AMERICAN UNIVERSITY

CENTER FOR THE STUDY OF RULEMAKING

PANEL 2

"OSSIFICATION" REVISITED: THE CURRENT STATE OF PROCEDURAL AND ANALYTICAL COMPLEXITY IN RULEMAKING

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CORNELIUS KERWIN: Okay. Our third session this morning is on a topic that is probably mentioned as frequently as any with regard to contemporary rulemaking, and that is ossification: the state of procedural and analytical complexity in rulemaking.

We have four experts in the field addressing the issue. We're going to lead with Tom McGarity, who is probably very sorry he ever used the term ossification, since he's now known as the father of ossification. But Tom is the author of, again, a seminal piece on this very topic. He's the Kronzer chair in Trial and Appellate Advocacy at the University of Texas at Austin. He's also the president for the Center for Progressive Regulation.

Following him will be Scott Farrow. Scott is the chief economist at the U.S. Government Accountability Office, GAO; has been since 2002. He taught previously at Penn State and at Carnegie Mellon, and he's been twice detailed to the Executive Office of the President, and he's recently published in risk analysis.

Scott will be followed by Sidney Shapiro, who is the distinguished chair at Wake Forest University Law School. He's also a board member at the Center for Progressive Regulation. He's the author of – his most recent book anyway is "Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation." He's previously a trial attorney at the FTC, and deputy legal counsel, Secretary's Review Panel on New Drug Regulation at HHS.

John Morrall will be our forth speaker. John is the branch chief currently for Transportation, Health and General Government at the Office of Information and Regulatory Affairs of OMB. He's the lead author of OMB's annual report to the Congress on costs and benefits of federal regulation, known as the Stevens (sp) report. He's an expert in regulatory reform, cost-benefit analysis, labor economics, international economics and risk assessment.

Tom?

TOM MCGARITY: Thank you, Neil. Thank you for having me here. This is a great gathering of folks.

I need to first make it clear, as I always do when I talk about ossification, that I did not coin the very memorable term "ossification." I borrowed or perhaps stole it from Don Elliott, who first used this term at a conference we both attended at Duke. I will, however, claim credit for the subtler and more highly nuanced term "de-ossifying."

I want to talk a little bit about what I said back in my 1992 article. After initially quoting from Ken Davis extolling the virtues of the informal rulemaking process, I said

the bloom was off the rose. I did a little empirical work. OSHA standards took at least five years to complete. Controversial rulemaking initiatives were consigned to what was called regulatory purgatory. Some people called it the black hole at OMB. Agencies rarely revisited old rules, and they were using various informal devices, many of which you've heard about earlier this morning, to avoid the rulemaking process altogether.

I tried to identify some causes of ossification in the traditional ways an administrative law scholar would go about looking at any administrative law issue, focusing on procedure and substance. I thought it also would be useful to examine analytical requirements because that was something that was really happening and because I studied regulatory analysis requirements already for the administrative conference back in the 1980s. Finally, I examined the scientific review requirements, which in those days were not massive but did exist in some scientific advisory committee requirements and that sort of thing.

I would now like to revisit, according to that same scheme, where we sit today, understanding at the outset – let me make it clear – that I've not done the kind of systematic look that I took in 1992. Much of what I have to say today is impressionistic and not so much empirical or based on studies of things.

I did not find procedural requirements to be much of a problem in 1992. Much of the literature in the 1970s and '80s was about procedural gloss and how much was added to the rulemaking process. That just wasn't the problem then, and I still don't think it's much of a problem. We do see greater use of direct final rulemaking, which makes it even less of a problem in terms of slowing things down, to the extent that it works, and it apparently works a lot. The expansion of the scope of what is considered rulemaking that Peter talked about earlier is conceivably more of a problem because if more activity gets included in the scope of that, then more activity is subject to the ossification phenomenon. Procedurally, that could be a problem. However, that is more of a definitional thing than a procedural thing, I think.

