president’s second term compared with his first. Moreover, the results are not due to any presidential administration idiosyncrasy: the presidential time variable is significant and has the expected sign in the model when the presidential time variable interacts with the presidential administration indicators. The sign of presidential administration indicators is also the same as in the initial estimation. Finally, the other variables have the same sign as in the initial estimation.

## 4 Robustness of the Estimation

In this section, I do additional robustness checks. Specifically, I check for the robustness of the results by using an alternative estimating method and also by including other variables of potential theoretical interest omitted from prior analyses because of concerns that they could potentially bias the results.

I first conducted the analysis in a Bayesian estimation framework to see if we obtain similar results to the maximum likelihood estimation (MLE). The rationale for doing a Bayesian estimation

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<sup>24</sup>I coded the transfer rule variable from the short description of a rule review, description available in the RISC coding.

(with non-informative priors) is that the standard errors are more accurate in the Bayesian estimation. The results of the Bayesian estimation are similar to those obtained in the MLE estimation. For example, the coefficient for presidential time variable is 0.17 and the standard error is 0.03, results identical to the MLE estimation.

Second, one stylized fact about rulemaking is that in the last months of a presidential administration, agencies produce more regulations, the so-called midnight regulations. Although midnight regulations is a story about the quantity of rulemaking rather than the level of presidential control, I want to check whether increased presidential intervention in rulemaking may not be due to the midnight regulation phenomenon. I create a dichotomous variable, *Midnight Regulation* that takes value 1 if a rule is reviewed in the last year of a presidential administration and value 0 otherwise.

Third, I check whether differences in the working load of OIRA review across presidential administrations influence presidential intervention. As mentioned, the scope of OIRA review is established by executive order; the total number of rules reviewed has varied from about 2000 per year in the Reagan/ Bush I administrations to 500-600 per year in the Clinton/ Bush II administrations. Another factor may be that the number of OIRA career bureaucrats has varied by presidential administration from a maximum of 90 career bureaucrats in 1981 to a minimum of 47 in the second term of the Clinton administration. I create a variable: *OIRA workload* measured as the total number of rules reviewed in a year divided by the total number of OIRA staff in the same year. The rationale for not including this variable in the initial estimation is that OIRA workload does not vary much within a presidential administration, and whatever differences exist across presidential administrations are already accounted for by including the presidential administration indicators. However, I will check the robustness of the analysis with the inclusion of this variable as well.<sup>25</sup>

Fourth, I also check whether the analysis is robust with the inclusion of a variable that captures the time OIRA takes to review an individual rule. In the RISC coding there is information on the number of days OIRA takes to review each rule. The reason I did not include this variable in the original estimation is due to endogeneity concerns: it is plausible to argue that OIRA keeps a rule longer if it wants to change it. On the other hand, the variable could capture some important individual level differences between the rules. For example, some rules are more technical and require more time to review, some rules have more important distributive consequences, and it just takes longer for the OIRA and the agency. There could also be disagreement on certain rules, requiring more time for OIRA and the agencies to hammer out their differences. I create a variable, *Duration of OIRA review*, that measures the number of days OIRA takes to review a rule.

Finally, I check whether the analysis is robust with the inclusion of a variable that captures the total number of employees that help the president in achieving his policy objectives. If there is more institutional staff, it is easier for the president to engage in more activities to pass his policy agenda. Again, the rationale for not including this variable in the initial analysis is that it does not vary

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<sup>25</sup>I have also run the estimation with variables for the number of rules reviewed per year and the number of OIRA bureaucrats separately. The results are similar to those in the estimation with the OIRA workload variable.



much within a presidential administration, and, to the extent that it varies across administrations, its effect is already captured in the presidential administration indicators. I include a variable, *EOP staff* that measures the total number of employees in the Executive Office of the President in the year in which OIRA reviews a rule. Table 4 presents the results of the estimations for all the above robustness checks. Standard errors are in parentheses.

–Table 4 about here–

Table 4 shows that the results of our initial estimation are robust. First, when we include the OIRA workload variable the presidential time variable is unaffected. Second, the duration of OIRA review variable is significant and correlates positively with the probability of OIRA intervention in rulemaking. Except the proposed rule variable, the other variables are unaffected by the introduction of the duration of OIRA review variable. Finally, the results are robust with the inclusion of the midnight regulation and the EOP staff variables as well.

I have also run the same analyses presented in tables 1, 2, 3, and 4 on the entire sample of rules with agency random effects in order to include the agencies that proposed only one rule in the sample or lacked variation in their review outcomes. The results are identical to the results presented in tables 1, 2, 3, and 4.

