



The Presidential–Congressional Power Imbalance in Rulemaking

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In his book “Building a Legislative-Centered Public Administration” (which won the 2001 Louis Brownlow book award from the National Academy of Public Administration), David H. Rosenbloom noted that Congress in 1946 “faced an overall choice” in how to address the “large, powerful, disorganized, and poorly regulated executive branch.”

It could follow the advice of the Brownlow Committee and orthodox administrative thought by viewing a stronger president as the best – and perhaps only – means of bringing the executive branch under control, instilling good management and making agency processes rational and fair. Alternatively, Congress itself could try to exercise a greater degree of control over administration.²

The result of those congressional deliberations was the Administrative Procedure Act of 1946 (APA, 5 U.S.C. §§ 551–559), which Rosenbloom said “relied heavily on the idea that agencies should operate and be treated as extensions of the legislature.”³ As “extensions” (and not just “agents”) of Congress, “agencies are essentially fused to the legislature. They exercise its core constitutional responsibility – legislation.” Rosenbloom said that by 1946, the delegation of legislative power to the agencies was seen as inevitable and legitimate, although requiring control by the Congress to ensure openness, fairness, and public participation. Therefore, informal rulemaking procedures (e.g., publishing proposed rules, taking comments, and publishing the final rule) were seen as the adoption of legislative values in an administrative context.

Today, any notion that Congress controls federal rulemaking activity, or that Congress is even a co-equal to the president in directing such activity, is generally viewed as antiquated and unrealistic. For the past 35 years, presidents have dominated the day-to-day federal rulemaking process, establishing priorities for agencies’ regulatory activities, and reviewing and approving the agencies’ products prior to publication in the Federal Register. In a June 2001 article in *Harvard Law Review* (named that year’s top scholarly article by the American Bar Association’s Section on Administrative Law and Regulatory Practice), Elena Kagan (former dean of Harvard Law School and now justice of the Supreme Court) characterized the emergence of enhanced methods of presidential control over the regulatory state—what she termed the “presidentialization of administration”—as “the most important development in the last two decades in administrative process.”⁴ Kagan said those methods of control include directive authority at the front end of the process as well as personal ownership at the back end of the process, resulting in a “transformation...in the institutional relationship between the administrative agencies and the Executive Office of the President.”⁵

1. Much of this case study is drawn from the author’s previous writings and testimonies, including his May 6, 2008 testimony before a House committee that was examining the “unitary executive principle.” See *Federal Rulemaking and the Unitary Executive Principle: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judic.*, 110th Cong. (2008) (statement and testimony of Curtis W. Copeland, Ph.D., specialist in American National Government, Congressional Research Service).

2. DAVID H. ROSENBLUM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946–1999* (2000). Nine years earlier, the Brownlow Committee (formally known as the president’s Committee on Administrative Management) had recommended a number of changes to strengthen the president’s ability to manage the executive branch. See President’s Committee on Administrative Management, *Administrative Management in the Government of the United States* (January 1937).

3. *Id.* at 23.

4. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2385 (2000–2001).

5. *Id.* at 2384.

At a 2006 symposium at the Congressional Research Service (CRS) on “Presidential, Congressional, and Judicial Control of Rulemaking,” I moderated a panel on presidential review of rulemaking. The panel was composed of noted experts in the field of rulemaking and administrative law, and included representatives from federal agencies, the private sector, and academia. At the start of the discussion, I said the following:

We’ve heard a great deal of discussion today about whether Congress or the President or the courts control rulemaking; I’m here to answer the question. The reality is that on a day-to-day basis the President exerts a great deal more influence on rulemaking than either the courts or Congress, and I’ll take on anybody that wants to dispute that.⁶

No one on the panel or in the audience of more than 100 people objected to that characterization.

How did we go from the view in 1946 that agencies were “extensions” of Congress, and that agency rulemaking was an extension of legislative action subject to congressional control, to the current view that rules are frequently a reflection of the president’s priorities? The answer lies in a combination of two factors: (1) initiatives from every president during the past 35 years that were expressly intended to garner more power over agency rulemaking; and (2) congressional actions that have been ineffectual in controlling rulemaking, or that have even encouraged greater presidential authority. The following two major sections discuss each of these factors. The concluding section discusses ways for Congress to reassert its authority in this area.

A. Presidential Initiatives

Since 1980, two executive orders have largely determined the nature of presidential influence over agency rulemaking. First, Executive Order (EO) 12291, issued by President Reagan in 1981, dramatically changed the landscape, giving the president and his agents unprecedented authority to control the rulemaking process for most federal agencies.⁷ (Another Reagan executive order issued four years later extended this authority.) Second, EO 12866, issued by President Clinton in 1993, generally continued the president’s role in the rulemaking process—and in some ways, expanded it.⁸ EO 12866 is still in effect.

Before discussing these executive orders and other initiatives, a brief mention of the president’s principal agent in the rulemaking process—the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB)—is in order. OIRA was established by the Paperwork Reduction Act (PRA, 44 U.S.C. §§ 3501-3520, originally enacted in 1980) to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Under the law, agencies must receive OIRA-approval (signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years.

6. Curtis Copeland, Moderator, *Presidential Review of Rulemaking: Reagan to Bush II*, part of the CRS Symposium on Presidential, Congressional and Judicial Control of Rulemaking, September 11, 2006, *reprinted in* H. COMM. ON THE JUDIC., SUBCOMM. ON COM. AND ADMIN. LAW, INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS, AND PROCEDURE PROJECT FOR THE 21ST CENTURY 1415, 109th Cong. (Comm. Print 2006) [hereinafter *CRS Symposium*].

7. Exec. Order No. 12291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note (1982).

8. Exec. Order No. 12866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

1. Executive Order 12291

About two months after the PRA was enacted, and less than one month into his first term, President Reagan issued EO 12291, which expanded OIRA's mission far beyond just paperwork reviews.⁹ The executive order authorized the director of OMB to review any draft proposed or final rule or regulatory impact analysis from a covered agency (Cabinet departments and independent agencies, but not independent regulatory agencies).¹⁰ "Major" proposed rules (e.g., those expected to have a \$100 million effect on the economy) were required to be submitted to OMB at least 60 days prior to publication, and major final rules were to be submitted at least 30 days before they were published.¹¹ Non-major rules were to be submitted 10 days before publication. The executive order indicated that OMB's review should be completed within those time periods, but allowed the director to extend the review period whenever necessary.¹² The agencies were generally required to refrain from publishing any final rules until they had responded to OIRA's comments, and agencies published rules without OIRA approval at their peril.¹³

Rulemaking agencies were also instructed to refrain from taking regulatory action "unless the potential benefits to society for the regulation outweigh the potential costs to society," to select regulatory objectives to maximize net benefits to society, and to select the regulatory alternative that involves the lowest net cost to society. Agencies were to prepare a "regulatory impact analysis for each 'major' rule containing a description of potential benefits and costs, a description of alternative approaches, and a determination of net benefits. OMB was given the authority to make the final determination as to which rules were considered "major."

OIRA's regulatory review authorities were not unlimited, however. EO 12291 authorized OMB to take action only "to the extent permitted by law," and stated that the review procedures prescribed in the order did not apply to "any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order."¹⁴ Although Subsection 3(f) of the executive order prohibited agencies from publishing proposed rules until OMB review was concluded, it also specified that nothing in the subsection "shall be construed as displacing the agencies' responsibilities delegated by law."¹⁵ In its February 13, 1981, opinion supporting the legality of EO 12291, the Office of Legal Counsel within the Department of Justice said "the President's exercise of supervisory powers must conform to legislation enacted by Congress."¹⁶ Therefore, "[i]n issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress."

9. Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan administration decided to integrate OMB's regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA. For a description of the effects of this order, see Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 VA. J. NAT. RES. L. 1 (1984). In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required the same agencies to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions underway or planned. See Exec. Order No. 12498, 3 C.F.R. 323 (1986) reprinted in 5 U.S.C. § 601 (Supp. III 1985).

10. As used in this study, the term "independent regulatory agencies" refers to agencies established to be independent of the president, including the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. The term "independent agencies" refers to agencies that are independent of Cabinet departments but not independent regulatory agencies (e.g., the Environmental Protection Agency and the Office of Personnel Management). For a more detailed discussion of types of agencies, see DAVID E. LEWIS AND JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (1st ed. 2012). The book was prepared for the Administrative Conference of the United States and is available at http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf.

11. However, if an agency published a final rule without a prior proposed rule, the final rule was to be submitted at least 60 days prior to publication.

12. After describing the 60, 30, and 10-day review periods, Section 3 of EO 12291 states that OMB "shall be deemed to have concluded review" within those periods unless it advises an agency that it intends to comment on the rule or the regulatory impact analysis, in which case the agency is to "refrain from publishing" the rule or the analysis.

13. For example, when EPA issued a regulation over the objections of OIRA during the Reagan administration, an EPA official said that an OIRA official told him "there was a price to pay for doing what we had done and we hadn't begun to pay." Mary Thornton, *OMB Pressured EPA, Ex-Aide Says*, WASH. POST, September 28, 1983, at A1.

14. Exec. Order No. 12291, *supra* note 7, § 8(a)(2).

15. *Id.* § 3(f)(3).

16. Memorandum from U.S. Department of Justice, Office of Legal Counsel, on Proposed Executive Order on Federal Regulation (February 13, 1981), reprinted in *Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations, H. Comm. on Energy and Com.*, 97th Cong. (1981).

2. Executive Order 12498

In 1985, President Reagan extended OIRA's influence even further by issuing EO 12498, which required Cabinet departments and independent agencies (but not independent regulatory agencies) to submit a "regulatory program" to OMB for review each year that covered all of their significant regulatory actions that were underway or planned.¹⁷ Previously, EO 12291 had required each of those agencies to publish semiannual "regulatory agendas" of proposed regulations that the agency "has issued or expects to issue," and any existing rule that was under review.¹⁸ These agendas were required to contain a schedule for completing action on any major rule for which the agency had published a notice of proposed rulemaking. The new executive order went further, providing that, except in "unusual circumstances," OMB could return any rule submitted for review under EO 12291 to the issuing agency for "reconsideration" if it was not in the agency's regulatory program for that year, or was "materially different" from what was described in the program.

