

“The Obama Regulatory Record: Partisanship, Perception, and the 2012 Election”*

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In most presidential elections federal rulemaking processes and regulatory outcomes are typically not regarded by candidates or their campaigns as themes likely to capture the attention of voters, let alone their hearts and minds. The 2012 contest between incumbent Democratic President Barack Obama and Republican standard-bearer Mitt Romney proved an exception. The economy's lackluster standing throughout Obama's first term—with unemployment consistently above eight percent, stagnant or negative growth as measured by gross domestic product and a particularly noteworthy decline in consumer and small-business owner confidence—raised the critical question of how Obama-era regulations may or may not have contributed to the economy's torpid performance following the financial crisis of 2008.

The President's detractors in the Grand Old Party (GOP) and in the private sector posited unrelentingly that the Obama Administration's new regulations of business and industry—from oil and gas exploration to health care, financial institutions, and small businesses—were destabilizing and detrimental to economic growth and recovery. A Romney campaign advertisement in Colorado, similar to ones unleashed in seven other "swing" states in early September 2012, contended that "excessive government regulations are crushing job creation...thousands of jobs lost...the Romney Plan? Repeal Obama's excessive regulations, foster innovation" (9news.com). In a scathing critique of Obama's regulatory "czar" Cass Sunstein, who headed the Administration's Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), *Forbes Magazine* argued that "government regulation has been one of the nation's few growth industries" under Sunstein's watch: "stultifying, job-killing regulation has been a hallmark of the Obama administration" (Miller 2012).

President Obama expressed no regrets for his administration's regulatory record. In an interview with Columbia Broadcasting Service's (CBS) Steve Croft on *60 Minutes* in late September 2012 the chief executive asserted confidently that:

When it comes to regulations, I've issued fewer regulations than my predecessor, George Bush, did during that same period in office. So it's kind of hard to argue that we've overregulated. Now, I don't make any apologies for putting in place regulations to make sure banks don't make reckless bets and then expect taxpayers to bail them out. I don't make any apologies for regulating insurance companies, so that they can't drop a family's coverage, just when somebody in their family needs it most. And, you know, the problem that Governor Romney has is that he seems to only have one note: tax cuts for the wealthy and rolling back regulations as a recipe for success. Well, we tried that vigorously between 2001 and 2008 and it didn't work out so well (*60 Minutes* 2012).

Moreover, in an expressive and rather artful op-ed in the *Chicago Tribune* Sunstein (2012) defended the regulatory record of the Obama presidency by focusing on alleged cost-savings. He asserted that "Over the Obama administration's first three years, the net benefits of regulations reviewed by OIRA and issued by executive agencies exceeded \$91 billion—25 times the corresponding number in the Bush administration and more than eight times the corresponding number in the Clinton administration." Sunstein was careful to underscore the utilization of cost-benefit analysis—his forte—to justify new regulations that putatively have constructive, long-term societal impacts—from food and automobile safety to health care. His operationalization of the Obama Administration's regulatory methodology matched the *National Journal's* (2012) contention that "Obama approaches regulation as a pragmatist. He wants 'basic rules of the road' to make the economy more fair..."

So which side—Romney's or the president's—do the facts support relative to the Obama regulatory record and the impact on the national economy? It is a significant methodological challenge for any objective researcher to determine the merits of such vastly contradictory accounts of rulemaking from 2009-2012. Simply tallying the raw number of regulations passed

in one presidency or another, as the President suggested—or adding up the pages of regulations in the Federal Register across time to compare records—conveys little about the relative significance of any given regulation. Calculating relative benefits to costs across presidencies is even more problematic, whether the claims are from the president’s supporters or rivals.

As the OMB noted in a 2011 report to Congress, agencies often cannot quantify the cost-benefit ratio of regulations due to an absence of information, as “prospective estimates may contain erroneous assumptions, producing inaccurate predictions” (OMB 2011, 4). In other cases it is impossible to monetize societal benefits that *prevent* actions such as discrimination or crimes. Moreover, a draft report by the OMB (2012, 11) underscored “the difficulty of estimating and aggregating the benefits and costs of different regulations over long time periods and across many agencies using different methodologies. Any aggregation involves the assemblage of benefit and cost estimates that are not strictly comparable.” For example, when the Environmental Protection Agency (EPA) issues new Corporate Average Fuel Efficiency (CAFE) standards for automobile emissions every five or 10 years, the estimated benefits of hundreds of billions of dollars potentially skew any White House administration’s record depending on the timing of the new regulations. According to the *Washington Post*, Sunstein’s analysis “drew the exact type of comparisons that the budget office has cautioned against” (Hicks 2012). In a like fashion, a *Heritage Foundation* report highly critical of Obama-era regulations engaged in a similarly dubious comparison to the Bush years to lambast White House rulemaking (Gattuso and Katz 2012).

This research does not purport to reconcile the debate about cost-benefit analyses of federal regulations. Alas, sizing up the relative benefits of regulations, monetary or otherwise, in any presidential administration is a *subjective endeavor better left to voters*. On the other hand,

an objective analysis of the *costs* of regulations during the Obama presidency is possible. Indeed, such an examination is critical to understanding the role of the federal regulatory environment played in the 2012 presidential campaign and how voters perceived the Obama economic record.

The Congressional Review Act (5 U.S.C. § 802(a), passed in 1996, mandates that an agency promulgating a rule submit it to Congress and the Government Accountability Office (GAO) before the rule can take effect. GAO has tracked rules since 1997 and made available a searchable database on the Internet.¹ The vast majority of agency submissions include prospective costs, however imperfectly derived, to implement the rule.

This research focuses on rules implemented by the Obama Administration and classified by OIRA and the GAO as “significant.” Significant rules are defined as those that are expected to have an annual effect on the economy of \$100 million or more; involve a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or, may have significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (GAO). From 2009-August 2012 there were 302 new significant regulations promulgated by the White House, 233 of which had detailed cost estimates. The cost of new regulations is analyzed by department and agency to pinpoint the regulatory focus of the Obama’s first term.

In assessing the number and cost of significant new regulations by policy area, this chapter juxtaposes the regulatory record of the Obama Administration with public opinion data leading up to the 2012 presidential election. The central objective is to place into context the ways in which the debate about Obama-era regulation added to the essential economic narratives

of the Democratic and Republican presidential campaigns. The analysis underscores how regulatory issues became subsumed into the larger, partisan divide about the state of the economy and perceptions of Obama’s record of economic management. The evidence suggests that as the election neared, Republican voters became increasingly discontent with alleged “overregulation.” By contrast, Democratic voters approved of greater regulation of the environment, business, and health care—all central tenets of Obama’s policy agenda. Independents remained largely divided on the President’s regulatory strategy. In sum, assessments of the Obama regulatory record were notably—if not unexpectedly—connected to perceptions of the economy and filtered through partisan lenses as the 2012 election approached.

This chapter unfolds in four parts. The next section provides a very brief discussion of presidential power and innovations in regulatory control since Nixon to situate Obama’s presidency in “political time.” The second section analyzes the number and costs of new regulations by department and agency to underscore the regulatory focus of the Obama Administration. The third section assesses public opinion data, limited as they are, in the lead-up to the 2012 election in order to emphasize how regulatory issues were absorbed into the economic narratives of the Obama and Romney campaigns. The concluding section discusses the implications of regulatory policies moving beyond the 2012 race for the White House.

