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## OIRA: PAST, PRESENT AND FUTURE

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### TABLE OF CONTENTS

Abstract .....	2
I. The Past	
A. The Significance of a Historical Perspective .....	3
B. The Defining of Centralized Regulatory Review by Executive Orders .....	4
C. The Significance of an Iconic Executive Order .....	5
II. The Present	
A. OIRA Review of Executive Orders.....	11
B. The Necessity for OIRA Involvement.....	13
III. The Future	
A. The Need to Place an Incremental Ceiling on Public Expenditures for Compliance with Federal Regulations .....	17
B. Regulatory Budget: An Administrative Solution .....	20

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C. Regulatory Budget: A Legislative Solution .....	38
D. Cumulative Cost Control: OIRA’s Future .....	41
1. OIRA is losing its status as the world leader in regulatory innovation .....	43
2. Critics of a Regulatory Budget have raised legitimate concerns which have to be addressed in a public forum .....	43
3. Examination of alternative methods for controlling the cumulative cost of regulation.....	44
E. Next Step .....	46

**ABSTRACT**

Highlighting the fiftieth anniversary of centralized regulatory review, i.e., OMB’s review of agency regulations, and focusing on its half-century-and-counting longevity provides a basis for assessing how well the Office of Information and Regulatory Affairs (OIRA) is operating today and also demonstrates its ability to control the cumulative cost of federal regulations. The paper has three sections. Section 1 describes the iconic Executive Order 12291 which established the conditions for Presidential involvement in rulemaking. The section concludes with the recommendation that the principles which underlay Executive Order 12291 should guide (1) the development of future executive orders and (2) the revocation of existing executive orders. Section 2 explains that, as a result of the increased reliance by Presidents on executive orders to manage the agencies, it is imperative that OIRA be tasked with responsibility of reviewing regulatory related executive orders before they are promulgated. Section 3 concludes that OIRA should obtain public comment on the strengths and weaknesses of the regulatory budget currently in existence and subsequently advise on the issuance of an executive order which implements a regulatory budget based upon the principals set forth in Executive Order 12291 as amended by Executive Order 12886.

## I. THE PAST

### A. *The Significance of a Historical Perspective*

The purpose of this paper is to demonstrate that if we understand what it is about the development and implementation of centralized regulatory review that has led to its half-century-and-counting longevity, it will help us assess how well OIRA operates today and will also demonstrate that OIRA has the ability to control the cumulative cost of federal regulations. Scholars have concluded that the White House Office of Information and Regulatory Affairs (OIRA) is the most important institutional feature of the administrative state.<sup>1</sup>

OIRA and its centralized regulatory review function have been honed over a half-century.<sup>2</sup> Centralized review thus provides a record that can and should be studied to identify the attributes that have led to the program's longevity. The longevity of centralized regulatory review results from its being nourished and sustained by the focused work of a group of practitioners over a period of five decades and this longevity should serve as the basis for assessing the merits of proposals to modify its underlying structure.

Notwithstanding its longevity, centralized regulatory review is not an entitlement. If centralized regulatory review is abused it can vanish with a stroke of a pen. Its defining components are based upon a series of executive orders, not an explicit delegation of authority from the Congress to the President.

Time Magazine has stated that Executive Order 12291<sup>3</sup> is one of nine executive orders that has "changed the course of America." EO 12291 established the mechanism that became the foundation for centralized regulatory review. Steps should be taken to ensure

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<sup>1</sup> Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, Columbia Law Review, Vol. 106, p. 1260, 2006, p. 1.

<sup>2</sup> See, *A Half-Century of Centralized Regulatory Review*, Regulatory Pacesetters, September 29, 2017. Referenced from <http://www.thecre.com/forum8/?p=1092>

<sup>3</sup> Ronald Reagan, Executive Order 12291--Federal regulation, February 17, 1981. Referenced from <https://www.archives.gov/federal-register/codification/executive-order/12291.html>

that forthcoming executive orders abide by the standards established in Executive Order 12291. Failure to do could result in a game-changing intervention by either the Congress or the Courts which would jeopardize centralized regulatory review. It is for this reason that there is a need for the administrative law academy to review the procedures and standards used for the formulation and implementation of executive orders which have implemented the regulatory agendas of a number of Presidential Administrations.

*B. The Defining of Centralized Regulatory Review by Executive Orders*

Calendar Year 2019 marks the fiftieth year since Professor A. Allan Schmid,<sup>4</sup> on leave to a position in the Pentagon, declared that benefit-cost analysis should be applied to regulations—a giant intellectual leap from its then current use as a tool to analyze the economic merits of civil works projects such as inland waterways and dams. The foundation for centralized regulatory review, i.e., White House Office of Management and Budget review of agency regulations, was laid during the Johnson Administration when the Office of the Secretary of the Army began reviewing benefit-cost analyses of Corps of Engineers regulations. Two years subsequent to the publication of Professor Schmid’s paper, the Office of Management and Budget initiated the first centralized regulatory review process when it began reviewing environmental, health and safety rules with an emphasis on EPA’s rules. The Nixon Administration’s program, which required an analysis of the benefits and costs of a regulation, was named the Quality of Life Review and was the first program which ordered White House oversight of agency regulations.<sup>5,6</sup>

In each of the three ensuing Administrations, the President strengthened the centralized review of regulations by issuing

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<sup>4</sup> *The Evolution of Benefit-Cost Analysis into Federal Rulemaking*, Regulatory Pacesetters, August 16, 2017. Referenced from <http://www.thecre.com/forum8/?p=724>

<sup>5</sup> Jeffrey S. Lubbers, “A Guide to Federal Agency Rule Making, 6th Ed.,” American Bar Association (2018), p. 19. Referenced from <https://www.americanbar.org/products/inv/book/351350889/>

<sup>6</sup> Center for Regulatory Effectiveness, Quality of Life Review. Referenced from [http://thecre.com/ombpapers/quality\\_of\\_life.html](http://thecre.com/ombpapers/quality_of_life.html)

executive orders, e.g., Ford (inflation/economic impact statements), Carter (OMB oversight of the regulatory process), and President Reagan's iconic Executive Order 12291 which mandated for the first time—on a government-wide basis—both the benefit-cost analysis of rules and that the rules be submitted to OMB for review. These landmark actions were then reinforced by supporting executive orders which have been signed by every subsequent President. Of particular note, President Clinton's Executive Order 12866 became the successor and prevailing executive order for centralized regulatory review.

### C. *The Significance of an Iconic Executive Order*

In this age signified by a near gatling gun approach to the issuance of Executive Orders, the academic community is to be complimented for devoting increasing attention to the institutional standing of well-reasoned, peer reviewed Presidential instruments, including both Executive Orders and Proclamations, that stand the test of time. One such Executive Order is Executive Order 12291 which capitalized on advances made by four prior administrations. EO 12291 established the rules of the game for Presidential involvement in agency rulemaking.

This section focuses on establishing the analytic norm that should form the basis for the Presidential review or issuance of an executive order. Although the administrative state has been subjected to many executive orders, only a small number have had a lasting effect. A crucial reason for Executive Order 12291's enduring power is that it addressed the very vocal and competing demands by members of Congress and a wide array of stakeholders for either more regulation or less regulation.<sup>7</sup> The now time-tested decision process would be administered by the newly created OIRA. Executive Order 12866 should be understood as EO 12291's *bipartisan* derivative. Executive Order 12291 was in part an outgrowth of the inability of Congress to pass legislation which would control an ever-increasing

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<sup>7</sup> Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, Columbia Law Review, Vol. 80, No. 5 (Jun., 1980), pp. 943-989. Referenced from [http://www.thecre.com/pdf/20110621\\_Verkuil\\_ExParte\\_Contacts.pdf](http://www.thecre.com/pdf/20110621_Verkuil_ExParte_Contacts.pdf)

regulatory burden that contributed to rampant inflation. OMB was more interested in the passage of the Paperwork Reduction Act than it was in legislation that would, in its mind, limit its flexibility in overseeing the administrative state.<sup>8</sup>

Consequently, notwithstanding our tendency to ignore history, centralized regulatory review did not begin with Executive Order 12866, although it did fortunately provide centralized review with timely bipartisan support for its continuation. The signing of the Executive Order was a remarkable achievement because, without it, centralized regulatory review would have been terminated as a result of hostile opposition from within the Administration.

Executive Order 12291's landmark achievement was to require that regulatory agencies on a government-wide basis perform benefit/cost analyses of regulations and to submit the regulations and accompanying analyses to OMB for review as was initially required by the Nixon Quality of Life Review.<sup>9</sup> All regulatory actions taken by subsequent Administrations built upon these two building blocks of benefit-cost analysis and OMB review. Building these two blocks took twenty years<sup>10</sup> over five Presidential Administrations.

Executive Order 12291 gave legitimacy to, and increased the jurisdiction of, the best<sup>11</sup> of the various time tested centralized regulatory review processes developed and implemented<sup>12</sup> by the

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<sup>8</sup> Peter Behr, "If There's a New Rule, Jim Tozzi Has Read It," *The Washington Post*, July 10, 1981. Referenced from [http://thecre.com/pdf/20160228\\_tozzi.pdf](http://thecre.com/pdf/20160228_tozzi.pdf)

<sup>9</sup> George P. Shultz, Memorandum for the Heads of Departments and Agencies, "Agency regulations, standards, and guidelines pertaining to environmental quality, consumer protection, and occupational and public health and safety," October 5, 1971. Referenced from <http://www.thecre.com/ombpapers/QualityofLife1.htm>.

<sup>10</sup> Dick Kirschten, *The Twenty Years War*, *National Journal*, June 11, 1983. Referenced from [http://thecre.com/pdf/20\\_Years\\_War.pdf](http://thecre.com/pdf/20_Years_War.pdf)

<sup>11</sup> *Id.*, Shultz, (1971).

<sup>12</sup> Gerald R. Ford, Executive Order 11821—Inflation Impact Statements, November 27, 1974. Referenced from <https://www.presidency.ucsb.edu/documents/executive-order-11821-inflation-impact-statements>

four prior Presidential Administrations<sup>13</sup>—another step towards bipartisanship in establishing centralized regulatory review.

*Time Magazine* concluded that Executive Order 12291 is one of “9 Executive Orders Which Changed American History.”<sup>14</sup> Executive Order 12866 stands on a formidable foundation. Consequently, its progeny may be the subject of a serious challenge since both executive orders are intrinsically linked. Challenges to the administrative powers of the President might occur when the Congress concludes that either an incumbent President, or continuum of Presidents, abuse such authorities. In such an event, instruments which have been around for half a century might be spared the ax if the responsible authorities are advised of their lineage.

In essence, OIRA has two time-tested institutional anchors which should be exploited when the organization is in jeopardy, Executive Orders 12291 and Executive Order 12886. A potential third anchor under development deals with OIRA as a manifestation<sup>15</sup> of “internal” agency specific law.

