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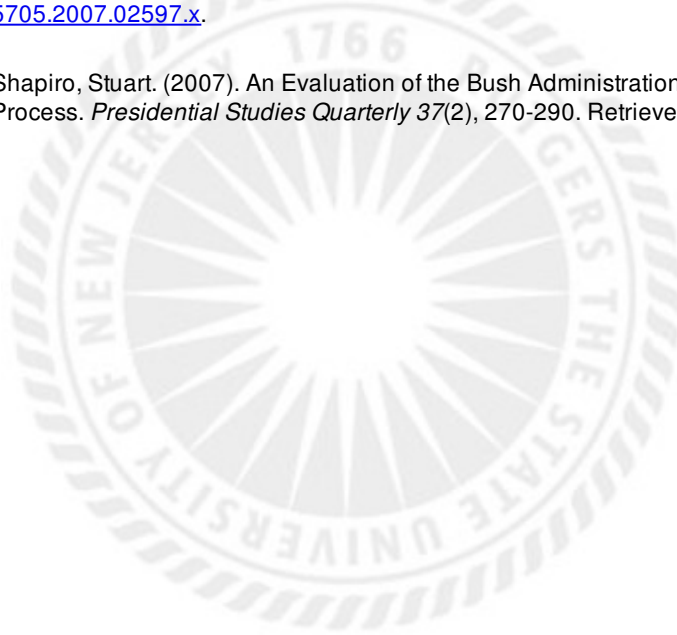
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An Evaluation of the Bush Administration Reforms to the Regulatory Process

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Abstract

The Bush Administration has implemented more reforms to the regulatory process than any of its predecessors. These reforms are often stereotyped as anti-regulatory. This article examines the reforms as a whole and asks which interests have been empowered by the Bush Administration regulatory reforms. I believe this method is a more effective way of assessing the impact of the reforms. I find that in addition to adding potential costs to the regulatory process, the reforms are likely to empower powerful interest groups and the presidency. Whether the impact of these reforms is pro-regulation or anti-regulation will depend on how a future administration more dedicated to regulatory protections uses them. I also lay out a research agenda to better empirically assess the impact of these regulatory reforms.

Biographical Paragraph

Stuart Shapiro is an assistant professor at the Edward J. Bloustein School of Planning and Public Policy at Rutgers University. He has written on the interaction between politics and the regulatory process. Recent publications including a case study of the ergonomics rulemaking in *Public Administration Review* and an examination of OIRA in the *Environmental Law Reporter*.

I Introduction

The first term of the Bush Administration was a busy time for aficionados of regulatory policy. In addition to heated debates on a number of substantive issues (such as the control of mercury emissions and the requirement that employers pay workers overtime), there have been a number of critical reforms to the regulatory process. The origin of these reforms has been the Office of Information and Regulatory Affairs (OIRA). Many of these reforms have been championed by the controversial administrator of OIRA, John Graham.

These reforms include the increased role of electronic-rulemaking, the implementation of the Information Quality Act (IQA),¹ the requirement that agencies use peer reviewers for critical information underlying regulations (OMB 2002), the use of "prompt letters" from OIRA to persuade agencies to take particular regulatory actions,² increased transparency in OIRA review of agency regulations, and the hiring of scientists in OIRA.³ The Bush Administration has been accused of being anti-regulation, and a number of these reforms have been cited as evidence by pro-regulation interest groups for this anti-regulatory philosophy (Citizens for Sensible Safeguards 2004).

This article is a review of the regulatory process reforms championed by John Graham's OIRA in the first term of the Bush Administration.⁴ Rather than attempting to view them as pro-regulation or anti-regulation, I believe it is more useful to ask to whom these various regulatory reforms likely to give power in the regulatory process and whether they raise the cost of issuing a regulation. I use existing analyses of the

individual reforms to argue that these reforms are likely to largely empower the President and those with access to the Executive Office of the President. Many also raise the cost of the regulatory process to agencies. The second of these impacts is clearly anti-regulatory in its results but the first is not necessarily so.

This article will argue for a more accurate criticism of the Graham reforms: that they will likely concentrate rulemaking power in a small group of interests with more established access, influence and power.⁵ The reforms could further tip the balance of power in regulatory policy toward powerful interest groups and away from agency bureaucrats, private individuals, and small businesses. While e-rulemaking in particular has been described as opening up the regulatory process, it is being implemented in a way that is more likely to render the public comment process meaningless than to increase the impact of public involvement (Noveck 2004).

I also highlight the ongoing need for empirical assessments of the Bush Administration reforms. The expectations of those academics who have analyzed the reforms are very different than the expectations that the Administration has voiced for these changes. When such empirical assessments occur they should not be limited to discussions of the pro- or anti- regulatory effects of the reforms but rather should examine whose voices have become more influential in the regulatory process as a result of the reforms.

This article is structured as follows: Section II examines theories of the administrative state put forward by Croley and others and maintains that the best way to evaluate administrative reforms is to determine whom they empower within the regulatory process. In Section III, I briefly summarize the regulatory reforms of the

past four years. Evaluations of these reforms are discussed in Section IV. In Section V, I discuss the argument that the primary aim of these reforms is to further “ossify” the regulatory process; in Section VI, I draw conclusions about the reforms' long-term substantive impact and lay out an agenda for future research on these reforms.

II Evaluating Regulatory Reforms

Debates about the wisdom of implementing regulatory reforms are usually polarized. Republican administrations or legislators⁶ usually propose changes to the regulatory process; pro-regulatory interests usually oppose them, on the theory that regulatory changes will make the regulations they support less likely to be promulgated. However, despite the bevy of changes to the regulatory process, agencies continue regulating at an astounding pace (Crews 2004). Pro-regulatory interests are wrong, therefore, in their assumption that the impact of reforms will merely be to impede the promulgation of regulations protecting the environment or public health. Procedural reforms are often intended to empower particular groups (McNollgast 1987). Rather than merely seeing reforms as anti-regulatory, I think it is more useful to evaluate reforms based on whom they are likely to empower.

