ARTICLES

OIRA'S DUAL ROLE AND THE FUTURE OF COST-BENEFIT ANALYSIS

by Stuart Shapiro

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SUMMARY

The role that cost-benefit analysis (CBA) plays in regulatory decisionmaking is at a crossroads, as is the role played by the agency that oversees its implementation, the Office of Information and Regulatory Affairs (OIRA). The Trump Administration has largely demonstrated agnosticism toward CBA; this has left many to question whether OIRA can still play the role of ensuring quality analysis while serving as the eyes and ears of the president in overseeing regulation. This Article discusses the history of these dual functions within OIRA, the challenges posed by the regulatory policy of the Trump Administration, and possible alternative homes for CBA to ensure that there is a place for quality analysis of executive branch regulations.

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 (CBAs) 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 ears"[1] 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. CBA may suggest that a regulation that the president would oppose for political reasons 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 Ronald Reagan through Barack Obama all supported the idea of using CBA as a tool for making regulatory policy, even as, on occasion, their policies produced costs that clearly outweighed their benefits. There are signs that under the Donald Trump Administration, the commitment to CBA 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 decisionmaking.[4] It has been exceptionally late in submitting required reports to the U.S. Congress on the costs and benefits of regulations. 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 CBA mean for OIRA's future and for the future of CBA 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 regula-

Author's Note: This work was developed as part of a workshop at the C. Boyden Gray Center for the Study of the Administrative State. I am grateful to the participants in this workshop for their comments on two drafts of this Article. All errors are my own.

1. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1082 (1985).
2. Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ELR 10433 (July 2005).
3. *See* Office of Information and Regulatory Affairs, *OIRA Return Letters*, https://www.reginfo.gov/public/do/eoReturnLetters (last visited Mar. 16, 2020).
4. *Infra* notes 51-65.
5. *Infra* notes 67-87.
6. Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§3501-3521).

tions 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 CBA, and OIRA's ability to balance its two most significant responsibilities.

This raises the further question of how best to situate CBA 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 CBA. As a result, it is time for supporters of CBA to consider alternative institutional arrangements for the use of CBA in regulatory policy, in order to ensure it has a role in decisionmaking. These arrangements could include housing review of CBAs 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 CBA in the regulatory process.

This Article proceeds as follows. In Part I, I review the history of and the academic literature on OIRA's two missions. Part II discusses the challenge to the analytical mission of OIRA posed by the Trump Administration, and Part III describes why this challenge may have lasting impacts on the role of OIRA and CBA. In Part IV, I discuss the advantages and disadvantages of various alternative institutional arrangements to safeguard CBA of regulations, and in Part V I offer concluding thoughts.

I. OIRA's Missions

OIRA was created in the Paperwork Reduction Act signed by President Jimmy Carter in 1980.[7] Regulatory review and the use of CBA to evaluate regulations were used in various formats throughout the 1970s by Presidents Gerald Ford and Carter.[8] The role of OIRA in regulatory review was formalized early in the Reagan Administration with the issuance of Executive Order No. 12291.[9] That 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 No. 12291 explicitly laid out the cost-benefit mission of OIRA, stating, "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."[11] The criteria in the Executive Order for whether regulations should be issued 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 priorities 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. Peter Shane argues that under Presidents Reagan and George H.W. 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] Future U.S. Supreme Court Justice Elena Kagan notes that while it was cast as being about deregulation and CBA, Executive Order No. 12291 most importantly enhanced presidential oversight.[15]

Christopher DeMuth and Douglas Ginsburg, among the prime intellectual influences on Executive Order No. 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]

Executive Order No. 12291 was maintained throughout the Reagan and Bush presidencies. While there was widespread uncertainty about whether President Bill Clinton would maintain OIRA regulatory review,[18] Executive Order No. 12866, issued by the Clinton Administration to replace Executive Order No. 12291, retained the role for OIRA of reviewing agency CBAs 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, however, also 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

7. *Id.*
8. Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 Admin. L. Rev. 37-69 (2011).
9. Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 19, 1981).
10. *Id.*
11. *Id.* §2(b).
12. President Bush established the Council on Competitiveness when OIRA was weakened due to U.S. Senate refusal to confirm an OIRA administrator. See Center for Regulatory Effectiveness, *Scope and Content Note*, http://www.thecre.com/ombpapers/1999-0129-F.htm (last visited Mar. 16, 2020), for more detail.
13. Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 Ark. L. Rev. 161 (1995).
14. Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1064 (1985).
15. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245-385 (2001).
16. DeMuth & Ginsburg, *supra* note 1.
17. *Id.* at 1080.
18. *See* Sally Katzen, *Tracing Executive Order 12866's Longevity to Its Roots*, Geo. Wash. Reg. Stud. Center, Oct. 1, 2018, https://regulatorystudies.columbian.gwu.edu/tracing-executive-order-12866%E2%80%99s-longevity-its-roots.
19. Exec. Order No. 12866, §1(b)(6), 58 Fed. Reg. 51735 (Sept. 30, 1993).

