OIRA AT THIRTY

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The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has been charged with overseeing federal regulation for thirty years, since its founding in early 1981. OIRA conducts that oversight in part under authority of the Paperwork Reduction Act of 1980,[1] a bipartisan statute fathered by Senator Lawton Chiles (D-Fla.) and signed by President Carter over the strong opposition of his Cabinet.[2] But the principal authority has been a succession of executive orders that have been equally bipartisan. From President Reagan's Executive Order 12,291[3] in February 1981 through President Obama's Executive Order 13,563[4] in January 2011, the orders, while varying in details and emphases, have followed the same essential policies and procedures:

Throughout, the core policy has been maximum net benefits: a regulation's benefits should exceed its costs, and the margin of benefits over costs should be the greatest among the alternatives considered.[5] The orders have included several ancillary policies. Most have been extensions of the benefit–cost standard and axioms of regulatory economics—identify a market failure justifying regulation, use performance standards rather than input controls, choose the most cost-effective means of achieving a given

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1. 44 U.S.C. §§ 3501–21 (2006).

2. Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (Dec. 11, 1980) (codified as amended at 44 U.S.C. §§ 3501–21); *see* Richard M. Neustadt, *Taming the Paperwork Tiger: An Experiment in Regulatory Management*, REGULATION, Jan.–Feb. 1981, at 28, 28, 32 (stating that five cabinet departments attempted to convince President Carter to veto the bill), *available at* http://www.cato.org/pubs/regulation/regv5n1/v5n1-6.pdf; Janet A. Weiss, *The Powers of Problem Definition: The Case of Government Paperwork*, 22 POLICY SCIENCES 97, 106–107 (1989) (discussing the five cabinet secretaries' pleas for President Carter not to sign the bill and Carter's response).

3. Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982).

4. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

5. Exec. Order No. 12,291 § 2(c); Exec. Order No. 12,866, § 1(a), 3 C.F.R. 638, 638–39§ 638 (1994); Exec. Order No. 13,563§ 1(b)(3) (Jan. 21, 2011).

goal. Others have been good-government desiderata that complement benefit–cost analysis—use clear language, be transparent, promote access and participation.

Throughout, the core procedure has been centralized review: agencies must submit proposed and final regulations, along with information and analyses describing their rationales, benefits, and costs, to OIRA for review and approval before issuing them. OMB is part of the Executive Office of the President, and OIRA reviews are for consistency with the executive orders' core and ancillary policies. (Review may also concern unstated, more particular "policies of the President" ranging from general philosophy to the political exigencies of the moment.) OIRA does not act independently on the President's behalf: irresolvable disagreements between regulatory agencies and OIRA are settled by the President or someone he designates, usually the Vice President.[6] Ancillary procedures have included an annual "regulatory agenda" planning exercise in which the agencies and OIRA agree to a general rulemaking schedule (including revision of existing rules as well as issuance of new rules) published in the Federal Register; this procedure was established by President Reagan, expanded by President Clinton, and has now been made a central feature of OIRA oversight by President Obama. OIRA has also issued occasional guidance documents on such matters as appropriate methods for discounting future benefits and costs.

It is remarkable to find this degree of policy constancy across Republican and Democratic administrations including one very conservative and one very liberal President.[7] If the same Presidents had issued executive orders on administering health care, Social Security disability, or wage-and-hour programs, the documents would have been highly dissimilar. This suggests that the OIRA policies and procedures have addressed a problem that is in significant respects apolitical. The problem, I believe, is the growth of the size, scope, and power of administrative regulation due to the increasing delegation of lawmaking authority from Congress to the Executive Branch.

The bipartisan nature of the response is clearest in the review procedures. By the late 1970s, regulatory decisions emanating from scores of single-purpose agencies were generating very large costs and benefits that were not captured well in budgeting or reporting practices. The President

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6. Exec. Order No. 12,866 § 7.

