Making Executive Review Work

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Thank you very much.

I am grateful to the Weidenbaum Center for having funded most of my work and to Murray Weidenbaum, in particular, for his support. My comments do not reflect any endorsement by either the Center or, especially, Professor Weidenbaum who, when I'm finished, is going to tell you all the reasons why I'm wrong.

I'm going to cover a lot of material as extensively as I can. Time requires me to be blunt, however. So I will bluntly summarize the theoretical underpinnings of Executive review as follows:

1. "Agencies are out of control." Recall some of the comments made by distinguished Senators that Jeff Hill had unearthed for you earlier.

2. "Only the White House can control them." The White House is supposed to break the infamous iron triangle. Any day now that is going to happen.

3. "Put review authority in OMB and make the agencies run its gauntlet." Fine idea. OIRA was created by the Paperwork Reduction Act of 1980. It opened for business on April Fools Day in 1981, an unusually auspicious date.

4. Finally, to make all this work we only have to: "Enforce the president's will with an iron fist." That is very important. It is all very simple.

Well, reality is much more complicated. Agencies, to the extent they are out of control, are only out of the *president's* control. Regulatory agencies behave rationally in accordance with their interests and it's just that those aren't always those of the

president. Some agencies are harder to manage than others, especially those that attract true believers. Some people characterize OIRA as brimming with true believers. Oh, were that only so. I haven't met a single impressionable teenager, including my own three, who dreams of becoming an OIRA desk officer. Now I have met many wannabe EPA enforcement agents, particularly like Steven Segal in the unbearably awful film "Fire Down Below." It is available on the web for $5.04 plus shipping.

Well, the White House has weak incentives to do this kind of control. The White House has weak incentives because admitting the need to do so implies the president made major personal errors and, as you know, presidents don't make mistakes. On top of that, the budget rules over all things at OMB. Creating OIRA to oversee regulation within OMB didn't change this.

Last winter, I sent a congratulatory note to a certain newly appointed OMB associate director. He was an OIRA Desk Officer with whom I worked in the late 1980s. I reminded him that he was obligated by OMB traditions, spanning a long time, to undermine OIRA at every opportunity. He replied, "You mean OIRA still exists?" Within OMB, OIRA only has fair weather friends.

Putting regulatory review within OIRA was a marriage of convenience of the paperwork and regulatory review functions, and it is true that it made sense to put these functions together. Some arranged marriages also prove to be successful. Twenty years later, I would say that these functions still sleep in separate bedrooms.

The iron fist approach to regulatory oversight quickly encountered the tempered steel of agency and congressional power. In its heyday, OIRA returned only a couple of percent of the rules it reviewed. In many years, the number of rules returned could be

counted on one hand after several digits have been amputated. The moral of that story is when iron fists meet tempered steel, bet on steel.

We have some common implementation problems and when we conceived the symposium today it was to summarize the accomplishments of Executive review and candidly admit where it had fallen short. The point was to focus on constructive improvement. Not finger pointing. Each of the three speakers in the first session agreed that this was a terrific idea. But as the date got closer, about 90 combined years of bureaucratic experience counseled some caution on their part. I displayed little caution in my ten years at OIRA and have learned nothing about it since. So I'll plow forward with the original theme.

Belzer's Trinitarian Axiom says that the maximum number of things that a child, a husband, or political appointee can remember is three. Today, I am providing a list of ten. I figure if you are going to break a hallowed rule you should do so in a blaze of glory. Some of the implementation problems were raised explicitly in the first session. Some were alluded to with great discretion and some were avoided like anthrax.

Jeff Hill has already recounted for you how the size of the OIRA staff has steadily declined over the years. He also noted that regulatory review is transaction oriented and thus inherently reactive to the agencies. Jeff didn't exactly make this point transparent, but Sally Katzen really sort of did during her breakfast presentation. Jeff didn't mention it because he is a gentleman and Sally didn't because she is out of the job. The fact is that OIRA rarely sees a draft regulatory action until after agency officials have already made at least a preliminary decision. Now the strength of commitment to that decision makes all the difference for the effectiveness of OIRA review.

