

Defragmenting the Regulatory Process

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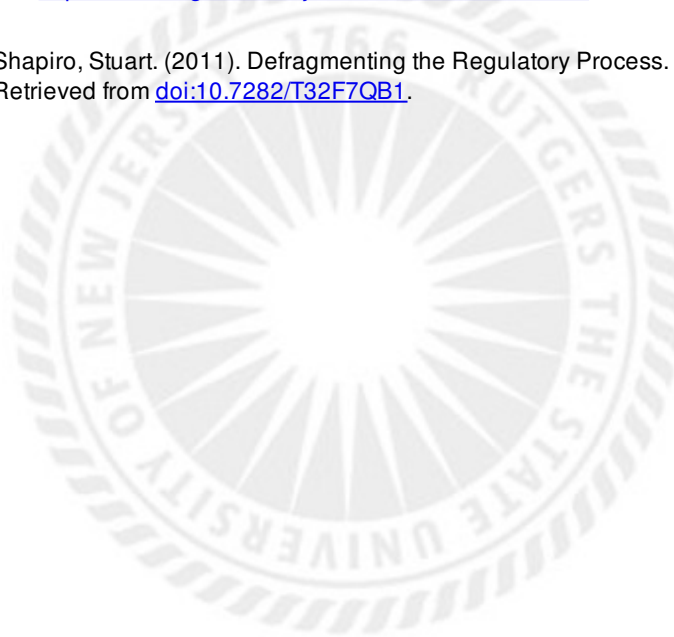
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Defragmenting the Regulatory Process^{*}

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Abstract

The regulatory process is often criticized for being cumbersome and slow, much like a computer whose hard drive is fragmented by files no longer used or useful. Like such a computer, the regulatory process contains many requirements of dubious utility. These include the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and numerous executive orders. While other parts of the regulatory process such as notice and comment and cost-benefit analysis have received much more academic attention, these other parts of the process deserve examination as well. This paper argues that such an examination will reveal that these statutes and executive orders add little of value to the regulatory process while consuming agency resources. An improved requirement for cost-benefit analysis with distributional analysis could easily replace virtually all of these requirements and improve regulations while reducing the time needed to promulgate regulations.

Keywords: Regulation, cost-benefit analysis,

1. INTRODUCTION

The federal regulatory process is under intense reexamination. Recently, the Office of Management and Budget (OMB) solicited comments¹ on the revision of Executive Order 12866,² which requires agencies to conduct regulatory-impact analyses and establishes oversight of the regulatory process by the Office of Information and Regulatory Affairs (OIRA). The request for comment yielded more than 130 responses, many of which were extensive and original.³

Many of the comments focused on the role of cost-benefit analysis and on risk assessment.⁴ Others focused on the propriety of presidential oversight over agency regulatory decisionmaking.⁵ These are rightly considered critical issues in the regulatory process. Indeed, most of the academic literature on the regulatory process focuses on these issues as well as on the notice-and-comment process. However, there is also a vast reservoir of other requirements imposed on rule-making agencies; these requirements have received little attention from scholars or practitioners. A number of these requirements apply to all regulations, and therefore any discussion of improving regulations that address environmental, security, and health risks should include an awareness of them.

Many of these other requirements are statutory, such as those set out in the Regulatory Flexibility Act (RFA)⁶ and the Paperwork Reduction Act (PRA).⁷ Others are

found in executive orders instructing agencies to analyze the impacts of their regulations on various constituencies. Although agencies treat many of these requirements in a pro forma manner, the Government Accountability Office (GAO) has found that a subset of the statutory requirements consume significant agency time and resources.⁸

The consumption of agency resources would not be an issue if these less frequently discussed procedures produced tangible benefits such as regulations that are more economically efficient or help particular populations more than they would otherwise. Do they? There has been almost no academic work assessing these procedures, but I will argue below that their impact on the content of regulations is probably very small. This conclusion is supported by evaluations by the non-partisan Government Accountability Office (GAO), the Office of Management and Budget (OMB), and by such academic studies as do exist.

Furthermore, although most of these procedural requirements were implemented to reward particular constituencies, in practice they appear to be of very limited assistance, even to their intended beneficiaries. Absent an impact on regulatory substance, one is left with arguments that the symbolic benefits of these requirements (highlighting the burden of paperwork, giving small businesses or families or others a privileged place in regulatory debates) is worth the costs.

