

NOTES

OIRA AVOIDANCE

The Office of Information and Regulatory Affairs (OIRA) is the most powerful federal agency that most people have never heard of.¹ Created by the Paperwork Reduction Act of 1980,² OIRA is tasked under Executive Order (E.O.) 12,866³ with coordinating the actions of the various federal agencies and with reviewing significant regulatory action⁴ under § 553 of the Administrative Procedure Act.⁵ OIRA and its review process thus serve as one of the principal means by which the President can exercise control over the administrative state.⁶

But there is a noticeable gap in academic analyses of OIRA and the efficacy of centralized review. The leading academic works on OIRA and presidential control of the administrative state have focused on the White House's⁷ and agencies'⁸ experiences of centralized review, drawing different conclusions about its success.⁹ These accounts, however, have not evaluated the degree to which agencies attempt to avoid the OIRA review process entirely. It is axiomatic that imposing salient costs on an actor gives that actor an incentive to avoid those costs — and OIRA review is costly and time-consuming.¹⁰ Agencies thus have an incentive to avoid OIRA review if possible, either by choosing to

¹ Martha Minow, Dean, Harvard Law Sch., Introduction of Cass R. Sunstein, Adm'r of OIRA, at Harvard Law School (Mar. 1, 2010).

² Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of the U.S.C.).

³ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

⁴ *See generally* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 102–22 (6th ed. 2006).

⁵ 5 U.S.C. § 553 (2006).

⁶ *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285–90 (2001). Others have challenged this view in powerful terms. *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1305–10 (2006).

⁷ *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

⁸ *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006). *But see* Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497 (2007).

⁹ For an account of strong presidential control and regulatory coherence, see Croley, *supra* note 7. Others have argued that presidential control is complicated by various factors. *See generally* Bressman & Vandenbergh, *supra* note 8. Still others have argued that OIRA is subject to the same political pressures that other agencies are — and that it cannot check public choice problems in the regulatory process. *See* Bagley & Revesz, *supra* note 6, at 1304–12.

¹⁰ *See, e.g.*, Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 5 (1995).

act via procedures not subject to review under E.O. 12,866¹¹ or by acting strategically should they choose to engage in § 553 rulemaking.

This Note attempts to shed light on agencies' behavior *before* the review process begins. Its primary conclusion, after reviewing a sample of the empirical data and several interviews the author conducted with two former OIRA officials, is that agencies may seek to avoid OIRA review by understating the costs of rules,¹² a phenomenon this Note terms "OIRA avoidance." Though mainly descriptive, this Note also briefly comments on the desirability of agencies' avoiding OIRA review, and suggests how the President might limit such behavior.

Part I briefly provides background information on the theory and history of OIRA. It then describes E.O. 12,866 and the duties it imposes on executive agencies. Part II offers an introduction to the phenomenon of OIRA avoidance. It provides a qualitative account, principally with information gleaned from interviews with two former OIRA officials, Sally Katzen and Donald Arbuckle. This Part suggests that agencies may in some situations have an incentive to avoid centralized review of their action and that they may take action consistent with that goal. Part III describes the Note's empirical methodology, reviews the data gleaned from OIRA's website, and suggests that, consistent with the data, agencies may understate the costs of rules to avoid OIRA review. This Part also discusses a potential counterhypothesis that could serve to explain the data, inspired by Professor Matthew Stephenson's theory of strategic substitution.¹³ Part IV offers a normative discussion, and Part V concludes.

I. OIRA: THEORY, BACKGROUND, AND RESPONSIBILITIES

OIRA was created after 1970s-era discontent with regulation led to explicit presidential oversight of executive branch rulemaking. This responsibility was eventually delegated to the Office of Management

¹¹ Under *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947), agencies have almost unfettered discretion over the choice of form by which they will take action. *But cf.* *Morton v. Ruiz*, 415 U.S. 199 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). While the structure of E.O. 12,866 gives agencies an incentive to avoid OIRA review by acting in ways other than § 553 rulemaking, this Note will focus on OIRA avoidance within the limits of § 553.

¹² It also seems plausible that agencies might try to avoid OIRA review by splitting single rules into multiple parts. *See* Donald R. Arbuckle, *OIRA and Presidential Regulatory Review: A View from Inside the Administrative State* 15 (2008) (unpublished manuscript) (on file with the Harvard Law School Library).

¹³ *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528 (2006); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

and Budget (OMB) within the Executive Office of the President.¹⁴ The goal of centralized review was to “ensure that regulations were consistent with each other and with administration policies and priorities.”¹⁵

Professor Richard Pildes and Professor Cass Sunstein — now Administrator of OIRA — have argued that putative presidential control of the federal bureaucracy by way of OMB review, a step initially taken by Presidents Nixon and Carter but entrenched by President Reagan, “has become a permanent part of the institutional design of American government.”¹⁶ Centralized control, meant to further “interagency dialogue, coordination, and analytical precision, as well as [the reduction of] regulatory costs,”¹⁷ enables a President to further a variety of policy goals, including conformation to his or her administration’s principles, the reduction of public and private costs, and the coordination of agency activity.¹⁸ However, joint oversight of the administrative state favors micro-level management by the Executive with attempts at macro-level changes being administered by Congress.¹⁹ Congress, being poorly positioned to oversee closely the details of the implementation of legislation, necessarily had to delegate the power to administrative agencies to implement its policies, and the power to harmonize the agencies’ disparate rules and regulations.²⁰ An institutional actor was needed that, while having incentives to micromanage, would also be able to coordinate regulatory policy.

From the growing administrative state and its concomitant need for coordination emerged a number of legislative innovations allowing for presidential control of regulatory policy. Congress laid the foundation for presidential control of the regulatory state with the passage of the Budget and Accounting Act of 1921,²¹ which created OMB. OMB — within which OIRA now resides — derives substantial political power from its control over the legislative and budgetary requests of federal agencies.²² The Paperwork Reduction Act of 1980 took presidential control of the administrative state one step further. Before 1980, Presidents had utilized a variety of informal review mechanisms

¹⁴ Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075 (1986).

¹⁵ *Id.*

¹⁶ Pildes & Sunstein, *supra* note 10, at 15; see also *id.* at 11–16.

¹⁷ *Id.* at 14.

¹⁸ See *id.* at 16.

¹⁹ See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 540–42 (1989).

²⁰ See *id.* at 541–43.

²¹ Pub. L. No. 67-13, 42 Stat. 20.

