Testimony of
Rick Melberth
Director of Regulatory Policy
OMB Watch

Regarding the
Rulemaking Process and the Unitary Executive Theory

Before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
US House of Representatives

May 6, 2008

Thank you for the opportunity to testify before you today. I am Rick Melberth, Director of Regulatory Policy for OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in1983 to remove the veil of secrecy from the White House Office of Management and Budget, OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public.

It is in the context of OMB Watch monitoring federal regulatory policies for the past 25 years that I appear before you today. My testimony focuses on 1) a brief history of centralized review of agency regulations, 2) the changes to the regulatory process made by the Bush administration, 3) issues of concern with requiring Regulatory Policy Officers (RPOs) to be presidential appointees, and 4) a few examples of executive branch intrusions into agency decision making processes. It is our view that today's regulatory practices go far beyond "centralizing" regulatory review and give the president unique and unparalleled authority, thus subordinating agency responsibility to implement statutory requirements. The application of the unitary theory gives the president and a cadre of employees that represent the president control over the substantive decision making of agencies. This has the perverse impact of injecting and elevating politics into decisions where science and rational judgment should prevail. In the end, we believe the public is poorly served by applying this unitary theory to regulatory decision making, and it threatens the constitutional separation of powers.

I. History of Centralized Review

The 1980 Paperwork Reduction Act, among other things, created a small office within the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (OIRA), to coordinate the information collection activities of federal agencies. Designed as a good government law, the PRA was used as a vehicle by the Reagan administration to reduce government red tape, a Reagan campaign promise. It gave OIRA the power to approve any

1742 Connecticut Ave. NW
Washington, DC 20009
tel: 202.234.8494
fax: 202-234.8584
email: ombwatch@ombwatch.org
web: http://www.ombwatch.org

collection of information from 10 or more people, including paperwork associated with implementing regulations.

In February 1981, a few weeks after taking office, President Reagan issued Executive Order 12291 (E.O. 12291) which established a major role for OMB – and OIRA in particular – in the review and approval of proposed rules put forth by federal agencies. Under the order the Director of OMB "is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order."[1] The other notable condition imposed by this order was the requirement that agencies use a cost versus benefits analysis to be reviewed by OIRA as an important factor justifying the need for regulatory action.

There have been a number of reports and congressional hearings demonstrating how E.O. 12291 shifted the balance of power, giving the White House OMB new leverage over agencies. OMB was known to have changed the substance of agency rules and for agencies that bucked the tide, OMB would keep rules under review forever, a type of hostage taking. This led to OMB being nicknamed the “black hole.” Moreover, E.O. 12291 and the PRA gave OIRA several bites of the same apple. It reviewed an agency’s proposed rule, its paperwork to carry it out, and its final rule. At any time, OMB could force the agency to do what it wanted. And in the backdrop was always fear that OMB also controlled the agency’s budget. OMB carried a big stick.

Still not satisfied that it had enough control over agency rulemaking, in January 1985, President Reagan issued a second executive order (E.O. 12498) that created a regulatory planning process to coordinate the agencies' regulatory plans with the administration's regulatory objectives. An agency was now to "submit to the Director of the Office of Management and Budget (OMB) each year, starting in 1985, a statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned."[2] One effect of this order was to provide OMB with access to agency decision making before proposed rules were submitted to OMB for review under E.O. 12291, and before the public's right to comment on proposed rules as set out in the Administrative Procedure Act (APA).

As noted at the time, OMB felt it was too hard to change the substance of rules when it did its E.O. 12291 review. They argued that various constituencies and advocacy efforts were already in place. As OIRA Administrator Douglas Ginsburg said in December 1984: “Agencies have been working on proposed regulations long before they come to notice and comment. Then we get ourselves in a confrontation with the agency over the end product.”[3] Accordingly, OMB wanted to intercede in the agency process as early as possible. Hence, the idea for E.O. 12498 was born.

These two orders, combined with the statutory authority granted under the PRA, created what we now recognize as centralized regulatory review, i.e., White House review of regulations for consistency with the president's policy priorities. The power to coordinate information

---

[1] Executive Order 12291, Sec. 3(e)(1). *Federal Register* Vol. 46, p. 13193, February 19, 1981.

