

STEALTH REGULATION: ADDRESSING AGENCY EVASION OF OIRA AND THE ADMINISTRATIVE PROCEDURE ACT

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INTRODUCTION

In May 2014, the *Harvard Journal of Law & Public Policy* published a series of papers as part of a multiauthor collaboration organized by the Mercatus Center at George Mason University.¹ That series of papers, together with a forthcoming article by Hester Peirce², reviews ways in which U.S. federal regulatory agencies engage in regulatory-like actions while avoiding requirements outlined by the Administrative Procedure Act³ (APA) and regulatory oversight by the Office of Information and Regulatory Affairs (OIRA) of the U.S. Office of Management and Budget (OMB). This Article summarizes lessons from the series and offers reform proposals that may improve upon the current situation.

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1. See John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Benefit-Cost Review*, 37 HARV. J.L. & PUB. POL'Y 425 (2014); Jerry Brito, "Agency Threats" and the Rule of Law: An Offer You Can't Refuse, 37 HARV. J.L. & PUB. POL'Y 553 (2014); Henry N. Butler & Nathaniel J. Harris, *Sue, Settle and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL'Y 579 (2014); Nina A. Mendelson & Jonathan B. Wiener, *Responses to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447 (2014); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523 (2014).

2. Hester Peirce, *Regulating Through the Back Door Rulemaking at the Commodity Futures Trading Commission*, 1 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION (forthcoming 2014).

3. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

The papers in our series tell an important story about how federal regulators—whether by design or by effect—circumvent both the APA and OIRA oversight. Regulators thus can achieve their ends without adhering to the standard regulatory procedures that represent part of the checks and balances of American government. These procedures have been designed to ensure that technical expertise drives regulatory decisionmaking, as well as to ensure a certain degree of democratic accountability of regulators to the public.

How widespread the problem is remains an open question.⁴ Powerful anecdotes, however, demonstrate how significant, rule-like actions having large economic impacts are escaping both OIRA oversight and standard mechanisms for democratic input in the policymaking process.⁵ Some of these examples are related to highly controversial and highly political actions by the federal government.⁶ Other anecdotes represent the day-to-day activity of federal agencies operating below the level of political visibility and media attention.⁷ These anecdotes, because they emerge at multiple federal agencies in different administrations, suggest that a problem does in fact exist. Going forward, scholars and policymakers should, on an agency-by-agency basis, determine the extent of the problem and whether it is worsening over time.

This Article is structured as follows. Part I describes the current regulatory environment in which agencies are operating, including the checks and balances that are supposed to ensure a minimal level of competence and accountability. In Part II, we describe how agencies circumvent these procedures, and we provide a nonexhaustive list of potential remedies. We conclude with an overview of regulatory reforms that might improve the current environment and a summary of the lessons learned from the collaboration between the Mercatus Center at George Mason University and the *Harvard Journal of Law & Public Policy*.

4. Mendelson & Wiener, *supra* note 1, at 450.

5. John Graham and Cory Liu mention four in their paper. Graham & Liu, *supra* note 1, at 426.

6. For example, the Treasury Department's decision to delay portions of the Patient Protection and Affordable Care Act is described later in this paper. See *infra* notes 37–42 and accompanying text.

7. For example, the EPA's move to determine formaldehyde exposure can cause leukemia. Graham & Liu, *supra* note 1, at 439–42.

I. BACKGROUND

In theory, the regulatory system in the United States is a bilateral relationship between the will of Congress, as expressed in authorizing statutes, and the actions of agencies, ordered to implement the statutory mandates they receive.⁸ Assuming a statute is constitutional, the judiciary's role is to ensure that the agencies' actions are faithful to the statutes.

The reality of the regulatory state is more complicated because of additional checks and balances imposed by Congress and the President. The APA and the OIRA review process are perhaps the two most important checks and balances added since the Progressive Era.

Both the APA and OIRA review touch on the themes of democratic accountability and technical competence. Democratic accountability asks regulators to be sensitive to the wishes of the people the regulatory system is supposed to serve, as reflected in the legislation their elected representatives pass and the comments citizens submit to agencies. Technical competence refers to the proper use of scientific, engineering, and economic information, including the expectation that rules will accomplish their statutory objectives while, whenever feasible and lawful, meeting basic standards of economic efficiency.

The Administrative Procedure Act, passed in 1946,⁹ was designed to ensure democratic checks on regulatory agencies (e.g., the requirements for public participation in rulemaking) but has evolved to place substantive, technical checks on regulatory actions (e.g., the requirement for substantial evidence in support of regulatory actions). The APA emerged to resolve conflicts associated with New Deal regulatory policies.¹⁰ Interest groups who were left out of the rulemaking process wanted a tool to make regulations more democratic, and regulators wanted to make the rules harder to reverse in a subsequent administration. Although the APA procedures were established at a time when there were far fewer regulatory agencies than exist today, the APA procedures, as embellished through judicial interpretation, have had a

8. For a history and rationale of the U.S. regulatory state, see SUSAN E. DUDLEY & JERRY BRITO, *REGULATION: A PRIMER* (2d ed. 2012).

9. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

10. Barry McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

durable effect during the decades of expansion and modernization of the federal regulatory state.

