Regulatory Oversight in the Clinton Administration

ROBERT J. DUFFY
Assistant Professor of Political Science
Rider University

Today we are sending a clear message to the special interests who used the Council on Competitiveness as a back door to avoid the law. That back door is closed. No longer will special interests receive special favors. No longer will our laws be ignored or undermined. No longer will decisions that should be made in public be made in private. In this administration, everyone will play by the rules and public decisions will be public information.

Al Gore, January 21, 1993

With these strong words, Vice President Al Gore announced yet another White House overhaul of regulatory oversight. Gore’s statement, made on the first full day of the Clinton presidency, clearly signalled the administration’s desire to distance itself from the widely criticized policies and procedures of the Bush White House. But just how different is regulatory review in the Clinton administration?

After all, in recent years presidents of both parties have used their executive powers to enhance their control of agency rulemaking. These actions are understandable, given the scope of federal regulatory programs, their potential economic consequences, and the public’s propensity to hold presidents accountable for the nation’s economic performance. Nonetheless, centralized regulatory review has been controversial because it raises questions about whether the president or Congress has the ultimate power to shape the actions of executive branch actors. Presidents Ronald Reagan and George Bush, for example, devised highly centralized review procedures which gave them greater control over rulemaking. Congressional Democrats perceived these actions as an attempt to undercut their own control over federal agencies, and regulatory politics became the focus of a pitched partisan and institutional battle.

The Clinton presidency thus raises a number of interesting questions for students of regulatory politics. Has the Clinton administration ushered in a less conflictual era of regulatory oversight? Has it, like most recent administrations, sought to control rulemaking through centralized review procedures? Although the Clinton White House has mandated numerous procedural changes, in my opinion, it has not abandoned the concept of centralized review. Indeed, regulatory review in the Clinton administration builds upon previous efforts and is firmly within the tra-
ditions of the institutional presidency. While rejecting the insulated and secretive practices characteristic of the Reagan and Bush era, the Clinton White House review program is, in many ways, the broadest and most far-reaching yet.

Information for this study has been gathered from Office of Management and Budget (OMB) documents, congressional hearings, newspaper accounts, and from interviews conducted with persons knowledgeable about regulatory review procedures. The interviews were open-ended and varied in length. In several cases, individuals requested that their names be withheld.

**Regulatory Review and the Administrative Presidency**

Regulatory reform is a common presidential goal. Indeed, White House efforts to gain greater control over federal rulemaking are a logical stage in the development of the modern "institutional presidency." According to Terry Moe, the institutional presidency is rooted in an incongruence, inherent in modern American politics, among structures, incentives, and resources. Simply put, presidents are burdened by expectations that far exceed their institutional capacity for effective action. Presidents seeking to enhance their capacity thus have strong incentives to initiate structural reforms, but the resources for acting on these incentives are usually inadequate, "constrained by political and bureaucratic opposition, institutional inertia, inadequate knowledge, and time pressures."\(^1\) The result has been the emergence of an "administrative presidency," characterized by an increasingly centralized and politicized executive department which allows presidents to pursue their personal and programmatic goals through unilateral executive action.\(^2\)

These developments can be traced to the New Deal, and to the subsequent expansion of federal responsibilities which made administrative politics the focal point of government activity. Over time, responsibility for determining the substantive content of programs shifted from the legislative branch to the bureaucracy. In subsequent decades, federal rulemaking was a decentralized, agency-oriented activity. Each agency was interested in its own programs, but none had a stake in coordinating policy across the bureaucracy. As programmatic responsibilities increased, however, the need for improved policy coordination, evaluation, and planning became apparent. This was of special concern to presidents who viewed the actions of the bureaucracy as an essential part of their constitutional responsibilities. Despite public and media perceptions, however, presidents face serious problems implementing their domestic policy initiatives because they are often derailed by competing forces, including some within the executive branch itself.

One common problem is that administrators seek "accommodation" with client groups and congressional overseers, and thus have their own agendas, which may or may not correspond with that of the president. The emergence of dense issue networks in the 1970s exacerbated this problem by involving numerous regulatory agencies, Congress, the federal courts, and public lobby groups in the details of administration. This development balkanized an already fragmented policy environment and further "eroded the discretion of presidents" to shape public policy. As a result, the White House sought new methods of circumventing entrenched and competing interests.\(^3\)
Because presidents can presumably count on greater responsiveness from their own people, they will shift more and more tasks into the White House for centralized evaluation, coordination, and action. Indeed, an executive strategy is quite tempting because it offers fewer constraints on presidential power. Executive strategy theoretically enables the White House to avoid dilution of the president’s political and programmatic goals. According to Moe, the pursuit of responsive competence encourages the increasing centralization and politicization of the executive branch.4

In addition to the factors Moe describes, certain political circumstances encouraged the Clinton administration to enact regulatory oversight mechanisms. First, candidate Bill Clinton pledged to focus his energies on domestic affairs, particularly economic policy. Although it is not clear to what extent federal regulation influences economic performance, it does have some effect. Thus, given Clinton’s personal interest in policy details and options, during his first term he sought to shape agency rulemaking. Second, Clinton entered office having received only 43 percent of the popular vote. His party, moreover, lost seats in the House and retained only a slim majority in the Senate. The lack of a credible mandate, combined with fierce Republican opposition to most of his domestic proposals, severely limited the president’s ability to move legislation through Congress. This task became even harder with the Republican takeover in November 1994. For an activist president faced with a hostile Congress, regulatory oversight is an attractive strategy because it allows him to pursue his goals without congressional approval.