## 5 Discussion and Policy Implications

The empirical analysis reveals an important aspect of presidential power that has been largely neglected. The main criticism to centralized presidential review in the Reagan-Bush era arose in large part from its observed anti-regulatory tendencies. The tenure of a regulation-friendly presidential administration contributed to the waning of scholarly interest in the relationship between partisanship and centralized presidential review. But the exclusive focus on the policy direction of OIRA review has missed an aspect of this institution. Although the Clinton administration used OIRA review less often to block regulations, presidential oversight was more aggressive than in the Reagan-Bush era. OIRA review is truly a presidential instrument that any president, regardless of partisanship, is likely to use to control administrative regulations even though they may use OIRA for different policy goals, depending on the administration’s agenda and regulatory orientation.

The empirical analysis also reveals that presidents increase their intervention in rulemaking over time. The empirical pattern is consistent with the story that presidents have more incentives to turn to rulemaking later because of decreased legislative opportunities. And as much as we can utilize the information contained in the data set, the additional empirical analyses suggest that this observed time pattern is not due to an increased divergence of preference between the president and the agencies over time or to (unobserved) strategic or procedural processes specific to unfunded mandate rules. Of course, there could be other mechanisms that cannot be ruled out on the basis of this data set, and therefore additional data and empirical works may be necessary to probe the mechanism behind the observed pattern of increased presidential intervention over time.

But regardless of the underlying process that produces this empirical pattern, this result has some important implications for our understanding of the administrative state.

Scholars and policymakers have attempted to understand the effect of various mechanisms of bureaucratic control on both the quality of regulations and the accountability of the rulemaking process. Scholars and policymakers have considered centralized presidential review as one of the best mechanisms to improve the quality and accountability of rulemaking (Kagan 1998; Croley 2003). The claim is uncontroversial for two reasons. First, the president is in a good institutional position to coordinate the rulemaking process and thus improve the quality of rulemaking (Kagan 1998; Croley 2003). And, secondly, the president is the only elected official accountable to a majority of the electorate. If rulemaking is responsive to the president, and in turn the president is responsive to the electoral majority, the rulemaking process is accountable to the electorate (Kagan 1998). However, the president might not have constant incentives to improve the quality and accountability of rulemaking. The empirical analysis indeed shows systematic differences in the levels of presidential control of agency rulemaking over the course of a presidential administration. Unless the need for accountability and coordination varies in the same direction with the president's incentives to control rulemaking, centralized presidential review might not fully solve the quality and accountability problems of the regulatory state.

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Table 1: Presidential Intervention in Agency Rulemaking 1981-2008

<b>Dependent Variable: Pr( Presidential Intervention =1)</b>				
	<b>(1)</b>	<b>(2)</b>	<b>(3)</b>	<b>(4)</b>
Bill Clinton	Omitted	Omitted	Omitted	Omitted
Ronald Reagan	-1.16 (0.14)	-1.10 (0.15)	-1.14 (0.16)	-0.81 (0.36)
George H.W. Bush	-0.22 (0.15)	-0.43 (0.17)	-0.42 (0.18)	-0.01 (0.48)
George W. Bush	1.11 (0.14)	1.19 (0.14)	1.21 (0.15)	1.09 (0.40)
Presidential Term	-	-	0.75 (0.13)	-
Presidential Time	0.16 (0.02)	0.17 (0.03)	-	0.19 (0.05)
Reelection Year	-	0.30 (0.16)	0.59 (0.17)	0.39 (0.18)
Divided Government	-	0.06 (0.16)	0.16 (0.16)	0.01 (0.18)
Presidential Approval	-	0.01 (0.006)	0.008 (0.006)	0.01 (0.009)
Transfer Regulation	-	-0.73 (0.14)	-0.73 (0.14)	-0.74 (0.15)
Proposed Rule	-	0.34 (0.10)	0.35 (0.10)	0.35 (0.10)
Reagan $\times$ Presidential Time	-	-	-	-0.06 (0.07)
Bush1 $\times$ Presidential Time	-	-	-	-0.15 (0.14)
Bush2 $\times$ Presidential Time	-	-	-	0.03 (0.10)
Constant	-0.54 (0.54)	-0.27 (0.67)	-0.31 (0.65)	-0.52 (0.74)
Log-likelihood	-1186	-1164	-1166	-1162
N	2262	2262	2262	2262

Model 1 estimate a multilevel logistic regression with agency-fixed effect, year varying intercepts, presidential administration indicators, and presidential time variable only. Model 2 estimates a multilevel logistic regression with agency-fixed effect, year varying intercepts and all variables described in the Estimation Method and Empirical Results subsection. Model 3 is similar with Model 2 although the estimation uses presidential term instead of presidential time while Model 4 estimates interaction effects between presidential time and presidential administration indicators.

Standard errors are in parentheses.

