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Office of Information and Regulatory Affairs: Past, Present, and Future

Abstract: This article has three sections, each of which deals with an Executive Order. The first section, “Office of Information and Regulatory Affairs (OIRA) Past,” emphasizes the critical role that Executive Orders played in the formation of OIRA. More specifically, OIRA owes its initial existence to the establishment of a centralized regulatory review system, the Quality of Life Review, which initiated Office of Management and Budget (OMB) review of environmental regulations through the issuance of a directive from OMB. Every subsequent President expanded OMBs powers through the issuance of Executive Orders which culminated in the Iconic Executive Order 12291. The section concludes with the recommendation that a select class of Executive Orders, and OMB Directives, be designated as “Iconic” by the National Archivist in consultation with the OIRA, and then given substantial deference by incoming Administrations. The second section, “OIRA Present,” describes an Executive Order issued during the Kennedy Administration which remains in effect but was promulgated prior to the establishment of OIRA and therefore recommends that a new Executive Order be issued which gives OIRA specific authority to participate in the conduct of interagency reviews of Executive Orders. The third section, “OIRA Future,” describes an Executive Order which implements a regulatory budget (RB) and institutionalizes a mechanism for controlling the size of the administrative state. This final section of the article recommends that the aforementioned Executive Order be reviewed and modified based upon the outcome of a request for public comments, and rules with demonstrated positive net benefits should no longer be accorded an automatic entitlement for issuance as a final rule absent their inclusion in an RB.

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1 The past

1.1 The significance of a historical perspective

The purpose of this section 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 the merits of various proposals to improve the management of the administrative state. In particular, this section focuses on instituting a program in the National Archives which would classify a select number of Executive Orders, including a select group of Office of Management and Budget (OMB) Directives, as “Iconic.” The Iconic designation would require that an incoming Administration give considerable deference to these Executive Orders and OMB Directives prior to considering their revocation.

Scholars have concluded that centralized review of regulations by the White House Office of Information and Regulatory Affairs (OIRA) is the most important institutional feature of the administrative state (Bagley & Revesz, 2006; Center for Regulatory Effectiveness (CRE), Quality of Life Review; http://thecre.com/ombpa/pers/quality_of_life.html). Justice Breyer has stated that “OIRA is the lineal descendant of efforts by Presidents Nixon, Ford, and Carter to achieve greater coordination within the huge Executive Branch” (Breyer, 1995).

OIRA and its centralized regulatory review function have been honed over the last half-century (Tozzi, 2017*d*). 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 it is abused it can vanish with the 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 (Pierce, 2019*a*).

Time Magazine has stated that Executive Order 12291 (Reagan, 1981) is one of nine Executive Orders that has “changed the course of America” (Rothman, 2017).

EO 12291 established the mechanism that became the foundation for centralized regulatory review. Steps should be taken to ensure that forthcoming Executive Orders abide by the standards established in Executive Order 12291. Failure to do so 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 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.

1.2 Defining centralized regulatory review by Executive Orders

Calendar Year 2019 marks the 50th year since Professor A. Allan Schmid, 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 (Tozzi, 2017*c*). The foundation for centralized regulatory review, that is, White House OMB 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 OMB initiated the first centralized regulatory review process when it began reviewing environmental, health, and safety rules with an emphasis on Environmental Protection Agency's (EPA) 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 (Lubbers, 2018, p. 19).

In each of the ensuing Administrations, the President strengthened the centralized review of regulations by issuing Executive Orders, for example, Ford's (inflation/economic impact statements), Carter's (OMB oversight of the regulatory process), and 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 (DeMuth, 2011; Katzen, 2011; Miller, 2011). President Obama furthered the cause by issuing Executive Order 13563 which strengthened the bipartisan foundation for centralized regulatory review.

1.3 The significance of an Iconic Executive Order

In this age signified by a near Gatling gun approach to issuing of Executive Orders, practitioners and the academic community are to be complimented for devoting increasing attention to the institutional standing of well-reasoned, peer reviewed Presidential instruments, including both Executive Orders and OMB Directives, that stand the test of time. One such example 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 (Tozzi, 2018d). 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 or less regulation (Verkuil, 1980). The now time-tested decision-making 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 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 (Behr, 1981).

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 (Shultz, 1971). 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 20 years and spanned five Presidential Administrations (Kirschten, 1983).

