

THE REGULATORY BUDGET DEBATE

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For thirty-five years the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget (“OMB”) has used benefit-cost-analysis (“BCA”) to review major rules issued by executive branch agencies. Generally, OIRA reviews major proposed agency rules to determine whether their expected benefits to society exceed their expected costs to society. If the estimated costs of a proposed rule exceed its estimated benefits, OIRA urges the agency to change the rule in ways that will increase its benefits and reduce its costs. For almost as long as OIRA has been applying BCA, some of the smartest and most productive progressive scholars have criticized the role of OIRA generally and OIRA’s use of BCA in particular. It is time for those scholars to stop wasting their energy tilting at windmills and put their extraordinary talents to use in more promising endeavors.

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INTRODUCTION

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1. In 2011, the *Administrative Law Review* published the papers presented at a conference sponsored by the George Washington University Regulatory Studies Program to celebrate the thirtieth anniversary of OIRA. See Richard J. Pierce, Jr., *Introduction to the OIRA 30th Anniversary Conference*, 63 ADMIN. L. REV. 1 (2011).

to change the rule in ways that will increase its benefits and reduce its costs. For almost as long as OIRA has been applying BCA, some of the smartest and most productive progressive scholars have criticized the role of OIRA generally and OIRA's use of BCA in particular.² It is time for those scholars to stop wasting their energy tilting at windmills and put their extraordinary talents to use in more promising endeavors.

I.

BCA HAS BROAD POLITICAL SUPPORT

Every President who has served during the last forty-five years has implemented a system of centralized review of major rules through use of BCA.³ For the last twenty-five years, Presidents from both parties have required that OIRA use BCA not only to review proposed new rules, but also to identify—and rescind or amend—existing rules that have become obsolete or unduly burdensome.⁴ When those two requirements are combined, they promote a well-designed regulatory budget in which the estimated social benefits of all rules exceed the estimated social costs.

Use of BCA to implement a regulatory budget has broad bipartisan support in every branch of government. The last five Republican Presidents and the last four Democratic Presidents have required BCA.⁵ Last Term, all nine Justices of the Supreme Court expressed the view that it would be “unreasonable” for any agency to issue a major rule without first considering its costs.⁶ Congress is actively debating the best methods of designing and implementing a regulatory budget, but elimination of BCA is not even within the range of options that Congress is considering. In June 2015, I testified in favor of BCA at the request of Senator Bernie Sanders,⁷ considered by many to be

2. See, e.g., Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002); Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998); Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433 (2008).

3. See Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 43–45 (2011) (describing how regulatory oversight changes implemented by the Nixon administration have had lasting effects).

4. Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 app. at 103–04 (2014); Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, 1 PUB. PAPERS 30–31 (Jan. 22, 1981).

5. See Tozzi, *supra* note 3.

6. *Michigan v. EPA*, 135 S. Ct. 2699, 2707–10, 2716–18 (2015).

7. *Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs and the S. Comm. on the Budget*, 114th Cong. (2015) [hereinafter *Regulatory*

the most progressive member of the Senate and the most progressive of the present candidates for the Democratic nomination for President.⁸ If the most progressive politicians continue to embrace BCA despite passionate pleas of progressive scholars to abandon it, then it is time for these scholars to pursue more promising methods of achieving their laudable goals.

II.

BCA IS BETTER THAN A STANDARD THAT IGNORES BENEFITS

I testified against a proposal to add a new type of regulatory budget—one that would ignore the benefits of rules and consider only the cost of rules—to a regulatory budget that is already based on BCA.⁹ Senate and House Republicans have proposed a regulatory budget modeled after the version that Canada has adopted.¹⁰ The version proposed by Republicans would prohibit any agency from issuing a new rule unless and until the agency rescinded an existing rule that costs as much or more than would the new rule.¹¹ I testified against that form of a regulatory budget for the same reason that I have always supported BCA: because it would be irrational. Any regulatory process that ignores either costs or benefits would cause great harm to society.