Table 2: The Type of Presidential Intervention 1981-2008

<b>Dependent Variable: Pr(Blocking a Rule =1)</b>		
	<b>(1)</b>	<b>(2)</b>
Bill Clinton	Omitted Indicator	Omitted Indicator
Ronald Reagan	0.99 (0.33)	0.91 (0.35)
George H.W. Bush	1.28 (0.28)	1.00 (0.31)
George W. Bush	0.85 (0.26)	0.89 (0.27)
Presidential Time	-0.31 (0.05)	-0.32 (0.06)
Reelection Year	-	0.22 (0.27)
Divided Government	-	0.37 (0.27)
Presidential Approval	-	0.01 (0.01)
Transfer Regulation	-	-0.76 (0.28)
Proposed Rule	-	0.75 (0.20)
Constant	-2.09 (0.81)	-2.30 (1.08)
Log-likelihood	-420.3	-406.5
N	14151	1415

Model 1 estimate a multilevel logistic regression with agency-fixed effect, year varying intercepts, presidential time, and presidential administration indicators only. Model 2 estimates a multilevel logistic regression with agency-fixed effect, year varying intercepts and all variables described in the Estimation Method and Empirical Results subsection. Standard errors are in parentheses.

Table 3: Presidential Intervention in Transfer Regulations 1981-2008

<b>Dependent Variable: Pr(Presidential Intervention =1)</b>				
	<b>(1)</b>	<b>(2)</b>	<b>(3)</b>	<b>(4)</b>
Bill Clinton	Omitted	Omitted	Omitted	Omitted
Ronald Reagan	-0.82 (0.24)	-0.75 (0.24)	-0.80 (0.25)	-0.04 (0.54)
George H.W. Bush	-0.33 (0.29)	-0.45 (0.28)	-0.55 (0.31)	-0.58 (0.81)
George W. Bush	1.41 (0.23)	1.45 (0.22)	1.43 (0.23)	1.67 (0.63)
Presidential Time	0.15 (0.04)	0.17 (0.04)	- -	0.23 (0.08)
Presidential Term	- -	- -	0.62 (0.21)	- -
Reelection Year	- -	0.45 (0.25)	0.70 (0.29)	0.36 (0.27)
Divided Government	- -	-0.01 (0.24)	0.13 (0.26)	-0.14 (0.26)
Presidential Approval	- -	0.02 (0.01)	0.02 (0.01)	0.02 (0.01)
Proposed Rule	- -	0.05 (0.16)	0.08 (0.16)	0.07 (0.16)
Reagan × Presidential Time	- -	- -	- -	-0.14 (0.10)
Bush1 × Presidential Time	- -	- -	- -	0.10 (0.24)
Bush2 × Presidential Time	- -	- -	- -	-0.05 (0.15)
Constant	-1.01 (0.25)	-2.34 (0.65)	-1.60 (0.63)	-2.68 (0.78)
Log-Likelihood	-486	-482.1	-485.7	-480.8
N	861	861	861	861

Table 3 estimates the exact same models as the ones in Table 1 (except for transfer rule variable). Standard errors are in parentheses.

Table 4: Presidential Intervention in Agency Rulemaking 1981-2008

<b>Dependent Variable: Pr(Presidential Intervention =1)</b>				
	<b>(1)</b>	<b>(2)</b>	<b>(3)</b>	<b>(4)</b>
OIRA workload	0.001 (0.01)	- -	- -	- -
Duration of OIRA review	-	0.02 (0.002)	-	-
Midnight Regulation	-	-	-0.16 (0.22)	-
log(EOP staff)	-	-	-	-0.51 (1.42)
Bill Clinton	Omitted	Omitted	Omitted	Omitted
Ronald Reagan	-1.12 (0.24)	-1.03 (0.16)	-1.11 (0.15)	-1.11 (0.16)
George H.W. Bush	-0.45 (0.30)	-0.48 (0.18)	-0.43 (0.17)	-0.39 (0.20)
George W. Bush	1.20 (0.15)	1.16 (0.15)	1.20 (0.14)	1.22 (0.15)
Presidential Time	0.17 (0.03)	0.16 (0.03)	0.18 (0.03)	0.17 (0.03)
Reelection Year	0.30 (0.16)	0.39 (0.16)	0.27 (0.16)	0.31 (0.16)
Divided Government	0.06 (0.17)	0.05 (0.17)	0.07 (0.16)	0.05 (0.17)
Presidential Approval	0.01 (0.006)	0.01 (0.006)	0.01 (0.006)	0.01 (0.006)
Transfer Regulation	-0.73 (0.14)	-0.59 (0.15)	-0.73 (0.14)	-0.73 (0.14)
Proposed Rule	0.34 (0.10)	0.16 (0.11)	0.34 (0.10)	0.34 (0.10)
Constant	-0.30 (0.73)	-0.27 (0.67)	-0.27 (0.67)	3.50 (10.55)
Log-likelihood	-1164	-1072	-1163	-1164
N	2262	2262	2262	2262

Standard errors are in parentheses.