Which groups may be empowered by regulatory reforms? In a work evaluating theories of the administrative state, Croley (1998) points us to several possibilities. The "public choice" theory predicts that the regulatory process will reward well-organized, well-financed interests. Because these well-financed interests will usually be the target of regulatory efforts, they will oppose most social regulation, supporting only those regulations that protect them from competition. This theory has been most forcefully articulated by economists (Stigler 1971;

Peltzman 1976). Croley (1998) argues that if the public choice theory is correct, the regulatory process should be designed to grant access more easily to powerful private interests than to the general public. In some limited circumstances, powerful pro-regulation interests may also have overcome the “free rider” problem and be among those who benefit from reforms that help well financed interests (Bosso 2005),

The second category described by Croley is the "neopluralist school." Neopluralists believe -- much like their pluralist predecessors -- that interest-group competition mirrors competition in the marketplace. Unlike public choice scholars, however, they contend that such competition does not always favor powerful interests (Becker 1983). If the pluralists are correct, reforms to the regulatory process will encourage participation in regulatory decisionmaking and favor the flow of information between regulators and interest groups (Croley 1998).

Croley calls the other two categories of theories the "civic republican" school and the "public interest"⁷ school. Civic republicans assume some public spiritedness among organized interests and view regulators as mediators who use the regulatory process to arrive at shared values (Reich 1985). If the civic republicans are correct, reforms to the regulatory process would encourage deliberation and participation.

These administrative theories give us three possible groups who may be empowered by procedural reforms, powerful interests, interest groups in general, or the public at large. Other works point us toward several other types of entities that a particular regulatory reform might empower. In an article focusing on the role of participation in agency decisionmaking, Rossi (1997) gives us a typology similar to Croley's, which he calls “Models of Agency Decisionmaking.” Of the three models

Rossi proposes, one is especially different from anything in Croley's theories; Rossi calls it the "expertocratic" model of agency decisionmaking. The expertocratic model views deliberation as dependent upon technical expertise. This is the traditional rationale for vesting power in bureaucracies:⁸ because -- made up of technical experts -- federal agencies are in the best position to have access to and to understand complex information needed to make policy decisions. The "expertocratic" model therefore predicts the empowerment of another group: agency technical experts. If this model is correct, reforms would tend to insulate the agency from public influences.

Political science literature suggests a fifth entity that regulatory reforms might empower. Political scientists discuss the use of administrative procedures to "stack the deck" and create a procedural environment for bureaucrats that leads to results desired by political officials (McNollgast 1987). Responding to the deck-stacking argument, Horn and Shepsle (1989) argue that procedures empower future political actors rather than constrain bureaucrats. Moe (1989) in particular has argued that the President has particular incentives to control bureaucratic actions and notes the increasing influence of the chief executive. Kagan (2001) shows how, during the Clinton Administration, various techniques, including those developed by Reagan and Bush, were used to drive regulatory policy in the opposite direction from the one intended by Clinton's Republican predecessors. She cites this as part of the evidence of the growing role of the President in the regulatory process. Therefore, another purpose of procedural reforms may be to empower the executive.⁹

Many of these purposes may not be mutually exclusive. A reform may empower the President and in doing so may help powerful interests with links to the Administration. A reform that empowers experts may also help the groups that employ these experts. I believe it is better to be over-inclusive in listing the entities that could be empowered and deal with any specific overlaps on a case by case basis. From the theories just discussed, we can extract five (non-exclusive) possible impacts of administrative reforms:

- Reforms can empower a (or multiple) powerful interest(s).
- Reforms can help interest groups generally.
- Reforms can aid deliberation by enabling the public at large to weigh in on regulatory decisions.
- Reforms can insulate experts and increase their influence.
- Reforms can increase the influence of the President.

I will use this 'empowerment' framework, below, to describe what researchers have had to say about the Graham reforms

III The Bush Regulatory Reforms

Of the many administrative reforms enacted over the first term of the Bush Administration, a significant number originated with John D. Graham, the controversial Bush appointment¹⁰ to lead OIRA. Some of the Graham's reforms have affected the entire regulatory process, while others have specifically affected the operation of OIRA. Graham acknowledged the impact of his reforms, saying

The changes we are making at OMB are not headline-grabbers: No far-reaching legislative initiatives, no rhetoric-laden executive orders, and no campaigns of regulatory relief. Yet we are making some changes that we believe will have a long-lasting impact on the regulatory state.”¹¹

The reforms pursued by Graham are varied. For example, his attempt to require peer review of scientific information supporting regulations has garnered headlines (Weiss 2004). Others, such as adding scientists to the staff of OIRA, have received little attention. Still others, such as Administration efforts to enhance electronic rulemaking, have been praised across the ideological spectrum.¹² The peer review guidelines and the OMB implementation of the Information Quality Guidelines have encountered vociferous criticism from opponents of the Bush Administration.¹³ Is it possible to find a consistent theme in the Bush Administration reforms? Below, I review the major changes to the regulatory process implemented by the Bush Administration, and in the next section I attempt to describe which constituencies they are likely to empower.

Electronic Rulemaking

Creating a regulatory system that relies more heavily on the internet has been an OMB priority. “E-rulemaking” has been one of the 24 presidential “e-government” initiatives shepherded by OMB. In an OMB report to Congress, the goal of the e-rulemaking initiative was described as “providing centralized access to the public for finding and submitting comments on federal regulatory material.” Achieving this goal is to be realized by pursuing three strategies (OMB 2003).

In the first stage of the e-rulemaking initiative, OMB has created a “one-stop” website, www.regulations.gov, that can be used to search all regulations open for public comment and to submit comments on them. The second stage of the initiative

is an electronic docketing system that will allow searches of all publicly available material on regulations past and present that went on line in late 2005.

The third stage for an electronic rulemaking system is

building a unified, cost-effective 'back room' regulatory management system to ensure efficiency, economies of scale, and consistency for public customers and the government (OMB 2003).

Invisible to the public, the goal of this system is to allow agencies to manage their internal regulatory processes more effectively. The stated goals of these three strategies are both to improve public access to the regulatory process, and to achieve cost savings for the government by eliminating redundant technologies.

Implementation of the Information Quality Act

The Information Quality Act (IQA) was passed as a rider on a 2000 appropriations bill.¹⁴ The IQA was little noticed when the bill passed. Because the statute was relatively ambiguous and no legislative history exists, it was left to OMB to interpret the guidelines for federal agencies (Wagner 2004). OMB issued, in the Federal Register, proposed and then final “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (OMB 2002).”

