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## Presidential Review of Agency Rulemaking

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T.J. Halstead  
Legislative Attorney  
American Law Division

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## Summary

Presidential review of agency rulemaking is widely regarded as one of the most significant developments in administrative law since the introduction of the first formal review programs in the 1970's. The evolution of presidential review of agency rulemaking efforts from the Reagan era through the current Administration marks a significant assertion and accumulation of presidential power in the regulatory context. While initial presidential forays into centralized regulatory review were limited in scope, presidential review of rules has emerged as one of the most effective and controversial mechanisms by which a President can ensure the realization of his regulatory agenda.

Limited regulatory review began with President Nixon's establishment of a program requiring proposed environmental, consumer protection, and occupational and public health and safety regulations be circulated within the executive branch for comment. President Reagan issued an executive order requiring agencies to prepare inflationary impact statements for any major regulatory actions, and President Carter expanded presidential review through the issuance of an executive order requiring a regulatory analysis of all proposed major rules.

In 1981, President Reagan issued Executive Order 12,291, ushering in a new era of presidential assertions of authority over agency rulemaking efforts. E.O. 12,291 required cost-benefit analyses and established a centralized review procedure for all agency regulations. E.O. 12,291 delegated responsibility for this clearance requirement to the Office of Information and Regulatory Affairs, which had recently been created within the Office of Management and Budget as part of the Paperwork Reduction Act of 1980. The impact of E.O. 12,291 on agency regulatory activities was immediate and substantial, generating controversy and criticism. Opponents of the order asserted that review thereunder was distinctly anti-regulatory and constituted an unconstitutional transfer of authority from the executive agencies. The review scheme established in the Reagan Administration was retained by President George H.W. Bush to similar effect and controversy.

Many of the concerns voiced regarding E.O. 12,291 were assuaged by President Clinton's issuance in 1993 of Executive Order 12,866, which implemented a more selective and transparent review process. E.O. 12,866 has been retained by the current Administration, which has utilized it to implement a review regime subjecting rules to greater scrutiny than in the Clinton Administration. The actions of both the Clinton and George W. Bush Administrations in implementing the provisions of E.O. 12,866 could be taken to indicate a conception of presidential authority consonant with that conveyed by the Reagan order. However the comparatively nuanced exercise of this asserted authority by these Administrations has largely diminished arguments against the constitutionality of presidential review. Accordingly, presidential review of agency rulemaking has become a widely used and increasingly accepted mechanism by which a President can exert significant and sometimes determinative authority over the agency rulemaking process.

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# Presidential Review of Agency Rulemaking

## Introduction

Steadily increasing presidential involvement in agency rulemaking efforts has often been cited as one of the most significant developments in administrative law and domestic policymaking since the introduction of the first formal review programs in the 1970's.<sup>1</sup> The evolution of presidential review of agency rulemaking efforts since the Reagan era in particular constitutes a significant assertion and accumulation of presidential power in the regulatory context. While initial presidential forays into centralized regulatory review were limited in scope, presidential review of rules has emerged as one of the most widely-used and controversial mechanisms by which a President can ensure the realization of his regulatory agenda.

The first formal regulatory review program was instituted by President Nixon in 1971 through the establishment of a "Quality of Life Review" program designed to improve "the interagency coordination of proposed agency regulations, standards, guidelines and similar materials pertaining to environmental quality, consumer protection, and occupational and public health and safety."<sup>2</sup> Under this program agencies were required to submit "significant" proposed and final regulations to the Office of Management and Budget (OMB), which then disseminated them to affected agencies for comment. President Ford extended regulatory review through Executive Order 11,821, requiring agencies to prepare "inflation impact statements" for any "major" regulatory action.<sup>3</sup> President Carter expanded presidential review through the issuance of Executive Order 12,044, which required agencies to prepare a "regulatory analysis" of all proposed "major rules," examining the potential economic impact of the proposal and an evaluation of alternative regulatory options.<sup>4</sup> President Carter took the additional step of forming the Regulatory Council, which

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<sup>1</sup> See Jeffrey S. Lubbers, "A Guide to Federal Agency Rulemaking," Third Edition, American Bar Association, p.19 (1998); Steven Croley, "White House Review of Agency Rulemaking: An Empirical Investigation," 70 U. Chil L. Rev. 821 (2003).

<sup>2</sup> See "Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety," Memorandum to Heads of Departments and Agencies from George P. Schultz, Director, OMB (Oct. 5, 1971) (available at [<http://www.thecre.com/ombpapers/QualityofLife1.htm>], visited on April 3, 2005).

<sup>3</sup> 39 Fed. Reg. 41,501 (Nov. 29, 1974).

