CAUSE OR CURE? COST-BENEFIT ANALYSIS AND REGULATORY GRIDLOCK

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INTRODUCTION

Environmentalists can be forgiven for thinking that cost-benefit analysis contributes to regulatory gridlock, because it does. Cost-benefit analysis slows down the regulatory state by serving as an obstacle to new regulation while rarely acting to spur administrative action. Under rules that have been in place since the early 1980s, most major new federal regulations must pass a cost-benefit test before they can be adopted. This process impedes new regulation by placing significant analytic burdens on agencies that seek to act. Under the current system, however, cost-benefit analysis has very little to say about agency inaction. So, whenever an agency wishes to regulate, regulatory review requirements insist that the new rule be justified by cost-benefit criteria. When agencies fail to address a pressing environmental problem, this inaction—though it can be just as costly, in economic terms, as inefficient regulation—is not subjected to cost-benefit scrutiny.

There are two potential solutions to this imbalance. The first is to scrap cost-benefit analysis altogether. This solves the problem of cost-benefit gridlock, but creates significant new problems of its own. Regulation can have far reaching and profound consequences for the environment and economy; it is unwise to abandon the effort to understand, prior to adoption, what the likely economic costs and benefits of a regulation will be. The second potential solution is to create institutional mechanisms for cost-benefit analysis to be used to spur administrative action.

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While difficult, this second solution shows much greater promise.

This essay proposes a new function of executive review that would use cost-benefit analysis to review agency inaction. Under this proposal, when a petition for rulemaking has been denied by an agency, petitioners would have the option of seeking review before the Office of Information and Regulatory Affairs (OIRA). Petitioners would be able to present the case that a new regulation was justified by cost-benefit analysis. If OIRA agrees, then the agency and OIRA would engage in a formal consultative process to begin a rulemaking, and, if that fails, OIRA would make a formal finding that a new rule was justified. Part I gives some general background on cost-benefit analysis. Part II discusses both substantive and institutional biases in how cost-benefit analysis is currently carried out. Part III discusses how the current system of deferential review by courts of agency inaction is inadequate. Part IV discusses the proposal for a new form of executive regulatory review of agency inaction.

I. COST-BENEFIT ANALYSIS AND REGULATORY REVIEW

A. *Executive Order 12,291 and Regulatory Review Under President Reagan*

Within a month of his inauguration in 1981, President Ronald Reagan issued Executive Order 12,291, asserting an unprecedented level of control over administrative agencies including the Environmental Protection Agency (EPA).[1] This executive order created the architecture for the central review of agency action that is in place today. Under the order, agencies were required to prepare detailed cost-benefit analyses of proposed regulations with a significant impact on the economy, and if a regulation's expected costs exceeded its expected benefits, then the regulation could not go forward. Officials within OIRA—a branch of the Office of Management and Budget (OMB)—would oversee this process, and were empowered to determine whether proposed regulations passed muster under cost-benefit analysis. This entire process of OIRA review was largely shrouded in secrecy, with the relationships between OIRA officials, agency representatives, and lobbyists kept from the public view.

[1] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

The news of the new executive order was not met with unmitigated enthusiasm by the environmental community. Many feared that cost-benefit analysis was a code for deregulation, and this concern was not misplaced. The agency received OMB's inputs so late in its rulemaking process that it was "virtually impossible to do anything productive about them,"[2] meaning that the agency had less incentive to incur the immense costs of promulgating regulations in the first place. The size of OIRA's staff, which was tiny relative to the number of regulations it was meant to review, gave rise to costly and lengthy delays.[3] Furthermore, the opacity of the new OMB review process led to fears that industries would be able to kill regulations behind closed doors.[4] In short, critics worried that the cost-benefit analysis of regulation would mean that OIRA would become a "black hole"[5] for regulations.

Writing in 1986, Alan Morrison, who at the time represented Public Citizen, summarized the concerns of many pro-regulatory groups about how OMB operated.[6] Morrison argued that the OMB review process resulted in "costly delays that are paid for through the decreased health and safety of the American public,"[7] and that OIRA "operates in an atmosphere of secrecy,"[8] thereby making "a mockery of the system of open participation."[9] He focused his attack on the delays associated with OMB review and cost-benefit analysis: "[T]he vast amount of additional resources spent in justifying proposed regulations to OMB . . . are all burdens on the federal treasury, yet there is no indication that these costs have been balanced against the benefits to be derived from this complex

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[2] E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167, 169 (1994).

[3] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 5 (2005).

[4] Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 31–35 (1984).

[5] Chris Mooney, *Paralysis by Analysis, Jim Tozzi's Regulation to End All Regulation*, 36 WASH. MONTHLY 23, 24 (May 2004).

[6] Alan B. Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

[7] *Id*. at 1064.

[8] *Id*.

[9] *Id*.

labyrinth of OMB overlay."[10] Morrison was not alone in his concerns. In a statement entered into the 1987 Congressional Record by Representative Henry Waxman of California, Dr. Samuel Epstein, a cancer researcher, placed blame for undiminished cancer rates in part on cost-benefit analysis, accusing President Reagan of "insisting on formal cost-benefit analysis which focus on industry costs . . . and making regulation dependent on the Office of Management and Budget with its subservience to the White House."[11]

There were also deep political and ideological differences between the environmental community and the OMB staff during the Reagan administration. James Tozzi, who was appointed deputy administrator of OIRA under Reagan, described the interplay between environmentalist and central regulators during that time in the following way: "Under the Reagan administration, every environmental regulation had to come to me. I was heavily criticized by the environmental groups and we were frequently called up to [congressional] committee hearings. It was bloody. I loved it."[12]

Cost-benefit analysis thus became one of the key causes of "regulatory ossification."[13] Both the analytic requirements imposed by OMB and the anti-regulatory tilt of OMB review significantly dampened progress on federal environmental regulation. Agencies were forced to spend more time defending new regulations, and less time innovating, revising and updating regulations, and addressing new problems. As part of the broader changes brought around by the Reagan administration on environmental issues, Executive Order 12,291 marked the end of an age for environmental groups. From this point forward, progress would be slow and plodding, as new regulations creaked through the review process of a largely hostile administration.

