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# Collaborative Governance Meets Presidential Regulatory Review

Donald R. Arbuckle\*

## I. INTRODUCTION

My views on collaborative governance come primarily from my twenty-five-year experience working in the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).<sup>1</sup> This small office has been responsible for presidential review of regulations since its creation in 1981.<sup>2</sup> OIRA has often been the subject of criticism for, among many other things, delaying agency efforts to issue regulations and, in the eyes of some, unduly interfering with agency rulemaking autonomy.<sup>3</sup> While the Conference on Collaborative Governance, held in Washington, D.C. on April 2-3, 2009, was not about the merits of such regulatory review, OIRA features prominently in the regulatory development process, and it is seen by some as one of the impediments to collaborative rulemaking.

Formal collaborative governance was ably described by Professor Phillip J. Harter at the April 2009 conference and it has been the subject of many of his writings over the past twenty-five years.<sup>4</sup> During my tenure at OIRA, where I served as Deputy Administrator from 1996 to 2006, I had a view of the federal government's extensive regulatory landscape seen by few others—the vantage point of the White House across multiple administrations. From this background and perspective, I will share my thoughts on collaborative governance in the regulatory process.

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1. I joined OIRA in July 1981, several months after it was created; served as Deputy Administrator from 1996 to June 2006; and served as Acting Administrator of OIRA from February 1998 to July 1999, and from December 2000 to July 2001.

2. OIRA was created by the Paperwork Reduction Act of 1980, Pub. L. No. 96-511 § 3, 94 Xgzz. 2825 (1980) (codified at 44 U.S.C. § 3503 (2006)). The act was reauthorized in 1995 as Pub. L. No. 104-13 (codified at 44 U.S.C. § 3501 (2006)).

3. See generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008).

4. PHILLIP J. HARTER & JOHN P. MCCRORY, PUBLIC POLICY DISPUTE RESOLUTION: SELECTED READINGS (2002); Phillip J. Harter, *Negotiation Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Phillip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1984); Phillip J. Harter et al., *Alternative Dispute Resolution with Emphasis on Rulemaking Negotiations*, 4 ADMIN. L.J. (1990); Phillip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997); Phillip J. Harter, *Assessing the Assessors: The Actual Experience of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000); Phillip J. Harter, *In Search of Goldilocks: Democracy, Participation and Government*, 10 PENN ST. ENVTL. L. REV. 113 (2002); Phillip J. Harter, *Negotiating Government Policy: Better Decisions Through Democratic Synergy*, in REGULATION ECONOMIQUE ET DÉMOCRATIE (Martine Lombard ed., 2006).

The White House environment, including OIRA's regulatory review process, is not conducive to formal collaboration, as it is described by Professor Harter.<sup>5</sup> As I will discuss below, White House decision-making and OIRA regulatory review have a hierarchical component that is at odds with the horizontal nature of collaboration. The President's constitutional duties to manage the executive branch and OIRA's role as his agent in regulatory review require strong oversight of agency regulatory activity. Rulemaking is one means by which the executive branch implements not only statutory mandates, but also presidential policy; any sitting President would be loathe to delegate his authority to a collaborative panel. Nonetheless, the benefits of collaboration can be substantial, and the President could use his authority to encourage the use of collaborative rulemaking either in connection with certain rules or at specific stages of the rulemaking process, as appropriate. OIRA, eager or not, will do what the President asks of it. However, wholesale use of collaborative rulemaking across the executive branch is unlikely to occur.

## II. COLLABORATION V. COMBAT

The notion of collaboration in the rulemaking process has an intuitive appeal to anyone who is familiar with the sometimes maddeningly complicated and frustratingly lengthy Administrative Procedure Act (APA) procedures for developing regulations.<sup>6</sup> "Informal rulemaking," a means of setting policy without the quasi-judicial character of "formal" rulemaking, has taken on the battlefield quality of partisan politics. Public comment has become a bare-knuckled contest of contending stakeholders, whose comments may read more like briefs in preparation for future combat in the federal courts.<sup>7</sup> Often, public comment comes in the form of floods of e-mail, with each message expressing outrage and indignation (often using the same language) that the agency would even consider issuing such a rule or, conversely, that the agency has been too slow in issuing the same proposed rule.

In addition, new laws have appended to the APA process a variety of responsibilities that add to agencies' regulatory development. For example, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the Congressional Review Act, and the Small Business Regulatory Enforcement Fairness Act all require certain issues be considered and addressed in many major rulemakings.<sup>8</sup> Also, a garden of executive orders has grown over the

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5. See Phillip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RESOL. 413 (2009). The basic principles of formal collaboration, however, are found throughout his writing over the past twenty-five years. See works cited *supra* note 4.

6. Administrative Procedure Act, 5 U.S.C. §§ 553-559 (2006). The APA procedures for "informal rulemaking" outlined in section 553, are by themselves quite simple. However, with a seventy-year history of extensive interpretation by the courts, these procedures have become complex.

7. See, for example, virtually any docket related to the Environment Protection Agency's rulemakings on climate change and the regulation of CO<sub>2</sub>. These dockets can be viewed electronically at <http://www.regulations.gov> (in the document search field, enter "environmental protection agency.>").

8. Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (codified at 44 USCA § 3507 (2006)); Regulatory Flexibility Act, Pub. L. No. 96-354 (codified at 5 U.S.C. § 601 (2006)); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4 (codified at 2 U.S.C. § 1501 (2006)); Congressional

years, requiring additional impact statements as part of an agency's regulatory analysis. The most significant order in this regard is Executive Order No. 12,866, which establishes centralized regulatory review by OIRA and requires benefit-cost analyses for the major rules.<sup>9</sup> Other executive orders require analysis focused on federalism and tribal impacts, civil justice reform, takings, environmental justice, children's health, and energy.<sup>10</sup> This tangle of requirements (as evidenced in columns of boiler plate language found at the end of many regulatory preambles), adds to the complexity of rule writing and increases the likelihood of process errors that may lead to either legal or political challenges to rules.