²² See Bruff, *supra* note 19, at 546.

to oversee executive branch rulemaking.²³ The Act created a formal entity — OIRA — through which the President was to exercise his power of centralized review, though it was given limited powers far narrower than those it presently exercises.²⁴

President Reagan quickly utilized his newfound powers, issuing two orders “assert[ing] vigorous centralized control over the regulatory process.”²⁵ The first, E.O. 12,291, set forth substantive principles to govern agency action, including cost-benefit analysis, and, importantly, required agencies to prepare regulatory impact analyses (RIAs)²⁶ to accompany “major” rules having an annual economic impact of \$100 million or more. “The order amounted to an effort to promote centralized OMB control of the regulatory process, to be conducted in accordance with presidential policies favoring deregulation and close attention to cost.”²⁷ The second, E.O. 12,498, sought to take centralized review further, requiring agencies to submit an annual regulatory plan to OIRA for review and approval, with initiatives not included in the plan being “permitted only under a narrow set of circumstances.”²⁸ OIRA thus became the locus of regulatory planning.

President Reagan’s executive orders — which were retained by President George H.W. Bush — were “extremely controversial.”²⁹ Critics argued that the Reagan Administration attempted to use regulatory review as a guise for deregulatory action.³⁰ Critics also objected to the secretiveness of and lack of accountability in the review process: under E.O. 12,291, OMB and interest groups met to discuss regulatory policy without the relevant agency’s being invited, and OMB used the review process to waylay — sometimes permanently — regulations that it found objectionable.³¹

President Clinton replaced President Reagan’s executive orders with one of his own, E.O. 12,866, which “retained the most important

²³ See, e.g., *id.* at 546–52; Anthony Vitarelli, Note, *Happiness Metrics in Federal Rulemaking*, 27 YALE J. ON REG. 115, 117–18 (2010).

²⁴ See Vitarelli, *supra* note 23, at 118.

²⁵ Pildes & Sunstein, *supra* note 10, at 3.

²⁶ A regulatory impact analysis is an extensive cost-benefit analysis of a rule’s potential economic impact. See John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 435 n.184 (2008).

²⁷ See Pildes & Sunstein, *supra* note 10, at 3.

²⁸ *Id.*

²⁹ *Id.* at 4; see also *id.* at 4–6.

³⁰ See, e.g., Bagley & Revesz, *supra* note 6, at 1263–66.

³¹ See, e.g., Kagan, *supra* note 6, at 2280; Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064–65 (1986); Pildes & Sunstein, *supra* note 10, at 5. President Clinton sought to remedy these problems in E.O. 12,866 by limiting OIRA’s ability to engage in ex parte communications with parties not employed by the executive branch, see Exec. Order No. 12,866, § 6(b)(4), 3 C.F.R. 638, 647–48 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006), and by placing time limits on OIRA review, see *id.* § 6(b)(2), 3 C.F.R. at 646–47.

features of President Reagan's oversight system,"³² most notably the requirements that agencies submit important regulations to OMB for review and utilize cost-benefit analysis; the Order also established an annual regulatory planning process.³³ Significantly, E.O. 12,866 modified E.O. 12,291's analogous limitation on OIRA's ability to review agency action. Under E.O. 12,291, agencies had to follow special decisionmaking processes for major rules, including submitting the rule to OMB for review.³⁴ Additionally, unlike previous presidential programs that authorized selective review of important regulations, E.O. 12,291 required agencies to submit all proposed and final regulations to OIRA for review, essentially conditioning publication on OIRA approval.³⁵ E.O. 12,866, however, explicitly limited OIRA's jurisdiction; the Order provided that OIRA had the power to review only agency actions identified by the agency or OIRA as "significant" — a change in terminology with important practical consequences.³⁶ But in a critical and deliberate break with E.O. 12,291, E.O. 12,866 added catch-all provisions designed to broaden the potential category of regulatory action subject to OIRA review.³⁷ However, E.O. 12,866 continued to limit OIRA review to the actions of executive agencies; independent regulatory commissions and boards were not required to submit their rules for review, though they did have to submit regulatory plans.³⁸

Most importantly for purposes of this Note, E.O. 12,866 defined "significant regulatory action" as agency action taken by way of notice-and-comment rulemaking likely to result in a rule that will have an annual economic impact of \$100 million or more, create serious inconsistency with action undertaken or planned by another agency, materially alter the budgetary impact of entitlements or grants, or raise novel legal or policy issues arising out of legal mandates or the President's priorities.³⁹ The Order required agencies to provide lists of their planned regulatory actions to OIRA and to designate those the agency deems significant within the meaning of the Order. Those regulatory actions not so designated are not subject to OIRA review un-

³² Kagan, *supra* note 6, at 2285.

³³ *See id.* at 2286.

³⁴ *See* BREYER ET AL., *supra* note 4, at 104.

³⁵ *See* Exec. Order No. 12,291, § 3, 3 C.F.R. 127, 128–30 (1981), *reprinted in* 5 U.S.C. § 601.

³⁶ Exec. Order No. 12,866, § 6(b)(1), 3 C.F.R. at 646.

³⁷ *See id.* § 3(f)(2)–(4), 3 C.F.R. at 642. Sally Katzen, Administrator of OIRA under President Clinton from 1993 to 1998, states that the catch-all provisions of E.O. 12,866 were designed to explicitly allow for OIRA review of controversial regulations while at the same time freeing agencies of OIRA review of every rule, as had been the case under E.O. 12,291. Telephone Interview with Sally Katzen, former Adm'r, OIRA (Sept. 2, 2010) [hereinafter Katzen Interview] (on file with the Harvard Law School Library).

³⁸ *See* Exec. Order No. 12,866, § 3(b), 3 C.F.R. at 641.

³⁹ Exec. Order No. 12,866, § 3(f)(1)–(4), 3 C.F.R. at 641–42.

less the Administrator so informs the agency.⁴⁰ If a regulatory action is identified by the agency or determined by OIRA to be significant, the submitting agency must comport with a variety of procedural requirements, including submitting an RIA.⁴¹

Although President George W. Bush briefly and temporarily altered the requirements of regulatory review during his second term, E.O. 12,866 continues to govern regulatory review of agency action.⁴² Its \$100 million threshold for substantive review, combined with the costs and delays of centralized review,⁴³ gives those agencies whose action is subject to OIRA review both the means — understating the costs of rules, splitting them into parts, and understating their social impact — and the incentive to behave strategically in order to avoid OMB review. It is to that subject that this Note now turns.

II. OIRA AVOIDANCE: AN INTRODUCTION

A. *Reasons for Avoiding Review, Methods for Doing So, and President Clinton's Responses*

Despite the discussion in Part I, and the concomitant increase in presidential control of the regulatory state that has culminated in OIRA's powers under E.O. 12,866, it remains true that the executive branch is a “they” and not an “it.”⁴⁴ This observation helps to explain the existence of intrabranch conflicts among various actors all nominally committed to furthering a President's policy goals.⁴⁵ A qualitative discussion illustrates this point with respect to OIRA and the executive agencies. That agencies would seek to avoid OIRA review of

⁴⁰ *Id.* § 6(a)(3)(A), 3 C.F.R. at 645.