Below are the views of leading scholars in the field of administrative law on Executive Order 12291:

- “Second, and more innovatively, his [Reagan] Administration issued the now-iconic Executive Order 12291”<sup>16</sup>
- “In a meeting sponsored by the Federalist Society. . . Professor David Vladek of Georgetown University law school” observed “That the Reagan Executive Order 12291, which instituted government-wide centralized

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<sup>13</sup> Jimmy Carter, Executive Order 12044—Improving Government Regulations, March 23, 1978. Referenced from <https://www.presidency.ucsb.edu/documents/executive-order-12044-improving-government-regulations>

<sup>14</sup> Lily Rothman, “9 Executive Orders That Changed American History,” *Time Magazine*, February 6, 2017. Referenced from <http://time.com/4655131/executive-orders-history/>

<sup>15</sup> See, *Is OIRA a Manifestation of the Principles Enunciated by Professor Jerry Mashaw?* Regulatory Pacesetters, February 17, 2019. Referenced from <http://www.thecre.com/forum8/?p=3291>

<sup>16</sup> Jerry Louis Mashaw, David Berke, *Presidential Administration in a Regime of Separated Powers*, Yale Journal of Regulation, Vol 35, 2018.

regulatory review is, along with the APA, is one of the two most influential documents of the regulatory state.<sup>17</sup>

- “Arguably, the most important legal document of the last 30 years that hardly anyone in America knows about was Executive Order No. 12,291, the Reagan executive order that created the modern system of White House<sup>18</sup> oversight of federal regulatory policy making.<sup>19</sup>
- “To date, the cost-benefit revolution has had three defining moments.... The first moment, and by far the most important, came from Ronald Reagan in 1981, when he signed Executive Order 12291, with the most boring imaginable title: Federal Regulation.”<sup>20</sup>

Executive Order 12291 has become an institution because it did not overreach; it never claimed to displace the authority of an agency to make the final call on the substance of a rule. Equally, if not more importantly, the administrative processes used to implement the Order were time tested and refined before they were implemented on a government-wide basis as a result of a decade of experience gained through the Quality of Life Review, initiated in 1971, which focused on EPA.<sup>21</sup> A bridge still to be

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<sup>17</sup> *An Alternative to the Regulatory Accountability Act?* OIRA Watch, May 25, 2017. Referenced from <http://www.thecre.com/oira/?p=7007>

<sup>18</sup> Chuck Ludlam, Oral History Project, United States Senate. P. 43.

Referenced from

[https://www.senate.gov/artandhistory/history/resources/pdf/Ludlam\\_Interview1.pdf](https://www.senate.gov/artandhistory/history/resources/pdf/Ludlam_Interview1.pdf)

<sup>19</sup> Peter M. Shane, *The White House Role in Regulatory Policy Making: Time for a Change?* Huffpost, 03/05/2009, Updated May 25, 2011.

Referenced from [https://www.huffingtonpost.com/peter-m-shane/the-white-house-role-in-r\\_b\\_172290.html](https://www.huffingtonpost.com/peter-m-shane/the-white-house-role-in-r_b_172290.html)

<sup>20</sup> Three Excerpts from: Cass R. Sunstein, “The Cost-Benefit Revolution” (The MIT Press: 2018). Referenced from

<http://www.thecre.com/forum8/wp-content/uploads/2018/08/Sunstein-Cost-Benefit-Revolution.pdf>

<sup>21</sup> Jim Tozzi, *OIRA Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, Administrative Law Review 63 (Special Edition 2011). Pp 44-50. Referenced from [http://www.thecre.com/pdf/20111211\\_ALR\\_Tozzi\\_Final.pdf](http://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf)



crossed is the application of the executive order to independent agencies.<sup>22</sup>

The policies and processes inherent in Executive Order 12291 were initially implemented by the *first* office in OMB dedicated solely to regulatory review and oversight—the Office of Regulatory and Information Policy.<sup>23</sup> This office was a functioning unit that *pre-dated* OIRA. Upon morphing into OIRA (Office of Information and Regulatory Affairs), this office ensured that Executive Order 12291 did not migrate to the Executive Order graveyard. Not only is the sustainability of an Executive Order as dependent upon its implementation as it is on its design, but also its shelf life is enhanced by *bipartisan* sponsorship as was the case when President Carter included the passage of the Paperwork Reduction Act, which created OIRA, into his State of the Union address.<sup>24</sup>

What is needed is for the academic and stakeholder communities to research the factors which lead to the institutionalization of a select number of executive orders. An emphasis should be placed on the executive actions that have made a permanent change in governmental operations comparable to those resulting from the promulgation of Executive Order 12291. Hopefully, the resultant work product would establish a *quality norm* for future executive actions.

Adherence to accepted norms could provide a filter to be used prior to the issuance of an executive order which revokes existing executive orders as was the case with Executive Order

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<sup>22</sup> C. Boyden Gray, *The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking*, Mercatus Working Paper, May 31, 2017. Referenced from <https://www.mercatus.org/publications/cost-benefit-analysis-centralized-review-independent-agency-rulemaking-trump>

<sup>23</sup> See, *The Regulators: Our Invisible Government*, an irreplaceable documentary on the White House regulatory review process, narrated by Edward G. Marshall. Links to the two-part documentary are available from Regulatory Pacesetters: <http://www.thecre.com/forum8/?p=1660>.

<sup>24</sup> Jimmy Carter, State of the Union Address 1981, January 16, 1981. Referenced from <https://www.jimmycarterlibrary.gov/assets/documents/speeches/su81jec.phtml>

13497 which stated “Executive Order 13258<sup>25</sup> of February 26, 2002, and Executive Order 13422<sup>26</sup> of January 18, 2007, concerning regulatory planning and review, which amended Executive Order 12866 of September 30, 1993, are revoked.”<sup>27</sup>

One might wonder why Executive Order 12291’s progeny did not suffer a similar fate given the fact that the two aforementioned executive orders were minimal expressions of the base program. A crucial answer is that Executive Order 12291’s progeny were bipartisan.

Readers interested in a detailed review of actions that lead to the institutionalization of Executive Order 12291 should read *Beyond Structure and Process: The Early Institutionalization of Regulatory Review* by political science professor Andrew Rudalevige.<sup>28</sup>

Executive Order 12291, its predecessors and its progeny—Executive Order 12866—have dominated the regulatory state for a half-century<sup>29</sup> and their formulation and implementation should be the basis for judging the continuity of existing

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<sup>25</sup> George W. Bush, Executive Order 13258—Amending Executive Order 12866 on Regulatory Planning and Review, February 26, 2002. Referenced from <https://www.presidency.ucsb.edu/documents/executive-order-13258-amending-executive-order-12866-regulatory-planning-and-review>

<sup>26</sup> George W. Bush, Executive Order 13422—Further Amendment to Executive Order 12866 on Regulatory Planning and Review, January 18, 2007. Referenced from <https://www.presidency.ucsb.edu/documents/executive-order-13422-further-amendment-executive-order-12866-regulatory-planning-and-review>

<sup>27</sup> Barack Obama, Executive Order 13497—Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, January 30, 2009. Referenced from <https://www.presidency.ucsb.edu/documents/executive-order-13497-revocation-certain-executive-orders-concerning-regulatory-planning-and-review>

<sup>28</sup> Andrew Rudalevige, *Beyond Structure and Process: The Early Institutionalization of Regulatory Review*. Paper prepared for the Annual Meeting of the Midwest Political Science Association, Chicago, Illinois, April 2017. Referenced from <http://www.thecre.com/forum8/wp-content/uploads/2017/05/Professor-Rudalevige.pdf>

<sup>29</sup> *A Half-Century of Centralized Regulatory Review*, Regulatory Pacesetters, September 29, 2017. Referenced from <http://www.thecre.com/forum8/?p=1092>

executive orders as well as the issuance of future executive orders. Executive Order 12291 establishes the quality norm for executive orders because it (1) did not contain a jurisdictional overreach (2) was accompanied by an extensive legal analysis supporting its content (3) was premised on processes which were tested prior to their incorporation into an executive order, (4) was reviewed to determine whether Executive Order 12291 did in itself comply with its directives, particularly that its benefits exceed its costs and (5) was accompanied by the provision of an adequate staffing level.

OIRA should be vested with the opportunity to review all executive orders having regulatory consequences before they are issued and this new responsibility should accrue as a result of an executive order.

## II. THE PRESENT

### A. *OIRA Review of Executive Orders*

OIRA owes its existence to a statute, the Paperwork Reduction Act of 1980;<sup>30</sup> it owes its personality to a series of executive orders issued by a number of Presidential Administrations. Consequently there are a number of ways to address “The Present”. One common approach is to analyze the regulatory program of the incumbent administration and make suggestions thereto. Another analytic approach is to identify a void in the regulatory program of the incumbent administration as well as a deficiency in the program of its predecessors. This step of identifying program deficiencies is of paramount importance because of the changing landscape of the administrative state and is the approach taken herein.

Section I delineates the ascendancy of executive orders in the management of the administrative state and provides an analysis of an exemplary executive order, and its progeny. Thus, the section provides the historical and analytical bases for using the exemplary order as the norm against which other orders should be evaluated. This section provides the rationale for OIRA review of forthcoming executive orders as well as the revocation of existing

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<sup>30</sup> Id., Behr (1981).

ones. The historical preoccupation of the academy with judicial review is changing in that it is beginning to address agency edicts: “For years, administrative law has been identified as the external review of agency action, primarily by courts. Following in the footsteps of pioneering administrative law scholars, a growing body of recent scholarship has begun to attend to the role of internal norms and structures in controlling agency action”<sup>31</sup> Others make a similar point: “I continue to support the proposal that Justice (then Professor) Breyer made in 1993: 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.”<sup>32</sup> There is no better venue for the academy to focus its attention on than the need for OIRA to review Executive Orders.

On June 21, 1962, the Kennedy Administration published Executive Order 11030<sup>33</sup> dealing with preparation and review of Executive Orders. Although the Executive Order has been subject to a number of amendments the Executive Order vests OMB with the authority of managing the review of Executive Orders within the Executive Branch. OIRA participation in this process is ad hoc at best. The review process was and usually remains reserved for the OMB’s General Counsel and the Department of Justice. Both of these institutions were and are staffed by extremely high-caliber individuals; nonetheless they lack the day-to-day operating knowledge of OIRA with respect to the intricacies of the administrative state.

It is for this reason that the White House should issue a new Executive Order to amend its administrative process to require that proposed Executive Orders be reviewed by the General Counsel of

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<sup>31</sup> Gillian E. Metzger and Kevin M. Stack, *Internal Administrative Law*, Michigan Law Review, Vol. 115, Issue 8, 2017.