PRESIDENTIAL POWER, AGENCY RULEMAKING, AND REGULATORY REVIEW

Presidents’ use of “unilateral administrative tools as a mechanism for policy change” (Rudalevige 2009, 11) has captured the increased attention of scholars of the “institutional” or “administrative” presidency in the last thirty years (Burke 2000; Hart 1995; Howell 2003; Moe and Howell 1999; Nathan 1983; Waterman 1989). In their attempt to control policy implementation presidents have engaged in strategic efforts to politicize the bureaucracy through

their appointment power and to centralize decisionmaking by shaping organizational structures (see *inter alia*, Hecló 1975; Lewis 2008; Moe and Wilson 1994; Rudalevige 2005). Presidents execute control in a top-down fashion through institutional structures and processes they can craft autonomously (Moe 1985), avoiding the well-documented collective action problems of Congress (Cox and McCubbins 1993; Mayhew 1974; Weingast and Marshall 1988).

The quest to understand the parameters of presidential influence over agency rulemaking is a prime example of scholars' renewed focus on the *formal*, institutional powers of the American executive rather than the *informal* bargaining powers championed by Neustadt (1960). On this account the OMB and OIRA stand out as the most important structures in the executive establishment. Scholars generally concur that regulatory review by the White House fundamentally shapes the institutional balance of power between the presidency and Congress vis-à-vis policy implementation. Writing several decades ago, Moe and Wilson (1994, 37) posited that "Presidents have imposed new procedures on regulatory agencies in a sustained attempt, stretching over twenty years, to gain control over agency rulemaking and assert presidential priorities." The evolution of centralized regulatory review has indeed been bipartisan. Attempts to scale back regulation have been an article of faith among Republicans who have occupied the White House since 1972. But Presidents Carter and Clinton made their own contributions to greater presidential control of rulemaking to fit their own agendas. A brief inventory of presidential innovations in rulemaking since Nixon places the Obama Administration into a comparative, historical frame of reference and underscores the institutionalization of regulatory review.

President Nixon's "plot" to restrain the bureaucracy through super-secretaries and administrative means may have failed in his abbreviated second term (Nathan 1975). But it is

critical to note that his “Quality of Life” interagency review of proposed rules represented the first White House effort to come to terms with regulatory costs and alternatives, particularly with respect to the Environmental Protection Agency. One impact was to delay the rulemaking process, and consequently, implementation of regulations (Bruff 1988/89, 546-47; Quarles 1976).

Nixon’s successor, Gerald Ford, used his discretion via Executive Order (E.O.) 11821 to empower the OMB to develop criteria to be utilized by federal agencies to assess the economic costs of regulations. The strategy was part of Ford’s anti-inflation strategy, dubbed WIN (Whip Inflation Now). Agency cost-benefit analyses, or “inflation impact statements,” had to be submitted and approved by the OMB (Fuchs and Anderson 1987, 27). Critics charged, however, that the process was too decentralized and that agency estimates had little consequence in halting the regulatory onslaught of the 1970s (see O’Reilly and Brown 1987).

President Carter’s primary innovation in regulatory matters consisted of establishing a Regulatory Council in the White House. Comprised of the heads of regulatory agencies, the Council developed and published a “Calendar of Federal Regulations” in an effort to take a longer term view of rules in the pipeline and coordinate streamlined implementation. The Calendar identified rules with “significant” economic impacts and sought to assess relative benefits to costs. The Council paid particularly close attention to potential inter-jurisdictional disputes in implementation (Bruff 1988-89, 548-49).

The Reagan-H.W. Bush era represented nothing less than a major assault by the two Republican presidents on new regulations. At the outset of his first term Reagan established a Task Force on Regulatory Relief, headed by Vice President Bush, to undertake cost-benefit analyses of existing regulations. Further, Reagan signed E.O. 12291, which *mandated* that

agencies submit economic impact analyses of proposed regulations deemed “significant” (exceeding costs of \$100 million). E.O. 12291 enhanced significantly presidential control of the bureaucracy. As Cooper and West (1988, 870-71) note, OMB was “empowered to stay the publication of notice of proposed rulemaking or the promulgation of a final regulation by requiring that agencies respond to its criticisms” and OMB could “recommend the withdrawal of regulations which cannot be reformulated to meet its objections.” Finally, early in his second term Reagan again took aim at halting an expansion of federal regulations. E.O. 12498 required OMB review of proposed agency rules to ensure consistency with the president’s agenda and policies (Hahn 1998, 202)—a new form of “central clearance” that had been previously reserved for legislation (see Neustadt 1974).

Reagan’s two executive orders remained in effect during George H.W. Bush’s term. Bush replaced the Task Force on Regulatory Relief with the Council on Competitiveness, chaired by Vice President Quayle, which was charged with undertaking broad cost-benefit analyses of regulations. The Council on Competitiveness was notable for rather spectacular battles between the White House and the Democratic-controlled Congress over implementation of regulations connected to the 1990 Clean Air Act Amendments (see Duffy 1996).

Cost-benefit analyses of proposed regulations continued as the norm during the presidency of Bill Clinton. E.O. 12886, which superseded Reagan’s E.O. 12291, mandated a “National Performance Review” (NPR), nicknamed affectionately “reinventing government.” Headed by Vice President Al Gore, the objective of the NPR was to cut red-tape and render government programs more efficient and performance-based (Kamensky 1996). The Republican-led 104th Congress also played a role in attempting to curtail the thrust of new regulations, and Clinton did not mount significant opposition. The Unfunded Mandates Reform

Act (1995) and the Small Business Regulatory Enforcement Fairness Act (1996) were examples of congressional efforts to reestablish greater levels of regulatory oversight on Capitol Hill (Hahn 1998, 203).

Regulatory review under President George W. Bush, as William West (2005, 79) contends, was “re-energized” and in large measure further politicized. Shapiro (2007, 271) argues that reforms undertaken in Bush’ first term by OIRA director John Graham resulted in the potential concentration of rulemaking power “in a small group of interests with more established access, influence, and power.” Further, E.O. 13422 (2007) mandated that federal agencies designate a “regulatory review officer,” appointed by the president, with the ability to decide whether new rules were warranted. The order also provided for enhanced executive review of “guidance documents” issued by regulatory agencies for the implementation of rules (Copeland 2007). Finally, upon Graham’s departure from OIRA in 2006, Bush was “sufficiently concerned with installing his preferred head of OIRA in April 2007 that he did so by recess appointment, evading Senate scrutiny, at some political cost” (Rudalevige 2009, 15). Bush’s appointee, Susan Dudley, stirred significant controversy when OIRA opposed proposed Environmental Protection Agency (EPA) rules on greenhouse gases in 2008 (Eilperin 2008).

The Obama Presidency and Regulation: Angst, Perception, and Republican Contretemps

The preceding review of White House regulatory review, albeit cursory, emphasizes the degree to which President Obama clearly inherited an “institutionalized” and significantly more centralized White House configuration for rulemaking than existed four decades earlier.

Whether the politicization of the Bush years would follow in OIRA remained an open question in 2009. But there is little doubt that the structure enhanced not only the Administration’s early

quest to repeal a host of Bush-era rules but also facilitated the focus on financial market reform, climate change, and health care—among the most controversial elements of the Obama agenda.

Some in the private sector were alarmed by Obama’s appointment of Cass Sunstein as OIRA director in mid-2009. Others quietly welcomed his selection, as they viewed his “academic” approach to regulatory affairs as a potential hedge against expansive regulation championed by more liberal elements in the Administration and the Democratic Congress. Indeed, one observer suggested the degree to which OIRA under Sunstein was “wonky.”² “OIRA,” David Brooks (2011) writes, was “composed of career number-crunchers of no known ideological bent who try to measure the trade-offs inherent in regulatory action... This office has tried to elevate the role of data so that every close call is not just a matter of pleasing the right ideological army.” Sunstein’s scholarship on transcending traditional partisan debates over regulation and his abiding faith in cost-benefit analysis suggested, to the discreet delight of many industry officials and to the nascent chagrin of progressive Democrats, that he might oppose expensive new regulations and moderate the thrust of Administration rulemaking by prioritizing economic growth (Layton 2009; Skrzycki 2009).

