

# Institute for Policy Integrity

## New York University School of Law

### Memorandum

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Date: February 13, 2009

From: Richard L. Revesz and Michael A. Livermore

Re: New Executive Order Governing Regulatory Review

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Enclosed, please find a copy of *Fixing Regulatory Review: Recommendations for the Next Administration*. In that report, issued by the Institute for Policy Integrity (“IPI”) in December 2008, we provide a detailed set of recommendations for reforming the process of regulatory review, as well as a markup of Executive Order 12,866 that incorporates those substantive recommendations. We continue to endorse all of the recommendations in that report.

In addition, we would like to submit these comments to expand upon our proposal to review agency inaction through an annual petition review process, and to provide thoughts on how the Office of Information and Regulatory Affairs (“OIRA”) can facilitate sound decisionmaking within independent agencies.

#### **Agency Inaction**

Under the current executive order, the primary role of OIRA is to review agency action. While this function has come under criticism over the years,<sup>1</sup> we believe that OIRA does have an important role to play in ensuring that agency decisionmaking is informed and well-justified. So long as methodological biases that tilt cost-benefit analysis in an antiregulatory direction are eliminated, OIRA review will pose little risk of systematically weakening regulation. To the contrary, OIRA review instead will facilitate sounder regulatory practices that maximize the net benefits delivered by agency policy.

However, there is a deeper institutional bias that disfavors regulation. Because OIRA only reviews agency action, but does not review agency inaction, the current executive order reduces the incentive for agencies to act on pressing social problems. Assuming that agencies are not systematically inclined towards overregulation, the existence of OIRA review of agency action, without some parallel mechanism to prod agencies to act when it would increase well-being, has a generally antiregulatory effect.

Some steps have been taken by previous administrations to counteract this effect, both formally and informally. Informally, it has always been within the power of the

OIRA Administrator to work with agency heads to formulate new rulemakings. The power has been used to greater or lesser extent, depending on the disposition of the Administrator, and takes place outside the rulemaking process. While informal coordination between OIRA and the agencies can be extremely productive and should be encouraged, alone it is an insufficient counterbalance to the checking effect that OIRA's current review process has.

The most important existing formal mechanism to review agency inaction is the practice of issuing "prompt letters" adopted by then-Administrator John Graham in 2001. The purpose of the prompt letter is to "to bring a policy matter to the attention of agencies" and to "permit[] public scrutiny and debate" of the issue.<sup>2</sup> Prompt letters have covered a variety of topics, including critical habitat under the Endangered Species Act,<sup>3</sup> crash tests,<sup>4</sup> and trans fatty acids in foods.<sup>5</sup> In certain cases, prompt letters stimulated important dialogue between agencies and OIRA and ultimately led to the adoption of regulations.

However, the prompt letter process has been used irregularly—only fifteen prompt letters have been issued, and the last prompt letter was issued in April 2006.<sup>6</sup> This number is dwarfed by the number of regulatory actions that OIRA has reviewed. Because prompt letters have no basis in the executive order, there is no requirement that OIRA issue prompt letters at all, or that agencies respond. In addition, because they are an *ad hoc* measure—adopted on OIRA's own initiative—there is no additional funding to support this function. When staffing or other resources are stretched, prompt letters must give way to OIRA's more formal role of reviewing regulations proposed by agencies.

OIRA also has no mechanism to structure the process of developing prompt letters. There is an essentially limitless number of potential regulations that agencies could adopt and that OIRA could prompt. One of the most difficult questions for establishing a mechanism to review inaction is how to cabin that review in a meaningful way. The prompt letter process does not propose any means to limit the scope of OIRA's discretion or direct OIRA to particularly pressing issues. Because there is no public process to solicit views from affected interests or stakeholders, it is impossible to know how OIRA decided to focus on some issues rather than others. Where we are aware of how OIRA settled on particular issues, this information is not comforting. For example, one of the most important prompt letters, issued in January 2003, asked agencies to consider forty-nine regulatory-reform proposals.<sup>7</sup> These proposals were almost all generated directly by the regulated community, without input from interest groups, stakeholders, or the general public.

