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Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House

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Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*

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I will be discussing the relationship between the Environmental Protection Agency ("EPA") and the White House. I will focus specifically on the role that the Office of Information and Regulatory Affairs ("OIRA"), within the Office of Management and Budget ("OMB"), plays in reviewing the EPA's regulatory output.

As I will explain, OIRA's actual practice in reviewing agency rules departs considerably from the structure created by the executive order governing OIRA's process of regulatory review.[1] The distribution of decision-making authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA

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1. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993). EO 12,866, issued by President Clinton in 1993, continues – in principle – to govern the mechanics of OIRA review. President Obama issued his own executive order, EO 13,563, on OIRA review in 2011, but that order reaffirmed EO 12,866 and did not by its terms change the *process* of OIRA review (such as deadlines and disclosure requirements) in any respect. *See* Exec. Order No. 13,563, 3 C.F.R. § 215 (2011).

review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow – or allow agencies to follow – most of the transparency requirements of the relevant executive order.[2]

Describing the OIRA process as it actually operates today goes a long way toward previewing the substantive problems with it. The process is utterly opaque. It rests on assertions of decision-making authority that are inconsistent with the statutes the agencies administer. The process diffuses power to such an extent – acceding, depending on the situation, to the views of other Cabinet officers, career staff in other agencies, White House economic offices, members of Congress, the White House Chief of Staff, OIRA career staff, and many more – that at the end of the day, no one is accountable for the results it demands (or blocks, in the case of the many rules stalled during the OIRA process). And, through it all, environmental rules take a particular beating, from the number of such rules reviewed to the scrutiny they receive to the changes they suffer in the course of the process.[3]

These problems are significant, and they deserve serious attention. Although I discuss these problems at the end of this paper, my main objective in this paper is descriptive. Misunderstandings of the OIRA process abound. Too often these misunderstandings are perpetuated by, or not contradicted by, the very personnel who have been involved in the process. Indeed, after I finished a stint as the head of the EPA office responsible for acting as the primary EPA liaison to OIRA, I did not write at any length about my experiences with OIRA review. Partly out of continuing loyalty to the administration that had made my time in government possible, partly out of respect for the sensitivity of interactions between high-level government officers, and partly out of a sense of sheer futility,[4] I had resolved to move on to other topics. But when accounts of OIRA's role in

2. *See infra* Part II.

3. *See infra* Part III.

4. *See* Lisa Heinzerling, *Towards Engaged Scholarship*, PACE L. REV. (forthcoming) (manuscript at 19-20), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225283.

the Obama administration began to emerge from other quarters,[5] and when these accounts, in many respects, did not jibe with my own experience, I decided to resurface and to describe the OIRA process from my perspective. Hence the account that follows.

I. THE HISTORY OF WHITE HOUSE REVIEW

It will be useful first to give a brief history of White House review of agencies' regulatory actions. Some form of centralized review of agency action has been with us for decades. Such review took place episodically in the Nixon, Ford, and Carter administrations.[6] But, it was during the presidency of Ronald Reagan that the practice of regulatory review began to take on the shape it has today.

A. Executive Order 12,291

In one of his earliest acts as President, Ronald Reagan issued an executive order – Executive Order 12,291 – that gave centralized review more systematized form in two respects.[7] First, Executive Order ("EO") 12,291 put a specific office – OMB[8] – in charge of reviewing agency actions.[9] Second, it adopted cost-benefit analysis as the governing framework for this review.[10]

5. *See* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013) [hereinafter SIMPLER]. *See also* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839 (2013) [hereinafter *Myths and Realities*].

6. *See, e.g.*, Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 536-37 (1986) (describing "rather modest and unintrusive" efforts by the White House to control agencies during the 1970s). *See* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 239-42 (2012) (providing a more detailed discussion).

7. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981).

8. *See* OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS ch. 1.2(c) (1997), *available at* http://www.whitehouse.gov/omb/inforeg_chap1 (within OMB, OIRA was the office responsible for regulatory review). From here on out in this article, I will refer to "OMB" only where I mean to distinguish OMB from OIRA or where (as in the Office of Legal Counsel opinion I am about to discuss) another party has referred to OMB rather than to OIRA.

9. Exec. Order No. 12,291 § 3, 3 C.F.R. § 127 (1981).

10. *Id*. § 2(b)-(c).

Before President Reagan issued EO 12,291, the Office of Legal Counsel ("OLC") reviewed the order for legal soundness.[11] Notably, OLC's opinion confirming the order's legality rested on the premise that the centralized reviewers (OMB and a newly created Task Force on Regulatory Relief) would only supervise, and not displace, the exercise of discretion given to the agencies by statute. OLC wrote: "[T]he fact that the President has both constitutional and implied statutory authority to supervise decision-making by executive agencies . . . suggest[s] . . . that supervision is more readily justified when it *does not purport wholly to displace, but only to guide and limit*, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official. . .. The order *does not empower* the [OMB] Director or the Task Force to *displace* the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions."[12]

OLC's opinion does not state that an order displacing the agencies' discretion would certainly be illegal. But it does interpret EO 12,291 not to permit such displacement and it does suggest a potential legal problem with such displacement. Reading only EO 12,291 and the OLC's opinion on it, one would conclude that agencies retained the decision-making discretion they were given by the statutes they are charged with administering.

In practice, though, it was not that simple. During the Reagan years, critics charged that OIRA did indeed displace – and not merely supervise – agencies' decision-making discretion.[13] In addition, OIRA's process of review frequently

11. *See* Proposed Executive Order Entitled "Federal Regulation," 5 Op. O.L.C. 59 (1981).

12. *Id*. at 62-63 (emphasis added).

13. *See, e.g.*, Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2502-05 (2011). Percival cites a wealth of sources on this point. *Id.* at 2504, n. 127. Beyond OIRA, Reagan's appointees to the environmental agencies also were quite willing to take deregulatory actions on their own initiative. *See generally* Philip Weinberg, *Masquerade for Privilege: Deregulation Undermining Environmental Protection*, 45 WASH. & LEE L. REV. 1321 (1988).

delayed agency rules for extended periods.[14] The process also at times degenerated into one in which OIRA served as a conduit for the views of industry on particular regulatory actions.[15] This feature of the process was especially troubling insofar as the process was opaque. Only in 1986 did OIRA begin to make public the documents shared by outside parties with OIRA during its review.[16] Even so, the bulk of the process – which agency actions went to OIRA, what happened to them while they were there, who made the decisions – was closed off to the public.[17] Moreover, the cost-benefit lens through which OIRA viewed agency rules proved to skew against some kinds of rules, in particular environmental rules, since so many of the benefits of environmental rules are difficult or impossible to quantify and monetize, and since so many of these benefits occur in the future while the settled practice of cost-benefit analysis is to steeply discount future consequences.[18]

Such critiques dogged the OIRA review process under EO 12,291 through the Reagan years and into the presidency of George H.W. Bush.[19] By the time Bill Clinton came into office in 1993, many were hoping for change.[20] Within months of taking office, President Clinton responded with a new executive order on regulatory review, EO 12,866.[21]

14. *See, e.g.*, Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 565-68 (1989).

15. *See*, *e.g.*, Claudia O'Brien, *White House Review of Regulations Under the Clean Air Act Amendments of 1990*, 8 J. ENVTL. L. & LITIG. 51, 58-80 (1993).

16. Bruff, *supra* note 14, at 582 (*citing* OFFICE OF MGMT. & BUDGET, MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES SUBJECT TO EXECUTIVE ORDER NOS. 12,291 AND 12,498, SUBJECT: ADDITIONAL PROCEDURES CONCERNING OIRA REVIEWS UNDER EXECUTIVE ORDER NOS. 12,291 AND 12,498 (June 13, 1986)).

17. *See, e.g.*, Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1067-68 (1986).

18. *See, e.g.*, Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1293-97 (1987).

19. *See generally* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 189 (2008).

20. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6 (1995).

21. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993).

B. Executive Order 12,866

Although EO 12,866 preserved the status quo in that it continued to require centralized White House review of agency actions under a cost-benefit framework, it also reformed several specific features of this review that had proved troublesome. Taking on the issue of displacement, an early passage in EO 12,866 "reaffirm[ed] the primacy of Federal agencies in the regulatory decision-making process."[22] At the same time, however, the order for the first time explicitly stated that if a conflict arose between OIRA and an agency over a particular matter that could not be resolved by the OMB Director and the agency head, it would be the President (or the Vice-President acting on the President's behalf) who would settle the dispute – and make the "decision with respect to the matter."[23] EO 12,866 also provided a specific framework for elevating decisions beyond OMB and the agency head: the Vice-President (then Al Gore) was to make recommendations to the President on how to resolve the conflict.[24] EO 12,866 thus gestured toward the primacy of the agencies while simultaneously – for the first time in such an order – explicitly providing that the President would decide the hardest cases and laying out the process to follow when conflicts arose.[25]

Addressing the problem of delay, EO 12,866 set out specific time limits on OIRA review. Advance notices of proposed rulemaking, notices of inquiry, and "other preliminary regulatory actions prior to a Notice of Proposed Rulemaking" were to be reviewed within 10 days.[26] Regulatory actions previously reviewed by OIRA were to be reviewed within 45 days if "there has been no material change in the facts and circumstances upon which the regulatory action is based."[27] "[A]ll other regulatory actions" were to be reviewed within 90 days.[28] EO 12,866 also

22. *Id.* at 638.
23. *Id.* § 7.
24. *Id*.
25. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2288-90 (2001).
26. Exec. Order No. 12,866 § 6(b)(2)(A), 3 C.F.R. § 638 (1993).
27. *Id.* § 6(b)(2)(B).
28. *Id.*

provided that the review process could be extended "(1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."[29] This provision allowing extensions seems, with its use of the word "and" rather than "or," to contemplate a process whereby both the OMB Director and the agency head would need to agree on the extension. Together, the new deadlines, precisely defined and tailored to specific circumstances, were clearly designed to end OIRA review that dragged on intolerably long or even indefinitely.

