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OIRA's Dual Role and the Future of Cost-Benefit Analysis

Stuart Shapiro

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OIRA's Dual Role and the Future of Cost-Benefit Analysis.

The Office of Information and Regulatory Affairs (OIRA) has, since it assumed the responsibilities of regulatory review in 1981, always had two primary missions. Populated by economists and individuals with advanced coursework in economics, it is the final word on the sufficiency of the agency cost-benefit analyses (CBA) that are required for some agency regulations. As a result of its location in the Executive Office of the President, and its responsibility for being the eyes and ears¹ of the president when it comes to regulatory policy, it also must ensure that agency regulations are consistent with presidential preferences.

OIRA has attempted to balance these priorities throughout its existence.² The challenges to doing so are fairly obvious. Cost-benefit analysis may suggest a regulation that the president would oppose is a wise idea. It may also suggest that a regulation preferred by the president has costs that far outweigh its benefits. Much of this balancing is invisible to the public and largely takes place via negotiations within the executive branch. Occasionally however, through public letters rejecting agency regulations,³ or regulations published with analyses that reach objectively questionable conclusions, one sees traces of the results of these debates.

Presidents Reagan through Obama all supported the idea of using cost-benefit analysis as a tool for making regulatory policy, even as on occasion, their policies produced costs that clearly outweighed benefits. There are signs that under the Trump Administration, that the commitment to cost-benefit analysis is weaker than in any of the five administrations that preceded it. The Trump Administration has issued an executive order that largely rejects the cost-benefit framework for decision-making.⁴ And individual regulations have been published by agencies either without analyses or with analyses that have received widespread criticism from economists.⁵

What do these signals regarding the utility of cost-benefit analysis mean for OIRA's future and for the future of cost-benefit analysis in the regulatory process? While OIRA appears in several statutes (it was created in the Paperwork Reduction Act),⁶ its regulatory review role is supported by Executive Orders, rather than those laws. Therefore OIRA's role reviewing regulations is by no means guaranteed, and must be reaffirmed by each new administration. From Presidents Reagan until Obama, while OIRA's regulatory review was regularly modified, its core functions were maintained. Now however, the actions of the Trump Administration have thrown kindling on long standing questions about the role of cost-benefit analysis, and OIRA's ability to balance its two most significant responsibilities.

This raises the further question of how to best situate cost-benefit analysis in the regulatory process. I argue that the Trump Administration's attitude toward CBA has highlighted the questions of whether an office working directly for the president can be an effective guardian of sound cost-benefit analysis. As a result, it is time for supporters of CBA to consider alternative institutional arrangements

¹ DeMuth, Christopher C., and Douglas H. Ginsburg. "White House review of agency rulemaking." *Harv. L. Rev.* 99 (1985): 1075. P. 1082

² Shapiro, Stuart. "Unequal partners: Cost-benefit analysis and executive review of regulations." (2004).

³ See <https://www.reginfo.gov/public/do/eoReturnLetters> (last viewed July 30, 2019).

⁴ *Infra* notes 53-66.

⁵ *Infra* notes 68-84.

⁶ Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501-21).

for the use of CBA in regulatory policy in order to ensure it has a role in decision-making. These arrangements could include housing review of cost-benefit analyses in the judicial or legislative branches, or elsewhere in the executive branch. Such arrangements could be in addition to or in lieu of OIRA's role as guardian of cost-benefit analysis in the regulatory process.

This article proceeds as follows. In the next section, I review the history and academic literature on OIRA's two missions. After that I discuss the challenge to the analytical mission of OIRA posed by the Trump Administration, and describe why this challenge may have lasting impacts on the role of OIRA and cost-benefit analysis. Finally I discuss the advantages and disadvantages of alternative institutional arrangements to safeguard cost-benefit analysis of regulations and offer concluding thoughts.

OIRA's Missions

The Office of Information and Regulatory Affairs was created in the Paperwork Reduction Act signed by President Carter in 1980.⁷ Regulatory review and the use of cost-benefit analysis to evaluate regulations were used in various formats throughout the 1970s by Presidents Ford and Carter.⁸ The role of OIRA in regulatory review was formalized early in the Reagan Administration with the issuance of Executive Order 12291.⁹ The order required agencies to conduct Regulatory Impact Analyses (RIAs) which were to include attempts to monetize the costs and benefits for all "major" regulations and to submit all regulations and any supporting analyses to OIRA for review.¹⁰

Executive Order 12291 explicitly laid out the cost-benefit mission of OIRA. It said, "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."¹¹ The criteria for regulations in the EO focused almost solely on economic characteristics of the regulation. The Order did not mention other considerations, including whether the regulation was in line with the priority of the president.

But while it was not mentioned in the executive order, the role of the president's political oversight was implicit and did not escape attention. Shane argues that under Reagan and Bush, between OIRA and the Council on Competitiveness,¹² a system was created that attempted to enhance agency accountability to the president.¹³ OIRA review was also seen as intended to "frustrate or dismantle the very regulatory scheme enacted by Congress and reaffirmed over the Administration's efforts."¹⁴ Kagan

⁷ Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521

⁸ Tozzi, Jim. "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding." *Administrative Law Review* (2011): 37-69.

⁹ Federal Register 46 FR 13193 (1981)

¹⁰ Id.

¹¹ E.O 12291 Sec 2.b.

¹² President Bush established the Council on Competitiveness when OIRA was weakened due the Senate refusal to confirm an OIRA Administrator. See <http://www.thecre.com/ombpapers/1999-0129-F.htm> (last viewed February 1, 2019) for more detail.

¹³ Shane, Peter M. "Political accountability in a system of checks and balances: the case of presidential review of rulemaking." *Ark. L. Rev.* 48 (1995): 161.

¹⁴ Morrison, Alan B. "OMB interference with agency rulemaking: the wrong way to write a regulation." *Harv. L. Rev.* 99 (1985): 1059. P. 1064.

notes that while it was cast as being about deregulation and cost-benefit analysis, EO 12291 enhanced presidential oversight.¹⁵

Christopher DeMuth and Douglas Ginsburg, among the prime intellectual influences on E.O. 12291, emphasized the role of presidential oversight portraying it as an inevitable outgrowth of the regulatory state.¹⁶ They compared it to other aspects of executive oversight,

“Just as the growth of direct federal spending led to presidential oversight of agency budgets, in 1921, and just as the growth of legislation led to presidential oversight of agency positions on legislation in 1940, so the growth of regulation led to presidential oversight of the rulemaking process in the 1970s.”¹⁷

EO 12291 was maintained throughout the Reagan and Bush presidencies. While there was widespread uncertainty about whether President Clinton would maintain OIRA regulatory review,¹⁸ Executive Order 12866, issued by the Clinton Administration to replace Executive Order 12291, retained the role for OIRA of supervising agency cost-benefit analyses of regulations,

“Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”¹⁹

The order also however made the political mission of OIRA explicit saying,

“The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law, the President’s priorities and the principles set forth in this Executive Order.”²⁰

Literature on OIRA has largely been divided between focusing on one of these two missions of OIRA. Work on the political mission has been published in law reviews and political science journals and evaluates both the appropriateness of presidential oversight of regulatory decisions, and whether this oversight has changed regulatory policy. Much of the debate on appropriateness took place early in OIRA’s history during the Reagan and Bush Administrations when Executive Order 12291 was in force. Advocates of presidential control cited benefits such as enhancement of the legitimacy of the regulatory

¹⁵ Kagan, Elena. "Presidential administration." *Harvard Law Review* (2001): 2245-2385.

¹⁶ DeMuth, Christopher C., and Douglas H. Ginsburg. "White House review of agency rulemaking." *Harv. L. Rev.* 99 (1985): 1075.