To make the point that a cost-only regulatory budget would be irrational and would impose large costs on the nation, I referred to OIRA's estimate of the aggregate costs and benefits of the rules it reviewed during the ten-year period between October 1, 2003 and Oc-

Budget Hearing] (unpublished hearing) (prepared statement of Richard J. Pierce, Jr.), <http://www.hsgac.senate.gov/download/?id=56FAFB42-8F15-453A-8241-ABBDF7226354>.

8. See Charles Postel, *If Trump and Sanders Are Both Populists, What Does Populist Mean?*, ORG. AM. HISTORIANS, Feb. 2016, at 3 (observing that “Bernie Sanders is one of the longest serving and consistently progressive politicians in the U.S. Congress”).

9. See *Regulatory Budget Hearing*, *supra* note 7; see also *Joint Hearing by Senate Budget and Homeland Security and Government Affairs Committees to Account for True Cost of Regulations*, U.S. SENATE BUDGET COMMITTEE (June 23, 2015), <http://www.budget.senate.gov/repUBLICAN/public/index.cfm/2015/6/joint-hearing-by-senate-budget-and-homeland-security-and-government-affairs-committees-to-account-for-true-cost-of-regulations> (providing a summary of the hearing and a video recording of the witnesses' testimony).

10. *Regulatory Budget Hearing*, *supra* note 7 (prepared statement of Sen. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs), <http://www.hsgac.senate.gov/download/?id=C608AAC1-38CE-4F50-A1D1-FD339283830C>.

11. *Id.*

tober 1, 2013.¹² OIRA estimated the costs of the rules as 57 to 84 billion dollars and the benefits of the rules as 217 to 863 billion dollars.¹³ If the United States had implemented a cost-only budget instead of a regulatory budget based on BCA during that period, the country would have been deprived of net benefits worth 133 to 806 billion dollars.¹⁴ Fortunately, application of BCA enabled the country to realize those benefits in the form of lives saved and illnesses, injuries, and property damage avoided.

III.

BCA HELPS AGENCIES ISSUE SOCIALLY BENEFICIAL RULES

BCA is a poor target for critics of centralized regulatory review. It often assists agencies in their efforts to issue rules that benefit society.¹⁵ OIRA is also a poor target for criticism of centralized review, in part because it is dwarfed by the regulatory agencies whose rules it reviews. It consists of about three dozen civil servants who perform their functions in the same manner in Democratic and Republican administrations.¹⁶ Two political appointees—traditionally academics—supervise those professional public servants.¹⁷ OIRA is blamed for delaying or blocking the issuance of beneficial rules, and for requiring agencies to amend rules in ways that favor regulated firms.¹⁸ Those criticisms are sometimes valid, but they are exaggerated. Additionally OIRA is often blamed for actions that are actually taken by myriad other agencies and White House offices.¹⁹

As Cass Sunstein explained shortly after he left his position as Administrator of OIRA to return to Harvard, OIRA's principal role is not to use BCA to review major rules proposed by regulatory agen-

12. OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 9–10 (2015).

13. *Id.* at 10.

14. *Id.*

15. Former OIRA Administrator Sally Katzen explains this role in *OIRA at 30: Reflections and Recommendations*, 63 ADMIN. L. REV. 103 (2011).

16. See John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POL'Y 30, 35–36 (2014).

17. See generally William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, 35 PRESIDENTIAL STUD. Q. 76 (2005).

18. See, e.g., Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059–64 (1986).

19. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1842 (2013).

cies.²⁰ Rather, its dominant role is to serve as an aggregator of data and views, which it elicits from other White House offices and agencies that play roles that are somehow related to the rule that OIRA is reviewing.²¹ The aggregated data and views are then used as part of the basis for decision making by OIRA's superiors in the White House.²² When the process of White House review delays the issuance of a rule, changes a rule to benefit regulated firms, or results in a refusal to approve a proposed rule, the decision might originate in OIRA; however, it is far more likely to come from some unknown combination of other executive branch officials.²³