After experiencing this jungle undergrowth of process requirements, an exhausted viewer could be forgiven for seeking respite by collapsing into the arms of collaborative rule-makers. And with good reason. Unlike disagreement and contention, collaboration has a positive connotation—reasonable people working together to resolve problems; teamwork; cooperation; fairness and respect for differing opinions. It speaks to those American traits of association and civic responsibility so admirably observed by Alexis de Tocqueville.<sup>11</sup>

Why is collaborative rulemaking not the norm? It continues to be an innovation that Professor Harter has spent his career trying to convince the federal government to adopt.<sup>12</sup> Many reasons exist for the federal government's half-hearted efforts to adopt collaborative rulemaking, and Professor Harter and other proponents of the idea are only too well aware of them. Proponents do not propose collaborative rulemaking as a substitute for the APA process, and they certainly do not see it as a substitute for policy debate and the institutions that exist to resolve these policy disagreements.<sup>13</sup> They do not argue that collaborative rulemaking is easy, will not take time, or will not be complex.<sup>14</sup> They readily acknowledge that diligent effort and resources are necessary to make collaborative rulemaking work, but they argue that its benefits are well worth the costs.<sup>15</sup> These benefits include the development of a rule that is better informed because all of the interested parties have been able to contribute information concerning the rule's impact. Perhaps more importantly, it leads to a rule on which the stakeholders, both proponents and opponents, have agreed, thereby diminishing the

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Review Act, 5 U.S.C. § 801 (2006); Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601 (2006).

9. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993), *reprinted as amended* in 5 U.S.C. § 601 (2006). This order was signed by President Clinton on Sept. 30, 1993. *Id.*

10. *Id.* (discussing federalism); Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 4, 1999) (discussing federalism); Exec. Order No. 13,084, 63 Fed. Reg. 72655 (May 14, 1998) (discussing tribal sovereignty); Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996) (discussing civil justice reform); Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988) (discussing property rights); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (environmental justice); Exec. Order No. 13,045, 62 Fed. Reg. 19885 (Apr. 21, 1997) (discussing children's health); Exec. Order No. 13,211, 66 Fed. Reg. 28355 (May 18, 2001) (discussing energy policies).

11. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop, eds., trans., Univ. of Chicago Press, 2000) (1904). In particular, see Volume I, "On Political Associations in the United States," and Volume II, "On the Uses the Americans Make of Public Associations in Civil Life," and "Relation of Civil Associations and Political Associations." *Id.* at 180-86, 489-92, 496-99.

12. See works cited *supra* note 4.

13. For a summary of this point, see Harter, *supra* note 5.

14. *Id.*

15. *Id.*

likelihood that the regulation will be challenged in court.<sup>16</sup> Finally, the stakeholders themselves may be surprised at the ingenious solutions that can result from a group working collaboratively.

Proponents of collaborative rulemaking are frustrated that these benefits have been adopted by the federal government in only a limited way. However, my experience at OMB leads me to conclude that there are several intractable barriers to collaborative rulemaking, including the role defined by Executive Order No. 12,866 for OIRA. I agree that collaborative rulemaking is a procedure that should be encouraged in certain cases where it can produce excellent policy outcomes. However, I also see several problems with the collaborative approach, as it is proposed by Professor Harter and his colleagues.

At the macro level, one of the chief obstacles to collaborative policy-making of any type is the Constitution. The mere existence of checks and balances establishes a relationship among the three branches of government and creates the need for constant interaction and eventual compromise (a rough form of collaboration) to make policy. In particular, there are many occasions for tension and conflict between the legislative and executive branches. In establishing these relationships among the branches of government, the framers of the Constitution considered the human propensity to seek and abuse power, which assumes conflict among those seeking to exercise authority.<sup>17</sup> While the Constitution establishes a governmental structure that places boundaries around conflict, it does not assume that humans will collaborate. Collaboration requires, after all, a common agreement that resolution needs to be reached and that collaborating parties are willing to compromise with their opponents.

Additionally, the Constitution creates a government that invites the public to participate in the process of governing. What these twin characteristics—inter-branch tensions and public participation—mean to the daily workings of the government is, not surprisingly, disagreement, debate, and discord. With these expected differing interests comes constant dispute within the government; between the government and the public; and among public parties themselves. Thus, the decision-making process of government is, necessarily, frustrating, laborious, time consuming, and inefficient. Collaboration, while desirable, is not the natural inclination of the interested parties and intra- and inter-governmental agencies that are developing policy.

The legislative and executive branches' shared authority over lawmaking, the result of the founders' fear of excessive governmental power, also means that in the day-to-day work of legislative and regulatory development, delaying, or blocking policies requiring action is easier than changing or creating new policies. This form of stasis is partly a result of the structure established by the Constitution, which requires each of the two chambers in Congress to reach agreement separately, then to reach agreement between them, followed by agreement by the President.<sup>18</sup> This stasis is also a result of the likelihood that, for any specific policy issue, more interests are likely to be either actively against the proposed policy

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16. *Id.*

17. See THE FEDERALIST Nos. 10 & 51 (James Madison) (Madison's well-known description of this characteristic of human nature).

18. U.S. Const. art. I, § 7.

change, or more comfortable with the status quo, than will be desirous of change. This characteristic of American governance means that collaborative governance has an initial impediment because it requires that the affected parties agree to cooperate on policy development and change. Collaboration can fall apart when a single major interest decides that its advantage lies in neither cooperating nor compromising. This difficulty means that collaborative rulemaking requires a unique set of circumstances that limits its widespread general applicability.

### III. OIRA AND COLLABORATIVE RULEMAKING

#### A. *The World According to OIRA*

OMB is an agency within the Executive Office of the President (EOP) and OIRA is a division within OMB.<sup>19</sup> OMB is like other federal agencies in some respects, but it also plays a unique role within the executive branch. The OMB strategic plan states that OMB: “*assists the President* in overseeing the activities of the Federal Government. Specifically, OMB’s mission is to *assist the President* in meeting his policy, budget, management and regulatory objectives and to fulfill its statutory responsibilities.”<sup>20</sup>

The staffs of OMB and OIRA consider themselves to be agents of the President, and they take this role seriously. OMB is the largest agency in EOP, with about 500 employees, and it has, by far, the largest complement of policy-oriented career civil servants in the White House.<sup>21</sup> OIRA career analysts and managers are non-partisan professionals who are extraordinarily sensitive to their role as staff of the President and to the ever-present risk of losing the trust of EOP political officials. Particularly, during a new administration’s first year, the potential for being seen by the victors fresh off the campaign trail as allied to the previous administration is a risk that OMB senior career officials must carefully manage. One characteristic of OMB and OIRA career cultures is that the staffs energetically serve an outgoing President at 11:59 a.m. on inauguration day and they serve his successor, including a new OMB political management, just as vigorously at 12:01 p.m.<sup>22</sup>

