Editors’ Summary: This Article addresses the potentially conflicting roles played by the Office of Management and Budget in overseeing agencies’ rulemaking: analyzing rules using cost-benefit analysis and exercising executive control of rulemaking. The author argues that the Office of Information and Regulatory Affairs’s role as the eyes and ears of the president in overseeing regulatory agencies has led to its analytical mission playing a secondary role and is, in part, responsible for the lack of visible effects (positive or negative) of cost-benefit analysis. By using a simple model, the Article demonstrates how executive review and analytical requirements interact in presidential decision-making. The author offers alternative hypotheses for the negligible impact of cost-benefit analysis on rulemaking and suggests a research agenda that could answer questions about the institutional design of cost-benefit requirements. The Article concludes that the role of cost-benefit analysis in regulatory policy is necessarily limited by its linking with executive review.

I. Introduction

In July 2001, John Graham was confirmed as Administrator of the Office of Information and Regulatory Affairs (OIRA). The vote on his confirmation was 61 to 37. Aside from the vote on U.S. Attorney General John Ashcroft, this was the closest vote on a President George W. Bush appointee in the first 18 months of the Bush II Administration. Eleven years earlier, during the term of President George H.W. Bush and the Bush I Administration, the U.S. Congress never confirmed an Administrator for the OIRA. Hearings were held for the nominee, James Blumstein, but confirmation was never granted.

The OIRA has long had a controversial history. The debates over Blumstein’s and Graham’s confirmations, however, were markedly different from one another. The committee hearings on Blumstein’s confirmation focused on the OIRA’s role as the mechanism by which the president overwatches the regulatory process. The debate focused on the question of whether or not the president had the authority to question or stop regulations promulgated by agencies pursuant to statutes passed by Congress.

Eleven years later, the floor debate on Graham’s nomination was a debate on the merits of the OIRA’s other key role, as the guardian of cost-benefit analysis in the regulatory process. Graham had been the director of the Harvard Center for Risk Analysis and was known as a strong advocate for risk assessment and cost-benefit analysis. Proponents of regulation see such analysis as biased against regulatory efforts and designed primarily to make the regulatory process more cumbersome.

The key event in the intervening decade was President William J. Clinton and his Administration’s endorsement of the idea of executive oversight of the regulatory process. With the adoption of Executive Order No. 12866 by a Democratic president, the opposition to an increased role for the president in the regulatory process subsided over the past decade. Elena Kagan’s discussion of how executive review

References:

3. Id.
5. Graham also received criticism for industry funding of the Harvard Center.
under Clinton was used to promote regulatory goals illustrates this change in philosophy. 9

Meanwhile, the debate on economic analysis has remained as heated as ever. Supporters of analysis often include conservatives and industry trade groups who hope that the use of economics will concretely demonstrate the foolishness of some regulatory activity. 10 Opponents argue that the benefits of regulations are difficult to monetize and that cost-benefit analysis is therefore inherently biased against regulation. 11 The debate over analysis is over 20 years old and shows no sign of abating. With each increase in the number and level of detail of analytical requirements in the regulatory process, supporters of economic analysis voice their hopes that regulation will become more cost effective and opponents argue that the regulatory process will be greatly harmed or that agencies will abandon rulemaking altogether.

Despite the stridency of this debate, there is little evidence supporting either side. Rulemaking has not been abandoned, nor have the net benefits of regulations been measurably increased. Each year many regulations are put in place, many of which have net benefits, and some of which do not. 12 Why have none of the successive attempts to enhance the role of economic analysis in the regulatory process produced any evidence that they either have succeeded in the ways hoped for by their proponents or crippled the regulatory process as envisioned by their opponents? This Article argues that the OIRA’s role as the eyes and ears of the president in overseeing regulatory agencies has led to its analytical mission playing a secondary role and is, in part, responsible for the lack of visible effects (positive or negative) of analytical requirements. The very virtues that advocates of executive review promote—bureaucratic efficiency 13 and accountability 14—may run counter to the objective of using analysis to choose between regulatory options. The Article uses a simple model to show that if cost-benefit analysis is subordinated to executive review, it is easier to explain regulatory outcomes from the past two decades than it would be by assuming analysis has had a large effect on regulations. If executive review is the more important of the OIRA’s two roles, then this development has rendered somewhat hollow the debate on cost-benefit analysis. As long as cost-benefit analysis is the lesser partner of executive review in this marriage of procedural controls, it will be impossible to argue that regulatory policy decisions have been either improved or hurt by analytical requirements.

In addition to executive review, legal and organizational factors limit the role of economic analysis as the major determinant of policy. It is unclear whether any requirements for analysis—whether or not they are coupled with executive review—would make a significant difference in regulatory outcomes, or whether the rulemaking process would move on as it has until now, namely, more influenced by political and legal pressures regardless of the nature of requirements for cost-benefit analysis. Answering this question has important implications for the future of rulemaking and cost-benefit analysis.

This Article reviews the debate over cost-benefit analysis and the impact that the interaction between analytical requirements and executive control of rulemaking has had upon this debate. Part II reviews the history of analytical requirements at the federal level and outlines the arguments for and against these requirements. It also details the evidence that analytical requirements have not deterred rulemaking. Part III discusses the growth of executive control and argues that this is the largest reason for the limited effect of analytical requirements. Part IV develops a simple model of how executive review and analytical requirements interact in presidential decisionmaking. Part V offers alternative hypotheses for the negligible impact of economic analysis and looks at directions that research should take in this area in order to answer questions about the institutional design of analytical requirements. In Part VI, the Article concludes that the role of cost-benefit analysis in regulatory policy is necessarily limited by its linking with executive review.