Moreover, OIRA is not the only White House office that directly influences agency rulemaking. In their study of rulemakings conducted by the Environmental Protection Agency ("EPA") over a twelve-year period, Lisa Bressman and Michael Vandenberg found that nineteen White House offices had communicated with EPA in an effort to influence the agency's decision-making process.²⁴ Ninety-three percent of agency officials reported that they had received communications from White House offices other than OIRA, and they reported that in some major rulemakings, other White House offices had greater influence on the agency's decision-making process than did OIRA.²⁵

OIRA is not even responsible for most of the methodology it uses to apply BCA in the process of reviewing rules. In his study of the origins of that methodology, Michael Livermore found that EPA had far more influence over the methods used by OIRA to apply BCA than did OIRA itself.²⁶ EPA has far more economists than OIRA does, and

20. *Id.*

21. *Id.* at 1841–42.

22. *Id.* at 1847.

23. *See, e.g., id.* at 1842 ("When a proposed or final rule is delayed, and when the OIRA review process proves time consuming, it is usually because significant inter-agency concerns have yet to be addressed."); *see also* ADMIN. CONF. OF THE U.S., IMPROVING THE TIMELINESS OF OIRA REGULATORY REVIEW 5 (2013) (observing that review by executive branch agencies outside OIRA may give rise to delays); CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS 47 (2013), <https://www.acus.gov/sites/default/files/documents/Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf> ("Delays in OIRA reviews caused by interagency reviews are not a new development.").

24. Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 92 (2006).

25. *See id.* at 66.

26. Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609–17 (2014).

it contracts with many other economists to aid it in developing appropriate methods of applying BCA.²⁷ The economists who perform those tasks for EPA are world-renowned experts on the design and application of BCA to regulatory actions.²⁸ Livermore found that OIRA borrowed the vast bulk of its BCA methodology from the economists who work for EPA.²⁹

The Livermore study suggests that the primary effect of OIRA application of BCA to rules proposed by regulatory agencies is indirect.³⁰ Executive branch agencies, like EPA, know that OIRA will use BCA to review their proposed rules.³¹ That induces them to hire good economists and to give them a seat at the decision-making table. This indirect effect of OIRA review is also supported by studies finding that when “independent” agencies make decisions, the quality of their economic analysis is systematically lower than that employed in executive agencies’ decision making.³² Rules proposed by independent agencies are not subject to OIRA review,³³ so independent agencies have less incentive to hire good economists and give them a significant role in making decisions. OIRA administrators from both political parties have urged Congress and the President to expand OIRA’s authority to use BCA in reviewing major independent agency actions, primarily on the theory that this will encourage independent agencies to engage in higher-quality economic analysis when making regulatory decisions.³⁴

27. *See id.* at 625–61.

28. *See id.* at 626–27.

29. *Id.*

30. *See id.* at 616–17.

31. *See* Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 *PACE ENVTL. L. REV.* 325 (2014) (discussing BCA requirements from the perspective of a former EPA official); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 *HARV. L. REV.* 1755 (2013) (observing how agencies behave in the face of OIRA’s BCA practices); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 *U. CHI. L. REV.* 1137 (2001) (exploring the agency behavioral incentives established by BCA requirements).

32. Curtis Copeland has described the scores of studies that have found that the quality of economic analysis used by independent agencies when they issue major rules is consistently much lower than the quality of the economic analysis that executive branch agencies use in the decision-making process. CURTIS W. COPELAND, *ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES* 61–113 (2013) (draft report prepared for the Administrative Conference of the United States).

33. *See* Katzen, *supra* note 15, at 109–10.

34. *See* Pierce, *supra* note 1, at 5–6; *see also* Katzen, *supra* note 15, at 109–10.

IV.

