MERCATUS CENTER
George Mason University
Bridging the gap between academic ideas and real-world problems

TESTIMONY

# REINVIGORATING, STRENGTHENING, AND EXTENDING OIRA'S POWERS

BY JOHN F. MORRALL III

House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial, and Antitrust Law

September 30, 2013

Thank you for your time and invitation to testify before this committee on the role of OMB's Office of Information and Regulatory Affairs, or OIRA for short. I have been studying, teaching, and working to improve regulatory policy for over 40 years, including my time as an economist, branch chief, and acting deputy administrator at OIRA from its beginning in 1981 to my retirement from the government exactly five years ago today. While I was at OIRA, we reviewed 21,741 final rules under EO 12866 and its predecessor, out of 129,481 final rules published by all federal agencies. About 300 of these rules were major rules with costs, benefits, or both over $100 million. The cost of those 300 rules, adding up the agencies' own estimates in today's dollars, is about $195 billion annually.[1]

I was a career civil servant and economist reviewing regulations and helping to manage the regulatory process under various executive orders and five presidents. I also worked at Department of Labor, Housing and Urban Development, Council on Wage and Price Stability (a predecessor of OIRA in the Carter administration), and at the Brookings Institution and the American Enterprise Institute. Before that I taught international economics in the University of Florida's business school. I am currently an affiliated senior scholar at the Mercatus Center at George Mason University and a regulatory analyst for *Bloomberg Government*.[2] My current jobs entail reading each day's *Federal Register* and analyzing the economically significant regulations and Regulatory Impact Analyses, something I used to do as a government economist. So please forgive me if my remarks make your eyes glaze over or I don't always use plain language.

A well-known Washington saying is, "Where you stand is where you sit," and I have sat in thousands of meetings at all sides of the table, discussing specific regulations as both a regulator and as a regulator

1. See *2009 Report to Congress on the Cost and Benefits of Federal Regulations*, Office of Management and Budget, Office of Information and Regulatory Affairs.

2. My observations and recommendations are my own and do not necessarily reflect the views of either the Mercatus Center or *Bloomberg Government*.

For more information or to meet with the scholars, contact
Robin Bowen, (703) 993-8582, rbowen@merctatus.gmu.org
Mercatus Center at George Mason University, 3351 Fairfax Drive, 4th Floor, Arlington, VA 22201

*The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.*

of regulators, which is one view of OIRA's role held especially by the agencies. So naturally I have some thoughts about how to improve both the regulatory process and outcomes. I hope they reflect a balanced staff perspective. They are in the form of observations, lessons learned, and recommendations for the new administrator from a lifelong advocate of better regulation. In view of the fact that OIRA's key function is to review regulations according to the good government principles of various executive orders and the president's own policies, I wish to make two broad points. First, OIRA should focus on its traditional mission of being a "watchdog" for the public, including citizens not yet born, seeking and attempting, if possible, to mitigate any unintended consequences of agency actions. Even a well-functioning process is not likely to produce good regulations absent a strong advocate for the broad public interest in the rulemaking process or an independent ability to verify agency claims. I will explain why the incentives and pressures applied to agencies create an ever-present risk of decision-making influenced more by politics and preferences than by the objective analysis focused on problem-solving that OIRA and OMB have traditionally been advocates for.

My second, and related point, is that an effective OIRA needs more of the right staff members—individuals trained in benefit-cost analysis and risk assessment—and more time to evaluate economically significant rulemakings.

## BACKGROUND

OIRA's key function is to review regulations according to the good government principles of various executive orders and the president's own policies. It reviews regulations issued by the executive branch agencies before they are published in the *Federal Register* as both proposals for notice and comment under the Administrative Procedure Act and as final regulations. By executive order, Executive Branch agencies are not permitted to publish significant regulations until completing OIRA review.

OIRA was established by President Carter in 1980 to control red tape and charged by President Reagan in January 1981 to help combat an economic crisis many feel was worse than the one we have just been through. Stimulative monetary policy could not cure a crisis it had created. Micro policy could, by reforming regulations. Reducing regulatory costs and maximizing its net benefits could create economic growth, higher employment, and a safer and more healthful society.[3] Twenty years ago today, President Clinton, after an internal debate about OIRA's future, decided to strengthen President Reagan's EO 12291 by issuing EO 12866, which focused review efforts on the most significant regulations and codified certain transparency and open government procedures. Despite the inherent controversy of having to say no to agencies and their constituencies, OIRA review and Regulatory Impact Analysis, as outlined in EO 12866, remain the basic framework for managing the executive branch regulatory process. (In the old days our softball team proudly called ourselves the No-Men.)

