

David versus Godzilla: Bigger Stones

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Working Paper 19-23

“The Future of White House Regulatory Oversight and Cost-Benefit
Analysis”, September 13, 2019

DAVID VERSUS GODZILLA:

BIGGER STONES

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DRAFT – Prepared for the C. Boyden Gray Center for the Study of the Administrative State conference on “The Future of White House Oversight and Cost-Benefit Analysis,” September 13, 2019.

ABSTRACT

For nearly four decades, U.S. presidents have issued executive orders requiring agencies to conduct comprehensive regulatory impact analysis (RIA) for significant regulations to ensure that regulatory decisions solve social problems in a cost-beneficial manner. Yet experience demonstrates that agency RIAs often fail to live up to the standards enunciated in executive orders and Office of Management and Budget guidance. We suggest four managerial changes that could increase OIRA’s leverage: (1) Define what counts as success when a regulation is adopted and link this to the agency’s strategic goals, (2) Use budget recommendations to enforce analytical requirements and achievement of agency GPRA objectives, (3) Combine regulatory budgets with agency budgets, and (4) Reward results, not activity.

I. INTRODUCTION

When General George Washington makes his entrance in the hit Broadway musical *Hamilton!*, his first words are, “We are outgunned ... outmanned ... outnumbered ... outplanned.”³ Washington presciently described the position of the Chief Executive – and his Office of Information and Regulatory Affairs (OIRA) – vis-à-vis the administrative agencies that write

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³ *Right Hand Man*, HAMILTON, Avatar Studios (2015), <https://genius.com/Original-broadway-cast-of-hamilton-right-hand-man-lyrics>.

regulations. Since 1981, OIRA's regulatory review responsibilities have waxed and waned with the volume of regulations subject to review. Over that same time period, the office acquired major new responsibilities, such as production of the annual report to Congress on the benefits and costs of federal regulations. Since April 2018, OIRA has also been tasked with reviewing Internal Revenue Service rules, which it did not previously review.⁴ Yet OIRA's staff has shrunk from 97 in 1980 to about 53 today, while the number of regulators in agencies has grown from 115,000 in 1980 to 192,000 in 2019 – an increase of 68 percent.⁵ OIRA's staff is outnumbered by regulatory agency staff by about 3600 to 1.⁶ Given the enormous disparities in resources and the significant potential reductions in human welfare if regulation is not adequately informed by economic analysis, this is truly a matchup of David versus Godzilla.⁷

All presidents since President Reagan have issued executive orders requiring agencies to conduct comprehensive regulatory impact analysis (RIA) for significant regulations to ensure that regulatory decisions solve social problems in a cost-beneficial manner.⁸ President Clinton's Executive Order 12866 outlines the principal requirements that currently apply.⁹ Every subsequent administration has reaffirmed Executive Order 12866.¹⁰

However, experience demonstrates that the executive orders, and Office of Management and Budget (OMB) guidance¹¹ implementing those orders, have been insufficient to ensure that regulation accomplishes important public goals

⁴ Brent McIntosh and Neomi Rao, Memorandum of Agreement, The Department of the Treasury and the Office of Management and Budget, Review of Tax Regulations Under Executive Order 12866 (April 11, 2018).

⁵ Figures calculated by authors from data in Susan Dudley & Melinda Warren, REGULATORS' BUDGET: MORE FOR HOMELAND SECURITY, LESS FOR ENVIRONMENTAL REGULATION (2018), Appendix A-3. Calculations exclude independent regulatory agencies and the Transportation Security Administration, which accounts for more than 53,000 full-time equivalent employees because it took over airport security screening after 9/11. OIRA's full-time equivalent employees have increased slightly from a low of 44 in 2010.

⁶ *Id.*

⁷ Richard A. Williams, "David vs. Godzilla, OIRA and the Federal Agencies," Testimony Before the House Committee on Oversight and Government Reform, Subcommittee on Government Operations, March 15, 2016.

⁸ See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

⁹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993);

¹⁰ Exec. Order 13258, "Amending Executive Order 12866 on Regulatory Planning and Review" (February 26, 2002); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Dominic J. Mancini, *Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs"* 2 Memo M-17-21 (April 5, 2017) ("In addition, EO 12866 remains the primary governing EO regarding regulatory planning and review. Accordingly, among other requirements, except where prohibited by law, agencies must continue to assess and consider both the benefits and costs of regulatory actions, including deregulatory actions, when making regulatory decisions, and issue regulations only upon a reasoned determination that benefits justify costs.")

¹¹ U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS (2003), available at http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

without imposing unnecessary costs on the economy. Even when agencies conduct detailed RIAs, there are often significant gaps in the analysis.¹² The quality of the analyses and use of economic analysis to inform regulatory decisions falls far short of the standards enunciated in executive orders. Consider that in any given year, less than one third of all major¹³ final rules are accompanied by analysis of both monetized benefits and monetized costs.¹⁴ This is a considerable failure, given that economically significant rules represent only about 1 percent of all rules.

Perhaps the most significant failure, beyond incomplete analysis of proposed regulations, is the failure to track successes and failures of regulatory agencies. As a result, neither the president nor Congress nor the public have any knowledge of whether the billions (if not trillions) of dollars of expenditures to produce and comply with regulations are improving outcomes for the American people. In fact, even the agencies themselves don't know whether their regulatory programs are making improvements. Without such information, knowing which programs, or even agencies, should continue to be funded is impossible, even if they appear to be well-intentioned.