[2] Executive Order 12498, Sec. 1(a). *Federal Register* Vol. 50, p. 1036, January 8, 1985.

[3] OMB Watch, *Through the Corridors of Power: A Citizen's Guide to Federal Rulemaking, (Washington, DC: OMB Watch, 1987), p. 26.*

collection and to review proposed and final regulations in a policy office of the White House, made OMB the equivalent of a political censor over agency actions. Even if it did not censor, its authority to subordinate agency decision making was clear.

As Christopher DeMuth and Douglas Ginsburg, both OIRA administrators, wrote in the *Harvard Law Review* (March 1986), White House centralized review of regulations was an "appropriate response to the failings of regulation."[4] They noted that regulation tends "to favor narrow, well-organized groups at the expense of the general public"[5] and that centralized review, on the other hand, "encourages policy coordination, greater political accountability, and more balanced regulatory decisions."[6] Yet our perspective is exactly opposite. Centralized review, as epitomized by the role of OIRA, has further politicized the rulemaking process, brought less accountability, and produced less protective rules.

During the presidency of George H. W. Bush, the Quayle Council on Competitiveness emerged to further politicize the regulatory process by giving the Vice President's office authority to oversee OIRA's actions. The Quayle Council also provided greater access to campaign contributors and business interests concerned with regulatory burdens – and none of its activities were required to be disclosed. The Quayle Council interfered with numerous health, safety, and environmental regulations to the benefit of regulated businesses.[7] It even imposed an extended moratorium on regulations in 1992. All this contributed to a highly centralized reviewing authority cloaked in secrecy. To the public, Congress and the courts, the agency issuing the regulation was held accountable; yet the White House, through OMB and the Quayle Council, was pulling the strings.

On the first day that President Clinton took office in 1993, he ended the Quayle Council and called for a more accountable and transparent rulemaking process. Several months later, in September, he revoked the Reagan orders but consolidated their requirements in Executive Order 12866. This is the executive order, with amendments, that provides the framework for the current regulatory process.

Most of the elements of centralized review as defined by the Reagan orders remained intact, including the use of cost-benefit analysis, annual regulatory planning, the preparation of regulatory impact analyses, and the prohibition on any agency action on a rule until after it has been reviewed by OIRA. The biggest change was in limiting the regulations to be reviewed to the most significant rules, whereas the Reagan orders required all regulations to be reviewed by OIRA. In addition, the order requires greater transparency on the part of OIRA regarding communications about proposed rules with those outside of government. It also requires each agency head to establish a regulatory policy officer "who shall report to the agency head."[8] Note the requirement that it is the agency head who shall appoint the RPO and the agency head to whom the RPO reports.

---

[4] DeMuth, Christopher C.and Douglas H. Ginsburg, "Commentary: White House Review of Agency Rulemaking" in *Harvard Law Review,* Vol. 99, (1986) p. 1081.

[5] Ibid., p. 1080.

[6] Ibid., p. 1081.

[7] Bass, Gary D., "Executive Management" in *Changing America: Blueprints for the New Administration*, edited by Mark Green. New York: Newmarket Press, 1992.

[8] Executive Order 12866, Sec. 6(a)(2). *Federal Register* Vol. 58, p. 51735, September 30, 1993.

II. Bush Administration Regulatory Changes

President George W. Bush has made two amendments to E.O. 12866 during his presidency. The first, in February 2002, received little public attention and only had a minor impact on the regulatory process. E.O. 13258 removed from the Clinton order the roles assigned to the Vice President and reassigned those duties to the Director of OMB and other senior policy advisors. E.O. 12866 had the Vice President playing the role of mediator between the agency heads and OMB when disputes arose over a regulatory policy decision.

Even though the Vice President's role was removed by the Bush order, it turns out that Vice President Cheney has played an active role in shaping selected regulations. In a *Washington Post* series about the Vice President, the paper recounted his personal involvment in overturning an Endangered Species Act decision affecting the Klamath River basin in Oregon, among others.[9] Later in this testimony, I provide more evidence of the Vice President's involvement.