Regulatory Review in the Clinton Administration

On January 21, 1993, in his first full day in office, President Clinton abolished the Council on Competitiveness and asked Vice President Gore to prepare recommendations for new regulatory review procedures. That same day OMB Director Leon Panetta rescinded all regulations proposed by the Bush administration that had not yet been published in the Federal Register.5 In announcing the actions, Gore said the “argument is no longer pro-regulation or anti-regulation. The argument is about how we regulate.”6 Gore subsequently convened an informal working group which labored for more than six months to develop new review procedures. In fact, the administration had been working on the task even before the inauguration, soliciting the suggestions of a wide range of groups, including the National Chamber of Commerce, OMB Watch, the Natural Resources Defense Council, and Public Citizen.7 The inclusion of the latter groups, who had been especially critical of regulatory review in the Reagan and Bush years, signalled Clinton’s intentions to chart a different course.

The new procedures were detailed in Executive Order 12866, which was issued on September 30, 1993. Although the new order mandated significant changes in the oversight process, it did not abandon the concept of centralized review. Nor did it reject the notion that the White House should play a role in that review. Instead, it built upon previous review efforts, especially those of Jimmy Carter, while seeking to “reform and make more efficient the regulatory process.”8
The objectives of the new order were “to enhance planning and coordination with respect to both new and existing regulations, to reaffirm the primacy of federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.”

To minimize delay, the order imposed time limits on Office of Information and Regulatory Affairs (OIRA) review, and established a “triage system by which agencies and OIRA, working together, identify which rules are significant enough to warrant OMB review.”

Executive Order 12866 also clarified the responsibilities of the key actors. Because they are the “repositories of significant substantive expertise and experience,” the regulatory agencies are assigned the task of developing regulations. The Office of Information and Regulatory Affairs within OMB is responsible for centralized review, and is instructed to ensure that regulations are “consistent with applicable law, the President’s priorities, and the principles set forth” in the order. To head OIRA, Clinton nominated Sally Katzen, who had served in the Carter White House as general counsel and deputy director for program policy in the Council on Wage and Price Stability. The order further designates the vice president as the president’s principal adviser on regulatory policy and planning.

In addition, the Executive Order stresses the importance of planning and coordination and establishes a regulatory planning cycle. As described in the order, the process began when the vice president convened a policy meeting with the president’s regulatory policy advisers and various agency heads to set priorities and coordinate efforts for the year. To improve their own internal planning, each agency was required to develop an agenda (referred to as the Unified Regulatory Agenda) of all regulations under development or review. Agencies were also instructed to develop Regulatory Plans describing the most important regulatory actions they planned to propose and submit to OIRA for review. Staff from OIRA and the Office of the Vice President then reviewed the plans to determine their conformity with administration priorities. Finally, each agency designated a Regulatory Policy Officer (RPO) who reported to the agency head and oversaw the “development of effective, innovative, and least burdensome regulations and to further the principles” established in the order.

The order also created a Regulatory Working Group (RWG) which meets quarterly to identify and analyze important issues affecting more than one agency. Patterned after the Carter administration’s Regulatory Council, the RWG, chaired by Sally Katzen, consisted of representatives of each agency that had significant regulatory responsibilities, the regulatory policy advisers, and the vice president. The RWG was intended to reduce interagency conflict by providing a vehicle for the early detection and resolution of potential disagreements.

Finally, the executive order provided that if a disagreement between the agencies, or between the agencies and OIRA, cannot be resolved by the OIRA administrator, the issue will be decided by the president or vice president. Their involvement may only be initiated by the request of the director of OMB, by the head of the issuing agency, or by another affected agency. To prevent this process...
from being used by interest groups as a “back door” to appeal unfavorable decisions, the order explicitly stated that such reviews will “not be undertaken at the request of other persons, entities, or their agents.”

President Clinton’s efforts to shape rulemaking have ample precedent. Since the early 1970s, every White House has established increasingly centralized and politicized review mechanisms, seeking to extend their influence over federal rulemaking. Initial efforts to strengthen presidential oversight came in the Richard Nixon and Gerald Ford administrations, but the first comprehensive review program began under President Jimmy Carter. Presidents Reagan and Bush used a variety of devices, including executive orders, to establish highly centralized and secretive review procedures which dramatically curtailed public access. The net effect of these changes was to make the White House and OMB the crucial access points for those seeking to influence federal rulemaking. As Richard Harris and Sidney Milkis note, “the procedures governing regulation were transformed from an institutional setup that favored program advocates to one that benefited those who were avowedly hostile to regulatory initiatives.”

Under Reagan and Bush, the aggressive use of White House oversight as a means of controlling regulation faced serious legal and political challenges. Public interest groups and Democrats in Congress thought that many of their actions violated norms of open decision making and contributed to the perception that they could not be trusted to use power wisely. Similarly, widespread perceptions that the review process was driven by interest group appeals rather than by rigorous analysis or principle undermined its legitimacy in Congress and in the public. Many were convinced that these two Republican presidents were more interested in protecting industry from the costs of regulation than in improving the quality of agency decision making.