<sup>4</sup> 43 Fed. Reg. 12,661 (March 24, 1978). The "major rule" designation was accorded to all proposed rules deemed likely to have an annual economic impact of 100 million dollars or more.

was tasked with coordinating agency rulemaking activities in an effort to avoid duplicative or conflicting regulatory regimes.<sup>5</sup>

While the programs established in the Nixon, Ford, and Carter Administrations illustrate a successive increase in the centralization of regulatory review with the Executive Office of the President, these programs are generally characterized as having been “designed primarily to facilitate interagency dialogue.”<sup>6</sup> However, these programs laid the foundation for the implementation of a much more extensive and vigorous review process under the Reagan Administration.<sup>7</sup>

## Regulatory Review Under E.O. 12,291

### A. Reagan Administration.

Shortly after taking office, President Reagan issued Executive Order 12,291, “to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for Presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations.”<sup>8</sup> E.O. 12,291 required agencies to submit any proposed major rule to OIRA for review, along with a “regulatory impact analysis” of the rule, including a cost-benefit analysis. The Reagan order was significant in comparison to earlier efforts in this context, in that it centralized review within OMB and had the practical effect of giving OMB a substantial degree of control over agency rulemaking. President Reagan expanded this review scheme with the issuance of Executive Order 12,498, which required agencies to submit an annual plan listing proposed regulatory actions for the year to OMB for review. This procedure enabled OMB to exert influence over agency regulatory efforts at the earliest stages of the process and to ensure that agency actions were in accord with the aims of the Administration. Additionally the order created a “Task Force for Regulatory Relief” which was tasked with reviewing and seeking the elimination of unneeded or ineffective regulations. In practical effect, the impact of the Reagan orders on agency regulatory activities was immediate and substantial. Under the order, OIRA reviewed over 2,000 regulations per year and returned multiple rules for agency reconsideration.<sup>9</sup> The practical effect of this rigorous review process was to sensitize agencies to the

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<sup>5</sup> Lubbers, n.1, *supra*, at 21.

<sup>6</sup> Robert V. Percival, “Presidential Management of the Administrative State: The Not-So-Unitary Executive,” 51 *Duke L.J.* 963, 990 (2001).

<sup>7</sup> *See, e.g.*, William F. West, “The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA,” *Presidential Studies Quarterly* 35, No. 1 at p.80 (March 2005).

<sup>8</sup> Exec. Order 12,291, 46 *Fed. Reg.* 13,193 (Feb. 17, 1981).

<sup>9</sup> Office of Management and Budget, “Draft Report to Congress on the Costs and Benefits of Federal Regulations,” 67 *Fed. Reg.* 15014, 15018 (March 28, 2002).

regulatory agenda of the Reagan Administration, largely resulting in the enactment of regulations that reflected the goals of the Administration.<sup>10</sup>

Not surprisingly, this review process generated criticism and controversy. In particular, the review scheme was seen by some as having a distinct anti-regulatory bias, leading to charges that the orders constituted an unlawful transfer of authority from the agencies to OMB; that the review process was too secretive and subject to influence by private interests; that OMB lacked the resources or expertise to properly assess submitted regulations; and that the required cost-benefit analysis did not take into account the unquantifiable social benefits of certain types of regulations.<sup>11</sup> Additionally, E.O. 12,291 was criticized on the grounds that it allowed OIRA to delay indefinitely rules under review, unless a countervailing statutory deadline or court order mandated promulgation.<sup>12</sup>

The order attempted to mitigate legal concerns regarding usurpation of agency decisionmaking authority by mandating that none of its provisions were to “be construed as displacing the agencies’ responsibilities delegated by law.”<sup>13</sup> Additionally, the Department of Justice’s Office of Legal Counsel (OLC) drafted an opinion shortly before the publication of E.O. 12,291, supporting its constitutionality.<sup>14</sup> The OLC asserted that the provisions of the order were valid as an exercise of the President’s power to “take care that the laws be faithfully executed,” additionally relying upon its determination that “an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by executive agencies.”<sup>15</sup> The opinion acknowledged, however, that “the President’s exercise of supervisory powers must conform to legislation enacted by Congress,” and went on to state that presidential “supervision is more readily justified when it does not purport to wholly displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official.”<sup>16</sup>

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<sup>10</sup> See, e.g., Elena Kagan, “Presidential Administration,” 114 Harv. L. Rev. 2245, 2279 (2001).

<sup>11</sup> For a thorough overview of the criticisms leveled at the Reagan orders, see Richard H. Pildes, Cass R. Sunstein, “Reinventing the Regulatory State,” 62 U. Chi. L. Rev. 1, 4-6 (1995); Elena Kagan, “Presidential Administration,” n.10, *supra*, at 2279-80. *But see*, Frank B. Cross, “Executive Orders 12,2291 and 12,498: A Test Case in Presidential Control of Executive Agencies,” 4 J.L. & Pol. 483 (1988) (supporting constitutionality and utility of review under these orders).