The second change came on January 18, 2007, when President Bush issued amendments to E.O. 12866 which continued the shift toward further centralizing regulatory power in OIRA. These amendments, prescribed in E.O. 13422, shift power away from the federal agencies, which are given regulatory power by legislative enactments, and usurp congressional powers. It is another brick in the foundation this administration has been building for a unitary theory of the presidency, one in which not only the executive branch is superior to the other branches in our constitutional system but that the White House exhibits significant control over the agencies.

After E.O. 13422 was issued, OMB Watch issued an analysis of the changes and expressed our concern about this continued accretion of power in OIRA. We wrote that among the changes:

- *The executive order shifts the criterion for promulgating regulations from the identification of a problem like public health or environmental protection to the identification of a "specific market failure (such as externalities, market power, lack of information)…that warrant new agency action."*
- *It makes the agencies' Regulatory Policy Officer a presidential appointee and gives that person the authority to approve any commencement or inclusion of any rulemaking in the Regulatory Plan, unless specifically otherwise authorized by the agency head.*
- *It requires each agency to estimate the "combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities."*
- *It requires "significant" guidance documents to go through the same OMB review process as proposed regulations before agencies can issue them.*
- *It also requires "economically significant" guidance documents (those that are estimated to have at least a $100 million effect on the economy, among other criteria) to go through the same OMB review process as "significant" regulations.* [10]

---

[9] Becker, Jo and Bart Gellman, "Leaving No Tracks." *The Washington Post*, June 27, 2007. "Because of Cheney's intervention, the government reversed itself and let the water flow in time to save the 2002 growing season, declaring that there was no threat to the fish. What followed was the largest fish kill the West had ever seen, with tens of thousands of salmon rotting on the banks of the Klamath River."

[10] OMB Watch, *A Failure to Govern: Bush's Attack on the Regulatory Process*, March 2007, p. 3. Available at http://www.ombwatch.org/article/articleview/3774

I want to focus my testimony at this point on one aspect of these changes created by E.O. 13422, the regulatory policy officer.

III. The Regulatory Policy Officer (RPO)

As noted above, the regulatory policy officer is a creation of the Clinton era executive order. Under Section 6 of E.O. 12866, *Centralized Review of Regulations*, the responsibilities of the agencies and of OIRA are outlined. Section6(a)(2) states:

> Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

The role of the RPO as envisioned was to coordinate and implement agency responsibilities regarding regulatory planning and review of regulations. These responsibilities are described in the preceding paragraph of the order and include: 1) allowing "meaningful" public participation in the regulatory process, 2) informing stakeholders of pertinent regulations, 3) providing OIRA with a list of planned regulatory actions, 4) providing OIRA with cost-benefit analyses for significant regulatory actions, and 5) making available to the public information on proposed and final regulations.

The RPO's role in practice was somewhat different across agencies. Not every agency maintained one designated RPO. The Department of Agriculture (USDA), for example, had various officials serving as de facto RPOs. Issue expertise determined where responsibilities rested on a specific regulation. In the Department of Energy, the RPO functioned as an agency counselor. The RPOs were not necessarily political appointees in all agencies, but the final regulatory decisions within agencies were in the hands of political appointees ultimately, usually the agency head or his or her designee. The essential points are that RPOs were appointed by agency heads, reported to those respective agency heads, and were participants in the regulatory process within the agency, not the driver of that process. The final responsibility for agency rulemaking rested with the politically appointed agency head, confirmed by the Senate.

Two of President Bush's amendments to E.O. 12866 impact the RPO. First, agencies are now required to designate a *political appointee* as their RPO, and were to do so within 60 days of the issuance of the amendments. New text also requires OMB to verify this designation.

Second, in addition to changing the requirements of the designated RPO, the Officer's responsibilities are increased. The RPO will now be charged with approving an agency's Regulatory Plan, a responsibility previously given to the agency head. The amendments state that "no rulemaking shall commence nor be included" for consideration in the agency's regulatory plan without the political appointee's approval. The Regulatory Plan includes the most important regulations which an agency plans in a given year.