Assessing the Clinton Review Program

Although issued at the beginning of 1993, implementation of key provisions of Executive Order 12866 was delayed by a lengthy start-up period. Nevertheless, the White House remains active in regulatory decision making. It has not abandoned centralized review; on the contrary, the Clinton White House is engaged in perhaps the most extensive and systematic review effort to date. In explicitly establishing a White House role in planning, Executive Order 12866 enables the administration to be involved at the earliest stages of rulemaking. Rather than wait until rules are formally proposed, White House officials work closely with upper-level managers to plan agency regulatory priorities and develop new rules. In addition, Vice President Gore’s National Performance Review has enabled this administration to do what others had only promised—undertake an extensive review of existing regulations.

There are some striking similarities to earlier presidential attempts to control rulemaking. Like his predecessors, Clinton recognized that command and control regulation is often inefficient, and has expressed a desire to rely more on market oriented approaches. Similarly, the administration’s claim that its regulatory review
proposals were designed to “lighten the load for regulated industries and make government regulations that are needed more cost-effective” could have been made by either Ronald Reagan or George Bush.\textsuperscript{17} In the words of one observer, “This is a centrist administration. They want win-win solutions. They want things that will make both sides happy or both sides equally unhappy.”\textsuperscript{18}

As a case in point, the principles offered to guide agencies’ regulatory programs reflect concerns with the economic impact of regulation. Agencies were instructed to “identify and assess available alternatives to direct regulation,” including the use of economic incentives to encourage the desired behavior. In addition, agencies were told to “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.” Moreover, when agencies determine that regulation is the best available method of achieving their goals, they were to design the regulation “in the most cost-effective manner,” so as to “impose the least burden on society.”\textsuperscript{19}

Despite these similarities, there are several important distinctions between the Clinton and Reagan-Bush review programs. Perhaps the most important difference is that President Clinton is generally supportive of social regulation. The administration’s National Performance Review (NPR), for example, notes that regulation has “significantly improved our quality of life.”\textsuperscript{20} These sentiments are a far cry from the fundamental objections to federal action raised by anti-regulatory forces in the Bush and Reagan administrations.

Another key difference is that review authority during Clinton’s first term was distributed among several executive branch offices and agencies; in Republican administrations, on the other hand, authority was highly centralized in the White House and OMB. Presidents Reagan and Bush, for example, created their own organizational units within the White House, staffed with loyal partisans, to review regulations. Although the Clinton White House is involved in rulemaking, the regulatory agencies have far more discretion than in prior years. This represents a return to the pre-Reagan era, when rulemaking was largely an agency-centered activity.

Relatedly, the Clinton process was characterized by greater openness and opportunities for public participation, whereas the Reagan and Bush programs were quite secretive. A wider range of viewpoints were considered, and industry groups no longer have privileged access. In another important departure, regulatory review no longer appears to be driven primarily by interest group appeals. Lastly, OIRA review was also more open and timely; the review group is not the “black hole” it was in the 1980s.

**Planning and Coordination**

Let us consider implementation issues in greater detail, beginning with the administration’s conscious effort to build greater cooperation into the review process. The mistrust that plagued regulatory review in earlier years has lessened, in part because of the end of divided government in the administration’s first two years. Unlike Reagan and Bush, Clinton’s regulatory strategies were embraced by
congressional Democrats, largely because the president endorsed the missions of most agencies. After twelve years in the presidential wilderness, Democrats perceived an opportunity to achieve some of their policy goals through executive action rather than legislation. Moreover, the Clinton review process was more transparent and, thus, more likely to be accepted by Congress. Finally, the lines of review authority were more clearly demarcated; to date there has been no attempt to revive the practice of intermingling OIRA and White House staff.

The Republican victory in the 1994 midterm elections, however, brought the return of divided government and renewed interbranch conflict over regulatory policy. Congressional Republicans wasted little time launching an unprecedented attack on the scope and cost of federal regulation. Indeed, the House of Representatives approved legislation that sought to dramatically transform the statutory basis of federal regulation, something Presidents Reagan and Bush never attempted in their tenures.21 Similar proposals were introduced in the Senate, where passage was blocked by recalcitrant Democrats.

Although Republicans and industry leaders have applauded the principles of the Clinton executive order, they have criticized its implementation, claiming "it is not enforceable in the courts and does not impose real accountability on agencies."22 According to Larisa Dobriansky, staff counsel for the House Subcommittee on Regulatory Affairs, there are no "real incentives" for agencies to implement the order in a systematic manner. Indeed, she characterized implementation as "inconsistent" at best and claimed that policy concerns frequently drove both agency analysis and decisions.23

One of the bills passed by the House, the Job Creation and Wage Enhancement Act, requires all federal agencies to perform detailed risk assessments and cost-benefit analyses for virtually all new regulations.24 According to House Speaker Newt Gingrich, the changes are necessary because many rules have been "absurdly expensive" and because regulators have routinely "misallocated resources on emotional and public relations grounds without regard to either scientific, engineering or economic rationality."25 Republicans also contend that the required studies would force regulators to "make the regulatory burden a matter of conscious choice rather than of accident."26 Because the detailed procedures would be required for virtually all regulations, however, and not just those deemed "major," demands on agency time and resources would likely skyrocket.

Critics claimed the new procedural requirements would tie the review process into knots of scientific review, economic analyses, and legal challenges. According to OMB Watch, "Federal agencies would be paralyzed with so many analyses to perform that they will no longer be able to issue, implement, or enforce federal regulations."27 The group concluded that "There is little doubt that the intent of these provisions is to provide industry with an additional weapon to stop regulations from being proposed or implemented if the agency was able to find the resources to slog through the myriad of new requirements being imposed."28

These proposals, if adopted, would tilt the rulemaking process in favor of the opponents of regulation, making it harder for agencies to justify new regulations or
enforce those already on the books. For these reasons, President Clinton threatened to veto the actions, characterizing the requirements for cost-benefit analysis and risk assessments as “extreme proposals” that “go too far. They would cost lives and dollars. A small army of special-interest lobbyists knows they could never get away with an outright repeal of consumer or environmental protection, but why bother if you can paralyze the government by process.”29 Although the proposals never became law, since the Republican takeover agencies have promulgated fewer rules.