In addition, EO 12,866 limited the range of rules OIRA could review. Only "significant" regulatory actions were to be reviewed.[30] Economically significant actions – those having annual costs of $100 million or more[31] – were to be accompanied by extensive cost-benefit analysis.[32] Beyond annual costs, other features that might make a regulatory action significant (and thus subject to OIRA review) were serious inconsistencies with another agency's plans,[33] material effects on budgetary impacts of various programs,[34] and the presence of "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."[35] The OIRA Administrator was given the final say as to which regulatory actions qualify as significant and thus must be reviewed by OIRA.[36]

EO 12,866 also took on the problem of OIRA acting as a conduit for industry views. The order required disclosure of all contacts with outside parties during the period of OIRA review.[37] The order limited the conditions under which outside views could be relayed to OIRA by requiring that only the Administrator of OIRA or "a particular designee" could receive oral communications by persons outside the executive branch

29. *Id.* § 6(b)(2)(C).
30. *Id.* § 6(a)(3)(B).
31. Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. § 638 (1993).
32. *Id.* § 6(a)(3)(C).
33. *Id.* § 3(f)(2).
34. *Id.* § 3(f)(3).
35. *Id.* § 3(f)(4).
36. *Id.* § 6(b)(3).
37. Exec. Order No. 12,866 § 6(b)(4)(B)(iii), (C)(ii)-(iii), 3 C.F.R. § 638 (1993).

regarding the substance of a regulatory action under review.[38] The order also provided that in the case of elevation to the President or Vice-President, any communications by outside parties, directed at the President's advisors or their staffs or the staff of the Vice-President, would be in writing and would become part of the public docket.[39] If the communication was not in writing, the advisors or staff members were to "inform the outside party that the matter is under review and that any comments should be submitted in writing."[40]

In other ways as well, EO 12,866 aimed to make OIRA review far more transparent than it had been. In fact, the order requires transparency throughout the OIRA process. If an agency plans a regulatory action that OIRA thinks is inconsistent with the President's policies or priorities, OIRA must tell the agency so, in writing.[41] If a regulatory action is under review, OIRA must provide information – in a "publicly available log" – about the status of that action.[42] If a dispute arises between OIRA and an agency over whether a particular rule should issue, and one of these parties requests resolution of the dispute by the President or Vice-President, OIRA must note – in a "publicly available log" – who requested elevation and when.[43] If OIRA returns a rule to an agency "for further consideration of some or all of its provisions," the Administrator of OIRA must provide a "written explanation" for this return.[44] If a regulatory proposal changes between the time it goes to OIRA and the time it emerges from OIRA, the agency must identify those changes ("in a complete, clear, and simple manner").[45] If OIRA insists on changes to the regulatory proposal during its review, the agency must identify those changes for the public ("in plain, understandable language").[46]

38. *Id.* § 6(b)(4)(A).
39. *Id.* § 7.
40. *Id.*
41. *Id.* § 4(c)(5).
42. *Id.* § 6(b)(4)(C)(i).
43. Exec. Order No. 12,866 § 6(b)(4)(C)(i), 3 C.F.R. 638 (1993).
44. *Id.* § 6(b)(3).
45. *Id.* § 6(a)(3)(E)(ii).
46. *Id.* § 6(a)(3)(E)(iii).

If followed (an important qualification, as we will see), these disclosure requirements would allow the public to know, often in real time, what actions are under review at OIRA, what the status of those actions is, and what the consequences of the review have been for any particular agency action.

A final refinement of EO 12,866 was the explicit inclusion, in the prescribed cost-benefit framework, of "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider" and of benefits such as "distributive impacts . . . and equity" and "the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias."[47]

Even with these changes, not everyone was thrilled with EO 12,866. Some were disappointed that OIRA and cost-benefit analysis would continue to play a large role in determining regulatory policy.[48] Others had long fretted that little would change if the culture – and personnel – at OIRA did not change.[49] Still others continued to worry about displacement of agency discretion; they thought that statutes giving authority and discretion to agencies did not allow the White House to direct the agencies to make particular decisions on particular matters.[50]

Nevertheless, it seems fair to say – certainly in retrospect – that the Clinton years were relatively quiet ones for OIRA review. The process did not seem to involve the kinds of delays and secrecy prevalent in the Reagan-Bush years.[51] The one known case of a high-level elevation of an issue to the President – involving EPA's National Ambient Air Quality Standards for particulate matter and ozone – resulted in a decision allowing the

47. *Id.* §§ 1(a), 6(a)(e)(C)(i)

48. Including this author: Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025, 2027-28 (1999).

49. Morrison, *supra* note 17 at 1067-68; Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 55-73 (1984).

50. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967 (1997).

51. Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 996-98 (2001).

agency to proceed with the rules.[52] While the OIRA process has never been free from controversy, the Clinton years were probably the least contentious.[53]

The period of relative quiet did not last. Upon assuming office in 2001, President George W. Bush, like his predecessors, sought to put his own stamp on regulatory policy through the OIRA process. Interestingly, however, he did not do this by issuing a significant new executive order. He did issue two executive orders on regulatory review, but they were (as these things go) relatively minor. One, EO 13,258, replaced the Vice-President-driven elevation process with a process staffed with the President's "advisors."[54] Another, EO 13,422, strengthened language requiring agencies to find a market failure before regulating and also directed OIRA to review significant agency guidance (that is, agency statements of policy or interpretation that do not have the legal effect of rules).[55] EO 13,422 generated criticism within the health, safety, and environmental community because of its tilt toward the superiority of private markets and its assertion of authority to review agency guidance.[56] But EO 12,866 also remained in place.

Rather than prescribing a whole new framework for regulatory review, President Bush chose an intellectually forceful

52. John H. Cushman Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern Over Costs*, N.Y. TIMES (June 26, 1997), *available at* http://www.nytimes.com/1997/06/26/us/clinton-sharply-tightens-air-pollution-regulations-despite-concern-over-costs.html.

53. *See* Steinzor, *supra* note 6 at 245-47 *but see* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006). Note, however, that in their important article reporting on the views of the OIRA process from those inside the EPA during the Bush I and Clinton years, Lisa Schulz Bressman and Michael Vandenbergh did not find substantial differences in the responses of EPA personnel to questions about White House involvement in rulemaking during these different administrations. *Id.*

54. Exec. Order No. 13,258, 3 C.F.R. 204-206 (2002) (amending Exec. Order No. 12,866 on Regulatory Planning and Review, 67 Fed. Reg. 9385 (Feb. 28, 2002)).

55. Exec. Order No. 13,422, 3 C.F.R. 191 (2007) (further amendment to Exec. Order No. 12,866 on Regulatory Planning and Review, 72 Fed. Reg. 2763 (Jan. 23, 2007).

56. *See, e.g.*, OMB WATCH, A FAILURE TO GOVERN: BUSH'S ATTACK ON THE REGULATORY PROCESS (2007), *available at* http://dev.ombwatch.org/files/regs/PDFs/FailuretoGovern.pdf.

and politically shrewd academic, John Graham, to head OIRA.[57] One of Graham's first acts as OIRA Administrator was to issue a memorandum on OIRA disclosure to OIRA staff. Acknowledging that transparency was essential to the legitimacy of the process,[58] Graham moved to increase transparency in several ways. He directed that documents related to OIRA review be made available online.[59] He required that notices of meetings and other communications with outside parties be made available online.[60] He returned rules to agencies with a written and public explanation of why they were being returned.[61] Each of these actions increased the public's access to information about what happened when rules went to OIRA.

Another of Graham's innovations, however, turned in the opposite direction. Graham began to insist that agencies involve OIRA early on in their deliberative processes.[62] This early intervention ensured that rules would not arrive at OIRA fully baked, with little for OIRA to do but accept or reject them. It also meant that many of OIRA's early efforts would leave no public trail. The latter point requires a note of explanation. OIRA has always, so far as I know, taken the position that only when a regulatory action is sent to OIRA through official channels – which now include a computer system used for the purpose of facilitating the transfer of rules between the agencies and OIRA – do the transparency requirements of EO 12,866 kick in. If an agency briefs OIRA on a rule prior to formally sending it to OIRA, or consults with OIRA before doing so, or even sends a full-

57. A sense of the reaction Dr. Graham's appointment inspired in environmental circles can be found in Steve Weinberg, *Mr. Bottom Line*, ONEARTH (Spring 2003), *available at* http://www.nrdc.org/onearth/03spr/graham1.asp.

58. John D. Graham, *OIRA Disclosure Memo-B*, OFFICE OF MGMT. & BUDGET (Oct. 18, 2001), http://www.whitehouse.gov/omb/inforeg_oira_disclosure_memo-b. ("I believe that the transparency of OIRA's regulatory review process is critical to our ability to improve the nation's regulatory system. Only if it is clear how the OMB review process works and what it does will Congress and the public understand our role and the reasons behind our decisions.").

59. *Id.*

60. *Id.*

61. *See OIRA Return Letters,* OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoReturnLetters (last visited Oct. 19, 2013).

62. John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 972-74 (2005).

fledged rule package to OIRA outside formal channels, none of this, or any of its consequences, will appear in the public record assembled for formal OIRA review. Thus, Graham's emphasis on early, informal intervention had the potential to significantly undermine the transparency achieved by his initiatives on disclosure.

One episode from the Bush years, which occurred after Graham left office, well illustrates OIRA's power to secretly alter an agency's course. Shortly after the Supreme Court held, in *Massachusetts v. EPA*,[63] that the Clean Air Act empowers EPA to regulate greenhouse gases, President Bush held a press conference in the Rose Garden and directed EPA and the Department of Transportation to develop rules for cars that would comply with the Court's decision.[64] EPA would, at the same time, prepare a finding as to whether greenhouse gases endangered public health or welfare and thus triggered regulatory obligations under the Clean Air Act.[65] The agencies went quickly to work, and within seven months EPA had prepared a draft endangerment finding, and the agencies together had prepared rules to regulate greenhouse gases from cars. The agencies sent the rules to OIRA for review.[66] Then things went off the rails.

As I have mentioned, OIRA uses a computer system – known as "ROCIS" – to manage regulatory submissions from agencies.[67] When an agency sends an action to OIRA for review, it submits the package to ROCIS.[68] From its end, OIRA then – in theory – uploads the package from ROCIS. When OIRA uploads the package, it is accepted for review. At that moment, the clock starts to tick on OIRA's review, and the public disclosure

63. 549 U.S. 497 (2007).

64. Lisa Heinzerling, *Climate Change at EPA*, 64 FLA. L. REV. 1, 2 (2012).

65. *Id.*

66. *Id.* at 2-3.

67. Even for Washington, the name of the system is exceptionally acronymic: the acronym "ROCIS" contains within it two additional acronyms. "ROCIS" stands for "RISC" (Regulatory Information Service Center) and OIRA Consolidated Information System."