Of course, this is true of all federal civil servants. However, while other executive branch career professionals serve the President through a departmental

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19. Exec. Order No. 11,541, 35 Fed. Reg. 10737 (July 1, 1970). OMB was created by the Reorganization Plan No. 2 of 1970 and Executive Order No. 11541 prescribing the duties of the Office of Management and Budget and the Domestic Council in the Executive Office of the President. *Id.*

20. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT & BUDGET, STRATEGIC PLAN (2008), available at [http://www.whitehouse.gov/omb/assets/about\\_omb/strategic\\_plan.pdf](http://www.whitehouse.gov/omb/assets/about_omb/strategic_plan.pdf) (emphasis added).

21. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010 (2009), available at <http://whitehouse.gov/omb/budget/fy2010/assets/eop.pdf>. OMB’s staffing request (measured in “full time equivalents” or FTE) for FY2010 is 528. *Id.* at 1109. During the author’s tenure as OIRA Deputy Administrator, OMB officials informally estimated the number of OMB political appointees at forty to forty-five; the rest of the OMB staff were career civil servants.

22. This is important because, at 12:01 p.m. on inauguration day, OMB career analysts and managers are, with the exception of the few new upper-level White House officials, virtually the only inhabitants of the White House complex with experience managing the government.

secretary or agency heads and the agencies' political appointees, OMB career professionals are responsible for serving the President directly.<sup>23</sup> OMB has its own Director and political officials, but OIRA staff members find themselves working side by side with White House officials from, for example, the Office of the Vice President, the Office of the Chief of Staff, Legislative Affairs, the Domestic Policy Council (DPC), the National Economic Policy Council (NEC), the Council of Economic Advisors (CEA), and the Council for Environmental Quality (CEQ). This is a unique level of access to the President's White House staff; it creates a strong working relationship with the immediate staff of the sitting President. How OIRA and OMB career staff manage the task of serving a particular administration, all the while remaining civil servants, is the subject for another essay. Suffice it to say here that OIRA and OMB career professionals have an unusual sensitivity to their responsibilities to the President and to the care, particularly as civil servants, that needs to be exercised serving within, as one OMB veteran was fond of putting it, "the seventeen most political acres on the face of the earth."<sup>24</sup>

In their role as agents of the President, all staff members within the White House, including OIRA, share a particular task and frame of mind: their job is to exercise and protect the authority of the President. This means representing him in the 220-year old, constitutionally established tug of war with Congress, and it also means, as the OMB strategic plan indicates, assisting him in "overseeing the activities of the Federal Government."<sup>25</sup> I recall hearing a White House official in the first few weeks of the Clinton administration saying that his predecessor had warned him that the new President's biggest headache was going to be Cabinet affairs—that is, managing the Cabinet departments and other agencies. Overseeing the executive agencies, from the White House's point of view, is not a ministerial task whereby White House and OMB officials tick off agency activities on a check list, trusting the agencies to be exercising the President's agenda. It means ensuring that agency activities meet the President's "policy, budget, management, and regulatory objectives," and with an enterprise as widespread and dynamic as the executive branch, meeting this goal requires constant oversight of the agencies. Both agencies and the White House must, of course, meet statutory and judicial requirements.<sup>26</sup> But within the frequently broad discretionary authority delegated by Congress to the executive branch, the President's policy agenda, not that of an agency, must prevail; it is the President who decides whether or not this has been accomplished. While agency heads may be designated by statute to be

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23. See OFFICE OF MGMT. & BUDGET STRATEGIC PLAN, *supra* note 20.

24. Robert Damus was the General Council of OMB during the George H.W. Bush and Clinton Administrations. Although he served in a position normally held by a political appointee, he remained a career civil servant, and served for all OMB staff as a model of dedication, intelligence, and service to the President. He died unexpectedly in November 2000. The term "the seventeen most political acres on the face of the earth" was a phrase he used a number of times in conversations with the author.

25. See generally OFFICE OF MGMT. & BUDGET, STRATEGIC PLAN, *supra* note 20.

26. Exec. Order No. 12,866, *supra* note 9. The order specifically indicates throughout that its provisions apply "to the extent permitted by law." See *id.* § 1(b) ("Principles of Regulation"); *id.* § 4 ("Planning Mechanism"); *id.* § 6(b) ("OIRA Responsibilities"). See also *id.* § 6(b)(4) ("Except as otherwise provided by law or required by a Court..."); *id.* § 9 ("Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law").

the legally responsible parties for rulemakings, the President is the constitutionally responsible head of the executive branch, and it is OIRA's job to assist him in meeting this responsibility.

To be able to oversee the vast geographical, policy, and administrative spread of the executive branch, OMB and OIRA have been given, either by statute or by the President himself, through executive orders or other forms of guidance, a number of tools.<sup>27</sup> Most simply put, proposed agency policies must come to OMB, where they undergo an EOP vetting, and be approved before they are issued.<sup>28</sup> This conceptually simple mechanism ensures that the President is aware of and can participate in and guide the activities of the executive branch. The most obvious tool of OMB's policy review is the annual budget process, by which OMB reviews draft agency budget submissions and conforms them to the President's agenda before his annual budget is submitted to Congress in early February.