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 No. 12291 was in force. Advocates of presidential control cited benefits such as the enhancement of the legitimacy of the regulatory 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 No. 12866,[23] many scholars followed the lead of 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; and (3) a recognition that Congress is unlikely to override such actions resulting from such oversight.[25] These incentives make some degree of presidential oversight of agency regulations inevitable, if not always desirable.

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

Debate over OIRA's other primary role, as the guardian of CBA in regulatory decisionmaking, has largely taken place in economic journals and some law reviews. Interestingly, both supporters and detractors of CBA have been disappointed with the implementation of CBA 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 argued that it 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 CBA can be seen as a procedural control on the bureaucracy. It serves as a method both for facilitating external oversight[34] 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 of CBA argue that OIRA's power to oversee agency CBA leads to an inherent antiregulatory 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 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]

20. *Id*. §6(b).
21. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821-85 (2003).
22. *Id*.
23. Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 Fordham Urb. L.J. 1097 (2005).
24. Kagan, *supra* note 15.
25. *Id*.
26. *Id*. at 2250.
27. Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate Over Law or Politics*, 12 U. Pa. J. Const. L. 637 (2009).
28. Kagan, *supra* note 15.
29. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L.J. 1337, 1349 (2012). *See also* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260 (2006).
30. *See* Bagley & Revesz, *supra* note 29.
31. Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 Regulation 33 (1981).
32. *See*, *e.g.*, Thomas O. McGarity, Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy (2005); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. Pa. L. Rev. 1553 (2001).
33. Thomas O. McGarity, *Some Thoughts on "De-Ossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992).
34. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. Pol. Sci. 165-79 (1984).
35. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243 (1987).
36. Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345 (2019).
37. *See*, *e.g.*, Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?*, 22 J. Econ. Persp. 67-84 (2008); Jerry Ellig et al., *Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations*, 7 Reg. & Governance 153-73 (2013).
38. *See*, *e.g.*, Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489-552 (2002).

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 (though more often criticized). Its 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, though there are a few exceptions. 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 CBA enumerates the costs and benefits to parties across the economy, they argue that CBA is the ideal tool to help the president manage the regulatory state.[40]

Steven Croley conducted 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 decisionmaking in the Executive Office of the President, OIRA career staff have done their jobs in a manner that ensures that analytical results are heard within the Executive Office of the President. Of course, he also relays an anecdote where a political official said to him, "[T]ell me what the analysis says we should do before I sell you down the river."[42]

In an earlier piece, I presented a perspective based in part upon my years as an OIRA desk officer.[43] I outlined four scenarios (see the table on page 10389, which is replicated from my earlier work).[44]

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 and 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.[45]

This is not to imply that analysis plays no role in OIRA decisionmaking. 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 weak or nonexistent. In these cases, there is room for analysis to play a significant role.[46] 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.[47] 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 CBAs 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 other parts of the executive branch,[48] particularly other parts of the Executive Office of the President.[49] 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.[50]

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 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 CBA?

II. The Trump Administration and CBA

The Trump Administration continues to rely upon Executive Order No. 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 CBA. 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 three years, several actions have indicated that the balance has moved further away from CBA. The clearest indication of this shift has been an Executive Order issued by the Trump Administration in its early days, Executive Order No. 13771.[51] This order implemented a requirement that agencies identify two regulations for repeal for every new regulation that they issue (the "two-for-one" requirement),[52] and a requirement that

39. DeMuth & Ginsburg, *supra* note 1.
40. *Id.*
41. Croley, *supra* note 21, at 882.
42. Donald R. Arbuckle, *The Role of Analysis on the 17 Most Political Acres on the Face of the Earth*, 31 Risk Analysis 884, 891 (2011).
43. I worked in OIRA from 1998 until 2003.
44. Shapiro, *supra* note 2, at 10438.
45. Shapiro, *supra* note 2.
46. *Supra* note 29.
47. Christopher DeMuth, *OIRA at Thirty*, 63 Admin. L. Rev. 15-25 (2011).
48. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838 (2012).
49. Shapiro, *supra* note 2.
50. Sunstein, *supra* note 48.
51. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).
52. *Id.* §2.

Table 1. Four Scenarios

	President* 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)

*The president's views on a regulation may not be clear. He may not have views on a particular regulation. However, as noted by Lisa Schultz Bressman and Michael Vandenbergh, 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. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control,* 105 Mich. L. Rev. 47 (2006).

agencies produce "annual regulatory cost submissions,"[53] in effect putting into place a regulatory budget.

These two requirements in Executive Order No. 13771 de-emphasized, for the first time in 36 years, the role of CBA in the regulatory process. Former OIRA Administrator Sally Katzen points out that the Executive Order mentions "costs" 17 times and never mentions "benefits."[54] 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.[55]

A regulatory budget is an idea that has circulated among regulatory scholars for at least a generation.[56] 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 CBA, 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.[57]

Some defenders of CBA have cast the new Executive Order as a concession to reality. They cite the lack of perfect information, which hampers review of CBA, and the lack of incentives for agencies to produce CBAs that are sufficiently rigorous to inform regulatory decisionmaking.[58] 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 to more carefully choose their priorities.[59] They also argue that these tools encourage the retrospective review of regulation.[60]