I argue here for "defragmenting" the regulatory process. When a computer does

not operate as quickly as possible, even though there is sufficient memory, often it is because the computer is "fragmented."⁹ Files are inefficiently stored, duplicative, and taking up computer memory when they do not need to. Similarly, the regulatory process is fragmented. There are too many requirements that do little to improve regulations. Many of the requirements duplicate work that could be done in a good cost-benefit analysis.

Removing these procedures will free up agency time to write regulations and focus on those procedures, like public comment and cost-benefit analysis, that do have the potential to change regulatory outcomes. Alternatively it could save taxpayer dollars by increasing agency efficiency. Many of these procedures have their largest effects on regulation intended to reduce risks such as environmental or public health regulations. The article proceeds as follows. In the next section (II), I review literature on cost-benefit analysis, executive review, and notice and comment, the aspects of the regulatory process that have gained the most attention. In Section III, I review the limited literature on the many unexamined procedures, and I evaluate the usefulness of these procedures. I conclude in Section IV by arguing for a simpler, defragmented regulatory process, though I acknowledge the political obstacles to achieving this goal.

2. THE FREQUENTLY EXAMINED PORTIONS OF THE REGULATORY PROCESS

The procedural requirements within the federal regulatory process that have received the most attention from scholars are notice and comment, cost-benefit analysis and presidential review. What follows is a brief summary of academic analysis of these three procedures.

The notice and comment process has its modern origins in the Administrative Procedure Act. Agencies are required to publish a notice of proposed rulemaking, solicit public comments on the proposed rule, and respond to those comments in a preamble to the final rule. Political scientists have produced various works examining the role of notice and comment in the rulemaking process. Much of this literature indirectly assesses the question of whether the notice and comment process adds value to the regulatory process. Golden found that in eleven case studies, public comments were unlikely to lead to significant changes.⁽¹⁾ West found that the role that comments played most successfully was to provide information to political overseers about constituents' views. In sixteen out of his forty-two cases, rules were altered in a “significant (but not fundamental) way.”⁽²⁾ Yackee examined 40 rules from four agencies and found that comments made a difference on low salience rules. She notes, “the bureaucracy often changes its implementation of public policy to better match the level of government regulation suggested by interest group commenters.”⁽³⁾

In sum, the recent literature suggests that public comment plays a limited but useful role in some rulemakings. Some have argued that the movement toward electronic

rulemaking has the potential to increase the utility of public comment.⁽⁴⁾ This utility, coupled with the fact that notice and comment provides an element of democratic oversight to the rulemaking process,⁽⁵⁾ suggest that notice and comment should and will continue to remain a part of the rulemaking process.

The role of OIRA has also received considerable attention. Executive Order 12866 gave OIRA two roles in the regulatory process; it is the guardian of cost-benefit analysis (CBA) and enforcer of presidential oversight.⁽⁶⁾ The cost-benefit analysis requirement, requires agencies to calculate the costs and benefits of all rules with an impact of more than \$100 million in any given year. Cost-benefit analysis has been alternately criticized by supporters of regulation for subverting important regulatory goals,⁽⁷⁾ and by opponents of regulation as ineffective in achieving its intended purpose of making regulations more economically efficient.⁽⁸⁾ Recently, a literature has emerged arguing that cost-benefit analysis can be modified so that it favors regulatory goals.⁽⁹⁾ This newer literature has served to marginalize opponents of CBA to some degree.

Despite a lack of consensus on the actual impact of cost-benefit analysis, advocates on both sides of the debate agree that cost-benefit analysis has the potential to play an important role in decisionmaking. Case studies of CBA have argued that analysis can have impacts in certain circumstances.^(10,11) While advocates (and scholars) disagree about whether this role is positive or negative, the fact that cost-benefit analysis has been the subject of debate for nearly three decades indicates its potential influence. With the

appointment of Cass Sunstein, a well-known advocate of cost-benefit analysis,⁽¹²⁾ as OIRA Administrator by President Obama, it is clear that despite the criticisms cost-benefit analysis is here to stay.

And scholars have put forward compelling arguments as to why the continued presence of CBA in the regulatory process is a good thing. Aside from the classic economic argument that CBA helps maximize net benefits to society, advocates have argued that CBA can increase transparency⁽¹⁰⁾ and can compensate for heuristics and biases that lead individuals to advocate for policies that are not necessarily in their interests.⁽¹³⁾ These heuristics and biases particularly plague public perceptions about risk and hence public reactions to risk regulation.