The partial government shutdown in January 2019 provides further evidence of public confusion. While some worried about falling airplanes or food contamination outbreaks, others noted that, outside of Washington and dire news reports, people not directly involved in the regulatory world didn't notice anything wrong.¹⁵

Clearly identifying the goals of a particular regulation and choosing the best possible option for achieving that goal (qualities a good RIA is expected to highlight) give agencies the best possible chance for achieving positive regulatory outcomes. The executive orders and OMB guidance lay out sound principles to guide regulatory analysis and decisions. We propose four managerial steps any administration could take to better enforce the requirements in the executive orders and to help ensure positive outcomes from regulatory programs: (A) Define success at the outset and link regulations to the agency's strategic goals, (B) Use budget recommendations to enforce analytical requirements and achievement of agency GPRA objectives, (C) Link requests for fiscal budgets to

¹² See *infra* Section II.

¹³ A "major" rule is a rule whose economic impact exceeds \$100 million annually. Major rules include economically significant rules from executive branch agencies and rules with equivalent impact from independent agencies.

¹⁴ See Richard Williams, *Comparison of Final Rules with Monetized Benefits and Costs*, MERCATUS CTR. AT GEORGE MASON UNIV. (Apr. 23, 2012), <http://mercatus.org/publication/comparison-final-rules-monetized-benefits-and-costs>; Jerry Ellig, *Evaluating the Quality and Use of Regulatory Impact Analysis* 11-12 (Mercatus Ctr. at George Mason Univ., Working Paper, 2016).

¹⁵ <https://www.theatlantic.com/politics/archive/2019/01/capitol-hill-aides-wait-disaster-end-shutdown/580639/>.

regulatory budgets in the president's annual budget requests, and (D) Reward regulatory results, not regulatory activity.

Part II of this article outlines the fundamental elements that a thorough RIA should include and discusses empirical research demonstrating that the quality and use of RIAs often falls short of the ideals envisioned in the executive orders and the Government Performance Results Act. Part III outlines our four proposals. Part IV concludes, which is why it is the final section, at the end.

II. ANALYSIS, REVIEW, AND OVERSIGHT FALL SHORT

For nearly four decades, presidents have required executive branch regulatory agencies to conduct economic analysis to inform their decisions about regulations.¹⁶ Under President Reagan's Executive Order 12291, OIRA reviewed all executive branch regulations. Under President Clinton's Executive Order 12866, OIRA reviewed only "significant" regulations – generally, regulations that have an effect on the economy exceeding \$100 million annually, have other material adverse effects, conflict with other agencies' actions, materially affect federal spending or loan programs, or raise novel legal or policy issues.¹⁷ Regulations with economic effects exceeding \$100 million annually or certain other material adverse effects listed in the executive order are often referred to as "economically significant," although that term of art appears nowhere in the executive order.

The most extensive RIA requirements apply to economically significant regulations. A thorough RIA should do four things:

(1) Assess the nature and significance of the problem the agency is trying to solve, so the agency knows whether there is a problem that could be solved through regulation and, if so, the agency can tailor a solution that will effectively solve the problem;¹⁸

(2) Identify a wide variety of alternative solutions;¹⁹

(3) Define the benefits the agency seeks to achieve in terms of ultimate outcomes that affect citizens' quality of life, and assess each alternative's ability to achieve those outcomes;²⁰

(4) Identify the good things that regulated entities, consumers, and other stakeholders must sacrifice in order to achieve the desired outcomes under each

¹⁶ See Jerry Ellig & Jerry Brito, *Toward a More Perfect Union: Regulatory Analysis and Performance Management*, 8 FLA. ST. U. BUS. L. REV. 1, 21-31 (2009).

¹⁷ Exec. Order 12,866, *supra* note 9, § 3(f).

¹⁸ *Id.*, § 1(b)(1) & § 6(a)(3)(B)(i).

¹⁹ *Id.*, § 6(a)(3)(C)(iii).

²⁰ *Id.*, §§ 6(a)(3)(C)(i) & 6(a)(3)(C)(iii).

alternative.²¹ In economics jargon, these sacrifices are known as “costs,” but just like benefits, costs may involve far more than monetary expenditures.²²

Without this information, regulatory choices are based on intuition (which may be faulty) or simply faith that the regulation will produce a positive outcome. Given the enormous influence that both the benefits and costs of regulation have on our day-to-day lives, decision-makers have a responsibility to act based on knowledge of regulation’s likely effects.

Regulatory review by OIRA is the president’s principal institutional tool for managing the development of regulations. Different administrations may have different approaches and emphasis,²³ but it is clear that presidents of both political parties value centralized regulatory review.²⁴ It is also clear that enforcement has been a major issue for presidents from both parties. For example, President Carter commented that although he knew “dealing with the federal bureaucracy would be one of the worst problems [he] would have to face,” at the end he realized it had been even “worse than [he] had anticipated.”²⁵

Some evidence shows that the requirements in the executive orders, coupled with review by OIRA, have induced agencies to engage in more thorough analysis than they otherwise would have undertaken. For example, “prescriptive” regulations that contain mandates or prohibitions receive more intensive OIRA review than regulations that implement budget programs, and prescriptive regulations tend to have more thorough RIAs.²⁶ Agencies also produce higher-quality RIAs when OIRA reviews the regulation for a longer period of time.²⁷ Agencies produce lower-quality analysis and explain its influence on decisions less extensively when OIRA is headed by an acting administrator, who has less political clout in the administration than a presidential appointee.²⁸ Case studies

²¹ *Id.*, §§ 6(a)(3)(C)(ii) & 6(a)(3)(C)(iii).

²² *See Id.* *See also* U.S. OFFICE OF MGMT. & BUDGET, *supra* note 11.