Executive Order 12291 gave legitimacy to, and increased the jurisdiction of, the best (Shultz, 1971) of the various time tested centralized regulatory review processes developed and implemented (Ford, 1974) by the four prior Presidential

Administrations (Carter, 1978) – another step toward bipartisanship in establishing centralized regulatory review.

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 a 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 of “internal” agency specific law (Tozzi, 2019a).

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

- (i) “Second, and more innovatively, his [Reagan] Administration issued the Now-Iconic Executive Order 12291” (Mashaw & Berke, 2018).
- (ii) “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 regulatory review is, along with the APA [Administrative Procedure Act], one of the two most influential documents of the regulatory state” (Tozzi, 2017d).
- (iii) “Arguably, the most important legal document of the last 30 years that hardly anyone in America knows about was Executive Order No. 12291, the Reagan executive order that created the modern system of White House oversight of federal regulatory policy making” (Shane, 2011).
- (iv) “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” (Sunstein, 2018).

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 the EPA (Tozzi, 2011; Morrison, 1986). A bridge still to be crossed is the application of the Executive Order to independent agencies (Gray, 2017).

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 (Marshall, 1982). This office was a functioning unit that predated OIRA. Upon morphing into OIRA, 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 (Carter, 1981).

What is needed is for the National Archives and OIRA 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. The National Archives has a record of analyzing regulatory process changes (Tozzi, 2009). Hopefully, the resulting 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 an existing one as was the case with Executive Order 13497 which stated: “Executive Order 13258 (Bush, 2002) of February 26, 2002, and Executive Order 13422 of January 18, 2007 (Bush, 2007) concerning regulatory planning and review, which amended Executive Order 12866 of September 30, 1993, are revoked.”

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 was 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 (Rudalevige, 2017).

Executive Order 12291, its predecessors and its progeny – Executive Order 12866 – have dominated the regulatory state for a half-century and their formulation and implementation should be the basis for judging the continuity of existing Executive Orders as well as the issuance of future ones (Tozzi, 2017c). Executive Order 12291 establishes the quality norm for Executive Orders because it (i) did not contain a jurisdictional overreach, (ii) was accompanied by an extensive legal analysis supporting its content, (iii) was premised on processes which were tested prior to their incorporation into an Executive Order, (iv) was reviewed to determine whether Executive Order 12291 did in itself comply with its directives, particularly that its benefits exceed its costs, and (v) was accompanied by the provision of an adequate staffing level.

The National Archives, the keeper of the nation's most treasured documents and the publisher of the Federal Register, in consultation with OIRA, should be vested with the mandate to review all Executive Orders having regulatory consequences and to classify a select number of them as "Iconic," meaning that incoming Administrations should accord them procedural and substantive deference prior to considering their revocation.

2 The present

2.1 OIRA review of Executive Orders

OIRA owes its existence to a statute, the Paperwork Reduction Act of 1980 (Behr, 1981); 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 therefore it 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 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 ones. The historical preoccupation with judicial review is changing in that emerging scholarly articles are 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" (Metzger & Stack, 2017). Professor Richard Pierce has made 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" (Pierce, 2017). There is no better venue for the academy, political scientists, and economists to focus their attention on than the need for OIRA to review Executive Orders.

On June 21, 1962, the Kennedy Administration published Executive Order 11030 dealing with preparation and review of Executive Orders (Kennedy, 1962). Although it has been subject to a number of amendments, the Executive Order continues to vest 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. The Kennedy Executive Order was issued prior to the establishment of OIRA.

It is for this reason that the White House, using Executive Order 11030 as its base, should issue a new Executive Order to amend its administrative process to require that proposed Executive Orders be reviewed by the General Counsel of 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 and the same process would apply to the new Executive Orders issued by the incoming Administration. In each case, the analytical norm would be the underlying legal principles set forth in Executive Order 12291 (Simms, 1981). The resultant OIRA review need not be a public endeavor but, in select instances, could be subject to public comment. The CRE has compiled a compendium of selected works by recognized scholars (CRE, OMB Papers, n.d.). This canon should serve as a guide to OIRA in conducting the aforementioned reviews. In addition the CRE maintains a daily report on a key activity associated with the management of OIRA (CRE, OIRA Watch; <http://www.thecre.com/oira/>).

2.2 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, Barack Obama, and Donald Trump have utilized, to 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 (Dodds, 2008; Appelbaum & Shear, 2016; Tozzi, 2018b).