¹⁷ *Id.* p. 1080

¹⁸ See <https://regulatorystudies.columbian.gwu.edu/tracing-executive-order-12866%E2%80%99s-longevity-its-roots-katzen> (last viewed July 30, 2019).

¹⁹ EO 12866 58 Fed. Reg. 51735 (Sept. 30, 1993) (1)(b)(6)

²⁰ *Id.* at (6)(b)

state and bringing a broad national perspective to regulatory issues.²¹ Critics saw OIRA review as inevitably ad hoc (because the president or OIRA cannot possibly have time to oversee very many agency decisions) and therefore inherently political.²²

While some skeptics remained after the issuance of Executive Order 12866,²³ many scholars followed the lead of future Supreme Court Justice Elena Kagan who argued for the necessity of presidential involvement in regulatory decisions.²⁴ She cited three incentives for the president to increase oversight of the regulatory bureaucracy 1) the growth in expectations regarding presidential performance from the public and the press; 2) divided government making legislative accomplishments harder; 3) and a recognition that Congress is unlikely to override such actions resulting from such oversight.²⁵

Kagan argued that presidential influence over regulatory decisions increased both via regulatory review and the use of other tools designed to show that the president can overcome bureaucratic inertia. She explained that presidential control made a difference in decision-making in the Clinton Administration. She argued that actions in the Clinton Administration, “greatly enhanced presidential supervision of agency action thus changing the very nature of administration.”²⁶ The result over time (and subsequent administrations have continued to provide evidence to this effect)²⁷ has been a consistent increase in presidential influence over the administrative state.²⁸

However, there are also skeptics regarding the positive assertion that OIRA increases presidential control, “there are reasons to doubt that OIRA is always the best proxy for presidential preferences.”²⁹ The skeptics argue that the volume of issues that OIRA deals with far exceeds those that can receive attention from the president and given the fact that OIRA is populated with civil servants

²¹ Croley, Steven. "White House Review of Agency Rulemaking: An Empirical Investigation." *The University of Chicago Law Review* 70, no. 3 (2003): 821-885.

²² *Id.*

²³ Heinzerling, Lisa. "Statutory Interpretation in the Era of OIRA." *Fordham Urb. LJ* 33 (2005): 1097.

²⁴ Kagan *supra* note 15.

²⁵ Kagan *supra* note 15.

²⁶ *Id.* at 2250

²⁷ Coglianesi, Cary. "Presidential Control of Administrative Agencies: a debate over law or politics." *U. Pa. J. Const. L.* 12 (2009): 637.

²⁸ Kagan *supra* note 15.

²⁹ Livermore, Michael A., and Richard L. Revesz. "Regulatory review, capture, and agency inaction." *Geo. LJ* 101 (2012): 1337. p. 1349. See also Bagley, Nicholas, and Richard L. Revesz. "Centralized oversight of the regulatory state." *Colum. L. Rev.* 106 (2006): 1260.

there is little reason to believe that their preferences on regulatory issues mirrors that of the president.³⁰

Debate over OIRA's other role, the guardian of cost-benefit analysis in regulatory decision-making has largely taken place in economic journals and some law reviews. Interestingly both supporters of CBA and detractors have been disappointed with the implementation of cost-benefit analysis as a tool for assessing regulation. Scholars with concerns about CBA have characterized CBA as immoral,³¹ claimed that it is inevitably biased against regulations designed to protect public health and the environment,³² and has been one of the principal sources of the "ossification" of the rulemaking process (whereby procedural requirements have deterred agencies from engaging in rulemaking).³³

In addition to its substantive role, the requirement to conduct a cost-benefit analysis can be seen as a procedural control on the bureaucracy. It serves as a method both for facilitating external oversight³⁴ of agencies by publicizing their decisions and as a method for making it more likely those decisions take into account factors such as costs and benefits.³⁵ In this sense the inclusion of a CBA requirement in the regulatory process is part of an overall proceduralization of the rulemaking process, a trend that has been described as harmful toward achieving the goals of statutes designed to protect public health.³⁶

In sum, critics argue that OIRA's power to oversee agency CBA leads to an inherent anti-regulatory bias regardless of the policy preferences of the president. Supporters of CBA would mostly disagree with this conclusion but they have a different set of concerns. Multiple studies have criticized the quality of RIAs, demonstrating that the assessments of costs and benefits they contain often fail to consider alternative policy choices, uncertainty, and the need to discount future costs and benefits.³⁷ These works largely argue that CBA cannot be accused of subverting

³⁰ Id.

³¹ Kelman, Steven. "Cost-benefit analysis: an ethical critique." *Regulation* 5 (1981): 33.

³² See e.g. McGarity, Thomas O. *Reinventing rationality: the role of regulatory analysis in the federal bureaucracy*. Cambridge University Press, 2005. And Ackerman, Frank, and Lisa Heinzerling. "Pricing the priceless: Cost-benefit analysis of environmental protection." *U. Pa. L. Rev.* 150 (2001): 1553.

³³ McGarity, Th. "Some Thoughts on 'De-ossifying' the Rule-making Process', (1992)." *Duke Law Journal* 41: 1385.

³⁴ McCubbins, Mathew D., and Thomas Schwartz. "Congressional oversight overlooked: Police patrols versus fire alarms." *American Journal of Political Science* (1984): 165-179.

³⁵ McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. "Administrative procedures as instruments of political control." *JL Econ. & Org.* 3 (1987): 243.

³⁶ Bagley, Nicholas. "The Procedure Fetish." *Michigan Law Review, Forthcoming* (2019).

³⁷ See e.g. Hahn RW, Tetlock PC (2008) Has Economic Analysis Improved Regulatory Decisions? *Journal of Economic Perspectives* 22, 67–84. and Ellig J, McLaughlin PA, Morrall JF III (2012) Continuity, Change, and

regulation if it has been done so poorly. The corrective often suggested is a more rigorous review process at OIRA or statutory requirements for CBA (rather than executive order requirements).³⁸

The debates on both presidential influence and economic analysis of rulemaking have been robust. OIRA's role has been praised and criticized in both contexts (more often criticized though). It's success in both enhancing presidential oversight and in increasing the economic efficiency of regulations is also the subject of disagreement. The interaction between these dual missions however has received less comment. There are a few exceptions though. In defending OIRA in its early years, DeMuth and Ginsburg discussed the synergy between the two missions.³⁹ Because the president has a nationwide constituency, and because cost-benefit analysis enumerates the costs and benefits to parties across the economy, CBA is the ideal tool to help the president manage the regulatory state.⁴⁰

Croley did a large scale empirical analysis of OIRA review during the Reagan, Bush, and Clinton administrations in an attempt to characterize OIRA as focused either on economics or politics. He found evidence to support both the arguments that OIRA was largely technocratic and that it was political. His overall interpretation however is that the technocratic explanation of OIRA review may have more merit,

“if regulatory favoritism by the White House independent of the OIRA review process is common, that fact probably argues in favor of a greater not a lesser role for OIRA in rulemaking review.. In other words, now OIRA review becomes an antidote to behind the scenes influence on agency rulemaking from other parts of the White House.”⁴¹

Don Arbuckle, long the Deputy Administrator of OIRA, argued that while politics is a fact of life in decision-making in the Executive Office of the President (EOP), OIRA career staff have done their jobs in a manner that ensures that analytical results are heard within the EOP. Of course he also relays an anecdote where a political official says “tell me what the analysis says we should do before I sell you down the river.”⁴²

Priorities: The Quality and Use of Regulatory Analysis across US Administrations. *Regulation & Governance* 7, 153–173.

