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OIRA AT THIRTY: REFLECTIONS AND RECOMMENDATIONS

SALLY KATZEN*

I am pleased to participate in this celebration of the thirtieth anniversary of the Office of Information and Regulatory Affairs (OIRA), an office that occupies a very special place in the world of regulatory policy and a very special place in my professional (and personal) life. I want to extend my congratulations and thanks to Susan Dudley (and The George Washington University Regulatory Studies Center) for organizing this conference and inspiring so many of us to contribute our time and energy.

Before discussing the most important policy and procedural issues that arose or were resolved during my tenure as Administrator, and any insights or recommendations with respect to regulatory analysis and oversight I might have based on that experience or from my continued involvement with OIRA (albeit on the sidelines) since then, I wanted to comment on some of the views—sometimes framed as assertions—expressed by previous administrators. Several of these administrators spoke passionately about the role of OIRA in promoting regulatory relief (rather than reform), to restrain the (natural impulses of the) regulatory agencies to regulate, and to stop or limit the imposition of regulatory costs on the economy.[1] Their

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1. *See, e.g.*, Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. (SPECIAL EDITION) 15, 23 (2011) (suggesting that OIRA review functions as both an entity of administrative review and constraint); Wendy L. Gramm, *Regulatory Review Issues, October 1985–February 1988*, 63 ADMIN. L. REV. (SPECIAL EDITION) 27, 30–33, 36 (2011) (discussing President Reagan's role in reducing regulatory burdens through OIRA); James C. Miller, III, *The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future*, 63 ADMIN. L.

views of OIRA's mission and mandate are not surprising, given that each of them was appointed by, and served at the pleasure of, a Republican president. I am the first Administrator to appear who was appointed by a Democratic president.

Republicans and Democrats typically think differently about regulations and consequently about the role of OIRA. I recognize that my views are in the minority in this crowd, but the fact that I am greatly outnumbered (and come relatively late in the day) is not because of any bias by the organizers, but rather as a result of the fact that during the thirty-year history of OIRA, Republicans have been in the White House for twenty years and Democrats for only ten years.[2] Republican appointees should reflect the policies of the presidents who appointed them, just as Democratic appointees should reflect the policies of the presidents who appointed them. Elections do have consequences, which is why I hope you will take with a grain of salt some of the sweeping statements that have been made by some of my predecessors about the "consistency" of OIRA over the years,[3] with the implication that OIRA has always subscribed to the same substantive principles (e.g., relief, restraint, emphasis on costs), always followed the same processes, and always had the same orientation or objectives. There was almost a suggestion that the continuity was somehow preordained or destined to be, and that OIRA was, for all intents and purposes, the same from one executive order (E.O.) to another, one Administration to another. In my view, that is simply not the case.

This is perhaps a good segue to reflections on the most important policy or procedural issues during my tenure as Administrator. For convenience, I think of them as falling into one of two categories: offense and defense, with the former being far more significant than the latter.

Under offense, I would return to the subject I just mentioned: the continuity (or even continued existence) of OIRA. Some may remember that when President Clinton was elected, there was considerable speculation that, given what the Democrats perceived as the deficiencies of E.O. 12,291, the President should and would scrap the whole system of

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REV. (SPECIAL EDITION) 93, 96–99 (2011) (discussing OIRA's role in minimizing regulatory costs).

2. Presidents Reagan and George H.W. Bush served from 1981 through 1992, and President George W. Bush served from 2001 through 2008. President Clinton served from 1993 through 2000, and President Obama has served a little over two years at the time of this writing.

3. *See, e.g.*, DeMuth, *supra* note 1, at 15–17 (highlighting various policies that have remained constant throughout Republican and Democratic administrations).

centralized review.[4] Certainly Democratic members of Congress had been very critical of OIRA during the Reagan–Bush years,[5] and the Democratic base—the environmentalists, organized labor, and public heath and safety groups—wanted OIRA dismantled or at least neutered. Many OIRAians walked the halls, talking about the possibility that they would be put out of business any day. It did not happen.