The Act sets up two ways by which agencies can promulgate regulations.¹¹ For a variety of reasons, agencies rarely use the first, known as formal rulemaking.¹² The second, and the most common way of issuing regulations, is known as informal rulemaking. It dispenses with the trial-like procedures found in formal rulemaking, such as cross-examination of experts, and establishes a process by which the public can comment on regulations. Agencies are then required to respond to the public's comments. Failure to respond to comments can cause rules to be deemed "arbitrary and capricious" and vacated by a judge. This bar may be a fairly low one for agencies to pass, but it allows anyone with "standing," roughly meaning parties who are impacted by a regulation, to sue the agencies. It is essentially a bill of rights for those affected that allows for some judicial oversight. The process thereby allows the public an opportunity to participate in government rulemaking to mimic the democratic process, particularly because regulatory decisions can impact virtually every aspect of American life. Over time, the arbitrary and capricious test has evolved to embrace more technical expectations, such as the requirement for "substantial evidence" and the so-called "default rules" for benefit-cost analysis that the courts apply when Congress is silent about benefits and costs in the authorizing statute.¹³

The second important component of the regulatory oversight system is review of proposed and final regulations by OIRA, a statutory office housed within the OMB. OIRA was created in late 1980 by President Carter pursuant to the Paperwork Reduction Act.¹⁴ Several months later, in February 1981, President Reagan issued an executive order requiring that all "major" regulations be accompanied by a Regulatory Impact Analysis (RIA), which included a benefit-cost analysis.¹⁵ More importantly, President Reagan instructed agencies that they were

11. For more information on the processes through which regulations are created, see DUDLEY & BRITO, *supra* note 8, at 35–55.

12. Aaron Nielson, *In Defense of Formal Rulemaking*, OHIO ST. L.J. (forthcoming).

13. CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2003).

14. Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521 (2006).

15. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

not permitted to publish a new regulation in the *Federal Register* until OIRA cleared it. Like the APA, the Reagan executive order sought to advance democratic values as well as technical competence. As the only elected official in the executive branch, the President was politically accountable for the actions of federal regulatory agencies (particularly those located in cabinet departments), and the Reagan executive order made clear that OIRA—and ultimately the White House—would review regulatory actions to make sure they were consistent with the President's policy priorities. From a technical-competence perspective, the Order also explicitly made economic efficiency an important goal of rulemaking, as the order mandated that agencies, where permissible under law, shall produce regulations whose benefits “outweigh” their costs and choose regulatory alternatives that “maximize net benefits.”¹⁶

Although controversial when first implemented, OIRA review has become a permanent feature of the federal regulatory process.¹⁷ Some analytic requirements, however, preceded OIRA's creation. These requirements began during the Nixon administration and were buttressed by President Carter before Congress created OIRA and the Reagan administration established the formal OIRA regulatory review process.¹⁸ Since the Reagan administration, presidents from both parties have remained committed to regulatory review. For example, in 1993, President Clinton issued Executive Order 12,866,¹⁹ which modified Reagan's Executive Order 12,291 and targeted OIRA's review on “significant” actions but left in place the essential elements of E.O. 12,291 (i.e., centralized OIRA review and the RIA requirement). E.O. 12,866 is still in effect today, as Presidents George W. Bush and Barack Obama both remained committed to the Order's principles of regulatory review. Indeed, Bush

16. *Id.*

17. See Michael Livermore & Richard Revesz, *Three Stages in the Use of Cost-Benefit Analysis as a Tool for Evaluating U.S. Regulatory Policy* (Eur. Univ. Inst., Max Weber Lecture Series, MWP—LS 2012/05, 2012), available at <http://cadmus.eui.eu/handle/1814/22774>.

18. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 40–41 (2011).

19. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

and Obama both issued executive orders aimed at buttressing or expanding OIRA's review authority.²⁰

The ultimate effect of OIRA's emergence has been to give a nationally elected political figure, the President, greater authority over the federal regulatory process, as the ultimate source of OIRA's political muscle in battles with regulators is the White House. From a technical point of view, OIRA's emergence has also inserted a form of technical review over the work of agency managers and experts because, after interagency review, the final word on a technical matter may come from OIRA rather than a regulatory agency. OIRA has a limited staff, but it can draw on specialized expertise from numerous agencies in the executive branch as well as the Council of Economic Advisers, the Office of Science and Technology Policy, and the Council on Environmental Quality. An advantage of OIRA's emergence is that there is now an institutional check on the "tunnel vision" at agencies that have limited incentives to produce rules that take benefits and costs into account.²¹

The requirement for review by a centralized executive body was another attempt to provide a check on agencies, in this case, by the President, who oversees the agencies. The requirement to do an RIA and ensure that, at a minimum, benefits exceed costs, may provide a slightly higher bar to passage of regulations than was set by the APA's arbitrary and capricious standards. Moreover, federal courts are increasingly enforcing a default benefit-cost standard under the APA.²² The numeric test, however, is difficult to enforce in cases where a rule has important intangible benefits or costs. In fact, President Clinton changed the OIRA review standard from "benefits outweigh costs" to "benefits justify costs" to allow agencies to weigh a variety of intangible factors.

From a practical point of view, the bigger difficulty for the President is that OIRA's staff has shrunk since its creation, from a peak of about ninety employees to fewer than fifty at the start of the Obama Administration, and to a low of thirty-

20. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

21. For a discussion of the bureaucratic problem of tunnel vision at agencies, see STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10–21 (1993).

22. SUNSTEIN, *supra* note 13.

eight at the end of 2013. Meanwhile, the regulatory agencies have roughly doubled in size during that period, with more than 200,000 people employed at rule-writing agencies.²³ Regulatory agencies outspend OIRA by a factor of 7000 to 1,²⁴ even while the small staff at OIRA is charged with overseeing the roughly 3000 regulations finalized each year.²⁵ Just to keep up with inflation, OIRA's budget would be over 30% higher today if the agency's resources had held constant since 1981.²⁶ Even keeping OIRA resources constant in real terms, however, is likely insufficient given the increased activity at the federal regulatory agencies. Had OIRA's budget kept pace with the growth of regulatory agency spending, OIRA's budget would be more than 200% above its 1981 levels in real terms.²⁷ As it stands, OIRA need only make marginal improvements to one of the many economically significant regulations the agency reviews each year to save society the resources to pay for the agency's currently small budget of a little over \$8 million annually (in 2013 dollars).²⁸

OIRA can draw on assistance from the Council of Economic Advisers and experts at other federal departments and agencies, but OIRA, due to its small size and limited authority, is now a modest force in the federal regulatory process relative to other agencies. As a result, despite OIRA review, the annual number of federal regulatory actions supported by quantitative estimates of benefits and costs is small—just fourteen in FY 2012.²⁹ Not

23. Susan Dudley & Melinda Warren, *Sequester's Impact on Regulatory Agencies Modest* (George Washington Univ. Reg. Studies Ctr. & Weidenbaum Ctr. on the Econ., Gov't, and Pub. Pol'y, Regulators' Budget Report 35, 2013), available at http://wc.wustl.edu/files/wc/imce/2014_regulators_budget.pdf.