Because prompt letters do not go far enough in correcting the imbalance caused by OIRA review of agency action, we have proposed an alternative mechanism to review agency inaction. There are several key realities that must be respected in designing this mechanism. First, because agencies are already overburdened carrying out their existing statutory mandates, it is important that review of inaction will not create substantial new burdens for agencies. Second, given the

boundless number of topics on which agencies do not act, it is important to cabin OIRA's discretion to direct agency action. Third, agencies should have the final say over their own priorities and agendas, subject to judicial review. Fourth, the process should take place in the context of agency agenda-setting, so that ideas for new rulemakings can be evaluated in light of overall agency priorities. Finally, there should be an open and publicly accessible process for reviewing inaction, and stakeholders should have the opportunity to submit comments to influence that process.

We recommend a review process that takes place during the agencies' policy meeting that is convened by the OIRA director each year. Under the existing executive order, the purpose of this meeting is "to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year."<sup>8</sup> This meeting provides a convenient and discreet opportunity for OIRA to assess areas where agencies have not acted, as part of an overall agenda-setting process for the coming year.

To structure that review, agencies should be required to compile a list of all petitions for rulemakings that they have received during the previous year, along with substantive comments that agencies received regarding those petitions. Petitioners should be invited to submit additional comments, directed to OIRA, describing why a new regulation is justified on cost-benefit grounds. A portion of the meeting should be open to the public so that additional comments can be submitted on the rulemaking proposals.

This new process would give OIRA the opportunity to weigh in on areas where stakeholders have identified a need for agency action. Under existing procedures, agency denials of petitions for rulemakings are not subject to OIRA review, and they receive very deferential review by courts.<sup>9</sup> The OIRA review process would help ensure that petitions for rulemakings are given full consideration by agencies and would provide an independent analysis of the merits of the proposal. Further, by requesting cost-benefit analysis from the petitioners, the process would encourage petitioners to show how proposed rules would be net-benefit maximizing—creating an opportunity for cost-benefit analysis to be used to support new regulation.

Because of the historic checking function of OIRA, it is important to develop some mechanism to spur agencies to act when action is justified; otherwise, a systematic bias within the structure of OIRA review will persist. The current prompt letter mechanism, while an improvement, is not sufficient given its *ad hoc* nature and lack of adequate structure. The mechanism that we propose fits well within the existing structure of review, gives OIRA the opportunity to review agency inaction in a structured and cabined fashion, and allows for adequate public input. With this new mechanisms in place, OIRA would remove an important bias that currently tilts review against regulation.

## Independent Agencies

Under the current executive order, independent agencies are not subject to review by OIRA. These agencies, while not fully subject to presidential control, carry out many important administrative functions and promulgate rules in several important substantive areas. No less than for agencies directly presided over by the executive, it is important that independent agencies arrive at decisions through rational decisionmaking processes and take full account of the consequences of their actions and inaction.

Although it is clear that independent agencies should undertake cost-benefit analysis when appropriate, the deeper questions are whether the President can and should create and enforce a requirement that they do so. Putting aside whether Congress was successful in creating truly “independent” agencies,<sup>10</sup> the intent to insulate certain agencies from direct presidential control is clear. Many of the most important agencies, such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), were established by Congress as independent agencies. As such, the heads of these agencies do not serve at the pleasure of the President, but are appointed for fixed terms (often exceeding a presidential term of office). In many cases, the leadership is explicitly multi-partisan, such that no more than a simple majority of the governing body can belong to the same political party.