In other words, OIRA could return a draft rule to an issuing agency if the office did not have advance notice of the rule, even if the rule was otherwise consistent with the requirements in EO 12291. The regulatory agenda and program requirements also permitted OIRA to stop or alter an objectionable rule before the rulemaking process developed momentum. Although Reagan administration officials at the time compared this planning process to the process used to develop the president's budget, critics noted that the budget process has a final step that the regulatory process lacked—review and approval by Congress.¹⁹ Therefore, they argued, the insertion of OIRA into the regulatory planning process represented a further aggregation of power in the hands of the OIRA administrator and, more generally, the president.

3. Comparison of EO 12291 to Previous Presidential Initiatives

Although transformative in many ways, the Reagan executive orders were not entirely new. Some type of presidential review of rulemaking has occurred since the 1960s,²⁰ and the appropriate role of the president and his representatives in the rulemaking process has long been the subject of academic debate.²¹ Prior to 1981, executive orders and other initiatives established relatively limited roles for the president and his agents in that process. For example:

- In 1971, President Nixon established a "Quality of Life Review" program in which executive departments and independent agencies submitted all "significant" draft proposed and final rules pertaining to "environmental quality, consumer protection, and occupational and public health and safety" to OMB, which then circulated them to other agencies for comment.²² Agencies were to provide a summary of their proposals, including their principal objectives, the alternatives that they considered, and a comparison of the expected benefits and cost of those alternatives.
- In 1974, President Ford issued EO 11821, which required agencies to prepare an "inflation impact statement" for each "major" proposed rule. The statement was a certification that the inflationary impact of the rule had been evaluated in accordance with criteria and procedures developed by OMB. Before a major rule was published in the Federal Register, the issuing agency was required to submit the associated impact statement to the Council on Wage and Price Stability (CWPS). CWPS would then either provide comments directly to the agency or participate in the regular rulemaking comment process.

17. Exec. Order No. 12498, *supra* note 9.

18. Exec. Order No. 12291, *supra* note 7, § 5.

19. CONG. RESEARCH SERV., OFF. OF MGMT. AND BUDGET: EVOLVING ROLES AND FUTURE ISSUES, 201-10 (1986) [hereinafter *OMB Evolving Roles*].

20. See Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37 (2011).

21. Some assert that the president should be able to make the final decision regarding the substance of agency rules, while others argue that the president cannot dictate the substance of rules that Congress has entrusted to the agencies. For a sample of this literature, see Robert Percival, *Presidential Management of the Administrative State: The Not-So Unitary Executive*, 51 DUKE L.J. 963 (2001); Peter L. Strauss, *Overseer, or 'The Decider'?: The President in Administrative Law*, 75 GEO. WASH. UNIV. L. REV. 696 (2007); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1 (2007); Michael A. Livermore and Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2012-2013); and Alan B. Morrison, *Commentary: OMB Interference with Agency Rulemaking*, 99 HARV. L. REV. 1059 (1986).

22. According to some observers, these requirements were routinely imposed only on EPA. For more on these reviews, see Tozzi, *supra* note 20.

- In 1978, President Carter issued EO 12044, which required agencies to publish semiannual agendas of any significant rules under development or review, and to prepare a regulatory analysis for all rules that have a more than \$100 million impact on the economy. The analysis was to contain a succinct statement of the problem, a description of the alternative approaches considered, and the “economic consequences” of those alternatives. OMB was instructed to “assure the effective implementation of this Order,” but was not given specific review responsibilities. President Carter also established (1) a Regulatory Analysis Review Group (RARG) to review the analyses prepared for certain major rules, and to submit comments during the comment period; and (2) a Regulatory Council to coordinate agencies’ actions to avoid conflicting requirements and duplication of effort.

However, the analytical and review requirements in EO 12291 were significantly different from these previous efforts. For example, the requirement in the new executive order that agencies choose the least costly approach to a particular regulatory objective went further than the requirement in President Carter’s EO 12044, which simply required agencies to analyze and consider alternative regulatory approaches. Also, whereas the regulatory oversight functions were divided among many offices (OMB, CWPS, RARG, and the regulatory council) during the Carter administration, EO 12291 consolidated these functions within OIRA. Another major difference was the amount of influence that OIRA had compared to its predecessors. Under previous executive orders, CWPS and RARG primarily had advisory roles. In contrast, under EO 12291, OIRA could overrule agency determinations regarding whether the rule was “major” (and therefore required a regulatory impact analysis), and could delay the regulation at either the proposed or final rulemaking stage until the agency had adequately responded to its concerns.

More generally, EO 12291 was viewed as a significant change in the balance of power between Congress and the president with regard to rulemaking. Kenneth Culp Davis, noted administrative law scholar and one of the authors of the Administrative Procedure Act, said that with the issuance of the executive order, the president has “assumed full power to control the content of rules issued by executive departments and agencies.”²³

4. Reactions to Initial OIRA Reviews

OIRA’s initial regulatory reviews under EO 12291 were highly controversial, with some of the concerns raised by Members of Congress and others focusing on the appropriate role of the president in carrying out statutory requirements that Congress placed on departments and agencies.²⁴ Other concerns focused on the effect that OIRA reviews had on the time required for agencies to issue rules, on the lack of transparency of such reviews, and whether OIRA had become a conduit for private interests.²⁵ In 1982, GAO reported that it was “generally impossible to determine what role OMB plays in any given rulemaking” because it “avoids putting its comments on pending rules in writing.”²⁶ Nevertheless, GAO supported OIRA’s review of agencies’ regulatory analyses, but also recommended more consistency and transparency.

By 1983, however, GAO concluded that the expansion of OIRA’s responsibilities under EO 12291 had adversely affected the office’s ability to carry out its statutory PRA responsibilities, and recommended that Congress consider amending the act to prohibit OIRA from carrying out other activities such as regulatory review.²⁷ Also in 1983, Congress was so dissatisfied with OIRA’s performance in the areas of regulatory and paperwork review that it permitted the office’s appropriation authority to expire (although the office’s statutory authority under the PRA was not affected and it continued to receive an appropriation via OMB). Questions continued to be raised in the academic literature regarding EO 12291 reviews.²⁸

23. Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 TULANE L. REV. 849 (1982).

24. *Role of OMB in Regulation: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Oversight and Investigation*, 97th Cong. (1981); *Infant Formula: The Present Danger: Hearing before the the H. Comm. on Energy and Commerce, Subcomm. on Oversight and Investigation*, 97th Cong. (1982) 93 (1981).

25. *Office of Management and Budget Control of OSHA Rulemaking: Hearing before the H. Comm. on Gov’t Operation, Subcomm. on Manpower and Housing*, 97th Cong. (1982).

26. U.S. GEN. ACCT. OFF., GAO/PAD-83-6, IMPROVED QUALITY, ADEQUATE RESOURCES, AND CONSISTENT OVERSIGHT NEEDED IF REGULATORY ANALYSIS IS TO HELP CONTROL COSTS OF REGULATIONS 4-6 (1982).

27. U.S. GEN. ACCT. OFF., GAO/GGD-83-35, IMPLEMENTING THE PAPERWORK REDUCTION ACT: SOME PROGRESS, BUT MANY PROBLEMS REMAIN (1983). Congress did not act on GAO’s recommendation.

28. See, e.g., Olson, *supra* note 9.

In 1985, five House committee chairmen filed an amicus brief in a lawsuit brought against the Department of Labor (DOL) regarding the DOL's decision (reportedly at the behest of OIRA) not to pursue a proposed standard concerning exposure to ethylene oxide, a sterilizing chemical widely used in hospitals and suspected of causing cancer.²⁹ The chairmen claimed that OIRA's actions represented a usurpation of congressional authority. Ultimately, however, the case was decided on statutory, not constitutional, grounds, and the court declined to rule on the legality of OIRA's actions.³⁰

Delays in the issuance of a statutorily required EPA regulation eventually led to a 1986 decision by the D.C. District Court that was critical of OIRA review delays.³¹ That same year, the House of Representatives voted to cut off all funds to OIRA, in part because the office was accused of "sitting on regulations" and operating in secret.³² In an effort to head off that legislation, the OIRA administrator issued a June 1986 memorandum to the heads of covered departments and agencies describing new procedures to improve the transparency of the review process.³³ For example, the memorandum said that OIRA would provide information to the public on meetings with outside parties, and on the dates it began and completed reviews of proposed and final rules. Although hailed by some as a congressional victory, OIRA reviews, and presidential involvement in rulemaking more generally, continued to be criticized as non-transparent.³⁴ But after 1986, the level of congressional scrutiny and opposition to EO 12291 reviews dropped considerably.

On the other hand, some observers were generally supportive of OIRA's expanded role under EO 12291, often utilizing a statement in a 1981 ruling by the U.S. Court of Appeals for the District of Columbia Circuit noting that:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President.³⁵

In 1987, the National Academy of Public Administration (NAPA) characterized regulatory management as an "essential element of presidential management."³⁶ In 1988, the Administrative Conference of the United States (ACUS) concluded that presidential review of rules "can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities,"³⁷ and later characterized such reviews as "beneficial and necessary."³⁸ In 1993, Stephen Breyer (now justice of the Supreme Court) characterized OIRA as having a cross-agency perspective that could bring to bear a wider range of concerns than any specific regulatory agency.³⁹

29. Public Citizen Health Research Group v. Tyson, 746 F.2d 1479 (D.C. Cir. 1986). See also MORTON ROSENBERG, REGULATORY MANAGEMENT AT OMB, in *OMB Evolving Roles*, supra note 19, at 218.

30. The court did say that OIRA's participation in rulemaking "presents difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies." 746 F.2d at 1507.

31. Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986).