Another tool of presidential management is regulatory oversight. Executive Order No. 12,866 (the Order) requires agencies to conduct an analysis of the benefits and costs of significant rules and submit these draft rules to OIRA prior to publication. OIRA then gives the agency's analysis and draft rule the same hard review that budget analysts give draft agency budgets.<sup>29</sup> This review, like any other OMB review process, is neither cursory nor ministerial. It is conducted by OIRA analysts and managers with their agency counterparts with professionalism and civility on both sides, but often agency and OIRA analysts disagree, and, occasionally, they disagree vigorously. Agency work may be judged by OIRA not to meet the principles of the Order; for example, sometimes the analysis is incomplete, or the agency has not explored a full range of alternatives that would permit the most useful public comment. OIRA may conclude that the agency's regulatory approach needs improvement to better meet the goal of producing the most public benefit at the least cost. Both agencies and OMB recognize that statutory goals must be met in a way that, to the extent permitted by statutory provisions, balances benefits and costs. OMB and OIRA's institutional frame of mind is that proposed government actions must be closely assessed to ensure that net benefits are maximized.<sup>30</sup>

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27. See Paperwork Reduction Act of 1995, 44 U.S.C. § 3504(e) (2002) (describing OMB's authorities coordinating information collection, dissemination and records management; information technology; privacy and information security; and statistical policy); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (outlining the primary authority for regulatory review); OFFICE OF MGMT & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (Aug. 7, 2009), (describing OMB's authority in the annual creation of the President's budget), available at [http://www.whitehouse.gov/omb/assets/a11\\_current\\_year/a\\_11\\_2009.pdf](http://www.whitehouse.gov/omb/assets/a11_current_year/a_11_2009.pdf); see OFFICE OF MGMT & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-19, LEGISLATIVE COORDINATION AND CLEARANCE (Sept. 20, 1979) (describing OMB's authorities regarding legislative clearance), available at [http://www.whitehouse.gov/omb/circulars\\_a019/](http://www.whitehouse.gov/omb/circulars_a019/).

28. This simple mechanism places OMB in a role sometimes described as the switchboard of the executive branch. For specific authorities, see sources cited *supra* note 27.

29. See Exec. Order No. 12,866, *supra* note 9, § 6 (specifically articulating agency analytic responsibilities and OIRA's review responsibilities).

30. Regarding regulatory review, see Exec. Order No. 12,866, *supra* note 9, § 1(a). "In choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits . . . unless a statute requires another regulatory approach." *Id.*



To translate this philosophy into the daily work of OIRA, it means OIRA analysts ask many questions about the agency's analysis, the proposed policy and/or the wording used in draft rules, and suggest changes. Sometimes the agency staff readily agrees that modifications should be made; sometimes agency staff allays OIRA's concerns by providing excellent answers to OIRA's questions. Sometimes the issue requires more analysis, and OIRA and the agency staff continue their discussions. Occasionally, OIRA analysts argue that their proposed modification is important and should be made while the agency disagrees. In this last case, OIRA and agency analysts, with some prodding by more senior officials on both sides, may resolve the issue among themselves. The issue also may be raised up the respective chains of command for others to negotiate a resolution. In cases where an impasse is reached, OIRA may return the rule to the agency rather than approve it to move forward for publication, or the agency may withdraw the rule.<sup>31</sup>

Some who follow the OIRA process of regulatory review argue that, since it is the agency heads to whom Congress directs statutory mandates, it is the agency's job to establish the appropriate balance between benefits and costs.<sup>32</sup> To a large extent, agencies do this independently since most rules do not come to OIRA for review. OMB and OIRA's role is to bring a skeptical eye to the agency's significant rulemakings, looking at them from the President's broader point of view, and to advocate and negotiate changes to draft rules as necessary. During the Clinton and George W. Bush administrations' experience with the Order, on average fifty percent of rules OIRA reviewed were modified in some fashion during the review period.<sup>33</sup> To date, in the Obama administration, seventy-one percent of rules submitted to OIRA have undergone some change during their review.<sup>34</sup> Presidents expect OIRA to perform this regulatory review, which it has done for nearly thirty years.

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31. Exec. Order No. 12,866, *supra* note 9, § 6(b)(3). In the past, another potential result was that the rule simply sat at OIRA. This occurred to an extent widely pointed out by critics of OIRA during the Reagan and George H.W. Bush Administrations. Delay was much less a problem during the Clinton and George W. Bush Administrations. During the latter, Administrators John D. Graham and Susan Dudley insisted that rules be cleared within the ninety-day review period established by Executive Order No. 12,866, and be extended only upon their personal sign off.

32. The proper relationship between OIRA (and the President) and the agencies as it relates to regulatory oversight has been a subject of intense scholarly and political debate since OIRA's creation in 1981. See *supra* text accompanying note 2. Recent expressions of this point of view are evident in comments in response to an OMB solicitation for ideas regarding a new executive order on regulatory review. Request for Comments, 74 Fed. Reg. 8819 (Feb. 26, 2009). See, e.g., Posting of Rena Steinzor to <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (Feb. 27, 2009); posting of OMB Watch to <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (Feb. 27, 2009); posting of J. Robert Shull to <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (Apr. 20, 2009).

33. Statistics (both current and historical) regarding OIRA review of rules are available through a website sponsored jointly by OMB and GSA, RegInfo.gov. See RegInfo.gov, EO 12866 Regulatory Review, <http://www.reginfo.gov/public/do/eoPackageMain> (click on "Review Counts") (last visited Dec. 6, 2009). These statistics include number of OIRA reviews, OIRA action (i.e., cleared without change, cleared with change, withdrawn, returned), and length of review for any time period between March 1981 and the present. *Id.* Historically, the number of rules returned has been a tiny percentage of rules reviewed, 0.2% during the sixteen years of the Clinton and George W. Bush Administrations; during the same time period, 5.0% of rules submitted for review were withdrawn by agencies. See *id.*

34. *Id.*

I have spent some time trying to convey a sense of the environment and mindset that I experienced within the White House. What I have described above may sound excessively imperious, even arrogant. Some government observers who follow agency rulemaking believe that, because agencies are the experts in their authorized subject areas and their authority and budgets are given to them by Congress, OIRA's role, if it is to have one at all, should be merely ministerial.<sup>35</sup> However, since the creation of OIRA in 1981, White House policy-makers, Republicans and Democrats alike, have expected OIRA to use its authority and analytic tools to ensure that the President is the ultimate policy-maker in the executive branch. Thus, on a day-to-day basis, OIRA insists on compliance with the regulatory review process and uses its authority to require agencies to modify rules to bring them into compliance with the Order and to ensure that draft rules are consistent with the President's policy. While, needless to say, OIRA's use of this authority is often strongly resented by agency officials,<sup>36</sup> I believe OIRA is properly exercising the President's authority, at his direction—to scrutinize agency draft rules and to ensure that they meet the principles of the Order.

