

**LEARNING FROM FAILURE:
A “FAILURE CV” FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS**

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Writing in the *Harvard Law Review* in 2012, law professor Cass Sunstein sought to educate readers about how the Office of Information and Regulatory Affairs (OIRA), a small office within the White House Office of Management and Budget that is responsible for centralized review of agency regulations, actually functions in practice.¹ His fundamental concern was that “the role of OIRA and the nature of the OIRA process [remains] poorly understood.”² Sunstein was well-suited for the task, having just come off a three-year stint serving as the OIRA administrator, the office’s politically-appointed head.

Sunstein had a point. OIRA rarely makes above-the-fold news, or any news for that matter. OIRA staffers carefully avoid the spotlight. On the occasions when the office does capture the attention of journalists, however, hyperbole and misinformation rule the day. The office has been described as “obscure, but powerful,”³ “one of the most powerful bureaucracies inside the Beltway,”⁴ “a black box inside a black hole,”⁵ the “cockpit of the regulatory state,”⁶ and the “killing ground for agency regulations.”⁷ Shapiro notes that OIRA’s shadowy image is further perpetuated by media references to the office’s leader, the OIRA administrator, as the president’s “regulatory czar.”⁸ These journalistic accounts feed into the misperception that OIRA’s power is absolute and unchallengeable. Academic work tends to cement this view rather than correct it. For example, law professor Lisa Heinzerling, who served as a political appointee in the Environmental Protection Agency (EPA) during the Obama years, recalls “[OIRA] was calling the shots. [It] decided what to review, offered line-by-line edits of regulatory proposals, convened meetings with outside parties, mediated disputes among the agencies, decided whether an agency’s benefit-cost analysis was up to snuff, and more.”⁹ This narrative is further entrenched by academic studies where scholars model OIRA’s power to audit draft regulations,¹⁰ alter them,¹¹ and veto them¹² as near absolute.

Like all stylized narratives, this characterization of OIRA is, of course, false. But it is perhaps so false as to be misleading rather than clarifying. In a separation of powers system, the power of all

political institutions is circumscribed, and OIRA is no different.¹³

Since its creation, OIRA's path has been marked by both successes and failures. In this chapter, I chronicle the office's institutional highs and lows. OIRA's successes are highly visible and relatively well known to observers, thus documenting them is, in some sense, par for the course. Its failures, however, are harder to observe and less widely known. Failing to document them, however, contributes to the false sense of the institution's super-capabilities.

A recent trend in academia is for highly successful scholars with remarkable professional accomplishments listed on their curriculum vitae (CV), to publish a second CV, a "failure CV," that records their failures, including rejected applications, work that was never published, etc. The purpose of a failure CV, then, is to "balance the record and provide some perspective,"¹⁴ by showing that even the most successful scholars routinely encounter failure and must overcome adversity. Failure CVs recalibrate for outside observers what "success" really looks like from the inside.

My aim here is similar; I seek not to recast OIRA as either a failed or failing institution—it clearly is not. The goal is instead to evaluate the extent to which OIRA's power has grown over time and, where possible, to identify places where the office could or should have succeeded but did not. Observing and documenting failures remedies the selection bias that emerges from focusing exclusively on success. In bringing to light areas in which OIRA has either struggled or failed entirely, this essay uncovers the commonalities that unite these incidents and elucidates patterns among them. My aim, therefore, is a practical one. The lessons of failure can guide OIRA's leaders and policy practitioners in steering the institution toward future successes. This correction can also help media and academic observers better understand the place of OIRA in the separation of powers system.

This more accurate perspective on success and failure reveals that OIRA has at times

studiously avoided giving agencies detailed guidance on how to manage important aspects of the regulatory process. This laxity arises from a desire by OIRA leaders and its rank-and-file to maintain maximum institutional flexibility and autonomy, but it comes at the cost that agencies can fill in the gray areas with less than desirable (in an analytical or normative sense) policy. This reveals lessons for future administrations that hope to further enhance OIRA's successes.

A Brief History of OIRA

OIRA emerged on the scene in 1980 when Congress passed the Paperwork Reduction Act,¹⁵ which created the office for the purpose of reviewing agency information collections. Seizing the opportunity, President Reagan shortly thereafter in 1981 issued an executive order giving OIRA the power to review drafts of agency proposed and final rules.¹⁶ The stated goal of Executive Order (E.O.) 12291 was "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, [and] provide for presidential oversight of the regulatory process."¹⁷ For major rules, those that the order defined according to their economic impact, agencies were required to prepare a Regulatory Impact Analysis (RIA), which included an evaluation of the draft rule's potential costs and benefits, and submit it to OIRA for review.¹⁸

After some fits and starts (discussed in the next section outlining the office's successes), OIRA got up and running and, throughout the Reagan and George H.W. Bush administrations, it reviewed all draft regulations issued by executive branch agencies. Shortly after taking office in 1993, President Bill Clinton revoked Reagan's order and issued a new order revising the scope of OIRA's purview. E.O. 12866 kept the basic framework for regulatory review intact, but refocused OIRA's work, so that, instead of reviewing all agency draft rules, the office would

only review those that were deemed “significant,” a determination that OIRA (not the agency) was to make.¹⁹ It also increased the amount of time allotted for OIRA review and extended the RIA requirement to cover all significant rules reviewed by OIRA, not just those with a sizable economic impact.

Since 1993, the basic setup established by E.O. 12866 has stabilized, albeit with some notable tweaks. Each successor president has issued executive orders to refine the process (and in some cases undo the reforms of other presidents). For instance, President George W. Bush issued an order that extended OIRA’s review to include sub-regulatory guidance documents, an action which added to the office’s already-substantial workload. That order, however, was subsequently revoked by President Obama.²⁰ In 2017 President Trump issued an order, E.O. 13771,²¹ that required agencies to remove two existing regulations for each one new one that was generated, a requirement that OIRA was charged with implementing. While this did not change the scope of OIRA’s review, it again instituted a significant additional workload.

OIRA is typically overseen by one Senate-confirmed presidential appointee, the OIRA Administrator, and employs roughly 45 “desk officers,” who are career staff analysts with advanced degrees in policy analysis, economics, and scientifically-relevant fields (e.g., epidemiology). In 2018, the most recent year for which data are available, the office reviewed 91 draft “economically significant” rules (i.e., those with an annual economic impact of \$100 million or more) and another 269 “significant” draft rules (i.e., those that raised “novel legal or policy issues” or met one of the other significance criteria laid in E.O. 12866) from 26 agencies,²² in addition to performing a number of government-wide oversight responsibilities relating to paperwork, information technology, and statistical reporting. Stepping back, one must conclude that, since its founding, OIRA has flourished; among the cognoscenti it is perceived as

having tremendous influence in the regulatory process. This does not mean, however, that it has achieved favorable outcomes at every turn, instead the tale has been one of both success and failure.