AGENCY APPLICATIONS OF BCA AND NEPA HAVE
SIMILARLY BENEFICIAL EFFECTS

The effect of OIRA review is similar to the effect of the National Environmental Policy Act (“NEPA”),³⁵ which Congress enacted at the same time that the OMB was created,³⁶ and at roughly the same time that agencies were charged with using BCA in developing rules.³⁷ NEPA requires federal agencies to file an environmental impact statement (“EIS”) every time they propose a major action that would significantly affect the environment.³⁸ The statute does not impose any substantive limit on any agency action.³⁹ In theory, an agency could comply with NEPA by issuing an EIS that says, “this action will have a terrible effect on the environment, but we are going to take it anyway.” That has not and will not happen, however, because the primary effect of NEPA has been to force agencies to consider environmental impacts when they take major actions and to hire environmental experts and give them seats at the decision-making table.⁴⁰ That effect—forcing agencies to consider the environmental impact of major actions—has influenced agency decision making in thousands of cases in the same indirect way that OIRA’s application of BCA in reviewing major agency rules has indirectly influenced agency decision making in many cases.⁴¹

V.

BCA IS BETTER THAN A FEASIBILITY STANDARD

In her thoughtful contribution to our discussion of regulatory budgeting,⁴² Amy Sinden sees bipartisan support throughout all of our

35. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2014).

36. Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959 (July 1, 1970), reprinted in 31 U.S.C. § 501 app. at 42–44 (2014).

37. See MAEVE P. CAREY, CONG. RESEARCH SERV., NO. R41974, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 2 (2014).

38. 42 U.S.C. §§ 4321, 4331.

39. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

40. See DAVID J. HAYES ET AL., STANFORD LAW SCH., COMMENTS AND RECOMMENDATIONS ON NEPA REFORM FOR THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY 3–5 (2014) (describing NEPA’s basic role in forcing agencies to consider the implications of their regulatory decisions).

41. See COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997).

42. Amy Sinden, *Windmills and Holy Grails*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 281 (2016).

major governmental institutions for some method of considering costs in deciding whether to issue a major rule. She believes, however, that agencies should use other methods of considering cost rather than BCA.⁴³ Like many progressive scholars, Professor Sinden argues that a “feasibility” standard is a better basis than BCA to decide whether to issue a major rule.⁴⁴ In many important circumstances, however, the application of a feasibility standard is likely to preclude an agency from issuing a major rule that would yield enormous benefits to the nation.

Feasibility can mean many things. As defined by both the Supreme Court and the EPA, feasibility refers to both technical feasibility and economic feasibility.⁴⁵ Both institutions use the degree of harm to the regulated sector of the economy as the basis for deciding whether a rule is economically feasible.⁴⁶

As the Supreme Court framed the issue in its 1981 opinion in *American Textile Manufacturers Institute v. Donovan*, an administrative agency had to have substantial evidence to support a finding that its rule “would not threaten the economic viability of the cotton industry” in order to establish that the rule was economically feasible.⁴⁷ The Court upheld the rule at issue in that case as feasible because it would not seriously threaten “the cotton textile industry as a whole.”⁴⁸ Specifically, the Court upheld the agency’s conclusion “that ‘although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation.’”⁴⁹

EPA has adopted a similar interpretation of economic feasibility. In its proposed finding on remand from the Supreme Court’s 2015

43. *Id.* at 282–83.

44. *Id.*

45. *See, e.g.,* *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 546 (1981) (Rehnquist, J., dissenting) (observing that the Court had apparently “adopt[ed] the [Secretary of Labor]’s view that feasibility means ‘technological and economic feasibility’”); Supplemental Finding that It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units, 80 Fed. Reg. 75,025, 75,030 (Dec. 1, 2015) (to be codified at 40 C.F.R. pt. 63) (construing requirements set forth in the Clean Air Act).

46. *See Donovan*, 452 U.S. at 533–36 (majority opinion); Supplemental Finding that It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units, 80 Fed. Reg. at 75,030.

47. *Donovan*, 452 U.S. at 522.

48. *Id.* at 530–36.