Agency–OIRA Relations

On balance, the relationship between many regulatory agencies and OIRA has also improved. Much of the improvement can be traced to the administration’s efforts to work with OIRA and the agencies to identify key issues early in the regulatory planning process, and to resolve disputes over proposed regulations before disputes become too contentious.30 This has been a priority of the Clinton White House. The planning process begins in June, when agencies send their draft Regulatory Plans to OIRA for review. OIRA then sends the plans to other affected agencies, the regulatory advisers, and the vice president. Staff from OIRA and the Office of the Vice President then review the plans to determine if they are compatible with the administration’s priorities. After consulting directly with the vice president’s staff, agencies revise their draft plans and then resubmit them to OIRA in August or September before they are published in the Federal Register.

During the Reagan and Bush administrations, the White House and OIRA would become involved only after the issuing agency had completed its analysis of a regulation. By the time OIRA received a rule to review, policy options had narrowed, and the agency had invested considerable time and resources in the proposed action. OIRA’s late involvement made it difficult to make significant changes and often contributed to delay in issuing regulations as the multiple perspectives were debated. Issuing agencies typically resented and resisted OIRA’s recommendations.31

Despite improvements, the planning process has not been a complete success. In the first year, for example, OIRA characterized the quality of draft plans as “uneven,” noting that some were quite thoughtful and rigorous, while others were “perfunctory.” OIRA concluded that although the draft plans helped avoid some interagency conflicts, they “did not provide many common themes and, taken as a whole, did not produce a consistent or coherent state” of the administration’s priorities.32

Many participants say the review process is now less adversarial, although explanations for the change vary. Some Republicans claim that OIRA is less conscientious under Clinton, and that it has been told to not “get in the way” on rulemaking, quickly approving rules despite questionable justification. Republicans cite an EPA air toxics program rulemaking pursuant to Title 3 of the Clean Air Act. According to critics, EPA decided to move ahead with the rule even though its own analysis indicated there would be minimal reductions in toxic emissions. The DOE questioned the wisdom of moving ahead, and urged EPA and OIRA
Administrator Katzen to defer or withdraw the rule. Nevertheless, OIRA quickly approved it, which, Republican critics charge, it would not have done in the 1980s.\textsuperscript{33}

For its part, OIRA claims the improved relationships are partly the result of some new practices established by Executive Order 12866. According to the order, agencies are responsible for determining which of their proposed actions are “significant” and thus subject to OIRA review. After making this determination, agencies typically submit to OIRA monthly lists of those actions. Even though they are not required to do so, some agencies now consult with OIRA staff before compiling the lists. OIRA describes this practice of early briefings by agencies on the content of specific rules as “a very constructive development.”\textsuperscript{34} In addition, the newly established Regulatory Training and Exchange Program is credited with improving agency–OIRA relations. The program brings senior agency careerists to OIRA to learn how regulatory review is conducted, so that this knowledge can be incorporated into agency rulemaking practices. In addition to providing agency staffers with insight into review procedures, OIRA staff learn more about agency perspectives.\textsuperscript{35}

Despite improvement, tensions have not disappeared. Career staffers at several agencies claim the change of administrations has not affected OIRA’s actions, and that, in terms of substantive review, little has changed. It is frequently heard that the “same people” work at OIRA and that they continue to have a “preference for body counts.”\textsuperscript{36} Staffers at some agencies, such as the FDA, contend that OIRA is “hostile” to their regulatory initiatives and subjects them to greater scrutiny.

There is some tension inherent in the agency–OIRA relationship. There are, for example, longstanding disagreements over the role of economic analysis in rulemaking. Economists at OMB and OIRA believe it has great utility, while many program officials believe that OIRA places undue emphasis on economic analysis, and that it is too often the determining factor in review. While recognizing the importance of economic analysis, critics believe it should be only one consideration. To date, the White House appears to agree. In an important shift from the Reagan and Bush years, Executive Order 12866 stated that costs and benefits were to be defined more broadly, to include qualitative measures that were “difficult to quantify, but nevertheless essential to consider.”\textsuperscript{37} In the same vein, agencies promulgating regulations need to show only that the presumed benefits “justify” the presumed costs; previously, the benefits had to “outweigh” the costs.\textsuperscript{38} With this more flexible standard, regulations can be issued, regardless of cost, if they seek desirable goals.

There are other sources of agency–OIRA conflict. OIRA reviews agency rules to determine their compatibility with the president’s goals. In carrying out this task, OIRA often second-guesses agencies, which naturally breeds resentment. Furthermore, agency political appointees seek to complete rulemakings in a timely manner in order to comply with statutory and court imposed deadlines. But OIRA staffers worry that rules are often promulgated with inadequate scientific or economic analysis, or even that such analyses are only prepared after the fact to justify the proposed rules. Although relationships have improved, Executive Order 12866
has done nothing to resolve this problem, which is inherent in the agency–OIRA relationship.39

**OIRA Review**

The executive order also established procedures for the centralized review of both new and existing rules. The new process was designed to make OIRA review more systematic and consistent, and to reduce the number of rules submitted for review, thus allowing OIRA to focus its time and resources on the most important rules.