32. Judith Havemann, 'Defunding' OMB's Rule Reviewers, WASH. POST, July 18, 1986, at A17; and Judith Havemann, *New Senate Difficulty Besets Regulatory Review Office*, WASH. POST, August 16, 1986, at A8.

33. Judith Havemann, *No 'Shade-Drawn' Dealings for OMB*, WASH. POST, June 17, 1986, at A21. To view a copy of this memorandum, see Memorandum from Wendy L. Gramm, OIRA Administrator, to Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498 on Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 [Revised] (June 13, 1986), reprinted in U.S. OFFICE OF MGMT. AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT 585 (1993).

34. See CHRISTINE TRIANO AND NANCY WATZMAN, ALL THE VICE PRESIDENT'S MEN: HOW THE QUAYLE COUNCIL ON COMPETITIVENESS SECRETLY UNDERMINES HEALTH, SAFETY, AND ENVIRONMENTAL PROGRAMS (OMB Watch/Public Citizen, 1991); and Bob Woodward and David Broder, *Quayle's Quest: Curb Rules, Leave No Fingerprints*, WASH. POST, January 9, 1992, at A1.

35. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). The case, however, had nothing to do with E.O. 12291 but rather with claims that presidential and congressional intercessions with EPA decision-makers after the close of the APA's public comment period were improper, both of which were rejected by the appeals court.

36. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES vii (1987).

37. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, PRESIDENTIAL REVIEW OF AGENCY RULEMAKING, CONFERENCE RECOMMENDATION 88-9 (1988), <http://www.acus.gov/recommendation/presidential-review-agency-rulemaking>.

38. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING, CONFERENCE RECOMMENDATION 93-4 (1993), <http://www.acus.gov/recommendation/improving-environment-agency-rulemaking>.

39. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 10-11 (1993). Breyer stated that "tunnel vision" by regulatory agencies can prevent them from seeing the larger cost-benefit picture.

5. Executive Order 12866

President George H. W. Bush continued the Reagan executive orders throughout his administration. However, in September 1993, President Clinton issued Executive Order 12866 on “Regulatory Planning and Review,” which revoked EO 12291 and EO 12498. EO 12866 is still in effect, and continued the general framework of presidential review of rulemaking that was established by EO 12291. For example, it requires covered agencies (again, Cabinet departments and independent agencies but not independent regulatory agencies) to submit certain proposed and final rules to OMB before publishing them in the Federal Register. The order also requires agencies to prepare cost-benefit analyses for their “economically significant” rules (essentially the same as “major” rules under EO 12291).⁴⁰ Like the previous executive order, EO 12866 makes it clear that the requirements for review by OIRA are only permissible “to the extent permitted by law.”⁴¹

However, EO 12866 differs from EO 12291 in several important respects. For example, it established a somewhat new regulatory philosophy and a new set of rulemaking principles,⁴² and limited OIRA’s reviews to “significant” rules, reducing the number of draft proposed and final rules examined by OIRA from between 2,000 and 3,000 per year to between 500 and about 700 rules per year. EO 12866 also established timeliness and transparency requirements that included but went beyond those that had been put in place by the previously mentioned June 1986 memorandum. For example, the order requires OIRA to either waive review or notify the agency in writing of the results of its review within certain time frames (e.g., within 90 calendar days of submission for most regulatory actions).⁴³

EO 12866 also requires OIRA to maintain a publicly available log containing the dates and names of individuals involved in all substantive oral communications between OIRA personnel and any person not employed by the executive branch, as well as the subject matter discussed during such communications. Agencies are required to identify for the public “in a complete, clear, and simple manner” the substantive changes made during the time of OIRA’s review, as well as the changes that were made at the suggestion and recommendation of OIRA.

While narrower and more transparent than its predecessor in some ways, EO 12866 is also broader in other respects and arguably gives the President more authority over the agencies than EO 12291. For example, Section 4 of EO 12866 continued the requirement in the earlier order that agencies publish an agenda of upcoming regulations, but broadened it to include independent regulatory agencies. As a result, agencies created to be independent of the president were required to notify OIRA about their upcoming rules. Also, Section 7 of EO 12866 states that (to the extent permitted by law) “any disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the president....” In the event of such disagreements, it is highly likely that the president would side with his or her own OIRA Administrator’s position because OIRA would likely have previously vetted that position with the president’s staff.⁴⁴

In addition to issuing an executive order that continued, and in some ways expanded, presidential authority over rulemaking, President Clinton was also more active than his predecessors in issuing directives to agency heads concerning how they should exercise their discretionary authority. President Clinton issued 107 such orders, compared to just 12

40. The definitions of “major” and “economically significant” rules are similar, and most “economically significant” rules are also considered “major.” Some rules may be considered “major” that are not “economically significant” (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets). See Memorandum M-99013 from Jacob J. Lew, Director, Office of Mgmt. and Budget, to the Heads of Departments, Agencies and Independent Establishments 5 (March 30, 1999), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf.

41. The phrase “to the extent permitted by law” is used five times in EO 12866 in the context of required actions by both OIRA and regulatory agencies.

42. For example, one of the stated objectives of EO 12866 is “to reaffirm the primacy of Federal agencies in the regulatory decision-making process,” which was widely viewed as leaving greater control of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation “justify” its costs was a noticeably lower threshold than the requirement in EO 12291 that the benefits “outweigh” the costs.

43. Exec. Order No. 12866, *supra* note 8, § 6(b)(2)(C).

44. This appears to be what happened in a March 2008 dispute between the EPA and OIRA on where to set secondary ozone standards. EPA appealed to the president, citing legal requirements, science, and previous court decisions. Nevertheless, the president sided with OIRA, and EPA complied. See National Ambient Air Quality Standards for Ozone; Final Rule, 73 Fed. Reg. 16497 (March 27, 2008).

throughout the Reagan and George H.W. Bush administrations.⁴⁵ President Clinton also publicly announced that certain rules would be proposed prior to any such announcement by the agency responsible for issuing the rules.⁴⁶ Elena Kagan noted in her 2001 article that while it is generally acknowledged that President Reagan used OIRA's review function as a tool to control the policy and political agenda in an anti-regulatory manner, President Clinton did much the same thing to accomplish pro-regulatory objectives.

6. OIRA Initiatives During the George W. Bush Administration

President George W. Bush retained Executive Order 12866 when he took office in January 2001, but the implementation of that order was significantly different during his administration. OIRA usually assumes the personality of the administrator, and of the president whom the administrator serves. During the Clinton administration, OIRA reportedly played a consultative and collaborative role, and consciously avoided confrontation with the agencies over agency rules. However, under President Bush, OIRA viewed itself as more of a "gatekeeper" designed to prevent poorly designed rules from being issued. Perhaps the best evidence of that change in perspective is in the office's use of return letters. In the seven years from 1994 through 2000, OIRA issued only seven letters returning rules to the agencies for "reconsideration." In 2001 and 2002, OIRA returned a total of 23 rules to the agencies.⁴⁷

In addition to the use of return letters, OIRA undertook a number of other initiatives during the Bush administration that strengthened its role in rulemaking. For example:

- OIRA increased the use of "informal reviews" of draft rules prior to their formal submission. In early 2002, the administrator said OIRA was trying "to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us—well, in a sense, they're rolling the dice."⁴⁸ OIRA said these informal reviews are not subject to the deadlines or the transparency requirements in EO 12866, but also said they were when OIRA could have its greatest impact on agency rules.
- Agency officials reported that OIRA placed greater emphasis on economic analysis than in the past, requiring more quantification of benefits and benefit-cost analysis for all regulatory options considered, not just the option the agency selected.
- OIRA began using "prompt letters" suggesting issues for the agencies' consideration. Between September 2001 and December 2003, OIRA issued a total of 13 such letters suggesting that agencies develop regulations in particular areas or encouraging ongoing efforts.⁴⁹ Although OIRA had privately suggested issues to agencies in the past, the use of public letters was new, reflecting what OIRA called a "more proactive role in suggesting regulatory priorities."

In 2003, GAO reported on these and other changes, and described in detail how OIRA was requiring significant changes to certain agency rules.⁵⁰ GAO also identified nine areas where the transparency requirements in EO 12866 could be improved. For example, GAO recommended that agencies be required to disclose (after rules are published) the changes made to rules during OIRA's informal reviews, that OIRA or the agencies reveal why rules are withdrawn from review, and that OIRA's meeting log more clearly identify what rule was being discussed and who participants were representing. OIRA disagreed with these recommendations.

45. *CRS Symposium, supra* note 6, at 1349.

46. For example, in 1995 he announced that by executive authority he would restrict the marketing and promotion of tobacco products to teenagers and that he was authorizing the Food and Drug Administration to take steps to achieve that goal. However, in 2000, the Supreme Court struck down those rules because it concluded that Congress had not given the FDA the authority to regulate tobacco. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

47. U.S. GEN. ACCT. OFF., GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 41-42 (2003) [hereinafter *GAO on OMB's Role in Rule Reviews*].

48. Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, CQ WEEKLY 520, 520-26 (2002).

49. The number of prompt letters subsequently declined to only two in 2004, and none in 2005, one in 2006, and none in 2007.

50. *See GAO on OMB's Role in Rule Reviews, supra* note 47.

7. Peer Review Bulletin

OMB and OIRA also published several documents during the George W. Bush administration that attempted to push its (and therefore the president's) regulatory authority in new directions. For example, in December 2004, OMB published its "Final Information Quality Bulletin for Peer Review" on its website,⁵¹ with publication in the Federal Register in January 2005.⁵² The bulletin required each agency (to the extent permitted by law) to conduct a peer review of all "influential scientific information that the agency intends to disseminate," with "influential scientific information" defined as any information expected to have a "substantial impact on important public policies or private sector decisions." Specific requirements were established regarding the adequacy of any prior peer review, the selection of reviewers (in terms of expertise, conflicts, and independence), the choice of peer review mechanisms (e.g., letter reviews versus panels), and transparency. The bulletin established additional requirements in these and other areas for "highly influential scientific assessments," as determined by the OIRA administrator. Agencies were required to post on their web sites an agenda for planned peer reviews, and to provide to OIRA each year a summary of the peer reviews conducted during the previous year. OMB said the bulletin was being issued "to oversee the quality of agency information, analyses, and regulatory actions."