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[10] *Id*. at 1066.

[11] 133 CONG. REC. 23,653 (1987) (extension of remarks by Hon. Harry A. Waxman).

[12] Dan Davidson, *Jim Tozzi, Center for Regulatory Effectiveness, Nixon's 'Nerd' Turned Regulations Watchdog*, FEDERALTIMES.COM (Nov. 11, 2002).

[13] *See, e.g.*, Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 340 (2007); Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385, 1405–06 (1992); Richard J. Pierce, Jr. *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 62–63 (1995).

And the long rear-guard action to prevent back-sliding on environmental issues had begun.

B. *The Development of Regulatory Review under President Clinton*

When President Clinton was elected in 1992, many observers hoped that he would abandon the Reagan-era executive review process.[14] Instead, Clinton issued Executive Order 12,866, leaving in place much of the regulatory review structure created by President Reagan, including OIRA review of "significant regulatory action."[15] Clinton's order, however, did include several new features. Most importantly, the Clinton order imposed new transparency requirements designed to take the secrecy out of the OIRA process.[16] Under Clinton, non-cost-benefit factors also became part of regulatory review, including "qualitative measures" such as "distributive impacts" and "equity."[17] To tackle the problem of delay, the executive order set deadlines on OIRA review that prevented the office from permanently stalling the implementation of a regulation.[18] During the Clinton years, the EPA also developed greater in-house capacity to conduct cost-benefit analysis. An important part of this process was the creation of EPA *Guidelines for Preparing Economic Analysis*,[19] which established a rigorous methodology for conducting cost-benefit analysis that would withstand review by OIRA.

The message from the Clinton White House was that centralized review and cost-benefit analysis could serve as a neutral tool.[20] For a variety of reasons, however, environmental

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[14] Pildes & Sunstein, *supra* note 3, at 6.

[15] Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) ("'Significant regulatory action' means any regulation action that is likely to result in a rule that [*inter alia*] may . . . [h]ave an annual effect on the economy of $100 million or more . . .").

[16] *Id.* at 51,742 (§ 6(b)(4)).

[17] *Id.* at 51,735 (§ 1(a)).

[18] *Id.* at 51,742 (§ 6(b)(2)).

[19] U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2000), *available at* http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/Guidelines.html. At the time of this writing the EPA is updating the Guidelines.

[20] This view was later bolstered by a piece written after the end of the Clinton Administration by Elena Kagan, the former Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council, in the Harvard Law Review, which detailed how Clinton harnessed the administrative state to achieve his own progressive political ends. Elena Kagan,

groups did not take advantage of the opportunity to shape how cost-benefit analysis was conducted or used. Environmental groups failed to meet on a regular basis with OMB, to participate and comment on cost-benefit analyses, to develop their own versions of cost-benefit analysis, or to engage in the development of cost-benefit methodologies.[21] Sally Katzen, who was the administrator of OIRA under Clinton, has expressed frustration with the environmentalist position, which she characterized as: "We don't like cost-benefit analysis, full stop."[22] Eventually, after trying to persuade environmental groups to develop more nuanced positions on cost-benefit analysis and participate more fully in its development Katzen became sufficiently frustrated that she "gave up in trying to entice them to devote energies to it."[23] Environmental groups also failed to participate in the process creating the EPA cost-benefit guidelines, where their opinions doubtlessly would have carried weight.[24]

Anti-regulatory groups were less shy about using Congress and public pressure to forward their vision of cost-benefit analysis. The Republican Congress, ushered in under the Contract with America, proved receptive to cost-benefit analysis as a means of weakening the administrative state. The 104th, 105th, and 106th Congresses all considered legislation that would have required administrative agencies to subject proposed regulations to risk assessment and cost-benefit analysis.[25] Scholars concerned about the prevalence of regulation also used cost-benefit analysis to create "regulatory scorecards"[26] that argued the many regulations

Presidential Administration, 114 HARV. L. REV. 2245, 2281 (2001). On this view, centralized cost-benefit review is part of the tool kit available to Presidents—progressive and conservative alike—to put their stamp on the bureaucratic apparatus.

[21] *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH at 32 (2008) (citing interview with Sally Katzen, former Dep. Dir. For Mgmt., Office of Mgmt. & Budget in Wash., D.C. (Feb. 20, 2007)).

[22] *Id.*

[23] *Id.*

[24] *See* REVESZ & LIVERMORE, *supra* note 21, at 32–36.

[25] *See, e.g.*, Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. (1995); Regulatory Improvement Act of 1998, S. 981, 105th Cong. (1997); Regulatory Improvement Act of 1999, S. 746, 106th Cong. (1999); Regulatory Improvement Act of 2000, H.R. 3311, 106th Cong. (1999).

[26] One of the first uses of this term was by Richard W. Parker, *Grading the*

were hopelessly inefficient. These scorecards were created by several important commentators, including John H. Graham, then of the Harvard Center for Risk Analysis, and Robert Hahn of the American Enterprise Institute.[27]

C. *Regulatory Review under President George W. Bush*

With the 2000 elections, environmental group influence in the White House diminished greatly. The importance of cost-benefit analysis, however, did not. President George W. Bush left the Clinton Executive Order in place, maintaining the important gains on transparency and delay that were embodied in that order. He also appointed John Graham as head of OIRA, a move that garnered significant criticism from the environmental community. Graham had been the director of the Harvard Center for Risk Analysis, and had been a leading advocate of greater use of cost-benefit analysis to stem overreach by the federal bureaucracy.