<sup>12</sup> See, e.g., *Environmental Defense Fund v. Thomas*, 627 F.Supp. 566 (D.D.C. 1986) (holding that OMB had acted impermissibly in delaying promulgation of EPA regulations beyond a statutory deadline).

<sup>13</sup> E.O. 12,291, §3(f)(3).

<sup>14</sup> See “Proposed Executive Order Entitled ‘Federal Regulation,’” Office of Legal Counsel, Department of Justice, 5 U.S. Op. Off. Legal Counsel 59, 61 (Feb. 13, 1981).

<sup>15</sup> *Id.* at 61.

<sup>16</sup> *Id.* at 61.

Despite these pronouncements in the OLC opinion and the order itself, allegations were made that OMB utilized E.O. 12,291 to determinatively control agency rulemaking activities during the Reagan Administration.<sup>17</sup> However, courts considering OMB involvement in agency rulemaking under the auspices of 12,291 did not address the constitutionality of such review. In *Public Citizen Health Research Group v. Tyson*, for instance, the court addressed the validity of a rule promulgated by OSHA governing ethylene oxide, including a challenge based on the argument that a critical portion of the proposed rule had been deleted based on a command from OMB.<sup>18</sup> While stating that “OMB’s participation in the 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,” the court nonetheless found that it had “no occasion to reach the difficult constitutional questions presented by OMB’s participation” given its finding that the challenged deletion was not supported by the rulemaking record.<sup>19</sup>

### **B. George H.W. Bush Administration.**

The Reagan orders were retained during the first Bush Administration to similar effect and controversy, with Congress going so far as to refuse to confirm President George H.W. Bush’s nominee for the position of Administrator at OIRA.<sup>20</sup> In 1989 the Administration created the Council on Competitiveness, which was empowered to resolve disputes between OIRA and regulatory agencies covered under E.O. 12,291.<sup>21</sup> The Council itself was likewise controversial, in one instance asserting its authority to uphold OMB’s rejection of certain elements of a proposed Environmental Protection Agency rule. EPA acquiesced in the Council’s decision, and excised the provisions from the final rule. When this deletion was challenged in court, the Court of Appeals for the District of Columbia did not address the propriety of the influence wielded by the Council, determining that the deletion was supported by the rulemaking record.<sup>22</sup> Touching upon the Council’s involvement, the court declared that EPA’s deletion of the provisions at issue “in light of the Council’s advice...does not mean that EPA failed to exercise its own expertise in promulgating the final rules.”<sup>23</sup> It is important to note that the court’s treatment of the Council’s involvement in the EPA rulemaking does not in any way indicate that the Council or OMB had authority to compel changes thereto. Instead, the court based its decision on a determination that there was a sufficient basis in the record to conclude that the EPA had exercised its independent expertise in promulgating a rule that was in accord with the Council’s position. As such, the court’s holding is illustrative of the

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<sup>17</sup> See Percival, n.6, *supra*, at 992.

<sup>18</sup> 796 F.2d 1479 (D.C. Cir. 1986).

<sup>19</sup> *Id.* at 1507.

<sup>20</sup> See Lubbers, n.1, *supra*, at 24.

<sup>21</sup> See Caroline Dewitt, “The Council on Competitiveness: Undermining the Administrative Procedure Act with Regulatory Review,” 6 Admin. L.J. Am. U. 759, 760 n.3 (1993).

<sup>22</sup> See *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992).

<sup>23</sup> *Id.* At 1152.

proposition that it is “very difficult, if not impossible, for the judiciary to police displacement if the agency accepts it.”<sup>24</sup>

## Regulatory Review Under E.O. 12,866

### A. Clinton Administration.

Many of the concerns voiced over the effects of E.O. 12,291 were assuaged, at least temporarily, by the review regime established by the Clinton Administration. Upon assuming office, President Clinton supplanted the Reagan Administration’s review scheme through the issuance of Executive Order 12,866, entitled “Regulatory Planning and Review.”<sup>25</sup> The preamble to E.O. 12,866 characterizes its provisions as presenting a more nuanced approach to the management of agency rulemaking, and declares that the objective of the order is to:

enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.<sup>26</sup>

While this language could be interpreted as a retreat from the broad executive authority asserted in the Reagan order, it is important to note that substantive changes to the regulatory review process made by E.O. 12,866 do not appear to have been developed as the result of a divergent interpretation of presidential power in this context. Rather, as is addressed in more detail below, the provisions of E.O. 12,866 indicate a similarly expansive view of presidential authority to control agency rulemaking. E.O. 12,866 was self-avowedly designed to ensure that federal agencies “promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by a compelling public need.” To accomplish this goal, the order requires agencies to supply OIRA with a “Regulatory Plan” of the “most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form” in each fiscal year.<sup>27</sup> Furthermore, the order provides for centralized review of all regulations, requiring each agency to periodically submit to OIRA a list of all planned regulatory actions, “indicating those which the agency believes are significant regulatory actions.”<sup>28</sup> The order defines a “significant regulatory action” as:

Any regulatory action that is likely to result in a rule that may:

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<sup>24</sup> See Percival, n.6, *supra*, at 994.