Evaluating Success and Failure

The idea of a failure CV originated with Melanie Stefan, a neurobiologist. Writing in the journal *Nature* she argued that, “As scientists, we construct a narrative of success that renders our setbacks invisible both to ourselves and to others. Often, other scientists’ careers seem to be a constant, streamlined series of triumphs.”²³ She argued that scholars should keep a running tally of their professional failures and, if their position afforded them the opportunity, make it public. Doing so would allow others to see that success was often a function of not just talent, but also effort. Her argument sparked a conversation within the academy, and others quickly followed suit, posting their “failure CVs” online alongside their traditional CVs.

Looking at OIRA, its successes are also highly visible—they are what gave rise to the descriptions of the office’s supposedly incontestable power that introduced this chapter, and they have become ingrained in the historical narrative of what the office is and what it does. However, like Stefan found in academia, its failures are harder to observe, either because they were not very public to begin with—unsurprising given the technocratic nature of regulatory matters and the office’s penchant for operating under the radar—or they have been obscured by the passage of time. Regardless, this lowered visibility helps to foster the illusion that the office is somehow infallible or omnipotent.

To remedy this, I construct OIRA’s failure CV. “Failure” in this context means one of two things: either OIRA tried to expand its power in some way and that attempt failed or was not

sustained over a longer period or, alternatively, OIRA missed a major opportunity to grow and meaningfully expand its power.²⁴ Most of the failures I discuss herein fall within the latter category, but both types of failure run counter to the prevailing narrative about OIRA.

Of course, an organization's failures only make sense in the context of its successes, since the one is inevitably measured in relation to the other. Therefore, in the next section I briefly highlight OIRA's successes. By success, I mean that OIRA launched an initiative that made the office more powerful, by tangibly expanding the scope of its review power or enhancing its reputation in some way.

Underlying this evaluation of OIRA's success and failures is an implicit assumption that, as an organization, OIRA is able to influence its own trajectory. This assumption builds off of work from both political science and the field of organization studies showing that bureaucrats themselves are often pivotal actors in charting their organization's course.²⁵ Theories of "bureaucratic autonomy" do not imply that external influences do not matter. For instance, in OIRA's case, the OMB director, the president, Congress, the courts, and some powerful interest groups certainly have influenced the organization's path. Instead, the concept of bureaucratic autonomy suggests that an organization that is more autonomous can overcome the constraints imposed by these external factors and prevail in establishing its own reputation and power sources. For OIRA, this means that it should not *a priori* be viewed as a pawn that is manipulated by and set to carry out the instructions of, say, the current OMB director or the current administration. This may be an accurate characterization of the organization—if it is not able to exercise bureaucratic autonomy. However, if the organization is viewed as more autonomous, an ambitious and strategic OIRA administrator or set of career OIRA staffers may be able to shape the office, its reputation and, ultimately, the policies it pursues.

Accounting for OIRA's Successes

When and where has OIRA been successful? There are many achievements that could be highlighted; for instance, OIRA has implemented the Paperwork Reduction Act for almost four decades. By nearly all accounts, this has been a successful undertaking; agencies comply with OIRA's oversight and, despite the massive amount of information that is managed under this law, there are very few violations of the law reported each year.²⁶ Instead, I focus on three of OIRA's higher profile accomplishments: the retention and expansion of regulatory review functions, the institution of core principles of regulatory review, and the balancing of transparency with the need to accomplish policy goals.

OIRA's foremost success lies in its very survival. OIRA is nothing if not controversial and by many accounts it is a marvel that the office has endured for nearly 40 years. Writing in 1982, the chairmen of five House committees with jurisdiction over regulatory agencies opined:

Unless it is checked, the program embodied in [Reagan's] Executive Order 12291 will fundamentally damage the administrative process by which our laws are implemented, the legislative system by which our laws are enacted and monitored, and the separation of powers upon which our system of government rests.²⁷

While OIRA's history is often recounted in matter-of-fact terms, as if its current status was a matter of certain destiny, there has been a near-constant struggle for OIRA's survival between those who have wanted to enhance the scope of the office, and those who have wanted to eviscerate it. As the quote from House overseers illustrates, this struggle was particularly acute at the outset.

At many points in its history it was not at all clear that OIRA would persist into the next administration or even the next year.²⁸ The fault lines were not necessarily partisan either; while initially it seemed that Republicans supported OIRA and Democrats opposed it (since its first

decade was under the auspices of Republican administrations), Democrats became more supportive and Republicans less so when President Clinton assumed office in 1993.

Despite this opposition OIRA endured and even grew in its power. For instance, early on, many assumed that OIRA would be eliminated as soon as Clinton took office. Instead of doing away with OIRA, however, Clinton issued E.O. 12866 which consolidated and enhanced OIRA's powers. Each subsequent president has continued to reaffirm OIRA's place in the regulatory process, and its power—and its reputation—has grown in kind.

Political scientist Terry Moe argues that presidential reliance on institutions like OIRA is part of a broader trend wherein presidents centralize power into the Executive Office of the President in order to more closely oversee the bureaucracy.²⁹ While OIRA certainly fits this pattern, it is also true that any president could have scrapped OIRA and replaced it with another institution that was more to their own liking. Instead, each has left OIRA largely unchanged and even worked to empower it. These actions are a testament to the demonstrated value of centralized review in OIRA, as well as to the office's reputation for professionalism and competency.

OIRA's second chief success has been its ability to dictate and sustain the central principles of regulatory review. There are two core tenets of regulatory review in the United States, both of which were instituted at OIRA's founding and have become more firmly entrenched over time. The first is the idea that regulations should only be created when there is a demonstrated need for them (i.e., the burden is on the agency to demonstrate why a particular regulatory action is warranted). The second is that, at least for the most important regulations, their effects should be evaluated in terms of their costs and benefits.

It is entirely possible that OIRA by itself could have survived and these principles could

have fallen by the wayside or been superseded by other approaches. That is, while these principles are considered doctrine today, it was not at all clear in the early years that they would be durable or thrive. The introduction of benefit-cost analysis as a mandatory and systematic component of regulatory review was particularly controversial. As one *New York Times* article explained:

The intensity of opposition to the use of cost-benefit analysis in the regulatory process ranges from those who oppose any application on the ground that, once adopted, it would reduce all decisions to simple-minded weighing of dollars, to those who think it is a useful tool for administrators but worry about its rigid application.³⁰

Given these doubts, it was uncertain that benefit-cost analysis would be faithfully taken up by the agencies and therefore endure. Public criticism of the methodology presented opportunities for agencies to avoid implementing benefit-cost analysis, which they had reason to avoid due to resource constraints and an aversion to additional measures of political control.

Yet, despite these challenges, today these two principles remain central to OIRA's work. In a recent public speech former OIRA Administrator Neomi Rao reiterated the first principle, remarking that "we're not in the business of just regulating for the sake of it."³¹ Her remarks also reaffirmed the centrality of benefit-cost analysis, a point that is frequently reiterated by OIRA's top brass.³² Again, the fact that these principles have endured is evidence of OIRA succeeding in an area where success was by no means foreordained.

A third institutional success is how OIRA has managed transparency around its review process and engagement with the public. Throughout its history, OIRA has regularly been criticized as "too secretive and subject to influence by private interests."³³ It might have been tempting for OIRA officials to ignore or disregard pointed critiques like this. Yet, doing so ran the risk of inviting more criticism, and potentially even exacerbated the aforementioned threat to

the office's existence. Instead, OIRA has consistently responded by increasing the transparency of its review process, but in a very limited and strategic way.