³⁸ See e.g. Hahn, Robert W., and Cass R. Sunstein. "A new executive order for improving federal regulation? Deeper and wider cost-benefit analysis." *University of Pennsylvania Law Review* 150, no. 5 (2002): 1489-1552.

³⁹ *Supra* note 16.

⁴⁰ *Id.*

⁴¹ *Supra* note 21 p. 882.

⁴² Arbuckle, Donald R. "The role of analysis on the 17 most political acres on the face of the earth." *Risk Analysis: An International Journal* 31, no. 6 (2011): 884-892. p. 891

In an earlier piece, I presented a perspective, in part based upon my years as an OIRA desk officer.⁴³ I outlined four scenarios (replicating the table below from my earlier work⁴⁴:

	President⁴⁵ Supports Regulation	President Opposes Regulation
Analysis Supports Regulation	Regulation is promulgated (A)	Regulation promulgated if analysis prevails, not promulgated if politics prevails (B)
Analysis Does Not Support Regulation	Regulation is promulgated if politics prevails, not promulgated if analysis prevails. (C)	Regulation not promulgated (D)

I argued that boxes B and C tell us about the balance struck between analysis and politics. Examples in the literature (particularly in Box C – Box B examples are hard to discern because one would need to either find rules not promulgated or rules promulgated despite presidential opposition or the opposition of his top staff) tend to show that when analysis and politics conflict, politics wins.⁴⁶

This is not to imply that analysis plays no role in OIRA decision-making. Within boxes A, B, and C, there is room for analysis to improve regulatory policy in cases where the decision to proceed with a regulation is made. And there are likely issues where presidential preferences are non-existent. In these cases, there is room for analysis to play a significant role.⁴⁷ Even in areas of conflict, the results of an analysis may lead to a more stringent or lenient regulation within the bounds of what is politically acceptable to the president and his administration. In any case, the analysis may add transparency to the regulatory debate.⁴⁸ But when the preferred policy choices of a president directly conflict with analytical results, then politics has an advantage over analysis.

Helping the president oversee agency regulatory decisions and ensuring the integrity of agency cost-benefit analyses are the two main missions of OIRA. There are other missions however tied to OIRA’s regulatory review function. Most notably, OIRA coordinates the review of agency regulations by

⁴³ I worked in OIRA from 1998 until 2003.

⁴⁴ *Supra* note 2 at 10438

⁴⁵ The president’s views on a regulation may not be clear. He may not have views on a particular regulation. However as noted by Bressman and Vandenberg, the views of other offices of the Executive Office of the President, all of which are largely staffed by political appointees may carry significant weight in OIRA review. These may include the Domestic Policy Council, the National Economic Council, the Council on Environmental Quality and others. In this discussion, the “president” refers to both the president and his top staff. Bressman, Lisa Schultz, and Michael P. Vandenberg. "Inside the administrative state: A critical look at the practice of presidential control." *Mich. L. Rev.* 105 (2006): 47.

⁴⁶ *Id.*

⁴⁷ *Supra* note 29.

⁴⁸ DeMuth, Christopher. "OIRA at Thirty." *Administrative Law Review* (2011): 15-25.

other parts of the executive branch,⁴⁹ particularly other parts of the Executive Office of the President.⁵⁰ Former OIRA Administrator, Cass Sunstein, has also emphasized OIRA's role in ensuring that agencies dutifully take into account public comments on their proposed regulations.⁵¹

Despite the importance of these other missions, the emphasis in the academic and legal literature on the political and analytical functions of OIRA is well placed. These are the most innovative parts of OIRA's regulatory review and the ones with the most potentially far reaching implications both for regulatory functions, and for presidential administration more broadly. How have the actions of the past two and a half years affected the balance between presidential influence on rulemaking and the role of cost-benefit analysis?

The Trump Administration and Cost-Benefit Analysis

The Trump Administration continues to rely upon Executive Order 12866 for regulatory review. On the surface therefore it appears that the role of OIRA is largely unchanged and focuses on balancing the political preferences of the president with the outcomes suggested by cost-benefit analysis. As described above, under previous administrations, this balance may have been carefully managed by OIRA but has always tilted toward the political preferences of the existing administration.

However, in the past two years, several actions have indicated that the balance has moved further away from cost-benefit analysis. The clearest action has been an executive order issued by the Trump Administration in its early days, Executive Order 13771.⁵² This order implemented a requirement that agencies identify two regulations for repeal for every new regulation that they issue (the "two for one requirement"),⁵³ and a requirement that agencies produce "annual regulatory cost submissions"⁵⁴ in effect putting into place a regulatory budget.

These two requirements in EO 13771 de-emphasized, for the first time in 36 years, the role of cost-benefit analysis in the regulatory process. Former OIRA Administrator, Sally Katzen points out that EO 13771 mentions "costs" 17 times and never mentions "benefits."⁵⁵ The two for one requirement instructs agencies to ensure that costs of regulations repealed are taken into consideration but makes no mention of the benefits. As such, scholars have described the order as unlikely to increase the net benefit of regulations.⁵⁶

⁴⁹ Sunstein, Cass R. "The Office of Information and Regulatory Affairs: myths and realities." *Harv. L. Rev.* 126 (2012): 1838.

⁵⁰ *Supra* note 45.

⁵¹ *Supra* note 49.

⁵² Executive Order 13771, <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/> (last viewed February 11, 2019).

⁵³ *Id.* Section 2.

⁵⁴ *Id.* Section 3.

⁵⁵ See <https://www.theregreview.org/2018/04/24/katzen-benefit-cost-analysis-promote-decisionmaking/> (last viewed February 11, 2019).

⁵⁶ Cecot, Caroline, and Michael A. Livermore. "The One-in, Two-out Executive Order Is a Zero." *U. Pa. L. Rev. Online* 166 (2017): 1. Note that the authors also argue that the EO will not facilitate presidential control.

A regulatory budget is an idea that has circulated among regulatory scholars for at least a generation.⁵⁷ Like the two for one requirement, the regulatory budget is an instrument focused solely on the costs of regulation and not on the benefits. It too will, at best, have no effect on the net benefits of regulations, the oft-stated goal of cost-benefit analysis and may indeed reduce net benefits. The regulatory budget has long been sold as a way of controlling the cost of regulation, and while its supporters often mention economic efficiency, they rarely discuss the benefits of regulation as pertaining to a regulatory budget.⁵⁸

Some defenders of cost-benefit analysis have cast the new executive order as a concession to reality. They cite the lack of perfect information and incentives for agencies to produce cost-benefit analyses that are sufficiently rigorous to inform regulatory decision-making.⁵⁹ The “two for one” approach and the regulatory budget provide a change to the procedural environment in which agencies make regulatory decisions that forces them to be more analytical and more carefully choose their priorities.⁶⁰ They also argue that these tools encourage the retrospective review of regulation.⁶¹

The more prevalent view however is that the new executive orders undermine the use of cost-benefit analysis in regulatory policy-making and contradict the utilitarian philosophy upon which CBA rests.⁶² One is left with the suspicion that after 36 years of using cost-benefit analysis in the regulatory process and after 36 years in which the overall regulatory burden grew, those who hoped that CBA would curb such growth have decided it is incapable of doing so and turned to other means such as the two for one approach or a regulatory budget that focus merely on regulatory costs.⁶³

OIRA attempted to temper the non-CBA focus of Executive Order 13771 by writing guidance that included the need to measure both the benefits and costs of regulations.⁶⁴ However, the public debate over Executive Order 13771 often leaves out this guidance. And the guidance does not change the fundamental fact that OIRA was charged with implementing an executive order that explicitly

⁵⁷ DeMuth, Christopher C. "The regulatory budget." *Regulation* 4 (1980): 29.