<sup>32</sup> Pierce, Richard J., The Regulatory Budget Debate (2017). GWU Law School Public Law Research Paper No. 2017-30; GWU Legal Studies Research Paper No. 2017-30, pp. 8-9. Available at SSRN: <https://papers.ssrn.com/abstract=2952418>

<sup>33</sup> Executive Order 11030, “Executive Order 11030--Preparation, presentation, filing, and publication of Executive orders and proclamation,” June 19, 1962. Referenced from <https://www.archives.gov/federal-register/codification/executive-order/11030.html>

OMB in consultation with the Administrator of OIRA. Consequently, incoming administrations would submit proposed revocations of regulatory related Executive Orders of the former administration to the career specialists in OIRA; the same process would apply to the new executive orders to be issued by the incoming Administration. In each case, the analytical norm would be the underlying legal principles<sup>34</sup> set forth in Executive Order 12291. The resultant OIRA review need not be a public endeavor but, in select instances, could be subject to public comment. The Center for Regulatory Effectiveness has compiled a compendium<sup>35</sup> of selected works by recognized scholars. This canon should serve as a guide to OIRA in conducting the aforementioned reviews. In addition the Center for Regulatory Effectiveness maintains a daily report on a key activity associated with the management of OIRA.<sup>36</sup>

#### *B. The Necessity for OIRA Involvement*

OIRA which has been referred to as the “cockpit” of the administrative state, has been functioning for nearly four decades and, since it is staffed predominantly by career civil servants, it possesses the institutional memory for the happenings in a wide range of programs and agencies. Three recent Presidents, George W. Bush,<sup>37</sup> Barack Obama,<sup>38</sup> and Donald Trump have utilized, to

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<sup>34</sup> Larry L. Simms, Office of Legal Counsel, US Department of Justice, Memorandum, “Proposed Executive Order entitled Federal Regulation,” 13 February 1981. Referenced from <http://www.thecre.com/pdf/DJMemoReaganEO12291PDF.pdf>

<sup>35</sup> Center for Regulatory Effectiveness, OMB Papers on Centralized Regulatory Review. Referenced from [http://thecre.com/ombpapers/Obama\\_review.html](http://thecre.com/ombpapers/Obama_review.html)

<sup>36</sup> Center for Regulatory Effectiveness, OIRA Watch. Referenced from <http://www.thecre.com/oira/>

<sup>37</sup> Graham G. Dodds, *By Order of George W. Bush: The Unilateral Directives of a Unilateralist President*, *The American Review of Politics*, Vol. 29, Fall, 2008: 197-213. Referenced from <https://journals.shareok.org/arp/article/view/267/244>

<sup>38</sup> Binyamin Appelbaum and Michael D. Shear, “Once Skeptical of Executive Power, Obama Has Come to Embrace It,” *The New York Times*, August 13, 2016. Referenced from

the fullest, the issuance of Executive Orders to implement their programs. There is a significant likelihood that the use of Executive Orders will continue to increase, probably at a rate considerably greater than most observers realize.<sup>39</sup>

Presidential use of Executive Orders can be traced to the early views of Alexander Hamilton in the Federalist Papers<sup>40</sup> which matured into their zenith during the Roosevelt Administration. The historical significance of executive orders in the governance of the regulatory state has been followed in large part by historians and political scientists and, to a lesser degree, by members of the academy whose education focuses on the management of the administrative state through rulemaking and judicial review.<sup>41</sup> Nonetheless, the increasing reliance by Presidents on Executive Orders has not escaped the critical eye of some legal scholars<sup>42</sup> of the administrative state, as witnessed by a proceeding sponsored by the Center for the Study of the Administrative State.

The significance of the academy in addressing the issuance of executive orders can only continue to increase with the expected increase in litigation surrounding the ascendancy of the “muscular” presidency which is characterized by the pivotal management of the administrative state by components of the Executive Office of the President. The following administrative authorities and studies are of particular significance to OIRA:

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[https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?\\_r=1](https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?_r=1)

<sup>39</sup> See, *The Potpourri of Executive Orders*, Regulatory Pacesetters, October 6, 2018. Referenced from <http://www.thecre.com/forum8/?p=2970>

<sup>40</sup> See p. 1572: Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, *Notre Dame Law Review*, Vol. 93, Issue 4, Article 8. Referenced from <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4787&context=ndlr>

<sup>41</sup> *A Library of Selected Works Which Provide a Basis for the Retention of an Executive Order Based on a Retrospective Review of Executive Order 12291*, Regulatory Pacesetters, September 4, 2018. Referenced from <http://www.thecre.com/forum8/?p=2726>

<sup>42</sup> Id, White (2018).

- President’s Committee on Administrative Management: Report<sup>43</sup>
- President’s Committee on Administrative Management: Analysis<sup>44</sup>
- Procedure in Administrative Rule-Making<sup>45</sup>
- Effective Public Policy and the Government Budget: A Uniform Treatment of Public Expenditures and Public Rules<sup>46</sup>
- Executive Order 12291<sup>47</sup>

The Presidency is not subject to the Administrative Procedure Act, nor should it be; but in the ascendancy of the “muscular” presidency, ill-founded Executive Orders could undermine fifty years of centralized regulatory review. This could occur as the result of a continuum of negative judicial decisions<sup>48</sup> or

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<sup>43</sup> The President’s Committee on Administrative Management, Report of the Committee with Studies of Administrative Management in the Federal Government, Government Printing Office, 1937. Referenced from [https://babel.hathitrust.org/cgi/pt?id=uiug.30112104110959;view=1up;seq=](https://babel.hathitrust.org/cgi/pt?id=uiug.30112104110959;view=1up;seq=3)

<sup>44</sup> Stephanie P. Newbold, Larry D. Terry, *The President’s Committee on Administrative Management: The Untold Story and the Federalist Connection*, Administration & Society, Vol 38, Issue 5, 2006. Referenced from [www.thecre.com/forum8/wp-content/uploads/2018/09/The-Presidents-Commission.pdf](http://www.thecre.com/forum8/wp-content/uploads/2018/09/The-Presidents-Commission.pdf)

<sup>45</sup> Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, Harvard Law Review, vol. 52 (1938). Referenced from [www.thecre.com/forum8/wp-content/uploads/2018/09/Procedure-in-Administrative-Rule-Making-Fuchs-1.pdf](http://www.thecre.com/forum8/wp-content/uploads/2018/09/Procedure-in-Administrative-Rule-Making-Fuchs-1.pdf)

<sup>46</sup> A. Allan Schmid, *Effective Public Policy and the Government Budget: A Uniform Treatment of Public Expenditures and Public Rules*, The Analysis and Evaluation of Public Expenditures: The PPB System, A compendium of Papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States. Volume 1, 91<sup>st</sup> Congress, 1<sup>st</sup> Session, 1969, pp. 579-591. Referenced from [www.thecre.com/pdf/Schmid.PDF](http://www.thecre.com/pdf/Schmid.PDF)

<sup>47</sup> Ronald Reagan, Executive Order 12291—Federal Regulation, Feb. 17, 1981. Referenced from <https://www.archives.gov/federal-register/codification/executive-order/12291.html#page-header>.

<sup>48</sup> Connor Rasso, *Trump’s deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate*,

Congressional mandates. For these reasons, OIRA should be involved in both the issuance of new Executive Orders as well as the revocation of existing Executive Orders using the Iconic Executive Order 12291, and its offspring Executive Order 12886, as templates for its actions.

As noted at the beginning of this article, centralized regulatory review is not an entitlement; it was earned<sup>49</sup> by selfless individuals working for nearly two decades; it could vanish, in large part, with the stroke of a pen. Nonetheless, OIRA does have a statutory base and has been delegated unexplored authorities<sup>50</sup> in the Paperwork Reduction Act of 1995 and the Data (aka Information) Quality Act.

For all of the reasons set forth above, OIRA should become the institutional memory on executive orders with regulatory consequences by participating in both the issuance of new orders as well as the revocation of orders via an executive order which vests it with such a responsibility.

### III. THE FUTURE

#### A. *The Need to Place an Incremental Ceiling on Public Expenditures for Compliance with Federal Regulations*

In November 2018, the ABA Section on Administrative Law held its annual regulatory summit.<sup>51</sup> The attendance was record breaking as were the quality of the presentations and timeliness of the topics. The agenda addressed the pacesetting issues of today. The discussants were well prepared and included those of

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Brooking Institution Center on Regulation and Markets. Referenced from <https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/>

<sup>49</sup> Id., Tozzi, (2011)

[http://www.thecre.com/pdf/20111211\\_ALR\\_Tozzi\\_Final.pdf](http://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf)

<sup>50</sup> CRE's Emphasis on Data Access and Data Quality is Rooted in the Paperwork Reduction Act Amendments of 1995, Regulatory Pacesetters, June 11, 2018. Referenced from <http://www.thecre.com/forum8/?p=2157>

<sup>51</sup> ABA Administrative Law Conference, November 1-2, 2018. Referenced from <http://www.thecre.com/oira/wp-content/uploads/2018/11/ABAAdLawConference-AgendaNovember2018.pdf>



differing views. A common refrain echoed throughout the summit was that the agenda was so enticing that it was impossible for a particular attendee to attend two panels at the same time.

The impact of an ABA Ad Law Section conference does not end with the final presentation at the conference; instead it is the incubator for ongoing discussions of concerns critical to the proper functioning of the administrative state.

However, the totality of the presentations at the conference lead to the conclusion that, notwithstanding the many worthwhile proposals to improve the regulatory process, in the absence of a macro constraint on incremental regulatory expenditures, the regulators in attendance will continue to have the unilateral ability to impose an unlimited *de facto* tax on every living American—irrespective of whether the aforementioned proposals were implemented.

Accordingly, a public debate should ensue as to whether such a capability should continue unabated if and when the existing regulatory budget<sup>52</sup> is revisited. Such a debate is relevant because, even if only those regulations whose benefits exceed their costs are promulgated, the majority of the benefits may not accrue to those paying the costs. Therefore, the nation is confronted with either a potential shortage—or exceedingly high opportunity costs—of capital to finance the totality of regulations whose benefits exceed their costs.

Whether or not to institute a ceiling on these *de facto* taxes is a public policy issue that needs to be addressed when, and preferably before, the existing constraint on regulatory expenditures expires. In a nutshell, there is presently a constraint on the incremental costs that regulators can impose on the public; should this constraint or a variant continue for the foreseeable future? Even if the answer is yes, the particular mechanism to do so is also open for debate.