Information about draft regulations and information collections that are currently under review is posted online at www.reginfo.gov. Additionally, meetings that OIRA holds with private stakeholders about regulations that are under review (called "12866 meetings" after the same-numbered executive order) are also posted on this web platform, along with any documents presented by the stakeholders during the meeting. Notably, while this approach offers a window into OIRA's operations, there are many more things that OIRA could do to provide transparency, but which it does not. For instance, OIRA could post versions of draft rules before and after its review, which would give outsiders a fuller sense of what changed during the course of review. Technically, both versions of these documents are considered part of the public domain,³⁴ and can be viewed in person at OIRA's docket library in Washington, D.C.; however, OIRA chooses to limit their visibility. Similarly, many have noted that "12866 meetings" tend to be the province of well-heeled groups.³⁵ OIRA could potentially remedy this by prominently posting the policy regarding the meetings (i.e., that they are available to all stakeholders) and also explaining the process for requesting a meeting. This information is provided on a government website,³⁶ but it is buried deep within a "Frequently Asked Questions" page and not prominent by any means.

These transparency decisions are not accidental; OIRA's moves have been carefully calibrated. After all, if OIRA were to make all or even most aspects of its review process transparent, it would be limited in what it could accomplish for two reasons. First, much of what OIRA does is political, thus offering too much transparency might stymie the office's ability to accomplish political goals, as disaffected parties could certainly find grievance with the

particulars of how individual rulemaking cases were handled. Such grievances might even become part of future litigation against agency rules, thus working against OIRA's intent to make lasting regulatory policy. Second, as I discuss later, the size of OIRA's staff has been relatively fixed and managing transparency on a wide scale would inevitably involve tradeoffs in terms of staff time and resources. Put differently, policies aimed at increasing transparency also have workload implications. Seen in this light, OIRA's strategy for managing transparency has been highly successful. The office has been able to balance the need to conduct some of its business behind closed doors with the need to placate those who allege that the office was too opaque (particularly in its early years).

These three aspects of OIRA—survival, principle entrenchment, and transparency—are key pillars of the office's success. Of course, the three successes highlighted here are not OIRA's only successes. For instance, one could readily point to the office's management of its paperwork reduction and statistical review responsibilities, both of which have been executed rather seamlessly over the years.³⁷ However, they are highly visible and have been critical to building institutional resilience.

OIRA's Failure CV

Despite these notable successes, OIRA has not always prevailed at attempts to expand its jurisdiction nor has it always wielded its power in the most effective manner. In several cases, OIRA did not take advantage of opportunities that had the potential to alter the institution's course in a positive direction. Below I outline four major failures, including the failure to routinize Regulatory Impact Analyses (RIAs), the failure to systematically oversee guidance documents, the failure to standardize regulatory lookbacks, and the failure to build staff capacity.

Each runs counter to the predominant narrative of OIRA as a highly successful institution and together they form a more nuanced (and, arguably, more accurate) view of OIRA.

To be clear, these failures do not constitute the entirety of OIRA's failure CV. The extended failure CV would undoubtedly point out that two features designed to augment OIRA's power have fizzled out of existence. The return letter, a way that OIRA could publicly shame agencies who submitted unpalatable rules for review, and the prompt letter, a way that OIRA could publicly direct which issues agencies worked on, were to revolutionize OIRA's review when they debuted early in the George W. Bush administration. That dream has surely died now, as the last return letter was issued in 2011 and the last prompt letter was issued in 2006. Nevertheless, the failures that I focus on below are representative of the range and depth of OIRA's institutional shortcomings.

OIRA's Failure to Routinize RIA

While the conceptualization of benefit-cost analysis as a staple of regulatory review undoubtedly accrues to OIRA's success column, the particulars of how benefit-cost analysis has been implemented on the ground leave much to be desired. Thus, I argue that the implementation of benefit-cost analysis accrues to OIRA's failure column, because there are many things that OIRA could have done to standardize, and thus further entrench, the practice of benefit-cost analysis that it did not do. In practice, benefit-cost analysis is unevenly applied across agencies. This unevenness has led many observers to speculate that agencies manipulate benefit-cost analysis to favor their preferred policy alternatives.³⁸ Given its central location and oversight role, OIRA is well positioned and has the authority and expertise to promote and enforce a more standardized benefit-cost analysis process. Yet in spite of this imperative, there are many things

the office could (and arguably should) have done to routinize the practice of benefit-cost analysis that instead languished.

A recent study evaluating the quality of RIAs conducted by the Department of Education concludes that the “practice falls short of methodological standards in a number of ways. Cost estimates appear to be underestimated and lack transparency with respect to method and assumptions. Benefit estimates are very infrequent and analyses often lack sensitivity testing, proportionality, and a reasonable counterfactual.”³⁹ This finding comports with those of numerous other studies that find that, except in the case of high-profile rulemakings, agencies fail to conduct RIAs in the first place or produce low quality analyses when they do.⁴⁰ This unevenness in implementation contributes to the perception that, rather than using benefit-cost analyses as an analytical tool, agencies use them to justify decisions that have already been made.

An example illustrates an area where OIRA could have, but has not, improved the quality of RIAs or standardized the benefit-cost analysis process. At present, there is no government-wide standard for the value of a statistical life (VSL), the monetary value that agencies attach to an individual life (in a statistical sense) when calculating the monetized benefits associated with a regulatory intervention that will reduce health or environmental risks and thus save lives. The current practice, laid out in broad brushstrokes in a 2003 guidance document,⁴¹ is for agencies to individually determine the appropriate VSL for their agency (or, in some circumstances, for the individual rule). This means that, as of 2017, three agencies—the Department of Health and Human Services (HHS), the Department of Transportation (DOT), and the Environmental Protection Agency (EPA)—had guidance documents, which they periodically update, setting out the methodology and literature underlying their particular VSL. Unsurprisingly, these agencies

arrive at different figures: when adjusted to reflect real 2015 dollars, a life is worth \$9.5 million at HHS,⁴² \$9.6 million at DOT,⁴³ and \$8.7 million at EPA.⁴⁴ While these figures are roughly comparable (in real 2015 dollars), that has not always been the case.

Having individual agencies set their own VSLs is inefficient, since every agency reinvents the wheel.⁴⁵ It is also not theoretically necessary, as a recent EPA report found that the academic literature did not make a strong case for adjusting the VSL for idiosyncratic (or agency-specific) factors.⁴⁶ The case against agency-specific VSLs is furthered by speculation that the value is sometimes gamed to advance political goals. For instance, under the George W. Bush administration, the EPA devalued the VSL—from \$7.8 million to \$6.9 million per life—adopting a lower rate than had been used by the agency during the Clinton administration.⁴⁷ Just a few years later under the more pro-regulatory Obama administration, several agencies made a change in the opposite direction, increasing their VSLs; for example, in 2010 the Food and Drug Administration raised its VSL to \$7.9 million, up \$5 million from its 2008 level.⁴⁸ These changes to the VSL align with the regulatory agenda of the respective administrations; a lower VSL—as the EPA’s under Bush—makes it harder to justify the costs of strong safety and health protections, whereas higher VSLs—like those adopted under Obama’s tenure—effectively make these regulations easier to justify. These kinds of politically convenient changes to what should be objective and consistent values reduce public confidence in the RIA process. OIRA has done little to nothing to limit the practice.