49. *Id.* at 536 (quoting Occupational Exposure to Cotton Dust: Final Mandatory Occupational Safety and Health Standards, 43 Fed. Reg. 27,349, 27,378 (June 23, 1978)).

decision in *Michigan v. EPA*,⁵⁰ the agency stated the critical question as “whether the power sector can reasonably absorb the cost of compliance with [the rule].”⁵¹ After analyzing this question from several perspectives, EPA found that “the vast majority of generation capacity in the power sector . . . would be able to absorb the anticipated compliance costs and remain operational.”⁵²

Imagine how a reviewing court might apply the feasibility standard to EPA’s Clean Power Plan (“CPP”)⁵³ or to any other rule that is intended to reduce carbon dioxide (“CO₂”) emissions by requiring electric utilities to switch from high-CO₂-emission coal to low-CO₂-emission natural gas or carbon-free sources like wind or solar power. It would make sense to characterize the coal sector of the economy as the sector most affected by the rule. Coalmine owners could—indeed, they already have—commissioned studies that show that the CPP will have devastating effects on the coal sector of the economy. It follows logically that the CPP would fail the feasibility test because it would seriously threaten the coal industry as a whole.

By contrast, it would be easy to support a finding that the benefits of the CPP vastly exceed its costs. This is one of many examples of the common situation in which an important rule would confer significant net benefits on the country but could not be upheld through application of the feasibility test proposed by Professor Sinden.

CONCLUSION

Both the application of NEPA by agencies and OIRA review of agency actions create delays in decision making and increase the resources that agencies must devote to each major action they take. I believe that both NEPA and OIRA application of BCA are so valuable to the agency decision-making process that those adverse effects are justified by the contributions that both make to the quality of agency decisions. As I have argued at length elsewhere, I cannot say the same about the massive adverse effects of judicial review on the time and

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

51. Supplemental Finding that It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units, 80 Fed. Reg. at 75,030.

52. *Id.* at 75,036.

53. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); see also Emily Hammond & Richard J. Pierce, Jr., *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 1 (2016) (describing and analyzing EPA’s proposed finding).

resources that agencies must devote to the process of issuing a major rule.⁵⁴ I continue to support the proposal that Justice (then Professor) Breyer made in 1993⁵⁵: we should replace counterproductive judicial review with review by a version of OIRA that is better staffed and broader in the values it brings to the review process.⁵⁶

I conclude where I began. It is time to end the discussion among the many talented scholars who have engaged in the futile effort to persuade some President or Congress to end OIRA's use of BCA. These scholars ought to use their energy to engage in more promising pursuits that accept the critical place of BCA in the modern administrative state. One promising pursuit comes to mind immediately. There is an important, ongoing debate about the best ways to estimate the benefits and costs of proposed rules.⁵⁷ The gifted academics who have urged the abandonment of OIRA review could make significant contributions to that debate. They could begin by explaining why co-benefits of rules should be counted as benefits for BCA purposes. That is the issue that will determine the outcome of the proceeding on remand from the Supreme Court's 2015 decision in *Michigan v. EPA*.⁵⁸

54. RICHARD J. PIERCE, JR., A COMPARISON OF THE CULTURES AND PERFORMANCE OF A MODERN AGENCY AND A NINETEENTH-CENTURY AGENCY (forthcoming 2016) (manuscript at 12) (on file with the *New York University Journal of Legislation and Public Policy*).

55. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 72 (1993).

56. *Id.*

57. *See, e.g.*, Laura J. Lowenstein & Richard L. Revesz, *Anti-Regulation Under the Guise of Rational Regulation: The Bush Administration's Approaches to Valuing Human Lives in Environmental Cost-Benefit Analysis*, 34 ENVTL. L. REP. 10,954 (2004) (suggesting that valuation of human lives is an effective way of measuring the costs and benefits of a proposed regulation).

58. *Michigan v. EPA*, 135 S. Ct. 2699, 2705, 2714 (2015).