The more prevalent view, however, is that the new Executive Orders undermine the use of CBA in regulatory policymaking and contradict the utilitarian philosophy upon which CBA rests.[61] One is left with the suspicion that after 36 years of using CBA 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 focuses merely on regulatory costs.[62]

OIRA attempted to temper the non-CBA focus of Executive Order No. 13771 by writing guidance that included the need to measure both the benefits and costs of regulations.[63] However, the public debate over Executive Order

53. *Id.* §3.
54. *See* Sally Katzen, *Benefit-Cost Analysis Should Promote Rational Decisionmaking*, Reg. Rev., Apr. 24, 2018, https://www.theregreview.org/2018/04/24/katzen-benefit-cost-analysis-promote-decisionmaking/.
55. Caroline Cecot & Michael A. Livermore, *The One-In, Two-Out Executive Order Is a Zero*, 166 U. Pa. L. Rev. Online 1 (2017). Note that the authors also argue that the Executive Order will not facilitate presidential control.
56. Christopher C. DeMuth, *The Regulatory Budget*, 4 Regulation 29 (1980).
57. Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 Admin. L. Rev. 835 (2014).
58. *See* Susan Dudley, *Regulating Within a Budget*, Reg. Rev., Apr. 23, 2018, https://www.theregreview.org/2018/04/23/dudley-regulating-within-a-budget/.
59. Ted Gayer et al., Brookings Institution, Evaluating the Trump Administration's Regulatory Reform Program (2017), https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf.
60. Susan E. Dudley & Brian F. Mannix, *Improving Regulatory Benefit-Cost Analysis*, 34 J.L. & Pol. 1 (2018).
61. *See* Richard L. Revesz, *Challenging the Anti-Regulatory Narrative*, Reg. Rev., July 23, 2018, https://www.theregreview.org/2018/07/23/revesz-challenging-anti-regulatory-narrative/; Jodi L. Short, *The Trouble With Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 Minn. L. Rev. 93 (2018).
62. Daniel Farber, *Regulatory Review in Anti-Regulatory Times*, 94 Chi-Kent L. Rev. 383 (2019).
63. *See* Memorandum from Dominic J. Mancini, Acting Administrator, OIRA, to Regulatory Policy Officers and Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commission

No. 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 ignores the benefit side of CBA. The two-for-one 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 CBA.

The prioritization of costs over benefits is also obvious in the RIAs produced by the Trump Administration.[64] No administration has anything close to a perfect record in conducting CBAs. This is why the criticisms of government CBAs (even from those who support its use)[65] have been so prevalent in the decades since the issuance of Executive Order No. 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 from the Obama Administration's methodology for assessing the costs and benefits of reducing carbon emissions. They greatly reduced the social cost of carbon[67] used in its RIA.[68] The changes were due to ignoring climate impacts outside the U.S. 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 intergenerational impacts, there is greater agreement that longer time frames require lower discount rates.[71] Further, 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.

- The Trump Administration's other signature attempt to repeal an Obama Administration regulation designed to curb carbon emissions has been its proposed Safer Affordable Fuel-Efficient Vehicles (SAFE) rule.[73] The RIA[74] accompanying this proposed rule from the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration was widely acknowledged to be rife with basic errors. Once corrected, these errors would eliminate the net benefits from the rule and show that it would decrease social welfare.[75]

- In another EPA rulemaking, the Trump Administration repealed the "Waters of the United States" regulation issued by the Obama Administration. Experts described the assumptions behind the Trump estimate of the costs and benefits of the repeal[76] as "stunning" and equivalent to assuming that "pigs could fly."[77] The estimate of benefits in the proposal[78] was "incomplete."[79] The original CBA quantified and monetized benefits that the Trump EPA ignored. As a result, "[t]he prior CBA provides a powerful default for the appropriate scope and assumptions and

(Apr. 5, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.