And there is the one other thing that I would add that needs some study. If I make a pitch for something to study right now, it would be the Small Business Regulatory Enforcement Fairness Act, or SBREFA as it's called, which gave small businesses an early bite at the apple. They get to see the rules before anybody else does and before they're even proposed. I do not know whether that is a problem or not, to be honest, because there is not much empirical work on it. I have talked to some people who have done anecdotal work on it, and one very interesting thing I learned, at least in the OSHA context, is that this SBREFA process is, if anything, being abused. That is, small businesses would get emails from a law firm that represented big businesses saying, you guys really ought to get your bite at the apple, and this is what you ought to say. We'll be happy to help you with this, and we won't even charge you for it. And knowing that law firms don't work for free, my guess is that it's really not a small business bite at the apple, but it's just a business early bite at the apple. But I don't know that to be generalizable. It is just what I've heard, and I think somebody ought to look into this one.

Analytical requirements. I had at the time divided them into judicially, congressionally and presidentially imposed analytical requirements. With respect to judicially-imposed analytical requirements, I had some bad things to say about the benzene case because I thought that the Supreme Court created a risk assessment obligation on OSHA's part out of whole cloth. I think if anything, the Supreme Court is trending in the opposite direction these days, with *the American Trucking* case refusing to impose a cost benefit requirement that clearly wasn't in the statute. In *DOT v. Public Citizen*, the Mexican Truck case, the Court once again held that NEPA's analytical requirements were inapplicable to the DOT truck safety rulemaking at issue in that case. Another aspect of the case that is not highly emphasized addressed a Clean Air Act conformity analysis required by the 9th Circuit, which would have been something of a judicially imposed analytical requirement had the Supreme Court let that opinion stand. I like to think it wasn't created of whole cloth because I am the one who came up with it, but it was a stretch. The 9th Circuit bought it; the Supreme Court didn't. So if anything, we have a trend in the opposite direction of judges adding analytical requirements to what agencies do.

With respect to congressionally imposed analytical requirements, we have seen some movement. Nearly all of it has been in the direction of greater ossification, but it could have been a whole lot worse in my view. During the 104th Congress that met in 1995 some very deadening things were being proposed by way of omnibus regulatory reform bills that did not get enacted. We did get a cost-benefit requirement in the Unfunded Mandates Act, and somewhat expanded regulatory flexibility requirements. We also got the added judicial review of regulatory flexibility analysis requirements, but I have not seen this as a huge problem at this point. Although some out there may disagree, I do not think it has been taken advantage of to any great degree thus far.

In terms of what the president has imposed, President Clinton retained most of what existed, but changed the executive order to soften up things a bit. You could see when that in the flattened trend in one of the earlier presentations. I think that had a lot to do with the easing of the executive order requirements and especially the review requirements. The Clinton Administration did, however, add a regulatory takings requirement, an intergovernmental review requirement a civil justice requirement, a children requirement, and a limited English. This is not complete. These are just the ones that I identified as significant.

During the first four years of the Bush administration, I do not think much was added to that, but there may be people out there who deal with this on a day-to-day basis who would say otherwise. At least formally, with regard to what is on paper, a lot of things by way of presidentially imposed analytical requirements during the Clinton administration, and not so much during the George W. Bush Administration.

I believe that the category of scientific review requirements is where the most important action is happening in the last few years. The Data Quality Act, or now called the Information Quality Act, it applies to all information disseminated, not just during the

rulemaking process. The big question here is going to be whether these challenges can be heard or will be heard apart from the review at the end of the rulemaking process. If it can, then that could really slow down things a great deal. We have the author of that statute here today.

Sid Shapiro has taken the position that if the agency has an ongoing rulemaking process, there should be no independent judicial review because notice and comment rulemaking is all about data quality challenges and any other kind of challenge the participants want to make. Any challenges to the quality of the data that the agency relies upon ought to be confined to the rulemaking process itself. The question is, are we going to get review or challenges within the context of an ongoing rulemaking. It has a great potential there to slow things down. The peer review requirements that grew out of the Data Quality Act are really presidentially imposed, but they arguably grew out of the statute. Ultimately, these requirements are brand new, and it is hard to tell how important they will become in terms of slowing things down, but they do have the potential to ossify things to the extent that put more constraints on the working of the rulemaking process.