II. Cost-Benefit Analysis at the Federal Level

The debate on the role of economic analysis in rulemaking began shortly after the blooming of the regulatory age in the early 1970s. From the beginning, attempts to integrate analysis into the rulemaking process involved delegating responsibility for supervising analytical requirements to an office within the Executive Office of the President. President Richard M. Nixon created a “Quality of Life Review” that gave the Office of Management and Budget (OMB) very limited authority to review regulations. President Gerald Ford required agencies to produce inflation impact statements that were reviewed by the Council on Wage and Price Stability. President Jimmy Carter established the Regulatory Analysis Review Group and issued Executive Order No. 12044, which, for the first time, required economic impact statements on all rules with an impact of more than $100 million. 15 While these were small steps, they increased the relevance of economics in regulatory decisionmaking. 16

11. This argument has been made by a number of critics. See, e.g., Lisa Heinzlerling, The Humbugs of the Antiregulatory Movement, 87 CORNELL L. REV. 648 (2002); Richard W. Parker, Grading the Government, 70 U. CHI. L. REV. 1345 (2003); Lisa Heinzlerling & Frank Ackerman, Pricing the Priceless Cost-Benefit Analysis of Environmental Protection, 150 U. PENN. L. REV. 1553 (2002); Sidney A. Shapiro & Robert Glickman, Risk Regulation at Risk: Re- Storing a Pragmatic Approach (Stanford Univ. Press 2003).
12. Office of Management and Budget (OMB) reports to Congress on the costs and benefits of federal regulations from 1997 to 2005 can be found on the Internet at http://www.whitehouse.gov/omb/inforeg/ regpol-reports congress.html (last visited May 9, 2005); see also infra note 48 (2002 and 2003 reports). Earlier reports are on file with the author or available from the OMB.
13. As opposed to economic efficiency.
16. For a more detailed history, see Murray Weidenbaum, Regulatory Process Reform From Ford to Clinton, 16 REGULATION 1 (2000);
The use of economic analysis grew sharply under President Ronald Reagan when, in 1981, he issued Executive Order No. 12291. Executive Order No. 12291 centralized the review of regulations and regulatory impact analyses in a new office within the OMB: the OIRA. The order required agencies to submit all proposed and final regulations to the OIRA before publication. The OIRA was granted the authority to approve or disapprove regulations and regularly returned them if they did not meet cost-benefit tests. Over the course of the Reagan Administration, the OIRA was often accused of being a bottleneck or black hole for regulations.

Executive Order No. 12291 was soon followed by Executive Order No. 12498, which required agencies to publish a list of their upcoming regulatory activities and gave the OIRA authority to review these lists. The OIRA continued to play a pivotal role in assessing agency regulations throughout the Bush I Administration. This role was supplemented by the Council on Competitiveness, which was chaired by the vice president. The Clinton Administration disbanded the council.

The return of the Democrats to the executive branch did not end the requirement for the use of regulatory analysis or the role of the OIRA. While President Clinton rescinded Executive Order No. 12291, he replaced it with Executive Order No. 12866. Executive Order No. 12866 cemented the place of regulatory impact analysis and the OIRA's review authority in the regulatory process while changing some of the details of how this review took place. With the institutionalization of centralized executive review of regulations and their supporting analyses under a Democratic president, the presence of the OIRA can now be seen as a permanent part of the regulatory process. President Bush has not issued a new executive order, finding Executive Order No. 12866 sufficient to exercise oversight over the regulatory process.

The institutionalization of economic analysis has not ended the debate on the appropriateness of economic analysis in the regulatory process. If anything, it has grown in strictness. The argument for cost-benefit analysis emerged in the 1970s after the creation of the U.S. Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). It is grounded in welfare economics and utilitarianism and premised on the proposition that government should intervene with the market only when the benefits of that intervention outweigh its costs.

Those who pushed for an increased role for cost-benefit analysis argued that many early regulations by EPA, OSHA, and other agencies would fail such a cost-benefit test. John Morrall demonstrated that the cost per life saved of federal regulations varied from $100 to $72 million, which, he argued, was clear evidence that further economic analysis should be done in setting regulatory priorities. This point was furthered by a 1995 study examining the cost-effectiveness of 500 life-saving interventions; this study again showed a wide variation. The argument advanced by both studies is that regulatory costs were consuming large quantities of public resources and were in some cases not producing corresponding benefits. If resources devoted to complying with a rule costing $72 million per life saved were instead devoted to a rule costing only $10 per life saved, many more lives would be saved. The hope of those supporting more rigorous economic analysis is that public and private resources will be used more effectively if cost-benefit analysis is done before a regulation is promulgated and if decisions are based upon that analysis.

Arguments against cost-benefit analysis generally take two forms. Several scholars argue that cost-benefit analysis is inherently biased against safety and health regulations. They make several points:

- Because many regulations have costs in the present and benefits in the future, the discounting of future values undervalues the benefits of regulations.
- Some benefits, like environmental goods and the value of a life, are inherently difficult to value, and, therefore, the benefits of regulations protecting these goods are underestimated whereas costs are easily quantified and hence given a greater weight.
- A cost-benefit analysis will typically evaluate a regulation based on its cost per life saved. This type of analysis assigns no value to many regulations.