The review process begins when an agency submits to OIRA a list of planned regulatory actions, indicating those which the agency determines to be “significant,” as defined by the order, and those which are not.40 OIRA must notify the agency within ten working days if it agrees with the finding. OIRA may only review actions identified by the agency or by OIRA as “significant”; others are not subject to review. If OIRA disagrees with an agency’s finding, and determines that a proposed action is “significant,” OIRA must provide the agency with a written explanation.41

For those actions deemed to be “significant,” the agency must send OIRA the text of the draft rule, a description of the need for the action, an assessment of its potential costs and benefits, and an explanation of how the action is consistent with either a statutory mandate or the president’s priorities. For those actions found to be “economically significant,” more extensive analysis is mandated.42

Indications are that OIRA is reviewing significantly fewer rules than in the past. OIRA reviewed 614 regulatory actions in 1995, a 70 percent reduction from the average of 2,200 rules per year over the previous decade. In addition, the number of rules under review at any given time has also shown a significant decline.43 Most of the reduction can be attributed to the executive order requirement that OIRA review only “significant” rules. But some of the drop can be traced to the Republican victory in the 1994 midterm elections and the subsequent anti-regulatory environment in Congress. Agencies may be afraid to promulgate new rules.

There appear to be some problems, however, with the process of listing rules as either “significant” or “non-significant.”44 According to OIRA, some agencies initially had difficulties in instituting internal systems to manage the listing process. Similarly, OIRA has expressed concern that agencies may not be giving “non-significant” regulatory actions adequate review and consideration, knowing that OIRA will not review them.45 Perhaps they had the FDA in mind. One staffer there observed that the agency now listed the vast majority of their regulations as “significant” because they know that OIRA will want to review them anyway. These views are, to some extent, a legacy of the distrust that has plagued the review process over the last ten years. Put simply, some OIRA staffers are uncomfortable with agencies having the initial responsibility for listing rules. As noted above, OIRA staffers commonly contend that agencies promulgate rules that are based on poor science or that are insensitive to economic factors, although there are signs that OIRA believes the agencies are doing a better job.
The meaning of the term “significant” has also been a source of some confusion within agencies and between agencies and OIRA. According to an OIRA report, the executive order’s definition is not “self-executing, and argument over its meaning has been at least partly responsible for the long start-up time in implementing the listing process.”46 As a case in point, the order defines an “economically significant” regulatory action to be one that has an annual effect on the economy of $100 million and which will likely “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments and communities.”47 Clearly, this definition is open to interpretation and, therefore, disagreement. Other aspects of the definition are equally unclear, but participants claim the confusion has dissipated as participants gained experience with the procedures.

Length of Review

OIRA’s official records also suggest that Executive Order 12866 has been instrumental in reducing delay in the review process, another of the administration’s primary goals. The order establishes strict time limits for OIRA review, which in most cases must be completed within ninety days. Extensions are allowed upon the written request of the OMB director or the agency head. If OIRA returns a regulation to an agency for further review, it must do so in writing, and must explain the reasons for its decision. The deadlines were designed to prevent OIRA from holding regulations “hostage,” a tactic used by the Quayle Council as a means of pressuring agencies to make concessions.48

Average OIRA review time in the first year dropped to thirty-five days, from thirty-nine days in 1992 and forty-four days in 1993. More recently, however, average review times have increased to thirty-eight days because OIRA is now reviewing only significant rules, which require more extensive analysis. Average review times for “economically significant” rules are only marginally longer, at thirty-nine days, than for other types of significant rules.49

Compared to the Bush administration, agencies are now more likely to have their rules changed by OIRA. Under E.O. 12866, OIRA has reviewed 1,757 regulations, and concluded review “with changes” on 612, or 34.8 percent. By way of contrast, the average percentage of rules cleared “with changes” over the previous ten years was only 22 percent.50 This increase is largely a function of OIRA reviewing fewer rules and having more time to study each in greater detail. It would also seem to disprove Republican charges that OIRA is less vigilant than under Republican presidents.

Another source of concern is that the rules of some agencies, such as HHS, EPA, Education, and HUD, are subjected to longer reviews. In 1995, average review times for these agencies was fifty-one, forty-nine, forty-six, and forty-five days, respectively.51 Similarly, thirty of the thirty-six meetings OIRA has held with outside parties on proposed regulations have involved EPA rules.52 As before, OIRA claims the longer reviews are warranted because these agencies promulgate more “big ticket” regulations, but others worry that it continues to target agencies that are the target of most business complaints.53
It is clear that OIRA scrutinizes some agencies more closely than others. It has made changes to 70 percent of the 108 rules proposed by the Department of Education. During that same period, OIRA proposed changes to 55.4 percent, or 107 of the 193 rules submitted by EPA. Staffers at some health and safety agencies contend that OIRA is suspicious of their missions and thus, rarely leaves their rules unchanged.

Despite signs of improvement, the official records understate both the extent to which OIRA influences rulemaking and the length of its review. As indicated above, OIRA now “requests” that agencies submit draft copies of rules before OIRA begins its formal review. According to several agency officials who requested anonymity, this practice allows OIRA to propose changes informally, often over the telephone. As a result, any changes made at this stage at OIRA’s request do not appear in the records as “rules cleared with changes” because the agency has not yet formally submitted the rule for review.