⁴¹ *Id.* § 6(a)(3)(B)–(F), 3 C.F.R. at 645–46.

⁴² President Bush continued to implement E.O. 12,866, though he modified it with his own E.O. 13,422. *See, e.g.*, Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146 (2010). Though its impact has been disputed, E.O. 13,422 — enacted after the Democrats took control of Congress in 2006 — attempted to make significant changes to centralized review, largely with the goal of increasing presidential control of the administrative state. *See* Michael Hissam, Essay, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292, 1296–1300 (2008). President Obama, however, rescinded E.O. 13,422 shortly after taking office, and issued a memorandum calling for a new executive order to govern the relationship between OIRA and the executive agencies and to set forth the criteria for agency rulemaking. *See* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 299 n.171 (2009). As of the date of this writing, such an executive order has not yet been issued. *See* Mendelson, *supra*, at 1146–47. President Obama's brief January 18, 2011 order does not alter this Note's analysis. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁴³ *See, e.g.*, Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1405–07 (1992); Morrison, *supra* note 31, at 1062–71.

⁴⁴ *Cf.* Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

⁴⁵ *See, e.g.*, Kagan, *supra* note 6, at 2287.

their rules is understandable: OIRA has historically had a strong deregulatory bent,⁴⁶ and even if agencies share policy preferences with OIRA, review is costly in terms of both time and resources, and it risks additional publicity for controversial rules.

Once E.O. 12,291 made an annual economic impact of \$100 million or more the relevant threshold for OMB review, disputes arose over whether a given rule qualified as “major” or “significant” and agencies predictably responded by understating the costs of their rules and by splitting unitary rules into parts.⁴⁷ Several reasons, both economic and institutional in nature, could explain this strategic behavior. The simplest explanation for OIRA avoidance is the resource-intensive and time-consuming nature of OIRA review.⁴⁸ Donald Arbuckle, Acting Administrator of OIRA during both the Clinton and George W. Bush Administrations,⁴⁹ has written that, while the criteria provided by E.O. 12,291 were clear, “agencies and OIRA [argued] about whether particular rules should be designated major. Since major rules required agencies to conduct a robust regulatory impact analysis . . . , agencies had an incentive to find rules non-major.”⁵⁰ He identifies three specific reasons for this agency strategic behavior. First, if a rule was designated major, it required an RIA to pass muster at OMB, and these analyses were not only expensive, but also often of little value to the agencies that performed them. Second, OMB’s analysis added a great deal of time to the process of promulgating a rule, and in the early days of E.O. 12,291, OMB was cavalier about the Order’s timelines — an issue that became important in President Clinton’s revised Executive Order.⁵¹ Third, Arbuckle notes that, given the laxity of the timing requirements, some rules “disappeared” during OMB review — a phenomenon about which agencies were justifiably upset.⁵²

But the above explanation is ultimately incomplete. Also important are sociological issues: personal and policy differences may complicate the administration of the formal legal rules of E.O. 12,866.⁵³ This may in part be because the executive agencies come to view OIRA as an essentially bureaucratic, nugatory body, given its supervi-

⁴⁶ See, e.g., Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1360–67 (2009) (book review).

⁴⁷ See Arbuckle, *supra* note 12, at 15.

⁴⁸ See, e.g., Pildes & Sunstein, *supra* note 10, at 5.

⁴⁹ See Donald R. Arbuckle, *Collaborative Governance Meets Presidential Regulatory Review*, 2009 J. DISP. RESOL. 343, 343 n.1.

⁵⁰ Arbuckle, *supra* note 12, at 15.

⁵¹ Telephone Interview with Donald R. Arbuckle, Clinical Professor of Pub. Affairs, Univ. of Tex. at Dall. (Sept. 2, 2010) [hereinafter Arbuckle Interview] (on file with the Harvard Law School Library).

⁵² *Id.*

⁵³ See James F. Blumstein, Essay, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 887–89 (2001).

sory role and lack of an explicit policy portfolio.⁵⁴ It may be because, as two former OIRA officials have noted, OMB and OIRA traditionally enjoy a closer working relationship with the President than the other agencies do,⁵⁵ potentially leading policymakers at those agencies to feel that their actions are being countermanded. Another reason may be that OIRA and the other agencies may have competing policy agendas.⁵⁶ Or it may be because pro-regulatory agency officials — should the President, like President Reagan, have a deregulatory bent — view centralized review as a guise for deregulation.⁵⁷

Additionally, it seems likely that some agencies are more inclined to attempt to avoid review than others. Arbuckle notes that certain agencies — the EPA in particular — were particularly astute at designating rules as non-major, either by providing a low estimate or by using valuation procedures that tended to be conservative, meaning that they took the lower of the range of potential costs.⁵⁸ Given the complicated intrabranch relationships underlying regulatory review, the formal strictures of centralized review gave way to a more complex process of negotiation.⁵⁹

Furthermore, under E.O. 12,291, agencies' ability to avoid centralized review for their major rules was enhanced by that Order's requirement that all rules be submitted for OMB review.⁶⁰ Arbuckle, who spent time at OIRA under the E.O. 12,291 regime, confirms this point.⁶¹ Though OIRA's initial Administrator, James Miller, and his Deputy, Jim Tozzi, had taken advantage of a provision in E.O. 12,291 giving the Administrator discretion in determining what rules to review — opting not to review, among others, certain rules for which it would have been politically risky for the White House to have a direct say — OIRA was responsible for reviewing over 2,000 rules per year.⁶² A subset of this group of rules were major rules requiring RIAs, which according to Arbuckle imposed “serious and significant” requirements on agencies.⁶³ Unsurprisingly, most of OIRA's time was spent on these rules, which also tended to be the most politically controversial and emanated disproportionately from a small group of agencies.⁶⁴

⁵⁴ Cf. Arbuckle, *supra* note 49, at 350–51.

⁵⁵ See Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 904–05 (2010) (book review).

⁵⁶ See, e.g., *id.* at 904–06.

⁵⁷ See Bagley & Revesz, *supra* note 6, at 1261–62 & nn.3–4.

⁵⁸ Arbuckle Interview, *supra* note 51.

⁵⁹ Cf. Blumstein, *supra* note 53, at 888–89.

⁶⁰ Cf. Bagley & Revesz, *supra* note 6, at 1277–78.

⁶¹ Arbuckle Interview, *supra* note 51.

⁶² *Id.*; see also Croley, *supra* note 7, at 846–47.

⁶³ Arbuckle Interview, *supra* note 51.

⁶⁴ *Id.*; see also Kagan, *supra* note 6, at 2278 & nn.130–31.