<sup>25</sup> Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

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

<sup>27</sup> E.O. 12,866, §4(c).

<sup>28</sup> *Id.* at §6(a)(3)(A).



- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.<sup>29</sup>

Upon receipt of such a list, OIRA has ten days to determine whether a planned regulatory action not identified as significant by the agency is in fact covered under the aforementioned definition. Planned actions that are not deemed significant are not subject to OIRA review, while those that are must be subjected to a cost-benefit analysis by the agency.<sup>30</sup> A regulatory action that is deemed significant is further subject to the review and clearance provisions of the order.<sup>31</sup> Under this process, OIRA is required to waive or complete review of preliminary regulatory actions (such as notices of inquiry or advance notices of proposed rulemaking) within ten working days after the submission of the draft action.<sup>32</sup> For all other regulatory actions (such as notices of proposed rulemaking or final rules), OIRA must waive or complete review within 90 calendar days after the date of submission.<sup>33</sup> The review process may be extended once by no more than 30 days upon request of the agency head and the written approval of the OIRA Administrator.<sup>34</sup> These requirements mark a significant departure from the provisions of E.O. 12,291, which, as was noted above, was criticized for allowing OIRA to delay most rules indefinitely.<sup>35</sup> The Administrator of OIRA may also remand a regulatory action to the agency “for further consideration of some or all of its provisions.”<sup>36</sup> In the event that a disagreement or conflict between an agency head and OIRA cannot be resolved by the Administrator, the President (or the Vice-President acting at the President’s request) may resolve the issue. Such consideration by the President or the Vice-President may only be initiated by the Director of OMB or the relevant agency head.<sup>37</sup>

The Clinton Administration drafted this language to make the OIRA review process less onerous on agencies than had been the case in the preceding Reagan and Bush

<sup>29</sup> *Id.* at §3(f).

<sup>30</sup> *Id.* at §6(a)(2)(B)-(C).

<sup>31</sup> *Id.* at §6(b).

<sup>32</sup> *Id.* at §6(b)(2)(A).

<sup>33</sup> *Id.* at §6(b)(2)(B). If OIRA previously reviewed the information contained in the submission and there “has been no material change in the facts and circumstances upon which the regulatory action is based,” the review must be completed within 45 days. *Id.*

<sup>34</sup> *Id.* at §6(b)(2)(C).

<sup>35</sup> See n.12 and accompanying text, *supra*.

<sup>36</sup> *Id.* at §6(b)(3).

<sup>37</sup> *Id.* at §7.

Administrations, and this goal manifested itself at OIRA in a selective review process that resulted in the consideration of significantly fewer rules.<sup>38</sup> For instance, while OIRA reviewed an average of 2080 regulations in fiscal years 1982-1993, the number of regulations reviewed fell substantially during the Clinton Administration, from 1100 in 1994, to 663 in 1995, and down to 498 in FY1996.<sup>39</sup> Furthermore, an average of 600 significant rulemaking actions were approved per year during the Clinton Administration, while only 25 rules, and none after 1997, were returned to agencies for further consideration.<sup>40</sup>

Additionally, the Clinton order provides for a more transparent review process than was the case with E.O. 12,291. In particular, E.O. 12,866 imposes substantial disclosure requirements on OIRA “in order to ensure greater openness, accessibility, and accountability in the regulatory review process.”<sup>41</sup> Specifically, the order regulates oral communications initiated by individuals not employed by the executive branch, mandating that only the Administrator of OIRA or a particular designee may receive any such communications “regarding the substance of a regulatory action under OIRA review.”<sup>42</sup> The order further controls all substantive communications between OIRA personnel and individuals outside the executive branch by requiring that a representative from the issuing agency be invited to any OIRA meetings held with outsiders, and that OIRA forward any such communications, “including the dates and names of individuals involved in all substantive oral communications,” to the issuing agency within ten days of receipt.<sup>43</sup> Additionally, the order requires OIRA to maintain a publicly available log containing information regarding contacts of the type mentioned above.<sup>44</sup> Finally, the order requires OIRA to make available to the public all documents exchanged between the agency and itself during the review proceeding, “after the regulatory action has been published in the federal register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action.”<sup>45</sup>