By rules of engagement, I have two specific dimensions in mind: First, OIRA's relationship to the agencies it oversees, and second, its relationship to the public. With respect to the agencies, it has a strange mixture of authority and subordination. With respect to the public, its contacts or either required by law or prohibited by Executive order. It is sort of Dr. Jekyll and Mr. Hyde, squared.

OIRA can give in to an agency, it can persuade it to change course, or it can return a rule for reconsideration. And that's it. Now the penalty for an agency failing to comply with Executive Order 12866 is – well, it's unclear. It can range from extreme condemnation to equally extreme approbation. A rebuke from OIRA can be very embarrassing but sometimes it is exactly what an agency head wants.

No matter which party is in the White House, the president's own initiatives are exempt from serious analytical review. If the president asks you for your opinion, he is looking for affirmation and not information.

Congress hates Executive review of agency rulemaking. It always has. It always will. If there is a statutory or judicial deadline, an agency can run roughshod over Executive review simply by delaying its submission until the deadline. And, finally, like the rest of OMB, OIRA's institutional role is to say "no." Be candid about that. Even the kinder and gentler OMB of most of the 1990s said "prove it." There are few organized interest groups in favor of either "no" or "prove it." This is compounded by the fact that OMB historically runs one of the worst spin machines in Washington. Ask Cindy Skrzycki, here from the Washington Post. It is tough to compete in the Washington spin cycle when all you have to say for yourself is "no comment."

I am going to focus today on possible ways to make some headway on problems that are highlighted in goldenrod on the slides. I am not supposing that I'm going to solve them all. That would be a little arrogant – even for me. Dr. Graham is clearly tackling the first item by announcing his intent to fill five new positions. If he is successful, OIRA's regulatory review staff will be about 40 percent below its peak in 1982 and about 40 percent above its abyss in 1999. As for the remaining problems in white on the slides, I think there are no solutions. Presidents will always exempt their own initiatives from serious internal scrutiny. Congress will always get huffy about OMB overseeing regulatory agencies. For some congressman, beating up on the Executive branch is what they live for.

Many remedies have been tried. Each had the best of intentions but nevertheless went a bit awry – consumed by the law of unintended consequences. Executive review is regulating the regulators. Agencies are the regulated parties and OIRA is the regulator. That is a very strange relationship. Agencies have learned a few tricks about noncompliance from those they regulate and OIRA needs to learn a few tricks about regulating from the agencies.

I will summarize very briefly here. “Negotiate and persuade” requires OIRA and the agencies to share the same objectives. Well, they don't. This leads to what I would call "Let's Make a Deal Syndrome" which undermines the role of impartial analysis. It allows contending parties to exaggerate their arguments. ”Securing OIRA's participation in agency workgroups” enables OIRA's staff to shape a rule and prevent serious conflicts later on. Agencies hate it. They consider OIRA staff to be the opposition, if not the enemy. The response is similar to the old joke about the enforcement officer visiting

a regulated party in the private sector and announcing, "I'm with the government and I'm here to help."

OMB's 1990 RIA guidance helped set government-wide standards for analysis but compliance has been spotty. In 1996, OMB issued what it called a "Best Practices Document." Most of that document actually consists of *minimum* practices. Things like "using the same baseline for estimating both costs and benefits," "discounting both costs and benefits," and "discounting them at the same discount rate." These are fundamental principles of benefit/cost analysis and they are not "best practices." "Best practices" are things to which we aspire but not things we actually intend to achieve. Any guidance that sets forth best practices establishes a ceiling for quality, not a floor. Ironically, the term best practices in found in only one place in the body of the 1996 guidance document, in a section on the use of contingent valuation methods. It *requires* agencies to use best practices. That is, it set a floor, not a ceiling.

"Returning a rule to the sender" is OIRA's most powerful weapon. It is publicly transparent and, as Neil Eisner alluded earlier, it can also be embarrassing. What Neil didn't say, because he is also a gentleman, is that sometimes a return from OIRA is exactly what the agency head wants. Returning a rule isn't such a great strategy when the agency head says "Don't throw me in that there briar patch."

I want to talk now about some new idea – at least, mostly new ideas. I will quickly dispense with two and offer a prediction about a third. Then I'll focus on three for which I accept responsibility. The distinguished commenters on this panel will tell you why my proposals won't work.