⁵⁸ Rosen, Jeffrey A., and Brian Callanan. "The Regulatory Budget Revisited." *Admin. L. Rev.* 66 (2014): 835.

⁵⁹ See Susan Dudley, "Regulating Within a Budget" <https://www.theregreview.org/2018/04/23/dudley-regulating-within-a-budget/> (last viewed February 12, 2019).

⁶⁰ Ted Gayer, Robert Litan, and Philip Wallach "Evaluating the Trump Administration's Regulatory Reform Program" Brookings Institution October 2017. See: https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf (last viewed February 12, 2019).

⁶¹ Dudley, Susan E., and Brian F. Mannix. "Improving Regulatory Benefit-Cost Analysis." *JL & Pol.* 34 (2018): 1.

⁶² See Richard Revesz "Challenging the Anti-Regulatory Narrative" <https://www.theregreview.org/2018/07/23/revesz-challenging-anti-regulatory-narrative/> (last viewed February 12, 2019) and Short, Jodi L. "The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting." *Minn. L. Rev.* 103 (2018): 93.

⁶³ Farber, Daniel A. "Regulatory Review in Anti-Regulatory Times." *UC Berkeley Public Law Research Paper* (2018).

⁶⁴ See <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf> (last viewed February 19, 2019).

ignores the benefit side of cost-benefit analysis. The Executive Order is, at its heart, directions to OIRA to prioritize one type of impact (and hence the interests of one set of affected communities) over the general welfare approach of cost-benefit analysis.

The prioritization of costs over benefits is also obvious in the RIAs produced by the Trump Administration.⁶⁵ No administration has anything close to a perfect record in conducting cost-benefit analyses. This is why the criticisms of government cost-benefit analyses have been so prevalent in the decades since the issuance of Executive Order 12291.⁶⁶ But no previous administration has seen its analyses so regularly and quickly criticized as the Trump Administration.

Here are a few examples:

- In its attempt to repeal the Clean Power Plan (CPP), the signature Obama Administration effort to combat climate change, the Trump Administration made numerous changes to assessing the costs and benefits. They greatly reduced the social cost of carbon⁶⁷ used in its RIA.⁶⁸ The changes were due to ignoring climate impacts outside the US borders, and changing the methods of discounting. After widespread criticism that their replacement for the CPP would cause higher mortality risk,⁶⁹ when finalized, the repeal included the “co-benefits” of the replacement plan.

The question of whether to consider benefits that accrue directly to those outside the United States is disputed in the economic literature.⁷⁰ However regarding the question of discounting for inter-generational impacts there is greater agreement that longer time frames require lower discount rates.⁷¹ Furthermore, the Trump Administration has been on the forefront of decrying the use of co-benefits to justify regulation.⁷² To suggest the elimination of co-benefits in some contexts, but to use them to justify repeal of regulatory initiatives in others, suggests an indifference to analytical approaches and the desire to subsume them to political goals.

- In another EPA rulemaking, the Trump Administration is attempting to repeal the “Waters of the United States” regulation issued by the Obama Administration. Economists described the assumptions behind the Trump estimate of the costs and benefits of the repeal⁷³ as “stunning”

⁶⁵ Ibid at 1: “Thus, cost-benefit analysis seems overall a marginal part of current regulatory policy-making.

⁶⁶ *Supra* note 9.

⁶⁷ Tollefson, Jeff. “How Trump plans to wipe out Obama-era climate rules.” *Nature News* (2017).

⁶⁸ See https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf (last viewed February 15, 2019).

⁶⁹ Lisa Friedman “Cost of New EPA Coal Rules: Up to 1400 more Deaths a Year” *New York Times* August 21, 2018.

⁷⁰ Masur, Jonathan S., and Eric A. Posner. “Climate regulation and the limits of cost-benefit analysis.” *Calif. L. Rev.* 99 (2011): 1557.

⁷¹ See <https://www.resourcesmag.org/common-resources/unpacking-the-administrations-revised-social-cost-of-carbon/> for details. Last viewed February 15, 2019).

⁷² See e.g. <https://www.pbs.org/newshour/show/how-trumps-epa-is-changing-the-public-health-benefits-around-mercury> (last viewed July 11, 2019).

⁷³ See https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf (last viewed February 15, 2019).

and equivalent to assuming that “pigs could fly.”⁷⁴ The estimate of benefits in the proposal was “incomplete.”⁷⁵ The original CBA quantified and monetized benefits that the Trump EPA ignored. As a result, “The prior CBA provides a powerful default for the appropriate scope and assumptions and any deviations from this default would have to be explained. . . The repeal is thus vulnerable to challenge given the inconsistency in its explanation for departing from the prior CBA.”⁷⁶

- The Department of Labor also has been working to repeal Obama Administration regulations. In their effort to reverse a rulemaking that governed the pooling of tips,⁷⁷ despite the likelihood that the regulation would result in transfers of hundreds of millions of dollars (thus triggering the RIA requirement in Executive Order 12866), the Department of Labor did not even conduct⁷⁸ a cost-benefit analysis.⁷⁹
- The regulatory impact analysis for a proposed regulation that would remove 1.7 million families from food stamp eligibility, a proposal from the Department of Agriculture, spent only three paragraphs discussing the benefits and costs of this action.⁸⁰ Such benefits and costs are certain to be significant under the definition of Executive Order 12866.
- In justifying the delay of dozens of Obama Administration regulations, the Trump Administration relied solely upon the costs of the regulations ignoring entirely the benefits.⁸¹
- Similarly in a regulation designed to lower civil monetary penalties for auto manufacturers that failed to meet emission standards,⁸² the Department of Transportation ignored the foregone benefits that would result from lowering the penalty (the higher emissions resulting from a reduced disincentive to comply with emission standards).⁸³

The requirement to conduct a cost-benefit analysis is far from the only procedural requirement in the rulemaking process that the Trump Administration has cut corners on. Other administration decisions have been overturned in court because of insufficient fealty to requirements for notice and

⁷⁴ See <https://www.eenews.net/stories/1060117957> last viewed February 15, 2019).

⁷⁵ *Supra* Note 63..

⁷⁶ Cecot, Caroline. "Deregulatory Cost-Benefit Analysis and Regulatory Stability." *Duke Law Journal*, *Forthcoming* (2018): 18-32.

⁷⁷ Federal Register December 5, 2017 82FR 57395

⁷⁸ One could argue that there is no market failure here, making an analysis trivial. However this ignores the fact that the regulation would result in hundreds of millions of dollars in economic transfers and as such, an analysis is required by Executive Order 12866.

⁷⁹ See <https://www.epi.org/press/dol-scrubs-economic-analysis-that-showed-its-tip-pooling-rule-would-be-terrible-for-workers/> (last viewed February 15, 2019).

⁸⁰ Federal Register July 24, 2019. 84 FR 35770

⁸¹ Revesz, Richard L. "Congress and the Executive: Challenging the Anti-Regulatory Narrative." *Michigan State Law Review* 2018, no. 4 (2019): 795.

⁸² Federal Register April 2, 2018 83 FR 13904

⁸³ Institute for Policy Integrity public comment on reduced civil monetary penalty rule. See https://policyintegrity.org/documents/05.02.18_CAFE_penalties_reconsideration_IPI.pdf

comment⁸⁴ and the Regulatory Flexibility Act.⁸⁵ But these are statutory requirements and while ignoring them is detrimental to respect for the rule of law, it is unlikely to have long term consequences for these particular statutes. Ignoring a non-statutory requirement like the Executive Order requirement for justifying regulations using analysis of benefits and costs puts that requirement in greater danger.