Arbuckle suggests that OIRA avoidance was particularly problematic with respect to major rules. This phenomenon was attributable both to the RIA requirement and to OMB's structure, which then was and now is modeled after the federal government, with EPA rules going to the EPA desk, and so on. Thus, if an agency — EPA, for example — had a number of controversial, major rules, the relevant OIRA desk was likely to be overwhelmed and to move even more slowly than usual in the review process.⁶⁵ Additionally, Arbuckle explains, those agencies whose actions were subject to OIRA review under E.O. 12,291 quickly learned that it was a White House directive with the President's personal support, rather than a garden-variety executive order requiring less stringent compliance. Serious time and resources were thus required to pass muster at OIRA, further increasing the incentive to keep rules from OMB.⁶⁶

Agencies seeking to avoid OIRA review had under E.O. 12,291, and have under E.O. 12,866, a variety of tools at their disposal. In some cases under E.O. 12,291, "agency officials divided potential major rules into two or more non-major components, and in other cases they . . . argue[d] that the estimated costs or benefits were under the \$100 million threshold, in order to avoid a 'major' designation."⁶⁷ Cost underestimation is similarly a potential strategy for avoiding review under E.O. 12,866, which retained its predecessor's \$100 million threshold, though it seems a less effective strategy than under E.O. 12,291, given that the former order does not rely entirely on economic impact to determine importance.⁶⁸ Additionally, agencies retain the ability to take action in forms not subject to review under E.O. 12,866 — formal rulemaking and adjudication. While agencies might prefer acting via formal rulemaking or adjudication for their own reasons,⁶⁹ these methods have costs of their own: they impose additional, expensive procedural burdens on agencies⁷⁰ and require them to act in forms different from § 553 rulemaking, which has become pervasive since the 1970s.⁷¹

Furthermore, agencies may attempt to make regulatory costs harder to quantify in order to avoid OIRA review. Responding to com-

⁶⁵ Arbuckle Interview, *supra* note 51.

⁶⁶ *Id.*

⁶⁷ Arbuckle, *supra* note 12, at 15.

⁶⁸ See Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641-42 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

⁶⁹ See BREYER ET AL., *supra* note 4, at 499-502; *cf.* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690-91 (D.C. Cir. 1973) (Wright, J.).

⁷⁰ See BREYER ET AL., *supra* note 4, at 489-92, 518.

⁷¹ See, e.g., *id.* at 499-502. More recently, *United States v. Mead Corp.*, 533 U.S. 218 (2001), limited the class of agency interpretations of law eligible for *Chevron* deference, making § 553 rulemaking more attractive for agencies.

ments on the regulations upheld in *Rust v. Sullivan*,⁷² the Department of Health and Human Services (HHS) appears to have taken such an approach. In light of the regulations' requirement that abortion-providing facilities be separated from federally funded programs, commentators on the proposed rule argued that an RIA was required under E.O. 12,291. HHS did not dispute that point, but it also did not perform an RIA. Instead, it moved from a per se rule regarding separation to a multifactor "totality of the circumstances" test. Under this new test, HHS argued that the costs of the regulations were too speculative to require OMB review.⁷³ By doing so, HHS appears to have avoided OMB review for a rule that the administration favored.

President Clinton took several important steps to protect OIRA's ability to exercise a meaningful role in the review process — steps that effectively limited agencies' ability to avoid centralized review. The first was a move from rules to standards. Sally Katzen, Administrator of OIRA from 1993 to 1998, explains that the Clinton Administration drafted E.O. 12,866 with the goal of giving OIRA the ability to determine which rules and regulations merited central review.⁷⁴ Crucial in this regard, she notes, were sections 3(f)(2) to 3(f)(4) of the Order, which gave OIRA residuary discretion to review agency action even if the cost of the rule did not meet the threshold. The second move was implied above: rather than requiring that OIRA review every rule and regulation, E.O. 12,866 required that agencies submit only significant rules to OIRA.⁷⁵ In relative terms, this change increased OIRA's resources. Finally, OIRA, concerned about the effects of inflation, acted to make sure that the \$100 million threshold was the correct one. Katzen states that before E.O. 12,866 became effective in September 1993, OIRA reviewed all outstanding rules and regulations to determine whether many rules and regulations came close to the \$100 million threshold. She remembers that few regulations came close to the \$100 million mark: the rules OIRA scrutinized either had an estimated economic impact well under \$100 million or were projected to have an impact of hundreds of millions of dollars, thus clearly necessitating OIRA review.⁷⁶

⁷² 500 U.S. 173 (1991).

⁷³ See Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects, 53 Fed. Reg. 2922, 2939–40 (Feb. 2, 1988).

⁷⁴ Katzen Interview, *supra* note 37.

⁷⁵ See, e.g., Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 88 n.25 (2008).

⁷⁶ Katzen Interview, *supra* note 37.

B. Countervailing Concerns and Alternative Explanations

But other concerns complicate agencies' decisions whether to attempt to avoid centralized review. Interestingly, Arbuckle notes that, in his experience, agencies were careful not to appear too cavalier in their designation of rules — in other words, agencies *did not* seek to avoid OIRA review in all instances, thereby winning credibility and political capital.⁷⁷ Furthermore, several factors external to OIRA put pressure on agencies in the other direction — that is, encouraged agencies to act collaboratively, rather than adversarially, with OIRA and OMB, thereby decreasing the incentive to avoid OIRA review. The development of “hard look” review,⁷⁸ culminating in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,⁷⁹ led agencies to develop more thoroughly records and justifications for their actions in order to protect rules from judicial scrutiny. At the same time, parties interested in challenging agencies became more skilled in doing so, arming themselves with economists, scientists, and lawyers who could challenge agencies on their own terms; arguably, courts became more expert in reviewing agency action as well.⁸⁰ These developments further encouraged agencies to prepare satisfactory explanations, and the resulting preparations effectively reduced the marginal costs of centralized review.

Additionally, as Arbuckle explains, agency heads have political incentives, derived from their relationships with the President and with Congress, to engage in more process and to justify their rules. With respect to the President, the more information and analysis an agency has, the better the agency can protect the President from political opponents. A similar story can be told with respect to Congress, which has steadily increased its scrutiny of the administrative state as it has grown in size and complexity: the more data an agency has to back up its actions, the better it can defend itself against congressional pressure, and the more likely it is to be able to maintain friendly relationships with those ultimately responsible for funding its actions.⁸¹

Several alternative theories also potentially explain the behavior this Note describes as OIRA avoidance. Agencies and OIRA may have good faith disagreements over a proposed rule's cost. Katzen notes that in several instances, executive agencies and OIRA disagreed over whether OIRA had jurisdiction to review agency action under

⁷⁷ Arbuckle Interview, *supra* note 51.

⁷⁸ See generally BREYER ET AL., *supra* note 4, at 347–404.

⁷⁹ 463 U.S. 29 (1983).

⁸⁰ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 68–69 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring). *But see id.* at 66–68 (Bazelon, C.J., concurring).

⁸¹ Arbuckle Interview, *supra* note 51.