In OMB Watch testimony in April 2007, we expressed concern about the increased politicization these changes may have introduced into agency decision making:

> By requiring the Officer to be a political appointee, the amendments suggest a further politicization of the regulatory process. OMB Watch is concerned that by installing a

political appointee as the RPO and increasing the responsibilities, that appointee will significantly affect an agency's ability to regulate in a fair and nonpartisan fashion.[11]

In late July, 2007, OMB released a list of RPOs for each agency. Of the 29 RPOs on the list, 27 have been confirmed by the Senate in their agency roles but not in their role as RPOs. The remaining two are political appointees who did not require any Senate confirmation. Nine of the sixteen cabinet level RPOs are General Counsel positions.

OIRA Administrator Susan Dudley framed this as a good government measure because one person will be accountable for major regulatory decisions in each agency.[12] This could not be further from the truth. The responsibilities of these officials have been substantially increased, yet they are not subject to Senate confirmation in their role as RPOs and their actions are not public. Subsequently, the RPOs are not likely to be accountable to Congress or the American people. Given the ability to significantly impact regulatory outcomes, these people should be confirmed by the Senate for these additional job responsibilities – responsibilities not foreseen when they were confirmed for their current positions.

We also have expressed concern that the point at which "a rulemaking shall commence" is also unclear. OIRA has provided a vague and unhelpful definition and has acknowledged the commencement of a rulemaking may differ from agency to agency.[13] This ambiguity could allow the RPO to exert influence at any stage in the rulemaking process and could prevent important scientific research or analysis from taking place. Nor do we know when or whether an RPO has prevented a rulemaking from taking place or the hurdles that may exist to begin and continue a rulemaking. If the current RPO approach is not changed by the next president, we encourage Congress to investigate how RPOs perform their responsibilities, and to establish disclosure policies to close the gap in transparency of this aspect of the rulemaking process.

In some agencies, the amendments related to the RPO may have little effect on regulatory development. In the case of the Department of Energy, the RPO is already a political appointee albeit without the sole responsibility to initiate regulations and without final decision making authority over regulations (unless one or both powers have been delegated to the RPO by the agency head). The White House is unlikely to have a greater or lesser impact on the way in which regulations are formulated within that agency. Similarly, the process in the Department of Labor is likely to go unchanged.

---

[11] Testimony of Gary Bass, Executive Director of OMB Watch before the House Committee on Science and Technology, Subcommittee on Investigation & Oversight, April 26, 2007, on "Amending Executive Order 12866: Good Governance or Regulatory Usurpation?" Available at: http://www.ombwatch.org/article/articleview/4096/1/360?TopicID=7

[12] Skrzycki, Cindy, "Bush, Congress Battle to Control Bureaucracy," Bloomberg News, July 17, 2007.

[13] In an April 25 memo instructing agencies on how to comply with the E.O. and the *Final Bulletin*, OIRA included the following definition of "commence" as it pertains to agency rulemaking: "The point at which a rulemaking commences may vary from one agency to the next, depending on each agency's procedures and practices, and may vary from rulemaking to rulemaking. As a general matter, a rulemaking commences when the agency has decided as an institutional matter that it will engage in a rulemaking. At the latest, the rulemaking will commence when the rulemaking receives a Regulation Identification Number (RIN)." M-07-13, Implementation of Executive Order 13422 (amending Executive Order 12866) and the OMB Bulletin on Good Guidance Practices (April 25, 2007), available at: http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf

In other agencies, however, the RPO change will likely centralize the regulatory process and create OIRA-like structures within agencies even though OIRA has been criticized over the years for exerting political influence. In the case of USDA, this change, if followed, will end the process of dividing regulatory authority based upon experience and expertise. Instead, the RPO will ultimately be responsible for all regulatory decision making and be involved in regulatory discussions from the beginning of agency considerations. Furthermore, installing a political appointee where one did not previously exist will facilitate White House input into agency regulatory matters.