As for the other aspect of OIRA's function, most scholars seem to agree that presidential oversight does have an influence on the regulatory process. Kagan, citing the Clinton Administration's use of executive review, argues that the president is uniquely positioned to enhance both the accountability and the efficiency of administrative decisions.⁽¹⁴⁾ Others support executive review on the grounds that it yields better management of executive agencies and implementation of a uniform regulatory policy;⁽¹⁵⁾ that it encourages policy coordination, political accountability, and more balanced decisionmaking; and that the president is more likely to advance national over factional interests.⁽¹⁶⁾ In the late 1980s, the Administrative Conference of the United States and the American Bar Association endorsed executive oversight of the regulatory process.⁽¹⁷⁾

Critics writing during the Reagan Administration contended that executive review gave unelected bureaucrats authority over Cabinet officials who were supposed to be responsible to Congress.^{10 (18,19)} Schultz-Bressman and Vandenberg criticize the lack of transparency in White House oversight and the overemphasis on reducing regulatory costs instead of maximizing regulatory benefits.⁽²⁰⁾ Like cost-benefit analysis, presidential oversight produces varied normative evaluations among scholars. Scholars across the ideological spectrum also agree that the President has considerable incentive to oversee agency regulatory decisions. They also agree that the courts have consistently validated presidential oversight. For these two reasons, presidential oversight will stay as part of the regulatory process and for the reasons detailed in the paragraph above, it is likely to be beneficial.

Notice and comment, cost-benefit analysis, and executive review are all prominent parts of the regulatory process and will remain so for the foreseeable future. While the effects of each one are still debated, there is a rough consensus that all three play important roles and will likely continue to do so. However, as mentioned above, there are many other steps in the regulatory process that have received much less attention.

3. THE LESS EXAMINED PORTIONS OF THE REGULATORY PROCESS

While academics have devoted less attention to many other aspects of the regulatory process, such as the Paperwork Reduction Act, and the Regulatory Flexibility Act, the same is not true of GAO. A recent GAO report⁽²¹⁾ gave an overview of the entire regulatory process. The report compiled a list of the requirements that agencies must follow when promulgating a regulation. Their table on the most commonly applicable requirements is reproduced in Appendix I .

GAO studied 139 "major" rules in its report and concluded:

In the 139 major rules we reviewed, the agencies mentioned at least 29 different broadly applicable requirements, but most rules only triggered a handful of the requirements . . . [T]he only analytical requirements triggered by more than 45% of all rules were the PRA, the RFA, and Executive Order 12866 (GAO 2009 at 25-26)

Agencies emphasized the impacts of the PRA and the RFA.

Officials from case-study agencies identified two long standing analytical and procedural requirements, the PRA regarding information collections and the RFA regarding analysis of rules' effects on small entities as having had more significant effects on time and resources than the more recent requirements¹¹ . . . Agency officials at FDA and SEC reported that compliance with the PRA information collection requirements may add a year or more to the timeline of regulatory development (GAO 2009 at 28).

The Executive Orders

The Executive Orders, the PRA, and the RFA, are rarely discussed in the academic literature. An analysis of the executive orders is the most straightforward. All of the Executive Orders (with the exception of E.O. 12866 which gives OIRA regulatory review authority) have several things in common. First, they direct regulating agencies to consider the impact of their regulations on some constituency (Native American tribes,

state and local governments, children and families) or some sector (energy, environmental justice, property rights). Second, agencies routinely fulfill their obligations with one-paragraph summaries in the preambles to their regulations. Many rules contain a sentence, like the following, asserting that the impact on constituency or sector is insignificant:

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.¹²

Wagner gives a particularly striking example of an EPA air-pollution regulation in which two of these executive orders (No. 12898 on environmental justice, and No. 13045 on children's health) are deemed inapplicable, even in a case where they clearly should have applied.⁽²²⁾ This is evidence that agencies can ignore these executive orders whenever doing so suits their needs. Finally, the GAO report indicates that few agencies consider any of these executive orders, hurdles to issuing regulations.

As such, leaving these executive order requirements in place or removing them is likely to have no substantive impact on regulatory decisions. The pro forma language used to fulfill the requirements of these executive orders indicates a general lack of effort to fulfill the intentions of the executive orders. From the point of view that agencies should only be required to do things that have some likelihood of actually improving their regulations, it would be better to revoke these executive orders. There is little doubt that the orders were issued with noble intentions. However, even their strongest advocates

would have a hard time arguing that the orders have had anything approaching their intended impact.