This same practice also understates the length of review. Many agencies will not submit rules to OIRA if they are likely to be rejected. Some rules have been held up for as long as four months within agencies because of OIRA objections during this informal pre-review stage. Rules are consequently delayed, but the statistics do not reflect the delay because the “clock” does not begin ticking until the rule is formally submitted to OIRA. Instead, any delays appear to be the agency’s responsibility.

Although OIRA characterizes the review deadlines as “useful and fair,” it has identified several situations in which they may hinder adequate review. Perhaps the most important involves detailed and restrictive legislation, a legacy of the distrust created by years of divided government. Convinced that agencies and OMB were unable or unwilling to promulgate regulations in a timely manner, Congress began writing very detailed laws which often imposed ambitious deadlines. As a result, some agencies are forced to develop regulations under severe time constraints, which precludes careful planning and coordination. In some cases, OIRA receives rules for review only days before a deadline. This is especially problematic for highly technical issues, which require months of research and analysis, and are often accompanied by lengthy reports. As OIRA explained in its six-month report on the effectiveness of Executive Order 12866:

It is our view that highly prescriptive legislation, including dictating time lines for promulgating regulations, has contributed to a regulatory system that is sometimes unmanageable or is driven by plaintiffs rather than by a rational planning process that directs the government’s limited resources to the most important problems and the most cost-effective solutions.

This is clearly not a problem OIRA can resolve on its own. Congress would have to forego one of its most effective, albeit problematic, means of influencing agency decision making, and there is little evidence it is willing to do so. This was true even before the 1994 midterm elections, and it is exceedingly unlikely that the continued Republican majority after the 1996 election will sacrifice an important
source of leverage. On the contrary, Congress considered legislation which would force the FDA to speed the approval of new drugs. Although this proposal never became law, congressional Republicans clearly signalled their intentions to the FDA.

**Public Participation and Disclosure**

The administration also pledged to promote greater openness, accessibility, and accountability in both the agencies and OIRA. In many ways, the executive order reflects a return to the participatory norms that became prevalent in the 1960s and the 1970s. In fact, the Clinton review echoes the Carter administration’s requirement that agencies provide the public with “early and meaningful participation” in the regulatory process, particularly in the development of new rules. Agencies are instructed to seek the participation of those affected by regulations, and to provide a comment period of not less than sixty days. Furthermore, agencies are encouraged to explore the use of “consensual mechanisms,” such as negotiated rulemaking, as a means of encouraging groups to work together and with the agencies to develop creative and more acceptable rules.

Executive Order 12866 has also reduced secrecy in the review process by establishing disclosure requirements for both the agencies and OIRA. Gary Bass, Executive Director of OMB Watch and a critic of OIRA’s past practices, says the administration “deserves to be applauded” for the executive order’s accountability and disclosure provisions, and has noticed a “significant improvement” in terms of openness. The disclosure provisions were designed to “remove the stigma of secrecy that had previously characterized regulatory review, and to make the review process more transparent.”

After a rule has been issued, for example, agencies are to make available to the public all the material they submitted to OIRA for review. They are also required to identify for the public in a “complete, clear, and simple manner” the substantive changes between the draft submitted to OIRA and the final action, indicating which changes were made at the suggestion of OIRA.

OIRA is also governed by numerous disclosure requirements which distinguish the current process from that in the Reagan-Bush years. In an important departure from past practices, all substantive communications, both oral and written, between OIRA and any outside party must be forwarded to the issuing agency within ten working days of receipt. Moreover, only the OIRA administrator may receive oral communications from parties outside the executive branch, and agency representatives must now be invited to any meeting between OIRA personnel and outside parties. In addition, OIRA is required to maintain a publicly available log containing the status of all regulatory actions under review, a notation of all written communications forwarded to the agency, and the dates, names of persons, and subject matter discussed in substantive oral communications with persons outside the executive branch. Log entries on pending rules include the date of the meeting, a list of attendees, and the meeting’s subject matter. At the conclusion of the review process, OIRA must disclose all documents exchanged between OIRA and the issuing agency, and it must also disclose the actions it recommends.
There are limits, however, to the openness of the review process. Public documents, in fact, do not reveal much about the review process; it is thus very difficult for outsiders to determine what really happens in agency–OIRA deliberations. More importantly, the procedures detailed in Executive Order 12866 do not seriously restrict the administration’s efforts to influence pending rules. In the words of one OIRA staffer, although the review process was more transparent during its first term, the Clinton White House did what previous administrations have always done, with “political people” still heavily involved.64

One key difference from prior administrations is that there are many paths to the Clinton White House for those appealing regulatory matters. In fact, the process is a bit of a free-for-all. When environmental groups or the EPA are unhappy, they go to Vice President Gore or the Council on Environmental Quality, while others enlist the support of allies in the offices of the White House counsel, the chief of staff, or the national science adviser. This stands in stark contrast to the Bush White House, where all roads ran through the Quayle Council. There is no comparable figure in the Clinton administration, although speculation centers on the roles of Vice President Gore and the National Economic Council (NEC). While Gore has been involved in several rulemakings, Sally Katzen claims that he understands and accepts that “the primary function of regulatory review properly rests in OMB and OIRA.”65 The others may be playing roles as well, but that is difficult to judge because participants are reluctant to divulge the extent of their involvement in rulemaking activities. In some respects, the rulemaking record reveals even less than it did in the Bush administration.