At many of the meetings to discuss the Regulatory Impact Analysis of the regulation, or RIA, a certain dynamic was often clear. The program officials and their lawyers saw the RIA as procedural hurdle to overcome and a possible danger to defending the regulation, either in the public rollout or upon a judicial challenge. Economists from the agencies often sat quietly in the meetings and were not supposed to talk to OIRA economists without going through their general counsel's office. Another important observation was that in meetings with outside interests, including the regulated, hardly anyone opposed a specific regulation. Rather, they suggested ways to tweak the regulation to their advantage or increase the costs to their competitors.

There is a vast literature about OIRA's proper role, its effectiveness in improving regulation, and recommendations for improvement, written by political scientists, economists and administrative law specialists,

3. Then vice president George H.W. Bush was put in overall charge of that effort as head of the Task Force on Regulatory Relief.

and environmental law professors.[4] Except for the environmental law professors, the literature generally agrees that safeguards against capture, tunnel vision, and ex post rationalization are needed in the regulatory development process.

I will mention just a few recent findings with which I have been involved that may prove useful to the new administrator, but first, I will provide some recent context.

## An Observation: From Watchdog to Information Retriever

OIRA's main modus operandi appears to have evolved after 42 years from being a watchdog whose job was to ensure that agencies used economic logic and quality benefit-cost analysis when regulating to being a "conveyor and convener" and "information aggregator" for the agencies so that they properly followed the Administrative Procedure Act and the "prescriptions of the relevant executive orders."[5]

Certainly, following the Administrative Procedure Act is a very important component of high-quality regulation, but the agencies have both strong incentives to make sure their regulations are not overturned on APA grounds and many more lawyers than OIRA. Moreover, the agencies have specific missions and mandates to mitigate important social problems by regulation and thus have fewer incentives than OMB/OIRA to ensure that costs and benefits have been carefully analyzed and alternative approaches examined. OMB's mandate is much broader and reports directly to the president. Given our limited government and private resources, OMB's traditional mission, not to mention its comparative advantage, has been to worry about and, if possible, mitigate any unintended consequences of agency actions and to make policy recommendations on budget and regulatory priorities within various statutory frameworks.

My observation is that the more recent OIRA has shifted its focus from the substance of regulatory policy issues and a soft regulatory budget role to ensuring that the management of the regulatory process is full and complete. My observation is supported by comparing the views of recent administrators on the role of OIRA, expressed after they left public service in the *University of Pennsylvania Law Review* in 2008 and the *Harvard Law Review* in 2013. The earlier article emphasizes the important role that benefit-cost analysis and priority played in OIRA review while the later article emphasizes the importance of its administrative role as a "conveyor and convener" and "information aggregator," although they both discuss the roles of process and substance.[6]

The big picture view of OIRA's mission was well expressed by Cass Sunstein in 2002:

> OIRA should also see, as one of its central assignments, the task of overcoming tunnel vision, by ensuring that aggregate risks are reduced and that agency focus on particular risk does not mean that ancillary risks are ignored or increased.[7]

Effective OIRA administrators appreciate old Washington wisdom, such as the already mentioned "where you stand is where you sit," and the newly popular "trust but verify." Even a well-functioning process is not likely to produce good regulations absent a strong advocate for the broad public interest in the rule-

---

4. The authors include both Supreme Court Justices and Nobel Laureates in economics.

5. The terms "conveyor and convener" and "information aggregator" were used by Cass Sunstein to describe OIRA's role in a recent *Harvard Law Review* article, "OIRA: Myths and Realities," published after he left OIRA. The emphasis on following the Administrative Procedure Act and the "prescriptions of the relevant executive orders" was a main message of Administrator Howard Shelanski's July 24, 2013 testimony before the Reducing Red Tape hearings of the House of Representatives, Committee on Small Business.

6. See John Graham "Saving Lives Through Administrative Law and Economics" *University of Pennsylvania Law Review* 157, no. 2 (December 2008) and Cass Sunstein "OIRA: Myths and Realities" *Harvard Law Review* 126 (2013): 1842.

7. Ibid.

making process or an independent ability to verify. OIRA and OMB have traditionally been both advocates for economic efficiency and experts in impartial data analysis. The new administrator is uniquely qualified with both formal legal and economic backgrounds. As someone who knows what it's like to work at OIRA, I would tell the new administrator that I think regulatory policy needs more careful analysis of consequences and less advocacy of specific interests. In my career, I recall several instances where better and more objective RIAs might have avoided significant harm to our national economy: HUD goals and timetable rules for GSEs that led to the increase in subprime mortgages and EPA's renewable fuel standards and ethanol regulations that increased corn prices.