The League of Conservation Voters, the National Environmental Trust, NRDC, and the federation of United State Public Interest Research Groups (USPIRG) all took strong positions against Graham's nomination.[28] Dr. Linda Greer, an NRDC senior scientist, expressed fears that, at OIRA, Graham would apply "pro-industry, anti-consumer, and anti-environment cost-benefit analyses to regulations."[29] Public Citizen published a report titled *Safeguards At Risk: John Graham and Corporate America's Back Door to the Bush White House*, which argued strenuously that Graham was "unfit to serve at OMB."[30]

It is important to note that the news during the Graham years was not all bad. Under Graham, OIRA did not drop a veil of secrecy over its proceedings, and in fact strengthened its transparency rules. Likewise, Graham's OIRA maintained a robust practice of arriving at timely conclusions. Cost-benefit analyses done by Graham have also been credited with convincing

Government, 70 U. CHI. L. REV. 1345 (2003).

[27] *See, e.g.*, Tammy O. Tengs, et al., *Five-Hundred Life-Saving Interventions and Their Cost-Effectiveness*, 15 RISK ANALYSIS 369 (1995).

[28] 147 CONG. REC. 13,925–26 (2001).

[29] News Release, Natural Resources Defense Council, NRDC Urges Senate to Reject OMB Regulatory Chief Nominee John D. Graham (March, 8 2001), *available at* http://www.nrdc.org/media/pressReleases/010308.asp.

[30] LAUREN MACCLEERY, PUBLIC CITIZEN, SAFEGUARDS AT RISK: JOHN GRAHAM AND CORPORATE AMERICA'S BACK DOOR TO THE BUSH WHITE HOUSE 2 (2001).

the Bush administration to embrace some important environmental regulations.[31]

The most recent development in cost-benefit analysis and regulatory review came after Graham's departure, when President Bush issued Executive Order 12,866, further centralizing control of administrative agencies. There were several key provisions, including a new requirement that agencies identify a market failure before moving forward with proposed regulations.[32] The revised order also expands the role of centralized review by subjecting guidance documents, in addition to actual regulations, to the OMB review process. Moreover, it places political appointees in the agencies as Regulatory Policy Review Officers, further cementing presidential control over the bureaucracy, and likely reducing the role of nonpolitical career civil servants.

II. INSTITUTIONAL AND SUBSTANTIVE BIASES IN COST-BENEFIT ANALYSIS AND REGULATORY REVIEW

In part because pro-regulatory groups have largely declined to participate in the development of cost-benefit analysis, important biases have become part of how cost-benefit analysis is practiced. There are two general categories of biases: substantive biases and institutional biases. Institutional biases—biases stemming from how cost-benefit analysis is used—and in particular bias in the process of regulatory review, are the subject of this paper. However, substantive biases in the methodology of cost-benefit analysis also contribute to regulatory deadlock by making it more difficult than it should be to justify new regulation.

A. *Substantive Biases*

There are many important substantive biases in cost-benefit analysis. These biases are discussed more fully elsewhere,[33] and

[31] *See* REVESZ & LIVERMORE, *supra* note 21, at 41.

[32] Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1.

[33] *See* REVESZ & LIVERMORE, *supra* note 21, at 55–147*; see also* 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 Analyses*, 34 ENVTL. L. REP. 10,954, 10,964–70 (2004); Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763 (2002); Richard L. Revesz, *Environmental Regulation,*

are therefore introduced only briefly here:

- Countervailing Risks. Too often, the unintended negative consequences of regulations are accounted for, without also accounting for similar positive consequences. Regulations can have both positive and negative consequences for non-target risks—there is no defensible reason to take negative risks into account in cost-benefit analysis, but fail to account for positive risks as well.
- Wealth-Health Tradeoff. In debates over environmental regulation there has been an oft repeated idea that any economic regulation, by reducing economic productivity, will result in loss of life because income and wealth is correlated with longer life. However, the assumption underlying the idea of a health-wealth tradeoff—that higher income causes people to be healthier—is contradicted by the most recent research on the subject. This research shows that education, which is associated with both higher wages and better health, is likely driving the correlation between health and wealth.[34]
- Life-Years Method. One of the methodologies underlying the "senior death discount" was the life-years method, where the value of risk reducing regulation is based not on the number of lives saved, but on how many years the regulation is likely to add to people's life expectancy. Using life-years to measure regulatory benefits devalues the lives of older Americans, and is unrelated to people's actual risk preferences. The value of a statistical life, based on people's actual willingness to pay to avoid risk, is a superior standard for estimating the value of life-saving regulations.
- Quality Adjusted Life-Years. An extension of the life-years method adds cost-of-life factors, devaluing risk reductions for people with chronic disease or disabilities. Even when used only to value morbidity risks, this method has all of the problems of life-years, as well as failing to take account of people's inherent ability to adapt to life-changing illnesses.
- Discounting. Discounting of future benefits is widely

Cost-Benefit Analysis, and the Discounting of Human Lives, 99 COLUM. L. REV. 941 (1999).

[34] *See, e.g.*, JAMES P. SMITH, RAND CORP., UNRAVELING THE SES-HEALTH CONNECTION 129 (2005), *available at* http://www.rand.org/pubs/reprints/2005/RAND_RP1170.pdf.

prevalent in cost-benefit analysis, and results in the systematic undervaluation of forward-looking regulation. While there is some justification for discounting in the context of long-latency diseases, that justification does not exist for regulations that benefit future generations. The current practice of discounting benefits to future generations radically understates our obligations to our children, grandchildren, and future progeny, and results in too little action on pressing issues like global climate change. It is also entirely unjustified, because intra-personal time preferences tell us little about how regulatory benefit should be allocated between individuals. Even in the long latency context, discounting must be adjusted to take account of factors like dread.

- Existence Value. There have been many attacks on the use of existence value in cost-benefit analysis. People's preferences to preserve endangered species and stretches of untouched wilderness—even when they do not plan to use those natural resources—should be respected. Technical problems with existence values admit of technical solutions. Simply valuing all existence values at zero because of the difficulty of deriving accurate estimates from stated-preference studies is not the best solution.
- Estimating Costs. In our dynamic market-based economy, industry can adapt, and cost estimations need to take this fact into account. In its current form, cost-benefit analysis tends to assume that industry and the cost of complying with regulations are static. But the reality is that, given the chance, industry has shown great ingenuity in reducing the costs of regulatory compliance. Many examples from past experience show that environmental and public health goals can be achieved for cheaper than expected.