Edith Stokey & Richard Zeckhauser, A Primer for Policy Analysis (W.W. Norton & Co. 1978)


whose health benefits do not rise to the level of saving lives.\textsuperscript{33}

- Cost-benefit analyses tend to be biased in favor of the status quo, which makes regulatory changes appear to be bad options.\textsuperscript{34}

According to these scholars, cost-benefit analyses tend, misleadingly, to undervalue the benefits and overvalue the costs of regulations.\textsuperscript{32}

The second set of arguments focuses on the delay that requiring cost-benefit analysis introduces into the regulatory process. According to this argument, the regulatory process has become so burdened by analytical requirements that agencies avoid rulemaking altogether. The rulemaking process has become “ossified” as a result of requirements for analysis and other procedural hurdles that agencies must clear in order to promulgate a regulation.\textsuperscript{35} Labor unions and environmental groups argue that requiring economic analysis is a backdoor way for opponents of statutes like the Clean Air Act (CAA)\textsuperscript{36} and the Occupational Safety and Health Act\textsuperscript{37} to delay those statutes’ implementation.\textsuperscript{38}

Neither the promoters nor the critics of cost-benefit analysis have seen their predictions realized. Although the two opposing views have emerged in every debate on a significant social regulation in recent times, there is little empirical evidence to support either side. Arguing against the claim that analysis requirements have stifled the regulatory movement is the fact that agencies have continued to regulate throughout the period during which cost-benefit analysis requirements for cost-benefit analysis have been in place. According to one study,\textsuperscript{39} the number of Federal Register pages reached an all-time high in 2002 of 75,606 pages. The number of rules published in 2002 was 6,802,\textsuperscript{40} and estimates of the cost of regulations run as high as $800 billion annually.\textsuperscript{41} In addition, there is little evidence that the time it takes to produce a rule has increased.\textsuperscript{42}

While there is little evidence that the requirement that agencies conduct cost-benefit analyses of significant regulatory efforts has deterred rulemaking, this leaves unanswered the question whether cost-benefit analysis has resulted in regulations with greater net benefits. No conclusive study exists comparing the net benefits of regulations promulgated before Executive Order No. 12291 and those promulgated in the 22 years since.\textsuperscript{43} However, a number of economists have reviewed recent rules and have largely concluded that the requirements for cost-benefit analysis have not had their intended effect.\textsuperscript{44} One study argued that the reason was agencies’ failure actually to follow the analysis requirements of the executive orders. The study noted that “[t]he RIAs [regulatory impact analyses] typically do not provide enough information to enable regulatory agencies to make decisions that will maximize the efficiency or effectiveness of a rule.”\textsuperscript{45} Another advocate of economic analysis concluded: “Health and safety regulations have fallen short of any reasonable measure of performance.”\textsuperscript{46}

43. Admittedly there have been no large-scale empirical analyses of this question. However, because numerous sources have noted that the rate at which regulations are produced has not decreased and that the resources devoted to rulemaking have not increased, it is reasonable to conclude that there has been at least no significant slowdown in rulemaking activity. One study of EPA rulemakings found only a statistically nonsignificant effect of OMB review on the time it took to review a rule. See Cornelius Kerwin & Scott Furlong, \textit{Time and Rulemaking: An Empirical Test of Theory}, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992).

44. In comparing proposed and final rules, Scott Farrow found that “such review appears to have no efficiency improving impact on the difference between proposed and final regulations or on the cost effectiveness of regulations that are implemented.” Scott Farrow, \textit{Improving Regulatory Performance: Does Executive Office Oversight Matter?} 2 (American Enterprise Institute/Brookings Joint Center Working Paper 2001).

45. Morrall argues that while the net benefits of rules have not improved over the history of the executive orders, the fact that they’ve gotten worse indicates a successful role for analysis. Since rules with high net benefits were more likely to be promulgated first, maintaining a constant level of net benefits shows that analysis has had an impact. John F. Morrall III, \textit{Saving Lives: A Review of the Record, 27 J. Risk & Uncertainty} 221 (2003).


47. Viscusi & Gayer, supra note 10, at 54.

Further evidence that the cost-benefit analysis requirements have had little effect are the constant attempts to strengthen them. These include actual laws passed, including the Unfunded Mandates Reform Act (UMRA)\textsuperscript{49} and the Congressional Review Act (CRA),\textsuperscript{50} many proposed bills,\textsuperscript{51} and proposals to augment the cost-benefit analysis requirement by requiring peer review for regulatory analyses.\textsuperscript{52} Proponents have justified these changes, proposed and enacted, largely in order to reduce the costs of federal regulations, thereby implying that the current requirements still result in regulations whose benefits do not justify their costs.\textsuperscript{53} Those supplemental requirements that have been enacted, such as the UMRA and the CRA, appear to have done little to change the situation. This leads to the question of why economic analysis requirements have neither stopped the regulatory process cold, as feared by regulatory advocates, nor led to more economically efficient regulations, as anticipated by regulatory critics.

III. Executive Review

As noted above, the OIRA has responsibility both for ensuring that agencies base their regulatory decisions on impact analyses and for exercising control over these agencies on behalf of the president. The second of these missions has also had a controversial history. The discussion of the role of the president in overseeing regulatory decisionmaking has taken place largely within the administrative law literature and compares presidential control with alternatives such as congressional control,\textsuperscript{54} interest group control, and bureaucratic discretion.\textsuperscript{55} As Richard Pildes and Cass Sunstein note, discussion of presidential control over federal agencies has been going on for more than 100 years.\textsuperscript{56} A number of prominent authors have praised the concept of presidential control. Kagan, citing the Clinton Administration’s use of executive review, argues that the president is uniquely positioned to enhance both the accountability and the efficiency of administrative decisions.\textsuperscript{57} Others support executive review on the grounds that it yields better management of executive agencies and implementation of a uniform regulatory policy\textsuperscript{58}; that it encourages policy coordination, political accountability,\textsuperscript{59} and more balanced decisionmaking; and that the president is more likely to advance national over factional interests.\textsuperscript{60} In the late 1980s, the Administrative Conference of the United States and the American Bar Association endorsed executive oversight of the regulatory process.\textsuperscript{61} Finally, others advance constitutional arguments in favor of substantive executive oversight: Steven Calabresi and Saikrishna Prakash assert that only such oversight can confer legitimacy upon the regulatory state,\textsuperscript{62} and Lawrence Lessig and Sunstein argue that the 20th century development of the administrative state has made executive control essential to fulfilling the goals of the original constitutional system.\textsuperscript{63}