To reinvigorate that role, OIRA needs first to restore its economic and technical staffing levels, which have been cut in half over its existence while its functions in paperwork, information policy, and statistical policy have been dramatically expanded. At one time, OIRA had a specific branch of a dozen or so economists who specialized in benefit-cost analysis, and OIRA hired scientific experts in risk analysis. Today it has a few experts scattered among five branches who are, for the most part, staffed with overworked although highly competent desk officers. In the past, OIRA was also fortunate to attract top economists on detail from the agencies. They impartially reviewed RIAs from other agencies, making substantive contributions while gaining insights that advanced their careers and agency regulatory policy when they returned.[8]

## RECOMMENDATION

In the words of Cass Sunstein's 2002 recommendation, "OIRA should be reinvigorated, and its powers should be extended and strengthened, so as both to deter unreasonable regulation and to ensure that reasonable regulation is forthcoming."[9]

As a first step, OIRA's ability to thoroughly review benefit-cost analyses and ensure high-quality standards should be a high priority of a new administrator.

### Findings from the Recent Literature: OIRA Has a Lot of Potential to Improve Regulation but Must Overcome Strong Political Influences

Recent findings from studies of the regulatory process by Mercatus scholars and others show that regulatory reform and better regulation are clearly needed and have significant potential to improve investment and economic growth. This is well understood by most of the world, with over 50 countries adopting RIAs and regulatory oversight practices informed by OIRA's early success. What we have learned is that better regulation is a constant struggle against short-term political gain for narrow interests.

First, while at OIRA , I developed league tables of risk regulations and found that the cost-effectiveness of final regulations aimed at saving lives can vary by several orders of magnitude. The findings imply that a better system of setting priorities when it comes to regulation could save thousands of lives while saving billions of dollars by focusing time and effort on issuing regulations that could save more lives at lower costs.[10]

Second, a study with Stewart Shapiro of Rutgers University, also a former OIRA economist, called "The

---

8. Several later became heads of the policy shops at their agencies.

9. Ibid. Shortly after this recommendation, OIRA was reinvigorated and strengthened by John Graham, who was President Bush's only confirmed OIRA administrator. He hired more economists and scientists, returned regulations to the agencies, using public "return letters," and even suggested cost-effective regulations to the agencies, using "prompt letters."

10. See Morrall, "A Review of the Record," *Regulation* (November/December 1986) and "Saving Lives: a Review of the Record," *Journal of Risk and Uncertainty* 27, no. 3 (2003).

Triumph of Regulatory Politics: Benefit Cost Analysis and Political Salience," published after we left OIRA, found upon analyzing ten years of benefit-cost data for 109 major rules that there was no relationship between the amount of information considered in the analysis and the net benefits in the rule.[11] We then decided to test other variables that might potentially affect the net benefits of a regulation. In particular, we wanted to examine the effect of political factors on the results of an analysis. We divided our dataset both by the comments received on the rule (assuming that rules that received more comments were more political) and by whether the rule was a "midnight" regulation promulgated in the last six months of an administration (assuming that administrations wait to the end of an administration to promulgate their more controversial rules). Our findings were stark. Rules that were issued away from the glare of the political spotlight had higher net benefits than politically salient rules.

The paper concludes, "Politics and economics in the rulemaking process are fatefully intertwined. Congressional politics influences the statute that puts bounds on the policy options an agency may consider. Presidential and agency politics influence agency choices both on policy and, as shown here, on the analysis of the policy." An OIRA administrator needs to insulate the economic analysis and recommendations from politics as much as is legally feasible.

Third, in a second paper with Shapiro, "Does Haste Make Waste? How Long Does It Take to Do a Good RIA," we examine the relationship between the amount of information in an RIA and the time it takes to write and review the RIA.[12] We find that the longer an agency spends developing the regulation and the longer that OIRA spends reviewing it, the more information in the analysis. However, the direction of causality is unclear. Better analyses may take more time to review. Or more review may make analyses better. We recommend increasing OIRA staff, which has advantages regardless of the direction of causality. Increasing OIRA staff has significant potential for improving regulatory analysis and the underlying regulations at a relatively low cost, even taking into account that the regulation provides significant net benefits, as OIRA maintains. As a second-best option, increasing OIRA review time would also likely provide net social benefits.