B. *One-Way Ratchet*

In addition to these substantive biases, the process of regulatory review creates an important institutional bias in how cost-benefit analysis is used. As currently structured, the role of OIRA review is generally to determine whether the benefits of regulation exceed its costs. OIRA mostly seeks to ensure that the agency regulation is not too stringent, and does not impose higher economic costs than are justified. OIRA does not generally look

into whether the regulation is too lax, and whether cost-benefit analysis would call for a stronger regulatory response. OIRA, then, tends to act as a one-way ratchet turning regulation down but not up. Because there is no comparable formalized procedure geared to increasing regulatory stringency, regulations tend to be less stringent than would be economically efficient.

A 2003 General Accounting Office (GAO) review of OIRA found that, out of the seventeen rules that had been "significantly changed" during review—fourteen of which came from the Environmental Protection Agency (EPA)—none had been made more stringent. Of the EPA rules, six had been changed to eliminate or delay specific provisions; four adopted lower-cost regulatory alternatives, and three were sent back for revisions in calculations.[35] In that report, the GAO noted that "attention to the cost side of the economic effects was most prevalent in OIRA's comments and suggestions."[36] Other studies have found that OIRA review "almost always. . .suggested that agencies delay or weaken safety, health, and environmental protections in some way."[37]

C. *Deregulatory Decisions Get A Pass*

Another source of bias is the fact that OIRA tends to scrutinize regulatory decisions more closely than deregulatory decisions. Under President Reagan's order, the cost-benefit analysis of deregulatory decisions was not even considered. In the 1980s and early 1990s, OIRA applied cost-benefit analysis to new regulations, but required "no cost analysis for [proposals] that relax[ed] existing standards."[38] The Clinton executive order changed things, defining the "significant regulatory actions" that would be subject to cost-benefit analysis to include deregulatory decisions.[39] OIRA now says it reviews deregulatory decisions,[40]

[35] U.S. GEN. ACCOUNTING OFFICE, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 74–78 (2003), available at http://www.gao.gov/new.items/d03929.pdf.

[36] *Id.* at 87.

[37] David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 369 (2006).

[38] Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 542 (1987).

[39] Deregulation can have an "annual effect on the economy of $100 million or more[.]" Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51,735 (Oct. 4, 1993). Therefore such measures fall under Clinton's Executive Order.

and agencies produce cost-benefit analyses of deregulatory decisions. However, under the George W. Bush administration, it appears that deregulatory decisions are not subject to such strict OIRA review. For example, the EPA claimed that its rule weakening New Source Review (NSR) would have only minor economic impacts, making cost-benefit analysis unnecessary. This claim is pure fantasy, given the huge scope of NSR—covering all "stationary sources," meaning any facility "which emits or may emit any air pollutant," a tremendous number of facilities including power plants, factories, and oil refineries. Even small changes will have large economic and environmental impacts. The failure to subject the NSR rule to cost-benefit analysis indicates a willingness to give deregulatory decisions a free pass.

D. *Agency Inaction*

Finally, one of the most powerful critiques of OIRA review and its use of cost-benefit analysis is that it merely responds to agency action and does not initiate regulation. Under the framework of the existing executive order, OIRA primarily serves an inhibitory role for the regulatory state. No similar formal mechanism exists to excite the agencies into action. There have been efforts on the part of individual OIRA Administrators—both formal and informal—to spur agency action, but these efforts have been ad hoc and outside the context of official regulatory review.

OIRA administrators are free to use their position to informally spur regulation. Sally Katzen has been credited with working behind the scenes to encourage regulatory efforts. These efforts are naturally difficult to track, but may play an important role, depending on the administration. There have also been small steps to formalize the regulation-forcing role. In 2001, OIRA announced a new practice of issuing "prompt letters" designed to spur agencies into regulatory action.[41] Fourteen prompt letters have been issued on a number of matters. In some cases, OIRA has called on agencies to regulate in new areas—for example, by requesting OSHA to consider elevating promotion of automatic

[40] Memorandum from the Office of Management and Budget, Regulatory Analysis: Memorandum to the Heads of Executive Agencies and Establishments (Sept. 9, 2003).

[41] *Id.* at 21–22.

external defibrillators in the workplace.[42]

However, both the hit lists and the prompt letters are somewhat ad hoc mechanisms, not enshrined in the executive order establishing OMB review, and not firmly ingrained in the institutional practices of OIRA. The job of simply reviewing regulations that bubble up from agencies is nearly overwhelming—twenty-two OIRA staff are responsible for reviewing six hundred regulations a year—or twenty-seven per analyst per year, or about one every two weeks.[43] With current levels of staffing and responsibility, the prompt letters and hit lists must take a backseat to OIRA's primary role—checking regulations against cost-benefit criteria, mainly to ensure that costs do not exceed benefits.

III. AN INADEQUATE SYSTEM

A. *Challenging the Model of the Hyperactive Regulator*

If there is good reason to believe that agencies systematically tend to over-regulate, attend to too many issues, and veer toward hyperactivity rather than stagnation, then a check on agency action is needed. Therefore, before turning to reforms of the current system, it is worth asking whether an antiregulatory bias in regulatory review is justified.

Several theories of agency behavior posit that agencies tend to over-regulate. The most popular theory of the overzealous agency sees bureaucrats as essentially opportunistic creatures, and posits that the opportunistic bureaucrat will engage in "empire-building" by attempting to increase its mandate and budget. This theory, propounded by William Niskanen[44]—a member of President Reagan's Council of Economic Advisers, and the chairman of the Cato Institute—held significant sway for many years, in both public-policy circles as well as the academy. Another theory argues, in a spin on classic collective action theory, the well organized public interest organizations, like the Sierra Club, will

[42] Letter from John D. Graham, Adm'r, OIRA, to John Henshaw, Assistant Sec'y of Labor, Occupational Safety and Health Admin. (Sept. 18, 2001), *available at* http://www.reginfo.gov/public/prompt/osha_prompt_letter.html.