7. Moreover, OIRA regulatory review has bipartisan antecedents going back to the Nixon Administration; during the Carter Administration the standard of review was explicitly economic and review was overseen by the President's Council of Economic Advisors and the (now long defunct) Council on Wage and Price Stability. *See* Christopher C. DeMuth, *Constraining Regulatory Costs, Part I: The White House Review Programs,* REGULATION, Jan.–Feb. 1980, at 13, 15–20, *available at* http://www.cato.org/pubs/regulation/regv4n1/v4n1-4.pdf.

was going to get the credit and blame for many of these decisions, and it was inconceivable that he would be content to wait to read about them in the newspapers. The idea that the President could direct his subordinates' rulemaking discretion was highly controversial in OIRA's early years, when White House review was treated as essentially illegitimate and probably unconstitutional by some liberal interest groups and law professors[8] and by congressional leaders such as John Dingell, then chairman of the House Commerce Committee. My OIRA successor Douglas H. Ginsburg and I defended the practice in a 1986 law review article.[9] I would like to think that our article turned the tide of professional and congressional opinion, but in fact the decisive event was a 2001 law review article by Elena Kagan, then fresh from the Clinton White House, revealing that President Clinton had involved himself in rulemaking as energetically as President Reagan had done.[10] Once the critics understood that regulatory oversight was for Democrats as well as Republicans, the legitimacy controversy vanished.

The consistency of the review standards is a more complicated matter. The bipartisan use of benefit-cost analysis and a maximum net benefits rule tells me that the nature of the problem is more than regulation being decentralized, pervasive, and powerful—that it is also frequently excessive and in need of restraint. Academics such as Richard Revesz and Michael Livermore vigorously contest this view. They argue in their book *Retaking Rationality* that regulatory agencies are characteristically timid, slothful, and inert—and need to be spurred to action rather than held back.[11] It is also contested by all OIRA administrators *while they are in office*—when they invariably say that their compatriots in the regulatory agencies are wonderful people and completely on board with the President's programs and that OIRA is simply a technical advisor and occasional referee of interagency conflicts. In this view, OIRA's role is akin to that of a USAID contractor advising farmers in Afghanistan on the latest agricultural techniques.

But everyone knows that this is just a matter of maintaining a united front to the outside with people with whom one is disagreeing, sometimes heatedly, on the inside. Single-purpose regulatory agencies, with little in

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8. *See, e.g.*, Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981) (concluding that the Exec. Order No. 12,291 grants the President more power than he may constitutionally use).

9. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

10. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

11 RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008), *reviewed in* Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877 (2010).

the way of a budget constraint on the resources at their disposal, will typically pay too little heed to purposes other than their own.[12] The essential problem is incentives, not knowledge. The conflict between the White House and the regulatory agencies may be less pronounced in Democratic than Republican administrations, but it is still present, as illustrated most recently by the Environmental Protection Agency's (EPA's) withdrawal of its proposed "boiler MACT" rules, at White House direction, following a year of full-speed-ahead rhetoric in the face of mounting industry, labor, and congressional opposition.[13] Benefit-cost and economic analysis is the best language we have for specifying, and briefing for high-level decision, the merits of policy disagreements that will arise between the White House and the single-purpose agencies in every administration. Revesz and Livermore's book shows that benefit–cost analysis can justify as well as debunk regulatory initiatives. But I very much doubt that, if a White House thought its problem was to spur rather than restrain the agencies, it would do so by requiring them to demonstrate that the benefits of their regulatory proposals exceeded the costs.[14]

The record of thirty years of OIRA oversight is an arresting combination of contentious process and marginal results. Every OIRA administrator can attest that the job involves constant conflict with administration colleagues who are formally on the same team and who need to hang together in the face of outside political opposition. This is glossed over in the public record. I recently read some of the literature on the Reagan administration's decisions to accelerate the elimination of lead additives in

12. *See generally* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

13. Mark Mustian, *Boiler MACT Rules Put on Hold by USEPA*, ENVTL. LAW RESOURCE (May 20, 2011, 1:57 PM), www.environmentallawresource.com/2011/05 /articles/air/ boiler-mact-rules-put-on-hold-by-usepa/.