68. *OIRA Regulatory System, Records Management System and Records Management Center*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/gils_oira-gils (last visited Oct. 19, 2013).

requirements kick in. If OIRA does not upload the package, however, it is as if it was never sent to OIRA; no clock begins ticking, and the package does not appear on OIRA's website listing rules under review. This is what happened to the draft endangerment finding and the proposed rules on cars: OIRA simply declined to upload them into ROCIS. A presidential promise, months of work, compliance with a Supreme Court ruling – all went out the window with OIRA's simple refusal to be in receiving mode when the agencies sent the package over to OIRA.[69] The endangerment finding and the rules on cars languished at the agencies until the Obama administration came into office.

The effect on EPA of OIRA's declination of this regulatory package is hard to overstate. EPA had become accustomed, through sheer necessity, to OIRA's interventions in the rulemaking process. But, so far as I know, OIRA had never before simply declined to accept a fully formed regulatory package. Over a year later, by the time I arrived at EPA as the Administrator's climate advisor, agency personnel were still reeling from OIRA's action. During my time at EPA, when OIRA would delay uploading a package to ROCIS for any reason, worry would spread through the offices involved with the package that perhaps OIRA would – as it had with the endangerment finding and the cars rules – just not upload the documents, and it would be as if they had never been sent, or indeed as if they had never been written.

The refusal to open the documents on endangerment and cars caused a furor in the environmental community once it became known.[70] It emerged as a primary example of how OIRA should

69. Felicity Barringer, *White House Refused to Open Pollutants E-Mail*, N.Y. TIMES (June 25, 2008), http://www.nytimes.com/2008/06/25/washington/25epa.html?_r=0; Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year*; *Instead of New Rules, More Comment Sought*, WASH. POST (July 11, 2008), http://articles.washingtonpost.com/2008-07-11/news/36823556_1_greenhouse-gas-clean-air-act-human-health-and-welfare. As Eilperin and Smith report, it was not clear exactly who within the White House ordered that the regulatory package be declined. *Id.*

70. Here is Jon Stewart's hilarious take on the episode, *The Daily Show with Jon Stewart* (Comedy Central television broadcast June 25, 2008), *available at*:

not operate.[71] To critics, the incident bespoke disrespect for agency process and even for the rule of law. Many hoped such a thing would not happen again.

The assertiveness and opacity of OIRA during the George W. Bush administration led many to hope that when Barack Obama came into office, things would change for the better. And indeed, one of President Obama's first acts was to issue an executive order revoking the Bush-era executive orders on regulatory review.[72] As noted, the major substantive innovation of these orders was the assertion of OIRA authority to review agency guidance; thus, one of the major effects of the revocation of the Bush-era orders should have been to keep OIRA from reviewing agency guidance.

But this was not to be. In a little-noticed memorandum issued less than two months later, OIRA Director Peter Orszag essentially revoked President Obama's revocation of the executive order on guidance.[73] Orszag announced that OIRA would, despite Obama's order, continue to review agency guidance, since it had done so for many years.[74] The President's revocation of the Bush-era executive orders had received enthusiastic attention from progressive groups.[75] Perhaps not surprisingly, the OMB Director's memorandum revoking the major substantive part of

http://www.thedailyshow.com/watch/wed-june-25-2008/be-patient-this-gets-amazing---epa-e-mail

71. *White House Disses Supreme Court, Kills $2 Trillion Savings*, CLIMATEPROGRESS, http://thinkprogress.org/climate/2008/07/01/202838/white-house-mocks-supreme-court-kills-2-trillion-savings/ (July 1, 2008) (also discussing OMB intervention in EPA's later-issued Advance Notice of Proposed Rulemaking regarding greenhouse gases).

72. Exec. Order No. 13,497, 3 C.F.R. § 218 (2009) (revoking Executive Orders 13,258 and 13,422 concerning Regulatory Planning and Review).

73. Memorandum from Dir. of the Office of Mgmt. & Budget Peter R. Orszag for the Heads and Acting Heads of Exec. Dep'ts and Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

74. *Id.*

75. *See, e.g., Obama Begins Regulatory Reform*, CTR. FOR EFFECTIVE GOV'T, http://www.foreffectivegov.org/node/9689 (Feb. 10, 2009); James Goodwin, *Revoking EO 13422: An Important First Step Toward Fixing the Regulatory System,* CTR. FOR PROGRESSIVE REFORM (Feb. 4, 2009), http://www.progressivereform.org/printPage.cfm?idBlog=417B6671-1E0B-E803-CA4ED11FA8E0030C.

the President's executive order – issued quietly, without a press release – received almost no attention.[76] In fact, so stealthy was the replacement of Obama's order with Orszag's memorandum that, even months later, I found myself having to explain to EPA personnel why they still needed to send agency guidance to OIRA for review. Quite understandably, they had read Barack Obama's executive order rather than Peter Orszag's interoffice memorandum.

In another gesture of potential change, in January 2009 President Obama also issued a presidential memorandum directing the Director of OMB to consult with representatives of regulatory agencies and to make recommendations to the President for a new executive order on regulatory review.[77] The memorandum noted that much had been learned since 1993, when EO 12,866 was issued, about both the substance of regulation ("what works and what does not") and about "how to improve the process of regulatory review."[78] "In this time of fundamental transformation," President Obama declared, "that process – and the principles governing regulation in general – should be revisited."[79] The President also laid out specific topics he wanted covered in OMB's recommendations:

> [T]he recommendations should offer suggestions for the relationship between OIRA and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in

76. No press statement appears on the White House website devoted to such items: *Statements and Releases,* THE WHITE HOUSE, http://www.whitehouse.gov/briefing-room/Statements-and-Releases/2009/03 (last visited Oct. 10, 2013).

77. Presidential Memorandum of January 30, 2009: Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.

78. *Id.*

79. *Id.*

> formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.[80]

President Obama directed OMB to produce the recommendations within 100 days.[81] The President also directed OMB to consult with the representatives of regulatory agencies, "as appropriate," in formulating recommendations for a new executive order.[82] From my time at EPA, I know that agencies did indeed submit comments to OMB. Notably, OMB never made the agencies' comments public; thus we do not know what the agencies said to OMB about regulatory review and how to improve the process. OMB also asked the public for comments on regulatory review and how to reform it.[83] Public comments (183 of them)[84] came in by the end of March 2009.[85]

And there the matter sat. Agency personnel, buoyed by the possibility of reform of a secretive, intrusive, and time-consuming process, eagerly anticipated the new executive order. Outside groups interested in health, safety, and environmental protection cheered the prospect of changes to a system that had worked disproportionately against rules in their domain. But nothing happened for almost two years, and, in that time, OIRA continued to assert its customary control over agency regulatory decisions.

C. Executive Order 13,563

In January 2011, a new executive order on regulatory review finally emerged.[86] The single most notable fact about the new

80. *Id.*

81. *Id.*

82. *Id.*

83. Federal Regulatory Review, 74 Fed. Reg. 8819 (Feb. 26, 2009) (inviting public comment on how to improve the process of regulatory review and principles governing regulation).

84. Steinzor, *supra* note 6 at 255-56.

85. Federal Regulatory Review, Extension of request for comments, 74 Fed. Reg. 11,383 (Mar. 17, 2009) (extending public comment period to March 31, 2009). A summary of the comments from 170 different individuals and organizations can be found at: *Comments on New Regulatory Order Pour into OMB*, CTR. FOR EFFECTIVE GOV'T, http://www.foreffectivegov.org/node/9913 (last visited Oct. 10, 2013).

86. Exec. Order. No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

order, EO 13,563, is how not-new it was; much of the order simply repeats, verbatim, the language of EO 12,866.

Another striking fact about the order is how weakly responsive it is to President Obama's own directives in his presidential memorandum of January 2009: EO 13,563 does not say a word about "the relationship between OIRA and the agencies" or "methods of ensuring that regulatory review does not produce undue delay." On "disclosure and transparency," the order says nothing about disclosure and transparency related to OIRA, but focuses only on the agencies and here simply advises them to place materials online and in an open format wherever possible.[87] On "public participation in agency regulatory processes," the order advises the agencies to seek out the public's views prior to proposing rules (something agencies already routinely did).[88] On "the role of cost-benefit analysis," the order adds nothing to EO 12,866 except for a new allowance for "human dignity" in the calculations of regulatory benefits.[89] As for "the role of distributional considerations, fairness, and concern for the interests of future generations," the order adds only the word "fairness" to EO 12,866's already-existing references to distributive impacts and equity.[90] And as for clarifying "the role of the behavioral sciences in formulating regulatory policy" and identifying "the best tools for achieving public goals through the regulatory process," the only new item in the new executive order was a reference to "appropriate default rules."[91]

President Obama's new executive order on regulatory review, in short, was neither very new nor very specific. Any hope that President Obama would use the new executive order as an occasion to fundamentally reshape the relationship between the White House and the agencies, or to loosen the grip of cost-benefit analysis on regulatory policy, was dashed. Yet the very vagueness of the executive order also created a large space within which OIRA could fashion a kind of common law of regulatory review. OIRA eagerly inhabited that space.

87. Exec. Order No. 13,563 § 2(b), 3 C.F.R. 213 (2011).
88. *Id.* § 2(c).
89. *Id.* § 1(c).
90. *Id.*
91. *Id.* § 4.

II. THE COMMON LAW OF EXECUTIVE ORDER 13,563

The common law of EO 13,563 determines the most important features of the current process of regulatory review: who is the decision maker, what is reviewed, why particular actions fail regulatory review, when actions emerge from review, and what is disclosed about the process. If one has read EOs 12,866 and 13,563, which in theory govern this process, surprises are in store once we look at the way the process actually operates.

A. Who Decides?

Recall that EO 12,866 puts OIRA initially in charge of the process of regulatory review. But if, according to EO 12,866, a dispute arises between OIRA and the action agency, the dispute is to be resolved through a highly specified process that involves recommendations from the Vice-President and an ultimate decision by the President or by the Vice-President acting on his behalf.[92]

This is not how regulatory review works today. In my two years at EPA, I do not recall ever hearing of Vice-Presidential involvement in a regulatory matter. Moreover, the OIRA process in the Obama administration was not structured to funnel disputes between OIRA and the agencies to Vice-President Biden for his recommendations. It was far messier and more ill-defined than that. From my perspective, it was often hard to tell who exactly was in charge of making the ultimate decision on an important regulatory matter.

A recent account of the OIRA process by former OIRA Administrator Cass Sunstein helps to explain this confusion as to some regulatory matters, but leaves a puzzle as to others.[93] Sunstein states that OIRA's primary role in the regulatory process is as an "information-aggregator" – compiling information from many actors in the executive branch and using that

92. Exec. Order No. 12,866, § 7, 3 C.F.R. § 638 (1993). Recall that the Bush-era executive order replacing the role of the Vice-President with that of presidential "advisors" was revoked by President Obama during his first days in office. Exec. Order No. 13,497, 3 C.F.R. § 218 (2009).