In a potentially significant limit on openness, OIRA is not required to disclose its communications with other executive branch actors. Most importantly, communications between OIRA, President Clinton, and Vice President Gore remain private. As Sally Katzen explains, if a regulation is changed after a conversation with them, “that fact will be known, and the fact will be known that it came as a result of a suggestion or recommendation from OIRA; but whether I get it from the president or vice-president is, thank you, not going to be something which would be publicly disclosed.”66

This raises concerns that disaffected groups may turn to the White House for another chance to argue their cases. If that were to happen, the backdoor to regulatory review would be reopened, and the process could once again be driven by interest group appeals. Although it is far from conclusive, OMB Watch notes one troubling example involving an asbestos rule being developed by OSHA. According to the group, the asbestos industry obtained a copy of the proposed standard, and requested a meeting with Katzen. The meeting involved a comprehensive section-by-section discussion of the rule. Shortly after, OIRA staff wrote to OSHA, asking the agency to justify its proposal in light of the concerns expressed by industry. In the end, OIRA approved the rule with some minor changes, but none of them adopted the industry position.67 Nevertheless, the incident is worrisome because if OIRA is perceived to be a court of appeals, the authority of the regulatory agencies is undercut and interested parties have an incentive to harden their positions with the agency writing the rules.
Despite these concerns, it is clear that business groups have lost the privileged position within the regulatory process that they enjoyed until 1992. In the Clinton administration, there are few concerns about the backdoor influence that dogged the Quayle Council. As Margaret Mellon, director of the National Wildlife Federation’s biotechnology center, explains: “It is so different from the kind of bitterness engendered by a door that was always open to industry and kept us outside the garden gate.” By most accounts, OIRA is even-handed and does not negotiate with interest groups, which frustrates both the business and public interest lobbies. One public interest advocate described Katzen as an “agnostic” when dealing with lobbyists, noting that she is abrupt with everyone.

**Review of Existing Regulations**

Executive Order 12866 also required agencies to review existing regulations to ensure that they were still timely, effective, and did not impose “unnecessary” burdens. The National Performance Review has also provided the president with a valuable means of “reinventing” existing rules. In announcing the results of the most recent NPR update, Clinton said it was “possible to reform the regulatory system so that it is less intrusive and more responsive to the American people.” Clinton claimed that the NPR was expected to result in the elimination of 16,000 pages from the *Code of Federal Regulations*, and the streamlining of an additional 31,000 pages.

The White House made the review of existing rules a top priority after the 1994 midterm elections. In March 1995, the president issued a directive requiring agencies to review all of their regulations and to eliminate or revise those that were “outdated or otherwise in need of reform.” Agencies were ordered to submit to the White House, by June 1, a list of those regulations they planned to eliminate or modify. The directive also encouraged agencies to “reward results, not red tape.” OSHA regulators, it was suggested, should no longer be evaluated by the number of citations they issued, but by the safety records of the workplaces they monitor. Finally, each agency was given two weeks to provide OIRA with a list of pending rulemakings that could be converted into negotiated rulemaking.

Although prior administrations talked about reviewing existing rules, it was never a priority. According to participants, the process during Clinton’s first term was “more real,” especially since November 1994. With the White House seeking demonstrable results from its NPR initiative, senior agency officials took the effort seriously. The EPA claimed to be “in the midst of the most profound and comprehensive reevaluation and change” in its history, and proposed eliminating 1,000 pages, or 10 percent, of its pages from the *CFR*. Similarly, the Department of Agriculture planned to drop 3,400 pages of “obsolete or redundant” rules and “reinvent” another 8,000 pages, while the Department of Energy targeted 75 percent of its rules for elimination or revision.

It is possible that in its zeal for results, the White House may have moved too quickly. The March directive to the agencies left them little time to compile lists of rules for “reinvention.” According to one HHS staffer, some of the people...
involved in this process initially thought it was another symbolic exercise and did not take great care to ensure that the “right” rules were selected for listing. But agencies have since learned that the administration was serious, and now they have to live with the lists they developed.74

Conclusions

Recent presidents have found centralized regulatory review to be a tempting strategy. For those seeking fundamental and enduring policy shifts, however, it is often insufficient, especially during periods of divided government. As Harris and Milkis argue, executive action must be reinforced by similar changes in the statutory basis of regulation if it is to have lasting effect. Otherwise, administrative victories, like those of Reagan and Bush, may be “subject to legal challenges in the short run and administrative reversals in the long run.”75 Moreover, centralized regulatory review works best when the policy has broad support among other key actors, and when the others are willing to delegate authority to the president and the executive agencies.76

That was clearly not the case during the Reagan and Bush years, nor at the end of Clinton’s first term, as indicated by the significant differences between the president and Congress. Of course, this is not a new phenomenon; one of the consequences of divided government is that for much of the last two decades regulatory politics has been characterized by high levels of mistrust among OMB, the regulatory agencies, and Congress. That explains why Congress has written so much substantive and procedural detail into regulatory statutes. With the continuation of divided government after 1996, it seems likely that the two branches will continue to struggle for control of the bureaucracy. Indeed, it has been argued that in times of divided government, presidents have an even greater incentive to create centralized regulatory review mechanisms because policy making through the bureaucracy is one of the few avenues of influence available to them.77 Under these circumstances, it is imperative that credible review procedures are in place. Otherwise, agencies will again find themselves pushed and pulled by competing masters; rulemaking will be excessively politicized, and its credibility will suffer.