[43] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

[44] *See, e.g.*, WILLIAM A. NISKANEN JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38 (1971).

be able to capture agencies, to the detriment of less well organized industry interests.[45]

Both of these theories are deeply flawed.[46] It is not clear that pursuing larger budget or more grandiose mandates is the best course of action for the opportunistic bureaucrat.[47] There is a wide variety of other goods that agency heads could pursue—such as prestige, nicer offices, intellectually stimulating work, leisure time, and future employment prospects, that may or may not dovetail with increasing agency budgets and mandates. It may make more sense for an agency to "go along to get along" and treat industry with a light hand in order to accrue favors that will be useful in the job market. The second theory runs directly counter to classic collective action theory, where diffuse interest such as that in environmental protection will lose out in the lobbying process to better funded and more well-organized special interest lobbies. No convincing explanation of how the Sierra Club or other environmental organizations will outbid industry in the public choice auction has ever been put forward.

Even if some agencies did tend to over-regulate, that tendency will be balanced out by other agencies that tend to under-regulate.[48] For example, if some believe the EPA has a bias toward regulation, few would make the same claim about the Department of Energy. Because of the overlapping mandates of federal agencies and the widespread collaboration needed to carry sophisticated regulatory regimes, the over-regulating tendencies of some agencies will be in tension with the under-regulating tendencies of others.

The theories that would justify OIRA's focus on agency action are not persuasive. In order for cost-benefit analysis to be institutionally neutral, and best promote economically efficient regulation, some mechanism is needed to use cost-benefit analysis to spur agency regulation.

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[45] This theory was propounded by Murry Weidenbaum, the first Chairman of President Reagan's Council of Economic Advisors, among others. *See, e.g.*, Murray L. Weidenbaum, *The High Cost of Governmental Regulation*, CHALLENGE, Nov.–Dec. 1979, at 32–39.

[46] *See* Bagley & Revesz, *supra* note 43, at 1262.

[47] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2004).

[48] *See* Bagley & Revesz, *supra* note 43.

B. *Petitions for Rulemaking and Judicial Review*

There is already a process for non-governmental actors to spur regulation, by seeking recourse against recalcitrant agencies in court. If that process is adequate, then there is no gap for OIRA to fill. However, the large degree of deference given to administrative agencies by courts means that judicial review of agency inaction cannot be expected to genuinely provide a useful spur to agencies.

Under many statutes and administrative procedures, groups can petition for new rulemaking. Agencies, faced with such a petition will then typically respond in some fashion, either taking administrative action or, more likely, explaining why the petition is denied. Groups can then seek judicial review of the denial for of their petition.[49]

Judicial review of an agency's denial of petition for rulemaking, however, is quite deferential. As the D.C. Circuit said in 1979 "[u]ndeniably, an agency normally possesses a generous measure of discretion respecting the launching of rulemaking proceedings."[50] Two years later, that court characterized its review of denials of rulemaking as follows: "It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking."[51] Ensuing Supreme Court cases, such as *Heckler v. Chaney*[52] and *Chevron v. Natural Resources Defense Council*[53] have, if anything, strengthened the agencies' discretion in this area. As the D.C. Circuit court stated in 1989:

> While *Heckler v. Chaney*, 470 U.S. 821 (1985), teaches that nonenforcement decisions are presumptively unreviewable, . . . refusals to institute rulemaking proceedings remain outside *Chaney*'s core and are subject to a judicial check. At the same time, . . . [the scope of that review is] extremely limited [and] highly deferential. . . . We will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency. Furthermore,

[49] Envtl. Def. Fund v. Reilly, 909 F.2d 1497, 1504 n.97 (D.C. Cir. 1990).

[50] Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979).

[51] WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C. Cir. 1981) (internal citations omitted).

[52] 470 U.S. 821, 831 (1985).

[53] 467 U.S. 837, 842–44 (1984).

> under the instruction furnished in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), to the extent that the intent of Congress is not clear, we must accept an agency's reasonable interpretation of the substantive terms of a statute it is charged to administer.[54]

In *Massachusetts v. EPA*,[55] the Supreme Court further clarified the scope of review of the denial of a petition for rulemaking. In explaining the difference between non-reviewable decisions not to enforce a rule versus the reviewable denial of a petition for a rulemaking, the Court noted that rulemakings "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation."[56] However, while denials for petitions for rulemaking are reviewable, that review is "'extremely limited' and 'highly deferential.'"[57]

In *Massachusetts v. EPA*, the Court found that the EPA had failed even that deferential standard of view. Under the statute, the EPA was required to regulate auto emissions, "which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[58] The Court found that:

> EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.[59]

The agency's failure was in "offer[ing] a laundry list of reasons not to regulate" rather than either determining that greenhouse gases do not contribute to climate change—which it could not, in good faith do—or explaining why it was exercising

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[54] Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96–97 (D.C. Cir. 1989).

[55] 127 S. Ct. 1438 (2007).

[56] *Id.* at 1459 (quoting Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 3–4 (D.C. Cir. 1987).

[57] *Id.* (quoting Nat'l Customs Brokers, 883 F.2d at 96).

[58] 42 U.S.C. § 7521(a)(1) (2000).

[59] 127 S. Ct. at 1462.

its discretion not to undertake an inquiry into the dangers of greenhouse gases.[60] While *Massachusetts v. EPA* was a striking victory for environmentalists—and *may* provide a roadmap for more probing review of denial of petitions for rulemaking—its holding is quite limited. The EPA failed to justify its decision not to regulate according to the statutory criteria, and was chastised by the Court. If the EPA, however, had appropriately cited the statutory criteria, given the deferential standard of review, the case may have come out very differently.

Even when groups are successful in court, those victories can be largely illusory. *Massachusetts v. EPA* provides a perfect example. The plaintiffs in that case could not have had a more clear victory. The remedy? The denial of the petition for rulemaking was vacated, and the petition was remanded to the agency for further consideration.[61] The EPA has yet to regulate greenhouse gases from automobiles, and is very unlikely to do so under the current administration. Any change to this policy, if it comes, will likely be the consequence of an election, rather than a court order.