Not surprisingly, positive perceptions of Sunstein and the regulatory thrust of the Obama White House were neither universal nor enduring. “Republicans,” Peter Baker and John Broder (2012) contend, “saw what they considered a liberal Harvard professor and Obama pal and were deeply skeptical.” The pace of criticism of regulation in the Obama presidency hastened as the economic recovery stalled, especially after the \$789 billion stimulus package, passed in 2009, seemingly did little to spur private sector growth. The GOP alleged that regulatory profligacy emanating from the White House was the proximate cause of continuing levels of high unemployment. Environmental regulation became the focal point of contention.

Obama faced a growing onslaught of condemnation—particularly by Republicans in Congress following the mid-term elections of 2010—that regulations on climate change, in particular, were devastating for jobs in the manufacturing and energy sectors. At the very outset of the new legislative session in 2011 House Republicans introduced a number of bills to preclude implementation of proposed EPA regulations targeting greenhouse gases (Cappiello 2011). The strategy was part of a larger GOP campaign promise to block or de-fund the Administration’s efforts to combat “global warming.” Republicans cried foul and contended that the Obama White House was trying to carry out an unprecedented and extensive environmental agenda *administratively* following the failure of “cap-and-trade” legislation in Congress (Orange County Register 2011).

Generalized Republican critiques of the president’s regulatory record were bolstered by a bevy of reports undertaken by conservative think tanks, some of which the chair of the House Oversight and Government Reform Committee, Darryl Issa (R-CA), sought to exploit skillfully in hearings and reports. Such studies posited that Obama-era regulations, environmental or otherwise, were the primary impediment to an economic rebound. For instance, the Mercatus Institute asserted that the president’s policies had increased federal employment by 3.5 percent while the private sector continued to lose jobs (de Rugy 2010). As another example, the Competitive Enterprise Institute accentuated the putatively deleterious impact of regulatory burdens on small business job creation (Crews 2011).

In an effort to stem the tide of criticism that his Administration’s regulatory policies were repressing an economic resurgence, Obama signed E.O. 13563, entitled “Improving Regulation and Regulatory Review” in January 2011. The order mandated a government-wide review of existing regulations. The nominal objective, akin to Clinton’s NPR, was to streamline

rulemaking processes and dismantle “overlapping, inconsistent, or redundant” rules. The order also focused on cost-benefit analyses to justify new regulations and championed greater transparency and public involvement in rulemaking processes (Hemphill 2012).

But the order arguably had more symbolic than substantive value. The review effort, with an emphasis on Sunstein’s approach to cost-benefit analysis, was not historically novel. Rather, presidential action was aimed at assuaging anxiety in the private sector over the financial impact of regulations in the pipeline that might dissuade new hiring. Further, the executive order was an attempt to soften the image of the Obama White House as hostile to business concerns. Obama took the extraordinary step of writing an op-ed in the *Wall Street Journal* to explicate his rationale to business and industry. The review constituted part of a broad effort by the Administration to prompt business leaders to identify regulations they believed posed obstacles to “job-creating private investment” (Williamson 2011). Trade associations such as the U.S. Chamber of Commerce and the National Federation of Independent Businesses (NFIB) applauded the effort, particularly given Obama’s explicit acknowledgment that many regulations negatively affected small-businesses—the presumed backbone of any economic recovery (Bogardus and Viebeck 2011).

The war of words between House Republicans and the White House over regulation escalated in the 112th Congress nonetheless. In August 2011 House Republicans drafted a list of “the 10 most harmful job-destroying regulations” of the Obama presidency. The lion’s share involved environmental rules (particularly emissions standards), which Eric Cantor (R-VA) suggested were “reflective of the types of costly bureaucratic handcuffs that Washington has forced upon business people who want to create jobs” (quoted in Stiles 2011).

House Republicans' efforts to expose the Obama White House's alleged "overregulation" of business and industry on Capitol Hill complemented Mitt Romney's indefatigable—if sometimes factually questionable—critiques of Obama's economic record on the campaign trail in advance of the 2012 election. At the first presidential debate in Denver, Colorado in early October, Romney criticized the Dodd-Frank banking bill regulation as exemplary of an Obama-era regulation he would repeal. The Massachusetts governor emphasized that "regulation can become excessive, it can become out of date. And what's happened with some of the legislation that's been passed under President Obama's first term is you've seen some of the regulation become excessive and it has hurt the economy" (quoted in Mutikani 2012). In the second presidential debate in Hempstead, New York the GOP standard-bearer contended that regulations had quadrupled under Obama. Fact-checkers such as "OMB Watch" found that the total number of regulations was about average under Obama, although "significant" regulations (\$100 million or more in impact) had increased by about 24 percent over the first four years of George W. Bush's presidency (Bruner 2012). And finally, less than a week before the election, Romney campaign spokesman Ryan Williams reiterated Republicans' aggravation with Obama's regulatory record, underscoring that "We need a new president who actually understands businesses and won't punish them with higher taxes, more regulations, and job-destroying energy policies" (Jackson 2012).

In light of the vastly different competing claims of the Obama and Romney campaigns, the contours of the Obama regulatory record are best assessed by an objective review of number, cost, and policy focus of rulemaking from 2009-August 2012. The following section takes up these questions in close detail. The analysis elucidates several key points. The total *number* of significant and non-significant regulations in Obama's first term was *not* appreciably different

compared to George W. Bush or Bill Clinton (second term). The costs of significant rules were, however, greatest with respect to health and environmental policies. And herein lay key similarities and profound differences between the regulatory records of Obama and his predecessor, George W. Bush, that figured prominently into the Romney campaign's regulatory rhetoric. In both administrations the cost of regulations emanating from Health and Human Services was comparable. But the estimated costs of environmental rules in the first three and three-quarter years of Obama's presidency were more than 15 times the new regulations adopted over Bush's *two terms*.

THE OBAMA REGULATORY RECORD: UNRESTRAINED OR UNREMARKABLE?

GAO data on the number, cost, and policy focus of regulations provide a substantial basis to analyze rulemaking during the Obama presidency and make some basic comparisons across time since 1997. Figures 1 and 2 show the number of non-significant and significant rules adopted from 1997-August 2012, respectively. Non-significant rules are classified as those that have economic impacts of less than \$100,000; the economic impact of significant rules exceeds \$100,000.

[Figures 1 and 2]

Figure 1 shows that the pace of non-significant regulations was slightly higher during the second term of Bill Clinton (1997-2000) compared to his two immediate successors. The rate of non-significant rules was lowest in the last three years of George W. Bush's second term (2006-2008). There was only a slight uptick during Obama's first term, most notably in 2011. The increase, however, is not statistically significant.

Figure 2 focuses on significant regulations. From 1997-August 2012, the pinnacle came during Obama's second year in office, in 2010, at 100. The number is perhaps not extraordinary

considering the swift passage of important elements of the president's agenda a year earlier. Nonetheless, the rhythm of the most costly regulations was considerably higher in the first three years of Obama's first term compared to the entirety of George W. Bush two terms. From 2001-2008 the annual average was 62. From 2009-2011 under Obama the average was 88. A simple means test shows that the difference is statistically significant at $p < .02$. Taken together the data in Figures 1 and 2 suggest a misrepresentation in President Obama's contention in September 2012 during the televised *60 Minutes* interview that he issued fewer regulations than his predecessor. While there was little change in the number of minor rules, those with the greatest economic and social impact according to GAO *did mount appreciably*. But it is also imperative to note that significant regulations did *not* increase four-fold as Romney claimed during the presidential debates.