14. At the OIRA 30th Anniversary Conference where this paper was first presented (May 20, 2011), Sally Katzen, who administered OIRA for most of the Clinton Administration (1993–1998), said that I was quite wrong to claim that OIRA review had been nonpartisan across administrations. Her arguments were (a) that many people in the Clinton White House had opposed continuing the OIRA regulatory review program before he decided to continue it and (b) that she and her Clinton colleagues administering the review program took regulatory benefits, not just costs, very seriously. These are weak arguments! Clinton's review program continued the benefit-cost standards in all essentials and articulated ancillary economic principles in particular detail; his narrowing of OIRA review to a defined subset of "significant" rules (rather than all rules) was a streamlining improvement with no partisan content. I can attest that we in the Reagan Administration also took regulatory benefits very seriously, as in the accelerated lead-phasedown rules mentioned in the text; indeed it was Reagan who first established the "maximum net benefits" standard. In practice, OIRA review was highly similar in the Bush 41 and Clinton Administrations. *See* DeMuth & Ginsburg, *supra* note 11, at 883 n.19. Nevertheless, the fact that the longest serving Democratic OIRA administrator asserts that the program has been partisan *ipso facto* qualifies my assertion that it has been bipartisan.

gasoline.[15] The decisions included a marketable permits program that permitted petroleum firms with less refining capacity to purchase credits against lead restrictions from those with greater capacity; they also abolished an array of obnoxious preferences that some refiners had enjoyed under the previous, command-and-control approach. In the literature, this was something of a landmark in regulatory reform—one of the first uses of market techniques to reduce the costs and increase the benefits of environmental protection. That is true and gratifying, but entirely fails to capture the bitterness of the arguments and the confusion and dishonesty that surrounded the decision.

The marketable permits idea was an OIRA brainstorm; the relevant EPA officials didn't really understand it but had the vague idea that because it was market-based it must be pro-business and therefore anti-environment. At the height of the internal conflict, CBS News's "20/20" television show broadcast a sensational report by Geraldo Rivera that OIRA was gutting the child-saving lead phasedown rules at the behest of refiners who were dependent on lead additives for their business. The report was accompanied by a series of drawings, similar to those used to portray courtroom dramas, showing me meeting with the refiners to assure them that I would take care of the EPA rules for their benefit. That was the opposite of the truth—the refiners in question were themselves going to be phased out as their preferences were eliminated, and the courtroom sketches portrayed a meeting that had never occurred. The show generated an extended round of infuriating congressional and media inquiries with one bit of comic relief: a pat on the back from a White House staffer who believed the report and assumed I was doing the right thing! It is a miracle that the decision came out right in the end—but the decision was a victory of grit, not of reason.

Contretemps such as this one are the daily lot of the OIRA administrator and staff. OMB budget officials are also in direct conflict with administration colleagues—but only at budget preparation time, lasting a few months each year. White House officials lead lives that are unbelievably hectic and fraught with conflicts—but most of them concern much broader issues where the merits are much closer. The OIRA workload is unique, I believe, in dealing with an continuous parade of narrow, complex issues with the following general features: (a) each one is of intense importance to a small number of people but unknown to the rest of the world except through occasional, usually sensationalized news reporting; (b) many of them are shot through with interest-group lobbying and rent-

15. Richard G. Newell & Kristian Rogers, *The Market-Based Lead Phasedown*, *in* MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: LESSONS FROM TWENTY YEARS OF EXPERIENCE 171, 171–78 (Jody Freeman & Charles D. Kolstad, eds., 2007).

seeking; and (c) some of them involving disputes that cannot be resolved through analysis, deliberation, and compromise. I hasten to add that my own tenure, in common with those of other OIRA administrators, involved many close friendships and productive collaborations with agency officials, many disagreements that were resolved through honest deliberation, and many cases where I came to understand and support the agencies' positions. Yet zero-sum conflict and bureaucratic skullduggery were also commonplace. This is further evidence that the function of OIRA review is not merely to review and coordinate but to constrain and balance.