²³ Sally Katzen, *Cost-Benefit Analysis: Where Should We Go from Here?*, 33 FORDHAM URB. L.J. 101 (2005).

²⁴ *See Id.*; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986). *See also* Eric Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (arguing that presidents, regardless of ideology, can use analytical requirements and centralized regulatory review to mitigate the principal-agent problems inherent in managing regulatory agencies).

²⁵ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2273 (2001).

²⁶ *See* Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. (SPECIAL EDITION) 179 (2011).

²⁷ *See* Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis* 7 J. BEN. COST. ANAL. 523 (2016); Stuart Shapiro & John F. Morrall III, *Does Haste Make Waste? How Long Does it Take to Do a Good Regulatory Impact Analysis*, 20 ADMIN & SOC’Y 1 (2013).

²⁸ Ellig & Fike, *Id.* at 539-40 (finding that an acting OIRA administrator is negatively correlated with the quality of economic analysis); Ellig, *supra* note 14, at 73-75 (finding that an acting OIRA

document instances in which regulatory analysis helped improve regulatory decisions by providing additional options regulators could consider or unearthing new information about benefits or costs of particular modifications to the regulation.²⁹

For example, in his case study of a 2004 Environmental Protection Agency regulation requiring power plants to design cooling water intake structures that minimize harm to marine organisms, Scott Farrow concluded, “EPA clearly chose an approach that imposed a considerably lighter burden on society ... The record provides substantial evidence that the agency considered a lower-cost alternative to meeting a standard with the potential to save approximately \$3 billion in annualized dollars or approximately \$40 billion in present value.”³⁰

Thus, evidence suggests that effective OIRA review can make a difference. Nevertheless, the quality and use of regulatory impact analysis falls far short of the ideals enunciated in Executive Order 12866:

- Scholarly research reveals that in many cases, regulatory impact analyses are not sufficiently complete to serve as a guide to agency decisions. The quality of analysis varies widely, and even the most elaborate analyses still have problems.³¹ Surveying the scholarly evidence on regulatory analysis, Robert Hahn and Paul Tetlock conclude that economic analysis has not had much impact, and the general quality of regulatory analysis is low.³²

administrator is negatively correlated with the quality of economic analysis of alternatives, benefits, and the extent to which the agency explained how the analysis affected its decisions); Reeve Bull and Jerry Ellig, *Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis*, 70 ADMIN. LAW REV. 101, 163 (2018) (finding that an acting OIRA administrator is negatively correlated with the quality of economic analysis of alternatives, benefits, and the extent to which the agency explained how the analysis affected its decisions).

²⁹ REFORMING REGULATORY IMPACT ANALYSIS (Winston Harrington et al. eds., 2009); RICHARD D. MORGENSTERN, *ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT* (1997); THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991).

³⁰ Scott Farrow, *Improving the CWIS Rule Regulatory Analysis: What Does an Economist Want?*, in REFORMING REGULATORY IMPACT ANALYSIS 176, 182 (Winston Harrington et al. eds., 2009).

³¹ See Art Fraas & Randall Lutter, *The Challenge of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4* (Resources for the Future, Discussion Paper 10-54, 2010); Jamie Belcore & Jerry Ellig, *Homeland Security and Regulatory Analysis: Are We Safe Yet?*, 40 RUTGERS L.J. 1 (2009); Robert W. Hahn, Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader & Petrea Moyle, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL’Y 859 (2001); Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, REV. ENVTL. ECON. & POL’Y 192 (2007); Robert W. Hahn & Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 8 JOURNAL INT’L ECON. L. 473 (2005); Robert W. Hahn, Randall W. Lutter & W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* (AEI-Brookings Joint Ct. for Reg. Studies, 2000).

³² Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?*, 22 J. ECON. PERSP. 67 (2008). Most of the scholarly research focuses on effects of the Regulatory

- A Government Accountability Office (GAO) study examined the analysis accompanying a sample of 57 economically significant regulations issued between July 2011 and July 2013.³³ All included a statement of the need for the regulation and some discussion of benefits and costs.³⁴ Of those regulations, however, 19 percent included no discussion of alternatives, 24 percent had no monetary estimate of benefits, and 63 percent failed to calculate net benefits.³⁵ GAO emphasized that it only looked to see whether these elements were present or absent in the analysis; it did not evaluate their quality.³⁶
- The Mercatus Center's Regulatory Report Card assessed the quality and use of RIAs for economically significant, prescriptive regulations that cleared OIRA review between 2008 and 2013. It awarded scores that range from 0 to 20 points for the quality of analysis.³⁷ For the period 2008 to 2013, the average Report Card score for "prescriptive" regulations that contain mandates or prohibitions was 10.7 out of 20 possible points.³⁸ That's equivalent to an "F." The highest-scoring regulation ever evaluated received 18 points, equivalent to an A-.³⁹
- The number of regulations accompanied by information on monetized benefits and costs is only a tiny fraction of the overall number of proposed rules.⁴⁰ For example, in the 2008-2013 period, 14,795 federal regulations were proposed. About 9.5 percent of these were considered significant and hence eligible for OIRA review. About 2 percent of the rules were economically significant, with a full RIA required. Of the 1 percent of rules that were prescriptive regulations rather than budget regulations,

Impact Analysis, which is often written after major decisions are made. This may not account for economists' behind-the-scenes influence as the regulation is being developed.

³³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-714, FEDERAL RULEMAKING: AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS' SIGNIFICANCE COULD BE MORE TRANSPARENT (2014).

³⁴ *Id.* at 22-26.

³⁵ *Id.*

³⁶ *Id.* at 4.