93. *See* Sunstein, *Myths and Realities*, *supra* note 5.

information to help get at the right regulatory result.[94] Observing that the White House is a "they," not an "it,"[95] Sunstein emphasizes the role of other White House offices and officials, beyond OIRA, in shaping regulatory policy.[96] Sunstein lists almost a dozen White House offices that, he says, play a significant role.[97] Beyond the White House, Sunstein asserts that agencies other than the agency proposing a particular regulatory action also have a large influence on regulatory policy.[98] Sometimes it is another Cabinet secretary who might have such influence;[99] often, Sunstein says, it is career staff at another agency.[100] Sometimes it is the Chief of Staff of the White House who plays the major role;[101] sometimes it is a member of Congress.[102] Sunstein extols the virtues of this system, arguing that the aggregation of input from all of these different sources produces better regulatory results.[103] Of course, Sunstein's description also explains why it was often hard, from EPA's perspective, to know who was calling the shots; perhaps it was Rahm Emanuel, the White House Chief of Staff from 2009 to 2010, or perhaps it was Tom Vilsack, the Secretary of Agriculture, or perhaps it was a career staffer at the Department of Energy. The confusion was deepened by OIRA's insistence that, once a matter was under review, all communications run through OIRA.[104] At one point in my tenure at EPA, it was even suggested that a conversation between members of the President's Cabinet on a matter under review would be inappropriate if OIRA were not included.

Sunstein's account of the OIRA process at least helps me to understand why we were all so confused about exactly what the process was.

94. *Id*. at 1838, 1840, 1844, 1875.
95. *Id*. at 1840, 1854, 1858.
96. *Id*. at 1845, 1849, 1854, 1856, 1857, 1865, 1870-71.
97. *Id*. at 1855.
98. *Id*. at 1840-43, 1847, 1854, 1869.
99. *See* Sunstein, *Myths and Realities*, *supra* note 5, at 1851-52, 1858.
100. *Id*. at 1941-43.
101. *Id*. at 1856, 1871.
102. *Id*. at 1852, 1858.
103. *Id*. at 1840-41, 1843, 1869-72.
104. *Id*. at 1859.

In another respect, though, Sunstein's account in the *Harvard Law Review* is puzzling rather than clarifying. From my vantage point at EPA, it certainly often appeared that OIRA – not other White House offices, not other agencies – was calling the shots. OIRA decided what to review, offered line-by-line edits of regulatory proposals, convened meetings with outside parties, mediated disputes among the agencies, decided whether an agency's cost-benefit analysis was up to snuff, and more. It often appeared, from the agency's perspective, that other White House offices were brought in to bolster, not to question, OIRA's position on regulatory matters.[105] I was not in the White House, and so I cannot confirm that the latter impression was correct. But I can say that Sunstein's account does not jibe with my own perceptions of OIRA's power relative to EPA or to other executive branch actors.

In his new book on his time in the government, however, Sunstein paints a somewhat different picture of the role of OIRA during his tenure. Sunstein's book, "Simpler: The Future of Government," makes clear just how much power he wielded as the Administrator of OIRA. Referring to OIRA as "the cockpit of the regulatory state,"[106] Sunstein informs us that, as OIRA Administrator, he had the power to "say no to members of the president's Cabinet";[107] to deposit "highly touted rules, beloved by regulators, onto the shit list";[108] to make sure that some rules "never saw the light of day";[109] to impose cost-benefit analysis "wherever the law allowed";[110] and to transform cost-benefit analysis from an analytical tool into a "rule of decision," meaning that "[a]gencies could not go forward" if their rules flunked OIRA's cost-benefit test.[111] This account – in which OIRA plays a central and often decisive role in determining which rules move and which don't – is much more consistent with my own

105. This impression is consistent with EPA officials' accounts of White House involvement in rulemaking during the Bush I and Clinton years. Bressman & Vandenbergh, *supra* note 53, at 68-69.

106. *See* SUNSTEIN, SIMPLER, *supra* note 5, at 3.

107. *See id.* at 3.

108. *See id.* at 6.

109. *See id* at 7.

110. *See id.* at 8.

111. *See id.* at 161.

experience at EPA than is Sunstein's account of OIRA as a kind of neutral "information-aggregator."[112]

Beyond Sunstein's account, the relative power of EPA within the OIRA process is also well illustrated by considering the increase in influence that EPA personnel enjoy when they go on detail to offices within the White House. Many White House offices depend on agency detailees to help do their work. The Council of Economic Advisors and the Council on Environmental Quality nearly always have one or more detailees from EPA. These detailees, in my experience, participate actively in the OIRA process – and, often, not by pressing for EPA's rules but instead by offering critiques of EPA's work. The detailees appear to have far more power when they are housed in a White House office than they do at EPA, often because their expertise – frequently it is economics – is more central to the White House process than it is to EPA's regulatory frameworks. Going on detail to the White House increases the power of EPA personnel not because they somehow become more expert when they go to the White House, but because the White House privileges their particular expertise over other kinds of expertise. Going on detail to the White House also increases the power of agency personnel for another, very simple reason: the White House has the final say on agency rules.

The role of agency detailees in the OIRA process makes it hard to make sense of Sunstein's portrait of OIRA as an "information-aggregator." If, as I have said, an appreciable number of the people doing the work in the White House are actually employees on detail from the agencies whose work is being reviewed, what sense does it make to say that the OIRA review process increases the total amount of information gathered during a rulemaking process or that it increases the likelihood that a rule will get it right? The same agency personnel participating in the White House process have virtually identical counterparts, making the same kinds of observations, in their home agencies; yet these personnel have a power in the White House that they do not enjoy in their home agencies. More than an information-aggregator, then, OIRA is an information-

112. Sunstein, *Myths and Realities*, *supra* note 5, at 1838.

sorter; economic information rises to the top, other information shakes out below.

Also relevant to the question of who is calling the shots in the OIRA process is the kind of rules OIRA reviews. Most of the rules OIRA reviews are not economically significant;[113] that is, they do not pass EO 12,866's economic-significance threshold of $100 million in annual costs.[114] Many of the rules do not have obvious interagency dimensions. Many are continuing iterations of longstanding regulatory programs. In these cases, when the rules got into trouble in the OIRA process, it often did not appear that there was any appreciable interagency pushback on the rules or any White House resistance outside OIRA. Often, indeed, it appeared that OIRA career staff simply trumped EPA career staff when it came to rules that were neither insignificant enough, from OIRA's perspective, to pass up the opportunity for review, nor significant enough, from EPA's perspective, to elevate the issue beyond OIRA.[115]

In these ways, the "common law" of regulatory review under President Obama manages to muddy the seemingly simple question: who runs EPA? Long gone, it appears, is the carefully articulated power structure of EO 12,866, with its process for elevating issues and for deciding them once elevated. In its place, a free-for-all of regulatory power has emerged, with no one clearly in charge. The lack of a clear power structure is, perhaps unintentionally, best captured by Sunstein's incongruent accounts of his own role in the process: was he the regulatory czar, or an information-aggregator? It depends on which account you read.

113. From January 20, 2009, to April 8, 2013, OIRA reviewed a total of 2514 regulatory actions, of which only 477 were economically significant. *Review Counts*, OFFICE OF INFO. AND REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoCountsSearch (last visited Sept. 30, 2013). For EPA, the numbers were 340 total rules, 66 of which were economically significant. *Id.*

114. Exec. Order No. 12,866, § 3(f)(1), 3 C.F.R. § 638 (1993).

115. For a similar account of the Bush I and Clinton years, see Bressman & Vandenbergh, *supra* note 53.

B. What Is Reviewed?

One domain in which OIRA's powerful role is quite clear, however, is in the decisions about which regulatory actions OIRA will review. EO 12,866 states that OIRA may review not only economically significant actions, but also actions with a significant potential for interagency conflict or inconsistency and actions that raise "novel legal or policy issues."[116] In fact, most of the rules OIRA reviews are not economically significant. In the Obama administration so far, some 80 percent of the EPA rules that have been reviewed were not economically significant.[117] Moreover, many of the rules under review lack any obvious interagency dimension. So how does OIRA come to review them?

While I was at EPA, we had a routinized process for determining what went to OIRA. Every three months or so, the Assistant Administrators of the program offices (air, water, solid waste and emergency response, chemical safety and pollution prevention) and I met with representatives from OIRA to go over the regulatory actions EPA planned to announce in the coming months. We offered our own opinion as to whether any given item warranted OIRA review. But the bottom line was that it was not our decision to make. If OIRA wanted to review something, OIRA reviewed it.[118] Sometimes, the reason for review was a little baffling, along the lines of: we've always reviewed this kind of action, so we'd like to review this one, too. The explanation was baffling because the longstanding practice of review sometimes came straight from a prior administration with seemingly different perspectives on the role of regulation and government; the same OIRA career personnel who had "always" reviewed those kinds of actions were insisting that they should still review them, even after a change in personnel at the very top – and even though, strangely, they were often asserting such power of review under the EO provision that covered "*novel*" legal or policy issues.[119] On occasion, EPA was able to persuade OIRA

116. Exec. Order No. 12,866, § 3(f)(4), 3 C.F.R. § 638 (1993).

117. Numbers are available from the OIRA website. *Executive Order Review Counts Results*, OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoCountsSearch (last visited Sept. 30, 2013).

118. *See* Exec. Order No. 12,866, § 6(b)(2)(B), 3 C.F.R. § 638 (1993).

119. *Id.* § 3(f)(4).

not to review a regulatory action that OIRA was inclined to review; but this was the exception, not the rule.

It is thus quite perplexing to read recent accounts of the OIRA process that argue that agencies can avoid OIRA review altogether through quite obvious and simple stratagems.[120] Agencies can, it is argued, separate regulatory actions into different packages so that no one action is economically significant;[121] they can low-ball their estimates of regulatory costs to come in under the threshold for economic significance;[122] they can slip a policy out as guidance rather than as a rule;[123] they can do low-quality cost-benefit analysis to make OIRA review more difficult;[124] they can even, we are told, spring a rule on the world without warning to OIRA.[125]

From the perspective of EPA, at least, this is not a plausible account. Most of the EPA rules OIRA reviews are not economically significant, so fussing around to make a rule or package of rules not economically significant won't help to avoid OIRA review. OIRA, in any event, lavishes skeptical attention on EPA's estimates of regulatory costs. Moreover, as discussed above, OIRA continues to review agency guidance,[126] so denominating an action as guidance will not avoid OIRA review. And in my experience, OIRA personnel keep an eagle eye on EPA – on its public announcements, website, etc. – to make sure EPA does not sneak something past it. From OIRA's perspective, the system appears to work: EPA receives more sustained attention from OIRA than any other federal agency. Most often, EPA is the agency with the largest number of rules under review at OIRA.[127]

120. *See* Jennifer Nou, *Agency Self-Insulation under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011).