There are many potential rationales for why Congress would want to insulate certain agencies from full presidential control. Continuity and uniformity of policy through changes in administration—free from wild swings or abrupt policy reversals—is an important justification for independent agencies. At the time of the creation of the FTC, the Senate Committee Report gave the following statement to justify the creation of an agency removed from presidential authority:

The need has long been felt for an administrative board which would act in these matters in aid of the enforcement of the [laws], which would have precedent and traditions and a continuous policy and would be free from the effect of such changing incumbency as has in the nature of things characterized the administration of the Attorney General’s office.<sup>11</sup>

Although this concern was expressed in 1914, it remains equally legitimate today. The presidential elections of 1980, 1992, 2000, and 2008 all brought major shifts in policy orientation to the White House. For agencies under presidential control, these elections also brought important swings in how the laws were interpreted and enforced. Other things being equal, these kinds of policy shifts are undesirable because they increase legal uncertainty, upsetting legitimate expectations and interfering with the planning processes necessary to structure a business’s future and make personal decisions.

Independent agencies can also be justified as protectors of the interests of out-of-power minorities in the regulatory process. “In contrast to pure executive agencies,

independent agencies . . . serve as process-reinforcing or pluralism-reinforcing referees rather than reflexive servants of the president's majoritarian will."<sup>12</sup> To the extent that independent agencies impede the ability of the President to carry out his political agenda without making concessions to the opposition party, minority interests are protected.

Legal issues would also arise if the President attempted to subject independent agencies to review by OIRA. The Supreme Court has not settled the exact "independence" of independent agencies. In determining that the President could not remove Commissioners of the FTC at will, the Court found that independent agencies "cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control."<sup>13</sup>

The Court has also found, however, that immunity of executive branch officials from presidential control is only constitutional if "the Executive Branch [has] sufficient control . . . to ensure that the President is able to perform his constitutionally assigned duties"<sup>14</sup> including to "take Care that the Laws be faithfully executed."<sup>15</sup> It is possible to argue that Congress could not hinder the executive from placing a cost-benefit analysis requirement on all executive agencies (including independent agencies) to ensure that the agencies are faithfully executing the laws they administer by engaging in rational decisionmaking context.

Given the constitutional problems associated with harsh restrictions on presidential oversight of executive officers, courts may be inclined to read the enabling statutes of the independent agencies broadly to avoid addressing the constitutional question.<sup>16</sup> These statutes can be interpreted in a variety of ways, some which are consistent with the President imposing a cost-benefit analysis requirement.<sup>17</sup>

While there are plausible legal arguments that the President may have the authority to require cost-benefit analysis, this question is far from settled. Courts have recognized a number of mechanisms for the President to assert indirect control over the independent agencies,<sup>18</sup> but they have not affirmatively upheld the degree of direct oversight that application of the executive order's requirements for regulatory review would entail. At the very least, strict application of such requirements would set up the possibility of undesirable intra-branch conflicts—with resolution potentially occurring in the courts.

Given Congress's intent to maintain greater independence for certain agencies and the legal uncertainties surrounding the imposition of strict requirements on independent agencies, the President should not subject the regulations of independent agencies to the same level of OIRA review as traditional agencies. However, that does not mean that there is no role for OIRA to play in an advisory capacity.

To signal the importance of cost-benefit analysis for independent agencies, and to create a mechanism where both majority and minority members of governing bodies of independent agencies can commission an independent cost-benefit analysis, the President should revise the executive order under section 6(b) to insert the following language as a numbered paragraph:

At the request of any member of the governing body of a multimember agency whose members can only be removed by the President for cause, OIRA shall review any cost-benefit analysis conducted by any of these agencies in support of a proposed major regulation, or, if no cost-benefit analysis has been undertaken, conduct a cost-benefit analysis of any major regulation proposed by the agency.

This language does not subject independent agencies to OIRA review, but it does create a procedural mechanism to facilitate sound cost-benefit analysis of the proposed regulations of independent agencies. Because the final decision to adopt a rule continues to rest with the independent agency, and because OIRA review of agency action is only triggered by a representative of the agency, it is unlikely that this provision will be found impermissible—it largely amounts to an offer of assistance from OIRA to the independent agencies.

Because this new provision would create additional burdens on OIRA, there should be appropriate increases in OIRA's resources.