64. *See id*.
65. *Supra* note 37.
66. 46 Fed. Reg. 13193 (Feb. 19, 1981).
67. Jeff Tollefson, *How Trump Plans to Wipe Out Obama-Era Climate Rules*, Nature, Mar. 28, 2017.
68. *See* U.S. Environmental Protection Agency, Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal (2017), https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf.
69. Lisa Friedman, *Cost of New EPA Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. Times, Aug. 21, 2018.
70. Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 Cal. L. Rev. 1557 (2011).
71. Mark A. Moore et al., *"Just Give Me a Number!" Practical Values for the Social Discount Rate*, 23 J. Pol'y Analysis & Mgmt. 789-812 (2004).
72. *See, e.g.*, *How Trump's EPA Is Changing the Public Health Benefits Around Mercury*, PBS, Dec. 28, 2018, https://www.pbs.org/newshour/show/how-trumps-epa-is-changing-the-public-health-benefits-around-mercury.
73. *See* U.S. Environmental Protection Agency, *The Safer Affordable Fuel Efficient (SAFE) Vehicles Proposed Rule for Model Years 2021-2026*, https://www.epa.gov/regulations-emissions-vehicles-and-engines/safer-affordable-fuel-efficient-safe-vehicles-proposed (last updated Sept. 27, 2018).
74. *See* National Highway Traffic Safety Administration & U.S. Environmental Protection Agency, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021-2026 Passenger Cars and Light Trucks (2018), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ld_cafe_co2_nhtsa_2127-al76_epa_pria_181016.pdf.
75. Robinson Meyer, *We Knew They Had Cooked the Books*, Atlantic, Feb. 12, 2020, https://www.theatlantic.com/science/archive/2020/02/an-inside-account-of-trumps-fuel-economy-debacle/606346/.
76. *See* U.S. EPA & U.S. Department of the Army, Economic Analysis for the Proposed Revised Definition of "Waters of the United States" (2018), https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.
77. *See* Ariel Wittenberg, *Critics Slam WOTUS Economics: "In Theory, Pigs Could Fly,"* E&E News, Jan. 21, 2019, https://www.eenews.net/stories/1060117957. The expert, John Dorney, was referring to an assumption that Republican-controlled states such as North Carolina would on their own strengthen their regulations protecting navigable waterways. *See also* Kevin J. Boyle et al., *Deciphering Dueling Analyses of Clean Water Regulations*, 358 Science 49-50 (2017).
78. The comments here refer to the analysis accompanying the proposal. In the final rule (The Navigable Waters Protection Rule: Definition of "Waters of the United States," 33 C.F.R. pt. 328 (2020), https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf), EPA said the following, indicating perhaps that the flaws with the RIA were profound: "While the economic analysis is informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this final rule." *See*, *e.g.*, National Ass'n of Home Builders v. Environmental Prot. Agency, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012) (noting that the quality of an agency's economic analysis can be tested under the Administrative Procedure Act if the "agency decides to rely on a cost-benefit analysis as part of its rulemaking").
79. Farber, *supra* note 62.

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."[80]

- The U.S. Department of Labor also has been working to repeal Obama Administration regulations. In its effort to reverse a rulemaking that governed the pooling of tips,[81] despite the likelihood that the regulation would result in transfers of hundreds of millions of dollars (thus triggering the RIA requirement in Executive Order No. 12866), the Department did not even conduct[82] a CBA.[83]

- The RIA for a proposed regulation that would remove 1.7 million families from food stamp eligibility, a proposal from the U.S. Department of Agriculture, spent only three paragraphs discussing the benefits and costs of this action.[84] Such benefits and costs are certain to be significant under the definition of Executive Order No. 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.[85]

- Similarly, in a regulation designed to lower civil monetary penalties for automobile manufacturers that failed to meet emission standards,[86] the U.S. 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).[87]

Finally, OIRA is required to produce an annual report for Congress detailing the costs and benefits of regulations issued in the previous fiscal year. For nearly three years, the Trump Administration failed to issue either the final report for fiscal year 2016 or the draft reports for fiscal years 2017-2019. In December 2019,[88] with no publicity, the final 2016 report (which showed large net benefits for the regulations from the last year of the Obama Administration), and the three draft reports, were placed on OIRA's website.[89] The three draft reports were combined into one report that did not include the background data that had historically been included in these reports. Instead, the data were placed into spreadsheets that were also accessible via the OIRA website.[90]

The requirement to conduct a CBA is far from the only procedural requirement in the rulemaking process where the Trump Administration has cut corners. Other Administration decisions have been overturned in court because of insufficient fealty to requirements for notice and comment[91] and the Regulatory Flexibility Act.[92] 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 that largely ignore a key pillar of CBA (the benefits) and a series of regulatory analyses that have been widely criticized for their poor quality points to an antipathy toward CBA (or a complete agnosticism to 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.[93] What does this mean for the future of CBA? What does it mean for the future role of OIRA?

III. The Challenge Posed for CBA and OIRA

The Trump Administration has altered the dynamics of long-standing 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 CBA.

80. Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 Duke L.J. 1593 (2019).
81. U.S. Department of Labor, Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395 (Dec. 5, 2017).
82. 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 No. 12866.
83. *See* Heidi Shierholz, *DOL Scrubs Economic Analysis That Showed Its Tip Pooling Rule Would Be Terrible for Workers*, Econ. Pol'y Inst., Feb. 1, 2018, https://www.epi.org/press/dol-scrubs-economic-analysis-that-showed-its-tip-pooling-rule-would-be-terrible-for-workers/.
84. U.S. Department of Agriculture, Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35570 (July 24, 2019).
85. Richard L. Revesz, *Congress and the Executive: Challenging the Anti-Regulatory Narrative*, 2018 Mich. St. L. Rev. 795 (2019).
86. U.S. Department of Transportation, Civil Penalties, 83 Fed. Reg. 13904 (Apr. 2, 2018).
87. Institute for Policy Integrity Public Comment on Reduced Civil Monetary Penalty Rule (May 2, 2018), https://policyintegrity.org/documents/05.02.18_CAFE_penalties_reconsideration_IPI.pdf.
88. *See* Stuart Shapiro, *Making Sense of the Trump Administration's Regulatory Numbers*, Reg. Rev., Jan. 14, 2020, https://www.theregreview.org/2020/01/14/shapiro-making-sense-trump-administration-regulatory-numbers/.
89. *See* Office of Management and Budget, *Reports*, https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/ (last visited Mar. 16, 2020).
90. *Id.*
91. *See* Lisa Heinzerling, *Laying Down the Law on Rule Delays*, Reg. Rev., June 4, 2018, https://www.theregreview.org/2018/06/04/heinzerling-laying-down-law-rule-delays/.
92. California v. Bureau of Land Mgmt., No. 17-cv-07186 (N.D. Cal. filed Dec. 19, 2017); Sierra Club v. Zinke, No. 17-cv-07187-WHO (N.D. Cal. June 26, 2018).
93. Morrison, *supra* note 14.