[Figure 3]

Figure 3 provides some indication of which policy areas drew the greatest focus during Obama's first term. The data underscore that the number of regulations under the Department of Health and Human Services (HHS) was roughly *four times greater* than any other single agency, including the EPA and the Department of Agriculture. Of the seventy-eight new HHS regulations promulgated between 2009-August 2012 sixty (77%) concerned the Centers for Medicare and Medicaid Services. While some of the new rules were connected to the controversial Affordable Care Act (ACA or "Obamacare") others represented ongoing efforts to streamline these entitlement programs. Examples of new regulations span Medicare prescription drug plans to hospital, surgery, and physician fee schedules.

Just how costly were regulations in Obama's first term? As noted earlier, the overwhelming share of department and agency reports to the GAO on new regulations include

cost estimates (and sometimes benefit estimates). These data on costs extend back to 1997. In most cases a *range* of estimated costs for implementing the new rule is included in the departmental or agency report. Critics make the valid charge that government forecasts may be inaccurate or “low-ball” actual costs (Gattuso and Katz 2012), and OMB (2011, 2012) does not dispute methodological difficulties in both cost-estimates and longitudinal comparisons. Nonetheless, these official data—which represent the only systematic effort to assess future economic costs—are the sole metric available to researchers. At a minimum the data represent a baseline estimate. In aggregating overall anticipated costs of new regulations, as well as those by department and agency, this analysis is admittedly conservative in its findings by consistently employing the *lowest possible cost* estimated in the report for each new regulation when an upper and lower range is provided. As such, the analysis gives the “benefit of the doubt” to the White House in terms of economic impact.

[Figures 4 and 5]

Indubitably the debate between Republicans and Democrats about Obama-era regulations has much more to do with costs than the simple number of new rules. Figure 4 shows the aggregate costs by year from 2009-August 2012. The data suggest why House Republicans, such as Daryl Issa, took aim at the president’s regulatory record following the mid-term elections and why the Romney campaign sought to seize the issue of government regulation in the 2012 campaign. Between 2009 and 2010 the aggregate estimated cost of new regulations grew from \$35 billion to a high water mark of approximately \$63 billion, or by a factor of 75 percent. Obviously rulemaking during these two years corresponded to the large Democratic majorities on Capitol Hill that were swept into office with the president in 2008. Regulatory costs dropped considerably in 2011 and for the partial year of data included in 2012 (through August). The

data point to the relative importance of legislative cycles. Scholars and pundits typically recommend that presidents (and the Congresses they control) “hit the ground running” in their first two years before their popularity wanes and they face almost inevitable seat losses in the mid-term elections. During Obama’s first term the costs paralleled the growth in the number of new significant rules in his first two years, many of which were linked to legislation that emerged from the Democratic-controlled 111th Congress, from health care and banking to the stimulus package (American Reinvestment and Recovery Act).

Figure 5 details the departments and agencies promulgating the most costly regulations in the aggregate from 2009-August 2012. HHS led the charge at \$43.1 billion, with most of the costs relating to the Centers for Medicare and Medicaid Services (CMS). Notably, Republican opposition in Congress after the mid-term elections, and from the Romney campaign in 2012, focused far more on either defunding the ACA or a repealing the law in entirety rather than on the steady, if piecemeal regulations the new CMS director, Dr. Donald Berwick, sought to implement (New York Times, 2010; Pear 2010). Regardless, the \$43 billion figure for new regulations is not comparatively unreasonable for the entitlement programs in HHS that were responsible for 36 percent of federal outlays in fiscal year 2010. During the first four years of George W. Bush’s presidency, quantifiable costs of new regulations (n=54) for HHS were estimated by the author at \$59.5 billion, which translates to about \$63.1 billion in inflation-adjusted 2010 dollars. While critics of the ACA would certainly contend that the full impact of regulatory (and other) costs of the legislation are unlikely to be borne until after 2014, new HHS regulations during Bush’s first term *were* somewhat higher compared to Obama’s. At a minimum, the data suggest the extent to which both Administrations struggled to gain control of, and streamline seemingly intractable entitlement spending through new regulations that had

profound and uneven costs to health care facilities, providers, subscribers, and the federal government.

New environmental and energy regulations in Obama's presidency, however, do stand in stark contrast to his predecessor's first term, not in quantity but most particularly in economic impacts. Across Bush's first term new EPA regulations totaled only \$2.3 billion (approximately \$2.7 billion in inflation-adjusted 2010 dollars); the aggregate cost of \$28 billion to consumers and industry for Obama's first term (\$35 billion if Department of Energy rules are included) was 9 to eleven times greater. As Figure 5 indicates, the \$28 billion figure for EPA was nearly twice as much for any other single agency from 2009-August 2012, including Agriculture, Veterans Administration, and Labor. The most costly EPA rule (2010) mandated new greenhouse gas emission standards for automobiles and set new CAFE standards at an annualized cost of \$10.5 billion.³ The regulation prompted a legislative proposal by GOP Senator Lisa Murkowski (AK) in June 2011 to preclude the EPA from regulating greenhouse gases under the Clean Air Act. The bill failed 47-53, but placed the Obama Administration's energy policy and attempts to pass a comprehensive energy bill in the media spotlight (see Geman 2011; Dinan 2011). A follow-up EPA regulation in 2012 on air pollutants from coal- and oil-fired electric utility steam generating units was estimated to cost \$9.6 billion.⁴ These two regulations represented aggressive EPA action that had been put on hold by the Bush Administration, which worried about the relative economic strength of the automobile and coal industries (Lipton 2010). Finally, a single 2010 DOE regulation mandating "weatherization" assistance to low-income persons accounted for another \$5 billion in new costs, and was part of the American Recovery and Reinvestment Act or 2009 stimulus bill.⁵

Although environmental regulations galvanized Republican opposition to the Administration's climate change agenda, many costly, "big ticket" regulations in other policy areas drew little or no attention from GOP members in Congress or the Romney campaign. For example, a \$13.6 billion regulation in August 2010 from Veterans Affairs (VA) mandating an expansion of health care benefits to Vietnam veterans exposed to Agent Orange proved non-controversial (US Federal News 2010a). This single regulation accounted for more than 90 percent of all costs of new VA rules under Obama. Similarly, a \$2.5 billion regulation promulgated by the Federal Aviation Administration, which added performance standards to aircraft transmitters for air traffic control monitoring and safety, spurred little disagreement (US Federal News 2010b). Finally, a \$4 billion regulation by the Department of Education in late Fall 2009 outlining criteria for federal grants to the states for the "race to the top" program as part of the economic stimulus bill garnered more criticism from education groups, who chided a "a one-size-fits-all approach to improving education" (McNeil 2009), than Republicans in Congress who by then had accepted the American Recovery and Reinvestment Act spending as a *fait accompli*.

Cost Estimates, Cassandra, and Regulatory Reckoning: Implications for the 2012 Campaigns

Incredulity in agency cost estimates of regulations has become nothing less than dogmatic among many conservative watchdog organizations and think-tanks. For groups like the *Heritage Foundation* Melanie Klein's (1975, 293) use of the Cassandra metaphor seems most apropos, as government agencies putatively engage in "a refusal to believe what at the same time they know to be true" and a "universal tendency toward denial." A Competitive Research Institute working paper titled "Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway" sums up the disbelief that the ultimate price

tag of aggregate regulations for the US economy can ever be accurately measured. As Gattuso and Katz (2012) assert:

...the agencies that perform the analyses have a natural incentive to minimize or obfuscate the costs of their own regulations. For some, costs are only partially quantified; for others, not quantified at all. But even quantified costs may often fail to capture the true impacts, as regulators cannot estimate intangibles, the costs of which could dwarf the direct compliance burden.