8. Risk Assessment Bulletin

In January 2006, OIRA released a proposed bulletin on risk assessment for comment by the public and peer review by the National Academy of Sciences (NAS).⁵³ The bulletin proposed to establish six general risk assessment and reporting standards. It also proposed to establish a seventh general standard for assessments produced in relation to analysis for a rule with annual economic effects of \$1 billion or more and nine special standards for "influential" risk assessments that go beyond those general standards. Although characterized as "guidance" in the document's summary, the preamble mentioned the "requirements" of the bulletin, and listed the standards with which "[e]ach agency shall" comply.

In January 2007, an NAS committee reported that the proposed bulletin was "fundamentally flawed" and should be withdrawn by OIRA.⁵⁴ Instead, the committee said that OMB should issue a bulletin that outlines goals and general principles of risk assessments that federal agencies could use to develop their own guidance. In September 2007, OMB withdrew the proposed bulletin and instead issued a memorandum reiterating and reinforcing principles for risk assessment that were originally written in 1995, indicating that agencies should comply with the principles.⁵⁵

9. Good Guidance Practices Bulletin

In January 2007, OMB published a "Final Bulletin for Agency Good Guidance Practices."⁵⁶ Guidance documents (e.g., compliance guides, policy statements, and circulars), unlike regulations, are not binding on the public, but can provide information to the public that is helpful in understanding and complying with regulations. However, some guidance documents have been criticized as "backdoor rulemaking" in that they appear to establish new requirements that have not been reviewed by senior agency officials or OIRA.

51. See http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

52. Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (January 14, 2005) [hereinafter *2005 OMB Information Quality bulletin*].

53. OFFICE OF MANAGEMENT AND BUDGET, PROPOSED RISK ASSESSMENT BULLETIN (2006), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf. Risk assessment is used by federal agencies to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment. In a regulatory context, risk assessment helps agencies identify issues of potential concern (e.g., whether exposure to a given risk agent causes effects such as cancer, reproductive and genetic abnormalities, or ecosystem damage), select regulatory options, and estimate a forthcoming regulation's benefits.

54. Pat Phibbs-Rizzuto, *Draft OMB Guidance 'Fundamentally Flawed,' National Academies Panel Says in Report*, DAILY REPORT FOR EXECs., Jan. 12, 2007 (citing the National Academies of Science's Jan. 11, 2007 *Scientific Review of the Proposed Risk Assessment Bulletin from the Office of Management and Budget*).

55. For the September 2007 document, see https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-24.pdf; for the 1995 document, see https://georgewbush-whitehouse.archives.gov/omb/inforeg/regpol/jan1995_risk_analysis_principles.pdf.

56. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 343 (January 25, 2007). OIRA later issued a memorandum to agency regulatory policy officers on the implementation of the bulletin.

The OMB bulletin required each covered agency (all except independent regulatory agencies) to have written procedures for the clearance of “significant” guidance documents, establish certain standard elements for each such document (e.g., not include mandatory language such as “shall” or “must”), allow electronic access to and public feedback on such documents, and publish “economically significant” guidance documents (i.e., those with a \$100 million or more impact on the economy) in the Federal Register and solicit comments on the documents. The bulletin indicated that the definition of a “guidance document” includes all such material “regardless of format,” and says that guidance may be “significant” if it “may reasonably be anticipated to” have certain effects (e.g., raise novel legal issues, or create an inconsistency with another agency’s actions). OIRA was given a role in the implementation of this bulletin (e.g., to exempt certain types of documents from its requirements). Although some observers welcomed the issuance of this bulletin and suggested ways to make it stronger (e.g., judicial review), others said it represented a “power grab” by the White House, and could lead to less responsive government action.

10. Executive Order 13422

In January 2007, President George W. Bush issued EO 13422, which represented the most significant change to the presidential regulatory review process since 1993.⁵⁷ The changes included requirements that agencies designate a presidential appointee as a “regulatory policy officer” who could control rulemaking activity within the agencies. The order also expanded presidential review to include significant guidance documents (although such reviews were not subject to the transparency requirements in EO 12866). In congressional hearings on EO 13422, one member of Congress expressed concerns that the order would “shift to the President powers that the framers of our Constitution intended to be exercised by Congress.” Another member said she was concerned that “the main thrust of this new Order appears to shift control of the regulatory process from the agencies – the entities that have the most substantive knowledge and experience – to the White House.” However, other members said the new executive order simply formalized what was already occurring, and were “useful refinements” to the existing review process.⁵⁸

Within two weeks of taking office in January 2009, President Obama issued EO 13497 which (among other things) revoked EO 13422.⁵⁹ Shortly thereafter, however, the director of OMB issued a memorandum to the agencies instructing them to continue to send significant policy guidance documents to OIRA for review.⁶⁰

11. Obama Executive Orders

The Obama administration issued two executive orders on rulemaking that supplemented, but did not change, the requirements in EO 12866. In January 2011, President Obama issued Executive Order 13563 on “Improving Regulation and Regulatory Review.”⁶¹ The executive order is described as “supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in EO 12866 of September 30, 1993.” It reiterates many of the principles in the 1993 executive order (e.g., that benefits should “justify” costs, and that agencies should select the regulatory alternative that maximizes net benefits). The primary new element was a requirement that agencies develop a plan for the retrospective review of their existing regulations to determine if any should be modified, streamlined, expanded, or repealed. In July 2011, President Obama issued Executive Order 13579 requesting, but not requiring, independent regulatory agencies to follow the principles in EO 13563, and to develop plans for the review of their existing rules.⁶²

57. Exec. Order No. 13422 (Further Amendment to Executive Order 12866 on Regulatory Planning and Review), 72 Fed. Reg. 2763 (January 23, 2007).

58. For more information, see Curtis W. Copeland, *The Law: Executive Order 13422: An Expansion of Presidential Influence in the Rulemaking Process*, 37 PRES. STUD. Q. 531, 531-544 (September 2007).

59. Exec. Order No. 13497, 3 C.F.R. 318 (2010).

60. PETER R. ORSAG, GUIDANCE FOR REGULATORY REVIEW (March 4, 2009), http://www.thecre.com/pdf/20110118_m09-13.pdf. Orsag is a former director of OMB.

61. Exec. Order No. 13563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. (2006 & Supp. V 2011).

62. Exec. Order No. 13579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. (2006).

12. Delays of Rules During the Obama Administration

As noted previously, EO 12866 states that OIRA's reviews should generally be completed within 90 days. A study that I did for ACUS in 2013 showed that from 1994 through 2011, the average amount of time it took OIRA to complete a review was 50 days, and the highest average review time in any year was 62 days.⁶³ However, in 2012, the average time for OIRA to complete reviews increased to 79 days, and in the first half of 2013, the average review time was 140 days—nearly three times the average for the period from 1994 through 2011.⁶⁴ Some agencies were more affected than others, but by the first half of 2013, at least 17 departments and agencies had average review times of more than 90 days (up from only two departments in 2011). From 1994 through 2011, less than 2% of completed reviews took more than six months; however, in the first half of 2013, nearly 30% took more than six months, and nearly 13% took more than one year. Some rules sat at OIRA for more than two years.

Also, these statistics may understate the extent of the review delays during the Obama administration. According to senior employees that I interviewed in 11 departments and agencies, OIRA has increasingly used “informal reviews” of rules prior to their formal submission, and those reviews are not counted for purposes of calculating review times. Also, the senior employees said that OIRA in recent years had required agencies to get OIRA approval before submitting rules for review. In some cases, agencies reportedly had to wait months or even years to obtain OIRA permission to submit rules. As to why these delays were occurring, senior employees cited concerns by some in the Executive Office of the President about the issuance of potentially costly or otherwise controversial rules during an election year,⁶⁵ lengthy data or analytical requests from OIRA desk officers, and a perceived lack of management of those desk officers.

In response to the report, ACUS ultimately issued a statement indicating, among other things, that the agencies (not OIRA) should decide when significant rules will be submitted for review, that OIRA should adhere to the review deadlines in EO 12866, and that if OIRA is unable to complete reviews within a reasonable period, it should either return the rule to the agency or inform the public why the review was delayed.⁶⁶

Although the average length of OIRA reviews has shortened since 2013, those reviews are still longer than historical averages. For example, in 2014, the average length of OIRA reviews was 127 days (down from 137 days in 2013). Rules submitted by the Department of Energy took an average of more than 300 days, and EPA rules took an average of more than 200 days. As of mid-November 2015, there were 15 significant agency rules under review that had been at OIRA for more than six months, including four for more than a year, and one for more than four years.⁶⁷

13. OIRA and Lobbyists

In its previously-mentioned 2003 study, GAO reported that OIRA significantly affected at least 25 rules from nine health, safety, or environmental agencies. Most commonly, OIRA appeared to have influenced either (1) the expected costs and/or benefits of the rules and/or (2) the agencies' estimates of those costs and/or benefits.⁶⁸ GAO also reported that outside parties contacted OIRA before or during its formal review regarding 11 of the 25 rules that OIRA significantly affected. In 7 of these 11 cases, at least some of OIRA's recommendations were similar to those of the outside parties, particularly business groups. However, GAO could not definitively determine whether those contacts influenced OIRA's actions. In contrast, GAO reported that OIRA's actions were not similar to the recommendations made by public interest groups.

63. Curtis W. Copeland, *Length of Rule Reviews by the Office of Information and Regulatory Affairs* (December 2, 2013), <https://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf> [hereinafter *Copeland, OIRA Delays*].

64. An increase in average review time for completed reviews in one year may reflect the closure of lengthy reviews that primarily occurred in previous years.