First, the regulatory budget. Well, this isn't really a new idea but I include here because it hasn't been tried. Its principal defect is that it doesn't have a prayer of working. It has all the defects of fiscal budgeting with a host of additional problems. In particular, it would create incentives for especially perverse strategic behavior.

Regulatory accounting has been with us for a few years now. We are still waiting for something useful to come out of it. As long as its objective is to count the total costs and benefits of regulation, it will fail. OIRA is dependent on agency Regulatory Impact Analyses for their estimates. Many, perhaps most, of these documents are seriously flawed. Many regulations, such as those issued by independent commissions, have no RIAs at all.

Now I'll make a few cautionary predictions about "prompt letters" and move on to "published technical reviews," "RIA Blueprints," and "integrating paperwork and regulatory reviews." This is an innovation of new OIRA Administrator John Graham. A prompt letter, very simply, is an open invitation for the agency to take regulatory action in a specific area. The agency may have been aware of an issue for a number of reasons or have been aware of it but is slow to act. Dr. Graham has insisted that he is not opposed to regulation per se and, in fact, is in favor of regulation if it is cost effective and where benefits justify costs. Prompt letters clearly are an effort to prove to his critics that he is sincere. I, for one, am dubious about whether this will be persuasive. Some people didn't need to be persuaded of this because they have read his work. Others will never be persuaded.

Prompt letters also provide a way to overcome the end-of-pipe character of Executive review. They provide a tool for encouraging agencies to act and for

communicating early and publicly what OIRA thinks is important. There are some potential risks. There is a significant danger that a prompt letter will be misconstrued as a blank check. It would be troubling if an agency responded by plowing forward with a regulation that was ineffective, inefficient, or otherwise distasteful. Worse, an agency could celebrate its good fortune by cutting short research and analysis. It might do this to avoid learning anything that could undermine the case for regulating. Scientific and analytic stasis would result if agencies conclude that ignorance is indeed bliss. For any regulation covered by prompt letter, OIRA needs to oversee its development very, very carefully to prevent its good intentions from going awry.

Now on to my three proposals. OIRA staff develops significant expertise and insight and then what they do is they hide it under a bushel. This reflects long-standing OMB tradition, the wealth of inside information that it has gleaned, and a legitimate need to protect Executive branch deliberations. But it seriously undercuts the political legitimacy of Executive review and prevents OIRA from getting a fair hearing on the merits. What can be disclosed with compromising legitimate confidentiality concerns? Answer: An evaluation of the technical merits of an agency's RIA.

Publishing technical reviews would greatly increase transparency. They would provide useful new ways to expose poor analysis but also to reward excellence. Technical reviews provide a logical basis for OIRA's regulatory accounting report. I myself will admit to having been merciless in my public comments on these reports. So far, they have been merely clerical compilations of agency estimates with little value-added. Technical reviews provide the foundation for truly informative reports.

As for the top of my list for potential risks, the first is that OIRA could be wrong. Ten years ago, John Graham called me after discovering that I was the author of the article on federal agency risk assessment practices that John Morrall alluded to earlier. He asked me if the article had been peer reviewed. I answered with well-inculcated OMB disdain, "John, OMB doesn't *have* any peers." If OIRA were to publish technical reviews of agency analyses, it would not be able to get away with this. I am very fond of this idea now that John is in OIRA and I am not.

A second threat is that EOP officials might prefer that OIRA be less candid in its appraisals. There are things policy officials are happy to know about in confidence but would rather not see in print.

Third, a poor technical review could supplant the return letter as the most embarrassing outcome of OIRA review. I can imagine some agency heads might prefer that rules be quietly returned instead.

Finally, praise bestowed on agency analysis might be taken out of context and abused. We certainly have seen that before. OIRA might commend an agency for using a particular analytic approach in say, Regulation A. The agency might then use it as a precedent for Regulation B where it doesn't belong. This is a bit like the prompt letter problem insofar as an agency might misinterpret early encouragement as an unqualified endorsement.