OIRA's role has been seen by proponents of collaborative rulemaking as an impediment to its practice.<sup>37</sup> Any type of collaborative rulemaking, including regulatory negotiation, at least theoretically requires OIRA to give up some of its authority to the negotiating panel. During my tenure as Deputy Administrator, in a limited number of cases, an OIRA official was among the members of regulatory negotiation committee. This was unsatisfactory from OIRA's point of view because it (1) required a substantial time commitment by an OIRA staff member (admittedly not a particularly good reason from the point of view of the concept of collaboration, but a practical, administrative factor nonetheless); and (2) required OIRA to agree to accede to a group decision. While OIRA theoretically could still exert its Executive Order No. 12,866 authority, as a practical matter this would not be proper if OIRA was participating in good faith. This was a role that OIRA was hesitant to adopt. OIRA, thus, has appeared to be—and I think it is fair to say, has been—an impediment to the development of wider use of collaborative rulemaking.

Before turning the discussion more directly to OIRA and collaborative rulemaking, it is important to explain what the federal regulatory world looks like to OIRA. The executive branch's vast regulatory apparatus grinds along publishing on average 7,500 rulemaking documents in the *Federal Register* each year, roughly forty percent of which are proposed rule documents and about sixty percent are final rule documents.<sup>38</sup> A large number (approximately sixty-five percent) of

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35. See *supra* text accompanying note 32.

36. See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006). In this study, Bressman and Vandenbergh interview former EPA officials from the administrations of Presidents George H.W. Bush and Clinton. *Id.*

37. Harter, *supra* note 5.

38. The General Services Administration's (GSA) Regulatory Information Service Center (RISC), which keeps accurate and comprehensive records and statistics related to OIRA regulatory review, also has kept a count of rulemaking documents published in the Federal Register since 1981. These Federal Register statistics are not published, but are available upon request from RISC staff. See GSA, Regulatory Information Service Center, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA\\_OVERVIEW&contentId=10272](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=10272) (last visited Nov. 28, 2009) (for RISC staff con-

these documents are classified by the General Services Administration's (GSA) Regulatory Information Service Center (RISC) as "ministerial" or "routine and frequent," and, as such, they are relatively non-significant in nature.<sup>39</sup>

However, many of the rules published in the *Federal Register*, even if not formally significant, are important, even if only to a small number of interests. "Significant" rules are those that agencies must submit to OIRA for review.<sup>40</sup> During the Reagan and George H. W. Bush administrations, OIRA annually reviewed approximately 2,300 rules under Executive Order No. 12,291, the predecessor to Executive Order No. 12,866; during the Clinton and George W. Bush administrations, as a result of different review criteria in Executive Order No. 12,866, OIRA annually reviewed 500 to 600 rules.<sup>41</sup> All of these rules, significant or not, make up an extensive, closely woven regulatory fabric that is constantly being modified, updated, and expanded.

The four presidents for whom I worked each responded to public outcries against excessive regulation with efforts to reduce the government's regulatory inventory and output.<sup>42</sup> These efforts all produced some elimination of outdated rules and the modification and updating of many others. However, for many reasons, not the least of which has been an increasing number of statutory mandates to agencies to regulate, rules have kept accumulating in the *Code of Federal Regulations* (CFR), which has continued steadily to expand during the past four administrations. In 1981, the CFR contained 107,100 pages; in 1988, 117,500; in 1992, 128,300; in 2000, 138,000; and in 2008, 158,000.<sup>43</sup>

OIRA sees the volume of the federal government's regulatory output every day. Individual OIRA analysts are responsible for reviewing the significant rules from multiple departmental agencies and sometimes multiple departments. Each analyst works with the agencies for which he or she is responsible to decide which of all the agencies' proposed regulations are "significant" under the Order and should thus be submitted to OIRA for review. In addition, OIRA analysts work with agencies and RISC on the publication of the *Unified Agenda of Regulatory and Deregulatory Actions*, a semi-annual compendium of all regulatory actions

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tact information). The 7,500 rulemaking documents published annually by the Federal Register includes "ministerial" documents related to rulemaking, such as announcements of public meetings or changes of address for comment submission, as well as "routine and frequent" rules, such as Federal Aviation Administration airworthiness directives or Coast Guard drawbridge regulations. RISC Data (Sept. 2009) (Personal correspondence and data from RISC staff) (on file with the author).

39. RISC Data, *supra* note 38.

40. Exec. Order No. 12,866, *supra* note 9, § 3(f).

41. *Id.* Executive Order No. 12,866 requires that agencies submit for OIRA review only "significant" rules, as defined in section 3(f). Under Executive Order No. 12,291, which established regulatory review during the Reagan and George H.W. Bush Administrations, all rules were subject to review, except those specifically exempted by the OIRA Administrator. Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981), reprinted in 5 U.S.C. §§ 601, 603(c), 608(b) (2006). Executive Order No 12,291 was signed by President Reagan on Feb. 17, 1981, less than one month into his first term. *Id.*

42. Examples include The Reagan Task Force on Regulatory Relief; President George H.W. Bush's controversial Competitiveness Council; President Clinton and Vice President Gore's Reinventing Government effort; and President George W. Bush's "Card Memo" of January 20, 2001, and OIRA review of existing regulations under OIRA Administrator John D. Graham.

43. GSA Regulatory Information Service Center, *supra* note 38.

planned by the agencies in the next twelve months. Each *Unified Agenda* contains roughly 4,000 entries.<sup>44</sup>

Thus, OIRA's staff and managers look out over a vast regulatory ocean with an endless stream of draft rules coming into OIRA for review. This view from the top of the regulatory pyramid produces a certain wry skepticism among OIRA staff members toward the outside criticism that the regulatory process is all but frozen. OIRA analysts look around them and see, literally, thousands and thousands of regulations, currently in existence or in development. There may be individual Environmental Protection Agency (EPA), Food and Drug Administration (FDA), or Occupational Safety and Health Administration (OSHA) rules that take years to develop. The developmental timelines for some proposals, such as OSHA's steel erection rule are legendary.<sup>45</sup> Such examples, however, do not overcome the sense from OIRA's point of view that these regulations, as important as they may be, are but individual stars in an enormous regulatory galaxy.