Advocates could argue that the executive orders need to be more strictly enforced. The difficulty with this argument is that greater enforcement would have significant costs. OIRA, the likely locus of such enforcement is already significantly burdened by its responsibilities under Executive Order 12866 and the Paperwork Reduction Act. New offices within agencies could be formed or existing offices could be strengthened or refocused. However, these executive orders are designed to serve such a wide variety of constituencies that finding individuals capable of examining the impacts of regulations on all of them (and then arguing with powerful constituencies within their agencies to protect these interests) would be a significant and perhaps insurmountable challenge.

The Paperwork Reduction Act

The Paperwork Reduction Act (PRA) was passed in the waning days of the Carter Administration. It created OIRA, and gave it the power to coordinate information policy, and review any agency's collection of information from ten or more people. The PRA serves a myriad of intended purposes: it has, for example, been successful in managing and coordinating information, as well as in highlighting the burden of paperwork on the American public.

The PRA places requirements on agencies any time they wish to collect information from 10 or more people or entities. These requirements include an assessment of the burden placed on respondents to the information collection, and an assessment of whether the utility of the information to the government justifies this burden. They must also detail steps taken to minimize the burden. The agency must publish two notices in the Federal Register informing the public of an opportunity to comment on the information collection. These requirements apply to information collections in regulations as well as all other information collections.¹³ For the purposes of this paper, I will just evaluate only the regulatory implications of the PRA.

Academic literature evaluating the PRA is limited. However, OIRA puts out an annual report, its "Information Collection Budget," that is informative on this point. In 2009, the report observed that over the past ten years, the information burden on the American public has increased from 7 billion hours to over 9 billion hours. While this is mainly due to demographic changes (e.g., a greater number of people are filing tax returns) and statutory changes (e.g., new information collections required by homeland-security statutes), the effectiveness of the PRA in reducing burden has never been demonstrated.

The idea that the PRA has not accomplished its statutory goals has also been voiced by GAO in several reports on the Act.^(23,24,25) In October 2009, OIRA solicited comments on the PRA and possible reforms to it.¹⁴ Most of the comments indicated that

the PRA was in need of significant improvement and that it consumed considerable agency resources. There were also numerous comments suggesting that the PRA did little to improve information collections.¹⁵ On May 28, 2010, OIRA issued guidance encouraging agencies to use “generic clearances” when collecting information. This will streamline the PRA process for some information collections.

Furthermore, the core test of the PRA is whether the practical utility of an information collection justifies the burden it imposes on the public. This is much like the test in Executive Order 12866, which asks agencies to determine whether the benefits of a regulation justify its costs. Practical utility could be incorporated into the benefit side of a cost-benefit analysis and paperwork burden is already considered regularly as part of the costs of regulations. If the PRA was eliminated from the regulatory process, a well done cost-benefit analysis would be able to perform the same function.

Would eliminating the regulatory portions of the PRA provide any benefits? As noted above, agency officials told GAO that the act adds nearly a year to the regulatory process.⁽²²⁾ This may include the delay associated with securing PRA approval for information collections designed to support eventual regulations. While the one-year estimate deserves a healthy dose of skepticism -- as agency officials are likely to be prone to overestimate the effect of anything that creates more work -- the PRA does have built in time frames that ensure a certain amount of delay for the regulations themselves.

Eliminating this delay would streamline the regulatory process and allow the faster promulgation of regulations that provide benefits for society.¹⁶

The Regulatory Flexibility Act

Congress passed the Regulatory Flexibility Act in 1980, the same year as the PRA. Under the Act, agencies must perform a Regulatory Flexibility Analysis for any regulation that will "have a significant impact on a substantial number of small entities." This analysis requires discussion of alternatives to the regulation and efforts by the agency to minimize the impact of the regulation on small businesses. The Environmental Protection Agency and Occupational Safety and Health Administration are required to convene panels of small businesses early in the regulatory process to make suggestions for their regulations.¹⁷

The primary source of information on the impact of the RFA is the Office of Advocacy within the Small Business Administration. The Office of Advocacy has a considerable stake in defending the RFA since the RFA gives it a role in the regulatory process. The Office of Advocacy has claimed that the RFA has saved small businesses \$70 billion -- \$11 billion in FY 2008 alone^{18 (26)}-- but these numbers have never been verified by independent sources. While Keith Holman, a former Chief Counsel of Advocacy, was able to provide a few examples of regulations that were made more flexible for small businesses, it is impossible to tell whether the RFA was the only (or

most important) cause of these improvements.⁽²⁷⁾ The cost-benefit-analysis requirements of E.O. 12866 may also have contributed to these changes, and might even have caused them in the absence of the RFA.