The guidelines apply to all agencies subject to the Paperwork Reduction Act (which is nearly every agency in the executive branch), and require these agencies to ensure the quality of the information they disseminate. OMB provides definitions for the components of "quality" (which were specified in the statute): utility, objectivity, and integrity. The guidelines also distinguish between “influential” and "ordinary: information¹⁵ and require agencies to subject influential information to a higher

standard of review. Information that agencies determine to be influential is also subject to standards (also defined by OMB) for reproducibility and transparency. The guidelines then instruct agencies to develop their own individual guidelines setting out definitions of quality particular to the agency (but within the bounds of the definitions specified by OMB) and creating a procedure whereby members of the public can challenge information disseminated by the agency. Over 130 agencies have issued their own information quality guidelines since the issuance of the OMB guidelines.¹⁶

An important question regarding the eventual impact of the IQA is its judicial reviewability. In the first judicial decision regarding this question, a district court decided that "Congress did not intend the IQA to provide a private cause of action."¹⁷ A second decision that reached the same conclusion was upheld by the Fourth Circuit Court of Appeals in March 2006.¹⁸ If upheld by the Supreme Court, this would make agency responses to complaints under the IQA non-reviewable. There have been discussions in Congress about making the guidelines judicially reviewable.¹⁹

Peer Review

Building on its information-quality work, OIRA issued draft guidelines proposing that all significant technical information supporting a regulatory action be peer reviewed. The guidelines outlined the peer review requirements, specifying who could serve as a peer reviewer and identifying the categories of technical information to which the requirements applied.

The draft guidelines applied to all "significant" regulatory information,

defined as information influential in agency decisionmaking. It imposed strict requirements on “especially significant regulatory information.”²⁰ For this rather widely defined class of information, there were limitations on who could serve as a peer reviewer,²¹ a requirement for a public comment period prior to the peer review, and no anonymity for peer reviewers. While agencies were allowed to select the peer reviewers (subject to a broad definition excluding those with conflicts of interest), OMB solicited comment on whether a centralized body should appoint the reviewers (OMB 2003).

The proposed guidelines resulted in 187 comments²² 55 of which were in favor either of the guidelines or a stronger version of regulatory peer review, and the remainder of which opposed the guidelines, in many cases vehemently. In May 2004, OMB published a more detailed second draft, altering key provisions and granting substantially more autonomy to the agencies to conduct peer reviews in their own fashion. Although the revised guidelines were more deferential to agencies' decisions on how to handle most types of scientific information, it still required them to meet numerous detailed standards for so-called “highly influential scientific assessments.” It left vague the process by which scientific information would be classified as “highly influential” but made clear that the OIRA Administrator would have a significant role in the process (OMB 2004).

The most important change from the 2003 draft guidelines was a significantly narrowed definition of “conflicts of interest.” OMB now merely said that “a reviewer’s financial ties to both regulated entities (e.g., businesses) and the agency

should be examined.” OMB received 56 comments on its revised draft.²³ According to OMB's summary of the comments,

A majority of the commenters [,] even those who oppose promulgation of OMB standards for peer review, noted that the revised draft was responsive to criticisms and significantly improved compared to the initial draft.²⁴

Sixteen of the new comments merely requested an extension of the comment period, while 24 supported the guidelines or thought they should be stronger and 16 opposed them. On January 14, 2005, OMB published a final information quality bulletin for peer review (OMB 2005); the final guidelines were much the same as the version published in 2004.²⁵

Reforms in OIRA Structure and Function

OIRA has served a dual purpose: reviewing agency cost-benefit analyses, and ensuring that regulatory agencies do not take actions opposed to the preferences of the President, since the Reagan Administration. The Administration of George W. Bush did not make any significant changes to Executive Order 12866, issued by President Clinton, which governs OIRA review of agency regulations.²⁶ Instead, however, John Graham implemented a series of changes in OIRA review. These changes have not gotten the attention of the reforms discussed above, but they may have equally profound impacts on the regulatory process.

The most significant of Graham's innovations in OIRA practices is the “prompt letter.” Described by Graham as an attempt to “initiate new regulatory actions when they are sensible and based on sound science and economics,”²⁷ it is a letter from the OIRA Administrator to the head of an agency urging a potential regulatory action. Prior to the adoption of a prompt letter, OIRA had been an entirely

reactive institution: its mission had been to review actions that agencies had already taken. Graham has sent fourteen prompt letters to federal agencies.²⁸ Agencies have specifically responded to nine of these letters, largely with vague descriptions of plans to implement the reforms suggested by OIRA. The goals of the prompt letters range from encouraging the Occupational Safety and Health Administration to promote defibrillator use in the workplace to encouraging the Fish and Wildlife Service to incorporate data on critical habitat designations for endangered species into the President's Geospatial One-Stop Initiative.

Graham has also changed the hiring practices at OIRA. Traditionally OIRA has been populated by economists or individuals with a significant amount of economic training. According to Graham,

we are hiring the first scientists and engineers at OIRA to accompany a cadre of economists, statisticians, and information technology specialists. We believe this more diversified pool of expertise will enable us to ask better questions about agency proposals.²⁹

This change has been little commented-upon but could both give OIRA greater capacity to become involved earlier in the regulatory process (when scientific issues are still being decided) and change the professional mindset of the agency.

Finally, Graham has significantly increased the transparency of OIRA's role in the regulatory process. During earlier Republican administrations, one of the chief criticisms of OIRA was that it had served as a secret backdoor conduit for industry influence on agency regulations (Morrison 1986). Graham said, "Through the Internet, it is now possible for the public to scrutinize how we use science and economics to stop bad rules and help agencies craft better ones."³⁰ While this may

be a bit of an overstatement (OIRA does not make public the reasons for its changes to the rules that are eventually published), the OIRA website now contains “return letters” for any rule that OIRA has returned to an agency³¹, information on all rules currently being reviewed by OIRA, and most importantly a listing of all contacts between OIRA staff and outsiders on any regulation that OIRA is reviewing.

IV Evaluating the Reforms

Taken together the reforms described in Section III significantly change the regulatory process. It can be argued that there has been no four-year period since the late 1970s and early 1980s when the regulatory process has changed as much. In that period, the passage of the Paperwork Reduction Act and the Regulatory Flexibility Act, and President Reagan’s adoption of Executive Order 12866, all added procedures to the regulatory process. Do the reforms enacted in the past four years represent a coherent attempt to move the regulatory process in a particular direction? Or are they unrelated changes, the net effect of which may be very difficult to determine?