E.O. 12,866.⁸² For example, she remembers a dispute between OIRA and the Department of Agriculture fairly early in her tenure at OIRA, in which she first learned from the pages of the *Washington Post* about a proposed rule that would have required labeling on packages of meat and poultry. It was apparent from the story that the regulation would have an economic impact of far greater than \$100 million.⁸³ This occasioned a brief dispute with the Department of Agriculture, which was informed that it could withdraw the rule or send a draft to OIRA. It promptly did the latter.

Of course, some agency behavior of this type may be attributed to simple miscalculation. Arbuckle and Katzen differ on this front. Although they agree that agencies have an incentive to avoid OIRA review, Arbuckle argues that agencies behave strategically, while Katzen more optimistically explains the same action as agency mistakes in calculating economic impact or the erroneous failure to submit a significant rule for review.

Furthermore, procedural hurdles from without the executive branch may aggravate agencies' incentive to avoid centralized review. Katzen, generally skeptical of strategic agency behavior to avoid OIRA review, notes that the Congressional Review Act,⁸⁴ a 1996 law intended to make it easier for Congress to overturn agency action, increased agency incentives to act strategically. Essentially, the Act allows Congress to enact a "resolution of disapproval," which, if passed by both houses of Congress and signed by the President — or two-thirds of both houses in the case of a veto — would overturn any rule promulgated by a federal administrative agency.⁸⁵ Though an extended discussion of the Act is not germane here,⁸⁶ the Act does have implications for OIRA avoidance: it provides that "major" rules may not take effect for sixty days after submission to Congress, twice as long as the period for rules not so denoted.⁸⁷ For an even longer period, Congress may enact a joint disapproval resolution and invalidate the rule.⁸⁸

⁸² Katzen Interview, *supra* note 37.

⁸³ *Id.* For the *Post* story, see Carole Sugarman, *Meat Labels to Carry Safety Instructions*, WASH. POST, May 6, 1993, at A1.

⁸⁴ 5 U.S.C. §§ 801–808 (2006).

⁸⁵ *Id.* § 801(b)(1).

⁸⁶ For a useful discussion, see Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009).

⁸⁷ See 5 U.S.C. § 801(a)(3). Under the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), the rules of federal administrative agencies become effective no fewer than thirty days after publication. See 5 U.S.C. § 553(d). The Congressional Review Act does not modify this baseline, except with respect to what that Act terms "major" rules. See *id.* § 801(a)(4). "Major" rules are effectively the same as those agency actions that E.O. 12,866 characterizes as economically significant regulatory actions. See Note, *supra* note 86, at 2166 n.28.

⁸⁸ See 5 U.S.C. § 802.

The Act's review and effective date provisions for major rules, Katzen notes, increase the incentive to understate rule cost or split rules into parts to avoid the Act, adding to the incentive already created by E.O. 12,866.⁸⁹

C. *The Probability of Strategic Behavior*

Arbuckle and Katzen thus tell different stories about agencies' underestimation of costs to avoid review during their respective tenures at OIRA. Arbuckle's account straightforwardly describes agencies' strategic behavior, tempered by reference to the complications of political considerations and external factors, including the evolution of hard look review. In contrast, Katzen states that under the E.O. 12,866 regime, disputes between agencies and OIRA did not focus on the \$100 million threshold, but rather on whether agency action qualified as "significant" pursuant to the capacious provisions of E.O. 12,866 sections 3(f)(2) to 3(f)(4). According to Katzen, agencies were largely unsuccessful in avoiding OIRA review during the Clinton Administration, though she concedes that they have an incentive to do so under E.O. 12,866 and the Congressional Review Act.⁹⁰

How is one to interpret these conflicting stories? An important caveat to Arbuckle's discussion is that much of his experience was under the E.O. 12,291 regime. OIRA was a different organization then and, as Katzen noted, E.O. 12,291 was a substantially different order from E.O. 12,866.⁹¹ Nonetheless, while E.O. 12,866 did broadly enhance OIRA's residuary discretion to review agency action, it did not eliminate the incentive, supplemented by the Congressional Review Act, to act strategically. Perhaps the differences in interpretation can be attributed to differences in experience. Katzen, a political appointee, was not at OIRA for the same length of time as Arbuckle, who spent much of his career at OIRA. They held different offices within OIRA, which resulted in different levels of exposure to the details of the rule-making process.

It is also important to note that the occasional disputes described by Katzen and Arbuckle are not properly termed OIRA avoidance at all. Instead, they are better characterized as disputes over the correct valuation of a given rule, not attempts to avoid OIRA entirely. True OIRA avoidance — strategic behavior, undetected by OIRA, that is meant to cut that agency out of the regulatory review process — is the subject of the next Part of this Note.

⁸⁹ Katzen Interview, *supra* note 37.

⁹⁰ *Id.*

⁹¹ *But cf.* Bagley & Revesz, *supra* note 6, at 1262.

III. OIRA AVOIDANCE: METHODOLOGY, DATA, AND APPLICATION

This Part provides and discusses publicly available data, briefly analyzing agencies' possible attempts to avoid OIRA review. These data appear to demonstrate, consistent with the discussion provided above, that agencies and OIRA frequently disagree over whether a given regulation falls within the purview of OIRA's powers under E.O. 12,866. These data comport with the hypothesis introduced in Part II: that agencies may seek to avoid OIRA review by understating the costs of rules so the rules fall below the \$100 million threshold. However, the data comport as well with another hypothesis, hinted at by Arbuckle and elaborated upon in an analogous context by Stephenson: that agencies may "strategically substitute" by submitting to OIRA review those rules that most need protection against judicial review, while avoiding OIRA review where the agency action is unlikely to be overturned if challenged.⁹²

A. Methodology

This Note's methodology is straightforward. Agencies report their past action, present action, and planned future action to OIRA.⁹³ OIRA then makes this information publicly available, categorizing it on its website in a variety of ways, including whether the agency initially classified the rule as economically significant per the requirements of E.O. 12,866, and whether the agency classified the rule as major per the requirements of the Congressional Review Act.

In an attempt to determine whether agencies are acting strategically to evade the requirements of the Order, the author analyzed agency action from the initial reporting stage to the present. The author did so by reviewing each of the significant rules that an agency had submitted to OIRA during the period from 2000 through October 2010.⁹⁴ Each of these rules is classified by its Regulation Identifier Number (RIN) — a number used by OMB to identify each regulatory action listed in the Unified Agenda,⁹⁵ the semiannually issued document that summarizes the rules and proposed rules that each federal agency expects to issue during the next year.⁹⁶ OIRA's publicly available web-

⁹² See Stephenson, *supra* note 13, at 529–30.

⁹³ See, e.g., DeMuth & Ginsburg, *supra* note 55, at 907–08 & nn.77–78.