The VSL is just one small but illustrative example of where RIAs fall short. For instance, observers have repeatedly noted that, although Circular A-4 requires agencies to consider a range of alternatives in the RIA (in addition to the alternative that the agency is proposing), agencies often consider only one other alternative (e.g., the status quo) or fail to consider any alternative

at all. Writing in 2007, Hahn and Dudley found that, among a sample of rules where RIAs were required, “the percentage of RIAs that considered at least one alternative standard or level decreased from 85 percent during the Reagan administration to 74 percent during the Clinton administration.”^{49,50}

Why doesn’t OIRA scrupulously monitor how agencies conduct benefit-cost analysis? Or require more standardization of the process? There are many ways that OIRA could have accomplished this. For example, a standing group of experts from agencies, academia, and regulated industry could have been established to provide regular updates to OMB Circular A-4 and to evaluate and update a government-wide VSL. Additionally, OIRA staff could provide more enforcement for the quality of RIAs conducted, ensuring that they always include (for example) at least one alternative other than the status quo and the agency proposal. Doing some combination of these things would likely have diminished the political maneuvering—or at least the perceptions of political maneuvering—associated with the analytical parts of rulemaking.

By not pushing agencies to do a better job with benefit-cost analysis, either through rigorous monitoring or greater process standardization, OIRA relinquished an opportunity to both increase its power and enhance public confidence in the rulemaking process.

OIRA’s Failure to Oversee Guidance Documents

OIRA has also had a strained and often ill-defined relationship with agency guidance documents, and specifically its role in overseeing them. Guidance documents are non-binding policies issued by agencies, offered either in lieu of regulations or to further explicate how particular statutes or regulations should be implemented. In many ways they are the bane of regulatory overseers, since regulated parties often treat them as gospel, even though they are not

legally binding and, therefore, not subject to the same procedural rigor and disclosure requirements as regulations created through notice-and-comment. Because of this, they are often described as “regulatory dark matter,” and a recent House report describes them as having a “ubiquitous and nebulous character.”⁵¹

At present, there is very little standardization to the process of creating new guidance documents. Some agencies like the FDA have established their own practices and others voluntarily follow the “good guidance” practices outlined in a memorandum issued by the George W. Bush administration, but many agencies do not. There is also no official inventory of guidance documents.⁵² Further, OIRA’s role in overseeing guidance is murky. While OIRA has long maintained that it has authority to review guidance documents, there is ambiguity surrounding that interpretation, as I explain shortly. At various points, presidents have attempted to assert OIRA’s authority over guidance documents. Nonetheless, OIRA’s oversight role has been, at best, incoherent, and, at worst, nonexistent.

In OIRA’s early years under Presidents Reagan and H.W. Bush, capacity constraints (i.e., OIRA’s limited staff and the expectation that the office review all rules issued by covered agencies) prevented the office from reviewing guidance documents. As Noe and Graham explain,⁵³ in practice this meant that OIRA “rarely called in guidance documents for review and did not have an established practice for doing so.” Little changed in terms of reviewing guidance with President Clinton’s issuance of E.O. 12866, as Administrator Sally Katzen later recounted that OIRA never reviewed a guidance document during her tenure (1993–1998).⁵⁴ This practice continued into the early George W. Bush years.

In 2007 President George W. Bush issued an order (E.O. 13422) designed to enhance OIRA’s purview over guidance documents. Specifically, the order defined a “significant

guidance document,” required agencies to give OIRA advance notice of such documents and gave OIRA the authority to formally review these types of guidance. The order was controversial—many considered expanding OIRA review powers to guidance to be an unabashed power grab—not to mention aspects of the order that politicized other facets of the rulemaking process.⁵⁵ Shortly after the EO was released, OMB followed up with guidance on “good guidance” practices.⁵⁶

Perhaps because of the controversies surrounding Bush’s order—particularly those unrelated to guidance⁵⁷—upon assuming office, President Obama rescinded Bush’s order.⁵⁸ Shortly thereafter, the OMB director issued a memorandum indicating that revocation of the EO returned the status quo to its pre-2007 state, where “OIRA reviewed all significant proposed or final agency actions, including significant policy and guidance documents. Such agency actions and documents *remain subject to OIRA’s review under Executive Order 12866*” (emphasis my own). This was a confusing turn of events, because if OIRA had the authority to review guidance documents under E.O. 12866, then Bush’s order was superfluous in the first place. Not to mention that Clinton-era Administrator Katzen claimed to never have reviewed a guidance document during her five-year tenure. Further confusing matters, a congressional investigation uncovered that implementation of guidance review during the Obama years was spotty; between 2008 and 2017, a time when all significant guidance documents should have been reviewed by OIRA, less than two-thirds of significant guidance documents were sent to the office for review.⁵⁹

More recently, a flurry of developments has affected OIRA’s oversight role in guidance creation. In the spring of 2019 OMB issued a memorandum “clarifying” that all guidance was to be reviewed by OIRA.⁶⁰ The memo tied OIRA’s review authority to existing authorities the

office had under the Congressional Review Act (CRA), not E.O. 12866 as prior administrations had claimed. This was, instead, a new interpretation of the CRA, a law that had been passed more than 20 years prior. Yet, despite the grandiose claims of the memo, details about how implementation would work under the new guidance regime were initially quite sparse. Then in the fall of 2019, President Trump signed two executive orders on guidance.⁶¹ These orders require agencies to make a number of changes to their current guidance practices including: stating explicitly that guidance is non-binding, posting all guidance to a centralized; searchable web platform; establishing a process for the public to petition to repeal guidance; and increasing overall transparency regarding guidance document usage.

By increasing standardization of guidance production, the Trump administration's actions promise to address some of the low-hanging fruit with respect to guidance and OIRA's role in it. But much remains unanswered. Does E.O. 12866 cover guidance documents, or does only the CRA do so? Should agencies still follow the Bush-era memorandum regarding good guidance practices?⁶² What are the consequences if agencies do not alert OIRA before issuing a new guidance document? The net result is that, at present, it is difficult to definitively state OIRA's official stance on guidance documents.

One can be forgiven for failing to comprehend all of the twists and turns in OIRA's complicated guidance saga. The path has been anything but straightforward. What is clear is that the office has tried—and repeatedly failed—to develop a workable guidance oversight system. It is also clear that many of the issues surrounding guidance are deeply entrenched. It remains to be seen how the Trump administration's approach to guidance will be implemented. While the administration's actions clearly put OIRA into a more definitive oversight track, they come at a time when the administration is also asking OIRA to take on many other new responsibilities

(e.g., review of independent agency regulations, major deregulation-related tasks). Stepping back, it is too early to conclude whether these actions mark a clear inflection point in OIRA's relationship with guidance. Historically speaking, however, OIRA's approach to guidance has been ill-defined and unevenly implemented and, as such, it definitively accrues to the organization's failure column.