65. The impact of the 2012 election was the most frequently cited reason for the delays. The Washington Post reported that seven current and former administration officials said that the motives behind many of the delays were clearly political. See Juliet Eilperin, *White House delayed enacting rules ahead of the 2012 election to avoid controversy*, WASH. POST, December 13, 2013, at A1.

66. The ACUS statement can be viewed at <https://www.acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%202012-9-13.pdf>.

67. See <http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>.

68. See *GAO on OMB's Role in Rule Reviews*, *supra* note 47, at 84-92.

Two academic researchers recently reached similar findings. In an article in the *American Political Science Review*, Simon F. Haeder and Susan Webb Yackee reported that “lobbying is associated with change during OMB review.”⁶⁹ Specifically, the authors found that “when only business groups lobby, we are more likely to see rule change; however, the same is not true for public interest groups.”

14. Summary

In summary, a variety of actions during the past 35 years have greatly expanded OIRA’s and the president’s influence in rulemaking.

- Under President Reagan, OIRA required agencies to submit rules to OIRA for review before they could be published, submit cost-benefit and other economic analyses to OIRA for the most important of those rules, and prepare agendas notifying OIRA and the public about upcoming rules. Submitting a rule for review that was not on the agenda, or that did not meet OIRA’s requirement for cost-benefit analysis, could result in rejection by OIRA.
- President Clinton had been encouraged to do away with OIRA review and cost-benefit analysis requirements, but instead continued them and expanded OIRA and the president’s authority in some areas (e.g., specifically stating that the president would judge disagreements between the agencies and OIRA).
- Under President George W. Bush, OMB and OIRA established requirements for peer review and guidance documents, and attempted to do so in the area of risk assessment and regarding issues covered by EO 13422. OIRA became the “gatekeeper” to rulemaking during the Bush administration, imposing even more stringent requirements for agencies to follow in issuing rules, and more frequently using “informal reviews” to influence rulemaking (without triggering review deadlines or transparency requirements).
- President Obama continued many of these efforts (e.g., informal reviews, and continuing the review of significant guidance documents even though he revoked EO 13422), instituted systematic retrospective reviews, and encouraged independent regulatory agencies to comply as well. Also, OIRA during the Obama administration held on to rules for much longer than during any previous administration (apparently for political reasons), and for the first time systematically required agencies to get OIRA’s approval to even submit rules for review.

OIRA is uniquely positioned both within the rulemaking process (reviewing and commenting on rules just before they are published in proposed and final form in the *Federal Register*) and within OMB (with its budgetary and management influence) to enable it to exert significant influence on agency behavior. The office is the president’s personal representative in the rulemaking process.⁷⁰ Some have suggested that advocating the president’s priorities may take precedence over other responsibilities of the office. For example, former OIRA Administrator Susan Dudley and a co-author wrote more than 10 years ago that “OIRA is supposed to simultaneously provide independent and objective analysis, and report to the president on the progress of executive policies and programs. When those functions conflict, the presidential agenda will most certainly prevail over independent and objective analysis.”⁷¹

69. Simon F. Haeder and Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President’s Office of Management and Budget*, 109 *AM. POL. SCI. REV.* 507, 507-522 (2015); see also Simon F. Haeder and Susan Webb Yackee, *Psst, wanna change the law? Lobby this little-known government office after it’s passed*, *WASH. POST*, July 27, 2015, https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/27/psst-wanna-change-the-law-lobby-this-little-known-government-office-after-its-passed/?utm_term=.d97d22eab026.

70. Former OIRA administrator John Graham said, the office’s actions “necessarily reflect Presidential priorities.” John D. Graham, *Presidential Management of the Regulatory State*, speech at the Weidenbaum Center Forum, National Press Club, Washington, D.C. (Dec. 17, 2001). Similarly, former OIRA administrator Sally Katzen was quoted by GAO as saying that “OIRA is part of the Executive Office of the President, and the President is the office’s chief client.” See *GAO on OMB’s Role in Rule Reviews*, *supra* note 47.

71. Susan E. Dudley and Angela Antonelli, *Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight*, *REGULATION*, fall 1997, at 17-23.

B. Congressional Influence on Rulemaking Has Diminished

While the president's influence on rulemaking has clearly increased in recent decades, and despite numerous complaints by members about agency rulemaking actions, the influence that Congress has on rulemaking has diminished. There are several possible reasons for this, including continued broad grants of rulemaking authority, ineffectual rulemaking reform statutes, and statutes that actually give the president more authority to control agency rulemaking. But underlying all these reasons appears to be an unwillingness to assert effective control over regulatory agencies, or to prevent the president from doing so.

Both EO 12291 and EO 12866 specifically stated that their requirements applied “to the extent permitted by law.” Therefore, Congress could have, but did not, constrain those presidential efforts. As Elena Kagan said in her 2001 Harvard Law Review article, “presidential administration” became dominant in rulemaking and is legal not because the Constitution requires it, but because “Congress generally has declined to preclude the President from controlling administration in this manner.”⁷² She described Republican efforts in Congress to restrain President Clinton's use of power over agency rulemaking as “feckless,” “just as an earlier Democratic Congress...had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process.”⁷³

1. Broad Grants of Rulemaking Authority

Substantive rulemaking starts with an authorizing act of Congress, and is one of the means through which statutes are implemented and specific requirements are established. The statutory basis for a regulation can vary greatly in terms of its specificity, with some statutes delineating exactly what regulatory agencies should do and how they should take action. For example, the Employee Retirement Income Security Act (29 U.S.C. §1001 et seq.) gives the Pension Benefit Guaranty Corporation no discretion in drafting rules that establish minimum pension insurance premium rates, specifying to the dollar what those rates should be.⁷⁴ Also, Congress may impose specific procedural requirements on agencies' rulemaking processes (e.g., the conduct of public hearings, the publication of a notice of proposed rulemaking by a particular date, or the coordination of rulemaking with another agency).

In other cases, however, and perhaps more commonly, statutes give rulemaking agencies substantial discretion in how rules are developed and what they require.⁷⁵ For example, the Agricultural Adjustment Act provides a broad grant of rulemaking authority to the secretary of agriculture, stating only that agricultural marketing should be “orderly” but providing little guidance regarding which crops should have marketing orders or how to apportion the market among growers. More recently, the Patient Protection and Affordable Care Act (ACA, P.L. 111-148) contained numerous provisions giving federal agencies broad authority to issue “such regulations as may be necessary” to carry out certain requirements in the law. Other ACA provisions simply stated that agencies “may” issue rules in certain areas.⁷⁶ Similarly, of the 330 rulemaking provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010), more than half appear to be discretionary in nature, stating that certain agencies “may” issue rules to implement particular provisions, or that the agencies shall issue such rules as they “determine are necessary and appropriate.”⁷⁷ An article in the New York Times described the Dodd-Frank Act as a “2,000 page missive to federal agencies,” and that it “is notably short on specifics, giving regulators significant power to determine its impact.”⁷⁸

72. Kagan, *supra* note 4, at 2245.

73. *Id.* at 2314.

74. For example, 29 U.S.C. §1306(a)(3)(A) states that the annual premium rate payable in the case of a single-employer plan for basic benefits is “an amount equal to the sum of \$19 plus the additional premium (if any) determined under subparagraph (E) for each individual who is a participant in such plan during the plan year.”

75. DAVID EPSTEIN AND SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

76. CURTIS W. COPELAND, CONG. RES. SERV., R41180, *REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT* (P.L. 111-148) (2010), <http://www.ncsl.org/documents/health/Regulations.pdf>.

77. CURTIS W. COPELAND, CONG. RES. SERV., R41472, *RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND PROTECTION ACT* (2010), <http://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf>; CURTIS W. COPELAND, CONG. RES. SERV., R41180, *REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT* (P.L. 111-148) (2010).

78. Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. TIMES, June 27, 2010, at A1.

These kinds of broad delegations of rulemaking authority to the agencies may be chosen because Congress lacks the technical expertise needed to craft detailed legislation, or because Congress cannot reach consensus on how particular issues should be resolved. Nevertheless, when Congress permits agencies to prescribe “such regulations as are necessary” without providing boundaries, it is essentially giving agencies legislative power. And, courts tend to give agencies broad authority to interpret such statutes.⁷⁹ On the other hand, when Congress requires that a regulation contain certain elements, Congress retains a measure of control over (and responsibility for) the subsequent rulemaking process.

2. Ineffectual Reform Statutes

Congress has established a number of crosscutting rulemaking requirements that apply to all or most regulatory agencies. Most of them have been established since 1980, including the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Congressional Review Act. Taken together, these provisions require agencies to perform an array of analyses and other actions before rules can be published and take effect, and appear to give Congress a real role in the rulemaking process. Upon closer inspection, however, the statutes can be seen as ineffectual, with numerous “loopholes” giving agencies substantial discretion regarding when and how the requirements are to be applied. As a result, Congress’ influence on rulemaking is not what it appears to be.

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612), requires federal agencies to assess the impact of their forthcoming regulations on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, all agencies must prepare a regulatory flexibility analysis at the time certain proposed and final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are initiated. Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and nearly half of all final rules are published without a proposed rule, including about one-third of all “major” rules.⁸⁰

79. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in which the Supreme Court established a doctrine of judicial deference to agency statutory interpretations of congressional delegations of rulemaking authority in certain circumstances. Such deference is deemed to be “implicit” in statutes where Congress has not been “precise” or “direct” with respect to its intent with respect to the scope of its delegation but rather is “silent or ambiguous with respect to the specific issue.” If there is such a gap that an agency must fill, “the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” 467 U.S. at 843-44. The deference accorded agency administrators by so-called Chevron doctrine has been the subject of academic and judicial controversy and is seen as an important aspect of the diminution of Congress’s control over its delegations of law making power that it has not effectively addressed. For an overview, see JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 446-76 (5th ed. 2012).