24. Jerry Ellig & James Broughel, *OIRA Spending Falls as Agency Spending Swells*, MERCATUS CTR. AT GEORGE MASON UNIV. (Oct. 17, 2013), <http://mercatus.org/publication/oira-spending-falls-agency-spending-swells>.

25. U.S. OFFICE OF MGMT. & BUDGET, DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT (2013), available at http://www.whitehouse.gov/sites/default/files/omb/infoereg/2013_cb/draft_2013_cost_benefit_report.pdf.

26. Ellig & Broughel, *supra* note 24.

27. *Id.*

28. *Id.*

29. See U.S. OFFICE OF MGMT. & BUDGET, *supra* note 25, at 22.

surprisingly, presidents since at least Harry Truman have complained about the difficulty of controlling regulatory agencies.³⁰

In addition to helping an elected official, the President, serve the public interest, OIRA's role is to ensure a minimum level of competence from agencies, in essence acting like a watchdog to provide oversight of agency actions.³¹ The requirement to do an RIA exists to ensure that agencies follow certain principles of good policymaking when promulgating regulations. These principles include steps like identifying the problem the agency is seeking to solve, identifying alternative ways to address the problem (including nonregulatory solutions), and evaluating the effectiveness, cost-effectiveness, and efficiency of each of those alternatives with a benefit-cost analysis.³²

These two components of our regulatory oversight system, democratic accountability and technical expertise, are now central features of the U.S. regulatory state. As we will see, without these components the system breaks down. When agencies are no longer subject to these checks and balances, they take actions that are questionable on both democratic and technical grounds. Not only is this behavior a problem for making regulations that achieve their goals, it also erodes the credibility of our political institutions in the public's eyes.³³

What we have described as "checks and balances" on agencies may seem to some like bureaucratic obstacles to serving their conception of the public interest. Neither the APA nor OIRA review, however, necessarily restrains or slows federal regulatory agencies. Many regulatory actions can be fully justified under the standards and procedures created by the APA and OIRA. In circumstances where the APA or OIRA do pose an obstacle to agency objectives, federal regulators do not necessarily surrender. To the contrary, we have shown—through the papers in this series—that agencies take creative steps to bypass the APA and OIRA review. Agencies behave this way

30. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–73 (2001).

31. *Hearing Before the H. Subcomm. on Regulatory Reform, Commercial, and Antitrust Law*, 113th Cong. (2013) (testimony of John F. Morrall III, Affiliated Senior Scholar, Mercatus Ctr. at George Mason Univ.), available at http://mercatus.org/sites/default/files/Morrall_OIRA-powers_testimony_092713.pdf.

32. See Exec. Order No. 12,291, *supra* note 15; Exec. Order No. 12,866, *supra* note 19.

33. Peirce, *supra* note 2.

because they are permitted to do so, although the process they follow is not always apparent to the President or to Congress.

II. PROBLEMS AND POTENTIAL SOLUTIONS

Although the usual rulemaking procedures give permanence and legality to a policy, for a variety of reasons that system may appear too burdensome to agencies at times, so agencies may prefer to use other, less accountable methods to set policy.³⁴ Here we describe several, but not all, of the ways agencies may regulate through the back door, so to speak.

There are important differences between the various methods agencies employ, and different agencies that engage in these actions may do so to different degrees, depending on their statutory constraints, agency culture, the receptivity of potential partners (e.g., the States), and other factors. Some methods of evading OIRA review and the APA, like consent decrees, may be legally binding, while others methods are not, such as threats made by agency officials (e.g., warning letters or enforcement actions) or issuances of policy memoranda or guidance documents.

A. *Policy Memoranda and Guidance Documents*

Guidance documents and policy memoranda are sets of instructions or announcements written by agencies to inform regulated parties of what they can do to be confident they are in compliance with a regulation.³⁵ Regulatory agencies also use these documents to control the activities of the agency staff and to avoid ad-hoc and inconsistent enforcement of rules by different personnel within an agency. Informal policy documents are not legally binding but they may elicit changes in behavior as individuals view actions outlined in these documents as a safe harbor for complying with a regulation or, even when no regulation exists, as a path to avoiding conflicts with the regulatory agency. Documents of this sort may have a purpose beyond avoiding the APA or OIRA, of course. They clarify the terms of regulations that may have been written originally with vague language. They help to keep the public informed about what

34. See Mendelson & Wiener, *supra* note 1, at 468–81.

35. Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010).

agency staff are thinking and they are a method for administrative bureau chiefs to control their subordinates' behavior.

Agencies, however, can also use these documents in instances where they might want to change the behavior of the regulated public but for reasons of time, political sensitivity, or constraints on resources, they might find the usual regulatory procedures too burdensome.³⁶ Or agencies may simply want to avoid OIRA review and the informal rulemaking process. The line between what is a legitimate use of agency guidance or policy memoranda and what is not certainly is vague. One criterion for discerning this line could be whether guidance qualifies as "significant" as defined under Executive Order 12,866. If an agency action is non-binding, for example, it is difficult to imagine why it should have an annual impact of over \$100 million on the economy. A significance determination might upgrade the status of any guidance to the level of a traditional regulation.