The consequence is that portrayals of the regulatory costs mandated by the Federal government are subject to vastly differing estimates from non-governmental entities. The Competitive Research Institute forecasts the annual costs of all regulations at \$1.8 trillion, or half of the federal budget, and suggests that Congress's delegation of rulemaking processes to unelected representatives in the executive branch is as undemocratic as the estimates are unrealistic (Crews and Ryan 2012).

[Figure 6]

The argument about “unquantified” costs of new regulations is perhaps the most persuasive and troubling for any administration to defend its regulatory record. Figure 6 shows the annual percentage of new rules for which departments and agencies were unable to arrive at a methodology to forecast future economic impacts during Obama's first term. The percentage of annual regulations without cost estimates ranges from just under a quarter to nearly a third from 2009-August 2012. The most that can be said about these significant rules is that they were expected to impose costs of at least \$100,000,000 or more according to the GAO. But in actuality the costs for new Agriculture and Energy regulations on wetlands and environmental protection, Department of Defense stop-loss and homeowner assistance rules, and a whole host of Federal Reserve regulations on truth-in-lending compliance that fell into this category may far exceed the minimum figure.

How did such critiques affect the 2012 presidential race? The lack of empirical data on costs to many regulations, as well as challenges to the veracity of agency estimates, would seemingly facilitate the challenger's (Romney's) ability to make reasonable if not easily verifiable arguments about alleged regulatory profligacy of an incumbent administration. At the same time the competing claims about the benefits and drawbacks of new regulations test the electorate's ability to discern the truth, leaving many to rely on perceptions that are almost naturally filtered through partisan lenses and reinforce their own predilections. Evidence of this phenomenon is apparent in public opinion data on regulation prior to the 2012 presidential election.

REINFORCING PARTISAN CLEAVAGES: PUBLIC OPINION ON REGULATIONS

Public opinion polls do not regularly include specific questions on federal regulations. However, a limited number of polls, both longitudinal and in the last two years of Obama's first term, cast some light on how the economic narratives of the president's and Romney's campaign reinforced traditional partisan divides on the role of the federal government generally, and some key regulations in detail.

[Figure 7]

Taking a longer view since the new millennium, polling data suggest that Americans became more skeptical of the regulatory thrust of the Obama term. Figure 7 shows that throughout George W. Bush's two terms, approximately 40 percent or less of respondents believed that there was "too much government regulation of business and industry." The American Enterprise Institute for Public Policy Research data show a significant rise in the figures for 2009 and 2010 to just under 50 percent in the last year in the time series. As noted earlier, 2010 was the high water mark for "significant" regulations, both in terms of quantity and

cost, in Obama's two years. The evidence suggests that congressional enactment of Wall Street reform legislation (Dodd-Frank) and the ACA in the first two years of Obama's presidency raised concerns about overregulation.

[Figures 8, 9, 10]

Pew Research Center polling data in the latter two years of the Obama term buttress the assertion that partisan cleavages deepened over regulatory issues. Figure 8 shows opinions by party affiliation in March 2011 and February 2012 as Romney's path to the GOP nomination became clearer. Republican views that "government regulation does more harm than good" grew by approximately twelve points in the span of the two surveys. Democrats' skepticism grew only slightly and remained below 40 percent. Independents' views changed little across time, as they were virtually split at 49 percent by 2012.

The partisan gap on regulatory issues is elucidated in Figures 9 and 10. Figure 9 underscores Republican antipathy toward regulation generally. The percentage of GOP supporters contending there was "too much regulation" of everything from small businesses to health care never fell below 50 percent as of the 2012 survey. Indeed, Republican distaste for small business regulation was the highest in the five categories and suggests that the Romney campaign's steadfast focus on the alleged harm of Obama-era regulations on this front reinforced GOP voters' predispositions. It is critical to note, however, how *few* Democrats surveyed agreed with the statement—particularly with respect to large corporations and banks. Less than 20 percent of those self-identified Democrats had negative views of the regulatory environment in the private sector. Finally, Independents were most skeptical of small business regulation but split at 49 percent. On regulation of large corporations, banks, the oil industry, and on health care Independents were more closely aligned with Democrats.

Finally, Figure 10 presents polling data by party affiliation on whether federal regulations on several categories should be strengthened. Apart from food production and packaging, less than 30 percent of Republicans consistently supported strengthening environmental, automobile efficiency, workplace health and safety, or prescription drug regulations. Notwithstanding prescription drugs, significant majorities of Democrats endorsed stronger regulations on all other categories. Independents were most divided on food and environmental regulations, and considerably less enthusiastic than Democrats on bolstering automobile efficiency, workplace, and prescription drug regulations.

REPRISE AND CONCLUSIONS: THE REGULATORY TABLEAU OF THE 2012 ELECTION

It is doubtful that exit polls or post-election surveys following the November 6, 2012 presidential election will place regulatory issues specifically front and center on most voters' minds. Rather, poll after poll leading up to Election Day demonstrated consistently that the overall state of the economy—more than any other single issue—dominated the concerns of voters. A margin of two million voters nationally apparently accepted the Obama campaign's arguments that the economy was improving—or would improve—if the president were re-elected. Whether Obama-era regulations helped or hindered the economic recovery remains an open question, and the path forward in federal rulemaking is uncertain in the second Obama term.

The argument of this chapter is that the controversies over the scope and cost of new regulations in Obama's presidency were part and parcel of the larger economic narratives of the two campaigns. For Romney and the GOP the regulatory glass was half full: Costly, job-killing regulations impeded an economic recovery and stifled private sector innovation. For Obama and the Democrats the swift new regulatory frameworks put in place by the Administration after the

housing and financial crisis of 2008 may not have brought about a full recovery but brought the economy back from the brink of imminent collapse. The most that can be said following the November 6, 2012 results is that voters were willing to stay with Obama's course.

The limited opinion data available on the public's views of Obama-era regulations buttress the contention that Republicans were predisposed to oppose the hallmark private sector, health, and environmental regulations that the Administration aggressively pursued. Democrats, on the other hand, were not only content with new rules but most also preferred *more* regulation. The Obama and Romney campaigns reinforced these partisan predilections in the 2012 race, while Independents (as on many other issues) were divided on regulatory questions and both campaigns pursued their support determinedly. Romney's argument fell short.

No sooner has the 2012 election ended than pundits, editorialists, and future presidential challengers in the GOP will certainly call into question the regulatory policies of the second Obama term. *Reste à voir* how the Affordable Care Act (Obamacare), slated to go into full effect in 2014—not to mention the Administration's dogged pursuit of policies to combat "global warming"—will impact the economy in the immediate future. But what is certain is that the lack of consensus on the ways to measure empirically the costs and benefits of federal regulations will provide fodder to those who contend that the Obama presidency has been marked by excessive red-tape in Washington. Surely countervailing studies will place regulatory policy in Obama's second term into further question in advance of the 2016 election. Peter Lewin (2009) sums up the essential debate that will likely play out between Democrats and Republicans in the next presidential election:

Regulators are fallible human beings whose knowledge of the present and ability to predict the future—including the future consequences of their actions—are seriously limited. The future is and will always be unpredictable. One might wonder whence even dedicated public servants are to come up with such 'accurate

assessments' when such assessments depend on events beyond their ability to foresee. Why should they do better than the market in this respect? After all, it is not even their own money they are regulating.

Obama's reelection—especially with the GOP firmly in control of the House of Representatives—scarcely ended the debate. In fact, the president's victory will likely re-energize it.