80. U.S. GEN. ACCT. OFF., GGD-98-126, *FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES* (1998) [hereinafter *GAO on Federal Rulemaking*]; and U. S. GOV’T ACCOUNTABILITY OFF. GAO-13-21, *FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS* (2012). Many agencies are apparently aware of this limitation; GAO estimated that in more than 500 final rules published in 1997, the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by a proposed rule. See *GAO on Federal Rulemaking* at 31.

GAO has examined the implementation of the RFA several times within the past 35 years, and a recurring theme in GAO's reports is a lack of clarity in the act and a resulting variability in the act's implementation. For example, GAO reported that EPA certified 96% of its proposed rules published from 1994 through 1999, with the rate of certification going up (to 100% in some parts of EPA) after Congress imposed new requirements on rules that are not certified.⁸¹ Under the agency's guidelines, an EPA rule could impose \$10,000 of compliance costs on 10,000 small entities, and those effects would still not be considered "significant" or "substantial."⁸² In 2001, GAO testified that the promise of the RFA might never be realized until Congress or some other entity defines what the terms "significant economic impact" and "substantial number of small entities" mean in a rulemaking setting.⁸³ In 2006, GAO again testified on the RFA, noting its numerous prior recommendations.⁸⁴ To date, Congress has not acted on any of GAO's recommendations.

b. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995 was enacted in an effort to reduce the costs associated with federal imposition of responsibilities, duties, and regulations upon state, local, and tribal governments and the private sector without providing the funding appropriate to the costs imposed by those responsibilities.

Title II of UMRA (2 U.S.C. §§1532-1538) requires Cabinet departments and independent agencies (but not independent regulatory agencies) to, among other things: (1) prepare a written statement containing specific descriptions and estimates for any proposed rule or any final rule for which a proposed rule was published that includes any federal mandate that may result in the expenditure of \$100 million or more in any year by state, local, or tribal governments, in the aggregate, or the private sector; (2) identify and consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative (or explain why that alternative was not selected) for each rule for which a written statement is prepared; and (3) develop an effective process to permit elected officers of state, local, and tribal governments (or their designees) to provide input in the development of regulatory proposals containing significant intergovernmental mandates.

In February 1998, GAO reported that, because of the way the statute was written, title II of UMRA had little effect on agencies' rulemaking actions during its first two years of implementation.⁸⁵ First, many of the act's requirements did not appear to apply to most of the "economically significant" rules (e.g., rules with a \$100 million impact on the economy) that were promulgated during this period. For example, if a final rule did not have an associated proposed rule, or if it imposed a mandate as a condition of federal financial assistance, the written statement requirement in Section 202 of UMRA does not apply. Second, UMRA does not require agencies to take the actions specified if the agencies determine that they are duplicative of other actions or that accurate estimates of the effect of their rules are not feasible. Third, even when UMRA is triggered, it often requires agencies to take actions that are identical or similar to actions that they were already required to take. For example, UMRA's requirements for the conduct of cost-benefit analysis and identification of regulatory alternatives are similar to the requirements that were already in place under Executive Order 12866, which was issued more than a year before UMRA was enacted.

In May 2004, GAO again reported that UMRA's written statement requirements only applied to about 7% of the major or economically significant final rules issued in 2001 and 2002, even though some of the non-covered rules "appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act's thresholds."⁸⁶ In March 2005, GAO reported that parties from various sectors (businesses, public interest groups, academia, and others) most commonly cited UMRA's numerous definitions, exclusions,

81. U.S. GEN. ACCT. OFF., GAO/GGD-00-193, REGULATORY FLEXIBILITY ACT: IMPLEMENTATION IN EPA PROGRAM OFFICES AND PROPOSED LEAD RULE (2000).

82. *Id.*

83. U.S. GEN. ACCT. OFF., GAO-01-669T, REGULATORY FLEXIBILITY ACT: KEY TERMS STILL NEED TO BE CLARIFIED (2001).

84. U.S. GOV'T. ACCOUNTABILITY OFF., GAO-06-998T, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS (2006).

85. U.S. GEN. ACCT. OFF., GAO/GGD-98-30, UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES' RULEMAKING ACTIONS (1998).

86. U.S. GEN. ACCT. OFF., GAO-04-637, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE (2004).

and exceptions as problematic and in need of improvement.⁸⁷ In February 2011, GAO reiterated these conclusions, noting that there are 14 reasons why a rule may not be considered a “mandate” under UMRA.⁸⁸ In each of these reports, GAO made numerous recommendations to improve UMRA. To date, however, Congress has not acted on any of GAO’s recommendations.

c. Congressional Review Act

The statutory provision commonly known as the Congressional Review Act (CRA) (5 U.S.C. §§801-808) was enacted in March 1996, and is arguably the clearest example of Congress attempting to regain authority in agency rulemaking. The CRA established expedited procedures by which Congress may disapprove agencies’ rules by enacting a joint resolution of disapproval. Under the act, before any final rule can become effective it must be filed with each house of Congress and GAO. The definition of a “rule” under the CRA is very broad, and the act applies to rules issued by Cabinet departments and independent agencies as well as independent regulatory agencies. If OIRA considers the issuing agency’s rule to be “major,” the agency generally must delay the rule’s effective date by 60 days after the date of publication in the Federal Register or submission to Congress and GAO, whichever is later. After Congress receives an agency’s rule, a member of Congress can introduce a resolution of disapproval that, if adopted by both houses and enacted into law, can nullify the rule, even if it has already gone into effect.

Congressional disapproval under the CRA also prevents the agency from proposing to issue a “substantially similar” rule without subsequent statutory authorization.

As of November 2015, federal agencies had submitted almost 70,000 rules to GAO (and, presumably, Congress) since the CRA took effect in March 1996, including more than 1,350 major rules. However, only fourteen rules have been overturned through CRA’s procedures—one in March 2001 and thirteen during the first several months of 2017. Many reasons have been suggested for why the CRA has not been used more often, but chief among them may be the fact that, if the president vetoes a resolution of disapproval (which is likely if the underlying rule is developed during his administration), then enactment of the resolution would require approval of a two-thirds majority in both houses of Congress to override the veto. The rejection of each of the four rules noted above was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming president (George W. Bush in 2001, then Donald Trump in 2017). In both cases, the new Congress convened and adopted a resolution disapproving the rule published under the outgoing president (Clinton in 2001, then Obama in 2017), which the new president signed into law. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.

Also, a study that I did in 2014 indicated that many agency rules were not being submitted to Congress or GAO at all—which means that the rules were not subject to the expedited disapproval procedures.⁸⁹ From 1997 through 2011, federal agencies submitted an average of about 3,600 rules to GAO each year, which was about 88% of the final rules that were published in the Federal Register in those years.⁹⁰ However, federal agencies submitted only about 71% of the rules that were published during 2012 and 2013—more than 1,200 fewer than would have been submitted at the 88% historical rate of submission. During the first half of 2014, less than half of the published rules were submitted to GAO, nearly 650 fewer than would have been submitted at the 88% rate of submission. At least six of the missing rules were considered “major” under the CRA, and at least 37 other rules were considered “significant” under EO 12866.

One of the reasons why so many rules were not submitted to GAO and Congress appears to be a decision by GAO (for

87. U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-454, UNFUNDED MANDATES: VIEWS VARY ABOUT REFORM ACT’S STRENGTHS, WEAKNESSES, AND OPTIONS FOR IMPROVEMENT (2005).

88. U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-385T, UNFUNDED MANDATES: FEW RULES TRIGGER UNFUNDED MANDATES REFORM ACT (2011) (Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight of Government Management).

89. Curtis W. Copeland, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS, July 15, 2014, <https://www.acus.gov/sites/default/files/documents/CRA%2520Report%25200725%2520%25282%2529.pdf>.

90. Some published rules fall under exceptions to the CRA submission requirement (e.g., rules of particular applicability), or were technical corrections or amendments to previously published rules (which GAO does not include in its database).

budget reasons) to stop voluntarily checking the Federal Register to determine whether all covered rules were being submitted. Congress could require (and fund) a reinstatement of those checks. Also, because the CRA prohibits judicial review of any “action” or “omission,” it is unclear whether a court may prevent an agency from enforcing a covered rule that was not reported to GAO and Congress. To address this issue, Congress could permit some form of judicial review of the CRA rule submission requirement. Congress could also focus the submission requirement on a more limited number of rules (e.g., eliminating “routine” and “administrative” rules on such topics as fireworks displays and bridge opening schedules), thereby focusing the effort on rules that are of greater concern to Congress and the public.

This study was widely reported,⁹¹ and the previously mentioned problems with the CRA are well known. Nevertheless, to date, Congress has not acted to improve the operation of the CRA.

6. Statutes That Give the President More Power

In addition to regulatory reform statutes that are largely ineffectual, there are also statutes that have had the effect of giving the President *more* authority. These include the Paperwork Reduction Act, the Information Quality Act, and an OMB reporting requirement.

a. Paperwork Reduction Act

As noted earlier in this chapter, the Paperwork Reduction Act (PRA) established OIRA. Under the law, agencies must receive OIRA-approval for each collection request before it is implemented, and those approvals must be renewed at least every three years. OIRA can disapprove any collection of information if it believes the collection is inconsistent with the requirements of the PRA.⁹² OIRA data indicates that the office takes action on between 3,000 and 5,000 information collection requests (new approvals, renewals, or revisions) each year.

The PRA was amended in 1995. The amended version reaffirmed the principles in the original act and gave significant new authorities and responsibilities to OIRA. For example, the act now requires OIRA to “oversee the use of information resources to improve the efficiency and effectiveness of governmental operations to serve agency missions.” One of the key features of the PRA of 1995 was the requirement that OIRA, in consultation with the agency heads, set annual government-wide goals for the reduction of information collection burdens by at least 10% in fiscal years 1996 and 1997, and by at least 5% in each of the succeeding four fiscal years. The act also required OIRA to establish agency burden reduction goals each year representing “the maximum practicable opportunity in each agency.” This type of language encourages OIRA (and therefore the president) to exert greater control.