External studies have cast serious doubt on the efficacy of the RFA. The primary way that agencies become subject to the act is by promulgating regulations that "have a significant impact on a substantial number of small entities." Shive notes that the agencies, however, are permitted to articulate their own definitions of the terms "significant impact" and "substantial number," and courts grant agencies a great deal of deference.⁽²⁶⁾ Thus, it is relatively easy for agencies to avoid making changes that the Act might seem to require.^{19 (28)}

GAO has conducted a number of studies on the RFA. GAO concluded in 1994 that "agencies' compliance with the Act varies widely."⁽²⁹⁾ In 2001, reporting on the RFA and on subsequent amendments, GAO said that, "their full promise has not been realized."⁽³⁰⁾ Finally, in 2006, GAO noted the problem described by Shive, above "A recurring finding was that uncertainties about RFA's requirements and key terms, and varying interpretations by federal agencies, limited the Act's application and effectiveness."⁽³¹⁾ The Congressional Research Service has echoed these concerns.⁽³²⁾

The analysis of costs conducted within a cost-benefit analysis generally focuses on the cost to businesses. It would not be difficult to break out the benefits and costs of a

regulation on small businesses. Requiring a separate RFA is time consuming and in many cases redundant. As described above, the RFA has probably had limited benefits for small businesses. At the same time, it increases agency costs and to the extent that it delays socially beneficial regulations, it imposes significant social costs.

The unexamined portions of the regulatory process have probably remained so for a reason. Their costs have largely been borne by regulatory agencies (and therefore not visible to the public or the focus of interest group attention), particularly in agencies that regulate in the area of risk reduction. To the extent that they delay beneficial regulations, they may produce significant net social costs.⁽³³⁾ Yet these costs may be hidden, meaning that these statutes do not get criticized to the same extent as cost-benefit analysis or the recent Bush regulatory reforms which have gotten significant attention from advocacy groups because of their controversial origins. The implementation of these unexamined portions of the regulatory process is carried out in the bowels of the bureaucracy. The opportunity costs of not allowing agencies to work on other tasks or having smaller agencies is invisible.

In addition to having a potentially significant cost, these procedural requirements have few benefits, either from a social welfare perspective or to the constituencies they were enacted to help. With the exception of the Small Business Administration's favorable (but hardly neutral) assessment of the RFA, there have been no demonstrations that any of these procedures lead to better, less costly, or more protective regulations. In

fact, despite the existence of the procedures, small businesses have experienced an increased paperwork burden and higher regulation-related costs.²⁰ The overall level of regulation has also increased. One could argue that these metrics would be higher if the procedures were not in place, but there is no evidence to support this claim.

It is hard therefore to make anything other than a symbolic argument (such as "small businesses deserve a seat at the table when regulatory decisions are made") that the procedures discussed in this section should be kept in place. Giving symbolic weight to particular parties in the regulatory process is not without value. It is unclear, however that such symbolism is worth the cost to agencies, and the cost imposed by regulatory delay.

What would a regulatory process look like if these requirements were removed? I now turn to a description of a defragmented or simplified regulatory process.

4. ARGUING FOR A SIMPLER REGULATORY PROCESS

Eliminating the procedures discussed in Part III above (the Executive Orders and the PRA, and RFA statutes) would streamline, defragment, and "clarify" the regulatory process and regulations themselves.²¹ No longer would preambles to regulations be cluttered with off the shelf language asserting that the agency was complying with these statutes. Regulations would be easier to understand and to evaluate. Agencies wouldn't

have to spend time achieving pro forma compliance with the language of the PRA and the RFA without actually achieving the goals of these statutes. So what is the downside?