⁹⁴ OIRA makes this information available on its website summarizing regulatory data. See *Historical Reports*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoHistoricReport> (last visited Jan. 8, 2011).

⁹⁵ See *FAQ*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited Jan. 8, 2011).

⁹⁶ See Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1177 & n.64 (2009).

site on regulatory review also includes a variety of other data points, including whether the rule was published for the first time or whether it had been published in an earlier Unified Agenda, and, at that point in the review process, whether the rule was classified as economically significant and whether it was classified as major.

The author then compared those classifications with the classifications provided the first time the rule was published in the Unified Agenda, using the information the agency had initially provided to OIRA.⁹⁷ The object was to determine whether there were discrepancies between the agencies' initial classifications of their rules as economically significant — particularly, whether they had not been so classified — and OIRA's determinations. A substantial number of data points in accordance with the hypothesis described above — that agencies may understate the costs of rules — would tend to suggest, though not prove, strategic behavior on the part of agencies.⁹⁸

Although a complete empirical evaluation of possible OIRA avoidance across the administrative state is beyond the scope of this Note, the analysis herein considered a rough cross section of agencies to attempt to provide a useful discussion of the possibility of strategic behavior throughout the executive branch, looking at the rules promulgated by a freestanding executive agency, an agency within a cabinet department, and a cabinet department. Therefore, the author analyzed rules promulgated by EPA, the agency responsible for many of the major rules reviewed by OIRA, a number of which are politically controversial;⁹⁹ the rules of the National Oceanic and Atmospheric Administration (NOAA), an executive agency within the Department of Commerce; and the rules of the Department of the Interior (DOI), a cabinet department. By analyzing rules from the year 2000 to the present, the author examined a time frame long enough to provide an adequate sample size and to encompass both Republican and Democratic administrations.¹⁰⁰ The Note's tentative conclusion, confirmed by discussions with former OIRA officials, is that agencies may in

⁹⁷ This comparison was done by using the search function of the regulatory review site, which contains information on Unified Agendas going back to 1995. One can search for a rule by RIN or by the use of search terms. See *Search of Agenda/Regulatory Plan*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaSimpleSearch> (last visited Jan. 8, 2011).

⁹⁸ Such action could, of course, simply represent a disagreement on valuation, or otherwise on the rule's significance. Alternatively, OIRA could reclassify rules as economically significant for more straightforwardly political reasons; however, as then-Professor Kagan noted, there are easier ways for the President to influence agency rulemaking. See generally Kagan, *supra* note 6.

⁹⁹ See, e.g., David B. Spence & Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: The Political Logic of Inefficient Regulation*, 53 VAND. L. REV. 599, 616 (2000).

¹⁰⁰ This Note's sample size is admittedly small, and these agencies may not be perfectly representative. Furthermore, this Note's methodology is subject to the obvious limitation that it will not account for the strategic behavior that OIRA did not catch. As a result, the analysis may be underinclusive and OIRA avoidance may be a more pervasive problem than the data illustrate.

some instances behave strategically to avoid OIRA review. Agencies whose portfolios are politically controversial — like EPA — appear to be more likely to engage in such behavior. Consistent with a great deal of recent scholarship, such action may be more likely to take place during presidential transitions. The Note’s findings, and a brief normative discussion, follow below.

B. EPA, NOAA, and DOI

1. *EPA.* — EPA has long had a rocky relationship with the centralized review process;¹⁰¹ it has also consistently issued a great number of economically significant rules.¹⁰² OIRA reviewed 133 significant regulatory actions taken by EPA between 2000 and November 1, 2010, a mean average of twelve per year. It reviewed annually as many as nineteen significant actions, in 2009, and as few as five, in 2003.¹⁰³ Within this universe of 133, there were seventy-eight different RINs — in other words, seventy-eight unique agency actions were reviewed by OIRA within the relevant time period.¹⁰⁴

Of the seventy-eight different EPA rules in the relevant time period, sixteen of the rules not otherwise subject to OIRA review — 20.5% — had their initial classification changed to reflect an initial underestimation of economic significance by EPA.¹⁰⁵ These rules were either initially classified as not economically significant, or their economic significance was initially undetermined; OIRA, of course, concluded that the rules were in fact economically significant. This phenomenon was particularly pronounced during the period of transition from the Clinton Administration to the Bush Administration: of the eleven significant rules that were reviewed during 2001, five —

¹⁰¹ See Bagley & Revesz, *supra* note 6, at 1269–70.

¹⁰² See Katzen, *supra* note 8, at 1500.

¹⁰³ These totals were calculated by determining how many significant regulatory actions OIRA reviewed each year and then summing the totals during the period surveyed. See *Historical Reports*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eoHistoricReport> (select “Environmental Protection Agency” in “Economically Significant Reviews Completed” tab; then select year in “Select Calendar Year” tab; then follow “Submit” hyperlink) (last visited Jan. 8, 2011).

¹⁰⁴ Since OIRA uses the same RIN for a given regulatory action — even if that regulatory action is reviewed by OIRA multiple times — a number of the RINs surveyed appeared multiple times within the EPA data set. For example, OIRA reviewed an EPA rule with the RIN 2060-AG52 — a rule dealing with emissions standards for the manufacturing of lumber and plywood — three times between 2001 and 2004. For purposes of calculating potential OIRA avoidance, it is important to use the number of unique RINs — not the total number of significant regulatory actions reviewed — to analyze whether and when OIRA avoidance may have taken place, since using all significant regulatory actions reviewed would result in inflated figures with respect to both the numerator and the denominator.

¹⁰⁵ Ten additional rules that were initially not classified as economically significant had their classification changed to correct an underestimation of economic significance. However, these rules were subject to OIRA review under the other provisions of E.O. 12,866. Thus, they were not counted for purposes of determining the percentages relevant to OIRA avoidance.

45.5% — had their initial classification changed to reflect a determination by OIRA that they were economically significant.¹⁰⁶ Consistent with the growing literature on presidential transitions,¹⁰⁷ this trend suggests that holdover officials may behave strategically because of disagreement with new political appointees and the agenda they represent.¹⁰⁸

The author's analysis of OIRA review of significant EPA rules from 2000 through 2010 also revealed another, unexpected phenomenon: in a smaller subset of rules — five of seventy-eight, or 6% — OIRA disagreed with EPA's initial classification of the rule as economically significant at some point in the review process, reclassifying it as otherwise significant or non-major.¹⁰⁹ Though the limited nature of this phenomenon may suggest simple disagreement about valuation, one can also imagine it resulting from strategic action under the guise of revaluation. For example, a President, in an attempt to appease or protect his stakeholders, could order OIRA not to review a rule that those stakeholders favor, knowing that OIRA review is time-consuming and potentially politically hazardous.¹¹⁰ Alternatively, an agency could exercise excessive precaution against future challenge.