Presidential use of Executive Orders can be traced to the early views of Alexander Hamilton in the Federalist Papers, which matured into their zenith during the Franklin D. Roosevelt Administration (White, 2018, p. 1572). 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 legal community whose education focuses on the management of the administrative state through rulemaking and judicial review (Tozzi, 2018c). Nonetheless, the increasing reliance by Presidents on Executive Orders has not escaped the critical eye of some legal scholars of the administrative state (White, 2018).

The significance 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:

- (i) President’s Committee on Administrative Management: Report (The President’s Committee on Administrative Management, 1937);
- (ii) President’s Committee on Administrative Management: Analysis (Newbold & Terry, 2006);
- (iii) Procedure in Administrative Rule-Making (Fuchs, 1938);
- (iv) Effective Public Policy and the Government Budget: A Uniform Treatment of Public Expenditures and Public Rules (Schmid, 1969);
- (v) Executive Order 12291 (Reagan, 1981).

The Presidency is, for good reason, not subject to the Administrative Procedure Act, but in the ascendancy of the “muscular” presidency, ill-founded Executive Orders could undermine 50 years of centralized regulatory review. This could occur as the result of a continuum of negative judicial decisions or Congressional mandates (Rasso, 2018). 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 established 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 in the Paperwork Reduction Act of 1995 and the Data Quality Act (DQA) also known as the Information Quality Act (Tozzi, 2018a).

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 existing Orders through the issuance of an Executive Order which vests it with such a responsibility.

3 The future

3.1 The need to place an incremental ceiling on public expenditures for compliance with federal regulations

In November 2018, the American Bar Association (ABA) Section on Administrative Law held its annual regulatory summit (Emery & Prosnitz, 2018). The attendance was record breaking as were the quality of the presentations and timeliness of the topics. The agenda addressed the pacesetter issues of today. The discussants were well prepared and included those of 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 Administrative 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 leads 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 are implemented.

Accordingly, a public debate should ensue as to whether such a capability should continue unabated if and when the existing regulatory budget (RB) 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 a potential shortage – at an exceedingly high opportunity cost – 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 as a result of the

implementation of an RB. Should this constraint or a variant thereto 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 academia have a wide range of significant issues before them and it is likely that the aforementioned issue will not rank highly with the general public in part because of the ever increasing role of regulators and non-government organizations in opposing measures to restrict the size of the administrative state during the legislative process (Walker, 2017; Tozzi, 2018a). That said, the implementation of a program to control the cost of regulation could be the starting point for OIRA to develop a national constituency.

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:

- (i) Commodity Supplemental Food Program (United States Department of Agriculture, Food and Nutrition Service, Commodity Supplemental Food Program; <https://www.fns.usda.gov/csfp/commodity-supplemental-food-program-csfp>). The CSFP works to improve the health of low-income elderly persons of at least 60 years of age by supplementing their diets with nutritious United States Department of Agriculture (USDA) Foods.
- (ii) Food Distribution Program on Indian Reservations (USDA, FDPIR). The FDPIR is a Federal program that provides USDA Foods to low-income households, including the elderly, those living on Indian reservations, and to Native American families residing in designated areas near reservations.
- (iii) School Breakfast Program (USDA, SBP; <https://www.fns.usda.gov/sbp/school-breakfast-program-sbp>). The SBP operates in the same manner as the National School Lunch Program. School districts and independent schools that choose to take part in 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 are willing to 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.

On the other hand 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 should not 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 an RB addresses these matters and inserts a ceiling on *de facto* tax increases. There might be some truth in the adage that “there is no free lunch.”

In addition, if there were ever an instrument capable of fulfilling OIRAs responsibility of harmonizing regulatory programs across all federal agencies, the RB is such a mechanism (Bagley & Revesz, 2006). The execution of an RB requires the 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 would be based on public comments received on Executive Order 13771 and would delineate the legal foundation and process to be used to implement the Order.