A second innovation I recommend is RIA Blueprints. I first recommended this publicly in my comments to OIRA last July on this year's draft regulatory accounting report. I am reiterating it today because I know how incredibly responsive OIRA has

been to my comments on past draft reports. I hope to find a more sympathetic audience here. It could hardly be anything but more sympathetic.

RIAs are prepared to justify decisions – this is an open secret in the regulatory business – not to inform decision making. Errors are tough to fix when they are the foundation of an agency head's decision. RIAs ought to be performed first. They ought to be policy neutral portrayals of the likely consequences of regulatory decision making that would inform an agency decision maker as much as it can done so that a choice can be made intelligently. Of course, that's not the way things are actually done.

OIRA often seeks additional information and analysis during its end-of-pipe review. This happens because the agency has chosen not to evaluate an obviously interesting alternative, or it has used bad data and methods, or because it has imbedded in the RIA policy preferences that conflict with Executive order principles. Now, agencies hate these requests and they call them “late hits.” Sometimes they are. But Executive review is a full-contact sport.

RIA Blueprints, I think, are the solution because they are responsive to both sides’ legitimate complaints. Good analysis can precede decision making and late hits can be disallowed. An RIA Blueprint needs to have fairly detailed information concerning what alternatives will be analyzed; and what data, models, and default assumptions will be used in the analysis. In addition, a Blueprint should clearly specify procedures that provide flexibility. When will the default assumptions give way to empirical data? When will new data or models be used instead? Under what conditions will both parties agree to alter the Blueprint? Each of these issues must be addressed. Finally, a RIA Blueprint should have clear milestones for completion and publication of

all components. Public disclosure should not be delayed until after decisions have been made.

Let's talk about procedures for implementing RIA Blueprints. They should be written at the pre-rule stage, well before the agency has enough information to credibly know what its decision will be. Now, many will have prior beliefs about what analysis will reveal. That's okay so long as there are no thumbs on the scale. The process should be open to public participation under joint OIRA/agency leadership, perhaps a bit like a SBFRFA panel. The final text ought to be decided by OIRA and the agency, and requiring stakeholder consensus – like a regulatory negotiation – would be a mistake. RIA Blueprints would be published on line and clearly noticed in the *Federal Register* as a Memorandum of Understanding.

What does the agency get out of this. OIRA's review of the RIA at the end of the process would be limited to evaluating the agency's compliance with the Blueprint. OIRA would be fully justified in returning a rule that is accompanied by a noncompliant RIA, but of course it would have to provide a public justification for that. To ensure that this never occurs, an agency might want to provide milestones in the process whereby OIRA signs off, certifying that RIA components do in fact comply.

RIA Blueprints can't eliminate policy conflicts either during the process of regulatory development or at the end, but they can substantially reduce the clutter of analytic disputes so policy officials can focus on policy issues. The RIA Blueprint achieves the allusive goal of securing early involvement of OIRA and sister agencies, which otherwise might be excluded, and it does so in a way that preserves the agency's need to keep its own counsel. It provides for much more public participation and

transparency and it takes away the advantage that interest groups have in obtaining secret, privileged access to the regulatory development process.

RIA Blueprints provide an early opportunity to identify data gaps and to respond to them. Agencies can use the Paperwork Reduction Act process to fill these gaps. Alternatively, interested parties might respond on their own to generate needed data, safe in the knowledge that there is a structured process to ensure that scientifically superior data will be, in fact, used. Finally, the RIA Blueprint overcomes the long-standing problem of RIAs being prepared after decisions have been made.

There is no question that devising RIA Blueprints would be time consuming, especially at first as we learn our way around. It would divert some staff from their current tasks, though it should save time later in the process. It also might require more staff and staff with greater technical training. Of course, the process could be short-circuited by politics. There will always be an interest group that will want to scuttle the process once it appears to be headed in a direction it doesn't like. This is unavoidable but it isn't worse than the status quo. I think it is better than the status quo because the opportunity to participate in a public RIA Blueprint process provides a kind of procedural fairness that currently does not exist. It can't prevent someone from alleging that a grave injustice has been committed, but it reduces the credibility of such complaints.