Critics writing during the Reagan Administration contended that executive review gave unelected bureaucrats authority over Cabinet officials who were supposed to be responsible to Congress.\textsuperscript{64} With President Clinton’s adoption of Executive Order No. 12866, opposition to the unitarian position of executive control over rulemaking has abated.\textsuperscript{65} It has not, however, vanished. Cynthia Farina, writing more recently,\textsuperscript{66} assailed the new assertions of presidential power over the regulatory regime as inherently antiregulatory and as increasing the likelihood that the regulatory system will collapse under its own weight.\textsuperscript{67}

Regardless of scholars’ positions on whether increased presidential oversight of the regulatory process is a positive or a negative development, there is widespread agreement that with Executive Order Nos. 12291 and 12866, the role of the president in the regulatory process has permanently increased.\textsuperscript{68} Now that the role of the OIRA has been affirmed

\textsuperscript{54} See William West, Controlling the Bureaucracy (M.E. Sharpe 1995).


\textsuperscript{57} Kip Viscusi, Regulating the Regulators, 63 U. CHI. L. REV. 1423 (1996).

\textsuperscript{58} Blumstein, supra note 2.

\textsuperscript{59} Shane argues that executive decisionmaking is no more accountable to the public than legislative decisionmaking. Peter Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 ARK. L. REV. 161 (1995).

\textsuperscript{60} DeMuth & Ginsburg, supra note 28.


\textsuperscript{62} Steven Calabresi & Saikrishna B. Prakash, The President’s Powers to Execute the Laws, 104 YALE L.J. 541 (1994).

\textsuperscript{63} Lawrence Lessig & Cass Sunstein, The President and the Administration, 94 COLUM. L. REV. 1 (1994).


\textsuperscript{65} Blumstein, supra note 2.


\textsuperscript{67} An outstanding overall summary of the debate over executive control can be found in Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. CHI. L. REV. 821 (2003).

\textsuperscript{68} As Pildes & Sunstein note: “Presidential oversight of the regulatory process, though relatively new, has become a permanent part of the institutional design of American government.” Pildes & Sunstein, supra note 16, at 15. See also Robert J. Duffy, Regulatory Oversight in the Clinton Administration, 27 PRESIDENTIAL STUD. Q. 71 (1997).
both by Republican and Democratic administrations, its place seems secure: future presidents are likely to continue to use the OIRA to impose their agendas on regulatory agencies. Blumstein notes that “[t]he controversial twenty years, centralized presidential regulatory review has now taken center stage as an institutionalized part of the modern American presidency.”

Are the two missions of the OIRA—reviewing the analytical bases for agencies’ regulatory activity and furthering presidential agendas—compatible? Many of the articles mentioned above deal explicitly with only one of the missions and pay only glancing attention to the other. Christopher DeMuth and Douglas Ginsburg, writing during the early years of the OIRA, call the two complementary. Pildes and Sunstein also note some level of compatibility between the technocratic goals of cost-benefit analysis and the democratic goals of presidential reviews; they suggest ways to make them more compatible.

Thomas McGarity addresses this question thoroughly in his book on the role of economic analysis in the federal government. With several chapters devoted to OMB review under the Reagan and Bush I Administrations, McGarity discusses the perception that analysis was just a cover for antiregulatory policy preferences. Since the publication of McGarity’s work, the OIRA’s executive review and analysis functions have interacted through two additional administrations, increasing our ability to evaluate their relationship.

Joseph Cooper and William West also look at the intersection between economic analysis and executive control during the Reagan Administration. Like McGarity, they argue that analysis was used in the Reagan Administration to give greater legitimacy to the executive’s authority to review agency actions. They also recognize the inherent tension between the two missions of the OIRA, saying: “The theory and practice of OMB review testify to a deep seated and continual tension between political control and neutral competence.” In a more recent work, West argues that regulatory review has been quite responsive to presidential preferences and that this responsiveness is more characteristic of the OIRA than neutral competence.

Scholarship considering the OIRA’s dual goals is the exception, however. The literature on the OIRA’s two missions has largely focused on one or the other, generally ignoring their effect on one another. Because there is much more consensus in the literature that executive review is here to stay and play an important role in the rulemaking process, and because of the serious questions about whether cost-benefit analysis has played a significant role in rulemaking, this Article focuses on the effect of executive review on cost-benefit analysis.

To simplify the question of how executive review affects cost-benefit analysis, four basic scenarios, outlined in Table I, below, are considered. The two missions of the OIRA will converge on common goals when the existing administration supports a regulation with positive net benefits (Box A) or opposes one with negative net benefits (Box D). To see the effect of this interaction between cost-benefit analysis and executive review on the regulatory process, one must examine those cases where there is administration support for regulations (or regulatory alternatives) whose costs outweigh their benefits (Box C) or where there is administration opposition to regulations supported by cost-benefit analysis (Box B).