From these requirements, it is evident that E.O. 12,866 imposes significant information sharing and disclosure requirements between OIRA and an issuing agency, particularly with regard to substantive communications between OIRA and individuals outside of the executive branch. It should be noted, however, that the disclosure requirements of the order are less stringent in the context of inter-agency communications with OIRA during the review process. Specifically, whereas §6(b)(4) requires OIRA to disclose to the issuing agency any substantive communications with persons not employed by the executive branch, there is no similar requirement regarding communications with other agencies. Given this distinction, OIRA would not seem to be required to disclose communications with other

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<sup>38</sup> See Lubbers, n.1, *supra*, at 163.

<sup>39</sup> *Id.*

<sup>40</sup> OMB Draft Report, n.8, *supra*, at 15018.

<sup>41</sup> *Id.* at §6(b)(4).

<sup>42</sup> *Id.* at §6(b)(4)(A).

<sup>43</sup> *Id.* at §6(b)(4)(B).

<sup>44</sup> *Id.* at §6(b)(4)(C).

<sup>45</sup> *Id.* at §6(b)(4)(D).

agencies regarding a draft regulatory action to an issuing agency by the terms of the order.<sup>46</sup> Accordingly, OIRA would likewise not appear to be required by the order to make such communications available to the public upon completion of the review process, as is generally required, unless it affirmatively discloses the communications to the issuing agency during review proceedings.<sup>47</sup>

As touched upon above, the effects of OIRA review during the Reagan and Bush Administrations generated a great deal of debate regarding constitutional issues adhering to the displacement of agency decisionmaking authority. Not surprisingly, then, the transparency and selectiveness of E.O. 12,866, coupled with the more pro-regulatory stance of the Clinton era OMB, led to a rather rapid drop in debate concerning the proper scope of presidential review of agency rulemaking. However, it does not appear that the drop in rates of OIRA review during this period should be taken to indicate a concession that there were limits on presidential control over the agency rulemaking process, particularly in light of the vigor with which the Clinton Administration pressed agencies to effectuate its regulatory goals. For instance, President Clinton greatly expanded the use of formal presidential directives to executive agencies compelling specific action on their part. President Reagan and President Bush issued nine and four presidential directives respectively, three of which instructed agencies to either delay or terminate the issuance of regulations.<sup>48</sup> President Clinton, however, issued 107 presidential directives, several of which were designed to compel agencies to initiate regulatory action to address a particular issue of importance to the administration.<sup>49</sup>

Also, aspects of the Clinton order indicate just as expansive a view of presidential authority as the Reagan and Bush orders, despite the selectiveness and transparency that characterized OIRA review during the Clinton Administration. For example, E.O. 12,866, unlike Reagan's order, includes independent agencies within its ambit to a certain extent. The order does not require independent agencies to submit individual rules for review, but does

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<sup>46</sup> This would appear to be the case even in light of the requirement in §4 of the order that OIRA circulate regulatory plans provided by an issuing agency to other affected agencies and forward any communications received therefrom to the issuing agency. *See* E.O. 12,866, §4(c)(3)-(4). As noted above, a regulatory plan is essentially a list summarizing “the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year.” *Id.* at §4(c)(1). As such, this circulation and forwarding requirement seems inapplicable to OIRA review of agency regulatory actions under §6 of the order, given that the focus of the review is on “substantive action by an agency” that could lead to the promulgation of a final rule or regulation, as opposed to the initial summary of potential regulatory activity contained in a regulatory plan. *Id.* at §3(e).

<sup>47</sup> Specifically, given that §6(b)(4)(D) requires OIRA to make all documents exchanged between itself and the issuing agency available to the public upon completion of the review process, it would appear that any communications between OIRA and another agency would be subject to the disclosure requirements of the order in the event that OIRA did in fact provide them to the issuing agency. It should also be noted that irrespective of the disclosure requirements of E.O. 12,866, an interested party could request access to inter-agency communications under the Freedom of Information Act, subject to FOIA's deliberative process exemption. *See* 5 U.S.C. §552(b)(5).

<sup>48</sup> *See* Percival, n.6, *supra*, at 996.