My final proposal is to integrate the regulatory and paperwork review processes. Let me first say what this proposal is not. It is not some back-door scheme for using the Paperwork Act to rescind or repeal a regulation. Frankly, I think this issue is a red herring. OIRA does not have the statutory authority to disapprove the collection of information that is required by law. A genuine problem is that the process of developing

and reviewing a regulation is too often disconnected from the process of collecting data that would inform decision making. I cannot count the times when agency personnel told me that certain information, which we all agreed would be very useful, was not in fact available and there was no time left to collect it. So, let's fix this.

With bad data, a good decision requires dumb luck. Obtaining good data requires early anticipation of future data needs. The paperwork review process is the best available opportunity to anticipate these future data needs. This means identifying data gaps early and taking action to plug them. It also means identifying weak information collections and either improving them or terminating them. Finally, to firmly establish the credibility of these data, compliance ought to be documented with Information Collection Request supporting statements and research protocols when they are used for a Regulatory Impact Analysis. In other words, we should integrate the paperwork and regulatory review processes so that the best possible scientific and economic data are generated in time to be used for regulatory decision making. What a revolutionary concept!

To make this work, public participation in the Paperwork Reduction Act needs to be revitalized. OIRA is required by law to encourage public participation in paperwork review, but public participation is severely restricted under Executive review. This has been the case since the mid-1980s when what we called the "Wendy Gramm Procedures" where implemented. These extremes are hard to manage under the best of circumstances, and when a regulation contains a paperwork that is itself the crux of the rule, the system just breaks down. Everybody except Jeff Hill is completely baffled

about all this. Now we should make these procedures transparent and coherent because Jeff is not going to be with us in the federal bureaucracy forever.

Legitimate confidentiality needs of Executive review can be protected best, in my view, by maximizing the transparency of the rest of the process – especially information collection activities that occur long before there should be any concerns about ex parte communication. Integrating these functions makes it much more possible for OIRA to manage its increasing array of responsibilities, many of which it did not have 20 years ago when the current structure was established. There is a consensus that OIRA's procedures ought to be more transparent, and as these responsibilities grow, the need for transparency only increases.

There is another consensus that high quality science and economic analysis ought to play a larger role, if not actually guiding decision making then at least understanding the consequences of regulatory choices. Improving the quality of science and economics used in regulatory decision making requires restructuring procedures so that this information can be obtained in a timely manner.

Integration probably requires more staff, and perhaps staff with more specialized training. It will also require much better information systems. We have noted that OIRA is currently at half its maximum strength. Its staff structure is essentially unchanged in 20 years OIRA depends on information systems for managing its paperwork and regulatory review processes that, believe or not, were developed in 1980 and 1981, respectively. Integrating paperwork and regulatory review will increase transparency. Now the clear risk posed by transparency is that politics become more visible. Otto von Bismarck is credited with having said, "The less people know about how sausages

and laws are made, the better they'll sleep at night." Von Bismarck was not big on transparency. But he is still very popular today, especially in Washington.

For 20 years I've heard people say how important it is to get high quality science and economics. Let's not kid ourselves. The more important they are, the more they will become political battlegrounds. Peer review is widely believed to the solution for this. But I am skeptical. I have yet to see a peer review model that works well consistently and I've seen plenty that consistently work really badly. This is the next area where structural changes are probably needed, but that's a topic for another day.

Time for me to sum up. First, Executive regulatory review works but it clearly could work better. This is so obvious that even the General Accounting Office could have written a 100-page report with this title.

Second, I want to say what we all know but we try to ignore: the Law of Unintended Consequences applies to all reform proposals. It surely applies to my proposals as well and my turn at the business end of the knife is coming up in a moment.

Finally I want to sum up my collection of proposals as succinctly as possible with a coherent theme. Procedural changes that make OIRA more transparent where it can be transparent and an enhanced early and sustained participation by OIRA and the public have the greatest potential for success. Each of my three proposals serves to advance one or both of these fundamental objectives, and each can be done within the confines of current law and current Executive order. I'll be the first to admit that problem-solving is a dangerous business, but I'm not in government any longer and I've got a long way until retirement. So I feel comfortable taking some risks. And if you first

don't succeed, you are expected to keep trying. Unless you are learning how to skydive.

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