One example of guidance that clearly had measureable economic impacts relates to the 2010 Patient Protection and Affordable Care Act.³⁷ In July 2013, the IRS delayed reporting requirements for employers for one year through an announcement in a Treasury blog post.³⁸ Employer "shared responsibility payments," which are fines imposed on employers for not providing health insurance to certain employees, were also delayed.³⁹ The IRS followed this announcement by issuing a "bulletin" to businesses outlining how to stay in compliance during the transition period before reporting requirements and fines would be fully implemented.⁴⁰ Previously, guidance to employers regarding the employer responsibility payment was

36. Guidance documents can also be used to elicit changes in firm behavior in order to make the costs and benefits of an actual regulation appear smaller in the future. For example, if a majority of firms are in compliance with guidance, formalizing the policy in a regulation appears to present little cost to society. This appearance is misleading, however, if firms felt pressure to comply with the original guidance. Enforcement actions by agencies can have similar effects. See Peirce, *supra* note 4.

37. Patient Protection and Affordable Care Act, Pub. Law No. 111-148, 124 Stat. 119 (2010).

38. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF TREASURY (July 2, 2013), <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner.aspx>.

39. *Id.*

40. I.R.S. Notice 2013-45 (July 29, 2013).

issued in the form of a proposed rule in the *Federal Register*⁴¹ and the IRS took comments from the public on the proposal. The IRS's decision to issue the delay in the employer responsibility payment through a press release and subsequent bulletin, without taking further comments from the public as the policy changed, may be due either to the political sensitivity surrounding the issue or to the need to implement a policy change quickly before a key deadline on January 1, 2014. The implementation date for the fines changed yet again when the regulation was eventually finalized, demonstrating the ad-hoc and unpredictable nature of IRS policy.⁴² Even with the regulation finalized, employers have little assurance that a policy is now firmly in place that will not be overridden by another bulletin.

If nothing else, OIRA should find better ways of tracking guidance documents and policy memoranda. This responsibility is well in line with OIRA's role as an "information aggregator."⁴³ Information on agency use of guidance documents is dispersed throughout the government, making it difficult to track, and scholars have suggested that more empirical work is needed to determine the extent of the problems posed by these documents.⁴⁴ This suggestion should not be controversial, but it may mean that OIRA needs more resources. As we have already noted and will stress again later, OIRA staffing levels are a serious concern because the organization's staffing has diminished over time, while regulatory agency responsibilities and spending have increased significantly.⁴⁵

One solution would be to return to the system in place under President George W. Bush, where an executive order explicitly stated that OIRA would review all significant guidance documents.⁴⁶ The Obama administration later repealed President Bush's executive order.⁴⁷ The OMB, however, still claims au-

41. Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 217 (Jan. 2, 2013).

42. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 29 (February 12, 2014).

43. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

44. See, e.g., Mendelson & Wiener, *supra* note 1, at 462–63.

45. Ellig & Broughel, *supra* note 24.

46. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

47. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

thority to informally review these documents,⁴⁸ and it has retained a bulletin, written during the Bush administration, that outlines agency good guidance practices.⁴⁹

As such, OIRA has reviewed over 250 “notices” issued by agencies since 2009.⁵⁰ It is unclear how many more notices may have escaped OIRA’s attention. As with regulations, OIRA should have the explicit authority to return agency guidance and to require benefit-cost analysis for guidance having an economic impact of over \$100 million annually.

Another solution would be to label all guidance documents and policy memoranda as nonbinding.⁵¹ This policy would tell regulated parties that they can choose to ignore guidance documents and policy memoranda if they wish, so long as they comply with underlying regulations. Firms could also use labels in court to defend against any enforcement actions informed by agency guidance.⁵²

A stronger step would be to require notice and comment for all significant guidance documents.⁵³ A requirement to do an RIA could be mandated by executive order or by legislation. Or, an RIA could be required if OIRA’s Administrator requests it. Agency guidance would become very much like APA “legislative” rulemaking, and this is precisely the point. Agency actions that have rule-like effects should be treated like rules and go through the usual procedures that agencies have followed for over three decades.

48. Memorandum from Peter Orszag, Dir., Office of Mgmt. & Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

49. U.S. OFFICE OF MGMT. & BUDGET, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007), *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/m07-07.pdf>.

50. *Historical Reports*, U.S. OFFICE OF MGMT. & BUDGET, www.reginfo.gov/public/do/eoHistoricalReport (last visited Feb. 4, 2014).

51. Administrative Conference of the United States, Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103 (July 8, 1992).

52. An additional labeling requirement could be to force agencies to cite in documents the statute or regulation that spells out the agency’s authority in the area where the agency is providing guidance. This requirement would help in those cases where an agency’s legal authority to issue guidance is in doubt.

53. ACUS recommended a voluntary approach. *See* Administrative Conference of the United States, Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 41 Fed. Reg. 56,769 (Dec. 30, 1976).

An even more forceful solution would be judicial review of guidance documents, meaning a legal process could be set up that outlines the process for creating guidance documents, and regulated entities could challenge the guidance in court if agencies did not follow the proper procedures. However, as Stuart Shapiro has argued, this type of proposal may lead to more use of interim final rules or other even less accountable methods that are harder to track than guidance documents.⁵⁴ Agencies might resort to ad-hoc enforcement, issuance of warning letters, or threats directed at firms if they feel that issuing guidance documents has become too burdensome.⁵⁵ Indeed, there may be diminishing marginal returns to the oversight measures OIRA could implement if agencies simply find further evasion techniques.

Nonetheless, judicial review is worth considering on a subset of guidance documents with significant welfare consequences as it is unclear whether Shapiro's findings—that evasive activities are likely to increase with more oversight—apply beyond his case study of the Department of Labor. There are reasons to think agencies will continue to use guidance because these documents maintain an element of permanence that can be hard to reverse in subsequent years, and regulators are likely concerned about their legacies. Furthermore, it is not clear that regulatory review requirements under Executive Order 12,866 are leading to more evasive tactics because similar evasive activities occur at independent regulatory commissions, which are exempt from 12,866 requirements.⁵⁶ Factors other than judicial review or OIRA review, such as political salience, may be primary drivers of agency avoidance of proper regulatory channels.