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<thead>
<tr>
<th>Analysis Supports</th>
<th>Administration Opposes</th>
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<tr>
<td>Regulation promulgated.</td>
<td>Regulation promulgated if analysis prevails.</td>
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<tr>
<td>Regulation promulgated if politics prevail.</td>
<td>Regulation not promulgated.</td>
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Locating Box B scenarios is the most difficult. If analysis prevails and a regulation is issued, the administration will nearly always claim after-the-fact that it supported the regulation all along. By contrast, if the administration’s political preference prevails over analysis in Box B, the only evidence will be that a particular rule was not promulgated, something which is very difficult to find out. The best support for the existence of cases in Box B comes from Reagan Administration interviews cited by Erik Olson showing that analysis took a backseat to political preferences of the executive under Reagan:

As one key OMB official notes, “debate on the merits of the economic analysis doesn’t help resolve the real issues where OMB has budgetary, philosophical, or political problems with a rule, the regulatory analysis is used as a ‘key’ in holding up or changing the EPA action.”

This shows that in these Box B occasions, economic analysis was a secondary concern in the review process. McGarity provides additional evidence, presenting several cases in which political preferences trumped analysis. In his discussion of EPA’s national ambient air quality standard rules, McGarity cites an internal Reagan Administration dispute in which additional analysis might have shown that a stricter air quality standard was justified, but in which that analysis was not carried out. “Apparently a conflict erupted in OMB between the purists who were keen on analysis and the ‘realists’ who were keen on analysis so long as it signaled less burdensome regulation but were willing to ignore

69. Blumstein, supra note 2, at 855.
70. DeMuth & Ginsburg, supra note 28.
71. See Pildes & Sunstein, supra note 16.
72. See McGarity, supra note 16.
73. A recent work, Painting the White House Green (Randall Lutter & Jason Shogren eds., Resources for the Future Press 2004) [hereinafter Painting the White House Green], looks at the use of economic analysis in the White House generally and finds similar limitations to those found by McGarity.
75. Id. at 887.
77. See Olson, supra note 64, at 53.
it when it argued for greater stringency. The realists carried the day.78

Examples corresponding to Box C are easier to find. They show that when an administration’s political preferences conflict with economic analysis, analysis loses. If we assume that the purpose of cost-benefit analysis is to select regulatory alternatives with net social benefits,79 then numerous rules promulgated over the past 20 years fail this test. One study of 48 rules with regulatory impact analyses promulgated during the Clinton Administration80 notes that only 31 calculated both benefits and costs, and of those, only one-half had positive net benefits.81 While comparable data has not yet been compiled on rules from the Bush II Administration, there are many examples of regulations related to homeland security with ill-defined benefits and very high costs.82 In the case of both the Clinton Administration rules and the Bush II Administration homeland security rules, a natural assumption is that the administrations supported these rules despite the negative or indeterminate results of the analysis.83

It is possible that these examples are exceptions and that by and large cost-benefit analysis requirements have led to more efficient and cost-effective regulations. This is unlikely, however. First, if these examples were exceptional, one would expect a significant number of Box C regulations (which were preferred by the administration but not supported by analysis) to have been returned to agencies for thoughtful and thorough analysis is not intended to make the very agency charged with increasing the efficiency of the regulatory process more efficient. McGarity cites requirements to conduct an analysis to support significant rulemakings does add some thoughtful and thorough analysis is not intended to make the very agency charged with increasing the efficiency of the regulatory process more efficient. McGarity cites requirements to conduct an analysis to support significant rulemakings does add some

78. See McGarity, supra note 16, at 61. Similarly, in his discussion of OSHA’s hazard communication standard, McGarity discusses differences in OSHA and OMB analyses but notes that “the Vice President sided with OSHA, more for institutional and political reasons than because of the acuity of its analysis.” Id. at 109.

79. This is weaker than cost-benefit advocates would like and stronger than some opponents would prefer. Cost-benefit analysis supporters believe alternatives with the greatest net benefits should be chosen, while opponents would argue that if any test is to be used, the test should be whether the benefits of the regulatory alternative chosen justify its costs.


81. Hahn, supra note 46.

82. These include Food & Drug Administration regulations on protecting the food supply and DOT regulations on passenger screening, checked baggage, and cockpit weapons. The 2003 OMB report to Congress on the benefits and costs of regulations cites 69 rules related to homeland security promulgated since September 11, 2001. Of these, the costs were calculated for only 16 rules and the benefits were calculated for only 2. See 2003 OMB REPORT, supra note 48. Also, the OMB notes in its draft 2005 report: “Seven of the rules for which we were not able to present estimates of both costs and benefits implemented homeland security programs where the benefits of improved security are very difficult to quantify and monetize.”

83. There are also examples in the Reagan Administration when the requirements to conduct an analysis were waived for deregulatory actions showing that officials cared more about the direction of regulation than the results of analysis. See McGarity, supra note 16; and MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION (Johns Hopkins Univ. Press 1993).

84. See OMB, supra note 20.
What about accountability? Part IV develops a simple framework for thinking about the interaction between accountability and regulatory analysis. To presage the results of using this framework, the interaction of the two will depend on the nature of the net benefit curve and on the interests holding the executive accountable in a particular rule-making effort. In some cases, subordinating analysis requirements to executive review will lead to analytically supported outcomes, while in others it will not. This theoretical model yields results more consistent with actual outcomes over the past 20 years than does the hypothesis that cost-benefit analysis drives policy.