The combination of the executive orders which largely ignore a key pillar of cost-benefit analysis (the benefits) and a series of regulatory analyses that have been widely criticized for their poor quality points toward an antipathy toward CBA (or a complete agnosticism toward it) unseen in presidential administrations since the dawn of the regulatory era. It is particularly surprising to see this attitude in a Republican administration supporting deregulation since historically the criticisms of CBA have come from progressives.⁸⁶ What does this mean for the future of cost-benefit analysis? What does it mean for the future role of OIRA?

The Challenge Posed for CBA and OIRA

The Trump Administration has altered the dynamics of longstanding debates on CBA. Those who have historically supported CBA in the regulatory process as a way of controlling the growth of the regulatory state have largely been silent during the Trump Administration. Some have come to embrace the new techniques of regulatory budgeting and the two for one executive order while overlooking or excusing the differences between these techniques and cost-benefit analysis.

And those who have historically opposed cost-benefit analysis, have not dropped their opposition. While on some occasions, they have cited the flaws or omissions in Trump administration deregulatory efforts in their attempt to overturn these efforts in court,⁸⁷ they have also used these failings to point out what they see as the inherent failings of cost-benefit analysis.⁸⁸ This leaves a relatively small slice of advocates actively supporting a role of cost-benefit analysis in regulatory decision-making.

And CBA is likely to need advocates at some point in the future. While the Trump Administration has slowed the issuance of new regulations to a crawl,⁸⁹ two years into the administration there are no signs that to paraphrase Steve Bannon, the administrative state has been deconstructed. Eventually whether it is under an Elizabeth Warren administration, a Kamala Harris Administration or a Nikki Haley administration, debates over how our regulatory decisions are made will resume. And a Democratic Administration in particular is likely to repudiate the Trump Executive Orders

⁸⁴ See <https://www.theregreview.org/2018/06/04/heinzerling-laying-down-law-rule-delays/> (last viewed July 30, 2019).

⁸⁵ State of California v Bureau of Land Management Sierra Club v. Ryan Zinke Case No. 17-cv-07186-WHO. U.S. District Court Northern District of California.

⁸⁶ *Supra* Note 14.

⁸⁷ Stuart Shapiro “Embracing Ossification” *Regulation* Winter 2018-19. pp. 8-10.

⁸⁸ *Supra* Farber. Also see <https://thehill.com/opinion/energy-environment/432471-epa-is-rolling-back-protections-with-methodology-no-respectable> (last viewed March 5, 2019). And Shane, Peter, Daniel Farber, and Lisa Heinzerling, “Reforming ‘Regulatory Reform:’ A Progressive Framework for Agency Rulemaking in the Public Interest (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3416544) (last viewed July 15, 2019). Shane et. al. propose removing the cost-benefit criteria from OIRA review and replacing it with a test of whether the regulation is compliant with the agency’s authorizing statute.

⁸⁹ See <https://regulatorystudies.columbian.gwu.edu/trump-administration-picks-regulatory-pace-its-second-year> (last viewed February 19, 2019).

and return us to a regulatory regime governed by Executive Order 12866 (although in certain political climates EO 12866 itself could be revised significantly).

The future debates over cost-benefit analysis also have obvious implications for the future of OIRA. While OIRA attempted to write guidance to reassert the role of benefits in benefit-cost analysis,⁹⁰ there is no mistaking the emphasis on reducing regulatory costs in the Trump Administration over maximizing net benefits. As described above, OIRA's mission as the president's means for overseeing regulatory policy has often prevailed over its mission as guardian of cost-benefit analysis. But even administrations in which OIRA has been asked to sign off on flawed analyses spoke of the importance of both costs and benefits. Democratic administrations that typically support regulation to public health have appointed people like Cass Sunstein and Sally Katzen as OIRA Administrators. Both Sunstein and Katzen regularly invoke the need to balance costs and benefits in regulatory policy. Republican administrations that typically care more about the cost of regulation to businesses than their Democratic counterparts have pioneered techniques like the prompt letter⁹¹ to push agencies to issue regulations with large net benefits and touted regulations like EPA's removal of lead from gasoline.⁹²

With virtually no exceptions, this balance has been absent in the Trump Administration. And therefore the balance has largely been absent from OIRA's role since 2017. A recent essay on OIRA's accomplishments⁹³ (like Executive Order 13771) omitted the word "benefit" entirely. What used to be a somewhat unbalanced contest between political preferences and analytical objectives at OIRA seems to have turned into a rout. While the author of this essay on OIRA's successes says that the accomplishments "demonstrate the renewed vigor of OIRA" another (and in my view more correct) interpretation is that these accomplishments show the victory of politics at OIRA and the demise of CBA in the executive branch.

It is unlikely that the OIRA career staff have willingly or happily acquiesced to this. William West has described OIRA staff as "ideologues for efficiency."⁹⁴ My own experience as an OIRA desk officer and my continued interactions with those who serve in OIRA generally confirms this perception. But the preferences of OIRA staff has at most a limited relationship with how OIRA is perceived outside the White House complex.⁹⁵ That perception is instrumental in determining long term support for OIRA's role. In an administration that has ignored or eschewed high quality cost-benefit analysis, OIRA is inevitably going to be seen as increasingly more political than analytical.

If the next administration does not commit to re-centering cost-benefit analysis in OIRA's mission, then the potential for cost-benefit analysis to play a role in regulatory policy is diminished. Even if the next administration does make such a commitment, whether there is sufficient external

⁹⁰ *Supra* Note 64.

⁹¹ See <https://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> (last viewed February 19, 2019).

⁹² Morgenstern, Richard D. *Economic analyses at EPA: assessing regulatory impact*. Routledge, 2014.

⁹³ See <https://www.theregreview.org/2019/02/04/levinson-oira-reinvigorated/> (last viewed February 19, 2019).

⁹⁴ West, William F. "The institutionalization of regulatory review: Organizational stability and responsive competence at OIRA." *Presidential Studies Quarterly* 35, no. 1 (2005): 76-93, at p. 85.

⁹⁵ Stuart, Shapiro. "OIRA Inside and Out." *Administrative Law Review* 63 (2011): 135-47.

credible support for such a mission is an open question. As one scholar noted, “Advocates of CBA, whether economists or sympathetic legal scholars are thus under pressure from critics on both sides.”⁹⁶ This raises the question of how to restore cost-benefit analysis to a prominent place in regulatory debates, either within OIRA or outside of it.

Alternatives for Cost-Benefit Analysis and OIRA

In this section, I review alternative institutional arrangements for the use of cost-benefit analysis in the regulatory process. Some of these arrangements are supplements to OIRA’s role, others are replacements for it, some can be considered as either. In light of the treatment of cost-benefit analysis under the Trump Administration supporters of its use need to re-examine how (and whether) CBA can effectively be used to aid regulatory decisions.

Option 1: Get rid of cost-benefit requirements

Opposition to the use of cost-benefit analysis in regulatory policy has existed since the dawn of its official use in 1981. As described above⁹⁷ opposition centers on the perceived bias of cost-benefit analysis against regulations that are intended to protect public health and the environment. Others have argued that requiring CBA of agencies hoping to regulate leads to a regulatory process that stretches out over years and disincentivizes agencies from pursuing regulation.⁹⁸ If, as in the Trump Administration, the requirement to do cost-benefit analysis is not producing any benefits to regulatory decision-making, maybe it is time to take these costs more seriously.

Eliminating a requirement that agencies estimate the costs and benefits of their economically significant regulations would also allow OIRA to explicitly focus on their mission of assisting the president in regulatory policy. OIRA could continue to coordinate interagency review of regulations and assess whether agencies were responding adequately to concerns raised by the public.⁹⁹ This would also give OIRA a clearer mission in terms of regulatory review and everyone would understand that OIRA was speaking for the president when it raised concerns about agency regulations.