B. *Agencies Delegating to State-Level Authorities*

Another problem occurs when agencies defer or delegate their regulatory authority to the state level. Generally, the fed-

54. Shapiro, *supra* note 1.

55. There are reasons to think this outcome would not happen, however. For one, warning letters and threats must be targeted at specific firms, while guidance documents are relevant to all firms. Threatening one firm at a time may require too much effort from regulators. Additionally, even if agencies resorted to this practice, it may be preferable to the use of guidance documents since the scope of the evasion is confined to one or two firms, rather than an entire industry.

56. See Peirce, *supra* note 2.

eral government should consider preempting state laws in instances where having a multitude of state and local regulations is less efficient than having one standard at the federal level.⁵⁷ Even when efficiency is maximized, there are still costs to centralization, however. States lose the ability to tailor regulations to their unique populations and conditions and they lose the opportunity to serve as laboratories of democracy.

In some instances, federal regulators—when they desire a stricter regulation than can be justified under APA or OIRA review—may collaborate with key state regulators to set standards that will have national implications. A business regulation that is adopted in large states such as California or New York certainly has national economic ramifications and may end up being a *de facto* federal regulation if regulated firms decide to adjust their nationwide production processes rather than produce different products for populations in different states. Under some authorizing statutes, states are permitted to set stricter standards than the federal government, either unequivocally or only if the federal government determines that the states have satisfied certain evidentiary conditions. Graham and Liu point to California, which has the special status of being able to apply for a waiver from preemption of federal laws under the Clean Air Act. A waiver of preemption of this sort occurs when a state decides to “go its own way,” and the evidentiary requirements for the waiver vary by statute. In some cases, these waivers are desirable because they allow states to experiment with different solutions to societal problems. As such, it is important to identify those cases where a waiver will have implications beyond the border of the state receiving it.

In 2009, the EPA granted a waiver to California to set its own standards for greenhouse gas emissions from automobiles.⁵⁸ Given that California is such a large part of the U.S. car market, this change could have major implications for the entire U.S. car market. Yet this policy was not accompanied by a national benefit-cost analysis even though it was likely to have significant impacts on the national economy. Indeed, there are strong reasons to believe the policy might fail a benefit-cost test were one to be done.⁵⁹

57. Graham & Liu, *supra* note 1, at 431.

58. California State Motor Vehicle Pollution Control Standards, 74 Fed. Reg. 32,745 (July 8, 2009).

59. See Graham & Liu, *supra* note 1, at 436.

One solution would be to allow OIRA to require an RIA for significant waivers of preemption that are likely to have national implications. Requiring comment on these waivers from the national public would also allow impacted parties, in this case parties outside of California, to be heard in a democratic manner.

C. *Failure to Enforce Existing Rules*

A similar problem occurs when agencies choose not to enforce existing laws and regulations or they issue waivers to parties that normally would be required to comply with a regulation. For example, in June 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."⁶⁰ This memo explained that the deportation of illegal immigrants who arrived in the United States as children would be halted under certain circumstances. The policy was announced by posting the memo on the Department of Homeland Security website and in a press conference given by President Obama.⁶¹ Analysts speculated that the policy was announced because legislation that the President preferred was stuck in a divided Congress and thus had little chance of passage.⁶² In fact, the President cited this reason in his speech. The policy was highly controversial, was cited in news stories, and became a theme in the 2012 election campaign. This example suggests that agencies may use backdoor rulemaking when political sensitivity is high or when Congress has blocked a legislative initiative.⁶³ This policy was likely to be controversial whether it went through legislative

60. Memorandum from Janet Napolitano, Sec. of Homeland Security, to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Protection, et al. (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

61. Barack H. Obama, *Remarks by the President on Immigration*, OFFICE OF THE PRESS SEC'Y, THE WHITE HOUSE (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

62. Kevin Loria, *DREAM Act Stalled, Obama Halts Deportations for Young Illegal Immigrants*, CHRISTIAN SCI. MONITOR (June 15, 2012), <http://www.csmonitor.com/layout/set/r14/USA/Politics/2012/0615/DREAM-Act-stalled-Obama-halts-deportations-for-young-illegal-immigrants-video>.

63. For more discussion of political sensitivity as a motivation for agency use of guidance documents, see James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111; Raso, *supra* note 35.

or regulatory channels, so perhaps there was little additional cost in added controversy by setting policy through a memorandum rather than through a regulation.

When agencies issue waivers for policies that have national implications or are significant in nature, these waivers should undergo OIRA review and potentially be accompanied by a benefit-cost analysis. Agencies might also be required to seek public comments before issuing significant waivers. Going further, judicial review is a useful device when agencies fail to enforce rules, as this behavior is otherwise very difficult for an organization like OIRA to monitor.⁶⁴ At the very least, OIRA should track waiver activity at agencies and post the information on its website.

One of the primary elements of a political system that adheres to the rule of law is the notion that all are treated equally under the law.⁶⁵ Waivers by their very nature violate this notion, and as such should arouse suspicion whenever they are used in a politically sensitive manner. Failure to enforce a regulation is a choice by regulators and a form of policy making, just as is enforcement of a regulation. As such, examples of nonenforcement should be treated no differently than any regulation. One way to do this would be for Congress to lay out more clearly under what circumstances agencies are allowed to decline enforcing a particular regulation and to allow parties impacted by nonenforcement to challenge an agency decision in court. If Congress is clear about when agencies may decline to enforce policies, it also would help rein in abusive “sue and settle” practices (described shortly) while still allowing legitimate claims against agency nonenforcement of rules. One of the easiest ways for Congress to do this would be to allow agencies more time when setting legislative deadlines, because lack of time is one important reason agencies might not be able to enforce a particular statute. As a result, agencies would not be violating the law if they ran into problems implementing a policy by a date set by Congress.