NOTES

¹ <<http://www.gao.gov/legal/congressact/fedrule.html>>

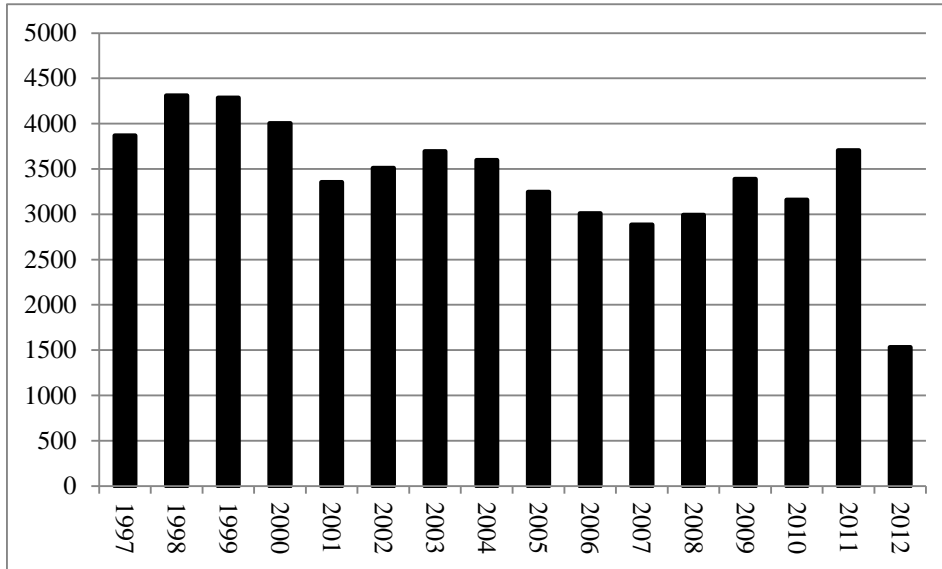
² Sunstein left OIRA in August 2012.

³ The rule was promulgated simultaneously by the EPA, Department of Transportation, and National Highway Transportation Safety Administration. See <<http://www.gao.gov/products/GAO-10-739R#mt=e-report>>

⁴ The EPA estimated the net benefits of the regulation at \$33 to \$90 billion. See <<http://www.gao.gov/products/GAO-12-489R#mt=e-report>>

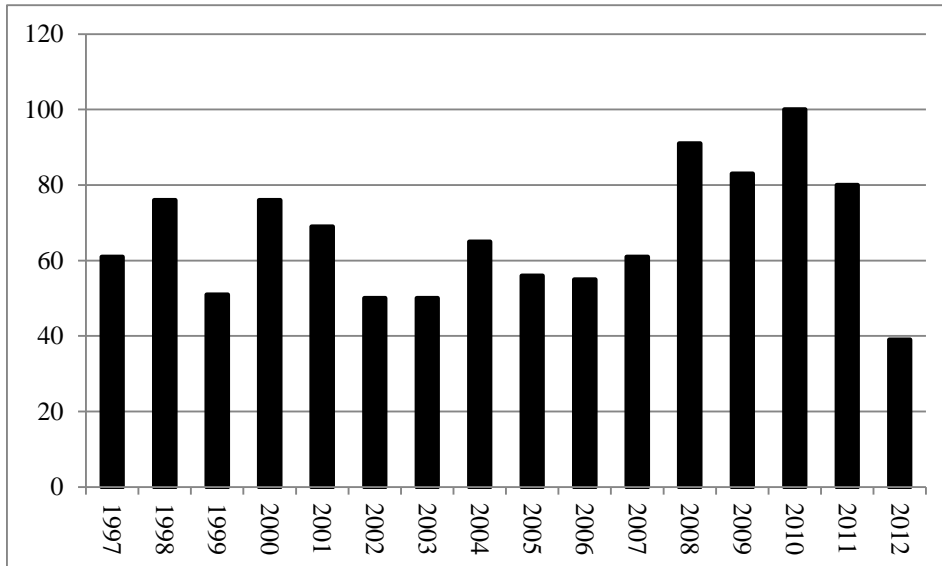
⁵ As the DOE report notes, the regulation was technically “cost-neutral” because funds for the weatherization grants were already appropriated by Congress in the stimulus bill. See the full report at <<http://www.gao.gov/products/GAO-10-409R#mt=e-report>>

Figure 1
Non-Significant Regulations, 1997-2012*



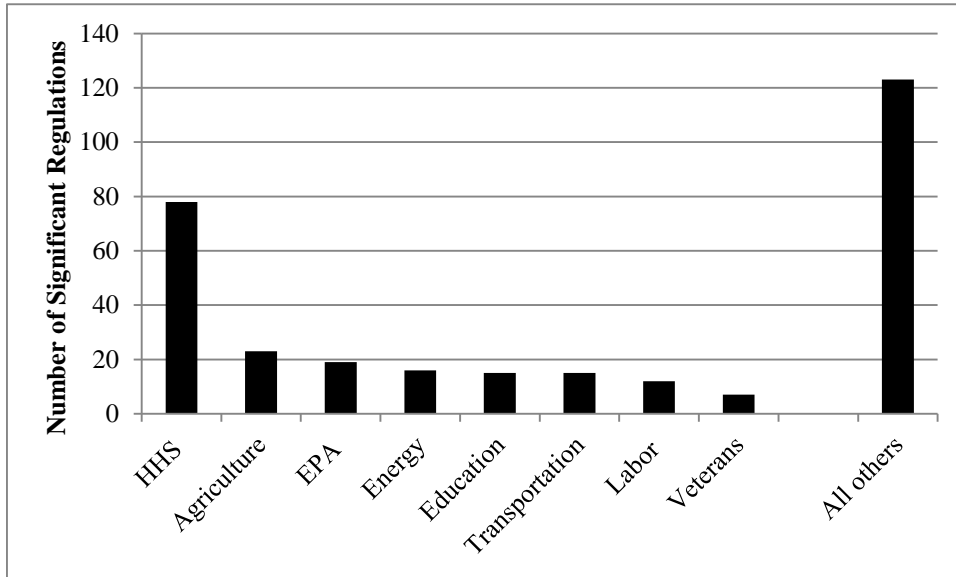
* Data for 2012 through August. Non-significant regulations < \$100,000 million.
Source: U.S. Government Accountability Office, Legal Decisions & Bid Protests
<http://www.gao.gov/legal/congressact/fedrule.html>

Figure 2
Significant Regulations, 1997-2012*



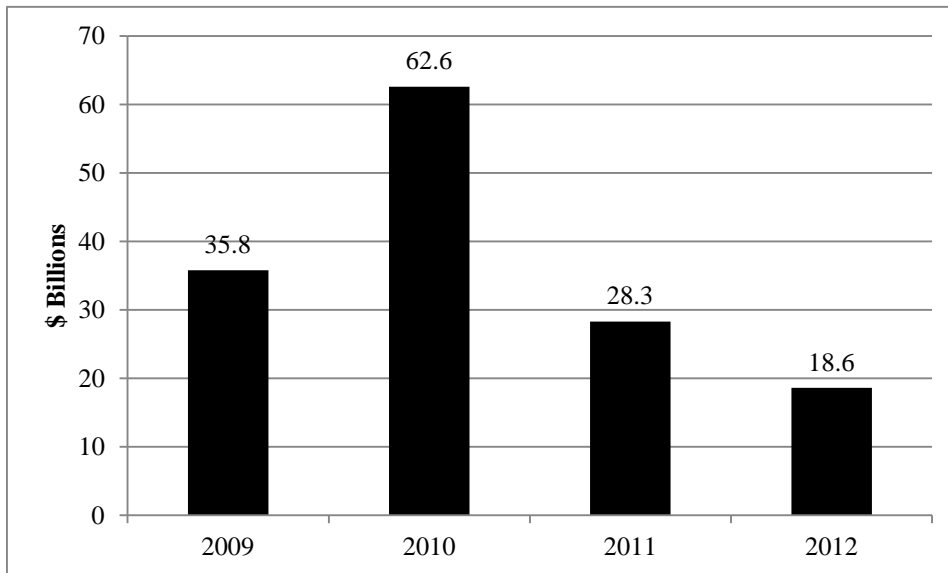
* Data for 2012 through August. Significant regulations > \$100,000 million.
Source: U.S. Government Accountability Office, Legal Decisions & Bid Protests
<http://www.gao.gov/legal/congressact/fedrule.html>

Figure 3
 Number of Significant Regulations by Department/Agency, 2009-2012*



* Data for 2012 through August. Significant regulations > \$100,000 million.