However, the elimination of a cost-benefit analysis requirement would ignore 36 years of history prior to the Trump Administration. While analyses over this period were certainly flawed and there are many cases when they did not influence decisions,¹⁰⁰ there are also many instances when analyses improved regulations as a result of conducting CBAs.¹⁰¹ These improvements come from various sources. Economists within agencies are empowered to suggest improvements to regulatory proposals.¹⁰² Requiring analysis forces agencies to grapple with their decisions long before the public ever is involved. Once the public is involved, the publication of an estimate of costs and benefits helps

⁹⁶ *Supra* note 63 p. 3.

⁹⁷ *Supra* notes 31-32,

⁹⁸ *Supra* note 32.

⁹⁹ *Supra* Shane, Farber, Heinzerling.at note 88.

¹⁰⁰ *Supra* note 37

¹⁰¹ Shapiro, Stuart. *Analysis and public policy: successes, failures and directions for reform*. Edward Elgar Publishing, 2016.

¹⁰² *Id.*

inform and educate the public (and office-holders) about the consequences of regulatory decisions.¹⁰³ This transparency-related benefit allows the public and their representatives to more effectively engage with agency decisions.

The presence of cost-benefit analysis also facilitates OIRA's other roles. By presenting and attempting to evaluate all of the consequences of an agency regulation, CBA simplifies assessment of regulation not just by the public, but by the president and by other agencies. In other words, presidential control of the regulatory state and interagency coordination are both facilitated by the cost-benefit analysis requirement.¹⁰⁴ Eliminating the requirement would make these other functions more difficult.

Given the transparency benefits of cost-benefit analysis, its proven record as improving (at a minimum) some regulatory decisions,¹⁰⁵ and the synergy between cost-benefit analysis and OIRA's other roles, it is hard to imagine a regulatory process that functions better without agency calculations of costs and benefits and the publication of these calculations. The mere presence of a CBA forces agencies, their political superiors, and the public at large to more seriously engage with the myriad impacts of a regulatory decision and its absence is likely to weaken this engagement.¹⁰⁶

Finally, prior to the Trump Administration, five consecutive presidents had voiced support for cost-benefit analysis and examined ways to improve its implementation.¹⁰⁷ This long record of bipartisan presidential support indicates that giving up on cost-benefit analysis as a procedural tool is short-sighted. To borrow from the debates on the Affordable Care Act, perhaps the dictum on cost-benefit analysis should be "mend it, don't end it."¹⁰⁸

Do Nothing

But perhaps the right course of action is to neither mend nor end the use of cost-benefit analysis and its role in OIRA review. OIRA review worked well, if imperfectly, for more than three decades. The staff at OIRA has long been able to balance the political preferences of their superiors with the need to ensure analytical integrity.¹⁰⁹ While conflicts between these two missions are most frequently resolved in favor of politics,¹¹⁰ there are many cases where political preferences are limited or political and analytical preferences are aligned. In these cases, there is space for analysis to improve regulatory decision-making.

It is thus tempting to view the Trump Administration as an anomaly. Indeed one of the phrases most often used to describe the past several years in American politics is "not normal."¹¹¹ It is certainly possible that the way OIRA operates will return to pre-Trumpian norms once this administration

¹⁰³ *Id.*

¹⁰⁴ *Supra* note 16.

¹⁰⁵ *Supra* note 101.

¹⁰⁶ *Supra* note 76.

¹⁰⁷ Arguably this support goes back to Presidents Ford and Carter before the creation of OIRA. *Supra* Tozzi

¹⁰⁸ See <https://thehill.com/opinion/john-feeherly/332442-feeherly-mend-it-dont-end-it> (last viewed February 20, 2019).

¹⁰⁹ *Supra* note 94.

¹¹⁰ *Supra* note 2.

¹¹¹ *Supra* note 63.

concludes. Making any changes to the role of cost-benefit analysis or OIRA's operations could be over-reacting to an anomalous situation.

In this sense, the trend in the Trump Administration has been an exaggeration (albeit a very significant exaggeration) of the challenges that OIRA has always faced. Its dual role has always necessitated compromises in its oversight of analytical outcomes. That those compromises have become more one-sided and more obvious is important but it also highlights longstanding concerns about the institutional role of OIRA.

The reasons for change are compelling however. As detailed above, cost-benefit analysis has received numerous blows to its credibility during the Trump Administration. Its defenders have been largely quiet. As a result, OIRA has also sustained damage to its credibility over the past two and a half years. It is hard to argue for OIRA as an analytical guardian when it has either repeatedly approved faulty analyses or (more likely in my view) its views have been repeatedly ignored when they conflict with political necessity.

In this sense, the Trump Administration by calling attention to the insufficiency in OIRA oversight of cost-benefit analysis has provided an opportunity for reform. Opponents of cost-benefit analysis may see this opportunity to scale back its role in regulatory decision-making. But scaling back CBA requirements is not the only alternative. Below are three other alternatives, one located in each branch of government for improving the quality of CBA, and ensuring high quality cost-benefit analysis plays a role in regulatory policy.

Each of these alternative arrangements can be considered as a supplement to OIRA review or a replacement for it. While the political mission of OIRA will remain, either with OIRA or elsewhere in the Executive Office of the President, the mission of reviewing cost-benefit analyses does not have to. For each of the three options below (Congressional review of CBA, enhanced judicial review of CBA, or an independent office reviewing CBA), maintaining OIRA review would create competition in the review of cost-benefit analysis. This may strengthen OIRA review and curb some of the current weaknesses of it. For this reason, the argument that the arrangements below should be in addition to OIRA supervision of regulatory cost-benefit analysis rather than in lieu of it is stronger than the argument that they are replacements. But if a future administration does decide to scale back or eliminate this aspect of OIRA's mission, these arrangements are also potential replacements.

Strengthening Judicial Oversight of CBA

The judicial branch is one source of potential enhancement of the role of cost-benefit analysis in regulatory decision-making. The courts already use the existing cost-benefit analyses conducted by agencies in cases where regulations that rely upon these analyses are challenged.¹¹² There is evidence in cases like *Business Roundtable v. SEC*¹¹³ and *Michigan v. EPA*¹¹⁴ that the courts are moving on their own to play a greater role in ensuring that CBA has a greater influence on regulatory decision-making.

¹¹² Cecot, Caroline, and W. Kip Viscusi. "Judicial review of agency benefit-cost analysis." *Geo. Mason L. Rev.* 22 (2014): 575.

¹¹³ *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

¹¹⁴ *Michigan v. EPA* 135 S. Ct. 2699 (2015)

However there is also an argument that this role will necessarily be uneven absent a specific requirement for courts to consider cost-benefit analyses.¹¹⁵

In an analysis of 38 cases, Cecot and Viscusi showed that courts often already examine cost-benefit analyses to evaluate challenges to regulations.¹¹⁶ This is often done as courts try to determine whether agencies have acted in an arbitrary or capricious manner under the Administrative Procedure Act.¹¹⁷ But the level of their scrutiny of the underlying analyses varies greatly. The statutes underlying regulations have very different language regarding the extent to which agencies are permitted, encouraged, or required to consider the costs and benefits of their regulatory actions. The stricter the language in a statute is regarding the need for agencies to consider costs and benefits, the more closely courts scrutinize agency cost-benefit analyses.¹¹⁸

Absent any direction to the courts regarding the consideration of costs and benefit in agency regulatory decisions, this variation is likely to continue. If courts are to replace or supplement the role OIRA currently plays, the standardization of judicial review is desirable. To achieve this standardization, there would need to be some kind of “supermandate.” As Cecot and Viscusi argue, “Congress could also enact a supermandate provision that might override an agency’s current mandate. The provision could either permit agencies to base policies on BCA (‘soft’ supermandate) or require agencies to base policies on a benefit-cost test (‘hard’ supermandate) notwithstanding current statutory prohibitions.”¹¹⁹

The benefits of a supermandate are clear from the literature described above. A clear statement in a statute like the APA that created either a soft or hard supermandate would establish the courts as an alternate reviewer of agency cost-benefit analysis. In effect it would clear up any debate left by *Michigan v. EPA*¹²⁰ about whether the courts had a role in using cost-benefit analysis as they adjudicated challenges to agency regulations.