As many of these reforms have been in place only a short time, few empirical assessments exist of their impacts. Such assessments would be the best arbiters of how these reforms affect the regulatory process. In this section I review what scholars (largely legal scholars) have had to say about the reforms. In most cases the conclusions of these scholarly works have been markedly different than the objectives stated by the Bush Administration when the reforms were implemented.³² I also suggest directions that scholarly research should take in order to empirically examine the reforms.

We must also keep in mind that other actors may yet have profound impacts on how the Bush Administration regulatory reforms function. Although regulatory reform has not been on the legislative agenda for several years, Congress may take actions to strengthen or weaken the reforms particularly if the party control in Congress shifts. The courts may also play an important role in determining the impacts of these reforms. I discuss the possible judicial reviewability of Information Quality Act complaints below. Courts may also play a role in the effect of regulatory peer review depending on the weight they give to peer reviews of significant regulations.

Electronic Rulemaking

The rhetoric surrounding electronic rulemaking is of a distinctly populist tone. The Administration claims that “[i]t will create a more citizen-centric regulatory process by improving on-line access to regulatory material.”³³ There is also some academic optimism about the potential for electronic rulemaking. Johnson (1998), for example, in discussing the internet's capacity to improve the rulemaking process, extols the broader participation that electronic rulemaking will allow. He emphasizes the hope that with more participants, it will be harder for small groups to hijack agencies, and it will be easier to hold agencies accountable for their decisions. The internet, he hopes, also has the potential to better educate citizens about regulatory initiatives. Zavestoski and Shulman (2002) also believe that e-rulemaking initiatives will increase participation, which they believe will be beneficial if, as in the case of the USDA organics rule,³⁴ more public comment translates into more deliberation .

Rossi (1997) sees an inherent tension between participation and deliberation. While participation promotes a breadth of involvement, deliberation promotes depth. Participation and deliberation may be complementary at low levels of participation, but as participation increases, deliberation decreases. Excessive participation can also crowd out thoughtful analysis and political accountability and lead to strategic obfuscation and poor decisionmaking. Herz (2004) and Coglianesi (2003), similarly, voice concern about bureaucrats tallying comments as if they were votes rather than engaging the substantive objections commenters raise.

There has been some recent work by political scientists on the question of who participates in the existing notice and comment process. Golden (1998) reviewed eleven rules from three agencies and found that in these cases, public comments were unlikely to lead to significant changes. She also considered whether the identity of the commenters affected whether agencies made changes in their regulations and found that it did not. She did note that although changes were unlikely, they did seem to occur when there was a consensus among a large number of commenters that a particular change was needed. West (2004) looked at forty-two rules and found that the role that comments played most successfully was to provide information to political overseers about constituents' views. Yackee (2005) examined 40 rules from four agencies that received between 2 and 200 comments and found that comments made a difference on low salience rules, particularly when commenters were in agreement on a change.

So do Bush Administration attempts to enhance electronic rulemaking capabilities represent a step forward in allowing greater participation in rulemaking?

Even if they accomplish this goal, are they likely to simultaneously lead to participation without deliberation? Noveck (2004) argues that as currently designed, electronic rulemaking will not improve the current system. The implementation planned for e-rulemaking does little more than move the current paper based system to the internet. Noveck further argues that increasing the number of comments while doing nothing to assist agencies in responding to the expected flood of comments, “pays lip service to participation while setting up the conditions to undermine its effectiveness.” In fact, if the increase in participation is significant, it may lead agency personnel merely to catalog comments rather than meaningfully consider them.

Noveck goes on to argue, “If anything[,] e-commenting arguably exacerbates the problem of everyone speaking and no one listening.” If this is indeed correct, the Bush Administration reforms are more likely to realize the fears voiced by Rossi and Herz rather than the hopes expressed by Johnson and by the Administration. Perhaps corroborating Noveck's concerns, Administration documents touting electronic rulemaking cite the likelihood of increased participation and access to the rulemaking process and remain silent on how agencies will react to a greater volume of comments.

It is tempting to view the movement toward electronic rulemaking as supporting a deliberative (or at least a pluralistic) vision of the administrative state. According to this view, by increasing the number of participants in the regulatory process, electronic rulemaking will decrease the influence of both powerful interests

and agency experts. An increase in the number of participants in decisionmaking decreases the influence of any particular party.

Noveck's argument suggests otherwise. Two reports by Shulman (2004, 2006) on stakeholder views of e-rulemaking supports Noveck's vision: e-rulemaking reforms, as currently proposed, are more likely simply to digitize the current rulemaking process than to make participation more meaningful. According to these stakeholders, overwhelmed by comments, agencies will be forced to choose between ignoring the comments or merely tallying the preferences they express. Agencies will, in turn, be likely to come to policy decisions by way of other means, which could include their own expertise, the influence of powerful interests (not dependent upon the public-comment process to get agencies' attention), or executive influence. Other aspects of the e-rulemaking initiative, including the user interface and the overall user friendliness were also criticized.

Future research on e-rulemaking should focus not just on the number of comments received but the nature of these comments and agency reaction to them. The skepticism voiced by Noveck and Shulman may be demonstrated in fewer changes between proposed and final rules, longer times to complete final rules, and comments that are more spam than substance. If this is how e-rulemaking changes the regulatory process, it could undermine a pluralistic or deliberatively democratic vision of the regulatory state by negating the limited influence that the public currently has through the notice and comment process.³⁵

Implementation of the Information Quality Act

Unlike electronic rulemaking, the information quality guidelines have been the subject of considerable controversy. The stated purpose of the OMB guidelines is to ensure that “agencies should not disseminate substantive information that does not meet a basic level of quality (OMB 2002).” The OMB guidelines apply to a wide variety of information disseminated by the government. The most important aspect of the guidelines is requiring agencies to set up a process to allow the public to challenge information disseminated by the government and to require agencies to respond to those challenges and allow appeals. Agencies are also required to report to OMB on their disposition of complaints and post their information quality correction requests on the Internet.³⁶

The IQA and the guidelines implementing it give external parties an additional chance to challenge agency regulations. Now, in addition to filing comments under the Administrative Procedure Act, and filing lawsuits against regulations once they are finalized, interest groups or the public can challenge the information used to support a regulatory effort. By giving OMB authority to become involved in agencies' responses, by requiring agencies to have an appeals process for rejected challenges, and by requiring agencies to post responses on the internet, OMB has endeavored both to ensure that agencies take information quality complaints seriously and to insert itself into the process of responding to those complaints.