3.2 RB: An administrative solution

The Trump RB is resulting in an unprecedented reduction in compliance costs based on reports issued by established third parties (Bosch, 2018). Although the long-term implications of certain provisions of the RB are to be determined, such as “One-in, Two-out,” the RB 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 a substantial 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 to implement such a ceiling so that it does not violate

any existing statutes? How are benefits of regulations incorporated into the functioning of an RB? These are all legitimate questions and the point being made is that practitioners and academicians should devote resources to answering these questions in lieu of challenging the concept of a ceiling. The current debate is reminiscent of the one that occurred some 50 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 regulatory process (Nielson, 2017). Benefit-cost analysis has increased in stature over the past half-century; however with the advent of the implementation of an RB, benefit-cost analysis will continue to have an important role but will no longer dominate the process as explained herein (Graham & Liu, 2014; Pierce, 2019b; Tozzi, 2019b, Appelbaum, 2019).

President Carter was the first President to make a favorable statement on an RB in his Economic Report of the President and he was the first President to develop a prototype RB of a specific agency (Tozzi, 1979).

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 proposed Regulatory Cost Accounting Act of 1980 (RCAA, 1980).

President Trump is the first President to actually implement an RB on a government-wide basis. The concept of an RB has been supported by academicians and practitioners including Christopher C. DeMuth, Clyde Wayne Crews, Jr, C. Jarrett Dieterle, Susan E. Dudley, Jeff Rosen, and other authors during the same time period (DeMuth, 1980; Crews, 1996; Dudley, 2016; Rosen, 2016b; Dieterle, 2017; CRE, CCCR, n.d.). Why were these articles not followed by a program to implement an RB?

Several legislative actions were proposed and 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 an RB. The Trump RB included a “One-in, Two-out” provision, which was not contained in the RB proposed by the Carter Administration. Almost exactly one year prior to the inauguration of the Trump Administration, a regulatory practitioner predicted that, in the near future, an Administration would implement and institutionalize an RB (Tozzi, 2016). In support of its prediction, the article provided a review of the distinguished organizations and individuals who were lining up to support an RBs implementation and other notable events such as:

- (i) The Administrative Law Review’s publication of the article *The Regulatory Budget Revisited* (Rosen & Callanan, 2014).
- (ii) The release of a white paper by the research chief of the Administrative Conference of the USA, Controlling the Cumulative Costs of Regulation,

that reviews various proposed solutions to runaway regulatory costs, including a One-in-One-out regulatory budget (Bull, 2015).

- (iii) Hearings on the issue convened by the Senate Homeland Security and Government Affairs Committee jointly with the Senate Budget and Homeland Security and Government Affairs Committees (United States Senate Homeland, 2015; United States Senate Joint, 2015).
- (iv) The endorsement of the idea of regulatory budgeting by at least two Presidential candidates (Goad, 2014; McLaughlin, 2015).
- (v) Discussion of regulatory budgeting on the program at the American Bar Association's Administrative Law Section (Rosen, 2015; Rosen, 2016a).
- (vi) 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" (Council on Foreign Relations, 2015, p. 9).
- (vii) CRE dedicates a section of its website to exclusive coverage of a regulatory budget (Tozzi, 2017e).
- (viii) The adoption of an RB in Canada, the UK, and Australia (Jones, 2015).

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 (Tozzi, 2015). The breadth and depth of the articles display an international interest in the concept of an RB. The articles are written by both academicians and practitioners and frequently focus on the results of implementing an RB in different countries.

A matter of particular interest is the "One-in; Two-out" provision contained in the Trump RB. In-depth studies have been performed on this provision. For example, a UK government study explained:

- (i) "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" (United Kingdom, Department for Business Innovation & Skills [UK BIS], 2014, Ministerial Forward).
- "Under One-in, One-out, Departments were encouraged to look for alternatives to regulation wherever possible, and required to find deregulation to match the cost of any new regulation deemed necessary" (UK BIS, 2014, p. 13).
- "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” (UK BIS, 2014, p. 13).

- “The Regulatory Policy Committee’s (RPC) scrutiny of Impact Assessments (see below) checks whether Departments have considered alternatives, alongside regulation” (UK BIS, 2014, p. 13).

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

The UK’s One-in, Two-out strategy (which reportedly is now One-in, Three-out) provided tangible results as verified by their RPC, which reported that at “the close of One-in, One-out on December 31, 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” (UK BIS, 2014, p. 13).

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:

- (i) “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-stakes machine gaming, ensuring better interaction between customer and operator and improving opportunities for more effective provision of information and interventions” (UK BIS, 2014, p. 10).
- (ii) “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 Program 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” (UK BIS, 2014, p. 10).