We acknowledge that a president has the right to oversee agency decision making and hold accountable those agency heads to whom he has delegated responsibility. Professor Peter Strauss has pointed out in his testimony before this Subcommittee and in other testimony and writings – and others have addressed as well – the distinction between making that decision and delegating that decision to accountable political appointees. This debate is an important one to have and to constantly revisit as each president makes his or her mark upon the institution of the presidency.

When Congress, however, explicitly legislates that a regulatory decision shall be made by an agency head and that decision shall be based on specific criteria, there is virtually no basis for reasonable people to disagree that the president does not have the authority to make the decision. The instance of President Bush overriding the EPA decision in the ozone rulemaking that Prof. Strauss discusses is one such example of constitutional overreaching.

What remains among our greatest concerns, however, about the RPO structure as required by E.O. 13422 is the opportunity for unprecedented interference in the information that goes into those regulatory decisions before policy makers are rightfully involved in the final agency decision. For agency experts to do their jobs as mandated by Congress in statutory delegations to agencies, information critical to those policy decisions must be free from political interference. The RPO structure has the potential to allow interference in the collection and analysis of all types of information necessary to making important public health and safety, environmental, and workplace safety regulatory decisions.

But, of course, the public will never know the extent to which RPOs have stopped, delayed, or interfered with the quality of decision information because there is no transparency and accountability imposed on the RPOs. There are numerous documented instances where OIRA has interfered in agency decisions and in the information used to make those decisions, as this testimony documents below.

To what extent will the RPO be a *de facto* OIRA official sitting in the agency coordinating and carrying out the responsibilities of the OIRA desk officers during the pre-rulemaking stage? Having been given the power to initiate regulations, we fear the RPO will further decrease agency rulemaking discretion and increase the trend toward OIRA dictating agency rulemaking. Transparency can prove our fear is groundless.

IV. Executive Office of the President Intrusions into Agency Decision Making

As I mentioned above, the involvement by OIRA in agency decision making is well-documented. For example, in September 2003, the General Accounting Office (GAO) (as the Government Accountability Office was then known) issued a report on OMB's role in reviewing

agency health, safety, and environmental rules.[14] Among the findings are that OIRA's greatest influence over rules is in the period before draft rules are submitted to OIRA for review, and that rules from EPA and the Department of Transportation were the rules most significantly changed and returned. Among the changes OIRA made were to rules regarding:

- tire pressure safety (mostly to do with changing the cost-benefit analysis),
- control of air emissions rules (by changing language that EPA was "considering" adoption of standards from "proposing" the adoption of standards, thus affecting the cost-benefit analysis)
- hazardous air pollutants from wood product coatings (by delaying the compliance dates of the rule from 2 to 3 years after the date of the final rule)
- proposed nonconformance penalties for heavy-duty diesel emissions (by changing EPA's choice of discount rates, fuel prices, and changing language regarding assumptions)
- listing manganese as a hazardous waste (OIRA deferred action on listing manganese thus killing the rule outright) and
- minimizing adverse environmental impacts from cooling water intake structures (by making changes to which industries would be covered by the rule by changing scientific and engineering standards).[15]

More recently, we have seen many more examples of OIRA's work to delay, weaken, or override agency regulations proposed by agencies, and continued interference in generating the information that goes into these decisions. The ozone decision is but one instance, although perhaps the most blatant, of executive branch interference at the decision making level.

A. Interference in Regulatory Standards

Although the Vice President was removed from the regulatory process by E.O. 13258, OMB Watch has documented instances in which representatives from Vice President Cheney's office have been involved in high profile environmental and national security regulations during OIRA's meetings with industry representatives, especially in 2007. Not only did someone from the Office of the Vice President (OVP) attend meetings about setting the ozone standard, but also attended four meetings about Department of Homeland Security (DHS) chemical security regulations. The final rules were actually weaker in their reporting thresholds than what DHS proposed. According to information posted on the OMB website, as of November 2007, OIRA had held more than 540 regulatory review meetings since E.O. 13258 was issued in 2002. A representative from OVP has been present at only 11, about two percent. However, eight of those 11 meetings have occurred since February 2007, including the four meetings on the DHS chemical security rule.[16]

Currently, various White House offices are interfering in a National Oceanic and Atmospheric Administration (NOAA) rule to extend protections to the North Atlantic right whale.