However, there are also downsides associated with judicial review of cost-benefit analysis. Judges are not economists. While some have argued that in cases that considered cost-benefit analysis to date, judges have ably identified flaws that indicate serious problems regarding regulations,¹²¹ former OIRA Administrator, Cass Sunstein, has urged caution, saying, ““But if courts are unable to understand

¹¹⁵ Bull, Reeve T., and Jerry Ellig. "Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis." *ADMINISTRATIVE LAW REVIEW* 70, no. 4 (2018): 873-959.

¹¹⁶ *Supra* note 112.

¹¹⁷ Sunstein, Cass R. "Cost-Benefit Analysis and Arbitrariness Review." *Harv. Envtl. L. Rev.* 41 (2017): 1.

¹¹⁸: *Supra* Bull and Ellig p. 943 “More detailed statutory standards are associated with more thorough analysis by both courts and agencies, and statutory silence is associated with less detailed analysis by agencies and highly deferential review by courts.”

¹¹⁹ *Supra* note 112 at p. 598.

¹²⁰ *Supra* note 114.

¹²¹ Masur, Jonathan S., and Eric A. Posner. "Cost-Benefit Analysis and the Judicial Role." *The University of Chicago Law Review* 85, no. 4 (2018): 935-986.

the highly technical issues involved, and if agencies are already performing well, judicial review would be a blunder."¹²²

The case of judicial review under the National Environmental Policy Act (NEPA)¹²³ is also a cautionary tale. Under NEPA, agencies are required to produce an environmental impact statement for certain agency decisions (much like agencies must do a cost-benefit analysis for certain regulatory decisions under Executive Order 12866). While initially courts rejected agency decisions because of inadequate environmental impact statements, over time agencies learned to do exceptionally complex statement which judges typically deferred to.¹²⁴ In fact, in recent years agencies have a perfect record defending their actions against NEPA based challenges at the Supreme Court.¹²⁵

This isn't to imply that judicial review in NEPA has been useless. Some agency officials credit it with helping to create a culture of environmental sensitivity in agencies where it was missing previously. It also empowers outside groups who now have the power to sue agencies and can use that in negotiations.¹²⁶ Enhancing judicial review of cost-benefit analysis thus has the potential to improve its use within agencies. However, it should be clear that agencies may react to such a requirement by making CBAs less transparent, which compromises one of the most important benefits of requiring analysis.

Congressional Review of CBA

An alternative to strengthened judicial review of cost-benefit analysis would be to house an additional review within the legislative branch. This proposal has been advanced intermittently since OIRA's origin. Such an office was proposed in legislation in 1998 in the *Congressional Office of Regulatory Analysis Creation Act*.¹²⁷ The office would have been a new entity that would have conducted its own cost-benefit analysis of major regulations, but it would have been done after agencies completed regulations.¹²⁸ This proposal was then incorporated in the *Truth in Regulating Act*¹²⁹ which transferred these authorities to GAO.¹³⁰ However money was never appropriated to GAO to carry out these new responsibilities and the budgetary authority for the office expired.¹³¹

¹²² *Supra* note 117, p. 8.

¹²³ 42 U.S.C. §§ 4321 et seq

¹²⁴ Karkkainen, Bradley C. "Whither NEPA." *NYU Env'tl. LJ* 12 (2003): 333.

¹²⁵ Lazarus, Richard. "The National Environmental Policy Act in the US Supreme Court: A Reappraisal and a Peek Behind the Curtains." *Geo. LJ* 100 (2011): 1507.

¹²⁶ *Supra* note 101.

¹²⁷ 105th Congress HR 1704.

¹²⁸ Id Section (3)(A)

¹²⁹ Public Law 106-212

¹³⁰ Rosenberg, Morton. "Whatever Happened to Congressional Review of Agency Rulemaking: A Brief Overview, Assessment, and Proposal for Reform." *Admin. L. Rev.* 51 (1999): 1051.

¹³¹ Lewis Jr, Marlo. "Reviving Regulatory Reform." Competitive Enterprise Institute (2005).

Hahn and Layburn took up the cause of Congressional review of regulatory analysis in a 2003 article.¹³² Their primary argument for such an office is the inherently political nature of OIRA due to its location within the executive branch. They also argue that such an office would increase regulatory transparency and improve regulation. In response to these arguments, Niskanen said that such an office would be subject to political pressure from Congress and would not necessarily lead to better analysis.¹³³

The debate over a Congressional office to review regulatory analysis has picked up steam again in recent years. In 2010, the *Congressional office of Regulatory Analysis Creation and Sunset and Review Act of 2010* was introduced.¹³⁴ The possibility of Congressional review has also been a part of the debate over many other regulatory reform bills introduced throughout the 2010s. None of these bills have become law however.

Philip Wallach and Kevin Kosar argued for a Congressional Regulation Office (CRO) in 2016.¹³⁵ The need for such an office arises, they maintain, from the lack of capacity in Congress to meaningfully engage in regulatory policy debates and the resulting power imbalance between the executive and legislative branches.¹³⁶ They drew lessons from the origins of the Congressional Budget Office including the need to integrate the creation of a CRO into a re-examination of the regulatory process and the need for ensuring that CRO would have the trust of both political parties.¹³⁷

Most importantly (from the perspective of this article)¹³⁸ the CRO proposed by Wallach and Kosar would conduct CBAs of regulation concurrently with agency analysis. CRO analyses would be submitted as public comments to agency proposed rules. Doing this would provide a check on the analyses that the executive branch produces,¹³⁹ and perhaps create incentives both for agencies to do better analysis, and for OIRA to focus more on analytical principles in its review of agency regulations.

This advantage of a Congressional review office speaks directly to the challenges that have always faced OIRA and have become more acute over the past three years. A Congressional office that produces (or reviews) agency cost-benefit analyses during the regulatory process, and makes public its work-product, would introduce competition to the regulatory analysis business, which is currently a monopoly. Competition generally spurs greater quality. The problems with the executive monopoly on regulatory analysis have always been present but the quality concerns have been particularly acute during the Trump Administration.

¹³² Hahn, Robert W., and Erin M. Layburn. "Tracking the value of regulation." *Regulation* 26 (2003): 16.

¹³³ Niskanen, William A. "More lonely numbers: regulations should be decided a political process, not more benefit-cost analyses." *Regulation* 26, no. 3 (2003): 22-23.

¹³⁴ 111th Congress H.R. 6223.

¹³⁵ Wallach, Philip, and Kevin R. Kosar "The Case for a Congressional Regulation Office" *National Affairs* Fall 2016.

¹³⁶ *Id.*

¹³⁷ *Id.* p. 63.

¹³⁸ Wallach and Kosar also argue for the CRO conducting retrospective analyses of regulation.

¹³⁹ *Supra* note 135.