“Out” regulations included:

- (i) “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” (UK BIS, 2014, p. 9).

- (ii) “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” (UK BIS, 2014, p. 9).

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 are common to the fiscal budgeting. For example, the 1979 Carter Regulatory Budget stated:

- (i) “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 an RB could encourage excess unaccountable costs and excess regulation. Should not government be accountable for all of the costs it imposes?”
- (ii) “As the Annual Report of the Council of Economic Advisers stated: “...there is no institutional framework within the Federal Government – analogous 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.”
- (iii) “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” (Tozzi, 1979).

Benefit-cost analysis can trace its lineage first to Jules Dupuit and subsequently to Alfred Marshall. However, the economist that brought it to the mainstream was Otto Eckstein when he authored the classic text *Water-Resource Development: The*

Economics of Project Evaluation (Eckstein, 1958). The text was instrumental in the emergence of the Army Corps 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 (Tozzi, 2017c). During this critical period Professor Eckstein served as a member of President Johnson's Council of Economic Advisers.

With the advent of an RB, the USA 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, for instance, was an institutional economist.

The concept of an RB was promoted by the Carter Administration some 40 years ago (Doern, 2009, p. 4). In the intervening years the RB 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 (welfare) of at least one individual. The aforementioned 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. 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 article to address potential areas of inquiry (Hopkins & Stanley, 2015). However, since it is unlikely that a Pareto improvement will occur in the immediate future, nor will a Kaldor-Hicks improvement necessarily increase public welfare, the mandatory adoption of all rules whose benefits exceed their costs is not sound public policy. 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 20th 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” (Hamilton, 1919, pp. 313, 316). Today, that statement might be associated more with a member of the legal profession than the economic profession; the standing of the economic profession, however, is always in a state of flux (Kwak, 2019). The emphasis on institutionalism then began to fade in the 1940s with a renewed emphasis on neoclassical economics which emphasizes 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. 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” (Hamilton, 1919, p. 318).

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 the following 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” (Tozzi, 1969). 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” (Vitarelli, 2010).

The purpose of this discussion is not to revamp procedures for benefit-cost analysis, but 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 an RB, we must delve into two tools that thus far have not been introduced into the debate on a continuous basis: (i) Optimal Delegation Theory and (ii) Game Theory. With respect to Game Theory, the concept of an institution is essential to assessing its effectiveness. Game Theory is a branch of mathematics which analyzes the interactive relationships in competitive situations 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 not necessarily needing 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 lack 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 of 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, an RB 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 (Tozzi, 1966; Tozzi, 2017a). A rigorous game-theoretic analysis of an RB 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 an RB appears to be non-existent and therefore is beyond the scope of this article.

This is not to say that there has been no work in this area; to the contrary foundational work has been devoted to modeling notice-and-comment rulemaking as a sequential game (Johnston, 2002). The author states that the game begins with (i) the “agency’s decision whether to propose a rule, proceeds through (ii) a lobbying stage in which both the agency and regulatory targets lobby the executive and legislative branches, and ends with (iii) 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” (Johnston, 2002).

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 an RB 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 an RB?

First, what is an RB? An RB is a ceiling on the total incremental cost of complying with regulations that can be imposed on the regulated community by a regulator.

After 40 years of discussion and analysis, an RB 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, a review of the merits of implementing an RB have been tailored around the possible use of benefit-cost analysis to rank order potential regulations to be included in an RB as well as the “One-in, Two-out” provision which is an add-on to the traditional RB.

While these reviews and debates are taking place, they are doing so without any input from economists versed in the theory of optimal delegation. Optimal Delegation Theory addresses in a very direct manner the central issue dealing with the execution of an RB, 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 an RB subject to a financial cap established by the President. Optimal Delegation Theory provides a metric for assessing the impact of a range of attributes in the formulation of an RB 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 an RB. 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 literature and because the authors of the papers write for their respective communities not policymakers.

Nonetheless, every attempt is being made to address this information gap and it is 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 easily understood 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 we would like to present some background information on Optimal Delegation Theory which emerges from a PhD

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 the personification of an RB.

The principal-agent dilemma, the heart of Optimal Delegation Theory, occurs when a person, the principal, authorizes another person, the agent, to act on their behalf. The dilemma arises if an agent acts on his or her own behalf and not necessarily in the best interests of the principal. If the principal and agent are housed in an institution they are governed by rules, however formal or informal and therefore subject to the principals of Optimal Delegation Theory.