And those who have historically opposed CBA 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,[94] they have also used these errors to point out what they see as the inherent failings of CBA.[95] This leaves a relatively small slice of advocates actively supporting a role of CBA in regulatory decisionmaking.

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,[96] three years into the Administration, there are no signs that, to paraphrase Steve Bannon, the administrative state has been deconstructed.[97] Eventually, whether it is under a Bernie Sanders Administration, a Joe Biden Administration, or a Mike Pence 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 and return us to a regulatory regime governed by Executive Order No. 12866 (although in certain political climates, Executive Order No. 12866 itself could be revised significantly or even eliminated).

The future debates over CBA also have obvious implications for the future of OIRA. While OIRA attempted to write guidance to reassert the role of benefits in CBA,[98] 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 CBA. 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 improve public health have appointed people like Sunstein and 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 letter[99] to push agencies to issue regulations with large net benefits, and touted regulations like EPA's removal of lead from gasoline.[100]

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 accomplishments[101] (like Executive Order No. 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."[102] My own experience as an OIRA desk officer and my continued interactions with those who serve in OIRA generally confirm this perception. But the preferences of OIRA staff have at most a limited relationship with how OIRA is perceived outside the White House complex.[103] That perception is instrumental in determining long-term support for OIRA's role. In an administration that has ignored or eschewed high-quality CBA, OIRA is inevitably going to be seen as increasingly more political than analytical.

If the next administration does not commit to recentering CBA in OIRA's mission, then the long-term potential for CBA to play a role in regulatory policy is significantly diminished. Even if the next administration does make such a commitment, whether there is sufficient external 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."[104] This raises the question of how to restore CBA to a prominent place in regulatory debates, either within OIRA or outside of it.

IV. Alternatives for CBA and OIRA

In this part, I review alternative institutional arrangements for the use of CBA in the regulatory process. Some of these arrangements are supplements to OIRA's role, others are replacements for it, and some can be considered as either. In light of the treatment of CBA under the Trump Administration, supporters of its use need to reex-

94. Stuart Shapiro, *Embracing Ossification*, Regulation, Winter 2018/2019, at 8-10.

95. Farber, *supra* note 62. *See also* Natalie Jacewicz & Richard L. Revesz, *EPA Is Rolling Back Protections With Methodology No Respectable Economist Would Endorse*, Hill, Mar. 4, 2019, https://thehill.com/opinion/energy-environment/432471-epa-is-rolling-back-protections-with-methodology-no-respectable; Peter Shane et al., Reforming "Regulatory Reform": A Progressive Framework for Agency Rulemaking in the Public Interest (2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3416544. 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.

96. *See* Bridget C.E. Dooling, George Washington University, Trump Administration Picks Up the Regulatory Pace in Its Second Year (2018), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/Insights/GW%20Reg%20Studies%20-%20Trump%27sFirst18Months%20-%20BDooling.pdf.

97. *See* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* Wash. Post, Feb. 23, 2017, https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

98. Memorandum from Dominic J. Mancini, *supra* note 63.

99. *See* OIRA, *OIRA Prompt Letters*, https://www.reginfo.gov/public/jsp/EO/promptLetters.jsp (last visited Mar. 16, 2020).

100. Richard D. Morgenstern, Economic Analyses at EPA: Assessing Regulatory Impact (2014).

101. *See* Bruce Levinson, *OIRA Reinvigorated*, Reg. Rev., Feb. 4, 2019, https://www.theregreview.org/2019/02/04/levinson-oira-reinvigorated/.

102. William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 Presidential Stud. Q. 76, 85 (2005).

103. Stuart Shapiro, *OIRA Inside and Out*, 63 Admin. L. Rev. 135-47 (2011).

104. Farber, *supra* note 62, at 3.

amine 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 CBA in regulatory policy has existed since the dawn of its official use in 1981. As described above,[105] opposition centers on the perceived bias of CBA 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.[106] If, as in the Trump Administration, the requirement to do CBA is not producing any benefits to regulatory decisionmaking, 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.[107] 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 CBA requirement would ignore 36 years of history prior to the Trump Administration. While analyses over this period were certainly flawed and there are definitely cases when they had limited or no influence on decisions,[108] there are also many instances when analyses improved regulations as a result of conducting CBAs.[109] These improvements come from various sources. Economists within agencies are empowered to suggest improvements to regulatory proposals.[110] 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 inform and educate the public (and officeholders) about the consequences of regulatory decisions.[111] This transparency-related benefit allows the public and their representatives to more effectively engage with agency decisions.

The presence of CBA 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 CBA requirement.[112] Eliminating the requirement would make these other functions more difficult.