³⁷ The Report Card originally consisted of 12 criteria based on requirements in Executive Order 12866. Trained evaluators award the RIA a score of 0-5 points on each criterion. It was later revised to cover 6 criteria based on the Executive Order's substantive requirements. The scoring methodology has been published in a peer-reviewed journal, and statistical analysis finds that the evaluator training results in consistent scoring across evaluators. See Jerry Ellig & Patrick A. McLaughlin, *The Quality and Use of Regulatory Analysis in 2008*, 32 RISK ANALYSIS 255 (2012). For an explanation of the scoring systems and steps taken to ensure that the scores are comparable across the two systems, see Ellig, *supra* note 14, at 14-16.

³⁸ Ellig, *Id.* at 18.

³⁹ *Id.*

⁴⁰ Williams, *supra* note 14.

only 82 – 0.6 percent of all rules proposed – had monetized figures for both benefits and costs.⁴¹

- For two-thirds of the regulations evaluated in the Regulatory Report Card between 2008 and 2013, agencies provided no explanation of how they used the RIA to inform their decisions.⁴²
- While executive branch oversight by OIRA has helped, one former OIRA administrator described OIRA oversight as producing “marginal results.”⁴³

Myriad causes contribute to these shortcomings in the quality and use of regulatory analysis and the failures of regulatory agencies to report outcome results of their regulatory programs. Scholars and commentators have written extensively about the need for new executive orders⁴⁴ or legislation⁴⁵ to correct the problem. Here, however, we focus on managerial reforms that any administration could implement without new executive orders or legislation.

III. IMPROVING THE QUALITY OF REGULATORY IMPACT ANALYSIS

A. Define Success at the Outset and Link to the Agency’s Strategic Goals

Agencies often fail to adequately assess the nature and significance of the problems they are trying to solve with regulations, despite specific language in Executive Order 12866 directing them to do so.⁴⁶ As a result, they often fail to indicate clearly what counts as a successful outcome of a proposed regulation and how long they expect before that successful outcome will be achieved. Consequently, it is hard to identify whether the agency is making progress, the point at which the regulation will no longer be necessary, or the point at which the problem will largely be solved and no additional regulation will be necessary. In the absence of this information, regulations are likely to be less effective and more costly than necessary.

The Government Accountability Office and independent scholars have found that few agencies engage in genuine retrospective review of regulations – i.e., evaluations to ascertain the actual benefits and costs of regulations after they are implemented.⁴⁷ Scholars and policymakers repeatedly call for greater focus on

⁴¹ Ellig, *supra* note 14, at 11-12.

⁴² Ellig, *supra* note 14, at 25.

⁴³ Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101, 104 (2011).

⁴⁴ Robert Hahn & Cass Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

⁴⁵ Christopher Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. LAW REV. ___ (2017).

⁴⁶ Exec. Order 12,866, *supra* note 9, § 1(b)(1).

⁴⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, RE-EXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS (2007); Randall

retrospective analysis of regulations.⁴⁸ For the years 2008-2012, the Mercatus Center's Regulatory Report Card included criteria that assessed whether the agency articulated goals and measures to gauge the results of the regulation and indicated what data it would use to evaluate the regulation's results after it is adopted.⁴⁹ Just one regulation in the sample had an RIA that included a reasonably complete framework for retrospective analysis of the regulation's effects.⁵⁰ Indeed, it is difficult to find any discussion of goals, measures, or provisions for retrospective review at all in the NPRMs or RIAs for economically significant regulations proposed during those years – even when the RIA contained information that could have been used to develop goals, measures, and retrospective review plans.⁵¹ The quality of analysis criterion with the lowest score is analysis of the systemic problem the regulation seeks to solve – another critical piece of information needed to define what counts as success.⁵²

President Carter's Executive Order 12044, issued 41 years ago, provided that an agency head could not approve a regulation until determining that the agency had developed a plan to evaluate the regulation after it was implemented.⁵³ Subsequent executive orders all had provisions requiring agencies to develop plans for retrospective review of existing regulations, and they empowered either the OMB director or the vice president to designate regulations that should be reviewed.⁵⁴ None, however, continued the Carter approach of requiring the agency to develop a retrospective review plan before the regulation could be issued.

President Trump's Executive Order 13771 motivated agencies to initiate extensive retrospective analysis efforts by imposing incremental regulatory budgeting and requiring agencies to remove two existing regulations for each new one.⁵⁵ Agencies now find themselves in the difficult position of trying to identify

Lutter, *The Role of Retrospective Analysis and Review in Regulatory Policy*, (Mercatus Ctr. at George Mason Univ., Working Paper No. 12-14, 2012); Joseph E. Aldy, *LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY*, Report Prepared for the Administrative Conference of the United States (2014).

⁴⁸ In 2002, Robert Hahn and Cass Sunstein recommended that agencies should be required to generate retrospective analysis of their major regulations with the help of OIRA in identifying which regulations qualify as major and thus worthy of retrospective analysis. See Hahn and Sunstein, *supra* note 44, at 1527. In 2006, former OIRA administrator Sally Katzen recommended agencies focus less on cost-benefit analysis methodology, and instead focus on retrospective review, believing that society would get more rational regulations if an agency's limited resources were spent examining previous regulations and institutions. See Katzen, *supra* note 23.

⁴⁹ Ellig & McLaughlin, *supra* note 37; Ellig, *supra* note 14 at 14.

⁵⁰ Ellig, *Id.* at 26.

⁵¹ *Id.*

⁵² *Id.* at 19.

⁵³ Exec. Order 12,044, 43 Fed. Reg. 12,661, § 2(d)(8) (Mar. 24, 1978).