---

[14] General Accounting Office, *OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews.* September 2003. Available at: www.gao.gov/cgi-bin/getrpt?GAO-03-929.

[15] This case was challenged in court. The Supreme Court has recently granted certiorari and will hear this case in its new term.

[16] OMB Watch, *Vice President Reemerging in Regulatory Review Meetings.* November 6, 2007. Available at: http://ombwatch.org/article/articleview/4067/1/85/?TopicID=2.

OIRA is serving both as a party to the interference and as a conduit through which other offices can exert pressure.

After initiating the rulemaking in 1998, NOAA's National Marine Fisheries Service published a notice of proposed rulemaking in June 2006 which, if finalized as written, would impose a speed limit of 10 knots on large shipping vessels traveling in the Atlantic Ocean during seasons when the right whale is most active. NOAA decided to take this course of action because collisions with ships are one of the leading causes of death for the North Atlantic right whale. The agency estimates the right whale population has dwindled to about 300 with at least 19 deaths caused by ship strikes in the past 22 years.[17]

In February 2007, NOAA sent a draft of the final rule to OMB for review. Under E.O. 12866, OIRA is to review proposed rules within 90 days with one possible extension of 30 days. The rule remains under review 440 days later.

In April 2008, documents obtained by the Union of Concerned Scientists and released by the House Oversight and Government Reform Committee show that not only is OIRA delaying the right whale rule, it is actively working to undermine the scientific basis for the regulation.[18]

The documents show that two offices, the Council of Economic Advisors and the Office of Science and Technology Policy, reanalyzed aspects of the regulatory science and attempted to use their analyses to question NOAA's findings. The CEA recalculated statistical models and questioned the validity of published literature in an attempt to undermine NOAA's finding that ship speed bears a relationship to whale mortality. Another document shows the Office of the Vice President questioned the validity of published studies NOAA is using as the basis for the rule and contended the agency lacks "hard data."

Nowhere in any of the documents does a White House official express an opinion on the rule or present alternative policy options. However, the scientific opinions the officials are advancing would weaken NOAA's scientific argument and allow opponents to more easily assail the rule. Ultimately, this kind of scientific interference can lead to weaker protections, or a complete absence of protections.

B. Interference in Generating Information

Curtis Copeland from the Congressional Research Service (CRS) has provided testimony to the Subcommittee addressing the numerous ways in which OIRA has used administrative mechanisms to interfere with the generation of information important to setting standards. I do not wish to repeat Dr. Copeland's testimony, but only to reiterate there have been many mechanisms employed by OIRA to impact the quality of information produced by agency experts. Among those mechanisms are directives on the use of cost-benefit analysis, peer review guidelines, data quality challenges, and an unsuccessful attempt to impose a one-size-fits-all risk assessment process on agencies. What follows are a few examples of this interference in health and safety standards.

---

[17] National Oceanic and Atmospheric Administration, *Proposed Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*, *Federal Register,* Vol. 71, p. 36299,June 26, 2006.

[18] The documents are available on the committee's website at: http://oversight.house.gov/story.asp?ID=1921 .

OIRA and other political staff have increasingly waded into the scientific aspects of decision making, even before that science becomes relevant for any particular rulemaking. Most environmental, public health, and safety standards are based on rigorous scientific research and findings. By controlling the scientific information behind these standards, politics can erode the very foundation upon which regulations are built.

One example is EPA's Integrated Risk Information System (IRIS). IRIS is a publicly searchable database for studies and information on the human health effects of chemical substances. EPA scientists and policymakers use the information in the database to make determinations about the risk of various substances. EPA studies both the carcinogenic and noncarcinogenic effects of substances and determines safe or tolerable exposure thresholds when possible. IRIS assessments can inform regulatory action intended to protect humans from the harmful effects of certain substances.