Given the transparency benefits of CBA, its proven record as improving (at a minimum) some regulatory decisions,[113] and the synergy between CBA 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.[114]

Finally, prior to the Trump Administration, five consecutive presidents had voiced support for CBA and examined ways to improve its implementation.[115] This long record of bipartisan presidential support indicates that giving up on CBA as a procedural tool is shortsighted. To borrow from the debates on the Affordable Care Act, perhaps the dictum on CBA should be "mend it, don't end it."[116]

Option 2: Do Nothing

But perhaps the right course of action is to neither mend nor end the use of CBA 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.[117] While conflicts between these two missions are most frequently resolved in favor of politics,[118] 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 decisionmaking.

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."[119] It is certainly possible that the way OIRA operates will return to pre-Trumpian norms once this administration concludes. Making any changes to the role of CBA or OIRA's operations could be overreacting 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 long-standing concerns about the institutional role of OIRA.

The reasons for change are compelling, however. As detailed above, CBA has received numerous blows to its

105. *Supra* notes 31-32.
106. *Supra* note 32.
107. Shane et al., *supra* note 95.
108. *Supra* note 37.
109. Stuart Shapiro, Analysis and Public Policy: Successes, Failures, and Directions for Reform (2016).
110. *Id.*
111. *Id.*
112. DeMuth & Ginsburg, *supra* note 1.
113. Shapiro, *supra* note 109.
114. Cecot, *supra* note 80.
115. Arguably, this support goes back to Presidents Ford and Carter before the creation of OIRA. Tozzi, *supra* note 8.
116. *See* John Feehery, *Feehery: Mend It, Don't End It*, Hill, May 8, 2017, https://thehill.com/opinion/john-feehery/332442-feehery-mend-it-dont-end-it.
117. West, *supra* note 102.
118. Shapiro, *supra* note 2.
119. Farber, *supra* note 62.

credibility during the Trump Administration. Its defenders have been largely quiet. As a result, OIRA has also sustained damage to its credibility as well over the past three 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 their views on analyses conflict with political necessity.

In this sense, the Trump Administration, by calling attention to the insufficiency in OIRA oversight of CBA, has provided an opportunity for reform. Opponents of CBA may see this opportunity to scale back its role in regulatory decisionmaking. 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 increasing the likelihood that high-quality CBA 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.[120] While the political mission of OIRA will remain, either with OIRA or elsewhere in the Executive Office of the President,[121] the mission of reviewing CBAs 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 CBA. 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 CBA 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.

Option 3: Strengthening Judicial Oversight of CBA

The judicial branch is one source of potential enhancement of the role of CBA in regulatory decisionmaking. The courts already use the existing CBAs conducted by agencies in cases where regulations that rely upon these analyses are challenged.[122] There is evidence in cases like *Business Roundtable v. Securities & Exchange Commission*[123] and *Michigan v. Environmental Protection Agency*[124] that the courts are moving on their own to play a greater role in ensuring that CBA has a greater influence on regulatory decisionmaking.[125] However, there is also an argument that this role will necessarily be uneven absent a specific requirement for courts to consider CBAs.[126]

In an analysis of 38 cases, Caroline Cecot and Kip Viscusi showed that courts often already examine CBAs to evaluate challenges to regulations.[127] This is often done as courts try to determine whether agencies have acted in an arbitrary or capricious manner under the Administrative Procedure Act (APA).[128] 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 CBAs.[129]

Absent any direction to the courts regarding the consideration of costs and benefits 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 necessary. 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 [CBA] ('soft' supermandate) or require agencies to base policies on a benefit-cost test ('hard' supermandate) notwithstanding current statutory prohibitions."[130]

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 CBA. In effect, it would clear up any debate left by *Michigan v. Environmental Protection Agency*[131] about whether the courts had a role in using CBA as they adjudicated challenges to agency regulations.

However, there are also downsides associated with judicial review of CBA. Judges are not economists. While some have argued that in cases that considered CBA to date, judges have ably identified flaws that indicate serious problems regarding regulations,[132] former OIRA Administrator Sunstein has urged caution, saying, "But if courts are unable to understand the highly technical issues involved,

120. Each of these subjects (particularly judicial review) has generated attention in the scholarly literature. The discussions below are therefore very broad overviews of these subjects, done in order to understand how well they would supplement or substitute for OIRA review.
121. Kagan, *supra* note 15.
122. Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 Geo. Mason L. Rev. 575 (2014).
123. 647 F.3d 1144 (D.C. Cir. 2011).
124. 135 S. Ct. 2699, 45 ELR 20124 (2015), where the court held that EPA could not ignore costs in its decision to regulate mercury emissions. This decision did not require agencies to conduct CBA (Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. Chi. L. Rev. 935-86 (2018)), but it may be a precursor to doing so. On the other hand, the decision does not address cases where the Agency is prohibited from considering costs (Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 Harv. Envtl. L. Rev. 1 (2017)).
125. *But see* Adrian Vermeule, *Does Michigan v. EPA Require Cost-Benefit Analysis?*, Yale J. on Reg., Feb. 6, 2017, http://yalejreg.com/nc/does-michigan-v-epa-require-cost-benefit-analysis-by-adrian-vermeule/ ("The opinion [*Michigan v. Environmental Protection Agency*] itself merely required the agency to consider the disadvantages as well as the advantages of its decision, thereby precluding one-sided decision-making; and the opinion explicitly disavowed any requirement that costs and benefits must be quantified.").
126. Reeve T. Bull & Jerry Ellig, *Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis*, 70 Admin. L. Rev. 873-959 (2018).
127. Cecot & Viscusi, *supra* note 122.
128. Sunstein, *supra* note 124.
129. Bull & Ellig, *supra* note 126, at 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.").
130. Cecot & Viscusi, *supra* note 122, at 598.
131. *Supra* note 124.
132. Masur & Posner, *supra* note 124.