Congressional review (or production) of regulatory analysis does raise some concerns. If it were to take place during the rulemaking process, Congressional reviewers (like OIRA but not bound by the executive branch) would have to maintain confidentiality regarding agency plans until a proposal or final rule was made public. If it were to do analysis post-issuance of regulation, as was proposed in the legislation in the late 1990s,¹⁴⁰ it is unclear whether it would have any impact on regulatory decisions. A Congressional review office would require funding and a sense of permanence in order to gain credibility. And as Wallach and Kosar note¹⁴¹, it would have to mirror the reputation for objectivity that the Congressional Budget Office has established and maintained. Niskanen's concerns about politicization are real and developers of a CRO should keep them in mind.¹⁴²

Alternative Executive Review of CBA

Could review of regulatory analysis occur outside any of the three branches of government or elsewhere in the executive branch? The Office of Advocacy ("Advocacy") in the Small Business Administration reviews agency analyses under the Regulatory Flexibility Act.¹⁴³ While not technically independent, Advocacy is given a relatively wide berth to criticize agency Regulatory Flexibility Analyses. But while they are free to criticize such analyses, they have little authority to actually impose their preferences. They can enter negotiations within the executive branch, but here they rely upon support from OIRA to win concessions from agencies. They publicly comment on agency proposed regulations¹⁴⁴ but it is unclear whether these comments have much of an impact.¹⁴⁵

The experience of Advocacy points to the challenges of creating an independent office to review agency cost-benefit analysis. There are numerous institutional design questions that would need to be solved. The first such question is where to place the agency. Placing it within the executive branch, like Advocacy, would likely render it dependent upon OIRA for influence, and make the office subject to the same political pressures as OIRA. Such an agency may be able to highlight problems with agency analyses publicly which would put pressure on OIRA and on agencies to improve specific regulatory analysis but it is not clear it would be allowed to do so over the long term if it resided in the executive branch.

An independent commission charged with reviewing analysis would be more likely to "pull no punches" in their criticisms. But an independent commission would raise other questions. Primary among these would be the question of when an agency analysis would be submitted to this new body. If submission was done after the publication of a regulation, it would raise the same issues as doing so to a Congressional review office. There might be some marginal pressure on agencies and OIRA to improve analysis for fear of embarrassment and concern about what the independent entity might point out to Congress and the courts. But absent stronger institutions in the other branches of government this fear may be limited.

¹⁴⁰ *Supra* note 127.

¹⁴¹ *Supra* 135.

¹⁴² *Supra* 133.

¹⁴³ Pub. L. 96-354 94 Stat 1164 (1981).

¹⁴⁴ See <https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters> (last viewed July 5, 2019).

¹⁴⁵ *Supra* note 101.

If regulations and their analyses were submitted to an external commission at the same time as submission to OIRA, the questions arise of what are the consequences of their review? Can they submit public comments on regulations? Are the comments part of the rulemaking record? How is pre-publication confidentiality ensured? Can the commission forestall publication pending resolution of the issues it raises? If the answer is yes to this final question, it would be a powerful check upon political influence on analysis. But such an arrangement may not be constitutional.¹⁴⁶ Giving a body outside of the direct control of any branch of government authority to review decisions by the executive branch would be breaking new constitutional ground.

An independent commission would be on firmer ground if its responsibilities did not include regulatory review. A commission devoted to regulation could examine questions such as the impact of the cumulative burden of regulations,¹⁴⁷ and the relationship between regulations and macroeconomic conditions such as unemployment,¹⁴⁸ or to conduct retrospective review of regulations.¹⁴⁹ These functions would not duplicate OIRA's work or ease the challenges of conducting analysis of policy decisions in a political environment but they would be valuable additions to our understanding of regulatory policy.¹⁵⁰

Conclusion

OIRA has had to balance its role as political overseer for the president and analytical watchdog throughout its nearly four decade history.¹⁵¹ Supporters of cost-benefit analysis playing a role in regulatory decision-making have thus long recognized the problem with locating review of analysis (and analysis itself) solely within the executive branch. Economic analysis is inherently dependent upon the inputs to the analysis and the assumptions made within it. This makes political manipulation of assessments of costs and benefits a constant threat.

The Trump Administration has made these manipulations a feature of cost-benefit analysis rather than a bug. The Administration has featured both the implementation of policies that are systematically designed to ignore or minimize the benefits of regulation, and individual decisions that either ignore the requirements to conduct analysis or are so clearly biased that courts have routinely

¹⁴⁶ Such an arrangement also raises questions of how such a body is staffed and how those in charge of it are chosen.

¹⁴⁷ Mandel, Michael, and Diana G. Carew. "Regulatory Improvement Commission: A Politically-Viable Approach to US Regulatory Reform." *Progressive Policy Institute* (2013): 3.

¹⁴⁸ Shapiro, Stuart. "Reforming the regulatory process to consider employment and other macroeconomic factors." In *Does Regulation Kill Jobs?*, pp. 223-238. University of Pennsylvania Press, 2013.

¹⁴⁹ Coglianese, Cary. "Moving forward with regulatory lookback." *Yale J. Reg. Online* 30 (2012): 57.

¹⁵⁰ Wallach and Kosar, *supra* note 135 suggest that the Congressional Office of Regulatory Analysis could perform these functions.

¹⁵¹ *Supra* note 2.

discarded the decisions.¹⁵² The result has been a systematic degrading of the role of analysis in government decision-making.

However, the uniqueness of the threat to analysis from the Trump Administration is not an essential prerequisite to understanding a need to re-examine the dual role of OIRA. One can see the Trump Administration as highlighting persistent flaws in the institutional design of the review of cost-benefit analysis rather than presenting a new threat. Most critical among these persistent flaws is the fact that the only check on agency analysis resides in the Executive Office of the President where it will inevitably be subject to crushing political pressures.

How can we correct this institutional design and augment the role of cost-benefit analysis while preserving the ability of agencies to fulfill their statutory missions? None of the solutions discussed above are without flaws. But if one believes (as I do) that cost-benefit analysis should play a role in regulatory decisions, some change to the current process is necessary. To use the language of costs and benefits though, increasing Congressional capacity to review analysis has the most potential benefits while creating the fewest costs to our system of governance.

Creating a Congressional Office of Regulatory Analysis would ensure that review of analysis is conducted by experts rather than by judges. Locating such an office in Congress rather than making it independent minimizes the likely practical and constitutional problems associated with government decisions being vetted outside the three branches of government. Finally, having additional review in the legislative branch rather than elsewhere in the executive branch ensures that the pressure on the regulating agency and on OIRA to produce high quality analysis would be maximized. Even a Congressional office with limited but public review power would create competition for good analysis.

The Congressional Budget Office does not ensure perfect budgetary numbers from OMB.¹⁵³ And it would be foolish to assume a CORA would lead to perfect analysis of agency regulations. But as the past two and a half years have shown, the role of analysis in regulatory decision-making is under threat. And if we believe that cost-benefit analysis in the regulatory process is a good (that it produces net benefits)¹⁵⁴ that it increases transparency,¹⁵⁵ and that it has the potential to improve policy decisions, then changes are needed to safeguard it.

¹⁵² See <https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/> (last viewed July 16, 2019).

¹⁵³ Indeed there is some argument that OMB budgetary quality has dropped since the creation of CBO but that is likely due to other factors and CBO may still improve OMB analysis over what it might have been in CBO's absence. Krause, George A., and James W. Douglas. "Does agency competition improve the quality of policy analysis? Evidence from OMB and CBO fiscal projections." *Journal of Policy Analysis and Management: The Journal of the Association for Public Policy Analysis and Management* 25, no. 1 (2006): 53-74.

¹⁵⁴ Portney, P. (1984). The benefits and costs of regulatory analysis. In V. K. Smith (Ed.), *Environmental policy under Reagan's executive order*. Chapel Hill: University of North Carolina Press.

¹⁵⁵ Sunstein, Cass R. *The cost-benefit revolution*. MIT Press, 2018.