<sup>49</sup> *See* Percival, n.6, *supra*, at 996.

require them to comply with the regulatory planning process established in the order.<sup>50</sup> Another example of the broad assertion of Presidential authority included in the Clinton order is the fact that the order provides that conflicts between agencies or between OMB and an agency are to be resolved, “To the extent permitted by law,” by “the President, or by the Vice President acting at the request of the President, with the relevant agency head.”<sup>51</sup> This language could be taken to indicate that agency heads are to retain some role in the resolution of a disagreement, but the order appears to vest ultimate decisionmaking authority in the President or Vice President, stating that “the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President’s decision with respect to the matter.”<sup>52</sup> Similar to the Reagan order, E.O. 12,866 mitigates the potential controversy that this type of presidential displacement of agency authority could generate by providing that this authority is to be exercised “only to the extent permitted by law,” thereby giving an agency head the opportunity to argue in a given case that the President could only issue an advisory opinion, but it seems that the potential implication of this provision is that the President is perceived as having determinative authority in this context.

This provision has turned out to have little effect, given that Clinton’s assertion and exercise of authority over the regulatory process manifested itself outside of the traditional OMB process. As noted above, President Clinton used devices such as presidential directives to direct agency heads to take a specific course of action in furtherance of his Administration’s regulatory agenda, in contrast to the Reagan and George H.W. Bush Administration’s approach of using the processes mandated in E.O. 12,291 to curtail agency rulemaking efforts. However, from the perspective of analyzing presidential control over the administrative process, it is interesting to note that unlike the Reagan order, E.O. 12,866 could be interpreted as asserting direct presidential authority over discretionary actions that have been assigned to agency heads by Congress.<sup>53</sup> Accordingly, while the operative aspects of E.O. 12,866 were welcomed by many as improving upon the transparency and selectiveness of OIRA review, other aspects of the order could be taken to indicate that the Clinton Administration’s view of presidential authority over agency rulemaking was largely consonant with that of the Reagan and George H.W. Bush Administrations, with the manifestation of this perspective differing primarily due to the obvious differences in the political aims of these administrations.

## **B. George W. Bush Administration.**

The George W. Bush Administration, while retaining E.O. 12,866, has developed a regulatory review policy that is subjecting rules to more stringent review than was the case during the Clinton Administration.<sup>54</sup> In particular, it has been asserted that the current Administration has returned to the regulatory review dynamic that prevailed under E.O.

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<sup>50</sup> E.O. 12,866, §4(c).

<sup>51</sup> E.O. 12,866, §7.

<sup>52</sup> E.O. 12,866, §7.

<sup>53</sup> See Kagan, n.10, *supra*, at 2319.

<sup>54</sup> While the George W. Bush Administration has retained E.O. 12,866, it should be noted that Executive Order 13,258, 67 Fed. Reg. 9385 (Feb. 28, 2002), removes the Vice President from the regulatory review process.

12,291, with OIRA going so far as to describe itself as the “gatekeeper for new rulemakings.”<sup>55</sup> At the same time, however, the George W. Bush Administration appears to be taking a more nuanced approach to OIRA review than was the case under E.O. 12,291, enabling it to have a substantial impact on agency rulemaking while avoiding the degree of criticism and controversy occasioned by regulatory review under the Reagan and George H.W. Bush Administrations.

OIRA has markedly increased the use of “return” letters to require agencies to reconsider rules under E.O. 12,866. According to a memorandum from OIRA Administrator John D. Graham for the President’s Management Council, return letters may be issued “if the quality of the agency’s analyses is inadequate, if the regulatory standards adopted are not justified by the analyses, if the rule is not consistent with the regulatory principles stated in the Order, or with the President’s policies or priorities, or if the rule is not compatible with other Executive orders or statutes.”<sup>56</sup> Under Administrator Graham’s tenure, OIRA has returned over 20 rules for agency reconsideration.<sup>57</sup> OMB has discussed two notable effects of the reinvigoration of this practice. First, the willingness to issue such letters emphasizes to agencies that OIRA “is serious about the quality of new rulemakings.” Second, agencies have begun to seek OIRA input “into earlier phases of regulatory development in order to prevent returns late in the rulemaking process.”<sup>58</sup> In practical terms, this type of collaboration is arguably beneficial to the extent that it enables OIRA to ensure that rulemaking efforts comply with the aims of E.O. 12,866, while giving agencies confidence that their regulatory proposals will not be returned after the investment of significant resources in their formulation. Conversely, this dynamic buttresses executive control over agency rulemaking efforts by allowing the exertion of influence at the earliest stages of the formulation process, and, as is discussed in more detail below, raises concerns regarding the extent to which this type of influence is disclosed.<sup>59</sup>

In a significant departure from the nature of OIRA review under the Reagan and George H.W. Bush Administrations, under the current Administration, OIRA has taken a proactive stance in identifying issues that the office feels are ripe for regulation, and has instituted the practice of issuing “prompt letters” to the appropriate agency to encourage rulemaking on those issues. OIRA has described the prompt letter as a “modest device to bring a regulatory matter to the attention of agencies.”<sup>60</sup> As acknowledged by OIRA, prompt letters “do not have the mandatory implication of a Presidential directive.” Rather, the device “simply

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<sup>55</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, “Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,” December, 2002 (hereinafter “2002 OMB Report”). See also CRS Report RL32397, *Federal Rulemaking: the Role of the Office of Information and Regulatory Affairs*, p. 21.