121. Nou, *supra* note 120 at 36.

122. *Id*.

123. *Id.* at 28-32.

124. *Id.* at 37-40.

125. *OIRA Avoidance*, *supra* note 120, at 1005.

126. *See* Memorandum from Dir. of the Office of Mgmt. & Budget Peter R. Orszag for the Heads and Acting Heads of Exec. Dep'ts and Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

127. Lists of rules under formal review at OIRA can be found online. OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov (last visited Oct. 22 2013).

On the issue of which regulatory actions go to OIRA, therefore, the express terms of EO 12,866 again recede and a common law emerges. OIRA reviews pretty much anything it wants to review and fits anything it must into the catch-all category, "novel legal or policy issues."

C. Why Do Rules Fail?

One of the most vexing questions concerning regulatory review has to do with the basis on which regulatory actions fail this review. When a regulatory action goes to OIRA for review, it goes fully formed, reflecting the agency's best judgment about the proper path in the relevant circumstances. EPA rules go to OIRA after an extensive period of internal development and review.[128] In many cases, the rules have been under development for years, with dozens or more agency personnel working on them. In the case of the most significant rules, they have gone to the Administrator herself for initial selection of options and later for final review.[129] It is a matter of some consequence, then, when OIRA does not allow such rules to issue, or requires substantial changes before they may issue.

One reason why OIRA might disapprove of an agency's planned action is that it disagrees with the agency's interpretation of the statute the agency is charged with administering. Notably, neither EO 12,866 nor EO 13,563 gives OIRA the authority to second-guess agencies' interpretations of the statutes they administer. Indeed, both executive orders explicitly state that nothing in them permits a departure from

128. EPA has a robust internal process for developing rules. EPA OFFICE OF POLICY, EPA'S ACTION DEVELOPMENT PROCESS: GUIDANCE FOR EPA STAFF ON DEVELOPING QUALITY ACTIONS (2011), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf.

129. EPA's Action Development Process specifies the criteria for determining which regulatory actions are "Tier 1" rules and thus must receive substantial input from the Administrator at important stages in the rulemaking process. EPA, EPA'S ACTION DEVELOPMENT PROCESS GUIDANCE FOR EPA STAFF ON DEVELOPING QUALITY ACTIONS 22-27 (2011), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf.

existing law.[130] Yet, in a post-*Chevron* world, that disclaimer means less than it seems.[131] If a statute is ambiguous – or if OIRA believes that a statute is ambiguous – then perhaps OIRA has room to press an agency to change its interpretation of a statute it administers, without running afoul of the EOs' injunction to follow existing law. After *Chevron*, "existing law" is up for grabs so long as existing law is ambiguous.

President Obama's OIRA has aggressively moved into the space created by *Chevron*. As a law professor, Cass Sunstein had promoted "cost-benefit default principles," according to which statutes are interpreted to allow cost-benefit analysis so long as they do not clearly forbid it;[132] as OIRA Administrator, Sunstein moved to lock these default principles into place.[133] With respect to EPA rules, OIRA actively pressed EPA to interpret its governing statutes to allow cost-benefit analysis, even where EPA had a long history of interpreting them not to allow it. Pressure like this appears to have borne public fruit when EPA announced its long-awaited proposal for addressing the ecological impacts of cooling water intake structures under the Clean Water Act.[134] In its preamble discussing the rule, EPA noted that it was adopting an interpretation of the relevant provision of the Clean Water Act that would allow cost-benefit analysis, citing EO 13,563 as authority for this interpretation.[135]

I have argued elsewhere that agencies should not get deference under *Chevron* when an interpretation is foist upon them by OIRA; OIRA is not charged by Congress with interpreting the statutes the agencies administer, and OIRA does

130. Exec. Order No. 12,866, § 9, 3 C.F.R. § 638 (1993); Exec. Order No. 13,563 § 7(b)(i), (c), 3 C.F.R. § 213 (2011).

131. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

132. Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001).

133. SUNSTEIN, SIMPLER, *supra* note 5, at 8 .

134. National Pollutant Discharge Elimination System – Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, Proposed Rule, 76 Fed. Reg. 22173, 22185, 22196, 22207, 22212 (Apr. 20, 2011) (to be codified at 40 C.F.R. pts. 122 and 125).

135. *Id.*

not have the expertise of the relevant agencies.[136] But whatever one thinks about the legal consequences of an OIRA-driven agency interpretation, one must take note of the large degree of influence wielded by OIRA when one of the powers it asserts is to embed cost-benefit default principles into the regulatory process.

To understand the boldness of OIRA's power grab, it helps to consider a bit of history. In 1994, eyeing the first Republican takeover of the House of Representatives in forty years, Newt Gingrich proposed an aggressive series of legislative reforms, bundled together as the "Contract With America."[137] Among the most contentious of the proposals was the "supermandate": a requirement that all rules protecting human health, safety, or the environment pass a cost-benefit test.[138] Critics of what President Bill Clinton dubbed the "Contract *On* America"[139] feared that applying a cost-benefit test to health, safety, and environmental rules would often spell their doom, as these rules produce benefits — in human health, in longer life, in cleaner air and water and land — that are hard to quantify and even harder to monetize.[140] President Clinton vetoed bills to fund the government in part because they contained the supermandate,[141] leading to the government shutdowns of 1995 and likely contributing to Clinton's political renewal.

Thanks to Sunstein, though, the supermandate is back. By pressing agencies to adopt cost-benefit analysis as a decision-making framework wherever the law allows it, Sunstein's OIRA has, by executive fiat rather than legislative enactment, imposed a cost-benefit supermandate wherever the law is ambiguous (which, of course, it often is). Presumably, then, one way that

136. Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006).

137. *See, e.g.*, Katherine Q. Seelye, *The 1994 Campaign: The Republicans; With Fiery Words, Gingrich Builds His Kingdom*, N.Y. TIMES, Oct. 27, 1994, at A1.

138. *See, e.g.*, Thomas O. McGarity, *The APA at Fifty: The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1494 (1996).

139. *See, e.g.*, Adam Clymer, *The Clinton Record: Congress; The President and Congress: A Partnership of Self-Interest*, N.Y. TIMES, Oct. 2, 1996, at A1.

140. *See, e.g.*, Todd S. Purdum, *Clinton Says G.O.P. Rule Cutting Would Cost Lives*, N.Y. TIMES, Feb. 22, 1995, at A14.

141. *See, e.g.*, R.W. Apple Jr., *Battle Over the Budget: News Analysis; In This Fight, Polls Guide All the Moves*, N.Y. TIMES, Nov. 15, 1995, at A1.

rules can fail the OIRA process is if they do not hew to OIRA's new supermandate.

Another way rules can fail the OIRA review process is to fail cost-benefit analysis. One way to fail is never to try. An important but little-remarked aspect of the relationship between EPA and OIRA is that OIRA's fine cost-benefit sieve leads EPA personnel to be deeply wary of developing rules that have very high costs in relation to their quantified and monetized benefits. Indeed, Sunstein himself suggests this may be one consequence of OIRA's cost-benefit test.[142] From the moment EPA begins even to think about proposing a rule that OIRA will likely want to see, EPA personnel wonder whether OIRA will accept it; this mindset narrows the range of rules EPA might otherwise consider.

If EPA does decide to propose a rule that has much higher costs than benefits, that rule may not make it past OIRA. Among environmental rules, non-air rules fare the worst in a cost-benefit framework. Rules governing air pollution often produce relatively (or even very) high benefits in relation to costs on account of reductions in particulate matter. Indeed, according to OMB, in the last decade clean air rules have produced a majority of the total monetized benefits conferred by all of the major regulations in the federal government.[143] Rules on water pollution, toxics, and hazardous waste contamination do not have a single category of benefits – like reductions in human mortality due to reductions in particulate matter – that makes it possible for them to clear the cost-benefit hurdle. These programs fare poorly in OIRA's process of review. EPA's proposal to regulate coal ash changed markedly while at OIRA, and has not seen the light of day since it was proposed.[144] EPA initiatives on toxics have stalled at OIRA for years.[145] Likewise, rules on water

142. Sunstein, *Myths and Realities*, *supra* note 5, at 1863.

143. OFFICE OF MGMT. & BUDGET, DRAFT 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, 15 (2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

144. *White House Misadventures in Coal Ash Rule*, CTR. FOR EFFECTIVE GOV'T (May 18, 2010), http://www.foreffectivegov.org/node/11001.

145. *See Executive Order Submissions Under Review*, OFFICE OF INFO. & REGULATORY AFFAIRS, (Oct. 3, 2013), http://www.reginfo.gov/public/do/

pollution appear permanently stuck.[146] While Sunstein reports that cost-benefit analysis is not a major reason why rules get stuck at OIRA,[147] it is hard to escape speculating that cost-benefit analysis must be one factor in the trouble these categories of rules have run into at OIRA. Indeed, Sunstein also says that rules that fail cost-benefit will in fact likely fail OIRA review. [148]

Sunstein asserts that EO 13,563 adds qualitative texture to the generally quantitative thrust of cost-benefit analysis.[149] In particular, he notes, EO 13,563 introduced "dignity" into the cost-benefit equation.[150] Sunstein cites the Department of Justice's rule on prison rape as an instance in which "dignity" made a difference in the regulatory process.[151] In its cost-benefit analysis of its rule aiming to reduce the incidence of prison rape, DOJ noted that it was very hard to quantify and monetize the benefits of reducing rape.[152] Nevertheless, DOJ said, reducing rape would promote human dignity, and this was a positive feature of its rule on prison rape.[153]

But I would venture to guess that the only reason DOJ was doing a cost-benefit analysis of rape prevention was that OIRA insisted on it. The only reason DOJ needed to reach to justify preventing rape was that OIRA's cost-benefit vision did not easily digest, in economic terms, a human indignity like rape.[154] To argue, as Sunstein does, that the inclusion of "dignity" in EO 13,563 somehow made it possible to issue DOJ's rule on prison rape is to get things very backwards.