⁵⁴ *Id.*, § 4; Exec. Order 12,291, *supra* note 8, § 3(i); Exec. Order 12,866, *supra* note 9, § 5; Exec. Order 13,258, 67 Fed. Reg. 9385, § 10 (Feb. 28, 2002); Exec. Order 13,563, *supra* note 9, at § 1.

⁵⁵ Exec. Order 13,771, 82 Fed. Reg. 12,285 (2017).

which existing regulations would be the best candidates for review. The absence of clear agency goals and measures for regulations hampers retrospective review, because it is not always clear what analysts or decision-makers should observe that would tell them whether the regulation is accomplishing its goals, or at what cost.

The 2-for-1 and regulatory budgeting requirements in Executive Order 13771 have been controversial,⁵⁶ and they may or may not be continued by future administrations. But there is another method, already authorized in existing law, that could be used to motivate retrospective analysis.

Language in the Government Performance and Results Modernization Act of 2010,⁵⁷ which amended the Government Performance and Results Act of 1993,⁵⁸ creates an opportunity for an administration to integrate retrospective evaluation of regulations with performance reporting and budget decisions. GPRA requires agencies to set strategic goals, identify measures that indicate progress toward those goals, set targets for those measures, and report annually on progress. Each agency is expected to report annually on its success in hitting those milestones and, if not, identify the reasons and identify new strategies to improve performance.⁵⁹ The GPRA Modernization Act (GPRAMA) requires agencies to identify high-priority goals every two years, report on progress toward these goals quarterly, and identify every program, tax expenditure, and regulation that contributes toward those goals.⁶⁰

Budget recommendations based on assessments of regulation's actual effects are the president's primary tool under GPRA to focus public discussion on retrospective analysis in a way that could affect decisions. As part of an administration's GPRA reporting, agencies should be required to group related regulations and any accompanying guidance into regulatory programs and evaluate the effectiveness of these programs in accomplishing their strategic goals. Since the majority of regulatory costs do not appear in the federal budget,

⁵⁶ See, e.g., Bridget C.E. Dooling, *Update: Litigation Challenging Trump's Regulatory "Two for One" EO*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 4, 2018), <https://yalejreg.com/nc/update-litigation-challenging-trumps-regulatory-two-for-one-EO/>; Jodi L. Short, *The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93 (2018); Caroline Cecot and Michael A. Livermore, *The One-in Two-out, Executive Order is a Zero*, 166 U. PA L. REV. ONLINE 1 (2017).

⁵⁷ Public Law 111-352.

⁵⁸ Public Law 103-62.

⁵⁹ "Managing for Results in Government.

https://www.gao.gov/key_issues/managing_for_results_in_government/issue_summary.

⁶⁰ US Government Accountability Office, REEXAMINING REGULATIONS: AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS, Report GAO-14-268 (2014) at 8.

agencies should also be required to assess the realized public and private costs of their regulatory programs so that they can be compared with the benefits.⁶¹

When agencies propose regulations, they should be required to identify goals and measures, derived from the agency's strategic goals, that can be used to evaluate the regulation's actual effects after it is implemented. Table 1, reproduced from the RIA for a proposed Department of Homeland Security regulation to establish a program to biometrically identify visitors leaving the United States, demonstrates how to match the results and measures of success for a regulation with a department's strategic goals. The table lists two departmental strategic goals, identifies the goals of the regulatory program that support these strategic goals, and explains how benefits associated with each goal could be measured.

⁶¹ JERRY ELLIG, MAURICE MCTIGUE & HENRY WRAY, *GOVERNMENT PERFORMANCE AND RESULTS: AN EVALUATION OF GPRA'S FIRST DECADE* 154-155 (2012).

Table 1: Regulatory benefits and measures tied to department’s strategic goals

DHS Strategic Goal / Objective Supported	US VISIT Goals / Objectives	Exit Objectives	Exit Benefit	Measure	
Strategic Goal 2 – Prevention					
Strategic Objective 2.1 Secure borders against terrorists, means of terrorism, illegal drugs, other illegal activity	Security Enhance the security of United States (U.S.) citizens and travelers.	Biometrically verify aliens’ identity	Increased National Security	Qualitative in terms of cost of terrorism and reduction of costs due to border security as well as unquantified security benefits.	
Strategic Objective 2.6 Improve the security and integrity of our immigration system	Integrity Ensure the integrity of the U.S. immigration system.	Provide mechanism to identify visa overstays	Improved Detection of Visa Overstays	Percentage of visa overstays (number of visa overstays detected as percentage of total alien travelers)	
				Cost savings from preventing a prior visa overstayer from entering U.S. (Subsequent detection and prosecution cost avoided)	
				Dollar value of accurately matching records	
		Accurate Matching of Arrival and Departure Records	Improved Exit Processing over existing biographic systems	Percentage of exit records matched to entry records (Number of exit transactions matched to entry transactions as percentage of total exit transactions)	
			Improvement in Effectiveness of Government Resources	Improved ICE Efficiency Attempting Apprehension	Value associated with the reduction of time spent seeking wanted persons no longer in the country
				Improved DIG Efficiency Processing Exit/Entry data	Qualitative improvement in efficiency in geographic targeting of visa violators
		Improved processing efficiency	Value of improved processing efficiency		
		Improved compliance with NSEERS requirements due to the improvement in ease of compliance	Quantitative, not monetized: Increase in expected NSEERS compliance rates.		
		Facilitate travel	Increase in economic activity created through the expansion in the number of Visa Waiver Program eligible countries	Value of additional domestic economic activity created by the increased number of travelers arriving from countries with relaxed visa requirements. Measured but not included in the aggregate present value of benefits	

Source: United States Visitor and Immigrant Status Technology Program, “Air/Sea Biometric Exit Project: Regulatory Impact Analysis” (2008) at 67-69.