**IV. A Model of Interaction Between Cost-Benefit Analysis and Executive Review**

Envision a two-dimensional graph (see Table II, below). On the x-axis is the level of regulation, and on the y-axis are the net benefits of the various regulatory options. Positive values on the y-axis represent net benefits, and negative values represent net costs.

**Table II: Graphing Net Benefits Versus Level of Regulation**

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<thead>
<tr>
<th>Quadrant I</th>
<th>Quadrant II</th>
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<tr>
<td>Less Regulation Means Positive Net Benefits</td>
<td>More Regulation Means Positive Net Benefits</td>
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How net benefits will vary with the level of regulation will depend on the economics of the particular issue. I call a scenario in which net benefits are highest with no regulation and decrease with more regulation the “Free Market Scenario” (the designation of points with letters will be explained below):

Finally, I call a scenario in which net benefits are highest with high levels of regulation and decrease with decreasing regulation the “Market Failure Scenario”:

In a system where all decisions were made according to the results of a perfectly conducted regulatory impact analysis, the regulatory option chosen would be the one for which net benefits were the highest (point “A” on each graph). We know from the discussion above that this is not currently the case, possibly because executive review constrains the choices of decisionmakers.

How does it constrain these choices? The literature on executive review gives us several possibilities. Kagan argues that executive review leads to regulatory choices that better reflect the preferences of the electorate, i.e., to greater accountability in regulatory decisionmaking. If this is the case, then according to the median voter model, the president and his staff will restrict the regulatory choices to those

92. This model obviously ignores the fact that different parties will have different estimates of where along the spectrum the greatest net benefits will occur.


in the middle of the spectrum above. (This assumes that, as in the median voter model, voters are distributed symmetrically on regulatory issues.) This may mean that choices are constrained to a very narrow range of options where the median voter falls. It could also mean that any option between the 25th and 75th percentile of regulatory activity is acceptable. How wide or narrow this constraint is likely to be will depend on a range of factors such as the salience of the issue, the timing of the regulation, and the intensity of the interest group climate. On the graphs above, the points labeled “E1” reflect the policy choices of an executive choosing an option in the absolute middle of the spectra.

In those scenarios in which either no regulation or stringent regulation produces the highest net benefits (“Free Market Scenario” and “Market Failure Scenario”), the executive review constraint (the point at which “E1” appears) will ensure that the choice with highest net benefits is not selected. Any choice not on either extreme of the spectrum produces less than optimal net benefits. In fact, depending on how narrowly the president and his staff restrict agency choices, and depending upon where the graph crosses the x-axis (the x-axis represents the point where net benefits are equal to zero), it is possible that the result will be a choice with negative net benefits. 95 This would certainly explain why critics on the left and right complain that OMB review has not led to wise policy choices.

In the “Realistic Scenario,” the prospects are somewhat more sanguine. If a level of regulation toward the middle of the spectrum leads to the greatest net benefits, then an executive responsive to the general electorate will encourage agencies to choose options that are analytically supported. It should be noted, however, that the peak representing the greatest net benefits may be more toward one side or the other, in which case while a regulatory option with positive net benefits may be chosen, it is not likely to be the option with the greatest net benefits. Once again, this depends on how much the executive restricts the policy choices.

However, critics of executive review argue that the president is more subject to pressure from powerful interest groups than from the general electorate. 97 If this is indeed true, we can expect the president’s staff to constrain agency choices toward one end of the spectrum or the other. An administration beholden to industry groups would constrain choices to the left end of the spectrum (“no or little regulation”), while one that listens primarily to prereregulation groups would constrain choices to the right end (“stringent regulation”). Once again, the width of this constraint will vary from issue to issue. Points reflecting the policy choices of an executive responsive to interest groups on either end of the political spectrum are indicated with an “E2” on the graphs above. “E2anti” refers to an executive responsive to antiregulation groups and “E2pro” refers to an executive responsive to prereregulation groups.

Interestingly, the effect of accountability to interest groups will be nearly the opposite of accountability to the general electorate. 98 Under the “Realistic Scenario,” analytically sound options were likely to be chosen if the president was accountable to the general electorate (“E1” occurred where there were positive net benefits) because the electorate wants a result that is in the middle of the spectra, which is where the options that have positive net benefits are also found, i.e., E1 lies above the x-axis. By contrast, if the president is accountable to interest groups under this scenario, then options with low or negative net benefits are likely to be chosen. (Both “E2” points occur where there are negative net benefits.)

In those cases where net benefits are greatest either with no regulation or stringent regulation, the analytical soundness of the policy chosen will vary with the interest groups to which the administration listens. An administration that is supported by antiregulation constituent groups will choose regulatory options with high net benefits in the “Free Market Scenario” (“E2anti” and “A” occur at the same point) and negative net benefits in the “Market Failure Scenario” (“E2anti” occurs at the point of lowest net benefits). An administration responsive to preregulation groups will choose an option with high net benefits in the “Market Failure Scenario” (“E2pro” and “A” occur at the same point) and negative net benefits in the “Free Market Scenario” (“E2pro” occurs at the point of lowest net benefits). 100

The observable implications of this model are several:

1. If an administration were beholden to antiregulation interest groups, one would expect analytically superior options to be chosen only in those cases where there is little justification for government intervention (cases where the “Free Market Scenario” holds).

2. If an administration were beholden to preregulation interest groups, one would expect analytically superior options to be chosen only in those cases where there are significant market failures and the need for government intervention is acute (cases where the “Market Failure Scenario” holds).

3. If executive review leads instead to greater accountability to the general electorate, one would expect analytically superior options to be chosen in cases where a moderate amount of government intervention leads to the outcomes with significant net benefits.