2. *NOAA.* — NOAA is a subagency within the cabinet-level Department of Commerce. Tasked with numerous responsibilities, NOAA's better-known divisions include the National Weather Service and the National Hurricane Center. The author analyzed NOAA's significant rules for two reasons: first, NOAA is a subagency within a cabinet department, and second, NOAA's portfolio is comparatively uncontroversial politically, resulting in a fairly low profile¹¹¹ — which suggests that its relationship with OIRA may be more amicable than, for example, EPA's.

¹⁰⁶ These rules were, classified by RIN, Rules 2040-AD02; 2060-AG67; 2060-AG63; 2060-AG52; and 2070-AD38.

¹⁰⁷ See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 894 n.11 (2008).

¹⁰⁸ Cf. Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1262–70 (2006). *But cf.* Arbuckle, *supra* note 49, at 347 & nn.21–22.

¹⁰⁹ For example, Rule 2060-AN98, which dealt with the implementation of EPA's Clean Air Mercury Rule, was initially classified in the Fall 2006 Unified Agenda as major and economically significant. See Clean Air Mercury Rule: Federal Plan, 71 Fed. Reg. 73,887 (Dec. 11, 2006). By the time OIRA review was completed in Spring 2009, the rule was no longer classified as economically significant or major. See *RIN 2060-AN98*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/doleAgendaViewRule?pubId=200904&RIN=2060-AN98> (last visited Jan. 8, 2011).

¹¹⁰ Cf. Kagan, *supra* note 6, at 2290–99.

¹¹¹ Cf. Dave Owen, *Probabilities, Planning Failures, and Environmental Law*, 84 TUL. L. REV. 265, 292 n.155 (2009).

OIRA reviewed fifteen significant regulatory actions taken by NOAA from 2000 through 2010, a mean average of 1.4 per year.¹¹² Of this group, there were ten unique RINs. Of these ten, three — 30% — had their initial classification changed to reflect a determination that NOAA had understated the rule's economic significance. Although the percentage of rules whose classification was changed is comparable to EPA's, the sample size is far smaller.

If one can infer anything from the NOAA data, it may be that agencies — regardless of size — may engage in cost underestimation. However, it also seems likely that OIRA avoidance may be less politically necessary for an agency that promulgates substantially fewer significant — and politically controversial — rules. In absolute terms, the costs that OIRA review imposes on NOAA and the risk of potential political controversy that its rules may inspire are simply lower than the costs and risks of controversy that EPA faces. NOAA's relationship with OIRA is almost certainly less salient for OIRA than EPA's relationship with OIRA, and as a result, NOAA likely has less of an incentive to avoid OIRA review.

3. *DOI*. — The author chose DOI as the final agency to analyze for two basic reasons. First, DOI is a massive agency with wide-ranging duties related to various natural resources issues.¹¹³ Second, DOI serves as a useful midpoint between the highly active — and controversial — EPA, and the smaller and less politically volatile NOAA.

OIRA reviewed fifty significant regulatory actions taken by DOI between 2000 and 2010, a mean average of 4.5 per year. Within this group of fifty, there were twenty-two unique RINs; within this subgroup, four — 18% — had their classifications changed from their initial designations to reflect OIRA's judgment that the rule was economically significant.¹¹⁴

Although the absolute percentage of rules whose classification was changed is lower for DOI than for either EPA or NOAA, a distinction is apparent between noncontroversial and controversial DOI rules. The lion's share of DOI's significant rules during the period 2000 through 2010 dealt with the regulations governing the hunting of migratory game birds; the Fish and Wildlife Service (FWS), a subdepartment of DOI, issues new regulations each year, several iterations of which OIRA reviews.¹¹⁵ None of these rules' initial classifications,

¹¹² These totals were calculated by determining the number of rules the Department of Commerce submitted on behalf of NOAA to OIRA for review each year.

¹¹³ See Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, 38–39 (1994).

¹¹⁴ These were RINs 1004-AD90, 1010-AD29, 1010-AD30, and 1029-AC56.

¹¹⁵ For example, in 2005, the *only* significant regulations of DOI's that OIRA reviewed were the FWS regulations issued that year.

however, were changed; only those rules whose subjects were potentially more politically volatile were reclassified. These rules involved the reduction in oil and gas royalty rates,¹¹⁶ the development of shale oil reserves,¹¹⁷ alternate energy development on the outer continental shelf,¹¹⁸ and the government's treatment of abandoned mines.¹¹⁹ Though these observations are hardly conclusive, they are consistent with an agency's underestimation of the costs of the rules most likely to prove politically harmful to an administration of either political stripe.

C. *Alternative Hypotheses*

The data discussed above are also consistent with several other hypotheses. Most strikingly, the data are potentially consistent with an analog to a hypothesis of Professor Elizabeth Magill's, elaborated upon by Stephenson: that agencies' choice of form in acting is contingent upon the particular action's chances of surviving judicial review.¹²⁰ Essentially, they theorize that the higher a rule's chances of being overturned on judicial review, the more likely the rule is to be created via those forms of process to which the courts have proven most amenable — in particular, § 553 rulemaking.¹²¹ From the perspective of an agency whose action is subject to judicial review, the argument goes, textual plausibility and procedural formality function as strategic substitutes.¹²²

This hypothesis has straightforward implications for this Note. Agencies might plausibly decide to seek out OIRA's expertise in cost-benefit analysis when they worry about their rules' ability to survive judicial review. Conversely, they will be comparatively unlikely to

¹¹⁶ Compare Reduction in Oil and Gas Royalty Rates in the Outer Continental Shelf Under the Deep Water Royalty Relief Act, 70 Fed. Reg. 64,836 (Oct. 31, 2005) (RIN 1010-AD29 in the Fall 2005 Unified Agenda), with RIN 1010-AD29, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200710&RIN=1010-AD29> (last visited Jan. 8, 2011) (RIN 1010-AD29 in the Fall 2007 Unified Agenda).

¹¹⁷ Compare Oil Shale Leasing and Operations, 71 Fed. Reg. 72,822 (Dec. 11, 2006) (RIN 1004-AD90 in the Fall 2006 Unified Agenda), with RIN 1004-AD90, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200804&RIN=1004-AD90> (last visited Jan. 8, 2011) (RIN 1004-AD90 in the Spring 2008 Unified Agenda).

¹¹⁸ Compare Alternate Energy-Related Uses on the Outer Continental Shelf, 70 Fed. Reg. 64,836 (Oct. 31, 2005) (RIN 1010-AD30 in the Fall 2005 Unified Agenda), with RIN 1010-AD30, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200810&RIN=1010-AD30> (last visited Jan. 8, 2011) (RIN 1010-AD30 in the Fall 2008 Unified Agenda).