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 honor, 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" (Smith, 1852).

In this instance, the principle-agent dilemma arises when the shareholders, the principals, authorize others who may not share their interests and will not act on their behalf. The implementation of an RB 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 1970s. It has matured through time and has lead 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" (Laffon, 2003).

Now some 40 years subsequent to the recognition of the principle-agent dilemma, as seen through the lens of Optimal Delegation Theory, it has a forceful presence in the initiation of a mechanism to control the size of the administrative state.

Substantive research dealing with the principal agent 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). Weingast offers the “congressional dominance” hypothesis: “The mechanisms evolved by Congress over the past one hundred years comprise an ingenious system for control of agencies that involves little direct congressional monitoring of decisions but which nonetheless results in policies desired by Congress” (Weingast, 1984; Miller, 2005).

The point being made here is that 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 RB. Hopefully this will also serve as an incentive for the economic and political science communities to become actively involved in the development of an RB.

In terms of an RB, the particular rules that govern the institution under review can be very wide in scope. In this instance the issue amounts 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 the principal? Do the agents have considerably more expertise than does the principal? And does the principal make only select delegations?

Applying Optimal Delegation Theory to an RB, one would designate the President as the principal and executive branch regulatory agencies as the agents. Professor Yair Listokin has applied Optimal Delegation Theory to the execution of an RB. Whether the President should bind the EPA (or another regulatory agency) to an RB, or should the President allow the 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 (Listokin, 2014).

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

- (i) “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...” (Listokin, 2014, abstract).

- (ii) “...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 regulations, agency regulations are promulgated in an unbounded institutional environment” (Listokin, 2014, p. 366).
- (iii) “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” (Listokin, 2014, p. 367).
- (iv) “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” (Listokin, 2014, p. 367).
- (v) “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” (Listokin, 2014, p. 368).

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 (Kundu & Nilssen, 2018).

3.3 RB: A legislative solution

If an RB 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 environment, it not likely that such circumstances will prevail. Consequently, 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 RBs have been put into place by a number of other countries for years (Doern, 2009; Speer, 2016). Even more significant is the fact that the economic community has developed a comprehensive body of thought in support of Optimal Delegation Theory over four decades as delineated in this article which provides a strong institutional anchor for the implementation of an RB.

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, 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.

Legislation has been introduced in both the House and the Senate over a period of nearly 40 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 that there is no natural constituency for an RB. The following are some notable examples of regulatory budgeting legislation that has been introduced, although an analysis of specific legislative proposals is beyond the scope of this article.

- (i) H.R. 2623 – Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017 (Meadows, 2017);
- (ii) S. 2982 – Article I Regulatory Budget Act of 2016 (Lee, 2016);
- (iii) S. 2988 – Regulatory Cost Assessment Act of 2014 (Lee, 2014);
- (iv) 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 (Bentsen, 1979).

Many of the key legal issues surrounding the Carter Administration's 1979 RB were discussed two years later, by the same authors, in a landmark law article (Wood et al., 1981). The article was coauthored 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 an RB. 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 an RB 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 it does indicate that the Carter Administration’s approach to limiting the growth of new regulations is quite viable.

3.4 Cumulative cost control: OIRAs’ future

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

- (i) application of benefit-cost analyses to regulations;
- (ii) establishment of a centralized review authority to check the accuracy of the benefit-cost analysis;
- (iii) 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 DQA to fill this void. The DQA did so 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 (Bergeson & Campbell, 2001).

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 centralized regulatory review.

It is impossible for OIRA to control the administrative state solely by reviewing individual regulations for the following reasons: (i) OIRA is now reviewing around 10% of the regulations promulgated by federal agencies and (ii) 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 20 years and came to fruition with the passage of the Paperwork Reduction Act of 1980, which established OIRA (Kirschten, 1983; Granquist & Tozzi, 1980).

The obvious question is why did it take 40 years after OIRA was established and after detailed RB proposals were developed in both the executive and legislative branches before an RB was implemented through an Executive Order? It should be noted that there was an institutional infrastructure, already in place, for cumulative

cost control during this period as well as blueprints for its implementation and support from a number of practitioners.