D. Sue and Settle Litigation

Still another method of avoiding checks on agency activities occurs when states or non-profit organizations sue federal regulatory agencies and settle in the form of a consent decree by

64. Stephen M. Johnson, *In Defense of the Short Cut*, 60 KAN. L. REV. 495, 538 (2012).

65. See generally F. A. HAYEK, *THE ROAD TO SERFDOM* (1944).

agreeing to issue a regulatory action.⁶⁶ Generally, this behavior occurs when an outside group believes an agency is not acting as it is required by statute. Agency staff who favor the regulation may view such lawsuits as “friendly.” In these cases, the agency (or parts thereof), whose interests may be aligned with those of the suing group, will agree to settle the lawsuit in exchange for issuing a regulation of some kind. In many instances, the regulations will still undergo OIRA review and notice and comment. The agency, however, is often under such a strict time constraint due to deadlines set in the consent decree that it can be difficult or impossible for OIRA to provide effective oversight or for the agency to adequately respond to public comments. Empirical research has found that longer OIRA review times are correlated with higher-quality economic analysis from agencies.⁶⁷ If better analysis drives better decisions, speeding up the regulatory review process with strict judicially enforced deadlines can lead to regulations that do not achieve objectives.

An example of this “sue and settle” phenomenon occurred in 2009 when several environmental groups sued the EPA for not properly enforcing the regional haze standards (RHS) outlined by the Clean Air Act.⁶⁸ The EPA entered into five consent decrees with the suing groups, and these agreements set strict deadlines for the EPA to initiate plans for enforcing RHS regulations. The EPA then used these deadlines as an excuse to reject state plans for compliance, claiming the agency did not have enough time to evaluate the states’ plans.⁶⁹ This excuse left some states out in the cold and forced them to adhere to the EPA’s preferred standard rather than their own.

One solution to this problem would be to have OIRA review proposed consent decrees that agencies wish to sign. After all, the agency and OIRA are both representing the President in the litigation, and the President, by executive order or pursuant to legislation, could stipulate that OIRA must clear any draft consent agreement. OIRA, however, currently lacks the staff to review all these judicial settlements, and some might argue that

66. See generally Butler & Harris, *supra* note 1.

67. Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis* (Mercatus Ctr. at George Mason Univ., Working Paper No. 13-13, 2013).

68. Butler & Harris, *supra* note 1, at 604–606.

69. *Id.*

OIRA, because it is part of the Executive Office of the President, will politicize the judicial process. As an alternative, OIRA might require an RIA for any regulations promulgated as a result of a consent decree, whether significant or not (assuming there is adequate time for the agency to conduct one).

Henry Butler and Nathaniel Harris propose several additional solutions to this problem. First, they recommend that judges take a more active role in monitoring sue-and-settle consent decrees, and that the Supreme Court make it easier for states or other third parties, who are impacted by the agreement but are not direct parties entering into it, to intervene in the consent decree. A final option would be for Congress to pass legislation making it easier for third parties to engage in the consent decree process.⁷⁰

Butler and Harris are skeptical of the role that notice and comment can play in the consent decree process, but they do not discuss what role RIA might play. If agencies were required to produce an RIA as a prelude to entering into consent decrees, it might shed light on those instances where these agreements produce highly inefficient results.

E. Other Evasion Tactics

Agency threats, ad-hoc enforcement, and warning letters are some of the methods most available to agencies to influence firms' behavior, as well as some of the most difficult to monitor. For example, the Food and Drug Administration (FDA) recently issued a warning letter to 23andMe, Inc., a company that sold take-at-home genetic tests, including disease-risk analyses.⁷¹ The letter directed the company to cease offering its personal genome services until it received further approval from the FDA. 23andMe responded by ceasing its disease-risk analysis services, although it continued its genetic testing services.⁷² Warning letters such as this one clearly elicit responses from regulated firms, although they are not technically binding like a statute or a regulation is.

70. *Id.*

71. Warning Letter from Alberto Gutierrez, Dir., Office of In vitro Diagnostics & Radiological Health, Ctr. for Devices & Radiological Health, U.S. Food & Drug Admin., to Ann Wojcicki, CEO, 23andMe, Inc. (Nov. 22, 2013), <http://www.fda.gov/iceci/enforcementactions/warningletters/2013/ucm376296.htm>.

72. Michael Hiltzik, *23andMe's Genetic Tests Are More Misleading Than Helpful*, L.A. TIMES (Dec. 15, 2013), <http://www.latimes.com/business/la-fi-hiltzik-20131215,0,1359952.column#axzz2nl3U9zrm>.

One simple reform is to require agencies to inform regulated parties when a communication is only a recommendation and is not legally binding. This reform would clarify the policy and reduce uncertainty. Agencies could also be required to cite the statute or regulation that defines agency authority in the area the warning letter addresses. This requirement could also pertain to agencies using social media to pressure or intimidate firms, such as when the Director of the Consumer Financial Protection Bureau used Twitter to put companies “on notice” about the Agency’s intentions to rein in deceptive practices.⁷³

Stronger OIRA requirements sometimes have the perverse effect of inducing agencies to employ techniques that are harder to track and review. Shapiro’s article points to the danger that agencies will increasingly use more evasive tactics, like threats, warning letters, and ad-hoc enforcement, as Congress or the President place new OIRA review requirements on other activities, such as agency guidance. We believe this danger is likely overblown, however. First, agencies are unlikely to prefer using a warning letter over a guidance document because guidance documents are relevant to all firms in a particular domain, and warning letters or threats are likely only applied to one firm at a time. Next, subsequent administrations can easily reverse threats and enforcement, whereas the effects of guidance documents are harder to undo if firms have already expended resources to comply. Regulators concerned with their legacies would likely prefer guidance for this reason.