E.O. 12,291 became E.O. 12,866. Much was the same, but there were important changes made. The process was more selective, with OIRA reviewing only "significant" regulations, not all regulations;[6] the process was made more transparent, with time limits (sort of) and disclosure of meetings with outsiders;[7] and benefits were given as much prominence (and weight) as costs.[8] This last item is perhaps one of the clearest examples of a different philosophy for OIRA—namely, an entity that would implement neutral principles to achieve smart or sensible regulations rather than advance a decidedly antiregulatory agenda.[9]

E.O. 12,866 made other changes. It established a Regulatory Working Group,[10] which worked reasonably well during the mid and late 90's as a collegial venue where regulatory policy officers could share best practices and vent shared frustrations. The E.O. also included a dispute resolution process when the agency head and the Office of Management and Budget (OMB) disagreed.[11] But the most significant accomplishment, if that is the correct term, of E.O. 12,866 was that questions about the legitimacy of OIRA review, the integrity of OIRA review, and the appropriateness of OIRA review were generally put to rest or relegated to the back burner.[12] The concerns did not disappear—indeed, in the comments solicited by

4. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281 (2001) (noting that while observers may have predicted that a Democratic president would curtail presidential supervision of administrative action, the opposite occurred).

5. *See* Gramm, *supra* note 1, at 28–30.

6. *Compare* Exec. Order No. 12,866 § 6(a)(3)(A), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745, 748 (2006), *with* Exec. Order No. 12,291 § 3(c), 3 C.F.R. 127, 128 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638.

7. *Compare* Exec. Order No. 12,866 §§ (6)(a)(3)(E), (6)(b)(4), 3 C.F.R. at 646–47, *with* Exec. Order No. 12,291, 3 C.F.R. at 127–34.

8. *See, e.g.*, Exec. Order No. 12,866 § 1(a), 3 C.F.R. at 638–39.

9. *See* Kagan, *supra* note 4, at 2286 (stating that the new order eased the mandate that agencies use cost–benefit analysis by authorizing agencies to incorporate equity, distributive impacts, and qualitative measures).

10. Exec. Order No. 12,866 § 4(d), 3 C.F.R. at 643.

11. *Id.* § 7, 3 C.F.R. at 648.

12. *See, e.g.*, JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 30–31 (4th ed. 2006) (explaining that Executive Order 12,866 was well received, and "OIRA has worked out a stable and workable relationship with the agencies in administering it").

OMB in early 2009 on possible revisions to the Executive Order,[13] there were the predictable comments urging the end of the transaction-based operations of OIRA.[14] But with President Obama's January 18, 2011, E.O. 13,563,[15] E.O. 12,866 and OIRA continue to thrive.

In that same vein, another important accomplishment was the reauthorization of the Paperwork Reduction Act (PRA).[16] As others have mentioned,[17] the Act, originally passed in 1980 (and signed by President Carter), established OIRA within OMB.[18] It was reauthorized in 1986, but then became a pawn in the struggle between those who approved of OIRA's expanded mission (e.g., implementing E.O. 12,291 as well as carrying out the statutory commands) and those who did not. In 1995, a bipartisan majority reauthorized the PRA and many in OIRA began to breathe easier.[19] So, with OIRA's track record of thirty years, through Republican and Democratic administrations, I take some small sense of satisfaction that we played an affirmative role in OIRA's survival.

Then there was the defense—the interminable defense. I am *not* referring to the relationship with the agencies; for the most part, those were rather collegial and a few were affirmatively cooperative and productive. There were, however, frequent disagreements with the Environmental Protection Agency (EPA), some of which were quite difficult and strained relations at both the staff and political appointee levels. But this was not surprising because the EPA has very prescriptive statutes[20] and the costs (and benefits) of the resulting regulations are among the biggest ticket items

13. Federal Regulatory Review, 74 Fed. Reg. 8819, 8819 (Feb. 26, 2009) (request for comments).

14. *See generally* Comments of Reece Rushing, Dir. of Regulatory and Info. Policy, Ctr. for Am. Progress, Recommendations for Regulatory Review, http://www.reginfo.gov/public/jsp/EO/fedRegReview/Reg_Review_EO.pdf; Comments of Rena I. Steinzor, President, Ctr. For Am. Progress, Plans to Rewrite Executive Order on OMB Regulatory Review (Feb. 20, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/PreliminaryCommentsonNewEO-Orszag.pdf; Comments of David C. Vladeck, Professor of Law, Georgetown Univ. Law Ctr., Developing an Executive Order to Govern Review of Regulations by Executive Branch Agencies (Mar. 31, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/David_Vladeck_Georgetown_Univ_Law_Center.pdf.

15. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

16. 44 U.S.C. §§3501–3521 (2006).

17. DeMuth, *supra* note 1, at 15; Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37, 38 (2011).

18. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

19. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163.

20. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (2006); Clean Air Act, 42 U.S.C. § 7401 (2006).

OIRA reviews.[21] The most significant EPA regulation during my tenure was the 1997 Ozone and Particulate Matter ten (PM10) National Ambient Air Quality Standards (NAAQS),[22] which Art Fraas addressed: superb process but less than superb results.[23]

The rest of the agencies developed passably good-to-excellent relations with OIRA. The Food and Drug Administration (FDA), for example, asked to brief us on a proposed seafood safety regulation very early in its deliberations. As the meeting went on (and on), the OIRA staff became increasingly skeptical of the approach being pursued and began suggesting alternative ways to achieve the FDA's objectives. The FDA staff left without any commitments to follow up, but then they did. They worked with the OIRA staff, and when the final seafood Hazard Analysis Critical Control Point rule ultimately emerged,[24] it was praised by all the stakeholders and an official at FDA called to read me the headline from an editorial in a newspaper from the Northwest calling it a "sensible regulation."

Another example came from the National Highway Traffic Safety Administration at the Department of Transportation (DOT) that involved the depowering of front passenger air bags. We saw a story in the clips about a baby who had been placed (by his parent) in a forward-facing car seat in the front passenger seat instead of in the center of the back seat (where he belonged). When an accident occurred, the air bag activated and smothered the baby. I called the General Counsel of DOT, and she said, "We are already working on a solution with the engineers but will need your help and cooperation to make it happen in a few weeks rather than a few months, let alone the years it sometimes takes to modify a regulation." One of our best economists and analysts went over to DOT and worked directly with the staff, and we had a notice of proposed rulemaking and a final rule out the door (and effective immediately) in lickety-split time.[25] I use this example when people say that rulemaking (complete with OIRA review) cannot be used in emergencies because it is too cumbersome and

21. OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2010 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 10–30 (2010).

22. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 C.F.R. pt. 50).

23. Arthur Fraas, *Observations on OIRA's Policies and Procedures*, 63 ADMIN. L. REV. (SPECIAL EDITION) 79, 81 (2011).

24. Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, 60 Fed. Reg. 65,096 (Dec. 18, 1995) (codified at 21 C.F.R. pts. 123, 1240).

25. Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 62 Fed. Reg. 807 (proposed Jan. 6, 1997); Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 62 Fed. Reg. 12,960 (Mar. 19, 1997) (codified at 49 C.F.R. pt. 571).

time-consuming; where there is a will, there is a way. This is also an example of a rule that we issued even though the costs were possibly greater than the benefits. Specifically, DOT found that while a rule permitting front passenger air bags to inflate less aggressively would likely save the lives of a few children and women of small stature—I never forgot that phrase—there would likely be more heavy unbelted teenagers and adults who would go through the windshield. But the teens and adults could do something to improve their chances—namely, put on the seatbelt—whereas the children were subject to the whims of their parents as to whether they were placed in the front passenger seat or the center of the back seat.[26]

So, when I speak of "defense," I am referring to post-1994 when the Republicans won control of both houses of Congress. They were almost universally supportive of OIRA's mission, but their expressions of support were overwhelming. There were countless hearings—it seemed I always had to testify about something, and the OIRA staff was drafting testimony and putting together very thick briefing books, which I would try to read from cover to cover. And there were countless legislative proposals, which we had to read, understand, translate for the White House, arrive at a position on the merits (or the politics), and then begin negotiations with congressional staff or members. I remember meetings with then-Senator Kempthorne (Republican–Idaho) on the Unfunded Mandates Reform Act[27] that seemed to go on for days. The good news was that, for the most part, they were trying to codify our existing practices; the bad news was that we didn't really want any legislation in the field—we were quite content with E.O.'s and OMB Bulletins, Circulars, and Guidance. They ultimately enacted (and President Clinton signed) the Unfunded Mandates Reform Act, the Small Business Regulatory Enforcement Fairness Act,[28] and the Congressional Review Act,[29] but we beat back the attempted moratorium on all regulations,[30] the codification of cost–benefit analysis,[31] and judicial review of just about everything.