OIRA's point of view is also unique from another perspective. While individual regulatory agencies, and the departments of which they are a part, are aware of the regulations they are proposing, they do not necessarily see, nor are they particularly interested in, the regulations of most other agencies. While the rules of EPA are often of interest to the Departments of Energy, Interior, and Transportation, they are seldom of interest to the Department of Homeland Security's Immigration and Customs Enforcement, or the Department of Commerce's Patent and Trademark Office, or the Department of Labor's Occupational Safety and Health Administration, or the Department of Health and Human Services' Centers of Medicare and Medicaid Services. Interest groups who closely follow rulemaking associated with their constituencies also tend to focus on the proposals of a few agencies, and often, only relatively few of those agencies' rulemakings. OIRA, however, sees all of the proposed rules, year after year, and from this vantage point, if the regulatory system is broken, the fractures are not so evident to OIRA.

### *B. Can OIRA and Collaborative Rulemaking Live Together?*

As I have noted, the decision-making environment of the White House—a hierarchical executive branch with the President at its head and OIRA as his agent—does not naturally encourage collaboration in the formal sense described by Professor Harter and many others.<sup>46</sup> In this hierarchical system, various informal means of collaboration—negotiation, cooperation, meetings and discussion,

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44. Unified Agendas are published by RISC and are available online through [reginfo.gov](http://www.reginfo.gov). [Reginfo.gov](http://www.reginfo.gov/public/), <http://www.reginfo.gov/public/> (last visited Nov. 28, 2009).

45. 29 C.F.R. §§ 1926.750-1926.761 (2008). The Department of Labor's Occupational Safety and Health Administration (OSHA) issued a notice of proposed rulemaking in January 1988 to reduce hazards associated with steel scaffolding. In 1992, the agency decided to develop the rule through negotiated rulemaking. (Professor Phil Harter served as the mediator for that effort.) OSHA eventually issued a final rule in January 2001, thirteen years after the initial proposal. The issuance of the final rule began a new controversy regarding a provision of the rule designed to increase slip resistance on scaffolding. This resulted in a final rule formally revoking the provision in January 2006. See [OSHA.gov](http://www.osha.gov), Safety Standards for Steel Erection, [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=16290&p\\_table=FEDERAL\\_REGISTER](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=16290&p_table=FEDERAL_REGISTER) (last visited Nov. 28, 2009).

46. See Harter, sources cited *supra* notes 4, 5.

internal decision-making by consensus—are present all of the time in the EOP decision-making processes. However, formal collaboration is not, nor in any extensive way is it likely to be, the model for White House decision-making.

As both a constitutional and political matter, the President is responsible to the American public. The public expects him to be a leader and decision-maker, not merely a symbolic head of state. This role ineluctably involves him not only in the more obvious policy arenas where his authority is strongest—national security and foreign affairs—but also in the day-to-day decision-making involved in domestic policy. Any President's policy agenda includes scores of domestic policy issues, and Presidents take the promises they made during election campaigns seriously. They chose the department and agency heads who, with the concurrence of the Senate, will implement those policies. However, within the confines of the law, it is the President's agenda that prevails, not the agency head's interpretation of what is best for the President. Regarding regulatory review, OIRA is the interpreter of compliance with the presidential policy set forth in the Order. If OIRA concludes that the policies of the Order have not been met, it may return the rule to the agency (assuming no statutory or judicial mandate precludes such action).<sup>47</sup> OIRA does this in its role as agent of the President who, through his senior staff, enforces OIRA's authority. When a rule is returned to an agency, the agency head is not free to decide to publish the rule regardless of OIRA's rejection of the rule.<sup>48</sup> Such action by an agency head is regarded as a substantial breach of White House authority, and the offending Secretary or agency head is likely to be called to the White House for instruction on the meaning of the Order.

The Order provides a process for appeal to the President and Vice President if the agency head disagrees with the OIRA Administrator and no resolution can be reached.<sup>49</sup> This formal provision of the Order, however, is virtually never used.<sup>50</sup> Instead, the dispute works its way up the White House and agency chains of command until the agency head makes her case to the Vice President or Chief of Staff or some other appropriate White House official, or to the President himself. The results of such "consultation" serve as the President's direction to the agency head. Of course, this decision-making process is entirely an intra-executive branch managerial mechanism, rather than a legal process. The decision reached

47. Exec. Order No. 12,866, *supra* note 9, § 6(b)(3).

48. *Id.* § 8. Publication of a rule without OIRA clearance occurred only a handful of times during my twenty-five-year tenure.

49. Executive Order No. 12,866 as issued in September 1993 stated that conflicts that cannot be resolved by the agency head and the OIRA Administrator "shall be resolved by the President, or by the Vice President acting at the request of the President." Exec. Order No. 12,866, *supra* note 9, § 7. The George W. Bush administration modified this provision of the Order in 2002 naming the Chief of Staff to assist the President in resolving regulatory policy disputes between the OIRA Administrator and the agency head. Exec. Order No. 13,258, 67 Fed. Reg. 9385 (February 26, 2002) (providing that disputes among agency heads or between an agency and OMB that cannot be resolved by the OIRA Administrator shall be "resolved by the President, with the assistance of the Chief of Staff to the President"). On January 30, 2009, President Obama repealed Executive Order No. 13,258, thus restoring the original Executive Order No. 12,866. Exec. Order No. 13,497, 74 Fed. Reg. 61113 (Jan. 30, 2009).

50. In a 2008 dispute between EPA and OIRA regarding review of an EPA draft ozone rule, the section 7 procedures of Executive Order No. 12,866 were used, to my knowledge, for the first time. See Letter from Susan E. Dudley, OIRA Adm'r, to the Honorable Steven L. Johnson, Adm'r, Evntl. Prot. Agency (Mar. 12, 2008), *available at* [http://www.reginfo.gov/public/postreview/Steve\\_Johnson\\_Letter\\_on\\_NAAQs\\_final\\_3-13-08\\_2.pdf](http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQs_final_3-13-08_2.pdf).

may, and usually does, have political implications. In any case, the ultimate decision-maker in such cases is the President.