Finally, in a study based on data from the RIA Report Card project at the Mercatus Center at George Mason University with colleagues Jerry Ellig and Patrick McLaughlin,[13] we found that, apart from relatively poor-quality scores, there was little overall difference in the quality and use of RIAs between the Bush and Obama administrations, although interestingly we found that the more liberal agencies (Labor, Health and Human Services) got through OIRA with lower-quality analyses in the Obama administration, while the more conservative agencies (Defense, Homeland Security) got through OIRA with lower-quality analyses in the Bush administration. OIRA needs to do a better job enforcing its quality standards and being aware of political influences.

The staff had a saying in OIRA when I was there: we don't make policy decisions; we just raise the cost of making bad decisions (by making them more transparent).

---

11. See Stuart Shapiro and John Morrall, "The Triumph of Regulatory Politics: Benefit Cost Analysis and Political Salience," *Regulation and Governance* 6, no. 2 (June 2012).

12. See Stuart Shapiro and John Morrall, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis," published online 21 August 2013, *Administration & Society*. The benefits of longer review time were confirmed by Ellig and Fike using a different data set. See Jerry Ellig and Rosemary Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Working Paper No. 13-13, Mercatus Center at George Mason University, Arlington, VA, July 2013).

13. See Jerry Ellig, Patrick A. McLaughlin, and John Morrall, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across US Administrations," *Regulation and Governance* 7, no. 2 (June 2013).

## FINAL THOUGHTS

The enormous amount of regulation generated each year and the huge potential for improving it could provide enormous net benefits to society. A strong watchdog agency is needed to provide the transparency and checks and balances needed to set priorities for high-impact regulations.

In addition to rebuilding OIRA's technical staff and enhancing its voice in policy debates with the agencies, several other more subtle steps should be considered by the administrator.

In its 2008 draft report to Congress, OIRA proposed publishing a scorecard that consisted of nine questions to rate the completeness of agency RIAs.[14] It was already using such a scorecard for internal purposes, such as staff performance awards. The hope was that this transparency approach would directly encourage agencies to do a better job providing the information required by OMB circular A-4, which established best practices for RIAs. However, even though the three peer reviewers asked by OIRA to review the report expressed support for the scorecard concept and no adverse comment was received, OIRA has not gone forward with the project.[15] Given that the scorecard concept is widely used in the academic literature on regulatory policy, including by the Mercatus Center, it may be time for OIRA to step up to the plate and increase its leverage.

Finally, a procedural change that would likely strengthen and reinvigorate OIRA would be to require that agencies perform their RIAs, including cost-benefit analyses of alternatives, before they choose their preferred alternative and draft the regulation. Agencies would be required to describe the problem to be solved, including any market failure, and send the RIA formally to OIRA for quality control and approval before the proposed regulatory language is sent. An amendment to EO 12866 could formalize this process.

Thank you again for the chance to express my views.

## ABOUT THE AUTHOR

John Morrall is an affiliated senior scholar at the Mercatus Center at George Mason University. His primary research interests are regulatory impact analysis, benefit-cost analysis, and regulatory reform and oversight. From 1981 until 2008 he worked at the Office of Information and Regulatory Affairs of the Office of Management and Budget as an economist, branch chief and Acting Deputy Administrator. He was the lead author for OMB's annual Report to Congress on the Costs and Benefits of Federal Regulations.

Dr. Morrall has been both a Visiting Economist at the American Enterprise Institute and a Brookings Institution Economic Policy Fellow. He also worked on regulatory reform at the Council on Wage and Price Stability. Prior to his government service he was an Assistant Professor of International Economics at the University of Florida. He has also taught economics at the American University and the University of North Carolina at Chapel Hill.

## ABOUT THE MERCATUS CENTER

The Mercatus Center at George Mason University is the world's premier university source for market-oriented ideas—bridging the gap between academic ideas and real-world problems.

A university-based research center, Mercatus advances knowledge about how markets work to improve people's lives by training graduate students, conducting research, and applying economics to offer solutions to society's most pressing problems.

Our mission is to generate knowledge and understanding of the institutions that affect the freedom to prosper and to find sustainable solutions that overcome the barriers preventing individuals from living free, prosperous, and peaceful lives.

14. OIRA, *Draft 2008 Report to Congress on the Costs and Benefits of Federal Regulations*, 18. This scorecard was used by Shapiro and Morrall to rate final RIAs with both cost and benefits from 2001 to 2008 in the two articles cited above. A more complete scorecard based in part on this one has been used to rate all proposed major rules since 2008. They are posted at http://mercatus.org/reportcard.

15. OIRA, *2008 Final Report to Congress on the Costs and Benefits of Federal Regulations*, 20–24.