The coverage of the PRA is extremely broad, including actions by Cabinet departments and independent agencies as well as independent regulatory agencies, and covering virtually any type of collection of information that these agencies “conduct or sponsor.” As a result of the 1995 amendments to the act, the PRA’s clearance requirements clearly cover collections of information “requiring the disclosure to third parties or the public,” effectively overturning the Supreme Court’s 1990 decision in *Dole v. United Steelworkers of America*.⁹³ Because many regulations require some type of information collection, the PRA gives OIRA a substantial amount of influence over rulemaking—its authority under EO 12866 notwithstanding.

b. Information Quality Act

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), generally known as the “Data Quality Act” or the “Information Quality Act” (IQA), amended the Paperwork Reduction Act and

91. Juliette Eilperin, *Study: Hundreds of rules passed by Obama Administration are technically illegal*, WASH. POST, July 29, 2014, https://www.washingtonpost.com/politics/study-hundreds-of-rules-passed-by-obama-administration-are-technically-illegal/2014/07/29/95e799ce-0872-11e4-a0dd-f2b22a257353_story.html?utm_term=.f85c62a93489.

92. However, multi-headed independent regulatory agencies can, by majority vote of the leadership, void any OIRA disapproval of a proposed information collection. See 44 U.S.C. § 3507(f).

93. 494 U.S. 26.

directed OMB to issue government-wide guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”⁹⁴ The act also required agencies to report periodically to the director of OMB on the number and nature of complaints received and how such complaints were handled by the agency. In addition, the previously mentioned peer review standards that OMB published in 2004 were issued pursuant to the authority that Congress granted in the IQA. OMB said “In the Information Quality Act, Congress directed OMB to issue guidelines to ‘provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information’ disseminated by Federal agencies.”⁹⁵ Thus, the IQA gives OMB (and therefore the president) another potential source of power over rulemaking.

c. “Recommendations for Reform”

Section 628(a) of the FY2000 Treasury and General Government Appropriations Act required OMB to provide a report on the total costs and benefits of federal regulations, and to make “recommendations for reform.” In 2001, OIRA transformed the general requirement for reform recommendations into an initiative requesting the public to identify specific rules that it believed should be eliminated or reformed. OIRA received a total 71 nominations from the public (44 of which were from the Mercatus Center at George Mason University), and OIRA selected 23 of them for “high priority review,” indicating that OIRA was inclined to agree with the suggestion.⁹⁶ However, OIRA did not disclose how it decided which rules merited high priority review.

Section 624 of the Treasury and General Government Appropriations Act of 2001, also known as the “Regulatory Right-to-Know Act,” required OIRA to include “recommendations for reform” in its cost-benefit report each year. OIRA again asked the public to identify regulations or regulatory programs in need of reform. This time, OIRA received comments on 267 regulations and 49 guidance documents from approximately 1,700 individuals, firms, trade organizations, and others. In its 2004 report on costs and benefits, OIRA identified 75 reforms that had been completed as a result of suggestions from the public and other efforts, and another 28 “promising” reforms that had been proposed by the agency.⁹⁷ In that same report, OIRA again requested public nominations of specific regulations that could be reformed, and expressed particular interest in reforms applicable to small and medium-sized manufacturers. OIRA received another 189 recommendations, of which 76 were judged to justify further action. OMB then published another report specifically on agency responses to these manufacturing-related recommendations.⁹⁸

Therefore, OIRA turned the seemingly innocuous requirement to identify “recommendations for reform” into a series of efforts to eliminate or change regulations, many of which had already gone through the OIRA review process.

C. What Can Congress Do?

Given that all presidents for the past 35 years have attempted to increase the authority of the president and/or OIRA in the federal rulemaking process, and given that Congress has been unable or unwilling to compete with the president in this arena, what can Congress do to reassert itself in the area of rulemaking?

94. OMB published those government-wide guidelines in interim form on September 28, 2001, and in updated final form on February 22, 2002. See GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY FEDERAL AGENCIES; REPUBLICATION, 67 F.R. 8452, 8452 (February 22, 2002).

95. 2005 OMB Information Quality Bulletin, *supra* note 52, at 7.

96. In its December 2002 report on costs and benefits, OIRA noted that several commenters questioned the 2001 comment process because the Mercatus Center provided a majority of the recommendations for reform. OIRA said it believed that, if there was a problem with that process, “it was not that the Mercatus Center was too active but that other potential commenters were silent.” U.S. OFFICE OF MGMT. AND BUDGET, OFFICE OF INFO. AND REG. AFF., STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 33 (2002), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf.

97. U.S. OFFICE OF MGMT. AND BUDGET, OFFICE OF INFO. AND REG. AFF., PROGRESS IN REGULATORY REFORM: 2004 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 1050-133 (2004), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2004_cb_final.pdf.

98. U.S. OFFICE OF MGMT. AND BUDGET, OFFICE OF INFO. AND REG. AFF., REGULATORY REFORM OF THE U.S. MANUFACTURING SECTOR (2005), https://georgewbush-whitehouse.archives.gov/omb/inforeg/reports/manufacturing_initiative.pdf.

1. Avoiding and Correcting Past Mistakes

The most obvious answer is for Congress not to continue to do some of the things that have contributed to this situation. For example, Congress should avoid enacting legislation with broad grants of authority to the agencies (and therefore the president) to put in place whatever regulations they “deem necessary.” The more specific Congress is in its delegations of rulemaking authority (i.e., what the regulations say and how they should be developed), the less power it provides to the president and regulatory agencies. However, specific regulatory requirements in legislation can also have a downside, preventing agencies from promptly crafting regulations that are the most suitable, cost-efficient responses to perceived problems. Ultimately, therefore, it is a balancing act; including enough specifics in legislation to ensure that Congress’ policy preferences are known while giving agencies discretion to craft regulations that are appropriate to the situation. When Congress decides to give agencies rulemaking discretion, it should do so knowingly and without the intent of later blaming the agencies for using the discretion that Congress provided.

Also, Congress can correct some of the known deficiencies in the crosscutting regulatory requirements that have been put in place over the years, and can avoid similar types of issues in future regulatory reform efforts. For example, Congress can improve the operation of the RFA and UMRA by implementing the numerous recommendations that GAO has made over the years. Congress can make the CRA more effective by taking action to ensure that the most important rules are submitted to GAO and Congress. Numerous other suggestions have also been made to improve the operation of the CRA.⁹⁹

In regulatory reforms that are still under consideration, Congress can use the experience of the past 35 years to avoid giving more power to the president or OIRA, and to avoid the use of exceptions and undefined terms (e.g., “significant economic impact” and “substantial number of small entities”) that permit agencies to avoid the rulemaking requirements. For example, one bill introduced during the 114th Congress (S. 1607, the Independent Agency Regulatory Analysis Act of 2015) would expand cost-benefit requirements and OIRA reviews to independent regulatory agencies. Doing so would greatly increase OIRA’s (and therefore the president’s) authority over such agencies. Not surprisingly, seven former OIRA administrators from the Reagan, Clinton, and George W. Bush Administrations have expressed support for the bill.¹⁰⁰

A number of other bills introduced during the 114th Congress would have increased OIRA’s authority. For example, the “ALERT Act” (H.R. 1759) would have required the head of each federal agency to submit a monthly report to OIRA identifying each rule it expects to propose or finalize within the following year. It also would have required a monthly report to OIRA of all rules that it expects to be finalized in the next year for which a proposed rule had been published, including an estimate of its cost and economic effects. Another bill, the “Regulatory Sunset Act of 2015” (H.R. 2010, S. 1067), would have required OIRA to develop an inventory of existing “covered rules” (which OIRA would define) and to prioritize them for sunset review.

On the other hand, some legislation introduced in the 114th Congress could have improved congressional authority in rulemaking. For example, the Regulatory Improvement Act of 2015 (H.R. 1407, S.708) would have established within the legislative branch a “Regulatory Improvement Commission,” and would have required the commission to “evaluate and provide recommendations for modification, consolidation, or repeal of covered regulations [those finalized at least 10 years earlier] with the aim of reducing compliance costs, encouraging growth and innovation, and improving competitiveness, all while protecting public health and safety.”

Using this information, Congress could hold public hearings and make formal inquiries into particular agency rules, as well as presidential initiatives in this sphere. Congress has done so in the past, but those efforts have been episodic and relatively infrequent in the past 10 to 15 years. More systematic and sustained uses of the traditional tools of congressional oversight can go far toward improving the authority of Congress in rulemaking.

99. See, e.g., MORTON ROSENBERG, *THE CRITICAL NEED FOR EFFECTIVE CONGRESSIONAL REVIEW OF AGENCY RULES: BACKGROUND AND CONSIDERATIONS FOR INCREMENTAL REFORM*, (July 18, 2012), a report prepared for the consideration of the Administrative Conference of the United States, https://www.acus.gov/sites/default/files/documents/CRA%20_%20Final%20Report.pdf.

100. See Letter from Sally Katzen, Susan Dudley, John Spotila, James Miller, John Graham, Wendy Lee Graham, and Christopher DeMuth to Sen. Rob Portman (June 17, 2015), https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=65eccc19-bac4-43f9-bc52-2154e2b09cfe.