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eoReviewSearch (showing chemicals rules that have been at OIRA for one to three years).

146. *See id.* (showing water rules that have been at OIRA for over a year).

147. Sunstein, *Myths and Realities*, *supra* note 5, at 1868-69.

148. SUNSTEIN, SIMPLER, *supra* note 5, at 161.

149. Sunstein, *Myths and Realities*, *supra* note 5, at 1865.

150. *Id.*

151. *Id.*

152. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT, REGULATORY IMPACT ASSESSMENT, DEPARTMENT OF JUSTICE FINAL RULE 3 (2012), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.

153. *Id.* at 5.

154. Lisa Heinzerling, Cost-Benefit Jumps the Shark, GEO. L. FACULTY BLOG (June 13, 2012), http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html.

One of the most problematic features of cost-benefit analysis, especially for future-oriented regulatory programs like those involving the environment, is its treatment of future consequences. In calling for recommendations on a new executive order, President Obama explicitly asked the OMB Director to address "concern for the interests of future generations."[155] This concern did not make it into the actual executive order, and indeed, the record of the Obama administration has been disappointing in this domain. The Obama administration's signature effort in this area – the estimation of the "social cost of carbon"[156] – used higher discount rates than OIRA's own cost-benefit guidance to agencies allows when a regulatory policy has significant intergenerational effects. The Obama administration approved a "central" value for the discount rate to be used in calculating the social cost of carbon of 3 percent and a upper value of 5 percent[157] – yet OIRA's own guidance allows agencies to use discount rates of 1 to 3 percent where intergenerational effects are significant.[158] Increasing the discount rate means decreasing the worth of future generations.[159] In approving a high range of discount rates for climate consequences, the Obama administration took a step backward, not forward, in the incorporation of future generations' interests in cost-benefit analysis.

We have seen that rules might fail OIRA review because they do not have a positive enough cost-benefit profile, and that President Obama's executive order on regulatory review has not appreciably helped rules get over this hurdle. Another reason why rules might fail OIRA review is that they simply fail "on the merits." This is, in fact, Sunstein's explanation of why EPA's

155. Presidential Memorandum of January 30, 2009, Regulatory Review, 74 Fed. Reg. 21, 5977 (Feb. 3, 2009), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-regulatory-review.

156. INTERAGENCY WORKING GRP. ON SOC. COSTS OF CARBON, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (Feb. 2010), *available at* http://www.epa.gov/oms/climate/regulations/scc-tsd.pdf.

157. *Id.* at 3.

158. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS (2003), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/.

159. *See* Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39 (1999).

final rule revising the ozone standard failed: the decision to return the rule to EPA was, Sunstein asserts, "unquestionably correct"[160] and "made on the merits."[161] He does not explain what this means – on the merits, considering cost-benefit analysis? on the merits, considering the scientific evidence? on the merits, considering EPA's other priorities and activities? – but he does insist that the rejection of EPA's rule on ozone was "not motivated by politics."[162]

Whatever view Sunstein takes of the "merits" of the ozone rule, it is hard to understand why the President rejected it and why Sunstein thinks that decision was "unquestionably correct." If, by the "merits," Sunstein means that the rule failed a cost-benefit test, that claim would be legally irrelevant. Neither EPA nor the White House was allowed to use cost-benefit analysis to pass judgment on the rule: the Supreme Court has held (unanimously) that EPA may not consider costs in setting the National Ambient Air Quality Standards.[163] The President's letter to Administrator Jackson emphasized "regulatory burdens," "regulatory uncertainty," and the economic downturn in explaining the return of the rule to EPA;[164] if these considerations were indeed the basis for the President's decision, the decision was unlawful.

Perhaps Sunstein means that the ozone rule failed on the scientific merits. Certainly, OIRA has played an active role in adjusting EPA's discussions of technical matters in its NAAQS decisions. In a report prepared for the Administrative Conference of the United States, Professor Wendy Wagner has carefully documented just how often OIRA intrudes upon EPA's technical

160. SUNSTEIN, SIMPLER, *supra* note 5, at 7.

161. *Id.* at 27.

162. *Id.* For a very different take on this episode, *see* John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES (Nov. 16, 2011).

163. Whitman v. American Trucking Associations, 531 U.S. 457, 465 (2001).

164. Press Release, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011) [hereinafter Statement by the President on Ozone], *available at* http://www.whitehouse.gov/the-press-office/2011/09/02/ statement-president-ozone-national-ambient-air-quality-standards.

analysis in the domain of the NAAQS.[165] But OIRA does not have the scientific expertise necessary to make judgments about where the NAAQS should be set. Nor, it should be added, does the President. Moreover, the scientific shakiness of the decision to direct EPA to withdraw the ozone standard emerged clearly at oral argument on the EPA standard left in place by President Obama's decision. At argument, the panel of D.C. Circuit judges sharply questioned the government's lawyers as to the scientific merits of the Bush-era ozone standard, left standing after EPA withdrew its revised standard.[166] They seemed very skeptical that the Bush-era standard was stringent enough.[167] Given the lack of relevant expertise on the part of OIRA and the President, and given the hard time EPA had defending the Bush-era standard in court, it is hard to imagine that when Sunstein says Obama's decision to reject EPA's revised standard was correct "on the merits," Sunstein means that the directive to withdraw the revised standard was "unquestionably correct" as a matter of science.

A final possibility is that Sunstein believes that the ozone decision was correct on the merits because it reflected good governance. The President's letter to Administrator Jackson emphasized the importance of regulatory certainty and observed that EPA was already in the process of reviewing the ozone standard in light of the very latest scientific evidence.[168] So perhaps Sunstein means that the decision to reject the standard was correct because EPA should just have waited for the new five-year review of the ozone standard, rather than reconsidering the Bush-era standard and replacing it with a revised standard based on the same evidence EPA had considered in the Bush administration.

165. Wendy Wagner, *Science in Regulation: A Study of Agency Decisionmaking Approaches* (Feb. 18, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf.

166. *See* Robin Bravender, *Obama Ozone Decision Blindsides Enviros – and His Own EPA*, POLITICO, (Sept. 2, 2011), *available at* http://www.politico.com/news/ stories/0911/62586.html.

167. *See* Lawrence Hurley, *Court Sympathetic to Enviros' Challenge to Bush-era Ozone Standards*, GREENWIRE (Nov. 16, 2012), *available at* http://eenews.net/public/Greenwire/2012/11/16/2. However, the court went on to uphold the Bush-era standard, in Mississippi v. EPA, 723 F.3d 246 (D.C. Cir. 2013).

168. *See Statement by the President on Ozone*, *supra* note 164.

The trouble with this potential explanation is that, by the time President Obama ordered the standard pulled, EPA had been working on the reconsidered ozone standard for 2-1/2 years, with the full knowledge and acquiescence of the White House. Work on the reconsidered standard was consistent with Rahm Emanuel's memorandum to agencies, written within a week of President Obama's inauguration, directing them to review new and pending regulatory actions begun in the Bush administration, [169] and with the President's own March 2009 memorandum on scientific integrity.[170] The Bush-era ozone standard was widely regarded as one of the biggest environmental defaults of the Bush administration relating to the environment; many thought the standard of 0.075 parts per million was scientifically unsound. Thus, in September 2009, EPA announced that it would reconsider the Bush-era ozone standard.[171] In January 2010, EPA proposed revising that standard.[172] EPA held three public hearings and took public comment on the proposed standard in 2010.[173] The proposal went through OIRA.[174] The *upper end* of the range the agency proposed to consider was 0.070 parts per million of ozone.[175] In other words, no part of the range EPA proposed for the revision encompassed the Bush-era standard.

169. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010); Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4435 (Jan. 26, 2009).

170. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010); Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity (Mar. 9, 2009), *available at* http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09.

171. *Fact Sheet: EPA to Reconsider Ozone Pollution Standards*, EPA, http://www.epa.gov/glo/pdfs/O3_Reconsideration_FACT%20SHEET_091609.pdf (last visited Nov. 9, 2013).

172. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (Jan. 19, 2010).

173. EPA, *Regulatory Actions: Ozone Standards*, http://www.epa.gov/glo/actions.html (last updated Sept. 24, 2013).

174. *Executive Order Reviews Completed Between Jan 1, 2010 to Dec. 31, 2010*, OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoHistReviewSearch (last visited Nov. 9, 2013) (proposed rule went to OIRA on Oct. 21, 2009, and review was completed on Jan. 6, 2010).

175. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2997 (Jan. 19, 2010).

It would be bizarre to say that stopping a decision that everyone knew about, 2-1/2 years into the process, was justified on the ground that stopping it was a good way to govern. It was the opposite: it was a bad way to govern. It wasted tremendous agency resources and valuable time; it put the agency back at square one in figuring out how to manage the ozone problem under the Bush-era standard; it sent a wave of distrust and disbelief through agency ranks and outside supporters of the agency; and it put the government in the difficult position of defending the Bush-era standard left in place. Unleashing chaos cannot be what Sunstein means when he says that the ozone decision was correct "on the merits"; but that was the decision's effect.

Under the common law of 13,563, then, rules can fail for a variety of reasons: they can reflect an OIRA-disapproved understanding of the role of cost-benefit analysis under the relevant laws; they can fail a cost-benefit test; or they can be bad ideas on some unspecified theory of the "merits." Perhaps these are some of the reasons so many EPA rules seem permanently stuck at OIRA, as I next discuss.

D. When Does Review End (and Begin)?

The common law of 13,563 also determines the timelines under which OIRA operates. As discussed above, EO 13,563 explicitly reaffirms EO 12,866, which is the executive order that sets forth timelines for OIRA review: 10 days for pre-rule actions, 45 days for final rules on subjects already reviewed and little changed, 90 days for everything else.[176] EO 12,866 also, as I have said, seems clearly to contemplate one 30-day extension if the OMB Director and the agency head agree to it.[177]

This is not the way the OIRA process now works. Many, many rules linger at OIRA long past the 90- or 120-day deadline.[178] Many pre-rule actions stay long past 10 days.[179] Some rules have been at OIRA for *years*.[180]

176. Exec. Order No. 12,866, § 6(b)(2)(A), (B), 3 C.F.R. § 638 (1993).

177. *Id.* § 6(b)(2)(C).

178. OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov (last visited Nov. 9, 2013).

Sunstein explains that, in fact, the prevailing understanding of EO 12,866 holds that an agency head may, on her own, request an indefinite extension of OIRA review.[181] This would mean that neither the requirement that the OMB Director agree "in writing" to the extension nor the requirement that the extension be once, for 30 days only, holds under the present understanding of EO 12,866. This would, in turn, mean that if an agency head asks for an extension, there actually is no deadline for completing OIRA review.