Regulatory practitioners and members of the academy have a wide range of significant administrative law issues before them but it is likely that the aforementioned issue will rank high with

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<sup>52</sup> See Executive Order 13771. Referenced from <https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf>

the general public in part because of the ever increasing role of regulators in the legislative process.<sup>53, 54</sup>

For example if a member of the public wishes to increase funding for school lunches he or she must convince the Department of Agriculture's Food and Nutrition Service to accord a higher priority to school lunches at the expense of other programs in competition for the same funds, including but definitely not limited to:

- Commodity Supplemental Food Program (CSFP).<sup>55</sup> The CSFP works to improve the health of low-income elderly persons at least 60 years of age by supplementing their diets with nutritious USDA Foods.
- Food Distribution Program on Indian Reservations (FDPIR)<sup>56</sup> The FDPIR is a Federal program that provides USDA Foods to low-income households, including the elderly, living on Indian reservations, and to Native American families residing in designated areas near reservations.
- School Breakfast Program (SBP).<sup>57</sup> The SBP operates in the same manner as the National School Lunch Program. School districts and independent schools that choose to take part in

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<sup>53</sup> Christopher J. Walker, "Lawmaking Within Federal Agencies and Without Judicial Review," *Journal of Land Use & Environmental Law*, Vol. 32, pp. 551-565, 20170, Ohio State Public Law Working Paper No. 376. Referenced from

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2900644](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2900644)

<sup>54</sup> Jim Tozzi, "A Regulatory Budget Is the Linchpin for the Creation of a National Constituency for OIRA," Notice & Comment, April 4, 2018. Referenced from <http://yalejreg.com/nc/a-regulatory-budget-is-the-linchpin-for-the-creation-of-a-national-constituency-for-oira-by-jim-tozzi/>

<sup>55</sup> See, US Department of Agriculture, Food and Nutrition Service, Commodity Supplemental Food Program website. Referenced from <https://www.fns.usda.gov/csfp/commodity-supplemental-food-program-csfp>

<sup>56</sup> See, US Department of Agriculture, Food and Nutrition Service, Food Distribution Program on Indian Reservations website. Referenced from <https://www.fns.usda.gov/fdpir/food-distribution-program-indian-reservations-fdpir>

<sup>57</sup> See, US Department of Agriculture, Food and Nutrition Service, School Breakfast Program website. Referenced from <https://www.fns.usda.gov/sbp/school-breakfast-program-sbp>

the breakfast program receive cash subsidies from the USDA for each meal they serve.

In this example, the group which receives the benefit from the increased funding (program participants) differs markedly from those paying the bill (the general tax payer); the former have virtually no limit on the amount of benefits they can receive but those paying the bill definitely have a finite pool of resources to finance the regulation. Therefore the fact that the benefits of the program exceed its costs has little relevance in itself because there are constraints on the magnitude of funds available to finance the program. In on-budget decision-making, the public is made aware of the consequences of funding one beneficiary group at the expense of another.

Now what makes the existence and consequences of a financial constraint vanish when a regulator issues a rule for which the benefit exceeds its costs? The answer is that they do not; instead they are hidden from public scrutiny.

When a member of the public wants to increase the nutritional value of school lunches he or she only has to convince USDA regulators to revise its existing regulation which regulates the nutritional content of food served in the school lunch program and demonstrate that the benefits of the proposal to whomsoever they accrue exceed its costs. In this instance, regulators are levying a unilateral *de facto* tax on the general public to finance benefits for a specific class of program beneficiaries. Why shouldn't the magnitude of the tax be a decision of elected officials on a government-wide basis in a transparent manner in lieu of being made on a case by case basis by unelected officials in an opaque manner? The adoption of a regulatory budget addresses these matters and inserts a ceiling on *de facto* tax increases. There is much to argue in support of the old adage that "there is no free lunch."

In addition, if there were ever an instrument capable of fulfilling OIRA's responsibility of harmonizing regulatory programs across all federal agencies, the regulatory budget is such a mechanism.<sup>58</sup> The execution of a regulatory budget requires the

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<sup>58</sup> Id., Bagley and Revesz, (2006), p. 1

simultaneous examination of the net benefits of all regulations promulgated by all agencies thus allowing for the development of a macro strategy that maximizes net benefits across all agencies. Therefore we need another Iconic Executive order, similar to Executive Order 12291, which seeks public comment on Executive Order 13771 and delineates the legal foundation and process to be used to implement the said executive order.

#### B. Regulatory Budget: An Administrative Solution

The Trump regulatory budget is resulting in an unprecedented reduction in compliance costs based on reports issued by established third parties.<sup>59</sup> The regulatory budget is working as was designed, agencies are given totals to work within to achieve government-wide objectives. Year to date reductions in compliance costs are substantial, a remarkable achievement in such a short period of time.

Ideally the magnitude of the ceiling placed on the costs to be imposed by regulators should be a decision of the Congress. Subsequent to such an action by the Congress, any such ceiling will have to be implemented by the Executive Branch consistent with prevailing statutes.

From the onset a wide range of questions emerge. What is the level of the ceiling and how is it determined? How do you implement such a ceiling so that it does not violate any existing statutes? How are benefits of regulations incorporated into the function of regulatory budget? These are all legitimate questions; the point being made here is that practitioners and the academy should devote resources to answering these questions in lieu of challenging the concept of a ceiling. The current debate is reminiscent of the debate that occurred some fifty years ago when an academician first recommended that regulations be subjected to a benefit-cost analysis and some opponents of the proposal argued that the requirement would lead to substantial delays in the

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<sup>59</sup> Dan Bosch, “Two Months to Go: Regulatory Budget Progress,” American Action Forum, Insight, August 13, 2018. Referenced from <https://www.americanactionforum.org/insight/two-months-to-go-regulatory-budget-progress/>

regulatory process.<sup>60</sup> Benefit-cost analyses has increased in stature over the past half-century; however with the advent of the implementation of a regulatory budget, benefit-cost analysis will continue to have an important role but will no longer dominate the process as explained herein.<sup>61</sup>

President Carter was the first President to make a favorable statement on a regulatory budget in his Economic Report of the President and he was the first President to develop a prototype regulatory budget of a specific agency.<sup>62</sup>

The Carter Administration recognized the importance of having a uniform set of cost data across all agencies and made a substantial investment in developing the Regulatory Cost Accounting Act of 1980.<sup>63</sup>

President Trump is the first President to actually implement a regulatory budget on a government-wide basis. The concept of a regulatory budget has been supported by academicians and practitioners including Christopher C. DeMuth,<sup>64</sup> Clyde Wayne Crews, Jr.,<sup>65</sup> C. Jarrett Dieterle,<sup>66</sup> Susan E. Dudley<sup>67</sup>, and other

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<sup>60</sup> Aaron Nielson, *Sticky Regulations*, University of Chicago Law Review, Forthcoming; BYU Law Research Paper No. 17-11. Referenced from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2950732](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2950732).

<sup>61</sup> Jim Tozzi, *Benefit-Cost Analysis and the Regulatory Budget*, 36 Yale J. on Reg.: Notice & Comment. (March 11, 2019). Referenced from <http://yalejreg.com/nc/benefit-cost-analyses-and-the-regulatory-budget-by-jim-tozzi/>

<sup>62</sup> Jim Tozzi, Editor, *Towards a Regulatory Budget: A Working Paper on the Cost of Federal Regulation* (1979). Referenced from <http://www.thecre.com/ombpapers/regbudget.html>

<sup>63</sup> Regulatory Cost Accounting Act of 1980 (proposed). Referenced from <http://www.thecre.com/ombpapers/RegCostAccounting1980.htm>

<sup>64</sup> Christopher C. DeMuth, *CONSTRAINING REGULATORY COSTS—PART II: The Regulatory Budget*, *The American*, April 6, 1980. Referenced from <https://www.aei.org/publication/constraining-regulatory-costs-part-ii-the-regulatory-budget/>

<sup>65</sup> Clyde Wayne Crews Jr, “Promise and Peril: Implementing a Regulatory Budget,” Competitive Enterprise Institute, April 1996. Referenced from <http://www.thecre.com/forum2/wp-content/uploads/2015/08/Promise-and-Peril-Wayne-Crews.pdf>

<sup>66</sup> C. Jarrett Dieterle, *Lessons from the godfather of regulatory budgeting*, *The Hill*, February 23, 2017. Referenced from [http://thecre.com/pdf/20170226\\_hill.pdf](http://thecre.com/pdf/20170226_hill.pdf)

authors<sup>68</sup> during the same time period. Why were these articles not followed by a program to implement a regulatory budget?

A number of legislative actions were proposed; these are addressed in the following section. However, no significant action was taken administratively until the Trump Administration issued an executive order mandating the government-wide adoption of a regulatory budget. The Trump regulatory budget included a one-in, two-out provision which was not contained in the regulatory budget proposed by the Carter Administration. Almost exactly one year prior to the inauguration of the Trump administration, a regulatory practitioner predicted that the Trump administration would implement and institutionalize a regulatory budget.<sup>69</sup> In support of its prediction, the article provided a review of the distinguished organizations and individuals who were lining up to support a regulatory budget's implementation and other notable events such as:

- The Administrative Law Review's publication of the article *The Regulatory Budget Revisited*.<sup>70</sup>
- The release of a white paper by the research chief of the Administrative Conference of the United States, *Controlling the Cumulative Costs of Regulation*, that reviews various proposed solutions to runaway regulatory costs, including a one-in-one-out regulatory budget.<sup>71</sup>

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<sup>67</sup> Susan E. Dudley, "Can Fiscal Budget Concepts Improve Regulation?" 19 *N.Y.U. J. Legis. & Pub. Pol'y* 259 (2016). Referenced from <http://www.thecre.com/forum2/wp-content/uploads/2015/08/Reg-Budget-Dudley-2016.pdf>

<sup>68</sup> See, *Controlling the Cumulative Costs of Regulation*. Referenced from <http://www.thecre.com/forum2/?p=939>

<sup>69</sup> Jim Tozzi, *The Coming of the Regulatory Budget*, *The Regulatory Review*, January 8, 2016. Referenced from <https://www.theregreview.org/2016/01/08/tozzi-regulatory-budget/>

<sup>70</sup> Jeffrey A. Rosen and Brian Callanan, *The Regulatory Budget Revisited*, *Administrative Law Review*, *Administrative Law Review*, Vol. 66:4 (2014). Referenced from <http://www.thecre.com/forum2/wp-content/uploads/2015/08/Rosen-Reg-Budget.pdf>

<sup>71</sup> Reeve T. Bull, *Controlling the Cumulative Costs of Regulation: Exploring Potential Solutions*, 2015. Referenced from [www.thecre.com/forum2/wp-content/uploads/2015/10/Bull-Article.pdf](http://www.thecre.com/forum2/wp-content/uploads/2015/10/Bull-Article.pdf)

- Hearings on the issue convened by the Senate Homeland Security and Government Affairs Committee<sup>72</sup> and the Senate Budget Committee.<sup>73</sup>
- The endorsement<sup>74</sup> of the idea of regulatory budgeting by at least two Presidential candidates.<sup>75</sup>
- Discussion<sup>76</sup> of regulatory budgeting on the program at the American Bar Association's Administrative Law Section.<sup>77</sup>
- Recognition in a recent Council on Foreign Relations publication that regulatory "budgets do force bureaucracies to weigh regulatory decisions more carefully and systematically analyze the existing regulatory stock."<sup>78</sup>

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<sup>72</sup> US Senate, Committee on Homeland Security and Governmental Affairs and the Committee on the Budget, Hearings, June 23, 2015. Referenced from <https://www.hsgac.senate.gov/hearings/measuring-the-true-cost-of-regulations-lessons-from-great-britain-and-canada-on-implementing-regulatory-reforms>