There are ways to alter the rules of the game governing petitions for rulemaking and Congress has already done so in the context of telecommunications regulation. The Telecommunications Act of 1996 included provisions designed to "promote competition" by "reduc[ing] regulation" of the telecommunication sector.[62] The Act included several provisions relating to "regulatory flexibility" which included a mechanism for regulated parties to petition the FCC to "forbear" from enforcing various communications regulations.[63] In addition to creating the right to petition, the statute also favors petitioners by creating a default rule *granting* the petition in cases where the FCC fails to rule on it. The statute provides:

> Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year

[60] *Id* at 1462.

[61] Massachusetts v. EPA, No. 03-1361 (Consolidated), slip op. 2007 WL 2935594 (D.C. Cir. Sept. 14, 2007).

[62] Preamble to Telecommunications Act of 1996, Pub. L. No. 104-104 (codified in scattered provisions of 47 U.S.C. § 151 et seq.).

[63] 47 U.S.C. § 160 (2000).

> period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section.[64]

After the one-year-plus-ninety-days period, a failure to Act by the FCC results in the requested relief.

This kind of default rule is rare, however, and it is worth noting that the political will to force the agency's hand came in the context of forcing *deregulation* when the agency fails to act, rather than new regulation. However, this example shows that the current rules, which afford agencies extremely broad discretion to avoid acting, are not set in stone.

C. *Rethinking Regulatory Review*

The solution to the substantive biases within cost-benefit analysis is straightforward—simply eliminate the use of techniques that are biased against regulation, and substantively, cost-benefit analysis will be more neutral. While there are certainly political hurdles that must be cleared theoretically, the steps that must be taken are clear.

Some of the institutional biases admit to obvious solutions as well. Central regulators can use cost-benefit analysis to ensure that regulations are sufficiently strong, and can subject deregulatory decisions to as rigorous analysis as other administrative action. While there is some institutional rearranging that would be necessary, as well as a larger budget for regulatory review, these are practical, rather than conceptual, problems.

The solution to the problem of regulatory inaction, however, is not as clearly addressed. The structure of administrative review has been around so long that we are habituated to thinking that cost-benefit analysis naturally serves as a check on administrative actions. Developing a mechanism to use cost-benefit analysis as a spur requires us to move beyond that framework.

IV. OVERCOMING INACTION

A. *Using OIRA – Executive Review of Denial for Petitions for*

[64] *Id* at § 160(c).

Rulemaking

While there are generally strong reasons to avoid adding additional layers of review to agency decisions—most importantly the time, money, and other resources that go into such review processes—there is a useful role for OIRA in conducting review of denials for rulemaking prior to judicial review. Courts, in conducting review of denials of petitions for rulemaking, are highly conscious of their limited expertise, and are hesitant to intrude into the traditional executive function of setting agency priorities. OIRA has less to fear in these situations. As an executive office, the inter-branch concerns are clearly not a problem. Further, as a specialist agency with competence in exactly the question at hand—agenda setting and the prioritization of agency resources—OIRA brings not only an independent perspective, but also significant expertise to bear. OIRA can help invigorate petitions for rulemaking as a way of identifying areas in which new rules are needed. As it currently stands, there is no formal way to include cost-benefit analysis in this petition process. A newly enhanced action-forcing role for OIRA can include the review of denials of certain petitions for rulemaking.

Under the current regime, a petition for rule-making begins when some interest—usually a public interest organization or a regulated entity—submits a petition to the agency, explaining its rationale for why new rulemaking is necessary. Efforts by interested parties to appeal directly to the courts, without first petitioning the agency for action, invite the courts to dismiss their actions for failing to exhaust administrative remedies or ripeness concerns.[65] An agency may have an internal mechanism to consider the denial of a petition for rulemaking, and in that case the petitioner will seek internal agency review before going to the courts.[66] Once the agency finally denies the petition for rulemaking, that decision is subject only to the deferential review of courts.

OIRA should create a procedure whereby petitioners that have been denied by the agency can present the case to OIRA for why

[65] *See, e.g.*, Ass'n of Flight Attendants-CWA v. Chao, 493 F.3d 155, 160 (D.C. Cir. 2007).

[66] *See, e.g.*, 47 U.S.C. § 405(a) (2000) (requiring those aggrieved by an order of the FCC to petition for reconsideration before the agency before seeking a judicial remedy).

the agency should move forward with a new rulemaking. Under this procedure, after the agency has rejected a petition, there would be an optional review process before OIRA. At this review, the burden would fall on the petitioner to show that a new rule is justified by cost-benefit analysis. The agency, and other interested parties, would have the opportunity to have input into the process. If OIRA finds that a new rule is justified, then it would enter into a consultation with the agency to try and move forward with a rulemaking. If the agency ultimately refuses, and internal executive discussions are not sufficient to resolve the conflict, then the petitioner would be free to seek recourse before the courts.

In order to ensure that agencies are not overwhelmed in responding to the demands of OIRA review, where petitioners do not present credible arguments, OIRA should make a preliminary finding of whether the petition is supported by a credible cost-benefit analysis. This preliminary finding will put the agency on notice when it must attend to a particular petition for review by more closely examining the cost-benefit analysis presented by the petitioner, or conducting its own cost-benefit analysis of the proposed rule.

B. *Circumscribed, Deferential, but Probing Review*

During the OIRA review process, the only question before OIRA will be whether a new rule is justified on cost-benefit grounds. OIRA should not conduct "arbitrary and capricious" review of the agency's decisionmaking process, nor should it look to the agency's governing statute or seek to interpret that statute. The closest analogue from the area of judicial review would be "step two" of *Chevron* where courts look to whether the agency action is "reasonable." OIRA's review would be even more narrow, however, because the standard of reasonableness would be supplied *ex-ante*—whether a new rule is justified on cost-benefit grounds.