I do not think of the '90s as the "good old days," although they were pretty good, but rather as another (slightly different) chapter in the history

26. Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 62 Fed. Reg. at 12,964–65.

27. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).

28. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, 110 Stat. 857 (codified as amended in scattered sections of 5 and 15 U.S.C.).

29. 5 U.S.C. §§ 801–808 (2006).

30. *See generally* Regulatory Transition Act of 1995, H.R. 450, 104th Cong. (setting forth the goal of establishing a moratorium on federal regulatory rulemaking actions).

31. Regulatory Improvement Act of 1999, S. 746, 106th Cong. (1999).

of OIRA, which I suspect will continue right along through this Administration and the next and the next. What lessons did I take away? What would I do differently? What advice would I give my successors? A few things come to mind. (For those who have an insatiable appetite for this stuff, I would refer you to my testimony last summer before the House Judiciary Subcommittee on Commercial and Administrative Law.[32])

First, I now believe that requirements for economic analysis and centralized review should be extended to the Independent Regulatory Commissions (IRCs)—those multi-headed agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, etc., whose members do not serve at the pleasure of the President and can be removed only for cause. The rules issued by the IRCs were not subject to review by OIRA under the Reagan E.O., nor under the Clinton E.O. In both cases, the legal advisors to the draftsmen concluded that the President had authority to review the rules of the IRCs,[33] and the decision not to do so was essentially for political reasons—namely, deference to Congress, which traditionally views the IRCs as "its" agencies, not the President's.

With the benefit of hindsight, I would reach a different recommendation. The problems that plague our nation do not fit neatly into one agency. Consider the recent financial meltdown, which implicated multiple agencies, including both executive branch agencies (e.g., Treasury) and IRCs (e.g., Federal Reserve). While the way executive branch agencies and IRCs conduct rulemaking is for all practical purposes the same, the differences between the two types of agencies in terms of their structures and their relationships to the President would suggest that the review process need not—possibly, cannot—be the same.

Congress confronted this very problem in the Paperwork Reduction Act where it provided for OIRA review of Information Collection Requests (i.e., government forms) from all agencies—executive branch and IRCs.[34] The elegant solution it adopted was to authorize OIRA to approve or disapprove paperwork from executive branch agencies directly,[35] but to allow IRCs to void any disapproval by majority vote of the commissioners,

32. *Federal Rulemaking and the Regulatory Process: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 21–40 (2010) (statement of Sally Katzen, Senior Advisor, Podesta Group; former Administrator, OIRA).

33. Memorandum from Larry L. Simms, Acting Assistant Attorney Gen., Office of Legal Counsel, to Honorable David Stockman, Dir., Office of Mgmt. & Budget (Feb. 12, 1981) (on file with author).

34. *See* 44 U.S.C. §§ 3501–3521 (2006).

35. *Id.* § 3507(b)–(c).

explaining the reasons therefore (presumably in a public meeting).[36] A variation on that approach could be used for regulatory review, whereby OIRA would provide its views in writing to the IRC, and this document would then be subject to a vote by the full Commission or Board (again, presumably in a public meeting) before final approval of the regulatory action. This is only one of several plausible ways to reconcile the competing interests involved.[37]

While some may see this as a power play for OIRA, I firmly believe that the end result would be better coordinated and coherent regulatory actions, and ultimately better decisionmaking. In this regard, it is instructive to note that IRCs do not typically engage in the rigorous economic analysis that has come to be expected (and generally accepted) for executive branch agencies. In the 2010 OMB Report to Congress, it appears that roughly half of the rules developed by the IRCs over a ten-year period have no information on either costs or benefits, and those that do have very little monetization of benefits or costs.[38] Recently, Art Fraas and Randy Lutter put together a conference at Resources for the Future to explore the subject and found—consistent with the OMB finding—that, as a general rule, the IRCs do not measure up to the executive branch agencies in undertaking (and using) economic analysis in developing their rules.[39]

The issue is particularly timely because with the Financial Regulatory Reform legislation,[40] we can expect over 100 rulemakings from the IRCs in the near future. Others may want to chime in, but this seems to me to be a no-brainer. And how it is done—that is, the review by OIRA or another entity—is relatively easy *if* there is a political will to make it happen.