There is considerable dispute over the actual impacts of the IQA. Pursuant to the conference report on HR 2673, the "Consolidated Appropriations Act of 2004," OMB was required to report to Congress on the implementation of the IQA. OMB

issued a report in 2004 characterizing the number of correction requests made under the agency guidelines as “relatively small.” OMB also argued that contrary to critics' concerns, it was not only industry that had requested corrections; IQA implementation had not slowed down the regulatory process; and the guidelines had not chilled agencies' disseminations of information (OMB 2003a). OMB Watch, a liberal watchdog group, sharply challenged these conclusions in its own report. According to the OMB Watch report, three quarters of information quality correction requests have been submitted by industry, and the total number of requests is triple the number claimed by OMB (OMB Watch 2004; McGarity et. al. 2005). These disputed figures make it difficult to evaluate the effect of the IQA upon the regulatory process and highlight the need for objective empirical assessments

A number of scholars have speculated about the long term impact that the IQA will have. This speculation has been largely fearful of the harm that the IQA will cause to the regulatory process. Wagner (2004) characterizes the IQA as “[i]mporting *Daubert* to administrative agencies.”³⁷ She argues that when agencies take on a quasi-judicial role, the line between science and policy decisions at an agency becomes blurred. The Act, Wagner argues, also gives those who want to litigate agency actions another forum in which to do so. As such, the complaint process favors those with extensive resources.³⁸ Lacko (2004) voices the related fear that the guidelines will “engender frivolous and unwarranted lawsuits . . . and have a chilling effect on the dissemination of useful information.”

Proponents and opponents of the IQA agree that much hinges on the unanswered question of the judicial reviewability of the guidelines. Opponents argue

that permitting judicial review would involve agencies in "collateral litigation that would siphon agency resources away from regulation."³⁹ Proponents argue that without judicial review, the guidelines would be rendered meaningless, and agencies free to blithely dismiss information correction complaints (Conrad 2003). As mentioned above, in the first two judicial opinions addressing this question, courts declined to review agencies' denials of information correction requests.⁴⁰

The fact that seventy-two percent of information quality complaints originated with industry, and many others with powerful Washington-based interest groups argues that the IQA and its implementing guidelines have to date served powerful interests (OMB Watch 2004).⁴¹ If agencies' denials are eventually found to be judicially reviewable, then these interests will gain even greater power over agency actions. In this scenario, the IQA and the OMB guidelines will likely empower powerful interests at the expense of agencies and less powerful interests.

If, on the other hand, agency denials are not found to be judicially reviewable, the extent to which the IQA empowers the powerful is less clear. Without judicial review, agencies will have the final say on whether a request/complaint is real or frivolous, whether challenged information challenged is "influential" and hence subject to higher standards, and whether to correct challenged information.⁴² In the absence of judicial review, an agency that wanted to push forward with regulatory efforts would not find it difficult to dismiss most of the information quality complaints it received.

Absent judicial review, the primary effect of the IQA may be increased presidential influence on the regulatory process. The IQA, through the complaint

process, gives OMB information earlier in the regulatory process regarding potential scientific issues long before a proposed rule is written. Regardless of its judicial reviewability, the IQA guidelines give OMB and the President another tool with which to influence agency decisionmaking.

Peer Review

Promulgated as an addendum to the information quality guidelines, the OMB peer review guidelines proved to be even more controversial. Like the IQA, the peer review guidelines have the purpose of improving the scientific basis for agency decisions (OMB 2005). As described above, the guidelines have gone through several iterations. Scholars and advocates have argued that even the toned-down final version, promises to have a significant impact on the regulatory process.

Peer review empowers experts outside of government to weigh in on agency policy decisions. Shapiro and Guston (2006) argue that this may create a "technocracy," which they define as the result of procedural displacement of public preferences by the preferences of technical experts. Such a displacement is consistent with an expertocratic view of government decisionmaking, but unusual in that the experts being empowered are outside rather than inside government.

This raises the question of whether the experts who will be playing a more prominent role in influencing regulatory policy may represent interests besides those of "sound science." Indeed, one of the chief issues raised by critics of the initial guidelines was over the OMB definition of "conflict of interest."⁴³ Many groups were concerned that OMB was excluding scientists who received agency funding from serving as peer reviewers, but was not giving the same treatment to scientists

associated with the regulated industry. OMB's revised guidelines clarified the conflict-of-interest standard. Nevertheless, the potential for industry-influenced peers remains, given that industry has a disproportionate share of resources with which to produce scientific studies. A small number of pro-regulation interest groups (most likely environmental groups) may be able to keep up (Bosso 2004). This is consistent with a view of the regulatory process as designed to secure rents for already powerful interests.

Other details of the peer review requirements send conflicting signals about who they will empower. On the one hand, agencies are directed to select the peers to conduct the reviews (OMB 2005); this would seem to promise the empowering of agency experts. If, on the other hand, agencies are severely constrained by the conflict-of-interest requirements, this power to choose reviewers will be relatively meaningless.

Regulatory peer review can be seen as empowering either technical experts or powerful interests. OMB describes its purpose as increasing the role of “sound science” in the regulatory process (OMB 2005). However, powerful interests, particularly industry, are most likely to be able to afford to produce the science to influence regulatory debates (Shapiro and Guston 2006). Therefore, unless peer review is implemented in such a way as to deliberately exclude industry scientists from playing a significant role,⁴⁴ it appears to empower the powerful. The revised guidelines go much further than the initial guidelines in establishing conflict-of-interest provisions that would make it difficult for industry scientists to participate as peer reviewers. However, by also emphasizing a need for balance among peer

reviewers, the new guidelines seem to guarantee that industry's point of view in scientific debates will be heard. Coupled with industry's advantage in funding and producing science, this guarantee appears to give regulated entities privileged access to the regulatory process.

The impact of peer review will take the longest to evaluate empirically of any of the reforms pursued by the Bush Administration. Whether Administration claims about the empowerment of experts or critical claims of empowering the powerful are valid, won't be known until a number of regulations go through the lengthy peer review process (or until it can be demonstrated that fewer rules dependent upon science are being promulgated).

Reforms in OIRA Structure and Function

The reforms in the functions of OIRA were among the first changes implemented by the Bush Administration but have received the least attention. There are virtually no academic studies that examine them. The reforms by and large have strengthened the ability of OIRA to oversee rulemaking in the executive branch. As discussed above, the three most prominent reforms have been the innovation of the prompt letter, the hiring of scientists on the OIRA staff, and the increased transparency of OIRA actions.