Figure 4
 Total Costs (\$ Billions) of New Regulations, Significant Rules, 2009-2012*



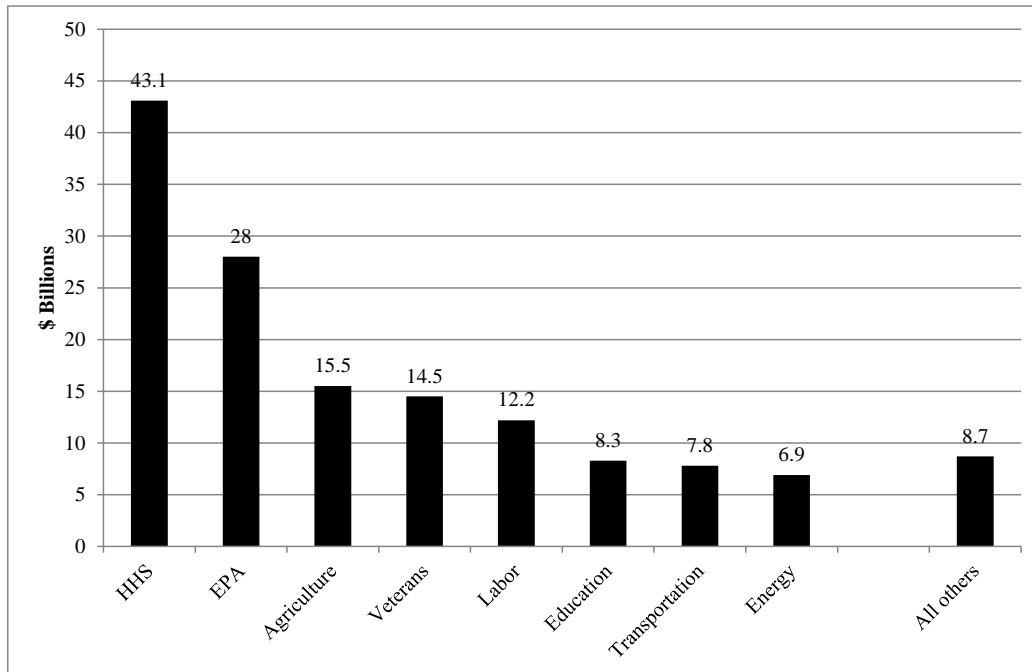
* Data for 2012 through August.

Source: U.S. Government Accountability Office, Legal Decisions & Bid Protests

<http://www.gao.gov/legal/congressact/fedrule.html>

Costs calculated by author; see text for details.

Figure 5
Aggregate Costs (\$ Billions) of Significant Regulations by Department/Agency, 2009-2012*

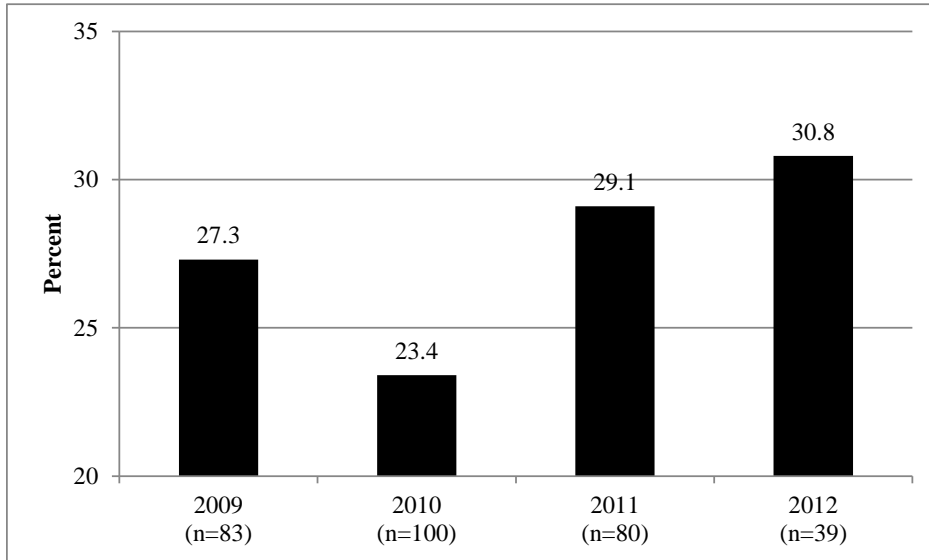


* Data for 2012 through August.

Source: U.S. Government Accountability Office, Legal Decisions & Bid Protests
<http://www.gao.gov/legal/congressact/fedrule.html>

Calculated by author; see text for details.

Figure 6
 Significant Regulations without Cost Estimates (Percent), 2009-2012*



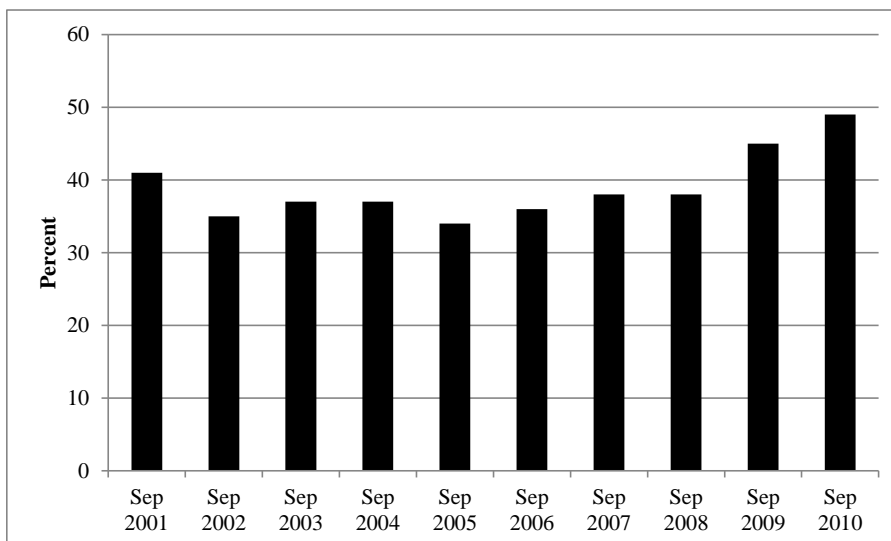
* Data for 2012 through August.