Which of these implications is true depends on who is doing the analysis. Conservatives would argue that in most cases the best option is no or little regulation, but over the past 20 years, many costly regulations have been promul-

95. In the market failure and free market graphs above, the point E1 occurs where the net benefits equal zero. This is for illustrative purposes and need not be the case (the net benefit line need not cross the x-axis right at the middle of the political spectrum).
96. Because critics on the right are most likely to believe that no regulation leads to high net benefits, whereas critics on the left are likely to believe that extensive regulation leads to high, if perhaps difficult to measure, net benefits.
97. See various scholars’ literature supra note 64.
98. This is an obvious simplification. An executive may be responsive to interest groups with preferences for regulatory solutions toward the middle of the spectrum or may want to be responsive to multiple groups with differing preferences. In either of these scenarios, accountability to interest groups will start to look more like accountability to the general public.
99. But see id.
100. A cynic might argue that this is why there is so much variation in estimates of the costs and benefits of controversial rules. Those supporting the regulation want to convince skeptics that we are in the “Market Failure Scenario” and, hence, regulations have high net benefits. Those opposing the regulations wish to make the opposite case. Both sides find economists capable of making their case. See McCarthey’s discussion of OSHA’s hazard communication standard for an excellent example of this, supra note 16.
A. Cost-Benefit Analysis Is Not Intended to Lead to Efficient Regulation

Eric Posner argues that agencies are required to conduct cost-benefit analysis in order to provide information to principals such as the president about the merits of agency proposals. According to Posner’s model, while such analyses may lead to more efficient regulations, this is not a primary goal of requiring them. If this were indeed the case, then it would also serve as an explanation for the seeming failure of Executive Order Nos. 12291 and 12866 to lead to regulations with significant net benefits.

The difficulty with Posner’s model is that, as noted by Kagan and others, Executive Order No. 12866 explicitly includes as part of the OIRA’s mission, “to ensure that regulations are consistent with... Presidential priorities...” If the sole purpose of cost-benefit analysis is to aid in oversight, why is such a requirement necessary given that the OIRA and the rest of the Executive Office of the President already engages in that oversight without the assistance of the analysis. It is possible, as Posner notes, that the analysis requirements may merely be symbolic politics, but if so, then a great deal of rhetorical power and academic literature has been spent debating the merits of this purely symbolic issue.

Rather, it is more plausible that those supporting the role of cost-benefit analysis both within and outside of government should be taken at their word on the importance of cost-benefit analysis. As the OIRA itself noted in its 2002 report on the costs and benefits of regulations, “through OIRA, the Administration is striving for a regulatory process that adopts new rules when necessary to serve the public interest, simplifies and modifies existing rules to make them more effective and/or less costly or less intrusive and rescinds outmoded rules whose benefits do not justify their costs.” The question then remains: why hasn’t economic analysis played more of a role in regulatory decisionmaking?

B. Public Misperceptions of Risk Prevent Acceptance of Cost-Benefit Analysis

Sunstein argues that regulations with high costs and low benefits arise from public support for such measures. The public support originates with a misunderstanding of risks and tradeoffs. Individuals are subject to heuristics and biases that lead to informational cascades and widespread public support for measures that are not justified by sound analysis.

Sunstein goes on to argue that cost-benefit analysis is a necessary corrective for this problem. Sunstein’s argument is not incompatible with the argument presented in this Arti-
ele, which provides further explanation as to why an executive review to the public or to interest groups will advocate policies that are not supported by cost-benefit analysis. By advocating for a greater role for cost-benefit analysis, Sunstein is implicitly arguing that the current regulatory process is overly responsive to political concerns and that analytical arguments should have greater weight.

Institutionally, however, Sunstein recommends a greater role for the OIRA, saying that “[t]he OIRA should have and be known to have a degree of authority over priority setting and cost benefit balancing.” As discussed above, an important part of the reason that analysis has not successfully triumphed over political concerns is that institutionally, cost-benefit analysis has never been separated from executive review. An executive who sees himself as accountable either to the general public or to specialized interests will always have analytical outcomes as a secondary goal.

C. Bureaucratic Agents Thwart Both Executive Review and Cost-Benefit Analysis

Much of the academic literature on political control of bureaucrats utilizes the lens of principal-agent theory. Executive review and cost-benefit analysis are both attempts by political principals (in this case the president) to control bureaucratic agents. Since monitoring is costly and the agents have superior information about the policy problem to be solved, principals put procedures in place that make it more likely that agencies will make decisions in the manner preferred by the principals. Executive review and analytical requirements are such procedures.

Elliott gives examples of how EPA bureaucrats successfully thwarted OMB review during the Bush I Administration. He argues that the rules produced were not improved nearly as much as they could have been by OMB review because review took place too late in the rulemaking process and because EPA staff successfully used congressional support to thwart the goals of OMB officials. It is possible that the reason that so many rules are not as cost effective as they could be is that despite presidents who wish to see cost-benefit analysis implemented as a key decision criterion, the means they have chosen are inherently incapable of achieving this goal.

In order to decide whether a cost-benefit analysis requirement would hamper rulemaking if it were designed differently, one would need to observe such a different design in practice. Looking only at the OIRA experience, we can see that agencies suggestions about areas of regulation that they should pursue. Graham has also pioneered the use of “prompt letters” to give agencies suggestions about areas of regulation that they should pursue. Previous administrators have also taken steps to attempt to involve the OIRA at an earlier stage.