Finally, not all possible evasion tactics that agencies could use are worth the trouble to police. For example, an agency could split a big rule into multiple rules to escape OIRA review, because each of the smaller rules may fall short of the minimum significance thresholds that trigger the OIRA review process.⁷⁴ But regulations take a lot of agency time and resources to write, and adding work for themselves by creating multiple rules is unlikely to appeal to agency staff. Additionally, the nature of repeated interaction between OIRA and the agencies makes it likely that OIRA will eventually catch on to this activity and find

73. Hester Peirce, *Regulation by Tweet and Other CFPB Follies*, U.S. NEWS & WORLD REP. (Apr. 22, 2013), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/04/22/bureau-of-consumer-financial-protection-must-be-held-accountable>.

74. Mendelson & Wiener, *supra* note 1, at 483–85.

a way to reprimand agencies that behave in this manner.⁷⁵ For example, OIRA could determine that a small rule is significant because it is closely related to several other proposed rules that, together, are significant. OIRA has final authority on significance determinations. For similar reasons of repeated interaction, it is unlikely that agencies are combining regulations to add complexity to the review process, and thereby confuse OIRA, though some cases of this activity may exist.⁷⁶

Incorporation by reference of private or international standards is another way agencies might avoid some review procedures. In this case, agencies give up discretion over the precise terms of the standard chosen and thus it is unlikely that they would choose this method routinely. Regulatory staffs of U.S. agencies, however, can and often do play a large role in international standard-setting discussions. The Basel capital adequacy standards is one such example.⁷⁷ In these instances, agencies may have a strong interest in deferring to international standards, especially because departing from such standards may prove difficult once a standard is in place. Even so, such standards will still have to be set in a regulation, thereby making them subject to the APA and to OIRA review.

III. CONCLUSION

The solutions mentioned in this Article fall into several broad reform categories, which we explore more closely below.

A. *Earlier Engagement*

OIRA could engage agencies earlier in the process of creating policy documents, including guidance documents or policy memoranda or any regulatory policy that significantly affects regulated entities. In theory, this solution is attractive, but it is unrealistic today given the considerable declines in OIRA's

⁷⁵ *Id.*

⁷⁶ For example, two scholars from Resources for the Future point to a recent EPA regulation that might easily have been split into parts. Art Fraas & Randall Lutter, Commentary, *Rule-making Negligence at the EPA*, WASH. TIMES (Oct. 8, 2013), <http://www.washingtontimes.com/news/2013/oct/8/fraas-and-lutter-rule-making-negligence-at-the-epa/>.

⁷⁷ For example, the Basel Committee's membership includes several banking regulators in the United States. *Basel Committee membership*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/membership.htm> (last visited Feb. 27, 2014).

staffing and funding levels since the agency's inception.⁷⁸ OIRA's resources clearly should be increased for this reason. In addition to the resource problem, however, OIRA would have to rely on early notification from agencies to make a determination that an issue is significant. As the very point of such notification and oversight is precisely why agencies sometimes resort to these non-APA tools to begin with, it is unlikely that OIRA would see complete compliance.

Presidents also have other means to control agencies, such as budgets and removal of agency heads. Unfortunately, although presidents can recommend budget cuts to non-compliant agencies, Congress may ignore them (and often does), and presidents are extremely wary of removing agency heads.⁷⁹

If, at a minimum, OIRA were to track agency use of policy documents and guidance, it would be an important source of transparency and would make empirical analysis of agencies' back-door rulemaking activities easier. The Government Accountability Office could also perform this role because it already tracks many rulemakings.⁸⁰ Tracking would also not interfere with the useful role that these documents play in terms of informing the public and allowing agency management a method for controlling lower-level staff.

Once given this tracking authority, OIRA should have the right to review these documents, as it does now in some cases, as well as the ability to return guidance documents for further improvements and to ask the agency to conduct an RIA, assuming OIRA's Administrator believes the document will have significant economic impacts. Similarly, OIRA could require the agency to take public comments on these items.

B. *Ex-Post Review*

Tracking of policy documents also might take place after the agency has already issued them. In this case, OIRA would act less as an ex-ante oversight mechanism and more in its role of information aggregator. OIRA could ensure transparency in this way and might also reserve the right to ask for a retrospec-

78. Ellig & Broughel, *supra* note 24.

79. Kagan, *supra* note 30, at 2273–74.

80. GAO *Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/fedrules.html> (last visited Feb. 4, 2014).

tive analysis of agency actions if it deems them to be of sufficient magnitude. Or, instead of aggregating information at OIRA, it may make sense to give this responsibility to the General Services Administration (GSA), as the GSA already houses some regulatory information. Some would argue that OIRA is better seen as a transactions office on behalf of the White House than as an information-collection and management office for the executive branch.

When agencies conduct a retrospective analysis, OIRA should ask that agencies evaluate not just individual rules but entire regulatory programs. One guidance document, like one rule, may not have a significant impact. Groups of rules or guidance documents, however, may have a very large impact in terms of benefits and costs. Agencies should be encouraged or even required to evaluate entire programs or to focus on how a multitude of regulations affect specific economic sectors. As part of an evaluation of regulatory programs, agencies should consider not just regulations, but guidance documents and other policy memoranda as well.

C. Legislative Solutions

Ultimately, all of the authority granted to agencies is done at the behest of Congress. One reason that agencies are given broad discretionary powers that can be easily abused is because Congress—due to internal conflicts or uncertainty—is often vague about what exactly it is authorizing an agency to do. Another reason is that Congress perceives that it can react to and fix a problem if agencies overreach. As such, Congress ultimately may be responsible for agency abuses. If this theory is correct, the solution also rests in Congress. To start, Congress should be as specific as possible about what it is authorizing an agency to do when legislation is written. This guidance will limit agencies' ability to expand their regulatory domains. Courts can police Congress on this matter by making sure that delegations of authority to agencies are clear and bounded. Congress could also play a stronger oversight role with respect to agency evasion of OIRA and the APA by holding routine congressional hearings on the topic and fashioning judicial review standards that are especially strict for agency actions that have been supported by no formal regulatory analysis.