¹¹⁹ Compare Abandoned Mine Land, 72 Fed. Reg. 22,765 (Apr. 30, 2007) (RIN 1029-AC56 in the Spring 2007 Unified Agenda), with RIN 1029-AC56, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200810&RIN=1029-AC56> (last visited Jan. 8, 2011) (RIN 1029-AC56 in the Fall 2008 Unified Agenda).

¹²⁰ See generally Magill, *supra* note 13; Stephenson, *supra* note 13.

¹²¹ See Stephenson, *supra* note 13, at 529–32.

¹²² *Id.* at 529–30.

bolster their analysis with OIRA review when they are confident of success. In other words, agencies may sometimes *opt in* to OIRA review to protect their rules from anticipated future challenge. On this account, that the majority of the rules described above did *not* have their classification changed makes sense: agencies often insure against challenge by seeking review, with some rules being reclassified to correct an initial overestimation of economic significance — as was seen in this Note’s discussion of EPA.

There are two responses to this hypothesis. The first is, in short, a welcoming one: the application of Stephenson’s and Magill’s hypothesis is entirely consistent with this Note. Both suggest that agencies act strategically to evade or invite review depending on policy-based considerations; their hypothesis serves to bolster, rather than undermine, the basic premise of this Note. The second is that agencies’ behavior is, obviously, influenced by considerations other than those described in this Note. A variety of factors — described above — have combined to encourage agencies to engage in a great deal of process, both internally and through centralized review, that they might not have absent external pressure.

Other hypotheses could also explain the data. Changes in a rule’s classification could result from entirely ordinary rulemaking practices, such as making substantive changes to a rule during the course of review or using preliminary calculations in the initial estimation of economic impact. Furthermore, in at least some cases, cost underestimation could be due to good faith disagreement between the agency and OIRA or to a miscalculation by either the agency or OIRA. These theories, however, seem unlikely to explain all reclassifications, given the incentive to avoid review and OIRA’s scarce resources.

IV. OIRA AVOIDANCE: A NORMATIVE DISCUSSION

It thus seems eminently possible, given the data and the conflicting accounts provided above, that executive agencies act to avoid costly OIRA review. This Part briefly discusses the normative implications of OIRA avoidance and offers suggestions on how OIRA and the President might act to stop agencies’ evasion of regulatory review.

Whether OIRA avoidance is ever desirable as a policy matter presents a more difficult question than *why* agencies would behave in such a fashion. The arguments on both sides largely reprise the debate over the propriety of centralized review more generally.¹²³ Comparative political accountability, perhaps the most satisfying argument for centralized review, seems at first blush to cut against the propriety of

¹²³ Cf. Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1483–1527 (1996).

OIRA avoidance: OIRA and OMB are — at least as a general rule — closer to the President than the executive agencies are;¹²⁴ thus, if the legitimacy of agency action is to be justified by the ability of the electorate to pass on an administration's policy, an efficacious system of centralized review is ultimately desirable. Conversely, OMB and OIRA may be subject to the same capture problems as other institutions;¹²⁵ if so, one can imagine situations in which it would be desirable for agencies to make policy without OMB supervision because the agencies might well be more accountable than OMB. Here, a lack of empirical information — and the difficulty of analyzing such a problem objectively — leaves us with arguments for each position.

Other arguments regarding the efficacy and desirability of centralized review are similarly equivocal as applied to OIRA avoidance. One might support centralized review on the simple theory that the President has the power under Article II to require that the executive agencies submit their plans to him before taking action, and presumably the President intends review to be efficacious. On this logic, it seems absurd that the President would intend for executive agencies to violate his own order. However, presidents are pragmatic: presumably E.O. 12,866 was issued with the knowledge that agencies would act strategically, and that OIRA did not have the capacity to review all agency action; indeed, OIRA's inability to do so was one of the primary lessons of E.O. 12,291.¹²⁶ Additionally, a President is presumably cognizant of the possibility of disputes between OIRA and agency heads; one imagines that in some set of cases, the President would side with the agency and not OIRA. A President thus might desire to cut OIRA out of the regulatory equation, without the disagreement rising to a point where he would find it necessary to replace the OIRA Administrator and her Deputy. For example, a President might want an agency to take action without OMB approval, thereby potentially shifting blame, or resulting in comparatively expeditious agency action, without appearing cavalier about centralized review.

Finally, one's support of or opposition to centralized review is likely linked to one's perspective regarding agencies' expertise in promulgating rules and regulations. On the one hand, agencies' comparative expertise in rulemaking may be the strongest argument in favor of avoidance, given that OIRA's review, as Katzen noted, has a substantive as well as a procedural component.¹²⁷ Indeed, OIRA has a comparatively small staff of economists, only a few of whom deal with

¹²⁴ See DeMuth & Ginsburg, *supra* note 55, at 904–05.

¹²⁵ See generally Bagley & Revesz, *supra* note 6.

¹²⁶ Arbuckle Interview, *supra* note 51.

¹²⁷ See Exec. Order No. 12,866, § 3(f)(4), 3 C.F.R. 638, 642 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

each agency's actions.¹²⁸ On the other hand, OIRA *is* expert when it comes to the basic requirement of centralized review: cost-benefit analysis. It is thus again unclear on this account whether OIRA avoidance is desirable.

How might a President and his OMB work to minimize OIRA avoidance if doing so comported with a President's policy goals? As Katzen notes, E.O. 12,866 increased OIRA's ability to review agencies' action by modifying the relatively rule-like structure of E.O. 12,291 to give OIRA the power, but not the duty, to review agency action ostensibly having an economic impact of less than \$100 million. One could imagine that E.O. 12,866 could be similarly redrafted in an attempt to reduce the incentive to strategically avoid the \$100 million threshold in particular. However, simpler solutions might be most efficacious: a President could attempt, after negotiation with Congress, to increase OIRA's funding. OIRA's staff, though expert in their disciplines, are almost overwhelmed by the review process: "twenty-two OIRA staff are responsible for reviewing six hundred regulations a year — or twenty-seven per analyst per year, or about one every two weeks."¹²⁹ Simply increasing OIRA's scarce resources would allow it to better deal with agency action designed to thwart review.

V. CONCLUSION

This Note has attempted to demonstrate that agencies may well take advantage of their incentive — provided by the executive orders governing regulatory review — to avoid presidential management of the regulatory state. It has provided a sketch of the history of centralized review of the regulatory state, useful information gleaned from interviews with former OIRA officials, and an empirical analysis of the data provided to OIRA by the agencies. It has also attempted to explain potential reasons for OIRA avoidance, discuss whether avoidance is ever normatively desirable, and suggest what a President desirous of more efficacious review might do to combat avoidance. Whether agency behavior of this type is ever appropriate deserves future discussion. In any event, OIRA avoidance is an issue with which the President, OMB, and Congress should be concerned.

¹²⁸ See Michael A. Livermore, *Cause or Cure? Cost-Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENVTL. L.J. 107, 119 (2008).

¹²⁹ *Id.*