Substantive review requirements. I do not see much change in substantive judicial review. My totally impressionistic conclusion is that the hard look is still pretty much a hard look. I had recommended in the ossification article a much softer glance, and I have since then advocated something like the pass-fail professor test for judicial review. There have been some interesting and intriguing studies on the politics of judicial review that I think are worth looking at, and I just cite a few on the slide.

With respect to congressional review, we have the Congressional Review Act. A lot was made of it at the time that it was being debated in Congress. It has been invoked once at a change of administrations. My guess is that may be the last time. It could conceivably be the case that the president would not veto a joint resolution disapproving a rule issued by one of his or her agencies. Since I do not think this is very likely, I do not believe it to be a major problem except for the fact that it creates a contingency while the rule is pending in Congress.

Presidential review. OMB is still reviewing rules, and it is still returning disfavored rules. It is clear that favored rules still move more rapidly. I have not had a lot of good things to say about what John Morrall and his folks are doing at OMB. However, I've got to applaud them for being by-and-large a much more transparent agency than in the past. It is nice to be able to get on the website and track the status of things.

In terms of ossification, there is an effort being made at OMB to get involved in the rulemaking process early on while the rules are getting generated within the agency. That has a great potential for reducing ossification insofar as OMB is an ossifier. If OMB is a regulatory purgatory, you can presumably go straight to heaven now, having had OMB's blessings down below. That change could actually help grease the skids. It does, however, reduce the transparency of process, so there is a tradeoff being made

there.

So where do we stand in 2005? Well, I think the bloom is still off the rose. Things may have gotten worse, with the addition of a few more ossifiers, particularly in that statutory area. The whole plant is looking pretty sick to me. (Laughter.)

SCOTT FARROW: Gee, that's a tough act to follow. I feel liked a pale plant here in some sense. (Laughter.) I'll be speaking about economic performance and regulatory review. I'm not speaking on behalf of GAO, where I am the chief economist at the moment, in part because I'm going over work that I did before I arrived at GAO.

Now, in terms of the debate I want to focus this on the issue of impacts which was brought up earlier. As an economist, I think about economic performance impact in terms of net benefits or cost-effectiveness, and economic performance being one dimension of governmental performance that people can worry about. Lots of other people worry about other dimensions. I'm an economist, I worry about economic performance. To that end, the ossification issue is not one that I deal with directly in the sense that I'm not certain if ossification is good or bad. I'm looking at the issue of economic performance of regulations.

One of the first things I did with Mike Toman in "Environment" was saying that in regard to state and additional federal efforts, that requiring agencies to use benefit cost information would likely only have a modest impact on regulatory performance. And in part, this was based on our review of the literature, on Mike Toman's activities at the Council of Economic Advisors, and my observations as a staff liaison to the Council on Competitiveness in the Bush Administration in the early 1990s.

We said that if you want to have something more than a modest impact you should think about increasing the demand for such analyses, perhaps with statutory language, to allow a reasoned balancing of benefits and costs where it might be absent and to address issues about quality. Now that I'm resident at GAO and I look at the volumes of things that accountants have on guidance and standards, in some sense there may be a dearth of guidance in some areas related to economic performance.

Moving on to something done while at Carnegie Mellon, there was the notion that regulatory review should not be distinct from other activities of government; that the regulatory review is generally an ex ante approach to things, and that when we think about economic performance of programs, there are other evaluations that can follow a similar approach, even building upon regulatory review., For instance, when GPRA asked for annual performance measures, economic performance measures could be used.. I also returned to the issue of some increased standardization of what have often been customized reporting, ad-hoc benefit-cost reporting standards.

Now, lest you think that I only sit on one side of the benefit-cost fence I think one of the ways in which economic analysis has failed to address issues that are important

around the country and certainly in D.C., are issues about distribution. I discussed environmental equity and sustainability in "Ecological Economics", and brought this into what is the default rule in benefit-cost analysis about potential compensation being paid. I was arguing that these phrases, environmental equity and sustainability, really refer to actual instead of potential compensation and set forth some suggestions.