My second suggestion is to reorient (or at least modify) the current focus of OIRA, which traditionally has spent virtually all of its time and resources on the review of individual regulatory actions developed by the agencies—one at a time (except where two or three arrive in close proximity to one another). I am *not* suggesting that OIRA cease and desist from this transaction-based function. But I think OIRA should do more than just

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36. *Id.* § 3507(f).

37. *Cost-Justifying Regulations; Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Comm. and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 21–33 (2011) (statement of Sally Katzen, Visiting Professor, NYU School of Law; Senior Advisor, Podesta Group).

38. OFFICE OF INFO. & REGULATORY AFFAIRS, *supra* note 21, at 97–98.

39. Arthur Fraas & Randall Lutter, CONFERENCE SUMMARY: CAN GREATER USE OF ECONOMIC ANALYSIS IMPROVE REGULATORY POLICY AT INDEPENDENT REGULATORY AGENCIES? 1 (2011), http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_Summary.pdf.

40. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

one-by-one reviews. As noted above, the issues plaguing our country do not fit neatly into one *agency*; nor are they likely to be solved by one regulatory *action*. Whether it be clean air, worker safety, food purity, energy efficiency, or a host of other issues, it is often instructive to look beyond the specific proposal *du jour* and consider the broader picture—in effect, construct a framework for addressing the problem, allocating resources, and ensuring a coherent and comprehensive regulatory solution. One current example is the so-called impending "train wreck," where the EPA intends to propose or finalize at least six major rules—including two NAAQS and two Maximum Achievable Control Technology Standards—affecting coal-fired power plants, each with its own compliance schedule for upgrading facilities, without any apparent consideration of the cumulative effect of these proposals on either the engineering challenges or the capital investment strategies necessary to accomplish these mandates.

The mechanism for embarking on and developing a more coordinated and coherent approach is already in place. Section 4(c) of E.O. 12,866 requires both executive branch agencies *and* IRCs to send to OIRA (for OIRA review and circulation to other affected agencies) a document that includes a statement of the agency's regulatory objectives and priorities as well as a summary of "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter."[41] The materials generated by the agencies are published in the semiannual *Unified Regulatory Agenda*, but the process itself has become more of a paper exercise than an analytical tool. This is not new; before, during, and after my tenure at OIRA the focus was on the transactions. But it does not have to be that way, and I think that is a fruitful area for further consideration by my successors.

This conference has sparked many fond memories and thoughtful ideas for making the process of centralized review even better. Most of the ideas are worth pursuing, with one exception. Respectfully, I must strongly disagree with the suggestion of Chris DeMuth that OIRA file its comments on the record for all to see and to be part of the administrative record for juridical review.[42] That is what the Council of Wage and Price Stability—the predecessor of OIRA in some sense—did. We may have made some difference in some of the proposed regulations we commented on, but not nearly as much as OIRA has been able to accomplish with its interagency

41. Exec. Order No. 12,866 § 4(c), 3 C.F.R. 638, 642 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745, 747 (2006).

42. DeMuth, *supra* note 1, at 21–22.

internal deliberations.[43] Judge Jay Plager spoke eloquently about the meetings he had at OIRA when he was at the Department of Health and Human Services, and how much he learned from a real dialogue. That is what we should aim for, rather than a battle of papers or bits.

Finally, two quick but relevant observations. First, OIRA has always been special because of its people—not the administrators but the staff. Over time and under different administrators, the staff has shone—its commitment to the process and the quality of the work has always been outstanding. There are many that could be called out for commendation, but the team (or "family" as we called it) was always uniformly supportive, encouraging, and engaging. Thank you for what you do—you are magnificent!

And second, speaking of people, while OIRA is celebrating its thirtieth anniversary, there is someone here who has also spent thirty years working in the field, often without receiving the recognition he deserves. As of this writing, Curtis Copeland is, thankfully, still working at the Congressional Research Service. I salute you—we all salute you—and thank you for a job exceedingly well done.

43. If Chris DeMuth believes that OIRA's accomplishments are marginal at best, *id.* at 19–21, he would have to call them miniscule at most if the discussions both from the interagency process and the back and forth between OIRA and the issuing agency were all "on the record."