<sup>73</sup> US Senate, Joint Hearing by Senate Budget and Homeland Security and Government Affairs Committees to Account for True Cost of Regulations, June 23, 2015. Referenced from <https://www.budget.senate.gov/hearings/joint-hearing-by-senate-budget-and-homeland-security-and-government-affairs-committees-to-account-for-true-cost-of-regulations>

<sup>74</sup> Benjamin Goad, *Rubio wants 'national regulatory budget,'* The Hill, March 10, 2014. Referenced from <https://thehill.com/regulation/pending-regs/200351-rubio-pitches-budget-for-federal-regulations>

<sup>75</sup> Patrick A. McLaughlin, *Bold Regulatory Reform Is Necessary for Economic Growth*, National Review, September 25, 2015. Referenced from <https://www.nationalreview.com/2015/09/jeb-bush-regulatory-reform/>

<sup>76</sup> Jeff Rosen, *Ongoing Interest in Regulatory Cost Budgets*, Notice & Comment December 10, 2015. Referenced from <http://yalejreg.com/nc/ongoing-interest-in-regulatory-cost-budgets-by-jeff-rosen/>

<sup>77</sup> ABA Section of Administrative Law Council Meeting Agenda -- Saturday August 6, 2016. Referenced from [https://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/council\\_agenda\\_with\\_materials\\_aug%206.pdf](https://www.americanbar.org/content/dam/aba/administrative/administrative_law/council_agenda_with_materials_aug%206.pdf)

<sup>78</sup> Council on Foreign Relations, *Renewing America: Progress Report and Scorecard, Quality Control: Federal Regulation Policy*, March 2015, p. 9. Referenced from [http://i.cfr.org/content/publications/attachments/Federal\\_Regulation\\_Report.pdf](http://i.cfr.org/content/publications/attachments/Federal_Regulation_Report.pdf)

- The Center for Regulatory Effectiveness<sup>79</sup> dedicates a section of its website to exclusive coverage of a regulatory budget.
- The adoption of a regulatory budget in Canada, UK, and Australia.<sup>80</sup>

There is a large library of research on regulatory budgeting performed over at least four decades in a number of countries which is available for examination.<sup>81</sup> The breadth and depth of the articles display an international interest in the concept of a regulatory budget. The articles are written by both academicians and practitioners and frequently focus on the results of implementing a regulatory budget in different countries.

A matter of particular interest is the “one-in; two out” provision contained in the Trump regulatory budget. In-depth studies have been performed on this provision. For example, a UK government study explained:<sup>82</sup>

- “Our world-leading One-in, One-out rule, introduced in January 2011, and increased to One-in, Two-out in January 2013, has ensured that new regulations are only introduced if absolutely necessary. These rules kick-started a cultural change across Government and regulation is now viewed as a last resort, rather than the default.”<sup>83</sup>
- “Under One-in, One-out, Departments were encouraged to look for alternatives to regulation wherever possible, and

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<sup>79</sup> See, [http://www.thecre.com/forum8/?page\\_id=1942](http://www.thecre.com/forum8/?page_id=1942)

<sup>80</sup> Laura Jones, *Regulatory Reform: Lessons from Canada*, Real Clear Policy, December 20, 2015. Referenced from [https://www.mercatus.org/expert\\_commentary/regulatory-reform-lessons-canada](https://www.mercatus.org/expert_commentary/regulatory-reform-lessons-canada)

<sup>81</sup> Center for Regulatory Effectiveness, The OIRA Module: Published Research, “Controlling the Cumulative Cost of Regulations.” Referenced from <http://www.thecre.com/forum2/?p=939>

<sup>82</sup> UK Department for Business Innovation & Skills, THE NINTH STATEMENT OF NEW REGULATION: Better Regulation Executive, December 2014. Referenced from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397237/bis-14-p96b-ninth-statement-of-new-regulations-better-regulation-executive.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397237/bis-14-p96b-ninth-statement-of-new-regulations-better-regulation-executive.pdf)

<sup>83</sup> Ibid., Ministerial Forward,



required to find deregulation to match the cost of any new regulation deemed necessary.”<sup>84</sup>

- “Based on the success of One-in, One-out, in January 2013 the Government doubled its ambition by moving to One-in, Two-out. That meant that for every pound of cost which new domestic regulation imposes on business, two pounds of cost must be removed through deregulation.”<sup>85</sup>
- “The Regulatory Policy Committee’s (RPC) scrutiny of Impact Assessments (see below) checks whether Departments have considered alternatives, alongside regulation.”<sup>86</sup>

Many of the procedural concerns that often dominate the regulatory review conversation in the US, such as the consideration of benefits, did not rank high in the UK.

For better or worse, the then UK’s then One-in, Two-out strategy (which reportedly is now One-in, Three-out) provided tangible results as verified by their Regulatory Policy Committee RPC which reported that at “the close of One-in, One-out on 31 December 2012, the target of offsetting any new cost of regulation by introducing deregulatory measures had been exceeded, with a £1.2 billion net reduction in costs to business.”<sup>87</sup>

To gain a deeper insight into the regulations that were promulgated as well as those that are jettisoned in the One-in, One-out program, the following examples of “in” and “out” regulations are provided. “In” regulations included:

- “Gaming Machines (£17m IN). This regulation addresses problem gambling by requiring customers using higher stakes gaming machines to interact directly with staff after the first £50 if they want to continue to play the machine. The aim is to put an end to unsupervised high stake machine gaming, ensuring better interaction between customer and operator and improving opportunities for

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<sup>84</sup> Ibid., p. 13.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

more effective provision of information and interventions.”<sup>88</sup>

- “Charges controls in qualifying schemes used for automatic enrolment (£18.8m IN). This measure is being introduced to ensure that members’ retirement savings are not eroded by high or unfair charges. It also supports the Automatic Enrolment programme and will help maintain trust and confidence in pension providers supporting it. The measure will be implemented to allow some combination charging structures which help new providers enter the market, to ensure that there is a diverse competitive market for workplace pensions.”<sup>89</sup>

“Out” regulations included:

- “Return of Insurance Certificates (£28.7m OUT). This will remove the requirement for policy holders to return their motor insurance certificate if a policy is cancelled mid-term. This should save businesses £29m.”<sup>90</sup>
- “Construction and Design Management (£19.6m OUT). This measure will ensure there is clearer expression of duties for small projects, as well as a reduction in bureaucracy and appropriate guidance for small projects.”<sup>91</sup>

The One-in, One-out program did *not* explicitly consider the benefits of the regulations being promulgated and revoked nor did it express any concern over the non-consideration of regulatory benefits. Instead, implicit in the program is the political leadership’s trust that the centralized review agency’s career civil servants would only implement those actions which maximize public welfare subject to the prevailing constraints.

Another notable feature of regulatory budgeting is that its economic foundations share important historical precedents that

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<sup>88</sup> Id., p.10.

<sup>89</sup> Id.

<sup>90</sup> Id., p. 9.

<sup>91</sup> Id.

are common to the fiscal budgeting. For example, the 1979 Carter Regulatory Budget<sup>92</sup> stated:

- “Regulators are more sensitive to direct government expenditures where they face accountability in the appropriations process than they are to the compliance costs faced by the private sector for which they are not accountable. Just as free disposal encouraged excess emissions into the atmosphere, the absence of a regulatory budget could encourage excess unaccountable costs and excess regulation. Should not government be accountable for all of the costs it imposes?”
- “As the *Annual Report of the Council of Economic Advisers* stated: ‘. . . there is no institutional framework within the Federal Government—analogue to the budget for Federal spending programs—in which the total costs of regulations are brought together to permit the evaluation of economic impacts, setting of priorities, and the like.’ Others have made similar arguments.”
- “The regulatory budget (hereafter abbreviated as the RB) is another proposal that would represent a fundamental change in our approach to regulation. It is a mechanism that would limit the costs of those actions that federal regulatory agencies could force the private sector and other levels of government to undertake in any given period. If we refer to these latter costs as compliance costs, we can say that the RB would serve to limit regulatory agencies in the compliance costs they can impose on society during some time period in much the same way that the federal expenditure budget limits the departments of the federal government in their expenditures in any given year.”

Benefit-cost analysis can trace its lineage first to Jules Dupuit and subsequently to Alfred Marshall. However, the economist that

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<sup>92</sup> Jim Tozzi, Editor, “*Towards a Regulatory Budget: A Working Paper on the Cost of Federal Regulation (1979)*,” Center for Regulatory Effectiveness, OMB Papers. Referenced from <http://www.thecre.com/ombpapers/part6.html>

brought it to the main stream was Otto Eckstein when he authored the classic text *Water-Resource Development: The Economics of Project Evaluation*. The text was instrumental in the emergence of the Army Corps of Engineers of Engineers as the go-to agency in conducting benefit-cost analysis. The work of the Corps of Engineers on benefit-cost analysis was also instrumental in the establishment of centralized regulatory review.<sup>93</sup> During this critical period Professor Eckstein served as a member of the President Johnson's Council of Economic Advisers.

With the advent of regulatory budgets, the US is moving toward a place where the tools and methodologies of benefit-cost analysis and welfare economics no longer dominate. Instead, the field of institutional economics provides the conceptual paradigm. Institutional economists study how institutions shape economic behavior. Allan Schmid<sup>94</sup> was an institutional economist.

The concept of a regulatory budget was promoted by the Carter Administration some forty years ago.<sup>95</sup> In the intervening years the regulatory budget has been reviewed by a number of experts but it has not, until recently, benefited from some of the recent advances in institutional economics.

Benefit-cost analysis has its footing in welfare economics. Welfare economics is the branch of economics which utilizes the techniques common to neoclassical economics to assess the impact of a project on the welfare of all citizens. In order to do so one needs to develop a social welfare function which can be used to rank projects. Economics involves the allocation of scarce resources among competing ends. An allocation is Pareto optimal if and only if it maximizes a particular social welfare function in which the project harms no one but improves the well-being

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<sup>93</sup> *The Evolution of Benefit-Cost Analysis into Federal Rulemaking*, Regulatory Pacesetters, August 16, 2017. Referenced from <http://www.thecre.com/forum8/?p=724>

<sup>94</sup> Id., Schmid (1969).

<sup>95</sup> See p. 4: G. Bruce Doern, *A Regulatory Budget and a Strategic Regulatory Agenda: Twin Reforms for More Strategic, Integrated and Democratic Regulatory Governance*, Regulatory Governance Brief No. 1, Carlton University, January 2009. Referenced from <http://www.thecre.com/forum2/wp-content/uploads/2015/08/Reg-Budget-Doern1.pdf>

(welfare) of at least one individual. Pareto optimality is difficult to achieve therefore an alternative is the Kaldor-Hicks criterion which is fulfilled when the beneficiaries of a project are in the position to compensate those who suffer a loss from the project. Economists have debated the merits of the aforementioned criteria for years and there is far from a consensus; that said most of the practitioners of benefit-cost analysis support its continued use in ranking projects.

