GW Law Faculty Publications & Other Works | Faculty Scholarship

2017

The Regulatory Budget Debate

Richard J. Pierce Jr
George Washington University Law School, rpierce@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

Part of the Law Commons

Recommended Citation

Pierce, Richard J., The Regulatory Budget Debate (2017). GWU Law School Public Law Research Paper No. 2017-30; GWU Legal Studies Research Paper No. 2017-30. Available at SSRN: https://papers.ssrn.com/abstract=2952418

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

ABSTRACT

In this contribution to a mini-symposium on alternative forms of a regulatory budget, Professor Pierce explains why he supports a regulatory budget that takes into account the benefits of regulations as well as the cost of regulations rather than the cost-only versions of a regulatory budget favored by President Trump and House Republicans.

THE REGULATORY BUDGET DEBATE

Richard J. Pierce, Jr. [1]

For thirty-five years the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has used benefit-cost-analysis (BCA) to review major rules issued by Executive Branch agencies.[2] Generally, OIRA reviews major proposed agency rules to determine whether their expected benefits to society exceed their expected costs to society. If the estimated costs of a proposed rule exceed its estimated benefits, OIRA urges the agency to change the rule in ways that will increase its benefits and reduce its costs. For almost as long as OIRA has been applying BCA, , some of the smartest and most productive progressive scholarshave criticized the role of OIRA generally and OIRA's use of BCA in particular.[3] It is time for those scholars to stop wasting their energy tilting at windmills and to put their extraordinary talents to use in more promising endeavors. BCA HAS BROAD POLITICAL SUPPORT

Every President who has served for the last forty-five years has implemented a system of centralized review of major rules through use of BCA.[4] For the last twenty-five years, Presidents of both parties have

[1] Lyle T. Alverson Professor of Law. George Washington University.
[2] In 2011, the Administrative Law Review published the papers presented at a conference sponsored by the George Washington University Regulatory Studies Program to celebrate the thirtieth anniversary of OIRA. 63 Admin. L. Rev. Issue 1 (2011).
[3] E.g., Lisa Heinzerling & Frank Ackerman, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection, 150 U. Pa. L. Rev. 1553 (2002); Thomas McGarity, A Cost-Benefit State, 50 Admin. L. rev. 7 (1998); Sidney Shapiro & Christopher Schroeder, Beyond Cost-Benefit Analysis: A Pragmatic Reorientation, 32 HARV. ENV. L. REV. 433 (2008)
[4] Jim Tozzi, OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding, 63 Admin. L. Rev. 37, 43-45 (2011).

supplemented the requirement to use BCA to review proposed new rules with a requirement to use BCA to identify and to rescind or amend existing rules that have become obsolete or unduly burdensome.[5] When those two requirements are combined, they create a well-designed regulatory budget In which the estimated social benefits of all rules exceed their estimated social costs.

Use of BCA to implement a regulatory budget has broad bi-partisan support in every branch of government. It was required by the last five Republican Presidents and the last four Democratic Presidents.[6] Last Term, all nine Justices of the Supreme Court expressed the view that it would be "unreasonable" for any agency to issue a major rule without first considering its costs.[7] Congress is actively debating the best methods of designing and implementing a regulatory budget, but elimination of BCA is not even within the range of options that Congress is considering. In June 2015*, I testified in favor of BCA at the request of Senator Bernie Sanders*, generally considered to be the most progressive member of the Senate and the most progressive of the present candidates for the Democratic nomination for President. If the most progressive politicians continue to embrace BCA despite the passionate pleas of progressive scholars to abandon BCA, it is time for progressive scholars to pursue more promising methods of achieving their laudable goals.

BCA IS BETTER THAN A STANDARD THAT IGNORES BENEFITS

I testified against a proposal to add to a regulatory budget that is based on BCA a new type of regulatory budget that would ignore the benefits of rules and consider only the cost of rules.[8] Senate and House

---

[5] Exec. Order No. 13,563, 76 Fed. Reg. 3821-22 (Jan. 21, 2011); Remarks Announcing the Establishment of the Presidential Task Force on Regulatory Relief, 1 Pub. Papers, 30-31 (Jan. 22, 1981).