With the possible exception of the Paperwork Reduction Act, each of these procedures was put in place to satisfy a particular constituency. Small businesses vigorously support the Regulatory Flexibility Act. Each of the executive orders was put in place to satisfy a constituency that cares a great deal about the issues addressed. Standard political science teaches that when benefits of a regulation or statute are concentrated and the costs are diffuse, the group that receives the benefit will lobby much harder than those bearing the costs.⁽³⁴⁾ Small businesses will fight hard against attempts to repeal or weaken the Regulatory Flexibility Act. Those who bear the costs of such statutes (agencies and the beneficiaries of regulation) will not mount a similar fight, in part because of the diffuse nature of those who bear the costs and in part because of the hidden costs.²² Repealing these acts and executive orders is therefore a considerable political challenge.

In order to address this political challenge, it behooves us to imagine what the regulatory process would look like if these statutes and executive orders were repealed. The notice and comment process would remain at the center of rulemaking and continue to fulfill the participation requirements of the PRA and RFA. Cost-benefit analysis offers more possibilities for enhancing the role of particular interest groups that the government believes should have special standing in the regulatory process. As noted above, cost-

benefit analysis is controversial;⁽⁹⁾ however it is clear that cost-benefit analysis is here to stay. Also techniques for cost-benefit analysis are particularly sophisticated in areas of risk reduction and in dealing with uncertainty, the same policy areas where these procedural requirements most often apply.

There are many reasons to be skeptical that cost-benefit analysis can make up for some of the things that would allegedly be lost in repealing the PRA, RFA, and the executive orders. First among these is the concern that cost-benefit analysis as it is currently constituted does not have the impact on regulations that is intended.^{23 (8)} However, one of the primary reasons for the limited effect of cost-benefit analysis is that CBA requirements are not in statute and hence not judicially reviewable. The instructions to agencies on how to correctly conduct a cost-benefit analysis are in Executive Order and an OMB circular.

Making the quality of a cost-benefit analysis judicially reviewable would have considerable appeal to those who would be upset about losing the regulatory requirements in the PRA, RFA, and executive orders. Even if the requirement was only that agencies use analysis to justify their regulations (as is the case in the current executive order) and not apply a strict cost-benefit test, judicial review would force agencies to be more careful in their analyses and more transparent in their assumptions. This alone would lead to better analysis and hopefully better regulations.

In addition, there have been numerous calls for agency cost-benefit analyses to do more to incorporate equity concerns.^(11,35) Several scholars have suggested concrete methods to integrate analysis of efficiency and equity. The requirement to do distributional analysis could also be codified and made judicially reviewable. If Congress were to decide that cost-benefit analysis should consider the impacts of regulations on other groups (such as small businesses), this could also be made part of such a statutory requirement.²⁴ This could also mollify small businesses upset about the repeal of the RFA.

Would a statutory requirement for a high-quality cost-benefit analysis with distributional impacts make for better policy? Would it be politically feasible? I think the answer to the first question is relatively clear. As discussed above, the current regulatory framework has done little to improve regulations or even help the constituencies of particular statutes. Cost-benefit analysis has the potential (often unrealized) to contribute to policy and the addition of distributional components to cost-benefit analysis only makes this potential greater.

As for the political feasibility, the groups that oppose cost-benefit analysis would likely support the repeal of other burdens on the regulatory process but would obviously oppose enhancing the role of cost-benefit analysis. The constituencies who would oppose repealing the RFA, and parts of the PRA would have to be convinced that judicially reviewable distributional cost-benefit analysis would result in regulations at

least as favorable to them as the current framework. This is a tall order but should not be an impossible one especially since the existing statutes appear to do little to help these constituencies.

Finally it is clear that OIRA review will remain as part of the regulatory process. Freed from its responsibilities under the PRA and the RFA (as well as it's responsibility for ensuring that all of the Executive Order "boxes are checked"), OIRA will be able to better focus on the substance of regulations and the quality of analysis. The defragmentation of the regulatory process would also defragment OIRA's role and better allow them to oversee regulation from the executive branch.

This paper has laid out the case for defragmenting the regulatory process by repealing numerous statutes and executive orders and replacing them with enhanced cost-benefit analysis. The case is largely based on the limited impacts of the current regulatory procedures and the delay they impose on the regulatory process. Further research into these statutes would help flesh out this argument. Scholars should focus on the Regulatory Flexibility Act and the Paperwork Reduction Act and attempt to quantify their impacts. If particular pieces of these acts work well,²⁵ then they should be maintained or enhanced. If not then these requirements are simply making it harder for agencies to pursue their missions without producing any benefits to society or to particular groups.