Yet the result of these thirty years of skirmishing has been only marginal improvements in regulatory policy. All OIRA administrators can point to policy victories that made rules more public-interested and that saved money or lives or both, and I have no doubt that the procedure has produced benefits well worth its costs. To ask whether OIRA review is worthwhile is like asking whether budget review is worthwhile: from the outside, government spending may seem to be as out-of-control as government regulating, but no one seriously doubts that central budget control is preferable to leaving spending to individual agencies and their appropriating committees. There is, however, a gulf between the policies of the OIRA executive orders and the record of regulatory growth. As many academic studies and OIRA's own annual reports attest, a considerable number of federal regulations violate the letter or spirit of the executive orders—failing to do thorough or even cursory analyses of benefits and costs and slurring over straightforward matters of risk and economic assessment in ways that leave one very skeptical about the merits.[16]

Moreover, OIRA's policies and procedures, in contrast to budget procedures, are more than matters of good management and countering agency parochialism. They grew out of an intellectual movement—the regulatory reform and deregulation movement, which in the 1970s and 1980s was self-confident, research-and-evidence based, and bipartisan. The movement had aimed to do more than rationalize the growth of regulation with a nip here and a tuck there. Rather it had aimed to transform regulatory practice by exposing and suppressing interest-group machinations, harnessing rather than stifling private economic incentives, and demonstrating that disinterested economic analysis could weed out bad policies and point the way to better, more public-interested policies.[17]

16. Robert W. Hahn & Patrick M. Dudley, *How Well Does the Government Do Benefit-Cost Analysis?*, 1 REV. ENVTL. ECON. & POL'Y 192 (2007); OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (2011), *available at* www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

17. Martha Derthick & Paul J. Quirk, THE POLITICS OF DEREGULATION (1985).

Of course, no movement achieves its highest ambitions, and I have stated ours in lofty terms. But we are now in a world that has moved dramatically against the movement's aspirations: the delegation of expansive policy discretion to regulatory agencies has become rampant, command-and-control techniques are still routine at EPA and similar agencies, and two particularly dubious forms of regulation are on the ascendant for the first time in decades: price regulation in competitive markets and paternalistic, non-economic product quality standards. Deregulation has become a political dirty word while regulatory reform has come to mean any addition of new controls to the financial sector. OIRA has not perceptibly moderated these developments. It may actually have become an accomplice to them—by eliminating the most egregious cases of regulatory excess that might otherwise have galvanized broader reforms, while providing the reassuring appearance (only partially accurate) of policing against many lesser cases of excess.

The Clean Air Act is now forty years old and many people are saying that it was good for its day but has now outlived its usefulness and needs to be replaced by a new approach. We OIRA mavens might ask the same questions about our thirty-year-old program. Here's a suggestion: that OIRA make it a routine practice of preparing and publishing analyses of proposed and final rules, and that its staff be substantially beefed up for this purpose. The OIRA staff has prepared many first-rate analyses of regulatory proposals over the years. OIRA administrators have occasionally incorporated them into detailed "return letters"[18] on the understanding that the letters will be withdrawn and buried if the agency substantially accepts OIRA's position. My proposal is that these analyses be made publicly available and included in rulemaking records. An example of what I have in mind is the evaluation documents published with EPA's 2008 Advanced Notice of Proposed Rulemaking on controlling greenhouse gases under the Clean Air Act.[19] That was an extraordinary case, and one where the agency was preceding reluctantly on a course that OIRA and many others in the administration opposed. I would like to see the practice become standard for all major regulations—and that the evaluations be those of the Executive Office of the President rather than, as in the greenhouse gas case, of sister agencies.