OIRA's Failure to Standardize Regulatory Lookbacks

OIRA has also failed to establish a system for managing regulatory lookbacks. A regulatory lookback, which is sometimes referred to as a "retrospective review," is the idea that agencies should periodically scour their portions of the Code of Federal Regulations and eliminate outdated or ineffective regulations.

When President Trump assumed office in 2017, he made headlines by promising to eliminate "75% maybe more" of existing regulations in order to reduce the burden on regulated entities. While Trump is unique in the scale of his promised lookback, his desire to remove ineffective and outdated regulations from the books is not unique.⁶³ Every president, regardless of their political orientation, has attempted to do some version of this. As Coglianesse explains, "the second Bush White House issued three separate requests for nominations of existing rules to modify or rescind. President Barack Obama launched a government-wide regulatory 'lookback' initiative that gave priority to reviews that could generate 'significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens.'"⁶⁴ And President Trump's "1 in 2 out" order certainly is associated with retrospective review, since it requires agencies to eliminate existing regulations when creating new ones.

Despite these presidential initiatives, there is widespread agreement that retrospective

regulatory review has been a failure.⁶⁵ As one recent academic report noted, “that every administration feels compelled to call anew for retrospective review suggests that these repeated attempts at regulatory look-back have not been sufficient.”⁶⁶ The complaints are numerous: that the general approach focuses on costs, rather than benefits,⁶⁷ that the process is not transparent enough to the public,⁶⁸ that agencies lack sufficient data to do the job well,⁶⁹ or that the approach is necessarily ad hoc.⁷⁰

Again, OIRA is uniquely positioned to improve the way that agencies conduct retrospective reviews, but it has failed to establish a standardized way for agencies to evaluate what is on the books. Instead, each new administration has come up with a slightly different take on what these lookbacks should look like, who should do them, how they should do them, and how often. This is unquestionably an organizational failure, as a more standardized process would have provided agencies with certainty and afforded them the opportunity to plan accordingly. It would also make OIRA central in that process. OIRA’s failure is not one of imagination either, as observers have suggested numerous ways to improve lookbacks, from requiring regulatory sunsets (which would force agencies to reevaluate regulations at predetermined intervals), to requiring agencies to include data collection plans in their proposed rules so as to facilitate future evaluations of a rule’s effectiveness, to convening governmentwide panels that would offer agencies expertise in improving their existing regulatory framework and help them to develop a comprehensive plan.⁷¹

OIRA’s Failure to Build Staff Capacity

OIRA’s staff is responsible for numerous tasks, including not only reviewing draft regulations from dozens of agencies, but also reviewing information collections from these

agencies under the Paperwork Reduction Act, managing privacy and statistical standards for the federal government, and coordinating sundry activities within the executive branch. Doing all of these tasks requires skilled staff who are familiar with the policy and technical issues at play. Historically most OIRA “desk officers” have held advanced degrees in their respective areas, be it economics, epidemiology, public policy, public health, or statistics.

Having enough staff in place is critical to OIRA performing its work effectively and efficiently. Prior work has shown that in periods where OIRA staff has been more limited, the time OIRA spends reviewing individual regulations increases.⁷² Staff shortages are likely to impact other aspects of OIRA’s work as well, such as the number of agency regulations that OIRA is able to bring in for formal review and the quality of the reviews that it does conduct.⁷³ Yet, despite this centrality, OIRA’s staff size has been relatively stagnant over the last several decades. In many regards, the other failures that have already been noted may trace their origins to this underlying capacity deficit.

OIRA’s staff levels peaked its first decade. With 90 full-time equivalent (FTE) employees, OIRA had its largest staff in 1981. However, the imposition of E.O. 12866 in 1993 cut OIRA’s workload by changing its review purview from all agency regulations to a subset of the most significant ones, and OIRA’s staff numbers were reduced accordingly. Since 1994, OIRA’s total FTEs—a figure that includes both desk officers and administrative staff—has hovered at around 50, as shown in Figure 1. Meanwhile, as also illustrated in Figure 1 the office’s workload—in terms of total rules reviewed—has also remained somewhat constant during this period.

Figure 1: OIRA’s Staff Size has Stagnated in Recent Years



Note: Figure shows trends in the number of rules reviewed by OIRA (dashed line) and the number of FTEs within OIRA (solid line) each year. Regulatory review counts are drawn from www.reginfo.gov. OIRA’s FTE count is reported in OMB’s annual congressional budget justifications.

While OIRA’s staff numbers have leveled off, regulatory agencies have experienced large increases in staff sizes.⁷⁴ Increases in regulatory agency staff are potentially indicative of many things (e.g., increased inspections or industry oversight), but one possibility is that the sophistication of the rules produced by these agencies may have increased. This suggestion, which is supported by some observers,⁷⁵ would mean that OIRA’s primary task of regulatory review has become more difficult over time.

Additionally, concurrent with these trends within OIRA, the number of tasks delegated to the office has grown over time. For instance, in the mid 2000s OIRA took on new

responsibilities related to improving the quality of data used in regulatory analyses. President Trump also required OIRA to monitor the implementation of his “1 in 2 out” order, which again increased the workload without corresponding staff increases. For some time during the Bush administration and under a recent change during the Trump administration, OIRA has been tasked with reviewing a considerable volume of agency guidance documents. The same Trump memo that gave OIRA authority to review guidance documents,⁷⁶ also extended OIRA’s purview to rules from independent agencies, a potentially large workload increase.

It is clear, then, that OIRA would be well served with a much larger staff, one that is at the level of its earliest staffing figures. Increased capacity would be transformative, giving the institution the bandwidth to take on many of the issues laid out above, including reviewing guidance documents and improving the implementation surrounding agency RIA practice.

Yet, while calls for increasing OIRA’s staff size have been near constant throughout its history,⁷⁷ the actual numbers have not meaningfully budged.⁷⁸ Of course, increasing an agency’s staff size is not entirely within its own purview, since monies for staff must come from congressional appropriations. However, that does not exonerate OIRA, and its leadership in particular, from the failure to add the needed FTEs. Scholars have long recognized that growing an agency in terms of both its budget and its staff is the hallmark of highly effective bureaucratic leaders.⁷⁹ Thus, while staff enhancement is not a unilateral action that OIRA leaders could have taken, it is something that should have been a priority for each administrator. Each should have made the case for a larger OIRA publicly, privately, and repeatedly. While the historical record indicates that many OIRA administrators have in fact argued for more staff, none has expended the required capital to actually accomplish change. This is perhaps the organization’s most fundamental failure.

As several chapters in this volume have highlighted, the failure to advocate for increased staff is an OMB-wide issue and is by no means limited to OIRA. This hesitation stems from deeply held beliefs; as one former OMB staffer noted, OMB directors have sought to be “purer than Caesar’s wife” when it comes to asking Congress for more staff. The underlying concern is one of perception. OMB cannot ask other agencies to cut back while growing in its own right. While certainly a difficult needle to thread, the failure to make the political case for capabilities commensurate with the growth in responsibilities has not served OIRA’s, OMB’s, or the public’s, interest in the long term.