There are a number of reasons for the delay. The primary reason is that, from the onset, OIRA and its predecessor organizations were under constant legal and political attack and scrutiny. These actions engulfed OIRAs 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 an RB was the minimal attention given to the competitive nature of the bureaucratization of governmental functions (Tozzi & Levinson, 2014). Agencies which fail to provide utility to one or more constituencies – constituencies which may have changing demands – will vanish overtime.

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

3.4.1 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:

- (i) “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” (Bull, 2015, p. 1).
- (ii) “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” (Bull, 2015, p. 1).

- (iii) “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” (Bull, 2015, p. 2).

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 RB developed by the Carter Administration:

- (i) Did not include a “one in-two out” provision (Grossman, 2017).
- (ii) Incorporated benefits into the RB much in the same way they are used in the fiscal budget; regulations available for promulgation were ranked in a 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 RB 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 RBs 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.

3.4.2 OIRA is losing its status as the world leader in regulatory innovation

It is worth noting that OIRA has regained much of its standing by implementing an RB, mobilizing the DQA, rejuvenating the Congressional Review Act and initiating the

review of tax regulations (University of Minnesota Law School, 2018). Notwithstanding the massive reduction in its staff level that has been inflicted on OIRA since its establishment, it should consider serving as a catalyst for the U.S. Government's participation in the ongoing international debate regarding regulation of social media (Tozzi, 2019*d*).

3.4.3 Critics of a RB have raised legitimate concerns which have to be addressed in a public forum

One of the most widely expressed concerns about RBs is that they do not consider benefits. Although Section 3.2. explains that other countries are successfully implementing RBs 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.

Since it is not mandatory that an RB include a “One-in, Two-out provision” another issue to be examined is the conditions under which such a provision is compliant with the APA.

Lastly, is a regulatory budget an alternative to adding procedural requirements to the regulatory process (Tozzi, 2017*b*)?

The aforementioned issues as well as others identified in this section dealing with the implementation of an RB should be addressed in a number of fora (Elliott, 2017; Tozzi, 2019*c*; White, 2019). OIRA should take the lead by issuing an RFI, a request for information, from think tanks, NGOs, and stakeholder organizations (CRE, Unfinished Business, *n.d.*).

3.5 Next steps

3.5.1 Designation of Iconic Executive Orders by the Archivist of the USA

Throughout the years many Executive Orders have been issued. A select few of these Executive Orders have withstood the test of time and are not only on the books but are directing major regulatory programs. These select Executive Orders should be designated as “Iconic” by the Archivist. Such a designation would result in a rebuttable presumption against revocation.

3.5.2 Issuance of an Executive Order on the interagency review of Executive Orders

Presently Executive Order 11030 designates OMB as the agency in charge of the interagency review of proposed Executive Orders. This Executive Order was written prior to establishment of OIRA. The Executive Order should be replaced with one which gives OIRA a well-defined role in the review of Executive Orders.

3.5.3 Issuance of an Executive Order which ensures a consistency between the use of benefit-cost analyses performed for regulatory and non-regulatory programs in the Federal Government

For federal regulatory programs existing federal policy results in the promulgation as a final rule of any and all proposed rules whose benefits exceed their costs.

For federal capital construction projects, the demonstration of positive net benefits is a necessary but not sufficient condition for the execution of a project. In addition to demonstrating that the benefits of the project exceed its costs a proposed project must be included in the federal budget and therefore subject to a government-wide comparison of its merits relative to its competitors.

Subsequent to seeking public comment on Executive Order 13771, a revised Executive Order should be issued which amends the Executive Order to address validated deficiencies in the RB as presently implemented. The revised Executive Order should also:

- (i) establish as federal policy that the demonstration of positive net benefits for a proposed regulation is a necessary but not sufficient condition for promulgation as a final rule; and
- (ii) state that a proposed rule must be included in an RB before it is promulgated as a final rule. The failure to adopt the aforementioned policy is tantamount to establishing the said regulation as an entitlement because its funding is guaranteed by levying a *de facto* tax on the public just because it meets some preconceived metric.

OIRA has paid its dues; it should graduate from its activities devoted primarily to being a benefit-cost cop to the manager of the federal regulatory machine which requires a simultaneous examination of all proposed rules, as is the case with an RB. Such a process change would allow OIRA to reward those programs and agencies which adhere to established procedures for the conduct of benefit-cost analyses and would also encourage the beneficiaries of one rule to challenge the overly optimistic benefit estimates of its competitors.

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