This suggestion will strike some as modest and others as radical. Modest because it harkens back to the 1970s practice of the Council on Wage and

18 *See* Office of Information and Regulatory Affairs, *OIRA Letters*, REGINFO.GOV, http://www.reginfo.gov/public/jsp/EO/letters.jsp (last visited Aug. 14, 2011) (explaining the composition and purpose of a return letter).

19 Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act, EPA, (July 11, 2008), http://www.epa.gov/climatechange/anpr.html.

Price Stability (COWPS) submitting comments to rulemaking records—comments that were often very smart and incisive and often ignored;[20] radical because OMB and OIRA are more direct and powerful agents of the President than COWPS was, and are by firm tradition backstage players who can never be publically ignored (hence the expedient of using agency comments in the greenhouse gas case). I accept both points: the proposal is modest in that OIRA would be focusing more on written, formal analyses that agencies may or may not accept, and radical in that it would be doing so publically—even as OIRA worked to improve a rule as much as politically feasible, and even when a rule was ultimately issued on terms that flouted the OIRA critique.

But it is in exactly these respects that the procedure would be more realistic that the current one. Today there are two Executive Branches—the Executive Office of the President (EOP—the "White House Office" and auxiliary offices such as OMB, employing in total more than 2,000 people), and everything else (hundreds of agencies employing more than 1.3 million people). Actual presidential decisionmaking takes place entirely within the White House Office, among the President's closest confidants who are unconflicted by line responsibilities in the rest of the government. The President never deliberates with his domestic Cabinet officers, indeed never even sees or talks with them outside of ceremonial photo-ops and highly scripted group meetings. Day-to-day policy oversight is conducted by OIRA and other OMB offices, which are outside the White House Office and in most instances can no longer speak for the President with any assurance. The White House Office and the agencies are now even developing their own independent revenue bases, such as the White House's oil-spill compensation program and, at the regulatory agencies, the special taxing authorities of the Federal Communications Commission, the Public Company Accounting Oversight Board, and the new Financial Consumer Protection Bureau.

In these circumstances it would be best to acknowledge that the Executive Branch is nothing like a hierarchy executing the President's policies, but is rather a loose confederation of fiefdoms pursuing their own interests with an occasional boost or break from the White House. In this world, there are many irreconcilable differences between the two Executive Branches and many cases where the White House cannot be bothered over decisions in the rest of the government, even where the President would change course if he had time to focus on them. For OIRA to publish critical economic and benefit–cost assessments of rulemaking proposals,

20. *See Council on Wage and Price Stability Archive*, MERCATUS CENTER, http://cwps.mercatus.org/ (last visited Jul. 10, 2011) (discussing the authority for return letters as "written comments" to agencies meant to control inflationary influences).

and even of final rules, would take some getting used to but would be no shame in the light of current realities. It would conflict with the fiction of presidential omnipotence—but so does the current practice of sloughing off in silence many rules that obviously violate the presidential policies set forth in the executive orders. The procedure would surely involve some costs in the form of chilling the free flow of information between the agencies and OIRA—but this flow is already chilled by the ever-present possibility of leaks of self-serving information to the media and interest groups. OIRA would still be free to deliberate with the agencies to attempt to persuade them to modify their rules, and to seek the support of higher-ups including the President himself on behalf of its positions. And it would still be called upon to settle interagency disputes and to intervene at the President's behest in proceedings he specially cared about.

The important point is that there will be, in administrations of both parties, significant differences on the merits of environmental, health, safety, and economic regulation between appointees who work on them in the agencies and those who work from an administration-wide, and to some extent economy-wide, perspective. Every OIRA administrator (especially the current one, Cass R. Sunstein) has emphasized the role of OIRA review in increasing the transparency of rulemaking and thereby widening the circle of those who might understand what is going on.[21] Yet rulemaking remains a highly opaque process, and the private, backstage nature of OIRA review has increased the opacity to some degree. It would be a good thing if the world knew what the Obama OIRA really thinks of the profusion of new energy efficiency standards, such as the banning of incandescent light bulbs (the latter a Republican statutory initiative), of the Federal Reserve's price controls on debit and credit cards, and of EPA's use of linear dose-response curves with no uncertainty ranges as the driving force of its most ambitious air pollution standards involving fine particulates. All of these initiatives include propositions that many economically literate political liberals will be dubious about and that many affected industry groups will keep mum about for tactical political reasons. Whether OIRA supported or criticized those propositions, its positions would call attention to them and prompt a secondary literature, from the academic to the journalistic. And that could affect the course of policy more effectively than internal reviews standing alone. I once received a purloined e-mail thread from inside EPA warning that if the agency advanced a certain position in a rulemaking proceeding it would pilloried