In order to structure OIRA review of denials of petitions for rulemaking, and ensure that the office is acting within its areas of competency, it would be important for OIRA's review to be focused on cost-benefit analysis. Petitioners will, at the very least, need to produce a cost-benefit analysis supporting a new rule, compared to various alternatives including the current regime. OIRA should therefore establish a set of guidelines describing how petitioners should structure their arguments in cost-benefit terms,

and could include general guidelines for how these cost-benefit analyses should be carried out. Petitions that did not include methodologically defensible cost-benefit analyses should be outside the scope of OIRA review.

One complicating factor that should be taken into account in any cost-benefit analysis is the opportunity costs of the proposed rule—the rules that the agency might otherwise have engaged in, but cannot because its resources are being devoted to the rule in question. While it would be difficult for those outside an agency to estimate opportunity costs, it should not be impossible—the marginal value of recent rules by the agency provides a reasonable estimate. OIRA could also provide default estimates of opportunity costs so that each new petitioner need not engage in a separate inquiry.

Review should be deferential to the agency, insofar as the agency reviews the petition for rulemaking according to methodologically defensive cost-benefit criteria. To the extent that the agency and the petitioner have different views of how to measure the costs and benefits of a regulation, there should be deference to the agency's views—so long as they are supportable. Choices about how cost-benefit analysis is carried out can be left largely to the agency, so long as the agency's choices have a rational basis in cost-benefit methodology. Where an agency is acting consistent with a public statement or consistent practice for evaluating or carrying out cost-benefit analysis, OIRA should be deferential. However, if an agency is departing from its practice in evaluating a particular petitioner's cost-benefit analysis, naturally OIRA should require justification for that departure.

While OIRA review would be deferential to choices made by the agency, it would not be as deferential as review carried out by the courts. Because of its familiarity with cost-benefit analysis, OIRA would be in a position to scrutinize agencies analysis of the costs and benefits of regulation—just as is currently done with proposed regulation. While OIRA would give agencies some degree of deference for certain methodological choices, how those choices are implemented would be subject to strict review. The cost-benefit framework creates clear guidelines for petitioners and agencies in responding to petitions. Those clear guidelines facilitate review—determining whether they are met or not may be technical, but there is ultimately an element of objectivity to the question of whether a cost-benefit analysis (or response thereto) is

adequate.

Courts have good reasons to give agencies deference in their decisions over whether to initiate rulemaking. There are concerns about competency—generalist judges are not experts in agency resource allocation, nor are they intimately familiar with the areas regulated by agencies. There are also inter-branch concerns; judges are justifiably loath to treat on the President's prerogative, and allocating agency resources is seen as a core executive responsibility. OIRA is less subject to these problems. OIRA's area of expertise is agency resource allocation and the use of cost-benefit analysis to prioritize regulatory action. Further, there is no inter-branch concern, because OIRA is located within the executive.

Finally, it is also important that the OIRA review process not become overwhelmed with requests for deregulation. The purpose of OIRA review of denials for rulemaking would be to use cost-benefit criteria to determine when agency inaction is economically inefficient. Agency inaction should, generally speaking, mean a failure to regulate, rather than a failure to *de*regulate. OIRA should also not be in the business of nitpicking over the substantive choices that agencies make in creating a rule. A petition for review that is generated shortly after a rule is promulgated, with the purpose of proposing a new rule that was considered and rejected by the agency, should not find a hospitable home in OIRA. While petitions for rulemaking seeking deregulation, or seeking a different rule rather than a rule where none exists, should not be formally excluded from the OIRA process, there should be a presumption that where there is a regulatory regime in place—so long as it is not extremely outdated—the agency has acted appropriately in deciding not to change course. That presumption should be rebuttable in cases where the agency is demonstrably incorrect, or where there has been a grievous failure of the agency to revise and update regulatory programs on the basis of new information.

C. *Post-Review Consultation*

When OIRA finds that the benefits of the rule do outweigh the costs, it should enter into consultations with the agency in order to bring about a rule making. OIRA should not be given the authority simply to order the agency to regulate. Given OIRA's place in the Executive Office of the President, and its oversight

role over all of the agencies, this consultation should be enough to spur the agency to action in most cases.

During the consultation process, non-cost-benefit analysis concerns may be raised by the agency. To the extent that they are legitimate, these concerns may prove to be sufficiently powerful that agency inaction is justified. OIRA would not be forced to ignore these concerns during consultations, and an appropriate balance between concerns of economic efficiency and other issues—such as distribution or rights—must be struck.

During the consultation process, the agency can also develop a course of action that it finds desirable. While it may sometimes be the case that rules proposed by petitioners can simply be adopted by an agency, it is likely that in many cases the agency will not wish to adopt the recommendations of private parties wholesale, even if they have decided to move forward with rulemaking. Keeping OIRA involved during this pre-rulemaking phase will ensure that the considerations that led to the rulemaking—specifically the cost-benefit justifications for the regulation—are vindicated in the proposed rule.

As with the more formal review proceeding, the consultation process should include the petitioner, the agency, OIRA, and other interested parties. These parties should continue to be apprised as OIRA and the agency determine the best path forward, whether a new rulemaking is in fact justified, and what the contours of a new rulemaking should be.

It may be the case that this consultation process may sometimes fail, and the agency and OIRA will disagree about whether rulemaking is justified and necessary. For politically salient issues, it is unlikely that any such conflict will survive the consultation process—if necessary, conflicts between the agency and OIRA can be resolved by the President. However, for less salient issues, where high level White House involvement is unlikely, OIRA should be empowered to issue a formal ruling that the agency has failed to justify its inaction, and that the petitioner has presented a compelling case for a new regulation. OIRA should, when possible, decide not only that agency action is desirable, but also describe in greater detail the kinds of rulemakings that would be appropriate. While such a formal ruling on OIRA's part would not be binding on the agency, it can be used by petitioners to generate public support for their proposal, and can also be used by courts when examining an agency's

decision to deny a petition for rulemaking under the arbitrary and capricious standard.