Another issue related to impact grew out of a presentation to OECD on regulation. The core issue is, even internationally, how do you evaluate central regulatory institutions such as OIRA? We set up a framework with the assistance of Curtis Copeland who has since joined our sister congressional agency, but we looked at different framings for evaluation in terms of bureaucratic process, a rational economic actor, and political economy or governmental politics. Some of you will recognize this kind of framing from elsewhere.

In that piece we talk about a recent GAO report on a textual reading of a number of rules. GAO concluded that OIRA had a significant effect on 25 of 85 draft rules based on scope, impact, and estimated costs and benefits. But further in this paper I go back over John Morrall's older data, taking into account some of Lisa Heinzerling's comments, and went through some statistical analysis of whether there seemed to be an effect of OIRA review on different quantitative measures of regulatory performance, such as cost effectiveness. That was very difficult to find. That is, it was difficult to find an impact on the economic performance measures.

So what I get to as the bottom line is, does the dose make the cure or the poison? And my argument is economic performance is one type of performance information. As an economist, it's the one I'm particularly interested in. On the demand side, I think there are a number of applications where the demand for these kinds of products, both ex ante and ex post can be increased. On the supply side, the quality, consistency and indeed standardization can be improved. And so on the question increase or decrease the dose, you might guess at my answer.

Thanks very much.

SIDNEY SHAPIRO: Scott just said – I said, "RIA my way" and he said "or the highway." (Laughter.)

As you all know, there's been substantial criticism of cost-benefit analysis during OMB review by some academics and progressive interest groups, and an equally spirited defense of cost-benefit analysis by other academics and business-related groups. And if you want to know how this divides on the current panel, I would point out to you that when McGarity and Shapiro sat down, we sat down on the left. (Laughter.)

MR. : That's where the name tags were.

SID SHAPIRO:

In today's talk, I want to talk about something that is missing from the literature that criticizes cost-benefit analysis, which is how cost-benefit critics would undertake regulatory impact analyses. At the organization with which I'm affiliated, the Center for Progressive Regulation, we've started a research program to try to fill that gap. As a starting point, we've produced a draft of principles for regulatory analysis for public health and the environment. They're available on our website and they're available on the website set up for this conference.

In today's talk I want to defend a basic premise that lies behind these principles, namely, that regulatory impact analysis should support the application of regulatory tests that Congress has mandated to determine the scope of regulation. I will discuss briefly the current statutory tests, why currently RIA is not supportive of these tests, and why it should be.

As I look at environmental and health and safety statutes, there is a two-step structure. First, there is a risk trigger and then there is a statutory standard. The function of the risk trigger is to tell the agency when it must regulate. Once the agency determines that a particular hazard meets the statutory definition of risk, it must act to reduce that risk. The statutory standard, by comparison, tells the agency how to determine the extent to which the risk is to be reduced. In other words, it establishes the level of regulation that the agency must reach once it's determined that the requisite risk trigger has been met.

Here is a survey of a fairly large number of existing statutes, which we've divided according to the statutory trigger. What is noticeable and important for my analysis is that there are only two statutes that require cost-benefit balancing. By comparison, most statutes fall under either what I call constrained balancing or open-ended balancing.

Constrained balancing involves, typically, a requirement to reduce a risk to the level specified by a model technology, such as best available technology, which means cost is bounded by the availability of the technology. Open-ended balancing involves a statute in which Congress gives an agency a list – a laundry list -- of factors to consider in determining the level of regulation, one of which is cost, but there are always additional factors.

My claim is that there is a mismatch between regulatory analysis as it is now practiced and the statutes that agencies use to actually implement and reduce risk. This in turn, causes two problems. One is that RIA is not in support of the actual statutory test which the agency must use to determine the level of regulation. The second is that RIA therefore invites distortion of that test. Our proposed solution is to eliminate cost-benefit balancing unless the statute also uses it. While we would continue to look at economic data, we would not balance the costs and benefits that can be monetized.