and if agencies are already performing well, judicial review would be a blunder."[133]

The case of judicial review under the National Environmental Policy Act (NEPA)[134] 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 CBA for certain regulatory decisions under Executive Order No.12866). While initially courts rejected agency decisions because of inadequate environmental impact statements, over time, agencies learned to do exceptionally complex statements that judges typically deferred to.[135] In fact, in recent years, agencies have a perfect record defending their actions against NEPA-based challenges at the Supreme Court.[136] The use of incomprehensibility by agencies to achieve their goals has been seen across policy areas, and judicial review exacerbates this problem.[137]

This is not 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 power in negotiations.[138] Enhancing judicial review of CBA 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,[139] which compromises one of the most important benefits of requiring analysis.

Option 4: Congressional Review of CBA

An alternative to strengthened judicial review of CBA 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 (CORA) Creation Act.[140] The office would have been a new entity that would have conducted its own CBA of major regulations, but the analysis would have been done after agencies completed regulations.[141] This proposal was then incorporated in the Truth in Regulating Act,[142] which transferred these authorities to the U.S. Government Accountability Office (GAO).[143] However, money was never appropriated to GAO to carry out these new responsibilities and the budgetary authority for the office expired.[144]

Robert Hahn and Erin Layburn took up the cause of congressional review of regulatory analysis in a 2003 article.[145] 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, William Niskanen said that such an office would be subject to political pressure from Congress and would not necessarily lead to better analysis.[146]

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.[147] 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.[148] 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.[149] They drew lessons from the origins of the Congressional Budget Office (CBO), including the need to integrate the creation of a CRO into a reexamination of the regulatory process and the need for ensuring that a CRO would have the trust of both political parties.[150]

Most importantly (from the perspective of this Article),[151] 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,[152] 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

133. Sunstein, *supra* note 124, at 8, *but see* Masur & Posner, *supra* note 124, at 949 ("While we sympathize with this view, the argument overlooks the ways that CBA facilitates judicial review.").
134. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
135. Bradley C. Karkkainen, *Whither NEPA*, 12 N.Y.U. Envtl. L.J. 333 (2003).
136. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 Geo. L.J. 1507 (2011).
137. Wendy Wagner & Will Walker, Incomprehensible!: A Study of How Our Legal System Encourages Incomprehensibility, Why It Matters, and What We Can Do About It (2019).
138. *See* Lazarus, *supra* note 136.
139. However, CBAs are becoming longer and likely less transparent even without judicial review. *See* Christopher Carrigan & Stuart Shapiro, *What's Wrong With the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis*, 11 Reg. & Governance 203-12 (2017).
140. H.R. 1704, 105th Cong. (1998).
141. *Id.* §3(A).
142. Pub. L. No. 106-212, 114 Stat. 1248 (2000).
143. Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking: A Brief Overview, Assessment, and Proposal for Reform*, 51 Admin. L. Rev. 1051 (1999).
144. Marlo Lewis Jr., Competitive Enterprise Institute, Reviving Regulatory Reform: Options for the President and Congress (2005).
145. Robert W. Hahn & Erin M. Layburn, *Tracking the Value of Regulation*, 26 Regulation 16 (2003).
146. William A. Niskanen, *More Lonely Numbers: Regulations Should Be Decided by a Political Process, Not More Benefit-Cost Analyses*, 26 Regulation 22-23 (2003).
147. H.R. 6223, 111th Cong. (2010).
148. Philip Wallach & Kevin R. Kosar, *The Case for a Congressional Regulation Office*, Nat'l Aff., Fall 2016, at 56.
149. *Id.*
150. *Id.* at 63.
151. Wallach and Kosar also argue for the CRO conducting retrospective analyses of regulation.
152. Niskanen, *supra* note 146.

have become more acute over the past three years. A congressional office that produces (or reviews) agency CBAs during the regulatory process, and makes public its work product, would introduce competition to the regulatory analysis business, which is currently a monopoly. 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.

Congressional review (or production) of regulatory analysis does raise some institutional design questions and potential concerns. The questions involve the timing and scope of congressional review. If review were to take place during the rulemaking process, there would need to be an assurance that congressional reviewers (like OIRA but not bound by the executive branch) would maintain confidentiality regarding agency plans until a proposal or final rule was made public. A preclearance review would necessitate deciding whether the congressional office could stop publication of a proposed or final rule until it was satisfied. If instead the congressional review office were to do analysis post-issuance of regulation, as was proposed in the legislation in the late 1990s,[153] it is unclear whether such a review would have any impact on regulatory decisions besides spurring agencies and OIRA to be more careful in their analytical approach. Issues of scope include which agencies would be included in congressional review (would independent agencies be included or only those covered by Executive Order No. 12866?) and what the economic threshold would be in order to trigger congressional review.