[6] Tozzi, supra. note 4.

[7] Michigan v. EPA, 135 S. Ct. 2679, 2407-10, 2716-18 (2015).

[8] Testimony of Richard J. Pierce, Jr., In a Hearing on Accounting for the True Cost of Regulation: Exploring the possibility of a Regulatory Budget, Before the Senate Committee on the Budget and the Senate Committee on Homeland Security and Government Affairs (June 23, 2015).

Republicans have proposed a regulatory budget modeled after the version that Canada has adopted.[9] The version proposed by Republicans would prohibit any agency from issuing a new rule unless and until the agency rescinds an existing rule that costs as much or more than the new rule. I testified against that form of a regulatory budget for the same reason that I have always supported BCA—it would be irrational. Any regulatory process that ignores either costs or benefits would cause great harm to society.

To make the point that a cost-only regulatory budget would be irrational and would impose large costs on the nation, I referred to OIRA's estimate of the aggregate costs and benefits of the rules it reviewed during the 10-year period between October 1, 2003, and October 1, 2013. OIRA estimated the costs of the rules as 57 to 84 billion dollars and the benefits of the rules as 217 to 863 billion dollars.[10] If the US had implemented a cost-only budget instead of a regulatory budget based on BCA during that period, the country would have been deprived of net benefits of 133 to 806 billion dollars. Fortunately, application of BCA enabled the country to realize those benefits in the form of lives saved and illnesses, injuries, and property damage avoided.

BCA HELPS AGENCIES ISSUE SOCIALLY BENEFICIAL RULES

BCA is a poor target for critics of centralized regulatory review. It often assists agencies in their efforts to issue rules that benefit society.[11] OIRA is also a poor target for criticism of centralized review. OIRA is dwarfed by the regulatory agencies it reviews. It consists of about three dozen civil servants who perform their functions in the same manner in Democratic and Republican Administrations. Those professional public servants are supervised by two political appointees, most of whom have been academics. OIRA is

[9] Statement of Chairman Johnson, In a Hearing on Accounting for the True Cost of Regulation: Exploring the Possibility of a Regulatory Budget, Before the Senate Committee on the Budget and the Senate Committee on Homeland Security and Government Affairs (June 23, 2015).
[10] OIRA, 2014 Report to Congress o the Benefits and Costs of Rules and on Agency Compliance with the Unfunded Reform Act 1-2 (2015).
[11] Former OIRA Administrator Sally Katzen explains this role in Sally Katzen, OIRA at 30: Reflections and Recommendations, 63 Admin. L. Rev. 103 (20111).

blamed for delaying the issuance of beneficial rules, requiring agencies to amend rules in ways that favor regulated firms, and blocking the issuance of other beneficial rules. [12] Those criticisms are sometimes valid but they are exaggerated. OIRA is often blamed for actions that are actually taken by myriad other agencies and White House offices.

As Cass Sunstein explained shortly after he left as Administrator of OIRA to return to Harvard, OIRA's principal role is not to use BCA to review major rules proposed by regulatory agencies.[13] Its dominant role is to serve as an aggregator of data and views it elicits from other White House offices and from other agencies that have roles that are related in some way to the rule that OIRA is reviewing.[14] The aggregated data and views are then used as part of the basis for decision making by OIRA's superiors in the White House.[15] When the process of White House review produces delay in the issuance of a rule, changes in a rule that benefit regulated firms, or refusal to approve a proposed rule, the decision might have its origin in OIRA but it is far more likely to come from some uncertain combination of other Executive Branch officials.

Moreover, OIRA is not the only White House office that directly influences agency rulemaking. In their study of rulemakings conducted by EPA over a twelve-year period, Lisa Bressman and Michael Vandenbergh found that nineteen White House offices had communicated with EPA in an effort to influence the agency's decision making process.[16] 93 per cent of agency officials reported that they had received communications from White House offices other than OIRA, and they reported that in some

---

[12] E.g., Alan Morrison, OMB Interference With Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059, 1059-64 (1986).
[13] Cass Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838, 1842 (2013).
[14] Id. at 1841-42.
[15] Id. at 1847
[16] Lisa Bressman & Michael Vandenbergh,

major rulemakings, other White House offices had greater influence on the agency's decision making process than did OIRA.[17]