This remodeling of EO 12,866's structure on the timelines for review is news in and of itself. Many outside observers believe that there is in fact a deadline for OIRA review.[182] OIRA itself encourages this (mis)understanding by displaying 90 days as a timing benchmark on its regulatory dashboard.[183]

But it is worse than that. It is worse because the way that agency heads come to request extended review, in my experience, is that OIRA calls an official at the agency and *asks the agency to ask for an extension*. It is clear, in such a phone call, that the agency is not to decline to ask for such an extension. Thus, not only is there no deadline for OIRA review, but OIRA itself controls the agency's "requests" for extensions. In this way, it comes to pass that rules can remain at OIRA for years.

Quite apart from not knowing when OIRA review ends, it is also sometimes hard for the public to know when OIRA review begins. It has been widely reported that OIRA has lately been in the habit of not allowing agencies to send rules for review until OIRA has cleared them for review – a kind of pre-clearance procedure uncomfortably reminiscent of the Bush-era failure of

179. *Id*.

180. *Id*.

181. Sunstein, *Myths and Realities*, *supra* note 5, at 1846-47 n. 37.

182. *See, e.g.*, Megan R. Wilson, *Printers to Obama: Please Regulate Our Cleaning Rags*, THE HILL'S REGWATCH (Apr. 29, 2013), *available at* http://thehill.com/blogs/regwatch/pending-regs/296827-printers-to-obama-please-regulate-our-cleaning-rags ("Laws stipulate that the agency then has 90 days to review the drafts before returning them to agencies for correction or publication…").

183. OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/public (last visited Nov. 9, 2013).

OIRA to be in receiving mode when the endangerment finding and rules on cars went over for review.[184]

Some documents on publicly available websites corroborate these reports. EPA maintains a website, the Regulatory Development and Retrospective Review Tracker ("Reg DaRRT"), that is supposed to track important moments in the development of EPA rules.[185] Inspired by the Bush-era fiasco of the un-uploaded package on endangerment and cars, EPA designed a timeline with two dates relevant to OIRA review: one noting the date when EPA sends a regulatory package to OIRA, and one noting the date when OIRA "receives" the package.[186] A space of a day or two between these two dates might mean nothing; it might mean that the package went over late in the day, for example, and no one was around to upload it at OIRA. But a space of anything more than that may signal that OIRA has lapsed into non-receiving mode. Thus, for example, looking at the Reg DaRRT entry on EPA's rule requiring electronic reporting by Clean Water Act permittees, one can see that the rule went to OIRA on December 22, 2011, but was not received by OIRA until January 20, 2012.[187] It would be unusual to have this long a space between sending and receipt unless OIRA had identified some problem with the package.

Comparing EO 12,866 documents on regulations.gov to OIRA's own posted review dates can also be illuminating. On regulations.gov, one can see that EPA sent a rule relating to renewable fuels to OIRA on November 20, 2012[188] – but OIRA

184. See *supra* text at note 69.

185. US GOV'T ACCOUNTABILITY OFFICE, GAO-04-588T, FEDERAL FOOD SAFETY AND SECURITY SYSTEM: FUNDAMENTAL RESTRUCTURING IS NEEDED TO ADDRESS FRAGMENTATION AND OVERLAP (2004), *available at* http://www.gao.gov/assets/120/110801.pdf.

186. See, among many others, *Formaldehyde Emissions Standards for Composite Wood Products*, EPA, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2070-AJ92?opendocument (last visited Oct. 3, 2013) (showing date sent to OMB for review and date received by OMB).

187. *NPDES Electronic Reporting Rule*, EPA, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2020-AA47?opendocument (last visited Oct. 3, 2013).

188. *NPRM as Sent to OMB on 11/20/12*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2012-0621-0003 (last visited Oct. 3, 2013).

itself reports that it received this rule on January 30, 2013.[189] Some regulatory actions seem caught forever in email limbo between EPA and OIRA. A Notice of Data Availability on coal ash, for example, appears to have been sent to OIRA on March 12, 2012[190] – but the notice did not appear on OIRA's log of items under review until April 13, 2013.[191] Needless to say, even if OIRA did indeed respect the EO 12,866 deadlines once items are accepted by it for review, these deadlines would mean little if OIRA simply does not accept certain regulatory actions for review or only accepts them long after they have been sent.

To sum up, on the matter of deadlines, OIRA has broken entirely free from the constraints of EO 12,866. The 10-day, 45-day, and 90-day time limits on OIRA review perhaps survive as benchmarks, but nothing more. To maintain the fiction that deadlines still exist, OIRA extends review indefinitely at the "request" of agency heads – but these requests, in my experience, often are instigated by OIRA itself. To make matters worse, OIRA has fudged its own failure to meet the deadlines imposed by EO 12,866 by simply not "receiving" some regulatory packages until long after they are sent.

E. What Are We Told?

The last facet of the common law of EO 13,563 compounds the problems created by OIRA's other innovations to the regulatory review process prescribed in EO 12,866: OIRA follows, and allows the agencies to follow, almost none of the disclosure requirements of EO 12,866. OIRA also nowhere has written down the elements of its common law of regulatory review. This is why we are left to speculate about who is in charge of regulatory review. This is why so many people think OIRA reviews only really big and important rules, and perhaps why

189. *Entry on RFS Renewable Identification Number (RIN) Quality Assurance Program*, OFFICE OF INFO. AND REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoHistReviewSearch (last visited Oct. 3, 2013).

190. *Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers*, EPA, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2050-AE81?opendocument. (last visited Oct. 8, 2013).

191. OFFICE OF INFORMATION & REGULATORY AFFAIRS, www.reginfo.gov (last visited Oct. 16, 2013).

some believe that agencies can easily evade OIRA review altogether. This is why outsiders think there actually are deadlines for OIRA review and also think OIRA's website contains a full listing of items under OIRA scrutiny. The misconceptions about OIRA review would not be possible if OIRA either actually met the disclosure requirements of EO 12,866 or were more forthcoming about the many alterations it has made to the process described in the executive order.

OIRA does not explain in writing to agencies that items on their regulatory agenda do not fit with the President's agenda.[192] OIRA does not keep a publicly available log explaining when and by whom disputes between OIRA and the agencies were elevated. Indeed, when the first elevation of an EPA rule occurred in President Obama's first term, I drafted a brief memo for the EPA's docket explaining that elevation had occurred and noting the outcome. OIRA told me in no uncertain terms that the memo must not be made public. Moreover, except in one instance – President Obama's direction to then-EPA Administrator Lisa Jackson to withdraw the final rule setting a new air quality standard for ozone – OIRA has not returned rules to agencies with a written explanation about why they have not passed OIRA review.[193] Instead, as discussed above, OIRA simply hangs onto the rules indefinitely, and they wither quietly on the vine. This is how it comes to pass that a list of chemicals of concern or a workplace rule on crystalline silica lingers at OIRA for years.

Some agencies do post "before" and "after" versions of rules that have gone to OIRA. These redlined documents often feature hundreds of changes. There is nothing here like the "complete, clear, and simple manner" of disclosure contemplated by the Executive Order. There is also often no document that explains which changes were made at OIRA's behest. Where, as Sunstein explains, changes might come from OIRA, from another White House office, from another Cabinet head, or from a career staffer

192. The next several paragraphs are drawn from Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. 39 (April 2013), *available at* http://jreg.commons.yale.edu/who-will-run-the-epa/.

193. The website on regulatory review shows only one return letter (on ozone) issued during the Obama administration. *OIRA Return Letters*, OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/public/do/eoReturnLetters (last visited Mar. 25, 2013).

in a separate agency, the failure to follow the Executive Order's rules on transparency means that no one is ultimately accountable for the changes that occur. Who is responsible, for example, for the hundreds of technical changes made to the EPA's scientific analyses of air quality rules?[194] We simply do not know.

Here, too, OIRA is the stumbling block when it comes to transparency. Agencies know full well that they are not to be too transparent. OIRA reprimanded the EPA when the EPA accidentally posted interagency comments on its proposal to regulate coal ash impoundments.[195] But why shouldn't the public know who is responsible for changing the rules? In fact, without knowing the expertise and affiliation of the kibitzers, it is hard to evaluate their comments.

The problems go deeper still. OIRA maintains a "Regulatory Review Dashboard" that contains a good deal of information about rules under review, how long they have been under review, and so on.[196] It is spiffy and informative, but woefully incomplete. Some rules go to OIRA "informally" and do not appear on the Dashboard at that time. Some rules go to OIRA and appear on the Dashboard only weeks after the agency has sent them.[197] Some rules are done, from the agency's perspective,

194. Wendy Wagner has painstakingly documented such changes in a study prepared for the Administrative Conference of the United States. WENDY WAGNER, SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES (2013), *available at* http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf.

195. *See* CENT. FOR EFFECTIVE GOV'T, CHANGES TO COAL ASH PROPOSAL PLACE UTILITY'S CONCERNS ABOVE PUBLIC HEALTH (2010), *available at* http://www.foreffectivegov.org/node/11041 (recounting the same episode).

196. *See generally* OFFICE OF INFO. AND REGULATORY AFFAIRS; OFFICE OF MGMT. AND BUDGET, REGULATORY REVIEW DASHBOARD, http://www.reginfo.gov (last visited Oct. 8, 2013).

197. For example, compare the EPA's report of when it sent its rule on electronic reporting regarding water pollution permits to OIRA on, Dec. 22, 2011, to its report when OIRA "received" the rule on, Jan. 20, 2012. *See NPDES Electronic Reporting Rule*, EPA, http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2020-AA47?opendocument (last visited Nov. 9, 2013) (listing dates for "NPRM: Sent to OMB for Regulatory Review" and "NPRM: Received by OMB"). *See also Search Results for NPRM Review Status, Regulatory Review Dashboard*, OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/ (last visited Nov. 9, 2013) (search "RIN" for "2020-AA47" and search "Agency for Environmental Protection Agency) (showing OMB's received date to be Jan. 20, 2012).

but the White House prevents their transmittal to OIRA.[198] The truth is, the Dashboard purports to be, but is not, a full picture of the items under review at any given time. Thus it misleads at the same time it informs.