Contrasting Success and Failure

Why did OIRA fail in these endeavors? And, more generally, what distinguishes OIRA’s successes from its failures? Answering these questions is critical in putting OIRA’s failure CV to work—that is in using insight about failures in a constructive fashion to craft a more effective institution.

Looking across this accounting of OIRA’s successful and unsuccessful initiatives, several patterns emerge. To begin, OIRA’s successes—its survival, principled focus, and approach to transparency—are all things that OIRA’s leadership has tackled head-on and repeatedly reinforced. No one administration or administrator can reasonably claim these successes as their own, but rather they are the amalgamation of a consistently-prioritized and shared vision about what OIRA is and how it should work. OIRA’s failures also do not owe to one particularly ineffective administration or administrator; each of the failures—be it with RIAs, guidance, retrospective review, or staff shortages—has been a longstanding issue that multiple generations of leaders have either ignored or failed to effectively tackle. The lesson is one of the importance

of organizational leadership and continuity of vision across leadership transitions.

Additionally, OIRA seems to have been successful when expectations regarding both agency and OIRA responsibilities are made clear. Consider, for example, that from the agency's perspective, it is clear what will transpire at a "12866 meeting" (i.e., it will be a "listening session" that will be disclosed on the Internet afterwards). This stands in contrast to OIRA's policy and expectations regarding the level of analytical rigor required for any individual RIA, the expectations surrounding the creation and review of new guidance documents, or the expectations for retrospective review in any given year. In each of these cases, agencies cannot be reasonably sure of what to expect for any particular action, given the variation in experiences across individual actions and across different administrations.

OIRA's failure CV also highlights the institution's laxity in terms of formalizing many aspects of its rulemaking duties. Arguably, OIRA's work would be easier if agencies were given more instruction about what would be expected for, say, retrospective review every year for the next several years or if OIRA clarified exactly what a good RIA should include. Yet, OIRA seems reluctant to spell these things out, perhaps out of a concern such formalization would hinder its own discretion and flexibility.⁸⁰ This, however, is not cause enough to justify avoiding formalization altogether, as the benefits of doing so may be considerable in the long term even if it may reduce flexibility in individual instances. With more informed expectations, agencies may start doing a better job at preparing RIAs, guidance documents, planning for retrospective reviews, and the like.

How OIRA chooses to handle its formalization matters. These are highly technical matters and OIRA will need expertise as well as buy-in from the agencies. Here the Obama administration's approach to developing a government-wide standard for the "Social Cost of

Carbon” (SCC) provides an instructive example. In 2009 President Obama established an interagency working group to determine a governmentwide value of the SCC. The working group was composed of six executive branch offices (including OIRA) and six regulatory agencies and included experts who evaluated the science and came up with a single set of governmentwide values of the cost per ton of carbon. The SCC values, which were to be used across all agency RIAs, were developed in 2009 and 2010, and updated by the working group in 2013 and 2015. This interagency working group format provides a model for not only developing a government-wide VSL, but also for updating OMB Circular A-4 (governing RIA practices more generally), for handling guidance practices, and for developing a workable system for conducting regulatory lookbacks.

Of course, considering the SCC interagency working group raises an important consideration about durability. That group was convened by order of a memorandum issued by President Obama and when President Trump took office, he disbanded the group and essentially gutted the role of SCC in RIAs. Perhaps if Obama had used an executive order, which carries greater weight, the group might have gotten better treatment from Trump, but it is unlikely. As this discussion of OIRA’s history has underscored, executive orders seem to be a favored vehicle for making changes to the regulatory review process. But presidents seem to have no compunction about undoing the orders of their predecessors, meaning even these policy instruments may not be long lasting. Therefore, to establish durability, OIRA should consider other avenues to take up these issues, such as leaning on legislative allies to create standing groups via statute.

Before concluding, a final note on prioritization is warranted. This section has focused entirely on failures that are rooted around specific issues (e.g., guidance practices). The other

failure discussed in depth is OIRA's lack of staff capacity; this should be considered OIRA's first order of business. Growing staff is a political problem and one that an ambitious OIRA administrator should take on before addressing the other failures discussed herein.

The notion of a failure CV suggests that every person—and institution—suffers setbacks. Starting a conversation about OIRA's institutional shortcomings is important because it reveals a more accurate picture of OIRA and identifies concrete ways that the institution can improve. Without a doubt, OIRA is a powerful institution, but it nevertheless has problems, problems that are not easy to solve. However, the suggestions offered here are oriented toward moving OIRA to a more streamlined and effective regulatory review process, one that instills confidence among both agencies and the public.

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- ² *Ibid*, p. 1839.
- ³ Durbin, Dick. 2001. “Graham Flunks the Cost-Benefit Test.” *Washington Post*, July 16. Available online: https://www.washingtonpost.com/archive/opinions/2001/07/16/graham-flunks-the-cost-benefit-test/4a4af210-df8b-4137-b9b3-03e8a82df9a1/?utm_term=.dfa1cb48142.
- ⁴ Frederickson, Leif. 2017. “The Federal Agency that Few Americans have Heard of and Which we All Need to Know.” *Washington Post*, Sept 28. Available online: https://www.washingtonpost.com/news/made-by-history/wp/2017/09/28/the-federal-agency-that-few-americans-have-heard-of-and-which-we-all-need-to-know/?utm_term=.b9307939cbcf.
- ⁵ Arbuckle, Donald R. 2011. “Obscure but Powerful: Who are Those Guys.” *Administrative Law Review* 63:131–134, p. 134.
- ⁶ Sunstein (2012).
- ⁷ Steinzor, Rena. 2010. “Eye on OIRA: Regulation Goes Opaque.” CPR Blog, Center for Progressive Reform, June 10. Available online: <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5C7955F2-A0D9-B017-5A5D963250256AAF>.
- ⁸ Shapiro, Stuart. 2011. “OIRA Inside and Out.” *Administrative Law Review* 63:135–148.; Shapiro, Stuart and John F. Morrall III. 2012. “The Triumph of Regulatory Politics: Benefit-Cost Analysis and Political Salience.” *Regulation & Governance* 6(2):189–206.
- ⁹ Heinzerling, Lisa. 2014. “Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House.” *Pace Environmental Law Review* 31:325–369, p. 314.
- ¹⁰ Acs, Alex and Charles M. Cameron. 2013. “Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?” *Presidential Studies Quarterly* 43(3):443–467.
- ¹¹ Haeder, Simon F. and Susan Webb Yackee. 2015. “Influence and the Administrative Process: Lobbying the US President’s Office of Management and Budget.” *American Political Science Review* 109(3):507–522.
- ¹² Potter, Rachel Augustine. 2019. *Bending the Rules: Procedural Politicking in the Bureaucracy*. Chicago, IL: University of Chicago Press.
- ¹³ For example, Bolton et al. discuss in detail how a limited capacity hinders OIRA’s performance. Bolton, Alexander, Rachel Augustine Potter and Sharece Thrower. 2015. “Organizational Capacity, Regulatory Review, and the Limits of Political Control.” *Journal of Law, Economics, and*

Organization 32(2):242–271.