Source: U.S. Government Accountability Office, Legal Decisions & Bid Protests

<http://www.gao.gov/legal/congressact/fedrule.html>

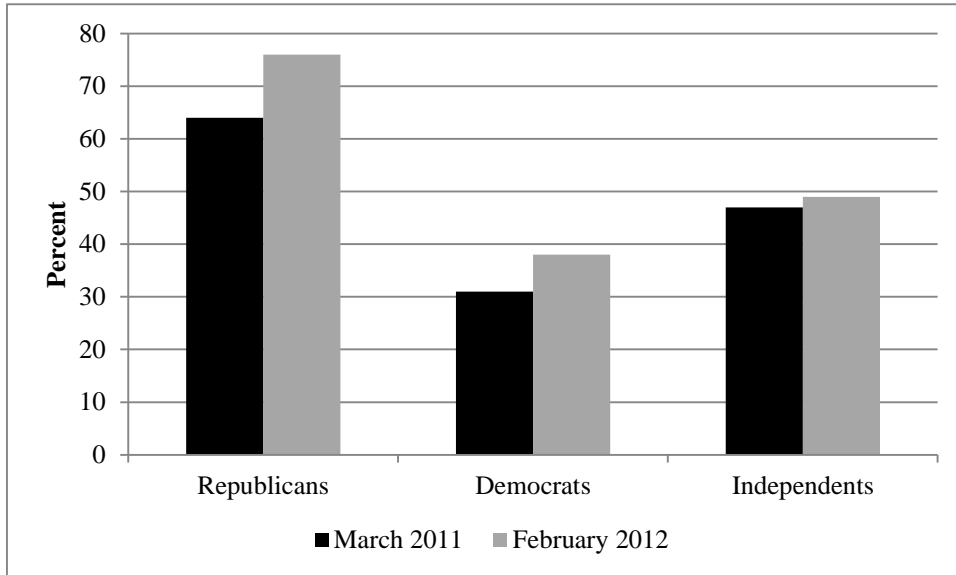
Calculated by author; see text for details.

Figure 7
 Public Opinion: “Too Much Government Regulation of Business and Industry”, 2001-2010



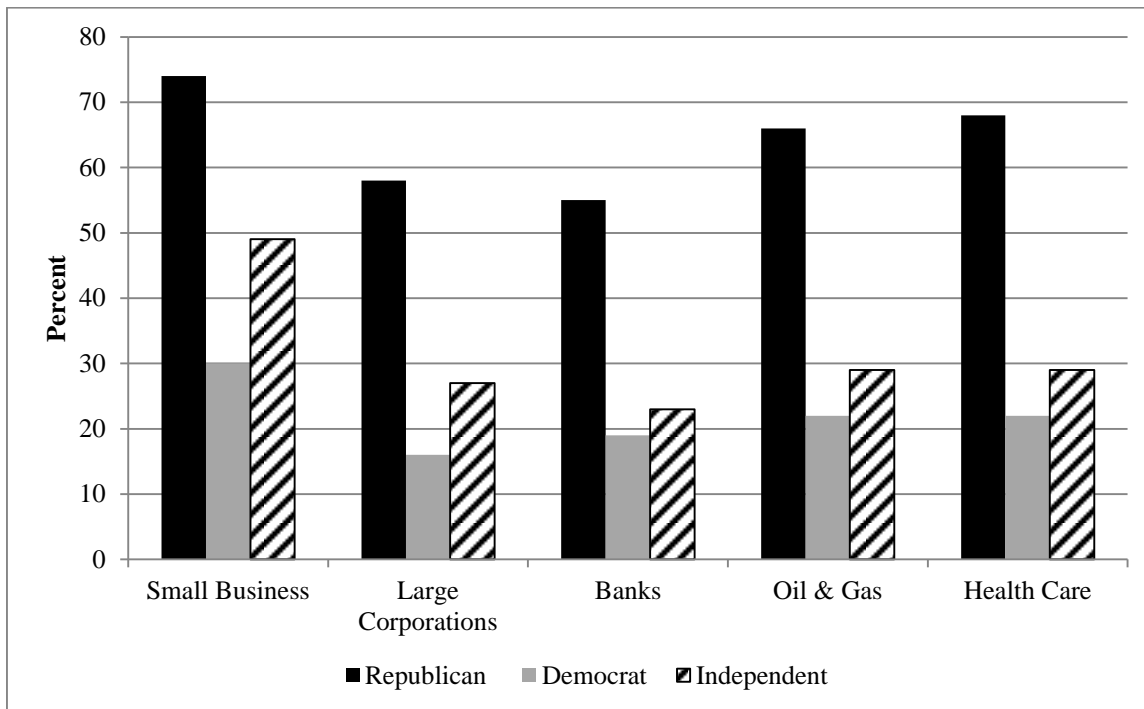
Source: Karlyn Bowman, “The Public View of Regulation, Revisited,” American Enterprise Institute for Public Policy Research, No.1 (January 2011): p. 4.

Figure 8
Public Opinion: “Government Regulation Does More Harm Than Good”



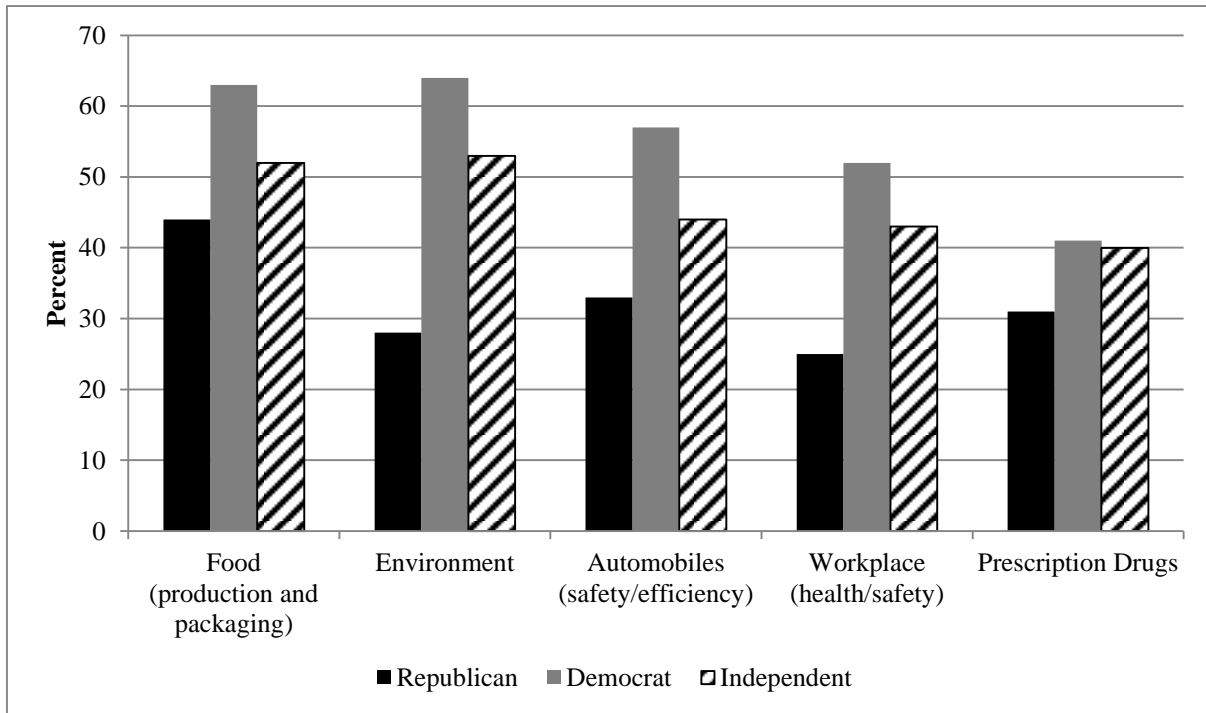
Source: Pew Research Center, February 2012.
<http://www.people-press.org/2012/02/23/section-2-views-of-government-regulation/>

Figure 9
Public Opinion: “Too Much Regulation Of ____?”



Source: Pew Research Center, February 2012.
<http://www.people-press.org/2012/02/23/section-2-views-of-government-regulation/>

Figure 10
Public Opinion: “Should the Federal Government Strengthen Regulations For _____?”



Source: Pew Research Center, February 2012.

<http://www.people-press.org/2012/02/23/section-2-views-of-government-regulation/>

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