OIRA is not even responsible for most of the methodology it uses to apply BCA in the process of reviewing rules. In his study of the origins of that methodology, Michael Livermore found that EPA had far more influence over the methods used by OIRA to apply BCA than did OIRA itself.[18] EPA has far more economists than does OIRA and it contracts with many other economists to aid it in developing appropriate methods of applying BCA.[19] The economists who perform those tasks for EPA are world-renowned experts on the design and application of BCA to regulatory actions.[20] Livermore found that OIRA borrowed the vast bulk of its BCA methodology from the economists who work for EPA.[21]

The Livermore study suggests that the primary effect of OIRA application of BCA to rules proposed by regulatory agencies is indirect. Executive Branch agencies like EPA know that OIRA will use BCA to review their proposed rules. That induces them to hire good economists and to give them a seat at the decision making table. That indirect effect of OIRA review is also supported by the studies that find that the quality of the economic analysis used by "independent" agencies in their decision making process is systematically lower than the quality of the economic analysis executive branch agencies routinely use to aid them in their decision making process.[22] Rules proposed by "independent" agencies are not subject to OIRA review so "independent" agencies have less incentive to hire good economists and to give them a significant role in making decisions. OIRA Administrators of both political parties have urged Congress or

---

[17] Id. at

[18] Michael Livermore, Cost Benefit Analysis and Agency Independence, 81 U. Chi. L. Rev. 609, 616-7 (2014).

[19] Id. at 625-61.

[20] Id. at 625-61.

[21] Id. at 625-61.

[22] Curtis Copeland has described the scores of studies that have found that the quality of economic analysis used by independent agencies when they issue major rules is consistently much lower than the quality of the economic analysis that Executive Branch agencies use in that decision making process. Curtis Copeland, Economic Analysis and Independent Agencies, Report to the Administrative Conference of the United States 61-113 (2013).

the President to authorize OIRA to use BCA to review major rules proposed by "independent" agencies, primarily to encourage independent agencies to improve the quality of the economic analysis they use in making major decisions. [23]

AGENCY APPLICATIONS OF BCA AND NEPA HAVE SIMILAR GOOD EFFECTS

The effect of OIRA review is similar to the effect of a statute that Congress enacted at the same time that OIRA was created and given the responsibility to apply BCA in reviewing rules. The National Environmental Policy Act (NEPA) requires any federal agency to file an environmental impact statement (EIS) every time it proposes to take a major action that significantly affects the environment.[24] NEPA does not impose any substantive limit on any agency action.[25] In theory, an agency could comply with NEPA by issuing an EIS that says "This action will have a terrible effect on the environment, but we are going to take it anyway." That has not happened and will not happen, however, because the primary effect of NEPA has been to force agencies to consider environmental impacts when they take major actions and to hire experts on the environment and to give them a seat at the decision making table. That effect of NEPA has influenced agency decision making in thousands of cases in the same indirect way that OIRA application of BCA in reviewing major agency rules has indirectly influenced agency decision making in many cases.[26]

BCA IS BETTER THAN A FEASIBILITY STANDARD

In her contribution to this mini-debate on regulatory budgeting,[27] Amy Sinden recognizes the existence of bi-partisan support in all of our major institutions for some method of considering costs in deciding whether to issue a major rule. She believes, however, that agencies should use other methods of

---

[23] Richard Pierce, Introduction to the OIRA 30th Anniversary Conference, 63 Admin. L. Rev. 1, 5-6 (2011).
[24] 42 U.S.C. §§4321, 4331.
[25] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).
[26] Council on Environmental Quality, The National Environmental Policy Act: A study of Its Effectiveness After Twenty-five Years (1997).
[27] Amy Sinden, Windmills And Holy Grails, ____________

considering cost rather than BCA. Like many progressive scholars, Professor Sinden argues that a "feasibility" standard is better than BCA as a basis to decide whether to issue a major rule. In many important circumstances, however, application of a feasibility standard is likely to preclude an agency from issuing a major rule that would yield enormous benefits to the nation.