A 2014 Government Accountability Office study notes that few agency executives participating in roundtable discussions with the authors could identify examples where the agency linked retrospective review of regulations with assessments of agency progress toward its performance goals under GPRA.⁶² GAO recommended that agencies should develop retrospective review plans when a regulation is adopted to better integrate retrospective review with GPRAMA reporting:

⁶² GAO, *supra* note 60, at 35.

Ensuring that agencies build in such performance metrics and a timeline for evaluating regulations after implementation would not only help facilitate retrospective analyses, but also help to lay a foundation to more closely tie retrospective analyses to reviews of broader agency priority goals. Moreover, GPRAMA's requirements for agencies to identify and assess how their various programs and activities, including regulations, contribute to agency performance goals and APGs [annual performance goals] further underscore the need for agencies to take such action.⁶³

OMB's guidance to agencies on implementing Executive Order 13771 takes steps in this direction. It primarily requires regulatory agencies to establish performance indicators, goals and targets in their annual performance plans that would monitor the number of retrospective evaluations, number of deregulatory actions, and the net cost or cost savings from regulatory and deregulatory actions.⁶⁴ Agencies customarily have at least one GPRA strategic goal related to improved management, and these kinds of performance indicators are likely to fall under this catchall management goal. But the guidance also noted that agencies should develop performance indicators and goals that would assess the contribution of regulatory programs to their other priority goals:

In addition, agencies should establish and report other meaningful performance indicators and goals for the purpose of evaluating and improving the net benefits of their respective regulatory programs (*i.e.*, all of the existing regulations in place that address a specific regulatory objective). This likely will require measuring the costs and benefits of regulatory programs and setting goals for improving those programs' net benefits. The effort to improve net benefits may be conducted as part of developing agency strategic and performance plans and priority goals, and may use existing quarterly and annual performance review processes to assess progress against these objectives. Please consult with your OIRA desk officer during your agency's development of new performance indicators for evaluating the net benefits of regulatory programs.⁶⁵

Experience with GPRA implementation for programs, however, suggests that much more than a reporting requirement is needed to drive improved regulatory analysis and performance. Research shows that GPRA definitely improved the quality of performance reporting by many agencies.⁶⁶ The quality

⁶³ *Id.* at 34.

⁶⁴ Mancini, *supra* note 10.

⁶⁵ *Id.* at 3.

⁶⁶ Ellig et al., *supra* note 61, at 3-25.

of performance information available to federal managers, and use of that information in decisions, also improved, but results varied widely across different agencies.⁶⁷ Indeed, some reports concluded that GPRA did little to systematically increase the use of performance information in agencies.⁶⁸ In 2001, OMB noted that “Performance measures are insufficiently used to monitor and reward staff, or to hold program managers accountable;” ten years later, OMB stated, “The ultimate test of an effective performance management system is whether it is used, not the number of goals and measures produced. Federal performance management efforts have not fared well on this test.”⁶⁹ The Bush administration attempted to link budget recommendations to performance information,⁷⁰ but congressional appropriations committees chaired by members of the president’s own party showed little interest in this information or in performance-based budgeting generally.⁷¹

The 2014 GAO report on retrospective analysis and performance goals offers a cautionary note that motivates our next recommendation: “[A]dditional opportunities for improvement depend in part on efforts to ensure that agencies are consistently held accountable for implementing existing guidance.”⁷²

B. Use Budget Recommendations to Enforce Analytical Requirements and Achievement of Agency GPRA Objectives

Agency RIAs often make some effort at compliance with the executive order on regulatory analysis, but still fall short of the standards envisioned in the executive order. Tying agency budgets to compliance with the executive order is a tool that could underscore an administration’s commitment to sound regulatory analysis.⁷³ Direct budgetary consequences would create a powerful incentive for agencies to improve the quality and use of RIAs. It would also provide an unequivocal signal that the administration believes regulators should understand the consequences of their actions before making decisions.

Tighter integration of regulatory review with budget decisions is hardly unprecedented. From 1970 through 1976, OMB budget officials conducted centralized review of regulations under what was then called the Quality of Life

⁶⁷ *Id.* at 177-202.

⁶⁸ Donald Moynihan, IBM CTR. FOR THE BUS. OF GOVT., *THE NEW FEDERAL PERFORMANCE SYSTEM, IMPLEMENTING THE GPRA MODERNIZATION ACT* 10-11 (2013).

⁶⁹ *Id.* at 11.

⁷⁰ Eileen Norcross, *An Analysis of the Office of Management and Budget’s Program Assessment Rating Tool* (Working Paper, Mercatus Ctr. at Geo. Mason Univ., 2005); Eileen Norcross and Kyle McKenzie, *An Analysis of the Office of Management and Budget’s Program Assessment Rating Tool for Fiscal Year 2007* (Working Paper, Mercatus Ctr. At Geo. Mason Univ., 2006).

⁷¹ Ellig et al., *supra* note 61, at 203-20.

⁷² GAO, *supra* note 60, at 35.

⁷³ Christina Forsberg, “Reducing Regulation,” unpublished manuscript, Mercatus Center at George Mason University, June 11, 2009 (on file with authors).