¹⁴ Haushofer, as quoted in Jaschik, Scott. 2016. “Sharing the Failures.” *Inside Higher Ed*, May 2. Available online: <https://www.insidehighered.com/news/2016/05/02/professors-failure-cv-prompts-discussion-what-constitutes-academic-success>.

¹⁵ P.L. 96-511.

¹⁶ Before then, a series of less formalized and somewhat ad hoc organizations—from the Nixon administration’s Quality of Life review program to the Carter administration’s Regulatory Analysis Review Group—provided agencies with various levels of feedback on their rulemakings. For an account of these predecessor organizations, see Tozzi, Jim. 2011. “OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding.” *Administrative Law Review* 63:37–69.

¹⁷ Executive Order 12291 “Federal Regulation,” February 17, 1981.

¹⁸ The order, however, did not require agencies to quantify all costs and benefits, an expectation that persists to this day.

¹⁹ Executive Order 12866 “Regulatory Planning and Review,” October 4, 1993.

²⁰ See Executive Order 13422 “Further Amendment to Executive Order 12866 on Regulatory Planning and Review,” January 18, 2007; and Executive Order 13497 “Revocation of Certain Executive Orders Concerning Regulatory Planning and Review,” January 30, 2009.

²¹ Executive Order 13771 “Reducing Regulation and Controlling Regulatory Costs,” January 30, 2017.

²² Figures are from www.reginfo.gov.

²³ Stefan, Melanie. 2010. “A CV of Failures.” *Nature*, Nov 17. Available online: <https://www.nature.com/naturejobs/science/articles/10.1038/nj7322-467a>.

²⁴ Failure—or its converse, success—should not be defined merely in terms of size and power. Good policy outcomes, which in the case of OIRA means that regulations are improved as the result of its review, are an important marker of an organization’s achievements. Policy outcomes are naturally more idiosyncratic and harder to systematically observe. Fortunately, for the purposes herein, OIRA’s ability to effectuate good policy outcomes goes hand-in-hand with its size and power.

²⁵ See, e.g., Carpenter, Daniel P. 2001. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* Princeton, NJ: Princeton University Press.; Egeberg, Morten, and Jarle Trondal. 2009. “Political Leadership and Bureaucratic Autonomy: Effects of Agencification.” *Governance* 22(4): 673-688. Huber, John D. Charles R. Shipan. *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy*. New York, NY: Cambridge University Press.

²⁶ For an accounting of the violations of this law, see the annual Information Collection Budget, which is published each year by OMB.

²⁷ As quoted in Vladeck, David C. 2007. “Amending Executive Order 12866: Good Governance or Regulatory Usurpation?” Testimony before the House Committee on Science and Technology, Feb 13 Available online: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1075&context=cong>.

²⁸ See, e.g., Shabecoff, Philip. 1981. “Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate.” *New York Times*, Nov 7. Available online: <https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html>.

²⁹ Moe, Terry M. 1985. The Politicized Presidency. In *The New Direction in American Politics*, ed. John E. Chubb and Paul E. Peterson. Washington, D.C.: Brookings Institution Press pp. 244–63.

³⁰ Shabecoff (1981).

³¹ Rao, Neomi. 2018a. “Assessing the Administrative State.” Remarks at the American Enterprise Institute, June 19. Washington, D.C. Available online: <https://www.youtube.com/watch?v=A6n9qEOByT4>.

³² See Rao 2018a; Rao, Neomi. 2018b. “What’s Next for Trump’s Regulatory Agenda? A Conversation with OIRA Administrator Neomi Rao.” Brookings Institution, January 26. Transcript. Available online: https://www.brookings.edu/wp-content/uploads/2018/01/es_20180126_oira_transcript.pdf; Tozzi (2011).

³³ CRS. 2005. “Presidential Review of Agency Rulemaking.” Congressional Review Service, April 5. Report #:RL32855. Available online: https://www.everycrsreport.com/files/20050405_RL32855_aea4443451f90263db284510507bc46d8f32eda7.pdf.

³⁴ Indeed, some individual agencies post both versions on the web. See Haeder and Yackee (2015) for an analysis comparing document changes pre- and post- OIRA review.

³⁵ Steinzor, Rena, Michael Patoka and James Goodwin. 2011. “Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment.” Center for Progressive Reform, White Paper #1111. Available online: http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

³⁶ See <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp/>.

³⁷ I do not spend more time outlining OIRA’s numerous other successes as an institution since they have been so well documented elsewhere (Arbuckle 2011; Shapiro, 2011; Tozzi 2011).

³⁸ For example, Potter (2019); Wagner, Wendy E. 2010. “The CAIR RIA: Advocacy Dressed Up as Policy Analysis.” In *Reforming Regulatory Impact Analysis*. New York, NY: Routledge pp. 56–81.

³⁹ Belfield, Clive R., A. Brooks Bowden and Viviana Rodriguez. 2018. “Evaluating Regulatory Impact Assessments in Education Policy.” *American Journal of Evaluation* pp. 1–19.

⁴⁰ E.g., Hahn, Robert W. and Paul C. Tetlock. 2008. “Has Economic Analysis Improved Regulatory Decisions?” *Journal of Economic Perspectives* 22(1):67–84; Shapiro and Morrall (2012); Shapiro, Stuart and John F. Morrall III. 2016. “Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?” *Administration & Society* 48(3):367– 389.

⁴¹ OMB. 2003. “Regulatory Analysis.” Sept. 17. Circular A-4. Available online: https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.

⁴² HHS. 2016. “Guidelines for Regulatory Impact Analysis.” Department of Health and Human Services document. Available online: https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf.

⁴³ DOT. 2016. “Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses–2016 Adjustment.” Department of Transportation memorandum, August 8. Available online: https://www.transportation.gov/sites/dot.gov/files/docs/2016_20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf.

⁴⁴ EPA. 2017. “Mortality Risk Valuation.” Environmental Protection Agency webpage. Available online: <https://www.epa.gov/environmental-economics/mortality-risk-valuation>.

⁴⁵ This inefficiency is underscored by the fact that invoking VSLs is relatively rare; government-wide only about a dozen rules per year involve VSL calculations; See Merrill, Dave. 2017. “No One Values Your Life More Than the Federal Government.” Bloomberg News, Oct 19. Available online: <https://www.bloomberg.com/graphics/2017-value-of-life/>.

⁴⁶ Merrill (2017).

⁴⁷ Associated Press. 2008. “Like the Dollar, Value of American Life has Dropped.” *New York Times*, July 10. Available online: <https://www.nytimes.com/2008/07/10/business/worldbusiness/10iht-10life.14401415.html?mcubz=1>.

⁴⁸ Appelbaum, Binyamin. 2011. “As U.S. Agencies Put More Value on a Life, Businesses Fret.” *New York Times*, Feb 16. Available online: <https://www.nytimes.com/2011/02/17/business/economy/17regulation.html>.

⁴⁹ Hahn, Robert W. and Patrick M. Dudley. 2007. “How Well Does the U.S. Government Do Benefit-Cost Analysis?” *Review of Environmental Economics and Policy* 1:192–211, p. 202.