D. Legal Constraints Prohibit Full Consideration of Costs and Benefits

Several statutes, most notably the CAA, explicitly prohibit agencies from considering costs in setting certain regulatory standards. The U.S. Supreme Court upheld the prohibition in the CAA in 2001. The Court has interpreted OSHA’s statute to prohibit the agency from comparing costs and benefits in setting health standards. These are the most prominent examples of legal or statutory constraints apparently overriding analytical requirements that are in Executive Orders.

This argument would serve to explain why certain agencies have taken regulatory actions over the past two decades without regard for costs and benefits. However, it is, at best, an incomplete argument. Other regulatory agencies such as the National Highway Traffic and Safety Administration and other parts of EPA have no such statutory bar to considering costs and benefits. Yet no one who criticizes the lack of consideration given to costs and benefits restricts their criticisms to those agencies with these legal bars. Furthermore, Court decisions regarding OSHA and EPA preclude the agencies from relying upon analysis but do not preclude its consideration.

It is possible that while not all statutes prohibit reliance upon cost-benefit analysis, they generally require agencies either to regulate in particular areas or set up principles that agencies must follow that naturally lead to regulations

112. Id. at 117. Sunstein does note briefly that if the OIRA cannot fulfill this role, then perhaps another risk agency should be created, but he does not describe where in the government structure that agency may be located. Id. at 118.
115. Graham has made earlier OIRA involvement in agency decision-making a key goal. In a speech on July 17, 2002, before the American Hospital Association, Graham said: “[E]arly OMB involvement is underway to increase the impact of OMB’s analytical perspective.” Graham has also pioneered the use of “prompt letters” to give agencies suggestions about areas of regulation that they should pursue. Previous administrators have also taken steps to attempt to involve the OIRA at an earlier stage.
116. Executive Order No. 12498 directed agencies to submit their regulations for OIRA review and gave the OIRA the authority to suggest changes. In practice, these agendas were very vague and did not provide sufficient information upon which to argue over specific directions that the agency should pursue. Elliott, supra note 114.
117. See Kagan, supra note 9.
120. See McGarity, supra note 16.
121. One example would be the food security regulations in the Bioterrorism Preparedness and Control Act of 2002, Pub. L. No. 107-188.
that do not maximize net benefits. This latter possibility has been the subject of many court cases and will not be discussed at length here other than to note that if indeed this is the case, then any attempt to design a requirement for agencies to make consideration of costs and benefits a part of their regulatory decisionmaking is futile without the amendment of many regulatory statutes.

VI. Conclusion

But is such an effort futile? It is difficult to generalize from the federal experience because there is only one example of such requirements. While Executive Order Nos. 12291 and 12866 differ, they both house responsibility for review of agency analyses within the Executive Office of the President, coupling these requirements with the function of facilitating presidential oversight of the rulemaking process. As this Article has argued, this results in the subversion of cost-benefit analysis to the political considerations of the president and his advisers. Little work has been done evaluating analytical requirements that are not attached to executive review.

Would analytical requirements designed any other way have more of an effect than those in Executive Order Nos. 12291 or 12866? Theoretically, the legislative branch could enforce analytical requirements on executive agencies, but a legislative agency might be subject to political pressures placed upon Congress just as political pressures on the president likely affect the OIRA. One could imagine an independent agency created with the purpose of analyzing regulations from executive branch agencies, but this would likely raise constitutional questions if such an independent agency were given any real power. Even if these political and legal obstacles could be overcome, there is still the question of whether statutes that explicitly and implicitly reject cost-benefit analysis would predominate in agency decisionmaking.

In the 2000 Truth in Regulating Act, Congress created a pilot program within the U.S. General Accounting Office to allow that office to review agency regulatory impact analyses. This would be an ideal way to study the impact of locating analytical requirements within the legislative branch, but Congress has not yet funded the office so the pilot program has not gotten off the ground. However, various state governments have implemented analytical requirements in a variety of ways. It is to these states that researchers should look in order to better understand the degree to which analytical requirements affect agency regulatory policy.

It is also possible, given the concerns many have raised about cost-benefit analysis, that making it subservient to executive review is a reasonable compromise between the extremes of the debate over the wisdom of cost-benefit analysis. Making cost-benefit analysis preeminent in regulatory decisionmaking might very well result in the subversion of statutory goals to protect the environment and public health as feared by critics of analysis. Eliminating analysis would deprive both the public and political officials of a valuable source of information about the impact of regulatory decisions.

As it stands, agencies must conduct analyses and these analyses give decisionmakers in the executive branch information that might not otherwise be readily available to them. By placing enforcement of these analytical requirements within the OIRA, which is also responsible for assisting the president in overseeing executive agencies, the role of cost-benefit analysis is necessarily restricted to that of decisionmaking tool rather than decisionmaking rule. This may be its most appropriate use.

122. Shapiro and Glicksman describe some of these principles as a “Risk or Ambient Quality Standard,” “Phaseouts,” “Constrained Balancing Standards,” and “Open-Ended Balancing Standards,” and classify a number of regulatory statutes in each category.


124. Farrow and Michael Toman suggest that modifying environmental statutes to include cost-benefit criteria is the best way to ensure that analysis plays the role it is intended to in regulatory decisionmaking. Scott Farrow & Michael Toman, Using Environmental Benefit Cost Analysis to Improve Government Performance (Resources for the Future Paper No. 99-11, 1999).

125. This statement applies to requirements for cost-benefit analysis, not other types of analysis such as environmental impact statements required under the National Environmental Protection Act.

126. This has been recommended by Randall Lutter, Head in the Clouds Decisionmaking: EPA’s Air Quality Standards for Ozone, in Painting the White House Green, supra note 73.