Review (QLR) process.⁷⁴ Proposed regulations, final regulations, standards, and guidance documents submitted to OMB for review were accompanied by a memo discussing the anticipated benefits and costs of the action and of alternatives.⁷⁵ Jim Tozzi, one of the OMB officials responsible for these reviews, noted that the involvement of budget examiners motivated agency compliance:

In understanding the significance and influence of the QLR reviews, it must be recognized that they were conducted by the budget side of OMB. This meant that they were often controlled or supervised by personnel who, as a result of their work on such analyses in the Corps of Engineers, were experienced in conducting benefit-cost analyses. It also meant that the budget powers of OMB could be brought to bear on the agencies.”⁷⁶

Viewed in this light, our proposal represents a middle ground between the QLR process (review of regulations by budget examiners skilled in benefit-cost analysis) and current practice (review of regulations by OIRA experts in regulatory impact analysis).

The incremental regulatory budget adopted in Executive Order 13771 gives the administration an even more finely honed tool to link high-quality analysis with budgeting. An agency’s *regulatory* budget, not just its *fiscal* budget, could be set based in part on how reliably its analysis of regulations demonstrates that they are likely to achieve the intended results at a reasonable cost. This should not be a subjective exercise but one in which OIRA develops quality standards and “grades” for RIAs. These grades should be publicized on OIRA’s website.

During the Obama administration, OIRA developed a checklist that indicates the major elements an RIA should contain.⁷⁷ The checklist also includes standards for the analysis and data; for example, RIAs should rely on “the best reasonably obtainable scientific, technical, and economic information,” and the data, sources, and methods should be made available on the Internet so that others can replicate the agency’s findings.⁷⁸ OIRA could grade RIAs based on how well they comply with that checklist. OIRA may rely on the Information Quality Act and its checks to help assure scientific quality.⁷⁹

⁷⁴ Jim Tozzi, *OIRA’s Formative Years: The Historical record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. LAW REV. 37, 46 (2011).

⁷⁵ *Id.* at 45.

⁷⁶ *Id.* at 46.

⁷⁷ Office of Information and Regulatory Affairs, “Agency Checklist: Regulatory Impact Analysis” (2010), available at https://www.transportation.gov/sites/dot.gov/files/docs/RIA_Checklist.pdf.

⁷⁸ *Id.*

⁷⁹ https://obamawhitehouse.archives.gov/omb/inforeg_agency_info_quality_links/

OMB budget review should include an assessment of the agency's success in achieving strategic goals via regulation at minimum cost. Regulatory programs should be discontinued if they cannot or are unlikely to achieve goals in the near future, or if the goal has been achieved or is no longer appropriate.⁸⁰ This change would leverage GPRA's reporting requirements to prompt agencies to develop an ongoing program of retrospective analysis of regulations. Assessing regulatory performance as part of the agency's budget review would strengthen the agency's incentive to take retrospective analysis and reporting seriously.

Achieving this goal requires delicate balancing within the executive branch. OIRA should be responsible for developing measures and assessing compliance with the executive orders on regulation. OIRA should make recommendations to OMB budget examiners. Others higher up in the administration would finalize the president's budget recommendations to Congress. The president's budget should include reporting of successes and failures at achieving regulatory goals to ensure that Congress takes the reports seriously.

In addition to rewarding agencies for better compliance with executive orders, future agency budgets should be recommended to Congress based on achieving results. This includes doing the required reports on achieving the goals and, in the longer run, actually achieving those goals. Where agencies continue to expend resources on goals that are not achieved or are not achievable, the president should recommend budget reductions for programs that seek to accomplish those goals. When agencies are acting on specific delegated authorities from Congress, and are unable to achieve results, the president should request legislation to fix poorly performing regulations.

C. Combine Regulatory Budgets with Agency Budgets

The most comprehensive way of combining evidence-based review of regulations with budgetary consequences would be to fully integrate regulatory budgeting with fiscal budgeting.⁸¹ Under one proposal, the president's budget would include proposed figures for the cost of regulations for each agency that could be used by congressional budget committees as part of their budget resolutions to limit the annual cost of an agency's regulations.⁸²

Executive Order 13771 already provides a framework that the executive branch can use to budget regulatory costs. The executive order states that agencies are to be given a projected cost, or cost savings for the costs of their regulations

⁸⁰ See Patrick McLaughlin & Richard Williams, *The Consequences of Regulatory Accumulation and a Proposed Solution* (Working Paper, Mercatus Ctr. at George Mason Univ., 2014).

⁸¹ Jason J. Fichtner, Patrick A. McLaughlin, and Adam N. Michel, *Legislative Impact Accounting: Incorporating Prospective and Retrospective Review into a Regulatory Budget*, PUB. BUDG. & FIN. 40 (2018).

⁸² *Id.*

for the coming fiscal year. For example, the Department of Health and Human Services was expected to reduce the cost of its regulations by nearly \$9 billion in fiscal year 2019.⁸³ If agencies have not been producing results in their regulatory programs, and subsequently have smaller agency budgets for the forthcoming year, it should follow that the budgets allocated them for private regulatory expenditures (i.e., the cost of regulations) should also be decreased.

Civil servants in agencies and OMB should be financially rewarded for identifying regulatory programs that are not working. The reverse is also true. Civil servants, or groups of civil servants who either find better ways to implement existing programs or develop new programs under existing laws that create net benefits for citizens, should also be financially rewarded.

D. Reward Results, Not Activity

Agencies often state that executives are to be held accountable for achievement of the agency's strategic goals and objectives.⁸⁴ It is not clear that this happens.

Regulatory agencies, and particularly the regulatory staff, often regard the production of regulations, rather than the production of benefits for the public, as their primary output. For example, one of us worked at the Food and Drug Administration's Center for Food Safety and Applied Nutrition. Outside of the center director's office was a chart that contained all of the year's regulations, with percentages of the number of regulations finished compared to the planned number of regulations.