Some proponents of collaborative rulemaking and students of executive authority argue that the view of the President as the ultimate decision-maker is wrong from both constitutional and political perspectives.<sup>51</sup> This point of view generally acknowledges strong presidential decision-making authority in national security and foreign affairs issues but argues that domestic affairs are different.<sup>52</sup> In that case, Congress has delegated authority to agency heads, not to the President (and certainly not to OIRA). Furthermore, agencies receive their budgets and other resources from Congress, which oversees the expenditure of these funds.<sup>53</sup> Finally, Congress, through its lawmaking authority, establishes both the agencies and the programs they are to implement.<sup>54</sup> This argument acknowledges the President's constitutional duty to oversee the executive branch, but does not recognize that he has ultimate decision-making authority. He is the overseer but not the "The Decider."<sup>55</sup> This is an elegant distinction but one that it hard to maintain in the froth of decision-making when a contentious policy issue reaches the Presidential, or at least White House, level.<sup>56</sup> Moreover, it does not comport with my experience of the President's actual use of his authority to manage agency rule-making.

When the President establishes his policy with an agency head, either through a Cabinet meeting, circulars or guidance, or his agents on the White House staff or at OMB, he is acting as a decider and not merely an overseer. Usually, the President leaves the details of implementing his regulatory policy agenda to the agencies, his senior aides, and OIRA.<sup>57</sup> For the vast majority of published rules, final decisions are made by the agency heads (or their delegates) without White House or OIRA input. In this sense, the President and his staff are broadly overseeing agency actions. However, if a particular issue has made its way to the Oval Office, when the President expresses his views to the department or agency head, he is exercising his constitutional duty to manage the executive branch by deciding what he wishes the agency head to do. That individual agency head serves at the President's pleasure and, by implementing his policy through rulemaking, that agency head is incorporating the President's decision into her final legal decision.

This is not to say that a department secretary need accept the contention of OIRA, OMB, or the Chief of Staff, that they are conveying the President's wishes. If the department head meets with the President, they will resolve the matter. The Secretary may convince the President to change his mind (either by the persua-

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51. Harter, *supra* note 5; see also Peter Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (June 2007) (analyzing with great thoroughness and nuance the distinction between the President as a decider and the President as an overseer).

52. Strauss, *supra* note 51, at 759.

53. *Id. passim*.

54. *Id.*

55. *Id.*

56. *Id.* at 704.

57. See *supra* notes 33, 38 (for statistics regarding OIRA review and Federal Register publication of rule making documents). Of the approximately 7,000 rulemaking documents published annually in the Federal Register, OIRA reviews about 600. Even if relatively non-important administrative and ministerial rules are excluded from consideration, OIRA still reviews only about twenty-five percent of the remaining 2,300. See *supra* notes 33, 38.

siveness of her argument or her threat to resign); the President and the agency head may negotiate a middle ground; the agency head may convince the President simply to let her make the decision; or the agency head may accept the President's view, adopting it as her own legal decision. In any case, it is the President who decides how the agency head is to proceed on certain issues. That individual, though confirmed by the Senate, is still the appointee of the President, and he may remove any political appointee from office at will. Such action is not without its political consequences, and Presidents rarely exercise this authority. However, in the end, the agency head can accommodate the President's point of view and make that decision her own, or she can resign. No one said being an agency head was easy.

In a number of ways, however, the President's actions regarding regulatory policy-making are more akin to oversight. For example, there are practical limits to the President's involvement in rulemaking, just as there are to OIRA's involvement. Regulatory agencies have extensive resources, at least in comparison to OIRA, and I believe that they try hard to make good decisions based on statutory mandates, analytic results, and public input. Even with OIRA review, agencies generally publish a version of their original draft rule.<sup>58</sup> OIRA is sensitive to statutory mandates, including deadlines. OIRA also, as part of EOP staff, is experienced in responding to political necessities, such as an administration's desire to announce a rule immediately, with or without OIRA review. OIRA accommodates these practical limitations and necessities, which are a normal part of business in EOP. Finally, in many cases, the White House decides to leave the decision-making duty with the agency head. OIRA staff may argue and negotiate with agency officials as best they can, but the OIRA Administrator or upper-level White House officials may agree ultimately that the agency should prevail. This is frustrating to the ever-vigilant OIRA analysts but perfectly within the boundaries of White House oversight of agency regulatory decision-making. This action, among other things, keeps politically sensitive decision-making away from the White House—a common stratagem among administrations. This process could be labeled as an example of the President as overseer rather than as decider.<sup>59</sup>

In all of the situations described above, partly because there may be debate as to who makes the final policy decision, a variety of individuals within the executive branch assert their roles as deciders. As is common with such individuals, they do not wish to give up that authority. Individuals who occupy high-level positions at agencies and in the White House are often there because they have been skilled at exercising authority and at negotiating. When they use collaboration, they use it to help them make better decisions—but those are still their decisions. In this cultural milieu, collaborative governance, which depends on egos being willing to restrain themselves, stands at a significant disadvantage.

For all of the reasons discussed above, formal collaborative rulemaking cannot replace APA notice and comment rulemaking; nor is the President likely to give up the executive branch policy oversight afforded him by OIRA's role in regulatory review. However, there is certainly room for collaboration on a smaller scale at various places in the process or in connection with individual rules.

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58. See RegInfo.gov, *supra* note 33.

59. Strauss, *supra* note 51 *passim*.

### C. OIRA and Collaboration Can Be Friends

The Obama administration is still establishing its regulatory policy. A new OIRA Administrator was only recently confirmed (in September 2009).<sup>60</sup> At the time of the writing of this paper, OMB had solicited public comments on a new executive order to replace the Order; however, a new one had not yet been published. The role of regulatory review in the new administration is, thus, not yet apparent. However, one of President Obama's first actions was a Memorandum to Agency Heads directing that "[g]overnment should be collaborative" and that "[g]overnment should be participatory."<sup>61</sup> It appears that this administration will be sympathetic to the use of collaborative rulemaking in some form.

If the President is serious about the use of collaborative rulemaking, he will need OIRA to help make it work. OIRA and all of OMB are skilled at ensuring a President's policies, including process policies, are implemented throughout the executive branch. OIRA staff have years of experience helping to make presidential policies work. If so directed, OIRA will serve this President well in encouraging collaborative rulemaking.