Appendix I GAO Chart on Rulemaking Requirements

Table 1: Rulemaking Requirements Generally Applicable to Major Rules

Source of requirements	Characterization of agencies' responsibilities
Requirements applicable to rules of all agencies	
Administrative Procedure Act	Procedures required for informal rulemaking, also known as notice-and-comment rulemaking
Congressional Review Act	Submission of rules to Congress for review
Endangered Species Act	Analysis of impact on endangered or threatened species
National Environmental Policy Act	Analysis of environmental impacts
National Technology Transfer and Advancement Act	Use of voluntary consensus standards
Paperwork Reduction Act (PRA)	Analysis of paperwork burden and submission to OIRA for approval of new information collections
Regulatory Flexibility Act (RFA)	Consideration of regulatory alternatives to lessen the burden on small entities
Requirements applicable to rules of cabinet departments and independent agencies, but not to rules of independent regulatory agencies	
Unfunded Mandates Reform Act	Analysis of costs and benefits of federal mandates and consideration of alternatives
Executive Order 12372	Consultation with state and local elected officials
Executive Order 12630	Analysis of impact on constitutionally protected property rights

Executive Order 12866	Submission of significant rules for OIRA review and analysis of costs, benefits, and regulatory alternatives
Executive Order 12898	Consideration of environmental justice impact on minority and low-income populations
Executive Order 12988	Ensuring clarity of regulatory language regarding legal rights and obligations
Executive Order 13045	Evaluation of environmental health or safety effects on children
Executive Order 13132	Consultation with state and local officials on federalism implications
Executive Order 13175	Consultation with Indian tribal governments
Executive Order 13211	Analysis of effects on energy supply, distribution, or use

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⁶ Pub. L. 96-354 94 Stat 1164 (1981) amended by Small Business Regulatory Enforcement Flexibility Act of 1996 Pub. L. 104-121. 110 Stat 857 (1996)

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⁸ The PRA requires preparation of an "Information Collection Request" and an additional comment period. The RFA requires preparation of a detailed Regulatory Flexibility Analysis.

⁹ <http://en.wikipedia.org/wiki/Defragmenting> (last viewed July 20, 2009).

¹⁰ An outstanding overall summary of the debate over executive control can be found in Steven Croley.⁽³⁶⁾

¹¹ Yackee and Yackee, provide an alleged counterexample, citing a bureaucrat who claims that the RFA did not slow regulation down because the agencies just hire more lawyers to clear the procedural hurdles imposed by Congress.⁽³⁷⁾ However this just demonstrates that the RFA can lead to greater consumption of taxpayer dollars.

¹² *Federal Register* 74 FR 16126 April 9, 2009.

¹³ See, for example, *Information Collection Budget of the United States Government*, produced annually by the Office of Management and Budget. The 2008 report can be found on http://www.whitehouse.gov/omb/assets/omb/inforeg/icb/2008_icb_final.pdf.

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¹⁵ All of the comments can be viewed at <http://www.regulations.gov/search/Regs/home.html#docketDetail?R=OMB-2009-0020> last viewed February 5, 2010.

¹⁶ While some individual regulations do not result in quantified net benefits, in total the regulations promulgated each year yield net benefits to society. See http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/ (last viewed August 17, 2009) for all of the reports.

¹⁷ There are numerous other requirements in the RFA, including requirements for enforcement beyond the scope of this article.

¹⁸ Office of Advocacy *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272* available at <http://www.sba.gov/advo/laws/flex/08regflx.html>

¹⁹ See also GAO (2001).⁽³⁰⁾

²⁰ A report commissioned by the Small Business Administration argues that small businesses face a cost/employee for regulatory compliance that is 36% larger than bigger firms.⁽³⁸⁾

²¹ I am not proposing to eliminate the non-regulatory portions of these statutes. Information collections that are not part of proposed rules would still be subject to the Paperwork Reduction Act and the information management provisions of the PRA should remain intact.

²² Those who bear the costs of these procedures are those who reap the benefits of regulations, consumers of safer toys, safer foods, breathers of safer air, are not aware that these procedures impose costs upon them and would find it difficult to mobilize to repeal these statutes.

²³ CBA may still affect agency decisionmaking in ways invisible to researchers.

²⁴ Other improvements to CBA such as incorporation of ex-post analysis (see e.g. Greenstone)⁽³⁹⁾ could also gain the support of CBA advocates.

²⁵ For example, the SBREFA panels convened by EPA and OSHA early in the regulatory process have not been studied at all.