A significant number of individuals continue to work on improving benefit-cost analysis and it is beyond the scope of this paper to address potential areas of inquiry. However, since it is unlikely that either the Pareto or Kaldor-Hicks criteria will be fulfilled in the immediate future, the adoption of all rules whose benefits exceed their costs will not maximize public welfare. Consequently, benefit-cost analysis as presently practiced needs to be augmented by other measures; a cornucopia of such measures is housed in the field of institutional economics.

In the early years of the twentieth century and in a departure from the then prevailing neoclassical economics, a number of economists were of the view that: “The proper subject-matter of economic theory is institutions....Economic theory is concerned with matters of process...Economic theory must be based upon an acceptable theory of human behavior.”<sup>96</sup> Nowadays, the statement might be associated more with a member of the legal profession than the economic profession. The emphasis on institutionalism then began to fade in the 1940’s with a renewed emphasis on neoclassical economics which emphasize the role of the individual, the principle of market equilibrium and rational decision-making as taught in standard economic textbooks.

Nonetheless with the advent of the twenty-first century institutional economics has regained its status as a functioning discipline in the economics profession. There was a reawakening of scholars who supported the earlier statements of W. H.

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<sup>96</sup> Walton H. Hamilton, *The Institutional Approach to Economic Theory*, The American Economic Review, Vol. 9, No. 1, Supplement, Papers and Proceedings of the Thirty-First Annual Meeting of the American Economic Association (Mar., 1919), pp. 313, 316. Referenced from <https://www.jstor.org/stable/1814009>

Hamilton who stated that neoclassical economics “neglected the influence exercised over conduct by the scheme of institutions under which one lives and must seek his good.”<sup>97</sup>

It was 100 years ago when Hamilton made the aforementioned statement; it was 50 years ago that it was reinforced by this statement, made by the author of this article: “The central theme of the paper is that value judgments are implicit in the criteria used for the measurement of the benefits and costs associated with a proposed investment and that conventional benefit-cost ratios tend to conceal these opinions.”<sup>98</sup> Nearly 100 years after Hamilton’s statement was published, other authors made a similar realization: “This Note examines the neoclassical economic framework that pervades contemporary benefit-cost analysis and considers how the fields of behavioral economics and hedonic adaptation may offer superior tools for assessing how regulations impact human behavior.”<sup>99</sup>

The purpose of this discussion is not to revamp procedures for benefit-cost analysis but instead to emphasize that as we move to a new plateau in the governance of the regulatory state that we must give greater consideration to the views and tools of the institutional economist.

Institutional economists define an institution as the rules of the game, the humanly devised constraints that structure human interaction. As we move to a new plateau in analyzing a regulatory budget we must delve into two tools that thus far have not been introduced into the debate on a continuous basis: (1) Optimal Delegation Theory and (2) Game Theory. With respect to Game Theory, the concept of an institution is essential to its effectiveness. Game theory is a branch of mathematics which analyzes the interactive relationships in competitive situations

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<sup>97</sup> Id., Hamilton, p. 318.

<sup>98</sup> Jim J. Tozzi, *Establishing Priorities for Public Investments*, (Interim Report), Office of the Secretary of the Army, Systems Analysis Group (Civil Functions), June 1969, Abstract. Referenced from <https://apps.dtic.mil/docs/citations/AD0689513>

<sup>99</sup> Anthony Vitarelli, *Happiness Metrics in Federal Rulemaking*, 27 Yale J. on Reg. (2010). Referenced from <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1302&context=yjreg>

where the standing of any one participant is determined by the action of other participants. Many game theorists define the term “institution” as the behavioral patterns that are of importance to the theorist and therefore is not necessarily a per se affiliation with an “organization.” Given this broad definition of the term “institution,” the allowable set of procedures and assumptions common to its execution are substantial and govern their usefulness to the practitioner.

Neoclassical economics and traditional institutional economics lacked the ability to analyze the complex interdependencies among individuals which are not driven by the profit motive, do not have complete information and are subject herd-like investing. Econometricians have had considerable success in refining the models and simulations used to understand these interdependencies and therefore have been expanding on the understanding the concepts defined by neoclassical and institutional economists. That said, in the view of this practitioner, the gulf between the findings of the academicians and the implementation of such game-theoretic findings by the practitioner community is substantial if not increasing.

With respect to game theory, a regulatory budget might be viewed as the rules applicable to principals and their associated agents and the resultant games might range from a zero sum game to a differential game.<sup>100, 101</sup> A rigorous game-theoretic analysis of a regulatory budget would be very beneficial. Although there are game-theoretic analyses which include optimal delegation considerations, a paper on the application of game theory to the working of a regulatory budget appears to be non-existent and therefore is beyond the scope of this paper.

This is not to say that there has been no work in this area; to the contrary foundational work has been devoted to modeling

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<sup>100</sup> Jim J. Tozzi, “An Optimum Mix of Heterogeneous Weapons Systems,” Chairman Joint Chiefs of Staff Study Group, 1966. Referenced from [http://thecre.com/pdf/An\\_Optimum\\_Mix\\_of\\_Heterogeneous\\_Weapons\\_Systems.pdf](http://thecre.com/pdf/An_Optimum_Mix_of_Heterogeneous_Weapons_Systems.pdf)

<sup>101</sup> *Gaming the Giveth and Taketh of Government*, Regulatory Pacesetters, March 25, 2017. Referenced from <http://www.thecre.com/forum8/wp-content/uploads/2017/03/Gaming-the-Giveth-and-Taketh-of-Government...pdf>

notice-and-comment rulemaking as a sequential game.<sup>102</sup> The author states that the game begins with (1) the “agency's decision whether to propose a rule, proceeds through (2) a lobbying stage in which both the agency and regulatory targets lobby the executive and legislative branches, and ends with (3) a decision by the regulatory target on whether or not to seek judicial review of the regulation. In this game, regulatory targets possess private information as to the cost of compliance and have two opportunities to block regulation. Their first chance is provided by a lobbying contest that is initiated by (and sometimes even before) a regulation is proposed. Here, they attempt to increase the political costs to the agency from going forward with the regulation as proposed. If they fail to kill the regulation, then targets have an opportunity to seek judicial review of the regulation. Although simplified, this sequential game captures many of the key strategic features of the regulation game, and *generates a number of nonintuitive insights into agency rulemaking incentives under alternative institutional environments.*”

It is for this reason that the attention herein will be devoted to advances made by the econometric community outside the realm of game theory.

Optimal Delegation Theory has been the topic of numerous articles written by econometricians over a number of years. However, until just recently, the application of Optimal Delegation Theory to the execution of a regulatory budget has been minimal. In that econometricians are well known for writing for themselves, it is difficult to translate their findings into useable rules for governance of any kind, in particular regulatory governance.

What is optimal delegation theory and why is it important to the functioning of a regulatory budget?

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<sup>102</sup> Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, University of Pennsylvania Law Review, Vol. 150, 2002. Referenced from [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3272&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3272&context=penn_law_review)



First what is a regulatory budget. A regulatory budget is a ceiling on the total incremental cost of complying with regulations that can be imposed on the regulated community by a regulator.

After forty years of discussion and analysis a regulatory budget has been implemented by an executive order of the President. The issuance of the executive order has been very controversial and it is only a matter of time before the entire issue will be revisited. As of this date the review of the merits of implementing a regulatory budget have been tailored, in large part, around the discussions surrounding the implementation of a fiscal budget including the possible use of benefit-cost analysis to rank order potential regulations to be included in a regulatory budget as well as the two out-on in provision which is an add-on to the traditional regulatory budget.

While these reviews and debates are taking place they are doing so without any input from economists versed in the theory of optimal delegation. The theory of optimal delegation addresses in a very direct manner the central issue dealing with the execution of a regulatory budget, namely a principal, the President, delegates authority to an agency, an agent who might not share the same priorities as does the President, to act in his or her behalf to formulate a regulatory budget subject to a financial cap established by the President. The theory of optimal delegation provides a metric for assessing the impact of a range of attributes in the formulation of a regulatory budget such as the biases of the agent.

Fortunately there is a vast literature assembled over more than four decades on optimal delegation theory written by very informed experts on the matter; unfortunately the vast literature has not been introduced in any substantive degree into the debate on a regulatory budget. Furthermore it will be very difficult to do so for a number of reasons including the fact that those involved in the debate often do not have the mathematical background to master the content of the said literature and because the authors of the said papers write for their respective communities not policymakers.

Nonetheless every attempt is being made to address this information gap and it the responsibility of the econometric-institutional community to provide the relevant background to practitioners in the policy, regulatory and legal communities.

What is needed is for someone to wade through the mathematics and translate their findings into an easy to understand document. In doing so it should be noted that economic models of reality are full of assumptions and these assumptions must be made explicit in reviewing the outcome of a model. Fortunately, we have identified a paper which applies Optimal Delegation Theory to regulatory budgeting and contains a translation of the findings into operating rules.

Prior to discussing the findings of the paper in detail we would like to present some background information on Optimal Delegation Theory which emerges from a Ph.D. thesis written by B. Holmstrom in 1977 and which as stated above presents a rigorous methodology for the development of procedures for addressing the principal-agent dilemma which is a personification of a regulatory budget.

The principal-agent dilemma, which is the heart of optimal delegation theory, occurs when a person, the principal, authorizes another person, the agent, to act on the person's behalf. The dilemma arises if the agents act on their own behalf and not necessarily in the best interests of the principal. If the aforementioned principal and agent are housed in an institution they are governed by rules, however formal or informal.

Optimal Delegation Theory can trace its roots back to the principal-agent dilemma identified by Adam Smith in 1776 when he concluded: "The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company."<sup>103</sup>

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<sup>103</sup> Adam Smith, *An Inquiry into the Nature and Causes of Wealth of Nations* (London: T. Nelson and Sons, 1852), 310–11, 316–18. Ironically, Smith's belief of the economic inferiority of corporations was misplaced

In this instance, the principle-agent dilemma arises when the shareholders, the principals, authorize others, directors, who may not share their interests to act in their behalf. The implementation of a regulatory budget forces one to address the principal-agent dilemma because the regulatory programs of a President, the principal, are often undertaken by vast bureaucracies who at times do not share the same priorities as that of the President. As one author has stated:

“In the history of economic thought the principal-agent dilemma is a recent innovation having emerged in the early 1970’s. It has matured through time and has led to a range of new developments in related fields of endeavor; consider that:

“Incentive theory is the most important development in economics in the last forty years. The principal-agent model is the core of this theory.”<sup>104</sup>

Now some forty years subsequent to the recognition of the principle-agent dilemma, as seen through the lens of the Theory of Optimal Delegation, it has a forceful presence in the initiation of a mechanism to control the size the administrative state.