In addition to experience with regulatory negotiation, OIRA has experience in another seldom-noted form of collaborative rulemaking. As proponents have described, collaboration can occur at a number of places in the regulatory development process—as part of a scoping session, as a policy dialogue, to develop recommendations to an agency on a proposed rule, or to reach an agreement on the policy itself.<sup>62</sup> Some experience along these lines is offered by the Small Business Regulatory Enforcement Fairness Act (SBREFA, or Act) small business panels.<sup>63</sup> The Act requires OIRA, the Chief Counsel for Advocacy of the Small Business Administration (Small Business Advocate), and either EPA or OSHA to form a review panel and convene small business representatives to seek their input for certain proposed rules affecting the small business community. The review panel must issue a public report on the comments of the small business representatives and alter the draft proposed rule as appropriate.<sup>64</sup>

Although a limited number of such panels have been convened over the past thirteen years, the experiences of OIRA, the Small Business Advocate, EPA, and OSHA with them were generally positive during my tenure at OIRA. The difficulties for the agency, the Small Business Advocate, and OIRA were much the same as the problems that attend other forms of collaborative rulemaking—finding appropriate panel members; providing them with enough information to enable them to understand the issue, but not so much so as to overwhelm them; and securing resources from the regulating agency, the Advocate's Office, and OIRA. Although Congress has discussed expanding such panels, it has not yet done so. One conceptual problem is that this process gives small entities an ad-

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60. Professor Cass Sunstein was nominated by President Obama to be OIRA Administrator on April 9, 2009. He was confirmed by the Senate on September 10, 2009.

61. Memorandum for the Heads of Executive Departments and Agencies, *Transparency and Open Government*, 74 Fed. Reg. 4685 (Jan 21, 2009).

62. Harter, *supra* note 5.

63. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 244 (1996) (codified as 5 U.S.C. § 609 (2006)).

64. *Id.*



vance opportunity to participate in the regulatory development process. Other stakeholders—states and Indian nations, for example—naturally wonder why they should not be afforded such opportunities. As with regulatory negotiation, agency and OIRA experience with SBREFA panels illustrates both the potential benefits and the difficulties of collaborative governance.

Collaborative rulemaking is a flexible process, but as some have warned, it is not formless, and it needs to result in an agreement among the parties.<sup>65</sup> Regulatory negotiation is a good example of this type of process, and valuable experience has been gained as to it over the past twenty-five years, including both its successes and failures. However, like regulatory negotiation, formal collaboration is difficult. It requires a group that represents all major interests; an impartial convener with the skill to build trust among the participants; time and resources, including the willingness to meet the bureaucratic requirements of the Federal Advisory Committee Act,<sup>66</sup> and decision-making by consensus.<sup>67</sup> Collaborative rulemaking is not an easy alternative to notice and comment rulemaking, and, in fact, cannot supplant it. The best outcome of collaborative rulemaking, however, results from a number of factors, one of which is that information relevant to the decision is shared by the participants, as opposed to being hidden, and that affected parties agree to be the deciders, rather than relying on the government to do it for them. It is a process with obvious benefits.

The difficulty with collaborative decision-making from OIRA's point of view, resource issues aside, is that it raises the question of the role of regulatory review, and, in the end, the President's authority. While outsiders may scoff at this as a typical, self-serving bureaucratic reluctance to abandon any of its own power, it is a real and reasonable concern within OMB and the White House. In fact, it is the reason I spent much of this essay describing OIRA's view of the regulatory world. Arguing that the President should not have such authority over agencies, or that OIRA is not really his agent, are interesting arguments; however they do not reflect the realities of presidential views on how to manage the executive branch, whether as decider or overseer.

From a broad perspective, for all of the reasons noted above, collaborative rulemaking is unlikely to replace the current notice and comment process to any significant degree. However, acknowledging its potential benefits, the current administration seems likely to encourage its use.<sup>68</sup> One way to resolve the OIRA concern regarding the President's authority, and a method that has been utilized in the past, is for an OIRA analyst to be part of the collaborating panel. While this puts pressure on OIRA's scant resources, it includes a representative of the President's point of view as one of the interests. Ultimately the President reserves the right to exercise his authority on any rule, whether that rule is developed by collaboration or by the agency, itself. OIRA staff has served on several regulatory negotiation panels, as well as on the small-business panels described above, and found them useful experiences, despite the fact they can be time-consuming.

Perhaps the cleanest way to resolve the impasse between regulatory review and collaborative rulemaking, however, would be for the administration to choose

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65. See Harter, *supra* note 5.

66. Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-16 (2006).

67. Harter, *supra* note 5.

68. Memorandum, *Transparency and Open Government*, *supra* note 61.

a relatively small number of upcoming rules from its regulatory agenda to which collaborative rulemaking techniques would be applied. Further analysis might indicate where in the regulatory process collaboration would be most helpful; it does not always have to be used to develop a proposed rule. The mechanism directing this action would be a presidential directive to the agencies and to OIRA that, in these selected cases, collaborative rulemaking is to be used, and OIRA's job is to help make the process work, whether it includes an OIRA panel member or not. OIRA would help develop guidance to agencies, including reporting mechanisms to make sure that the work to develop the collaborative process is completed and continues.

Without such specific direction and a specified set of procedures, collaborative rulemaking may be tried, but the chances are great that it will slowly recede into the background mist of official procedures and policies that have been tried and, without ever being officially revoked, are quietly discarded. It is axiomatic among veteran OIRA staff that all presidential policy directives are not equal. Such directives serve a wide variety of purposes, and, partly because there are simply so many of them, certain ones emerge as more important or more workable for the agencies, the White House, and OMB officials. Thus, a policy and its directives on collaborative rulemaking will be competing with many other processes and issues that occupy the agencies and the White House. These include, among others, budget and legislative development; legal issues that attend any policy-making endeavor; electoral politics; simple administrative issues, such as recordkeeping and the maintenance of Federal Advisory Committee Act requirements; human resources issues, such as fewer staff that have ever-increasing responsibilities; and relationships with the public. It will take a concerted managerial effort from both the agencies and OIRA to make any collaborative rulemaking succeed.

If the goals of collaborative rulemaking are modest initially, OIRA can become an agent for this regulatory development process instead of an impediment. This will require the President, while acting as process decider, to direct agency heads to commit to collaborative rulemaking, and to direct OIRA to serve as his agent to ensure that collaborative rulemaking takes place. OIRA and collaborative rulemaking will never be roommates, but they can become friends.