Feasibility can mean many things. As defined by both the Supreme Court and EPA, feasibility refers to both technical feasibility and economic feasibility. Both institutions use degree of harm to the regulated sector of the economy as the basis to decide whether a rule is economically feasible.

As the Supreme Court framed the issue in its 1981 opinion in American Textile Manufacturers Institute v. Donovan, the agency had to have substantial evidence to support a finding that the rule "would not threaten the economic viability of the cotton industry" to establish that it was economically feasible.[28] The Court upheld the rule as feasible because it would not seriously threaten "the cotton textile industry as a whole."[29] Specifically, the Court upheld the agency's finding that "although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation." [30]

EPA has adopted a similar interpretation of economic feasibility. In its proposed finding on remand from the Supreme Court's 2015 decision in Michigan v. EPA, the agency stated the critical question as "whether the power sector can reasonably absorb the cost of compliance with [the rule]." [31]After analyzing this question from several perspectives, EPA found that "the vast majority of generation capacity in the power sector would be able to absorb the compliance costs and remain operational . . ." [32]

---

[28] American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 530 (1981).
[29] Id. at 530-36.
[30] Id. at 536.
[31] Supplemental Finding that It Is Appropriate and Necessary to Regulate Hazadous Air pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units, 80 Fed. Reg. 75025, 75030 (Dec. 1, 2015).
[32] Id. at 75036.

Imagine how a reviewing court might apply the feasibility standard to the Clean Power Plan (CPP)[33] or to any other rule that is intended to reduce CO2 emissions by requiring electric utilities to switch from high CO2 emission coal to low CO2 emission natural gas or carbon-free sources like wind or solar. It would make sense to characterize the coal sector of the economy as the sector most affected by the rule. The coal mine owners could, indeed already have, commissioned studies that show that the CPP will have devastating effects on the coal sector of the economy. It follows logically that the CPP would fail the feasibility test because it would seriously threaten the coal industry as a whole.

By contrast, it would be easy to support a finding that the benefits of the CPP vastly exceed its costs. This is one of many examples of the common situation in which an important rule would confer significant net benefits on the country but could not be upheld through application of the feasibility test.

CONCLUSIONBoth the application of NEPA by agencies and OIRA review of agency actions have adverse effects in the form of delays in decision making and increases in the resources that agencies must devote to each major action it takes. I believe that both NEPA and OIRA application of BCA are so valuable to the agency decision making process that those adverse effects are justified by the contributions that both make to the quality of agency decisions. As I have argued at length elsewhere, I cannot say the same about the massive adverse effects of judicial review on the time and resources that agencies must devote to the process of issuing a major rule.[34] I continue to support the proposal that Justice (then Professor) Breyer

[33] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015), described and analyzed in Emily Hammond & Richard Pierce, The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid, 7 George Washington University J. En. & Env. L. 1 (2016).

[34] Richard Pierce, A Comparison of the Cultures and Performance of a Modern Agency and a Nineteenth Century Agency (forthcoming from Cambridge University Press and on file at NYU Journal of Public Law and Policy.)

made in 1995.[35] We should replace counterproductive judicial review with review by a version of OIRA that is better-staffed and broader in the values it brings to the review process.[36]

I end where I began. It is time for the many talented scholars who have been engaged in the futile effort of trying to persuade some President or Congress to end the process of OIRA use of BCA to review major rules to use their energy to engage in more promising pursuits. One comes to mind immediately. There is an important ongoing debate about the best ways to estimate the benefits and costs of proposed rules.[37] The gifted academics who have been urging abandonment of OIRA review could make significant contributions to that debate. They could begin by explaining why co-benefits of rules should be counted as benefits for BCA purposes. That is the issue that will determine the outcome of the proceeding on remand from the Supreme Court's 2015 decision in Michigan v. EPA.[38]

---

[35] Stephen Breyer, Breaking the Vicious Circle (1995).
[36] Id.
[37] E.g., Laura Lowenstein & Ricky Revesz, Anti-Regulation Under the Guise of Rational Regulation: The Bush Administration's Approaches to Valuing Human Lives in Environmental Cost-Benefit Analysis, 34 Environmental Law Review 100954 (2004).
[38] Michigan v. EPA, 135 S.Ct. 2699, 2705, 2714 (2015).