⁵⁰ See also Belfield, Bowden, and Rodriguez (2018).

⁵¹ Committee on Oversight and Government Reform. 2018. “Shining Light on Regulatory Dark Matter.” House Committee on Oversight and Government Reform, March. Majority Staff Report. Available online: <https://permanent.fdlp.gov/gpo110748/Guidance-Report-for-Issuance1.pdf>

⁵² Ibid.

⁵³ Noe, Paul R. and John D. Graham. 2008. “Due Process and Management for Guidance Documents:

Good Governance Long Overdue.” *Yale Journal on Regulation* 25(1):103– 112, p. 105.

⁵⁴ Ibid.

⁵⁵ The order also called for each agency to select a “regulatory policy officer” (RPO), who had to be a political appointee. The RPO would then be the point of contact for all of the agency’s important regulations. Many saw this as inviting even more politics into the rulemaking process.

⁵⁶ Portman, Rob. 2007. “Memorandum to Heads of Executive Departments and Agencies on Issuance of OMB’s Final Bulletin for Agency Good Guidance Practices.” Office of Management and Budget, Jan 17. Available online: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf>.

⁵⁷ Bravender, Robin. 2009. “Obama Tosses Bush Order, Eases OMB Grip on Rulemaking.” *E&E News*, February 4. Available online: <https://www.eenews.net/stories/73906>.

⁵⁸ Orszag, Peter R. 2009. “Memorandum to Heads and Acting Heads of Executive Departments and Agencies.” Office of Management and Budget, Mar 4. Available online” <https://tinyurl.com/thsenal>; Heinzerling (2014).

⁵⁹ Committee on Oversight and Government Reform (2018).

⁶⁰ OMB. 2019. “Guidance on Compliance with the Congressional Review Act,” April 11. Memo: M-19-14. Available online: <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>.

⁶¹ See “Promoting the Rule of Law Through Improved Agency Guidance Documents” (E.O. 13891; October 15, 2019, 84 FR 55235) and “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication” (E.O. 13892; October 15, 2019, 84 FR 55239).

⁶² According to the Government Accountability Office, some agencies do seem to follow the guidance on good guidance practices. GAO found that among the four agencies studied, all identified standard practices to follow when developing guidance, but they addressed OMB’s requirements on significant guidance to varying degrees. See GAO. 2015. “Federal Regulations: Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices.” Government Accountability Office report, GAO-18-436T. Available online: <https://www.gao.gov/assets/700/690650.pdf>.

⁶³ Trump also stands apart in his approach to deregulation; see Potter, Rachel Augustine, Andrew Rudalevige, Sharece Thrower and Adam L. Warber. 2019. “Continuity Trumps Change: The First Year of Trump’s Administrative Presidency.” *PS: Political Science and Politics* 52(4): 613-619.

⁶⁴ Coglianese, Cary. 2018. “It’s Time to Think Strategically About Retrospective Benefit-Cost Analysis.” *The Regulatory Review*, University of Pennsylvania, Apr 18. Available online: <https://www.theregreview.org/2018/04/30/coglianese-think-strategically-retrospective-benefit-cost-analysis/>.

⁶⁵ Coglianese (2018); Grossman, Andrew M. 2017. “An Administration Takes Sides.” *Notice & Comment*, May 25. Available online: <http://yalejreg.com/nc/an-administration-takes-sides-by-andrew-m-grossman/>; Raso, Connor. 2017. “Assessing Regulatory Retrospective Review Under the Obama

Administration.” Center on Regulation and Markets, Brookings Institution, June 15. Available online: <https://www.brookings.edu/research/assessing-regulatory-retrospective-review-under-the-obama-administration/>.

⁶⁶ Institute for Policy Integrity. 2016. “Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders.” New York University School of Law, report. Available online: <http://www.thecre.com/oira/wp-content/uploads/2016/11/Report.pdf>.

⁶⁷ Coglianesi (2018).

⁶⁸ GAO. 2014. “Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals.” Government Accountability Office report, GAO-14-268. Available online: <https://www.gao.gov/assets/670/662517.pdf>.

⁶⁹ Institute for Policy Integrity (2016).

⁷⁰ Grossman (2017).

⁷¹ Arguably, the Trump administration has gone some way toward standardization on this last point with the creation of regulatory reform officer roles within agencies, but this approach is entirely focused on costs and it is not clear whether these roles will persist beyond the Trump administration.

⁷² Bolton, Potter, and Thrower (2015).

⁷³ Shapiro and Morrall (2016).

⁷⁴ See, Balla, Julie. 2018. “Regulators’ Budget: OIRA’s Growth and the Future of Regulatory Reform.” Report, Regulatory Studies Center at George Washington University. Available online: https://regulatorystudies.columbian.gwu.edu/regulators_E2_80_99-budget-oira_E2_80_99s-growth-and-future-regulatory-reform.

⁷⁵ There is some sense among scholars that the level of rule sophistication has indeed increased over time. One key indicator is that the number of administrative requirements has grown; agencies must often evaluate the impact of a proposed rule on specific subpopulations, such as tribes, children, or small businesses. This is to say nothing of statute-specific procedural and analytical requirements imposed on individual agencies; see, e.g., Mashaw, Jerry L. 1994. “Improving the Environment of Agency Rule-Making: An Essay on Management, Games, and Accountability”. *Law and Contemporary Problems* 57:185–257.; McGarity, Thomas O. 1992. “Some Thoughts on ‘Deossifying’ the Rule-Making Process.” *The Duke Law Journal* 41:1384–462.; and Pierce, Richard J. 1995. “Seven Ways to Deossify Agency Rule-Making.” *Administrative Law Review* 47:59–95. Additionally, regulatory impact analyses can involve highly technical analytical calculations; the sophistication level for these analyses has likely increased as the academic field of cost-benefit analysis has evolved over the years. Finally, while evaluating regulatory complexity is notoriously difficult, some studies have found increased complexity in areas where it is easier to directly measure, such as financial regulation; see Barth, James R., and Stephen Matteo Miller. 2018. “On the Rising Complexity of Bank Regulatory Capital Requirements: from Global Guidelines to their United States (US) Implementation.” *Journal of Risk and Financial Management* 11(4): 77.

⁷⁶ OMB Memo M-19-14. (2019).

⁷⁷ See Balla (2018); Institute for Policy Integrity (2016); Shapiro and Morrall (2016).

⁷⁸ There have been small staff increases at OIRA under the Trump administration, but they are not of the magnitude I suggest is necessary here. See Bolen, Cheryl. 2017. “White House Regulatory Office Fully Staffed.” *Bloomberg BNA*, September 15. Available online: <https://www.bna.com/white-house-regulatory-n57982087934/>; Rao (2018a).

⁷⁹ E.g., Niskanen, William. 1971. *Bureaucracy and Representative Democracy*. New York, NY: Aldine Press.

⁸⁰ Indeed, this is consistent with my own experience serving as an OIRA “desk officer” from 2005-2007. Maximizing organizational flexibility so that OIRA could treat individual cases on their own merits was considered sacrosanct by both leadership and by rank-and-file staff.