Further, Congress could create institutional barriers to attenuate or reduce non-APA rulemaking. For example, Congress could require by law that significant guidance, warning letters, and enforcement actions go through an expanded review by OIRA. Congress should also be on the lookout for lawsuits against agencies made by friendly parties. Although lawsuits are an important way of holding agencies accountable to the law, some friendly lawsuits have had the opposite effect. Courts could be more aggressive, compelling agencies to notify affected parties in these instances. For example, where agency efforts are deficient, the court could notify a list of affected parties supplied by OIRA to the Justice Department or the agency.

Deadlines placed in legislation also need careful thought. Congress should sometimes consider giving agencies more time to implement regulations because the need to rush may be one reason agencies resort to quicker, less formal regulatory approaches.⁸¹

D. Independent Agencies

If an executive branch agency that answers to the President wants to circumvent the APA or OIRA review, it will have to find a clever way around the mandates imposed on it by statute and by executive order. Some agencies have a clear way around OIRA review because they are not subject to the executive orders governing the regulatory review process. So-called “independent regulatory commissions,”⁸² which occupy a constitutionally fuzzy part of our government, are not required to undergo OIRA review for their significant regulations, nor are they required to conduct an RIA for their major regulations.⁸³

As Jerry Brito and Hester Peirce demonstrate in their articles, independent agencies like the Consumer Product Safety Commission (CPSC) and the Commodity Futures Trading Commission (CFTC) also have incentives to avoid the APA when it suits their interests.⁸⁴ These articles provide some evidence to mitigate

81. See Peirce, *supra* note 2.

82. The primary characteristic of independent agencies is that the head of the agency cannot be removed except “for cause” by the President. See 44 U.S.C. § 3502(10) (2012), for a further definition of “independent regulatory commissions.”

83. These agencies still adhere to the APA and to the usual notice-and-comment procedures required under the Act.

84. Peirce, *supra* note 2.

Shapiro's concern that too many requirements on agencies will lead to further evasion tactics. Agencies like the CPSC and the CFTC are not subject to the same scrutiny by OIRA that executive branch agencies are, yet independent agencies evade the notice-and-comment process and the APA as well.⁸⁵

Presidents have asked independent regulatory commissions to follow the same requirements as executive branch agencies but have not made this request a binding legal requirement.⁸⁶ Most of the federal financial regulators are considered independent agencies, as are the Federal Communications Commission, the Federal Trade Commission, and others. Given the vast responsibilities handed to financial regulators by the Dodd-Frank Act, with hundreds of new regulations expected to be written, it is distressing that agencies are making these decisions without the insights provided by thorough RIA.⁸⁷

Requiring independent agencies to follow rulemaking procedures in line with executive branch agencies is a crucial part of any reform of agency evasion tactics. Bringing independent agencies up to speed on state-of-the-art policymaking techniques, like benefit-cost analysis, will make rulemaking more transparent and regulators more accountable, and will likely improve regulatory outcomes by making evidence, rather than politics, a more fundamental driver of policy.⁸⁸ In the case of independent agencies, the solution may be simple. The President could issue an executive order stating that E.O. 12,866 and

85. *See id.*

86. Curtis W. Copeland, *Economic Analysis and Independent regulatory commissions* (Admin. Conf. of the U.S. Draft Report, 2013), available at <http://acus.gov/sites/default/files/documents/Copeland%20CBA%20Report%203-29-13.pdf>.

87. The SEC, the CFTC, and the CFPB have moved toward incorporating economic analysis into their rulemaking procedures. *See, e.g.*, Memorandum from Div. of Risk, Strategy, and Fin. Innovation & Office of the Gen. Counsel, Sec. & Exch. Comm'n, to Staff of the Rulewriting Divisions and Offices (Mar. 16, 2012), available at http://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf; Emily Pierce & Niels Lesniewski, *How Cordray Snagged 17 Republicans*, ROLL CALL (July 16, 2013), <http://blogs.rollcall.com/wgdb/how-cordray-snagged-17-republicans/>; Jamila Trindle, *CFTC Taps Help for Cost Analysis on New Rules*, WALL ST. J. (May 10, 2012), <http://online.wsj.com/news/articles/SB10001424052702304070304577396192653277890>.

88. *See generally* Hester Peirce, *Economic Analysis by Federal Financial Regulators*, 9 GEO. MASON J. L. ECON. & POL'Y 569 (2013).

E.O. 13,563 apply to independent agencies.⁸⁹ Congress could also achieve the same ends through legislation.

E. *Final Thoughts*

The solutions presented here vary depending on the types of avoidance mechanisms, but some central themes remain. These include more accountability to the public through the notice-and-comment process, more opportunity for the President to make sure, through OIRA review, that the regulatory action is a presidential priority, and a higher standard of technical accountability by strengthening OIRA oversight of both executive branch and independent agencies.⁹⁰

This said, scholars and practitioners should be on the lookout for changes in agency behavior that result from any new requirements.⁹¹ OIRA, the agencies, Congress, and the courts are in a competition for power that shares the characteristics of a multiparty, multistage game. Institutional incentives matter, and any proposed solution must take into account the diminishing returns to hurdles placed in front of agencies. Similarly, there are costs and benefits to using OIRA resources to track and regulate agency behavior.⁹² OIRA resources, even if expanded in terms of staffing and funding, should be used carefully. It may also make sense to transfer some of the informational requirements now imposed on OIRA to an agency such as the General Services Administration.

The United States has built an impressive system of regulatory oversight procedures over the last sixty years. This system exists to ensure that the public is adequately represented by its government and that agencies act in the public interest rather than serve a more narrow interest. To ignore the procedures put in place over the last century is not just to ignore good public policy practices, it is to ignore the unfortunate lessons of history and to run the risk of repeating them.

89. Some scholars disagree that the President has the authority to do this. For more on this debate, see DUDLEY & BRITO, *supra* note 8, 47–48.

90. Another option, outside the scope of this paper, would be sharpening the “substantial evidence” test under the APA.

91. See generally Shapiro, *supra* note 1.

92. Mendelson & Wiener, *supra* note 1, at 15–21.