Using the number of regulations as a result that managers strive to achieve creates a bias in favor of adopting more regulations, since a steady stream of new regulations indicates that the agency is hard at work "solving problems." Pay, bonuses, career advancement, and recognition go to staff who successfully complete regulatory proceedings.⁸⁵ As one agency economist noted, "Success is putting out 10 regulations a year and bigger regulations are bigger successes. They don't say, 'We examined 10 regulations and we decided that 8 did not warrant regulation, which would be better.'"⁸⁶

Another former agency economist who worked on RIAs told us that when money got tight, the agency started awarding plaques in lieu of performance

⁸³https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Regulatory_Budget_for_Fiscal_Year_2019.pdf

⁸⁴ See <https://www.hhs.gov/sites/default/files/hr-resource-library-430-6.pdf>, https://hr.commerce.gov/s/groups/public/@doc/@cfoasa/@ohrm/documents/content/prod01_009799.pdf, www.dtic.mil/dtic/tr/fulltext/u2/a268045.pdf.

⁸⁵ Richard Williams, *The Influence of Regulatory Economists in Federal Health and Safety Agencies* 6 (Mercatus Ctr. at George Mason Univ., Working Paper No. 08-15, 2008) at 7.

⁸⁶ *Id.*

bonuses. Typically, the “performance” that merited the award of a plaque was the completion of a major regulatory proceeding. “I had a colleague who deserved a dozen plaques for regulations she stopped by asking the kinds of questions an economist would normally ask,” he noted. But plaques were a reward for regulatory activity, not a reward for improvements in regulatory decisions.

Two managerial changes can help correct this problem.

First, agencies and their managers should be evaluated and rewarded based on the demonstrated benefits they produce for the public, regardless of whether those benefits stem from new regulatory actions or decisions not to regulate.⁸⁷ Those benefits should be directly linked to achieving agency performance objectives under GPRA. In fact, agencies should be rewarded for putting in realistic “triggers” that allow them, or anyone, to check the outcome performance of a regulation at the appropriate time(s). For example, if the goal is to reduce the rates of obesity by providing more useful information, a survey can be taken after the information has been available and time has been allowed for results to be achieved. The trigger would be the time to check the reduction in average weight. This information on regulatory results from all agencies should also be made available in a consistent format in one area on OMB’s website.

Ideally, agencies should reward decision-makers for the actual net benefits (benefits minus costs) their decisions produce for the public, particularly where it is possible to measure both. This sounds like a tall order, but as Ellig et. al note, “Though establishing causal links between a regulation and outcomes may sometimes be difficult, it beats the alternative: blind faith that a regulation will accomplish the intended results simply because we want it to.”⁸⁸ To avoid creating an additional incentive for biased estimates, any such rewards should be based on independent, external evaluations of the effects of regulatory programs, rather than agency self-evaluations.⁸⁹ Of course, there can be significant lags before goals are achieved, and it may be difficult to attribute results to particular individuals. In these cases, agencies should be able to base rewards on known observable precursors of results. The key point is that agencies should not reward managers or staff based on regulatory activity or output.

Second, an administration can raise agencies’ and the public’s awareness that the decision *not* to regulate, when appropriate, can produce as much or more benefit to the public as a decision to regulate. Agencies should be required to report annually on the major instances in which they considered regulating but concluded that federal regulation would not be appropriate, either because the problem was insignificant (or would soon become insignificant), alternatives to

⁸⁷ Clearly, putting forth “straw dog” regulations just so they can be rejected would not be considered a successful performance outcome.

⁸⁸ Ellig et al., *supra* note 61, at 142.

⁸⁹ For examples, see Aldy, *supra* note 47 at 17-25.

federal regulation could better accomplish the regulatory objective, there is no federal regulatory solution, or the prospective costs exceeded the prospective benefits. However, care should be taken by OMB to ensure that agencies do not artificially inflate these results by proposing unrealistic goals for regulations and then deciding they are not worth pursuing. It may be advisable to give an agency credit for not regulating only when the agency rejects outside petitions for regulations that fall into one of the above criteria.

These requirements would help correct current incentives that prompt agencies to produce regulations in order to show they are productive. If accompanied by solid, objective analysis, a list of major decisions not to regulate would help build the case for refraining from regulating when the evidence suggests this is warranted.

IV. CONCLUSION

Citizens expect federal regulation to accomplish a lot of important things, such as protecting us from financial frauds, preventing workplace injuries, providing clean air, and deterring terrorist attacks. Regulation also requires sacrifices. Depending on the regulation, consumers may pay more, workers may receive less, our retirement savings may grow more slowly due to reduced corporate profits, and we may have less personal freedom. Regulatory impact analysis is the key ingredient that makes these tradeoffs more transparent to decision-makers and to the public. So understanding the effects of regulation has to start with sound prospective *and retrospective* regulatory impact analysis. Tying agency budgets and personnel bonuses to effective analysis and, ultimately, positive outcomes can go a long way to maximizing the value regulatory agencies create for citizens.

OIRA is tasked with enforcing executive orders on regulatory analysis and regulatory review. But like George Washington at the outset of the American Revolution, OIRA is “outgunned, outmanned, outnumbered, [and] outplanned.”⁹⁰ In sheer size, OIRA will inevitably play David to the administrative state’s Godzilla. Our proposals in Part III above are modest attempts to equip David with some bigger and better stones.

⁹⁰ *Right Hand Man*, *supra* note 3.