Substantive research dealing with the principal agency dilemma was initially produced by the economic community. That said the political science community has an extensive program dedicated to exploiting the output of a rigorous mathematically based analysis of the interrelationship of a principal and its agents as applied to a well-defined Congressional oversight setting.

“Although neither of these empirical forays could be regarded as the final word on the subject, Weingast’s articles constitute an enormous contribution to the study of congressional oversight and public bureaucracy by exemplifying quantitative research directed at precise questions (e.g., what are the political and other determinants of bureaucratic outputs derived from rigorous theory? Almost singlehandedly, these articles raised the bar for academic research in the area of bureaucracy”. Weingast (1984)

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because of the emergence of the regulation of the private sector by both federal and state regulators.

<sup>104</sup> Jean-Jacques Laffon, Editor, *The Principal Agent Model: The Economic Theory of Incentives*, Edward Elgar Publishing (2003). Referenced from <https://www.e-elgar.com/shop/the-principal-agent-model>

offers the “congressional dominance” hypothesis: “The mechanisms evolved by Congress over the past one hundred years comprise an ingenious for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress.”<sup>105, 106</sup>

The point being made here is that the academy and its associated practitioners and policymakers should assess the rich history of the principal-agent dilemma developed by both the economic and political science communities when assessing the merits and making improvements in the regulatory budget. Hopefully this will also serve as an incentive for the economic and political science communities to become actively involved in the development of a regulatory budget.

In terms of a regulatory budget, the particular rules that govern the institution under review can be very wide in scope. In this instance the issue reduces to a delegation problem; what are the rules that govern the delegation of decisions made by the principal to the agent? One definition of optimality is whether the preferences of the principal are maximized. Given this macro view of optimal delegation there are a wide number of variants therein, for example, are the agents biased, do the agents possess considerably more information than does the principal, do the agents have considerably more expertise than does the principal and does the principal make only a select delegations?

Now applying Optimal Delegation Theory to a regulatory budget one would designate the President as the principal and executive branch regulatory agencies as the agents. Professor Yair

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<sup>105</sup> Barry R. Weingast, “The congressional-bureaucratic system: a principle agent perspective (with application to the SEC),” *Public Choice* 44: 147-191 (1984). Referenced from [https://www.researchgate.net/profile/Barry\\_Weingast/publication/238356798\\_The\\_Congressional-Bureaucratic\\_System\\_A\\_Principal\\_Agent\\_Perspective\\_with\\_Applications\\_to\\_the\\_SEC/links/5670768a08aececf5532547.pdf](https://www.researchgate.net/profile/Barry_Weingast/publication/238356798_The_Congressional-Bureaucratic_System_A_Principal_Agent_Perspective_with_Applications_to_the_SEC/links/5670768a08aececf5532547.pdf)

<sup>106</sup> Gary J. Miller, *The Political Evolution of Principle-Agent Models*, *Annu. Rev. Polit. Sci.* 2005. 8:203–25. Referenced from [https://www.researchgate.net/profile/Gary\\_Miller9/publication/234836190\\_The\\_Political\\_Evolution\\_of\\_PA\\_Models/links/5480faf80cf22525dcb606b2/The-Political-Evolution-of-PA-Models.pdf](https://www.researchgate.net/profile/Gary_Miller9/publication/234836190_The_Political_Evolution_of_PA_Models/links/5480faf80cf22525dcb606b2/The-Political-Evolution-of-PA-Models.pdf)

Listokin has applied Optimal Delegation theory to the execution of a regulatory budget. Whether the President should bound the EPA (or other regulatory agency) to a regulatory budget, or should the President allow EPA to enact any regulations that meet a specified standard or rule such as positive net benefits is an example of the type of issue Professor Listokin addresses.<sup>107</sup>

Professor Listokin provides a very in-depth review of a regulatory budget based upon the principles of Optimal Delegation Theory. Some of his more significant conclusions are:

- “This Essay examines two alternative designs for hierarchical institutions: “bounded” and “unbounded.” In a bounded structure, a principal decides on a bounded aggregate numerical allocation, and then an agent makes the allocation to an underlying subject population while complying with the bound. In an unbounded structure, the principal provides no aggregate numerical cap, but instead provides some other form of guidance to the agent regarding allocation. . . .”<sup>108</sup>
- “...This scholarship debates the efficacy of different mechanisms, such as cost-benefit analysis, judicial oversight, executive branch oversight, and public oversight (for example, the Freedom of Information Act), for reducing costs of errors. Each method brings pluses and minuses, but all of the methods leave agencies unbounded. No matter how strict the oversight, any proposed rule that survives the oversight process becomes a regulation. So long as the cost-benefit analysis proves that the regulation has positive net benefits, or the regulation follows the statute, or the regulation passes through appropriate executive or judicial oversight, the regulation may be issued. Because there is no hard ceiling or floor on

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<sup>107</sup> Yair Listokin, *Bounded Institutions*, Yale Law Journal, Vol. 124, No 2, November 2014, p. 339. Referenced from [https://www.yalelawjournal.org/pdf/b.336.Listokin.395\\_ns5664pc.pdf](https://www.yalelawjournal.org/pdf/b.336.Listokin.395_ns5664pc.pdf)

<sup>108</sup> *Id.*, Abstract, p. 336.

regulations, agency regulations are promulgated in an unbounded institutional environment.”<sup>109</sup>

- “A regulatory budget provides the bounded institutional counterpart to the conventional unbounded regulatory environment. Although the concept of a regulatory budget is more than thirty years old, regulatory budgets are rarely implemented.”<sup>110</sup>
- The analysis in the previous two Parts offers several reasons to believe that bounded institutional structures such as regulatory budgeting may prove superior to traditional unbounded oversight methods.”<sup>111</sup>
- “Instead of an all-or-nothing approach to regulatory budgeting, wherein a regulatory budget is either applied to all agencies or none, the analysis provided here suggests that a regulatory budget may be appropriate for some agencies but not others. Alternatively, it may be appropriate for the head of an agency to impose a regulatory budget on a sub-agency but inappropriate for Congress to impose one on an entire agency.”<sup>112</sup>

Professor Listokin’s analysis also provides insights into the limitations of bounded institutions. That said, the paper provides academic support for the idea that regulatory budgeting can be a sound and effective tool for the governance of the administrative state as reinforced by other scholars.<sup>113</sup>

### *C. Regulatory Budget: A Legislative Solution*

If a regulatory budget is going to be enshrined in the administrative state, then such an event will only occur as a result of the passage of legislation. Nonetheless, in the current

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<sup>109</sup> Id., Sec. III. A. Traditional Regulatory Oversight Versus Regulatory Budgeting, p. 366. [Notes omitted].

<sup>110</sup> Id., p. 367. [Notes omitted].

<sup>111</sup> Id., p. 367.

<sup>112</sup> Id., p. 368.

<sup>113</sup> Tapas Kundu and Tore Nilssen, *Delegation of Regulation*, Oslo University, Department of Economics, 2018. Referenced from <https://folk.uio.no/toreni/KunduNilssenRegulation.pdf>

environment, it not likely that such circumstances will prevail. Nonetheless, it is imperative that actions be taken to continue the bipartisan support for centralized regulatory review. Seeking and obtaining such support is not beyond reach because regulatory budgets have been put into place by a number of other countries<sup>114,115</sup> for a period of years. Even more significant is the fact that the economic community has developed a comprehensive body of thought in support of Optimal Delegation Theory over a period of some four decades as delineated in this article which provides a strong institutional anchor.

A dominant role for Congress in the regulatory budgeting is not only based upon sound public policy arguments but also has the added advantage of providing a degree of protection from legal challenges.

Consequently, by subjecting the current Executive Order 13771 to notice and comment will provide a mechanism needed to garner public support for a regulatory budget similar to that enjoyed through the legislative process.<sup>116</sup>

Legislation has been introduced in both the House and the Senate over a period of nearly forty years and none of it has made any significant advances toward enactment. There are a number of reasons for this inaction by the Congress including the observation that there is no natural constituency for a regulatory budget. The following are some notable examples of regulatory budgeting legislation that has introduced although analysis of specific legislative proposals is beyond the scope of this paper.

- H.R. 2623 - Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017.<sup>117</sup>

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<sup>114</sup> Sean Speer, *Regulatory Budgeting: Lessons from Canada*, R Street Policy Study No. 54, March 2016. Referenced from <http://www.thecre.com/forum2/wp-content/uploads/2015/08/Reg-Budget-R-Street.pdf>

<sup>115</sup> Id, Doern, (2009).

<sup>116</sup> Susan Dudley, *A Brief History of Regulation and Deregulation*, The Regulatory Review, March 11, 2019. Referenced from <https://www.theregreview.org/2019/03/11/dudley-brief-history-regulation-deregulation/>

<sup>117</sup> Rep. Meadows, Mark [R-NC-11]. Introduced 05/24/2017. Referenced from <https://www.congress.gov/bill/115th-congress/house-bill/2623/text>

- S. 2982 - Article I Regulatory Budget Act of 2016.<sup>118</sup>
- S. 2988 - Regulatory Cost Assessment Act of 2014.<sup>119</sup>
- S. 51 - A bill to amend the Congressional Budget Act of 1974 to require the Congress to establish, for each fiscal year, a regulatory budget for each Federal agency which sets the maximum costs of compliance with all rules and regulations promulgated by that agency, and for other purposes.<sup>120</sup>

Many of the key legal issues surrounding the Carter Administration's 1979 regulatory budget were discussed two years later, by the same authors, in a landmark law article.<sup>121</sup> The article was co-authored by an attorney in the Office of the General Counsel of the Corps of Engineers, an office that had extraordinary influence on OMB's regulatory perspective. OMB was very mindful of the legal issues and concerns that were inherent in implementing a regulatory budget. Since the OMB officials responsible for regulatory review were transplants from the Civil Works program of the Army Corp of Engineers, it was only natural for them to seek advice and counsel from the Corps' Office of the General Counsel. The article thus speaks from a knowledgeable perspective.

The article strongly suggests that the approach taken by the Carter Administration to implementing a regulatory budget was considerably more manageable than an approach which includes a "one-in; two out provision". This is not to say that the latter is not a meritorious route, but does indicate that the Carter

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<sup>118</sup> Sen. Lee, Mike [R-UT]. Introduced 05/25/2016. Referenced from <https://www.congress.gov/bill/114th-congress/senate-bill/2982/>

<sup>119</sup> Sen. Lee, Mike [R-UT]. Introduced 12/08/2014. Referenced from [http://www.thecre.com/oira\\_reg/?p=7995](http://www.thecre.com/oira_reg/?p=7995)

<sup>120</sup> Sen. Bentsen, Lloyd M. [D-TX]. Introduced 01/15/1979. Referenced from <http://www.thecre.com/forum2/wp-content/uploads/2015/08/S-51-2.pdf>

<sup>121</sup> Lance D. Wood, Elliot P. Laws, Barry Breen, *Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies*, 18 Harv. J. on Legis. 1 (1981). Referenced from <http://www.thecre.com/pdf/RestrainingRegs.PDF>



Administration's approach to limiting the growth of new regulations is quite viable.