<sup>56</sup> John D. Graham, “Memorandum for the President’s Management Council,” Sept. 20, 2001. Available at [[http://www.whitehouse.gov/omb/inforeg/oira\\_review-process.html](http://www.whitehouse.gov/omb/inforeg/oira_review-process.html)]

<sup>57</sup> See CRS Report RL32397, n.55, *supra*, at 21. A list of return letters issued by OIRA is available at [[http://www.whitehouse.gov/omb/inforeg/return\\_letter.html](http://www.whitehouse.gov/omb/inforeg/return_letter.html)].

<sup>58</sup> OMB Draft Report, n.9, *supra*, at 15018.

<sup>59</sup> See n.67 and accompanying text, *infra*.

<sup>60</sup> OMB Draft Report, n.9, *supra*, at 15020.

constitutes an OIRA request that an agency elevate a matter in priority.”<sup>61</sup> OIRA has also taken steps to ensure that prompt letters are available to the public, in order to stimulate “agency, public and congressional interest in a potential regulatory priority.” Noting that prompt letters could be treated as confidential, OIRA has further stated that it feels publication is warranted “in order to focus congressional and public scrutiny on the important underlying issues.”<sup>62</sup> By specifically identifying regulatory issues of importance to the Administration through prompt letters, OIRA has presumably been able to exert a substantial degree of influence over the pursuit and scope of regulatory efforts in those areas.<sup>63</sup>

In addition to the use of prompt letters, OIRA has staved off criticism of the degree leveled at the Reagan and George H.W. Bush Administrations by increasing the transparency of the review process. As discussed above, the Reagan Administration in particular was criticized for its reluctance to open the OIRA review process to outside inspection. E.O. 12,866, as issued by President Clinton, established fairly expansive disclosure standards, requiring OMB and OIRA to disclose any closed door meeting between federal officials outside groups regarding a regulation. Under Administrator Graham, OIRA has retained these requirements and has significantly expanded access to this information by placing information regarding meetings and OIRA decisions on the OIRA website.<sup>64</sup> With this step, information that was previously accessible only at OIRA’s record room is now available via the internet, increasing access to OIRA information regarding meeting logs, communications between OIRA and agency officials, and general OIRA guidance on rulemaking.<sup>65</sup> This approach has effectively undercut what was once a major avenue of attack on OIRA review, although concerns remain regarding OIRA’s influence on the rulemaking process and the extent to which its involvement is disclosed.

In particular, a 2003 study by the General Accounting Office (GAO)<sup>66</sup> raised concerns regarding the level of transparency governing certain “preinformal review” OMB contacts with outside parties, as well as with contacts between OIRA and agency officials during “informal review.”<sup>67</sup> Specifically, one of the significant OIRA disclosure policies instituted by Administrator Graham establishes that OIRA will disclose substantive meetings and contacts with outside parties regarding rules under review even in instances where OIRA was engaged only in an informal review, including substantive telephone calls initiated by the

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* It is interesting to note that OIRA has also declared that “there is no reason why members of the public should not suggest ideas for prompt letters to the OIRA Administrator.” *Id.*

<sup>63</sup> See CRS Report RL32397, n.55, *supra*, at 22.

<sup>64</sup> See “OIRA Disclosure,” Memorandum for OIRA Staff From John D. Graham, Administrator, Oct. 18, 2001.

<sup>65</sup> See CRS Report RL32397, n.55, *supra*, at 23-24.

<sup>66</sup> GAO has since been redesignated as the Government Accountability Office.

<sup>67</sup> U.S. General Accounting Office, “Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews,” GAO-03-929 (Sept. 22, 2003) (hereinafter “GAO report”).

Administrator.<sup>68</sup> However, the GAO report found that OIRA does not consider a rule to be under review for purposes of these disclosure requirements if OIRA is in general consultation with an agency regarding a matter that has not become substantive or for which the agency has not submitted a draft rule for informal review. Accordingly, during this so-called “preinformal review” period, OIRA may communicate with outside parties without triggering the aforementioned disclosure requirements.<sup>69</sup> Additionally, the GAO report found that, with regard to contacts with agencies, OIRA interprets disclosure requirements as applicable only to the period where a rule is under formal review pursuant to E.O. 12,866.<sup>70</sup> In practical effect, this review dynamic allows varying degrees of unreported contacts both between OIRA and outside parties, and OIRA and the executive agencies.<sup>71</sup> Furthermore, as noted by GAO, these preformal review proceedings would allow an agency to submit a proposal to OIRA for informal review and to alter that proposal in accordance with OIRA’s input, without revealing any such changes to the public.<sup>72</sup>