The prompt letter turns OIRA's traditional role on its head. Typically OIRA is a reactive institution, reviewing regulations submitted by executive branch agencies. A prompt letter in contrast is a suggestion by OIRA to an agency to take a particular action. Kagan (2001) describes the executive branch under Clinton using public pronouncements to put pressure on agencies to pursue specific policies. The prompt

letter is the institutionalization of such pronouncements. As such, it will likely increase the ability of the President to influence agency regulatory policy.

The increasing scientific expertise of OIRA's staff also strengthens the President's ability to influence regulatory policy. Many of the crucial debates on regulatory issues involve questions of science (Jasanoff 1994). By adding scientists to OIRA's traditional cadre of economists and public policy experts, Graham has increased OIRA's ability to question agency science and given OIRA leverage in debates with agencies. The new scientific staff will also make it easier for OIRA to oversee implementation of the Information Quality Act and regulatory peer review.

The only one of the three reforms that does not clearly strengthen the executive is the increased transparency of OIRA actions. Indeed, this should help the public at large and particularly special interest groups interested in highlighting OIRA's role in making regulatory policy.⁴⁵ One can therefore see this reform as the only one which helps realize a deliberative-democracy vision of the regulatory state.

However, the increased transparency is not without advantages for the executive. Throughout OIRA's early days in the Reagan Administration, one of the primary criticisms it faced was for the lack of transparency of its actions (Morrison 1986). These criticisms took their toll on OIRA and gave the agency's opponents an easy weapon to use in debates over curtailing the role of OIRA in regulatory policy. By removing this basis for criticism, Graham has removed a weapon from his opponents' arsenal and made it much harder for them to question OIRA's legitimacy. Therefore, in addition to facilitating deliberative democracy, increased transparency

also strengthens executive oversight of regulatory agencies by removing a criticism of such oversight.

V Introducing Regulatory Delay -- Another Possible Impact

Graham's procedural reforms have one additional possible impact: delay. McGarity and others have long bemoaned the ossification of the regulatory process (McGarity 1992). Referring mainly to requirements for economic analysis and "hard look" judicial review, McGarity argues that the regulatory process has become too burdensome. As a result, agency officials are turning away from rulemaking as a policymaking option. While some have questioned McGarity's more dire conclusions (Shapiro 2002), it does indeed seem likely that procedural reforms will make rulemaking more costly to agencies.

This impact can occur along with the other five possible impacts. I distinguish delay, however, because even reforms which help parties who stand to benefit from regulations (such as workers or victims of pollution) may also be hurt by such reforms if the reforms increase the length of time it takes to produce the regulation.

The first three reforms discussed in Sections III and IV all have the potential to introduce significant delay into the regulatory process. Even if complaints under the Information Quality Act are not judicially reviewable, and even if OMB does not pressure an agency to take such complaints seriously, agency resources will be devoted to generating responses to and keeping records of IQA complaints. If the volume of the complaints becomes large, then this could be a non-trivial expense. The most obvious impact of the peer review requirement, is that it will add another step to the regulatory process for those regulations falling under its purview. Peer review in

the journal or funding context can take up to a year, and there is reason to believe that regulatory peer review will take even longer because of its interdisciplinary nature (Shapiro and Guston 2006).

Finally, it is likely that electronic rulemaking will increase the number of comments received by agencies (Johnson 1998). Regardless of whether one sees this as a good or a bad thing, processing more comments will take more time. Even if agencies merely sort the comments into "pro" and "con" categories, they will have to be careful to ensure that all comments are tallied and are publicly available in their dockets. This will also absorb agency resources and therefore could also conceivably slow down the regulatory process.

Only the reforms to the operation of OIRA are unlikely to add to the time that it takes an agency to promulgate a regulation.⁴⁶ The other reforms will introduce further delay into the regulatory process. Whether these reforms make the regulatory process so costly that agencies begin to eschew rulemaking as a policymaking option is uncertain.⁴⁷

VI Conclusion: Are the Reforms Anti-Regulatory?

As discussed in the introduction, reforms to the regulatory process can have a number of non-exclusive impacts. Many of these impacts can be characterized as empowering one group or another with a particular interest in regulatory outcomes. These include reforms that empower powerful interests, ones that empower interest groups broadly, ones that empower experts, and ones that empower the executive. Reforms can also encourage deliberation and cause delay in the regulatory process.

The first term of the Bush Administration was filled with regulatory reforms. These reforms uniformly came from the executive branch. More specifically the reforms largely came at the initiative of the Administrator of the Office of Information and Regulatory Affairs, John Graham. Graham has described his reforms as promoting good analysis and sound science.⁴⁸ His critics have accused him of attempting to subvert the regulatory process by causing delay and giving special access to the industry.

The limited academic work on these reforms, while speculative, lends some support to these critics. Table 1 summarizes the tentative conclusions from the discussion of the particular reforms (an x indicates that the reform is likely to have the impact at the top of the column). Three of the four major categories of reform are likely to cause delay. Electronic rulemaking (as currently designed) may lead to delay by flooding agencies with public comment. More clearly, the Administration's implementation of the Information Quality Act and, in particular, the Administration's peer review guidelines, will introduce further delay into the regulatory process. If agencies' responses to information quality complaints are held to be judicially reviewable, crafting careful responses will cause considerable delay.

	Empowers Powerful Interests	Empowers Interest Groups	Encourages Deliberation	Empowers Experts	Empowers President	Causes Delay
Electronic Rulemaking			negative			x
Information Quality Act	x (if judicially reviewable)				x	x
Peer Review	x			x		x
OIRA Reforms			X		x	

The key impact of the reforms to OIRA is to further enable executive oversight of agency decisions. This is also an outcome of the Information Quality Act implementation. The IQA, like the OIRA reforms, inserts OIRA into the agency decisionmaking process at an earlier stage. Many scholars have noted the paucity of changes in agency decisions once a proposed rule is issued (West 2004). By assisting OIRA involvement earlier in the regulatory process, the influence of OIRA should grow. The relatively consistent trend of increased agency oversight by the executive predicted by Moe (1989) and observed by Kagan (2001) has taken major steps forward under the Bush Administration.