21. Exec. Order No. 13,563, 76 Fed. Reg. 3821, (Jan. 21, 2011); Memorandum from Cass R. Sunstein to the Heads of Executive Departments and Agencies (June 18, 2010), *available at* www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf (referencing Disclosure and Simplification as Regulatory Tools).

by the AEI–Brookings regulatory studies center. Working on the inside at the highest levels of government, one comes to fear publicity to an excessive degree. Publicity can be powerful force for protecting the regulatory status quo, but it could be an even more powerful force for reforming it—especially if the publicity were a matter of formal procedure rather than surreptitious leaking.

The approach I recommend could also be a powerful complement to the longstanding proposal to make the executive order regulatory policies judicially reviewable. After thirty years of bipartisan endorsement and agency practice, these policies are sufficiently established to merit statutory codification. This would be accomplished by amending the Administrative Procedure Act (APA) to make the maximum net benefits rule and related policies default principles to be followed by agencies using the discretion provided them under their organic statutes; one could essentially swipe and paste Section 1(b) from the Obama Executive Order 13,563 or from the Clinton Executive Order 12,866. Aside from tradition, these policies would have philosophic and democratic merits. The legislature would be instructing the agencies to pursue their mandates for safe products, clean water, fair financial practices, and so forth in the most economical fashion possible. That is much more pointed and operational than instructing the agencies not to be arbitrary or capricious or to abuse their discretion, yet it is broad enough to claim wide public support for how regulatory agencies should conduct themselves. Congress has granted lawmaking authority to scores of unelected agencies, each one pursuing a specific mission among the scores of regulatory missions Congress has propagated—therefore it is reasonable that each mission should aim for the greatest public benefits at the least public costs (unless Congress has instructed otherwise in individual cases). Over time, a succession of judicial decisions would create a common law of what the general policy required in specific instances.

But for this to work, the rulemaking records available to the courts must become much more penetrable and analytical. Today the records are so sprawling and diffuse, always with some support somewhere for whatever the agency decides to do, that the conscientious reviewing court is often hard pressed to judge whether a decision was arbitrary, let alone cost-justified. One reason is that the benefit–cost and related analyses prepared under the executive orders are not, in general, part of the rulemaking records that courts may formally review in reaching their decisions (and typically do not exist at all in the case of the so-called "independent" regulatory agencies which have been exempt from the orders). Another is that rulemaking has evolved into a paper-filing exercise where there is no direct confrontation of opposing views and where the filed comments on all sides are often highly tactical, so that crucial arguments may be altogether absent.

Augmenting rulemaking records with agency benefit–cost analyses and OIRA criticisms would go a long way to remedying these problems. For all of its malleability, benefit–cost analysis is the best available method for organizing the issues in a complex regulatory decision for a nonspecialist—whether White House official or judge. The malleability problem, moreover, becomes much less serious when an analysis is formally critiqued, and its assumptions and uncertainties are exposed, and the critique is answered in turn. Indeed, adding agency benefit–cost analyses and OIRA reviews to rulemaking records, simply as a matter of administrative practice as I have suggested, could spur the emergence of a benefit–cost standard in judicial review even without APA amendment. For once the materials were in the record, they would give the courts the wherewithal to interpret the "arbitrary and capricious" standard with much greater precision and predictability than is currently possible. If Congress were then to codify the more robust standard in statutory law, and clarify its applicability to the "independent" agencies, so much the better.