Additionally, OIRA appears to have reinvigorated review of existing rules, and has taken steps to involve the public in the review process. In May 2001, OIRA solicited the public to nominate rules that should be considered for rescission or modification. OIRA received 71 nominations from 33 commentators, and concluded that 23 of the rules nominated merited “high priority review.”<sup>73</sup> In February 2004, OIRA solicited public nomination of reforms of regulations in the manufacturing sector, specifically requesting suggestions for reforms to regulations, guidance documents, or paperwork requirements that would “improve manufacturing regulation by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility.”<sup>74</sup> OIRA received 189 reform nominations from 41 commentators, determining that 76 of the 189 nominations “have potential merit and justify further action.”<sup>75</sup> This review process serves to further illustrate the degree of involvement of the current Administration in all facets of regulatory review.<sup>76</sup>

As touched upon above, OIRA’s use of mechanisms such as return and prompt letters have served to encourage agency collaboration with OIRA at the earliest stages of the rule

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<sup>68</sup> See CRS Report RL32937, n.55, *supra*, at 23.

<sup>69</sup> See GAO Report, n.67, *supra*, at 54.

<sup>70</sup> See GAO Report, n.67, *supra*, at 56.

<sup>71</sup> See n.46 and accompanying text, *supra*, for information regarding treatment of OIRA contact with other agencies during the review process.

<sup>72</sup> See GAO Report, n.67, *supra*, at 55-56.

<sup>73</sup> See CRS Report RL32356, *Federal Regulatory Reform: An Overview*, pp. 24-25.

<sup>74</sup> *Id.*

<sup>75</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, “Regulatory Reform of the U.S. Manufacturing Sector,” pp. 2-3, March 9, 2005.

<sup>76</sup> This review process has been derided in the public interest sector as an “anti-regulatory hit list” that would serve to weaken environmental protections, *See* OMB Watch, “White House Endorses Part of Anti-Regulatory Hit List,” March 21, 2005. Available at [<http://www.ombwatch.org/article/articleview/2746/1/309?TopicID=1>]. However, OIRA maintains that this review program is simply a “component of OMB’s multi-year effort to modernize or rescind outmoded rules.” *See* n.75, *supra*, at 3.

formulation process. Indeed, OIRA has stated that “it is at these early stages where OIRA’s analytic approach can most improve the quality of regulatory analyses and the substance of rules.”<sup>77</sup> The obvious potential for OIRA to exert a degree of influence over rulemaking at this stage of development that rivals or perhaps even exceeds that wielded during formal review proceedings could be seen as tempering the salutary effects of the increased transparency requirements imposed during the formal review process. Nonetheless, OIRA has maintained that “its interactions with agencies prior to formal regulatory review are pre-decisional communications that should generally be insulated from public disclosure in order to facilitate valuable deliberative exchanges.”<sup>78</sup> In light of these developments, it seems apparent that while the aforementioned changes to disclosure requirements pertaining to the formal OIRA review process have shielded the current Administration from the degree of criticism occasioned by E.O. 12,291, the potential that OIRA may play an important and potentially unacknowledged role in the formulation of agency rules during preformal review proceedings may be viewed as raising the same concerns that have traditionally adhered in this context.

## Conclusion

As has been illustrated by the consideration of the review regimes discussed above, there has been a steady evolution of presidential review of agency rulemaking from the Nixon Administration to the current Administration of George W. Bush. While the initial programs established in the 1970’s were generally viewed as benign, President Reagan’s issuance of E.O. 12,291 ushered in a new era of presidential assertions of authority over agency rulemaking efforts, raising attendant concerns with regard to the proper allocation of authority between the President and Congress in this context. Despite these separation of powers based concerns over the propriety of such review regimes, no reviewing court has squarely addressed the issue.<sup>79</sup> Furthermore, while the actions of both the Clinton and George W. Bush Administrations in implementing the provisions of E.O. 12,866 appear to indicate a conception of presidential authority consonant with that conveyed by the Reagan order, their more nuanced approach to exercising this authority has largely diminished charges against its constitutionality. In turn, presidential review of agency rulemaking has become a widely used and increasingly accepted mechanism by which a President can exert significant, and sometimes determinative, authority over the agency rulemaking process.

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<sup>77</sup> See 2002 OMB Report, n.55, *supra*, at 16; GAO Report, n.67, *supra*, at 57.

<sup>78</sup> See 2002 OMB Report, n.55, *supra*, at 13.

<sup>79</sup> See Lubbers, n.1, *supra*, at 31.