I anticipate there are at least three objections that might be raised to this proposal, so I'll respond to these three. I'm sure there are many more. First, it's better to have

explicit rather than implicit balancing. Second, the proposal will not be sufficiently rigorous, and third, it will perpetuate the existing over-regulation or extend it.

The first argument basically says if you're going to look at economic numbers, it is inevitable that costs and benefits are going to be compared. Alternatively, if you adopt a regulation in light of whatever numbers you come up with, you're attaching an implicit balancing of costs and benefits for the regulation being reviewed. A part of our proposal, however, is to try to find ways – and we're working on this – to devote equal attention to qualitative costs and benefits as well as quantitative. Since I'm operating out of an assumption that it almost always will be impossible to quantify all of the costs and benefits of a proposed regulation, you're always going to be looking at qualitative information as well.

And if you really do this honestly, if you have a mixture of qualitative and quantitative data, you simply can't balance. You can't implicitly come up with a cost-benefit measure because at least some of what you're looking at is qualitative and not subject to measurement.

Objection number two is that this will not be sufficiently rigorous, which leads to objection number three; this is how you folks got us into this mess in the first place. Under this argument, the complaint would be that efforts to do qualitative analysis in the manner that we're proposing simply will not be sufficiently rigorous to look at costs and benefits in a meaningful manner. So it would be better, according to this objection, to get the quantified data, compare it, and then move to the step of looking at qualitative data as a leavening factor to whatever your qualitative data shows.

My argument against this is that it assumes that economics is the only method of rationality which can inform us about regulatory analysis. Economics, however, is not the only form of rationality, and I do not believe it is the best one for purposes of regulatory analysis. This conclusion is based on my experience as a lawyer. I think there's a reason that judges do not make decisions, for example, when they issue an opinion, according to a cost-benefit methodology. Judges do not do this because most social problems are not capable of being fully monetized so that economics can tell us what to do, even assuming that we favor a utilitarian approach to solving those problems.

As a result, lawyers are trained to use reason to resolve social conflicts as best we can. The measurement of a good legal argument is the quality of the reasons that we give for our position or judgment. And I don't find this any different in the regulatory area. Since economics can't produce universal quantification, then it seems to me we have to resort to reason to decide what to do, which means reason ought to be at the bottom of any regulatory impact analyses.

That raises the third objection. It's this kind of soft, mushy reasoning that you lawyers have written into the statutes, and look what's happened. It's led to a great deal of over-regulation. Well, ultimately, this is an empirical question. And as you know, the literature is hotly contested. There are studies claiming great over-regulation. There are studies and reports claiming no over-regulation or limited over-regulation. My position,

as you might guess, is that I don't see the kind of over-regulation that has been claimed. Indeed, I think technology-based regulation is a great success story.

So my conclusions are these. RIA should support the agency's statutory mission. We need to find ways to give prominence to qualitative information. We're working on that project. We'd appreciate your interest and support of it, or criticism of it. And we look forward to the debate.

JOHN MORRALL: I would like to change the original title of this session. And I'd like to actually defend ossification, and change it to talk about the current state of regulatory reform and review in the United States. And I'll explain why in a minute. Before I do that, I want to issue a disclaimer. I am not here representing the administration. I'm on my own. They cut me off. (Laughter.) And I don't want to get in trouble. So – (laughter) – if there are any reporters, I'm not the administration.

So I want to change the title to "In defense of ossification and procedural and analytical complexity. I also apologize for doing this. I'm being slightly defensive, but I think I have reason to be slightly defensive. (Laughter.) The two people on my left, Tom McGarity and Sid Shapiro, have made a career, I guess, out of criticizing me and other people who do this kind of analysis.

Do I – and this is a great segue because what I was going to say is the book that they wrote about me and a couple other people, and I'm in great company, is called "Sophisticated Sabotage." And in that company – and I'm really pleased you put my name in there and had four or five footnotes criticizing my work – I'm in there with Judge Breyer; Cass Sunstein; Kip Viscusi, and my boss; John Graham , and so thank you for raising my stature. (Laughter.)