2. Appropriations Restrictions

In the past, Congress has also intervened in the regulatory process through budgetary means, preventing agencies from using their appropriations to issue or enforce certain types of rules. A study that the author did looking at appropriations bills from FY1999 through FY2008 identified least four types of such restrictions: (1) restrictions on the finalization of particular proposed rules, (2) restrictions on regulatory activity within certain areas, (3) implementation or enforcement restrictions, and (4) conditional restrictions (e.g., preventing implementation of a rule until certain actions are taken).¹⁰¹

A quick examination of the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235, December 16, 2014) revealed that these types of appropriations restrictions are continuing. For example, one provision in the FY2015 appropriations bill prohibited the finalization of an identified proposed rule that had been published more than four years earlier unless certain conditions were met:

None of the funds made available by this or any other Act may be used to write, prepare, or publish a final rule or an interim final rule in furtherance of, or otherwise to implement or enforce the proposed rule entitled “Implementation of Regulations Required Under Title XI, of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act” published by the Department of Agriculture in the Federal Register on June 22, 2010 (75 Fed. Reg. 35338 et seq.) unless the combined annual cost to the economy of such rules does not exceed \$100,000,000.¹⁰²

Another provision in the act prohibited enforcement or implementation of previously established statutory and regulatory provisions:

None of the funds made available in this Act may be used— (1) to implement or enforce section 430.32(x) of title 10, Code of Federal Regulations; or (2) to implement or enforce the standards established by the tables contained in section 325(i)(1)(B) of the Energy Policy and Conservation Act (42 U.S.C. 6295(i)(1)(B)) with respect to BPAR incandescent reflector lamps, BR incandescent reflector lamps, and ER incandescent reflector lamps.¹⁰³

Other provisions prohibited the development of any regulations within particular areas. For example:

Notwithstanding any other provision of law, none of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under title V of the Clean Air Act (42 U.S.C. 7661 et seq.) for carbon dioxide, nitrous oxide, water vapor, or methane emissions resulting from biological processes associated with livestock production.¹⁰⁴

Yet another provision required that certain regulatory provisions put in place two years earlier remain unchanged:

None of the funds made available in this or any other Act making appropriations for Energy and Water Development for any fiscal year may be used by the Corps of Engineers during the fiscal year ending September 30, 2015, to develop, adopt, implement, administer, or enforce any change to the regulations in effect on October 1, 2012, pertaining to the definitions of the terms “fill material” or “discharge of fill material” for the purposes of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).¹⁰⁵

101. CURTIS W. COPELAND, CONG. RES. SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (2008), <https://fas.org/sgp/crs/misc/RL34354.pdf>.

102. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, Division A, § 731, 128 Stat. 2167 (2005).

103. *Id.* at Division D, § 313.

104. *Id.* at Division F, § Section 419.

105. *Id.* at Division D, § 109.

Finally, one provision declared a published rule indefinitely “null and void.”

Provided further, That sections 201.2(o), 201.3(a), and 201.215(a), of title 9 of the Code of Federal Regulations (as in effect on the date of enactment of this Act) are hereby indefinitely declared null and void and shall have no force under the laws, and the Secretary of Agriculture shall, within 60 days after the date of enactment of this Act, rescind sections 201.2(o), 201.3(a), and 201.215(a), of title 9 of the Code of Federal Regulations (as in effect on such date).¹⁰⁶

These various types of appropriation riders are common, but do have limitations. For example, the restrictions are generally applicable only for the period of time and the agencies covered by the relevant appropriations bill. (Therefore, some provisions are repeated each year.) Also, to the extent that agencies have independent sources of funding (e.g., user fees) or implement their regulations through state or local governments, some of the limitations may not be as restrictive as they seem.

Some observers and interest groups have specifically advocated the use of appropriations provisions to stop rulemaking activity. For example, John Shanahan and Mark Wilson of the Heritage Foundation described several spending restrictions in 1995 appropriations legislation for EPA and the Department of Labor (e.g., restricting implementation of the Delaney Clause, wetlands permitting requirements, and an ergonomics standard), and said the following:

While permanent labor and environmental policy reform should be pursued, many of the problems addressed by the House appropriations riders are so egregious that immediate relief should be granted. While these riders are an imperfect solution, Americans should view them as necessary to encourage recalcitrant federal agencies to work with Congress to reform some of the nation’s most burdensome regulatory statutes.¹⁰⁷

Others, however, have expressed concerns about these kinds of provisions from both a procedural and a public policy standpoint. For example, in a 2005 article entitled “Regulatory Underkill,” William W. Buzbee of the Center for Progressive Reform said the following:

During the past decade, a particularly popular means of derailing programs, but in a low visibility manner, has been through the use of legislative riders. Such riders are typically not freestanding bills that are subject to the congressional committee process, openly debated, and visible for all to see. Instead, they commonly appear without announcement or even an open legislative sponsor. Riders are appended to other bills, often large spending appropriations bills that have broad support and reflect hundreds of fiercely negotiated bargains. Some riders enact provisions that could not pass as freestanding legislation.... Other riders bar the use of appropriations to implement controversial policies. These “carve-outs” effectively render such policies a nullity for certain periods or in certain areas. Because these riders do not involve a frontal attack on a popular law, and their advocates may remain unknown, the public seldom knows of these proposals in time to mount an effective opposition.¹⁰⁸

3. OIRA Review Limitations

Congress could also consider restricting the ability of OIRA or the president from reviewing particular rules or sets of rules (as Congress has done through provisions added to OMB’s appropriation bills with regard to agricultural marketing orders for the past 30 years).¹⁰⁹ Executive Order 12866 seems to contemplate and recognize this kind of limitation on presidential power when it states in Section 7 that the president will resolve disputes between OIRA and rulemaking

106. *Id.* at Division A, § 731.

107. John Shanahan and Mark Wilson, *Using Appropriations Riders to Curb Regulatory Excess*, HERITAGE ISSUE BULLETIN No. 218, October 16, 1995.

108. WILLIAM BUZBEE ET AL., *REGULATORY UNDERKILL: THE BUSH ADMINISTRATION’S INSIDIOUS DISMANTLING OF PUBLIC HEALTH AND ENVIRONMENTAL PROTECTIONS*, CENTER FOR PROGRESSIVE REGULATIONS WORKING PAPER (2004).

109. For example, the Consolidated and Further Continuing Appropriations Act of 2015 states that “none of the funds appropriated in this Act for the Office of Management and Budget may be used for the purpose of reviewing any agricultural marketing orders or any activities or regulations under the provisions of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.).”

agencies “to the extent permitted by law.”

If Congress prohibited OIRA review of particular rules or types of rules, then the appeals process in Section 7 would seem to be inapplicable, as there could be no dispute between OIRA and the rulemaking agency for the president to settle. On the other hand, enactment of restrictions on the president’s or OIRA’s authority may be resisted by the president through presidential veto or a signing statement. Also, if Congress indicated that OIRA should not be involved in the review of an agency’s rule, the president might try to counter that action by designating some other part of the Executive Office of the President (e.g., the Council of Economic Advisers) or some other agency (e.g., the Department of Agriculture) as the reviewing office for the rule.

However, any attempt to constrain OIRA would likely meet with opposition from the president. In June 2007, the House of Representatives voted to prevent the enforcement of Executive Order 13422.¹¹⁰ That effort was ultimately not successful after OMB said the legislation would interfere with “the President’s authority to manage the Executive Branch” and indicated that it would recommend that the president veto the bill. Congress has enacted numerous provisions in recent appropriations bills that prevent particular rules from being developed or enforced, but those restrictions are typically narrow in scope, of relatively short duration, and of uncertain impact.¹¹¹

4. Final Rule Authority to the Agencies

In discussions about presidential power and rulemaking, the traditional or classical perspective says the president cannot make the final decision on substantive rules that Congress has assigned to the agencies, but can attempt to influence agency officials up to and including firing them if they disagree. The “unitary executive” position asserts that the president should be able to make the final decision regarding such rules, even when Congress has assigned rulemaking activities to the agencies. In her 2001 article on “Presidential Administration,” Elena Kagan took a third position—that the president can determine the substance of agency rules, but not if Congress has specifically prohibited or limited the president’s intervention.¹¹²

Therefore, Congress could specifically indicate in legislation authorizing or requiring regulation that the agency head, not the president, has final rulemaking authority. However, such an approach would likely meet with presidential objection. For example, while the George W. Bush administration accepted and abided by congressional provisions limiting OIRA review of agricultural marketing orders, President Bush objected to statutory language that delegated final authority to subordinate officials, even those officials who have been appointed by the president with the advice and consent of the Senate.¹¹³ It is unclear to what extent such objections might have influenced the implementation of such laws.

5. Transparency Requirements

Congress could also increase the visibility of the president’s and OIRA’s involvement in the rulemaking process. Doing so might have the secondary effect of reducing such involvement. For example, Congress could:

- Prohibit OIRA from stopping agencies from submitting their significant rules for review, and require that the time limits for review begin when OIRA begins to review drafts of agency rules.
- Require that OIRA adhere to the 90-day review limit in EO 12866, and either complete review, return the rule to the agency with an explanation, or disclose to the public why the review is being delayed.
- Require that, after the rules are published, all changes that the agencies made at OIRA’s suggestion or

110. See § 901 of H.R. 2829 (as passed by the House), the Financial Services and General Government Appropriations Act, 2008, which funded OMB, among other agencies.

111. CURTIS W. COPELAND, CONG. RES. SERV., RL34354, CONGRESSIONAL INFLUENCES ON RULEMAKING THROUGH APPROPRIATIONS RESTRICTIONS (2008).

112. Kagan, *supra* note 4.

113. See, e.g., Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 534 (2008).

recommendation be reflected in the agencies' regulatory dockets—regardless of whether the changes occurred during formal or informal reviews by OIRA.

- Require either the agencies or OIRA to disclose why rules are withdrawn from review.
- Require OIRA to more fully disclose in the office's meeting log which regulatory action was being discussed and the affiliations of participants in those meetings.
- Require documentation of changes made to significant guidance documents that are reviewed by OIRA, and require that OIRA reveal when such documents are submitted for review and when the office's reviews are completed—just as OIRA does now for agency rules.

These suggestions to improve transparency are not new. They were all included in GAO's 2003 report on OIRA,¹¹⁴ the ACUS report on OIRA rule delays,¹¹⁵ or both. The same is true for most of the suggested improvements mentioned above. Virtually all of them have been made before, and Congress is (or should be) aware of them. What has been lacking to date has been the willingness for Congress to assert itself and reclaim at least some of the authority over rulemaking that it had in 1946 when the Administrative Procedure Act was passed.

114. See *GAO on OMB's Role in Rule Reviews*, *supra* note 47.

115. *OIRA Delays*, *supra* note 63.