The major difference from previous periods of divided government is that now Republicans control Congress, while a Democrat sits in the White House. We have seen that the relatively decentralized Clinton program continues the long shift of power to the bureaucracy. According to Joel Aberbach, such a strategy can work only “where there is a consensus on fundamental policy among all the key actors in the system. If not, there will be a drive back to central control by an administration anxious to regulate and direct what government is doing, or intense sniping from a Congress uneasy about the course of policy and frustrated by its loss of influence, or both.”78

Although centralized review has recently been used by Republican presidents seeking regulatory relief, it could also provide a Democratic president with a means of defending regulation from attack. As Aberbach notes, a decentralized review program increases the opportunity for assertive administrations to recentralize power.
in the White House. Moreover, the “incentive to do so will be there in cases where there are strong disagreements about policy. . . .”99 Exactly what President Clinton will do in his second term with a Republican Congress is unclear. Perhaps he will, like Reagan and Bush, seek to centralize power in the White House to defend his priorities. So far, however, that has not been the case. While Clinton has threatened to veto some of the most extreme anti-regulatory bills, he has also tried to take advantage of their popular appeal by claiming that he, too, favors regulatory reform. Although Clinton’s attempts to preempt congressional attacks on regulation may be perceived as a necessary response to changed political circumstances, they may actually have encouraged Republicans to go faster and further with those attacks, thereby undermining the administration’s programmatic and political goals.

Notes
9. Ibid.
11. The executive order names twelve advisers. These are the director of OMB; the chair (or another member) of the Council of Economic Advisers (CEA); the assistant to the president for economic policy (NEC); the assistant to the president for domestic policy (DPC); the assistant to the president for national security affairs (NSA); the assistant to the president for science and technology (OSTP); the assistant to the president for intergovernmental affairs (IGA); the assistant to the president and staff secretary; the assistant to the president and chief of staff of the vice president; the assistant to the president and the counsel to the president; the deputy assistant to the president and director of the White House office on environmental policy (DEP); and the administrator of OIRA.
12. The Regulatory Plans should include, among other things, a statement of the agency’s regulatory objectives and priorities and how they relate to the president’s priorities; a summary of each planned significant regulatory action, including alternatives to be considered and preliminary estimates of anticipated costs and benefits; and a statement of the need for each action and how it will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk relates to other risks within the agency’s jurisdiction. 58 F.R. 51735 (September 30, 1993).
13. Ibid.
14. Ibid.


23. Dobriansky also criticized the order for not requiring agencies to use the most recent or most reliable data in rulemaking, and claimed that EPA has deliberately used old data to justify rules. In particular, she claims that EPA used a fifteen-year-old study to underpin its risk assessment in a Clean Air Act rulemaking on air toxics from refineries. Personal interview, February 6–7, 1996.

24. Ibid.


28. Ibid., p. 9.


30. An OIRA report attributes much of the credit for improved relationship to the regulatory policy officers (RPO). As noted above, the executive order requires that each agency designate a RPO who reports to the agency head and works with OIRA at each stage of the regulatory process to further the order’s principles. Many agencies have designated their general counsel as RPO, ensuring a high level of agency attention to regulatory review. The RPOs work with one another in the regulatory working group (RWG), which is chaired by Sally Katzen. To date, the RWG has met three times. According to OIRA, the RWG is a “useful forum not only for discussion of ideas and the exchange of best practices, but also for coordinating regulatory activities that affect more than one agency.” 59 F.R. 24276, 24283 (May 10, 1994).


32. Ibid., p. 7.
33. Author’s interview with Larisa Dobriansky, staff counsel to House Subcommittee on Regulatory Affairs, February 7, 1996.


35. Ibid., pp. 9–10.


37. Executive Order 12866, 58 F.R. 51735 (September 30, 1993).


40. The order defines a “significant regulatory action” as one “that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the president’s priorities, or the principles set forth in this Executive Order.” 58 F.R. 51735 (September 30, 1993).

41. Ibid.

42. Ibid.


44. An OIRA report shows the agency received lists designating 1,624 regulatory actions. Almost two-thirds of the total were designated “non-significant,” while the rest were deemed “significant.” According to the report, OIRA agreed with the agencies’ initial designation 83 percent of the time. Specifically, OIRA concurred with agencies’ designations of 1,047 (or 64 percent) as “non-significant”; and 316 (or 19 percent) as “significant.” The remaining 261 (or 16 percent) were designated “significant” by OIRA, but not by the issuing agencies. See 59 F.R. 24276, 24277 (May 10, 1994).

45. 59 F.R. 24276, 24287 (May 10, 1994).

46. 59 F.R. 24276, 24288 (May 10, 1994).

47. 58 F.R. 51735 (September 30, 1993).


50. OIRA, “The First Year of Executive Order 12866,” p. 27.


52. Ibid.


55. Interviews with agency staffers, conducted between November 1995 and February 1996.

56. Ibid.

57. 59 F.R. 24276, 24288 (May 10, 1994).


59. 58 F.R. 51735 (September 30, 1993).

61. 59 F.R. 24276, 24277 (May 10, 1994).
63. Ibid.
64. Telephone interview with OIRA staffer, July 12, 1994.
69. Author’s interview with Dave Vladeck, November 15, 1995.
70. Presidential speech, September 18, 1995.
72. 60 F.R. 59658 (November 28, 1995).
73. 60 F.R. 59510, 59551 (November 28, 1995).
74. Interview with HHS staffer, February 1996.
75. Harris and Milkis, The Politics of Regulatory Change, p. 133.
76. Ibid., p. 138.
79. Ibid.