In any case, regardless of how issues of timing and scope are resolved, a congressional review office would require funding and a sense of permanence in order to gain credibility. And as Wallach and Kosar note,[154] it would have to mirror the reputation for objectivity that the CBO has established and maintained. Niskanen's concerns about politicization are real and developers of a CRO should keep them in mind.[155]

Option 5: 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 in the Small Business Administration reviews agency analyses of the impact of regulations on small businesses under the Regulatory Flexibility Act.[156] While not technically independent, Advocacy is given a relatively wide berth to criticize agency regulatory flexibility analyses. But while its staff is 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 regulations,[157] but it is unclear whether these comments have much of an impact.[158]

The experience of Advocacy points to the challenges of creating an independent office to review agency CBA. 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 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 its 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 were done after the publication of a regulation, it would raise the same issues as doing so at this stage 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.

If regulations and their analyses were submitted to an external commission at the same time as submission to OIRA, questions arise: what are the consequence of their review? Can they submit public comments on regulations? Are the comments part of the rulemaking record? How is prepublication confidentiality ensured? Can the commission forestall publication pending resolution of the issues it raises? If the answer to this final question is yes, it would be a powerful check upon political influence on analysis. But such an arrangement may not be constitutional.[159] Giving a body outside 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[160] and the relationship between regulations and macroeconomic conditions such as unemployment,[161] or conduct retrospective review of regulations.[162] These

153. H.R. 1704, 105th Cong. (1998).
154. Niskanen, *supra* note 146.
155. *Id.*
156. Pub. L. No. 96-354, 94 Stat. 1164 (1981).
157. *See* U.S. Small Business Administration Office of Advocacy, *Letters to Agencies*, https://advocacy.sba.gov/category/regulation/letters-to-agencies/ (last visited Mar. 16, 2020).
158. Shane et al., *supra* note 95.
159. Such an arrangement also raises questions of how such a body is staffed and how those in charge of it are chosen.
160. Michael Mandel & Diana G. Carew, Progressive Policy Institute, Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform 3 (2013).
161. Stuart Shapiro, *Reforming the Regulatory Process to Consider Employment and Other Macroeconomic Factors*, *in* Does Regulation Kill Jobs? 223-38 (Cary Coglianese et al. eds., Univ. of Pennsylvania Press 2013).
162. Cary Coglianese, *Moving Forward With Regulatory Lookback*, 30 Yale J. Reg. Online 57 (2012).

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.[163]

V. Conclusion

OIRA has had to balance its roles as political overseer for the president and analytical watchdog throughout its nearly four-decade history.[164] Supporters of CBA playing a role in regulatory decisionmaking have 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 CBA rather than a bug. The Administration has demonstrated both the implementation of broad governmentwide policies that are systematically designed to ignore or minimize the benefits of regulation, and individual policy decisions that either ignore the requirements to conduct analysis or are so clearly biased that courts have routinely discarded the decisions.[165] The result has been a systematic degrading of the role of analysis in government decisionmaking.

However, the uniqueness of the threat to analysis from the Trump Administration is not an essential prerequisite to understanding a need to reexamine the dual role of OIRA. One can see the Trump Administration as highlighting persistent flaws in the institutional design of the review of CBA 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 CBA 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 CBA should play a role in regulatory decisions, some change to the current process is necessary. To use the language of costs and benefits, increasing congressional capacity to review analysis has the most potential benefits while creating the fewest costs to our system of governance.

Creating a CORA 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 CBO does not ensure perfect budgetary numbers from the Office of Management and Budget (OMB).[166] And it would be foolish to assume a CORA would lead to perfect analysis of agency regulations. But as the past three years have shown, the role of analysis in regulatory decisionmaking is under threat. And if we believe that CBA in the regulatory process is good (that it produces net benefits),[167] that it increases transparency,[168] and that it has the potential to improve policy decisions, then changes are needed to safeguard it.

163. Wallach and Kosar, *supra* note 148, suggest that the CORA could perform these functions.

164. Shapiro, *supra* note 2.

165. *See* Connor Raso, *Trump's Deregulatory Efforts Keep Losing in Court—And the Losses Could Make It Harder for Future Administrations to Deregulate*, Brookings, Oct. 25, 2018, https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/.

166. Indeed, there is some argument that OMB budgetary quality has dropped since the creation of the CBO, but that is likely due to other factors and the CBO may still improve OMB analysis over what it might have been in the CBO's absence. George A. Krause & James W. Douglas, *Does Agency Competition Improve the Quality of Policy Analysis? Evidence From OMB and CBO Fiscal Projections*, 25 J. Pol'y Analysis & Mgmt. 53-74 (2006).

167. Paul R. Portney, *The Benefits and Costs of Regulatory Analysis*, *in* Environmental Policy Under Reagan's Executive Order 226 (V. Kerry Smith ed., Univ. of North Carolina Press 1984).

168. Cass R. Sunstein, The Cost-Benefit Revolution (2018).