Both peer review and the information quality requirements are likely to favor powerful interests. These interests have the resources to challenge the government on extremely technical matters. Their challenges could take the form of providing peers to serve as reviewers of agency documents, using the results of peer review to challenge agencies' final decisions in courts, or filing information quality complaints on the science supporting critical rulemakings. These interests will be able to exercise power under the IQA more effectively if the agencies have to pay attention to their information quality complaints because the agency response is judicially reviewable.

Experts may gain influence over the regulatory process because of the peer review guidelines and achieving a more deliberative process may be helped by the increased openness of OIRA. However, much of the analyses conducted outside of the Administration of the regulatory reforms argue that they will introduce further

delay into the regulatory process, increase executive oversight, and empower powerful interests. What is the likely substantive impact of these trends?

In the short term, all of these trends point in an anti-regulatory direction. Raising the cost to agencies of promulgating a regulation will make significant regulations less common. Executive oversight and increasing the role of powerful interests also make regulation less likely when the President has a strong anti-regulatory bent⁴⁹ and when one of the primary sources of support for the Administration is that group -- industry -- that bears the brunt of many regulations.

The longer-term impact, however, is much less clear. One way of getting at an answer is to consider whether an administration more committed than the present one to regulatory efforts to protect the environment and public health would reverse or modify the Bush reforms. None of the reforms is difficult to reverse as they have virtually all been issued via executive order or OMB bulletin. While the implementation of the IQA is statutorily driven, the statute is not very prescriptive in terms of the process to be followed by agencies in responding to complaints. It would be relatively easy for a new Administration to de-emphasize the role of OMB in overseeing agency responses and tacitly send the message that agencies will not be criticized whatever their response (again assuming a lack of judicial reviewability).

Because a new pro-regulatory administration may decide not to reverse the measures, two of the primary impacts, empowering the executive and empowering powerful interests can serve pro-regulatory as easily as anti-regulatory aims. Kagan (2001) has cited the Clinton Administration's use of administrative oversight to achieve a pro-regulatory agenda and Moe (1989) has argued that Presidents

regardless of party will use whatever tools are at their disposal to influence agency decisionmaking. Along these lines, it is easy to envision peer reviews (from pro-regulatory scientists) that argue for stricter standards, information quality complaints (from unions or consumer groups) against studies that support deregulation, and prompt letters to agencies to issue more stringent environmental and health regulations.

While empowerment of particular entities may be pro or anti-regulation, delay is unambiguously anti-regulatory (McGarity 1992). A pro-regulatory administration will have to weigh the benefits of using the Bush reforms to achieve agency oversight and hence their regulatory goals against the delay that the reforms will add to the regulatory process. This calculus will have to be conducted individually for each of the reforms in question.

As mentioned above, Congress and the courts could step in and change the calculus of these regulatory reforms dramatically. The most prominent example: if agency responses to complaints under the Information Quality Act are judicially reviewable, then the delay resulting from responding to these complaints and the resulting capacity of powerful anti-regulatory interests to halt the regulatory process will increase dramatically. The Administration, industry, and supporters of the IQA in Congress have all recently discussed amending the law to add judicial reviewability.⁵⁰ If this occurs, any new Administration will have its power to short-circuit the IQA or use it to its advantage dramatically curtailed.

Finally, empirical research on the Bush Administration regulatory reforms can accomplish a great deal to determine whether their predicted impacts actually

materialize. The discussion above suggests that empirical research should focus on the following questions:

- How does electronic rulemaking change the public comment process? This should include analysis not only the impact on the volume of comments but on the nature of the comments submitted and whether agencies are more responsive.
- While OMB and anti-administration groups have asked many of the right questions about the Information Quality Act, their answers differ. Good scholarly work is needed to analyze who is using the complaint process under the Act and what (if any) policy changes are resulting.
- Patience will be necessary to evaluate the peer review guidelines. Any evaluation will have to examine peer review reports and how those reports are used by courts to support or overturn agency regulatory efforts.
- Evaluating the OIRA reforms should involve a comparison of OIRA before and after 2001. This poses a logistical challenge since much of the data regarding OIRA reviews before 2001 is not available. Examining the impact of OMB prompt letters could and should be done by case study research.
- Finally data should be gathered to evaluate the hypothesis that these reforms will add considerable delay to the regulatory process. Are agencies promulgating fewer rules (assuming that political preferences are accounted for)? Does it take an agency longer to finalize a rule?

Endnotes

¹ Public Law 106-554 § 515.

² The prompt letters are available at:

<http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> (last viewed May 26, 2006).

³ The hiring of scientists and the increased transparency are both described in a Graham speech, *Presidential Management of the Regulatory State*, delivered to the National Economists Club on March 7, 2002 and transcribed at

<http://www.whitehouse.gov/omb/legislative/testimony/graham030702.html>. (last viewed May 26, 2006)

⁴ Several reforms were initiated at the beginning of Bush's second term, an attempt to increase oversight over agency guidance documents and outline requirements for agency risk assessments. These are not included here because they are still preliminary at the time this article was written.

⁵ These interests may be powerful industrial interests with considerable resources or pro-regulation interests such as environmental groups with access to the highest reaches of Democratic administrations.

⁶ The Reagan Administration (building on efforts by Nixon, Ford, and Carter) required economic analysis under Executive Order 1229, 3 C.F.R. pt. 127. The 104th Congress approved the Unfunded Mandates Reform Act (Public Law 104-4 (1995)), the Congressional Review Act, and the Small Business Regulatory Enforcement Fairness Act (Public Law 104-21 (1995)) and considered many other reforms.

Exceptions issued under a Democratic Administration include executive orders issued by President Clinton to require agencies to consider the impact of their actions on State and Tribal governments and on families.

⁷ Those in the public interest school believe that the behavior of regulators depends on the slack (or discretion) accorded them by political overseers. When bureaucrats are given significant discretion, they either help special interests or further their view of the general interest. When discretion is limited, they are more likely actually to serve the public at large (Levine and Forrence 1990). Croley (1998) criticizes the usefulness of this view for predicting regulatory outcomes or developments in the regulatory process.

⁸ Indeed, Rossi cites Max Weber and Felix Frankfurter as among the sources of the expertocratic model.

⁹ Procedural reforms could in theory enhance legislative oversight. However, since all of the reforms considered in this article were primarily proposed by the executive branch, I concentrate on increased executive oversight. The Information Quality Act was of course a legislative requirement, but the guidelines implementing it came from the Office of Management and Budget.