In 2004, according to a GAO report, OMB directed EPA to begin routinely submitting draft assessments to OMB for an interagency review. Previously, the need for reviews had been determined on a case by case basis.[19] At two points in the current IRIS process, EPA must submit drafts of chemical assessments to OMB for review. OMB does the bulk of its interfering during these review periods. OMB voices its own opinions on the chemical assessment and solicits the opinions of other federal agencies such as the Department of Defense, the Department of Energy, and NASA. EPA is prohibited from proceeding with the assessment until it receives explicit approval from OMB.[20]

OMB may interfere with the chemical assessments by suggesting to EPA its own scientific judgments or by forcing EPA to consider scientific studies that fit OMB's policy preferences. Alternatively, or additionally, OMB can delay work on an assessment. The IRIS process contains no time limits for the OMB review period.

In April 2008, EPA announced changes to its IRIS procedures which now involve OMB at even more stages in the process. The changes emanated from a working group comprised of officials from EPA, OMB, the Pentagon, and other federal agencies. All comments from OMB or other agencies will continue to be considered deliberative executive branch proceedings, allowing any incidences of scientific manipulation to evade public scrutiny.

In another example, in March 2007, a Department of Interior investigation found Julie A. MacDonald, the deputy assistant secretary for fish, wildlife and parks, allowed political considerations to taint a number of decisions in which the Fish and Wildlife Service (FWS) decided not to consider certain species endangered. Among the transgressions, MacDonald leaked internal agency documents to industry lobbyists and intimidated agency staff in order to manipulate scientific evidence. MacDonald resigned in April 2007 as a result of the scandal. In response to public pressure and the scrutiny of the House Natural Resources Committee, FWS decided to review eight endangered species decisions by MacDonald. In November, FWS

[19] Government Accountability Office, *Chemical Assessments: Low Productivity and New Interagency Review Process Limit the Usefulness and Credibility of EPA's Integrated Risk Information System*, March 2008. GAO-08-440. Available at: http://www.gao.gov/new.items/d08440.pdf.

[20] Ibid

.

announced it had confirmed impropriety in seven of the eight decisions and is now reviewing them.

Another example of scientific interference this time coupled with censoring government officials came to light in October 2007. Dr. Julie Gerberding, Director of the Centers for Disease Control and Prevention, had her testimony about the threat global warming poses to public health substantially cut by OMB before Dr. Gerberding was allowed to testify before the Senate Environment and Public Works Committee on October 23rd. Seven pages, about half, of the testimony was deleted from the draft submitted for OMB's review. The removed sections included information on extreme weather events and food and water-borne disease, among other things. Climate Science Watch obtained a copy of the draft as submitted and the censored version and posted the two on its website the day after the hearing.[21]

Lastly, I would like to recommend to the committee two reports recently issued by the Union of Concerned Scientists that have broadly documented examples of political interference in scientific information.[22] The first of these, *Federal Science and the Public Good: Securing the Integrity of Science in Policy Making,* documents interference across federal agencies providing specific examples, like the above, of misrepresenting science and the results of research, deleting and editing scientific information, and suppressing science, among other examples.

The second of these reports has received much greater public attention because the voices in the report are those of EPA scientists whose work has been made much more difficult by political interference at the agency. *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency,* contains the results of surveys of almost 5500 EPA scientists. Almost 30 percent of the EPA scientists from across the country responded to the surveys with devastating results. Nearly 60 percent of the respondents experienced political interference in their work and that this interference has been higher in the last five years than previously. In the essays accompanying the surveys, the respondents generally cite OMB as the source of the external interference.