So far I have explained the ways in which OIRA review, as practiced today, departs from the executive order it purports to be following, EO 12,866. I have suggested, along the way, reasons to think OIRA's practice may not be ideal. Now, I turn to the normative perspective in earnest, and explain why I believe OIRA's process of regulatory review is deeply problematic along several different dimensions.[199]

III. THE PROBLEMS WITH OIRA

In this paper, I have focused mainly on a descriptive account of the OIRA review process as it exists today. I believe this descriptive account is essential because there is so much misunderstanding about how OIRA actually operates. But this paper would be incomplete without a discussion of the normative problems created by OIRA's current practices. Other scholars have covered these problems well;[200] for this article, I rest with a relatively brief discussion.

I lead off with the last topic I covered in discussing the common law of EO 13,563: transparency. The opacity of the OIRA process has two large problems. The first is that opacity in government in general is a problem. It prevents people from understanding the way their government operates, how they can intervene and at what points, what the government is up to, who is making important decisions, why the government has made

198. Juliet Eilperin, *Obama Administration Slows Environmental Rules as it Weighs Political Cost*, WASH. POST, Feb. 12, 2012, http://articles.washingtonpost.com/2012-02-12/national/35442360_1_mercury-emissions-obama-administration-light-trucks (stating that the White House had not given EPA permission to send a rule on cars and trucks to OMB).

199. For a compelling argument that OIRA review is so problematic that it should be scrapped altogether, *see* Steinzor, *supra* note 6.

200. Indispensable articles in this literature, spanning a long period, include: Steinzor, *supra* note 6; Bressman & Vandenbergh, *supra* note 53; Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Percival, *supra* note 51; Morrison, *supra* note 17; Olson, *supra* note 49.

those decisions. The problems with opacity are, in fact, what led President Clinton to include disclosure requirements in EO 12,866 in the first place.[201]

Another problem with opacity in the OIRA process is that transparency is promised but not delivered. Opacity about transparency is the worst kind of opacity; people think a lack of information on a subject means there is nothing relevant to report, when in fact it might mean they are just not being told. Thus it is especially troubling, given the gaps in transparency I have described, that Sunstein continues to tout the transparency of the OIRA process.[202] If believed, this claim would lull people into thinking they have all the information they might need or want about this process. But they do not. Moreover, to claim transparency but offer mostly opacity is especially bad in an administration that has made openness in government one of its signature initiatives.

A second problem with OIRA review as it is now conducted is the one flagged by OLC in 1981 when it reviewed EO 12,291. OLC cautioned, as I have said, that displacement of discretion by White House personnel might run afoul of the laws lodging discretion within a particular agency or with a particular official at a particular agency.[203] Since that time, the academic literature on this issue has burgeoned, with many scholars on both sides of the political divide arguing that certainly the President has the authority to order political appointees within the agencies to make particular decisions. Perhaps most famously, then-professor Elena Kagan argued that statutes that give discretion to particular agencies or to particular officials within particular agencies are best read as implicit delegations of authority to the President to dictate specific regulatory outcomes.[204] Other scholars have followed Kagan's lead and argued that it is nonsensical to read much of anything into Congress's particular choices about who is to make particular

201. *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 878 (2003).

202. Sunstein, *Myths and Realities*, *supra* note 5, at 1854.

203. Proposed Executive Order Entitled "Federal Regulation," 5 Op. O.L.C. 59, 62-63 (Feb. 13, 1981).

204. Kagan, *supra* note 25, at 2288-90.

regulatory decisions.[205] What sense would it make, they ask, for Congress to give the President the authority to designate Superfund sites but not to give him directive authority over the setting of the NAAQS?[206] Some statutes give authority to the President, many others to agencies, and there appears to be no rhyme or reason in these choices.[207]

But if having rhyme or reason is a prerequisite for respecting Congress's choices, we have a lot of work to do unraveling its handiwork. Congress also has given USDA authority over meat but not cheese,[208] it has given FDA authority over eggs but not egg products,[209] it has given EPA authority over open waters but it requires EPA to share its authority over wetlands with the Army Corps of Engineers,[210] it has given DOT authority over fuel economy standards but not tailpipe standards for greenhouse gases.[211] The law is filled with delegations of authority that do not make obvious sense. But no one argues that FDA could just take over USDA's meat inspections, or that EPA could take over the Army Corps' functions with respect to wetlands. Even more tellingly, few other than those who believe in a strongly unitary executive believe that the President can simply ignore Congress's choices about whether the head of an agency can be removed for any reason or must only be removed for cause.[212] Yet it makes little sense, as far as I can tell, to have an independent SEC but a dependent EPA, or to have an independent FTC but a dependent CPSC. Why should we think nothing of ignoring Congress's instructions as to who within the executive branch should make particular decisions, but then cling tightly to its instructions about how to remove particular officials?

205. *See* Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 FORD. L. REV. 2455 (2011).

206. *Id*. at 2466.

207. *Id*. at 2466-68.

208. *See* US GOV'T ACCOUNTABILITY OFFICE, *supra* note 185, at 3, 21.

209. 21 U.S.C. 331 § 331 (2012); 21 U.S.C. § 1031 (2012). For a critique of the resulting regulatory patchwork, see Note, *Reforming the Food Safety System: What If Consolidation Isn't Enough?*, 120 HARV. L. REV. 1345, 1357-59 (2007).

210. 33 U.S.C. § 1344 (2012).

211. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

212. *See, e.g.*, Kagan, *supra* note 25, at 2326-27.

To delve fully into these issues would take me beyond the scope of this paper. My basic point is that it is not at all obvious that a delegation to a specific agency to make a specific decision delegates authority to the President to make that decision himself. It is even less obvious that such a delegation gives decision-making authority to OIRA career staff, other agencies' career staff, Cabinet members outside the relevant agency, the White House Chief of Staff, and others, apart from the President. Even if one believed that the President himself has decision-making power, Sunstein's account of the way the OIRA process actually works shows that it is almost never the President himself who is making the relevant calls, it is OIRA career staff and other agencies' career staff and other Cabinet officials and the Council of Economic Advisors and the White House Chief of Staff and a cast of many others.[213] To suggest that all of these players somehow can appropriately partake of the President's own power is ludicrous. It would be to suggest that the entire executive branch is "the President."

Thus, as in 1981, there remains a significant legal issue whether OIRA may exercise decision-making authority – not just oversight – with respect to regulatory decisions lodged by statute in particular agencies.

A third large problem with OIRA review as it is now conducted is that it lacks accountability. No one knows who is really in charge. Sunstein's account of the process has only deepened the impression that the process is chaotic and unpredictable, lacking clear lines of authority and producing outcomes that have no clear author. The precise process set out in EO 12,866 for resolving disputes between the action agency and OIRA has given way to a blurry struggle for power in a process that remains opaque and mysterious even to the closest participants in it. Chaos, opacity, mystery: these are not the hallmarks of accountability. Since OIRA review is founded in part on a perceived need for greater accountability in the regulatory domain, the absence of accountability in this process undercuts the very reason for that review.

213. *See* Sunstein, *Myths and Realities, supra* note 5, at 1855-59; *see also* Bressman & Vandenbergh, *supra* note 53, at 68 (counting 19 different White House offices involved in OIRA review).

The accountability deficit is worsened by officials' insistence that, despite all that I have shown here, it really is the agencies that are in charge of regulatory policy. Sunstein reports that "[a]gencies decline to accept changes with which they disagree" and that "[w]hen changes are made, the agency assents to them."[214] "It is true, of course," Sunstein allows, "that OIRA has a good deal of formal authority under Executive Orders 12866 and 13563. That authority matters. But in important cases, the agency convinces OIRA and others, on the merits, that its position is indisputably correct, or that it is reasonable enough even if not indisputably correct. And in important cases, the agency concludes that the views suggested by OIRA, and pressed by interagency reviewers, are clearly correct, or that they are reasonable enough even if not clearly correct."[215] I do not know why Sunstein believes that agencies come to understand that OIRA's positions are "clearly correct"; I believe, instead, that they often come to understand simply that OIRA is clearly in charge. But the continuing assertion that agencies accept OIRA's views, even welcome them, further dilutes accountability for the regulatory decisions in question.

Last but not least, the current process of OIRA review hits environmental protection especially hard. EPA most often leads the federal pack in terms of the number of its rules under review at any given time. Most of the EPA rules OIRA reviews are not economically significant. As of May 7, 2013, 15 of the 22 EPA rules under review had been there for over a year. As shown in redlined versions of EPA rules showing changes during OIRA review, OIRA devotes extreme attention – and sometimes little deference – to EPA's technical judgments.[216] Whole categories of rules protecting the environment fare poorly in the cost-benefit analysis OIRA demands.[217] Perhaps it is not surprising that a centralized structure first developed in the Nixon years to undercut protections under the new federal environmental laws would still, in 2013, save its strongest fire for these same protections. But it is a shame that so little has changed.

214. Sunstein, *Myths and Realities, supra* note 5, at 1847.
215. *Id.* at 1873 (footnote omitted).
216. See text at note 165 & note 194, *supra*.
217. See text at notes 144-46, *supra*.

Solving at least some of these problems with OIRA review would be simple: OIRA could just follow the rules laid down in EO 12,866. If OIRA followed EO 12,866's requirements for transparency, a good number of the issues surrounding OIRA's opacity would disappear. If OIRA followed the spirit of 12,866 and 13,563 insofar as they do not envision OIRA changing the laws under which agencies operate, the problem of OIRA interfering with the agencies' best judgments about the appropriate interpretations of the statutes they administer would go away. If OIRA followed the process EO 12,866 requires for elevation and dispute resolution at the highest levels, and if OIRA followed the disclosure requirements pertaining to such matters, some of the concerns about accountability would be mitigated. If OIRA kept to EO 12,866's deadlines, at least indefinite delay would not be one of the intrusions it visits upon the agencies. If OIRA sent return letters to agencies when it rejected rules, explaining in writing why it rejected them, there would exist a focal point for substantive discussion and accountability would be enhanced. Much can be done to improve things, in other words, simply by following the executive order President Obama himself has reaffirmed.

Other problems would be trickier to resolve. There would remain the overarching legal issue of whether it is fair to assume that statutes giving decision-making authority to executive agencies also give decision-making authority to the President (or his aides in OIRA and the larger White House). If the cast of thousands Sunstein describes still played a role in regulatory review, there would remain a serious accountability deficit. And, so long as the culture at OIRA does not change and so long as cost-benefit is the decision tool of choice, environmental protection will suffer.

IV. CONCLUSION

I hope that the descriptive account I have provided here, aimed at correcting the misimpressions that have grown up around OIRA review, will help to renew the debate over the role of OIRA and the larger White House in agency rulemaking.