## **Conclusion**

We are extremely pleased that the President has decided to revise the executive order governing regulatory review. We certainly agree that there are many lessons that can be learned from past experience with cost-benefit analysis and review of agency action. These lessons can be put into action to improve the administrative process and deliver greater regulatory benefits at lower costs. In this endeavor, the President has our enthusiastic support.

## Notes

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<sup>1</sup> See, e.g., FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004).

<sup>2</sup> Office of Mgmt. & Budget, News Release (Sept. 18, 2001) *available at* <http://www.reginfo.gov/public/prompt/2001-35.html>.

<sup>3</sup> Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Judge Craig Mason, Assistant Sec'y for Fish & Wildlife & Parks, U.S. Dep't of Interior (Aug. 21, 2003) *available at* [http://www.reginfo.gov/public/prompt/doi\\_mapping\\_prompt.pdf](http://www.reginfo.gov/public/prompt/doi_mapping_prompt.pdf).

<sup>4</sup> Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Michael P. Jackson, Deputy Sec't, Dep't of Transp. (Dec. 7, 2001) *available at* [http://www.reginfo.gov/public/prompt/nhsta\\_prompt120701.html](http://www.reginfo.gov/public/prompt/nhsta_prompt120701.html).

<sup>5</sup> Letter from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, to Tommy G. Thomson, Sec'y Health & Human Servs. (Sept. 18, 2001), *available at* [http://www.reginfo.gov/public/prompt/hhs\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html).

<sup>6</sup> See Office of Info. & Regulatory Affairs, OIRA Prompt Letters, *available at* <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> (a joint statement by OMB and OIRA is reported as a prompt letter).

<sup>7</sup> Memorandum for Heads of Selected Independent Agencies from John D. Graham, Adm'r, Office of Info. & Regulatory Affairs (Jan 22, 2003), *available at* [http://www.reginfo.gov/public/prompt/graham\\_response\\_regreform.pdf](http://www.reginfo.gov/public/prompt/graham_response_regreform.pdf).

<sup>8</sup> Exec. Order No. 12,866 sec. 4(a).

<sup>9</sup> Michael A. Livermore, *Cause or Cure? Cost-Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENVTL. L. J. 107, 121-22 (2008).

<sup>10</sup> See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008) (empirical study of actual insulation of independent agencies).

<sup>11</sup> 51 Cong. Rec. 10376 (1914).

<sup>12</sup> Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 170 (2006).

<sup>13</sup> *Humphrey's Executor v. United States*, 296 U.S. 602, 628 (1935).

<sup>14</sup> *Morrison v. Olson*, 487 U.S. 654, 698 (1988); *but see id.* at 705 (Scalia, J. dissenting) (arguing for much stronger test to protect the executive from congressional encroachment).

<sup>15</sup> U.S. CONST., art. II, § 3.

<sup>16</sup> It is also worth noting that both the Department of Justice and American Bar Association have found that the President can require that independent agencies conduct cost-benefit analysis. *Id.* at 40.

<sup>17</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis* 41 (AEI-Brookings Joint Center for Regulatory Studies Working Paper 02-4, March 2002).

<sup>18</sup> “[T]he President possesses significant additional levers of influence [beyond the removal power]. Most obviously, by appointment of the Commission chairman, who serves at the pleasure of the President and often dominates commission policymaking, the President can influence Commission policy and control who directs the administrative side of commission business, selects most staff, sets budgetary policy, and as a consequence commands staff loyalties. Here the White House connection is often less direct and generally more subtle, but consultation and coordination on general policy issues of national interest naturally occurs. Additionally, although statutory as well as political constraints may prevent Presidential dominance in specific decisions, the President is not stripped of overall influence because independent agencies generally require presidential good will to obtain budgetary and legislative support. Various administrative tools provide additional influence to the President; these include centralization of contracting, personnel requirements, and property allocations. Any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced.” *Free Enterprise Fund v. Public Company*

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Accounting Oversight Board, 537 F. 3d 667, 680 (D.C. Cir. 2008) (citations, quotation marks, and brackets omitted).