V. Conclusions

It is unlikely that centralized regulatory review will end any time soon. Many have argued that it is needed in such a vast and complicated federal government. It can provide inter-agency coordination, ensure that regulations are not in conflict with existing or other proposed rules, and provide a valuable planning and coordination function. We believe, however, that today's regulatory practices go well beyond the benefits of centralized review. Current practices give the president unique and unparalleled power to alter the collection and dissemination of information and to shape the substance of agency rulemakings – all behind the scenes. Even more striking is that a small number of OIRA staff have controlled this process all in the name of the president. In doing so, the implementation of agency statutory requirements

---

[21] See these postings at Climate Science Watch's website, available at: http://www.climatesciencewatch.org/index.php/csw/details/censored_cdc_testimony/

[22] Union of Concerned Scientists, Science Integrity Program, *Federal Science and the Public Good: Securing the Integrity of Science in Policy Making.* February 2008. Available at: http://www.ucsusa.org/scientific_integrity/restoring/scientificfreedom.html. And *Interference at the EPA: Science and Politics at the U.S. Environmental Protection Agency.* April 2008. Available at: http://ucsusa.org/scientific_integrity/interference/interference-at-the-epa.html.

may become secondary to the policies and priorities of the president as interpreted by the OIRA staff.

The application of the unitary theory as it is practiced in this administration and framed in executive branch directives gives the president, and a cadre of employees that represent the president, control over the substantive decision making of agencies. As a result, politics is injected and elevated into decisions where science and rational judgment should prevail. Political appointees have greater control over the substance of regulations; politics supersedes scientific and technical information that is critical to protecting our environment and health and safety at home and in the workplace. Even if this were not empirically true, the appearance would still exist, thereby tainting the public's perception of the regulatory process.

The current structure of the rulemaking process has several costs. There is now the potential for even greater conflict between the statutory authority delegated to the agencies by Congress and executive priorities. When the president has the ability to override this statutory delegation of authority, the balance of power between Congress and the Presidency is altered. There is the perception, if not the reality, that special interests are favored heavily over the needs of the public. This process does not lead to better rules and public protections. When the president makes a substantive regulatory decision based on political considerations, scientifically-based protective standards are vitiated. Finally, we can be assured that if Congress does not act, OIRA will remain the equivalent of a political censor over congressional mandates and agency decisions.

Admittedly, there are grey areas where "coordination" ends and "substantive interference" begins. When OIRA changes a word in a proposed rule, it may help to make the regulation more understandable. On the other hand, it may intentionally change the very meaning of the rule. While it may be appropriate for OIRA to coordinate, we believe it is wrong to interfere with substantive agency decisions.

We believe there are solutions Congress can pursue. First, Congress can review the role the White House plays in this review process with an eye toward removing or limiting OIRA's powers. Congress could define the powers it is willing to give to OMB regarding regulatory review. Since the 1981 Reagan Executive Order, Congress has chosen not to legislate in this area; hence OMB operates through the extension of presidential constitutional authority. Congress could also restrict in legislation OIRA's ability to review certain rules promulgated under a statute. This would require, of course, the ability of Congress to overcome a presidential veto or some other administrative recourse the president might exercise.

Second, Congress could place the statutory responsibility for agency decisions in the Senate-approved agency heads, not regulatory policy officers and not OIRA. If the review of an agency action is judged to be inconsistent with the priorities of the president, the president then should exert influence on the appointed agency head. This would also permit Congress to hold the ultimate policy maker accountable by removing the authority for regulatory decisions from an unaccountable agency subordinate. Similarly, Congress could choose to move centralized regulatory review out of OIRA and into another agency outside the Executive Office of the President. This would likely reduce OIRA's clout and influence over the substantive work of agencies.

Third, to the extent that centralized review of agency regulations remains lodged in OIRA or some other presidential office, Congress could seek mechanisms to hold that office accountable. One mechanism for this, we believe, is subjecting OIRA to the requirements of the

Administrative Procedure Act. If OIRA makes substantive regulatory decisions, it should be subject to the accountability provisions of the APA including subject to court actions. Coupled with this increased accountability, Congress could expand the requirements for defining what must be disclosed in agency regulatory dockets. Transparency requirements such as this would allow Congress, the courts, and the public to know the extent to which the executive has taken control over substantive agency regulatory outcomes.

Finally, regardless of the extent of partisan control over the legislative and executive branches, we urge Congress to exert its constitutional oversight control and restore the historical separation of powers balance so that unitary expansion of the executive branch is held in check.

Thank you for the opportunity to appear before you. This concludes my testimony. I'm happy to answer your questions.