¹⁰ The Senate vote on Graham's confirmation was 61-37, the closest vote on a Bush nominee besides John Ashcroft in the first two years of the Bush Presidency. *See* U.S. Senate Roll Call votes, 107th Congress, 1st Session Congressional Record p. S7938 July 19, 2001.

¹¹ Speech to the Weidenbaum Center Forum: "Executive Regulatory Review: Surveying the Record, Marking It Work," National Press Club, Washington, DC December 17, 2001.

¹² OMB Watch, a liberal watchdog organization, said,

“OMB's development of a single portal that allows citizens to access all federal regulations is a key first step to a successful online rulemaking process.”

See OMB Watch's website, at

<http://www.ombwatch.org/article/articleview/1199/1/271?TopicID=1>. (last viewed May 26, 2006).

¹³ For a detailed criticism by the Center for Progressive Regulation, see <http://www.progressiveregulation.org/perspectives/dataQuality.cfm>. (last viewed May 26, 2006).

¹⁴ See note 1.

¹⁵ "Influential information" is information that "the agency can reasonably determine . . . will have or does have a clear and substantial impact on important public policies or important private sector decisions" (OMB 2002).

¹⁶ Individual agencies guidelines appear at

http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html. (last viewed May 26, 2006).

¹⁷ Operation of the Missouri River Sys. Litig No. 03-MD-1555 (2004).

¹⁸ Salt Institute v. Leavitt, 440 F.3d 156 (4th Cir. 2006).

¹⁹ See <http://www.ombwatch.org/article/articleview/2645/1/231?TopicID=1>. (last viewed May 26, 2006).

²⁰ Regulatory information is "especially significant" if:

“(i) the agency intends to disseminate the information in support of a major regulatory action, (ii) the dissemination of the information could otherwise have a clear and substantial impact on important public policies or important private sector decisions with a possible impact of more than \$100 million in any year, or (iii) the Administrator determines that the information is of significant interagency interest or is relevant to an Administration policy priority.”

(OMB 2003)

²¹ Agencies were to strive to appoint reviewers without a conflict of interest, meaning any individual who

“(i) has any financial interests in the matter at issue; (ii) has, in recent years, advocated a position on the *specific* matter at issue; (iii) is currently receiving or seeking substantial funding from the agency through a contract or research grant (either directly or indirectly through another entity, such as a university); or (iv) has conducted multiple peer reviews for the same agency in recent years, or has conducted a peer review for the same agency on the same *specific* matter in recent years.”

²² Including one from this author.

²³ Again, including one from this author.

²⁴ *OMB Response to Comments on the Revised Peer Review Bulletin*, available on OMB's website at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html#iq> (last viewed May 26, 2006).

²⁵ Among the minor changes was one slightly broadening the exemption for time-sensitive safety and health information and another requiring agencies to adopt or

adapt the National Academy of Sciences policy for evaluating conflicts of interests among peer reviewers.

²⁶ One minor change removed the Vice President as arbiter of disputes between OIRA and agencies.

²⁷ See note 11.

²⁸ See note 2.

²⁹ See note 11.

³⁰ Id.

³¹ OIRA returns rules to agencies for various reasons. Once a rule is returned an agency cannot promulgate the rule without changing it and resolving OMB's objections.

³² Some have argued that the stated objectives of the reforms are different than the true objectives of the Bush Administration . I cannot assess this possibility.

³³ See <http://www.whitehouse.gov/omb/egov/c-3-1-er.html> (last viewed on May 26, 2006).

³⁴ According to Zavestoski and Shulman, the organics rule (Federal Register December 21, 2000 65 FR 80547) made extensive use of electronic participation.

³⁵ If one believes, like Elliot (1992), that the current notice-and-comment procedures give the public almost no influence, then the e-rulemaking reforms are likely to have no impact.

³⁶ "Memorandum to the President's Management Council," John Graham, August 30, 2004, available at: <http://www.whitehouse.gov/omb/inforeg/infopoltech.html#iq> (last viewed May 26, 2006).

³⁷ Briefly, Daubert held that scientific knowledge can be offered as expert testimony, and the Court regards as scientific knowledge only that which is derived by the scientific method, only inferences that are derived by the scientific method can be offered as expert opinion testimony. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

³⁸ Wagner and Michaels (2004) also point out that the OMB Guidelines exempt confidential business information from the IQA process, thereby presenting another advantage to industry.

³⁹ Letter from Center on Progressive Regulation to EPA Docket Clerk regarding EPA's draft information quality guidelines (May 31, 2002), available at http://www.progressiveregulation.org/perspectives/DQA_Letter_CRE.PDF. (last viewed May 26, 2006).

⁴⁰ See notes 17 and 18.

⁴¹ While this data comes from a group overtly hostile to the Information Quality Act, the report from OMB provides no counter claim.

⁴² Lacko (2004) recommends that agencies use all of these mechanisms to minimize the guidelines' impact.

⁴³ See, for example, public comments on the proposed bulletin by the Federation of American Scientists, at <http://www.whitehouse.gov/omb/inforeg/2003iq/85.pdf> (last viewed May 26, 2006).

⁴⁴ Noah (2000) suggests that regulatory peer review be used in a very limited context, remain under agency control, and be given limited weight by reviewing judges. If this suggestion were adopted, then the negative aspects of regulatory peer review

might be minimized. This is very far from where many of the proposals for regulatory peer review have been, however.

⁴⁵ Indeed, numerous such groups have used the data available on the web about OIRA meetings with interest groups draw inferences about industry influence on OIRA.

See, for example,

<http://www.ombwatch.org/article/articleview/1382/1/132?TopicID=1>. (last viewed May 26, 2006).

⁴⁶ One could hypothesize that increased transparency will lead to greater interest group lobbying of OIRA and therefore add time to the OIRA review process. I ignore this possibility which has not been evidenced in the transition to a more transparent review.

⁴⁷ Some, including Shapiro (2002), have maintained that despite the costs of other regulatory requirements, agencies have not avoided rulemaking as McGarity predicted.

⁴⁸ See, for example, John Graham's speech to the Heinz School at Carnegie Mellon, October 4, 2002, available at

http://www.whitehouse.gov/omb/inforeg/graham_cmu_100402.html (last viewed May 26, 2006).

⁴⁹ In the 2004 State of the Union address, the President said, "Our agenda must help small business owners and their employees with relief from needless federal regulation."

⁵⁰ See <http://www.ombwatch.org/article/articleview/2645/1/231?TopicID=1> (last viewed May 19, 2005).

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