The process of review and consultation does create a loss of autonomy for the agencies. Involving OIRA and outside groups in the pre-rulemaking process forces an agency to start taking their views into consideration at an early period, and lessens the ability of agency staff to shape the direction of rulemaking. If some agencies prefer traditional rulemaking—which does not involve OIRA review or outside comments until a later stage—they can be expected to take steps to avoid review of inaction. Given that existing regulations are given greater deference then an absence of regulation, agencies may attempt to fill regulatory voids before petitioners have the opportunity to initiate the OIRA review process.

This would be a salutary side effect of OIRA review of inaction. An important criticism of the American administrative state is that, all too often, certain risks are given great attention and are regulated quite strictly, while other risks are largely ignored. To the extent that agencies attempt to quickly regulate a number of risks, they will be tempted to regulate less strictly in the first instance to avoid strong opposition from regulated industry. Less strict regulation of more risks, rather than highly strict regulation of a few risks, is preferable from a cost-benefit perspective as a general matter because the first increments of risk reduction can be expected to be the cheapest. If the threat of OIRA review spurs agencies to act in areas that they have previously ignored, that is a major benefit of a new system. Where regulations are inefficiently lax, OIRA review of agency *action*—properly reformed so that it examines equally for laxity as well as inefficient stringency—will help avoid regulation that is too weak.

D. *Judicial Review*

Petitioners for rulemaking that have been denied by an agency should not be forced into the OIRA process—it should be an option for those petitioners that believe they can show that new regulation is justified on cost-benefit grounds. OIRA review should therefore not be treated by courts as a prerequisite to judicial review. There are some regulatory programs where cost-benefit analysis is not the primary criteria for regulatory action—forcing petitioners to justify their petitions in cost-benefit terms before seeking judicial review would therefore be foolish. Even

where regulatory programs can be justified on cost-benefit terms, the possibility of OIRA review should not diminish the rights of petitioners to seek review in the courts. Where petitioners decide to forego the OIRA process, they will be able to pursue traditional judicial review under its deferential terms.

Where OIRA finds that the petitioner has not shown that new regulation is justified, petitioners will also be free to seek review in the courts. Judicial review should lie for the original denial for the petition for rulemaking, but judicial review should not be expanded to include review of OIRA's findings. OIRA should be free to issue summary findings that the petitioner did not show that the benefits exceeded the costs, although greater detail would be helpful to future applicants. OIRA's finding that the benefits did not outweigh the costs should not be subject to judicial review either procedurally or substantively. Although OIRA is acting independently from the agency, its decisions should be treated as preliminary steps toward the ultimate decision reached by the agency concerning the petition for rulemaking. There is little justification for subjecting OIRA's finding to review, rather than simply asking courts to review the agency's original denial. As the number of reviewable decisions is allowed to propagate, there are additional burdens on the courts to review actions and the executive to defend actions.

Agencies, however, would be well advised to take a second look at the petition for rulemaking after OIRA review in order to incorporate all of the information presented during the review process into its record. If the agency makes a second finding, denying rulemaking, on the basis of the more complete record, the court should look to the larger record—and decisionmaking process—when subjecting the agency to arbitrary and capricious review. Petitioners that seek OIRA review would therefore face a risk that OIRA would issue detailed findings, justifying the agency's choice not to act, making success before courts even more difficult. This risk would help ensure that only those petitioners that believe they have a legitimate chance before OIRA will pursue review there before turning to the courts, limiting the burdens on agencies and OIRA from the new executive review.

In the rare cases where an agency fails to move forward with rulemaking notwithstanding an OIRA finding that a new rule is justified, the entire record, including OIRA's finding and the comments presented by the petitioner and other parties to OIRA

should be under review. While the OIRA review process is unlikely to revolutionize judicial review of agency inaction, it will empower courts in two important ways. First, to the extent that court review has been limited because of a lack of expertise, formal findings from OIRA may allow courts to be less deferential to the agency's position in inaction cases. At the very least, the agency will be required to show that it is exercising its discretion in a reasonable fashion in light of OIRA's findings. In this way, OIRA review would create a more complete record for court's to judge the agency's inaction under the arbitrary and capricious standard.

Secondly, formal findings from OIRA suggesting a proposed rule would facilitate court's mandamus power. Now, it is essentially impossible for courts to order agencies to adopt a rule because courts would be forced to develop a rule themselves—something well outside their expertise. The best they can do when an agency has not justified inaction, is to order the agency to either provide better justification or to submit a rulemaking under a strict timeline. Where OIRA has proposed a rule, courts issue more specific mandamus orders to recalcitrant agencies, requiring them to initiate rulemaking on the regulation as proposed in the OIRA ruling. This greater degree of specificity significantly increases the court's power to force agency action.

CONCLUSION

By allowing citizens and groups to use cost-benefit analysis to justify new regulatory actions, a new petition process where parties could take denials of their petitions for rulemaking to OIRA for review would give pro-regulatory interests the opportunity to use cost-benefit analysis to forward their cause, and would also increase participation in the setting of agencies' agendas. Although it will remain important for individual agencies, as well as the central regulatory review office, to maintain a large degree of control over the specifics of agenda-setting, there is also an important role for affected interests. Because of the structure of regulatory review, there is currently ample opportunity for affected interests to bog down the regulatory process; it is time to create a countervailing opportunity to get the process started.

The point of OIRA review is not to intrude into agency territory or prerogative, but instead is designed to put bite into the

petition for rulemaking process. Because of the limited expertise of generalist courts, and their position outside the executive, courts are in a poor position to review agency inaction, and the substantial deference given to agency decisions in this area is a consequence of the difficulty for courts of conducting such review. OIRA is in a much better position to scrutinize an agency decision to deny a petition for rulemaking, insofar as the petition is supported on cost-benefit grounds. In these cases, OIRA review can serve the useful purpose of independently evaluating the agency's decisionmaking and thereby facilitate more probing, and ultimately useful, judicial review.