*D. Cumulative Cost Control: OIRA's Future*

From its onset, it was believed that central regulatory review would have three components:

- 1) Application of benefit-cost analyses to regulations.
- 2) Establishment of a centralized review authority to check the accuracy of the benefit-cost analysis.
- 3) Implementation of a program to control the cumulative cost of regulations.

Midway through the agenda, a fourth item was added. It became apparent that OIRA would not have the resources it would need to effectively police the issuance of every regulation as well as to conduct retrospective reviews. What was needed was for the Data Quality Act (DQA) to fill this void. The DQA did so, brilliantly, by placing the responsibility for initiating a retrospective review on stakeholders through the Act's Request for Correction process. The DQA was an outgrowth of lessons learned about the limited opportunity that stakeholders have for relief from inaccurate information disseminated by federal agencies in the form of standalone reports.<sup>122</sup>

Section 1 of this article addressed the first two components outlined above and the third was discussed earlier in this section. What remains to be discussed, however, is the institutionalization of regulatory budgeting. Institutionalizing regulatory budgeting—ensuring that it becomes a lasting practice—requires that OIRA lay the foundation for its assuming a long-term role in regulatory budgeting's implementation.

It is impossible for OIRA to control the administrative state solely by reviewing individual regulations for the following reasons 1) OIRA is now reviewing in the neighborhood of 10% of

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<sup>122</sup> Lynn L. Bergeson & Lisa M. Campbell, *The Tozzi Decision: Another Arrow in Manufacturers' Quiver in Product Defense Wars*, EPA Administrative Law Reporter, Vol. 18, Num. 5, November 2001. Referenced from <http://www.thecre.com/pdf/20020425-tozzi.pdf>

the regulations promulgated by federal agencies and 2) cumulative costs are not considered in the reviews of individual regulations.

The originators of centralized regulatory review thought it would take five years to institutionalize the process. Instead, the struggle for centralized review took nearly twenty years<sup>123</sup> and came to fruition with the passage of the 1980 Paperwork Reduction Act<sup>124</sup> which established OIRA.

The obvious question is why did it take forty years after OIRA was established and after detailed regulatory budget proposals were developed in both the executive and legislative branches before a regulatory budget was implemented via executive order? There was an institutional infrastructure in place for cumulative cost control during this period as well as blueprints for its implementation and support from a number of academicians.

There are a number of reasons for the delay. The primary reason is that OIRA and its predecessor organizations were under constant legal and political attack and scrutiny. These actions engulfed OIRA's resources. It was hardly the ideal time to expand the mission of an organization when its very existence was in question. A related reason for the delay is that OIRA underwent a long series of personnel reductions which resulted in its staff being halved.

Another reason for the delay in implementing a regulatory budget was the minimal attention given to the competitive nature of bureaucratizes.<sup>125</sup> Agencies which fail to provide utility to one

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<sup>123</sup> Id., Kirschten (1983).

<sup>124</sup> Statement of Wayne G. Granquist, Associate Director for Management and Regulatory Policy, Office of Management and Budget; Accompanied by Jim J. Tozzi, Assistant Director for Regulatory and Information Policy on H.R. 6410 Paperwork Reduction Act of 1980 before a Subcommittee of the Committee on Government Operations, U.S. House of Representatives, Ninety-sixth Congress (Second Session), February 7, 21, and 26, 1980. Referenced from

<http://www.thecre.com/ombpapers/PaperWorkReductionAct.htm>

<sup>125</sup> Jim Tozzi and Bruce Levinson, *Accomplishment Beyond Dollars*, The Environmental Forum, Vol 31, No 1, Jan./Feb. 2014. Referenced from [http://thecre.com/pdf/20131222\\_Environmental\\_Forum\\_Jan2014.pdf](http://thecre.com/pdf/20131222_Environmental_Forum_Jan2014.pdf)

or more constituencies—constituencies which may have changing demands—will vanish overtime.

In implementing a regulatory budget, OIRA has reignited some of its entrepreneurial, risk-taking attributes. However, it still needs to address several ominous long-term threats.

1. *OIRA is losing its status as the world leader in regulatory innovation*

The Council on Foreign Relations concluded in 2016: “The United States used to be the trailblazer in regulatory reform. The rest of the rich world has caught up, however. Countries such as Australia, Canada, and the United Kingdom can now lay claim to being at the cutting edge of regulatory management. They have implemented systems that better manage the existing stock, for example, with regulatory budgets and automatic reviews, while improving the filter for new regulations through empirical study.”<sup>126</sup>

It is worth noting that OIRA has regained some of its standing by implementing a regulatory budget and initiating the review of tax regulations.<sup>127</sup>

2. *Critics of a Regulatory Budget have raised legitimate concerns which have to be addressed in a public forum*

One of the most widely expressed concerns about regulatory budgets is that they do not consider benefits. Although Section III. B. explains that other countries are successfully implementing regulatory budgets without explicitly incorporating a benefits analysis, this remains one of the regulatory budgeting issues that needs to be addressed through a series of open forums and workshops.

Another issue to be examined is, since it is not mandatory that a regulatory budget include a one-in, two-out provision, the conditions under which such a provision is compliant with the APA be identified.

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<sup>126</sup> Council on Foreign Relations, (2015) p. 4.

<sup>127</sup> University of Minnesota, Law School, “Prof. Hickman Named Special Adviser to OIRA,” April 18, 2018. Referenced from <https://www.law.umn.edu/news/2018-04-18-prof-hickman-named-special-adviser-oira>

Lastly, is a regulatory budget an alternative to adding procedural requirements to the regulatory process?<sup>128</sup>

The aforementioned issues as well as others identified in this section dealing with the implementation of a regulatory budget should be addressed in a number of fora. OIRA should take the lead by issuing a RFI, a request for information from think tanks, NGOs, and stakeholder organizations.<sup>129</sup>

### *3. Examination of alternative methods for controlling the cumulative cost of regulation*

There are alternatives to regulatory budgeting for controlling the cumulative cost of regulations. An article which examines multiple policy options while considering fundamental reforms to OIRA's status quo explained:

- “Over three decades ago, the United States was at the forefront of developed nations in creating a centralized system for regulatory review and rationalizing regulatory policymaking through the use of benefit-cost analysis. As catalogued elsewhere on this site, the idea of centralized executive review of agency rules first began to take shape during the Johnson Administration, and it fully matured in its present form in the early days of the Reagan Administration. Presidents George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama have all fundamentally reaffirmed the basic framework President Reagan created, which involves benefit-cost analysis of pending rules and centralized review of significant regulations by the Office of Information and Regulatory Affairs (OIRA). Though the system that has emerged still provokes controversy, most have accepted the inevitability and desirability of some form of executive review.”<sup>130</sup>

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<sup>128</sup> Center for Regulatory Effectiveness, OIRA Watch, “An Alternative to the Regulatory Accountability Act?” May 25, 2017. Referenced from <http://www.thecre.com/oira/?p=7007>

<sup>129</sup> Center for Regulatory Effectiveness, OMB Papers on Centralized Regulatory Review, Unfinished Business. Referenced from <http://www.thecre.com/ombpapers/unfinished.htm>

<sup>130</sup> Id., Bull, (2015) p. 1.

- “In the ensuing thirty years, the United States’ system for executive review has changed very little, notwithstanding some minor readjustments. In that same time period, other developed nations have enacted significant regulatory reforms, some of which involve copying the American framework but many of which represent new innovations that go well beyond what the United States has adopted.”<sup>131</sup>
- “If the United States is to succeed in controlling the cumulative regulatory burden, then it must consider fundamental reforms to the status quo. Existing regulatory impact analysis mandates and OIRA review play a critical role in combating overregulation and containing the costs of the regulatory state, but they alone are inadequate to control ever-increasing regulatory costs. In contemplating potential reforms, the United States fortunately needn’t start from scratch, as many developed nations have undertaken significant regulatory overhauls in recent years. By observing what has worked well overseas, the United States can learn from and ideally build upon foreign innovations, refashioning international best practices to fit the American context.”<sup>132</sup>

The author analyzes a number of different approaches for controlling cumulative costs. In response to some of the paper’s conclusions reached therein it should be noted that the prototype regulatory budget developed by the Carter Administration:

- Did not include a “one in-two out” provision.<sup>133</sup>
- Incorporated benefits into the regulatory budget much in the same way they are used in the fiscal budget; regulations available for promulgation were ranked in a

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<sup>131</sup> Id. [Note omitted.]

<sup>132</sup> Id., p. 2.

<sup>133</sup> Andrew, M. Grossman, An Administration Takes Sides, 36 Yale J. on Reg.: Notice & Comment, May 25, 2017. Referenced from <http://yalejreg.com/nc/an-administration-takes-sides-by-andrew-m-grossman/>

descending order of net benefits and those incorporated into the budget were those with a total cost equal to the allowable increase in government-wide regulatory expenditures working downward on the aforementioned ranking of candidate regulations.

The operating philosophy of the regulatory budget of the Carter Administration paralleled that of the fiscal budget employed by administrations of both parties over a number of decades—namely that there was never a planned retrenchment of the regulatory state but instead a control of its rate of growth something akin to the ever increasing size of the federal deficit espoused by both political parties.

Although alternatives to regulatory budgets are worth exploring, regulatory budgeting remains the default strategy for controlling cumulative regulatory costs until such time as it becomes apparent that an alternative method would be more effective.

#### *E. Next Step*

The bottom line is that historically, with the possible exception of Executive Order 12291 and its offspring Executive Order 12866, executive orders related to the management of the regulatory state are in jeopardy when there is change in a Presidential Administration. The last three years of momentum for regulatory budgeting should not be lost.<sup>134</sup> Consequently there is ample justification to take the necessary steps to institutionalize a regulatory budget because (1) it has been reviewed in the literature for four decades, (2) a prototype is available for review, (3) it has been subjected to state-of-the-art scientific reviews and (4) it has been in existence for three years. What is needed is an immediate review<sup>135</sup> of the topics outlined in section 3.D.2., *Critics of a*

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<sup>134</sup> Adam J. White, *Regulatory Reforms and Counter-Reformations*, The Regulatory Review, March 12, 2019. Referenced from <https://www.theregreview.org/2019/03/12/white-regulatory-reforms/>

<sup>135</sup> E. Donald Elliott, *President Trump Establishes Regulatory Budgets by Executive Order*, Inside Energy & Environment, February 1, 2017. Referenced from

*Regulatory Budget have raised legitimate concerns which have to be addressed in a public forum* followed by a revised executive order which would continue the use of a regulatory budget based upon soliciting public comment on Executive Order 13771 which implements the existing regulatory budget.

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<https://www.insideenergyandenvironment.com/2017/02/president-trump-establishes-regulatory-budgets-by-executive-order/>