And I'm also on the same panel with Scott Farrow. Now, although he's a friend, he does work at GAO, and the only agency OMB shows deference to is GAO. (Laughter.) One of the reasons is because it's pretty well known – Sally knows this – there are probably more people at GAO investigating OIRA than there are in OIRA. (Laughter.) So now that I have no friends.

First Slide: In Defense of "Procedural and Analytical Complexity

I think one of the problems with the ossification analysis and the implication that there's procedural and analytical complexity is that the people that are promoting this idea, the CPR people in particular, are focused on the environment and public health. But they're using charged words that should not be used to describe important policy issues. The hidden message is, there is not enough regulation. But this is way too simple a way to look at the regulatory state.

There are many forms of human activities that are regulated by the government. Those that think there are not enough environmental regulation may think that there's too much homeland security regulation and too much regulation of civil liberties or

immigration regulation, too much tracking of students coming to study in universities. Those regulations are all done perhaps based on the precautionary principle, by the way. And a lot of people on both sides think there may be over-regulation there. I'm not saying which way I feel.

Moreover, the ossification idea, which is claimed to be the anti-regulatory approach, retards deregulation. Recall that to reduce regulation, you need regulation and you have to go through the ossification process. And in fact, the *State Farm* air bag case indicated that particularly very well. Their benefit-cost analysis was actually used as part of the evidence to overturn a deregulation of the early Reagan administration.

Second Slide: What is the Actual Evidence for the Costs and Benefits of Regulatory Reform and Review?

So I want to look at what is the actual evidence about the costs and benefits of regulatory reform and review. And I want to look at particularly the requirement for regulatory impact analysis, benefit-cost analysis, and the requirement that OMB/OIRA, oversee the regulatory review process for the so-called independent agencies. And I've divided this into five ways to look at it. Continuity; I want to look at economic performance; I want to look at the fact there's international imitation; I want to look at the actual results of what we've done in OIRA; and then I want to briefly look at some of the academic evaluations.

And so I'm talking really about benefit cost analysis, which the previous panelists just criticized, and I just want to mention that I don't think when you criticize benefit-cost analysis and economic analysis you really are understanding that we have limited resources, and that cost effectiveness can actually provide more benefits for the same costs or less costs. That's why a benefit-cost analysis is important. It is one factor in the decision-making process. It can't be ignored, and you can't just simply go with the statutory requirements because there would be no way then to make comparisons to set priorities.

Third Slide: Evolution and Continuity of Presidential Oversight

My first piece of evidence is the history of Presidential oversight. Look at the last six presidents have all had regulatory oversight programs with requirements of benefit-cost analysis. Most of you already know this history. I don't think I need to go all through it. But each president, starting with President Ford, had an RIA requirement and an executive branch review process. The RIA requirement, by the way, going back to 1975 has always been $100 million. There have been changes in administrations, changes in parties, and they've all adopted and continued and in some ways improved – many ways improved, the regulatory oversight process.

In fact, there's a really excellent article that Mr. West just published about OIRA in *Presidential Studies Quarterly,* where he looks at the tension between neutral competence and responsiveness to the president. He looks at how OIRA has been fairly

successful in this over time by this balancing approach that we've had to do between reporting both to the president and the presidency. He comes out a little bit harder against political expediency than I would have hoped, but it's a very good article and I hope he gets a chance to talk about it. It just was published in March, which is this month.

So the first bit of evidence is the fact that we've been using it for 30 years. The second piece is also very important. Regulatory reform delivers strong economic performance. It was a rationale for the regulatory reform program of the Carter Administration, the Ford Administration, and even the Reagan Administration, An important objective was to improve macro performance – economic performance, as you can see from the history again I lay out starting in the 1970s.

Fourth Slide: Improving Regulatory Quality Leads to Strong Macro Performance

A lot of people seem unaware of this, but since the mid-1980s, U.S. economic performance, that's per capita growth, inflation, and employment, has been by far one of the best in the developed world. And this is contrary to the per capita income convergence theory, which says that countries with the highest income should fall behind in per capita growth because they have more capital than countries behind them, and there should be convergence in GDP per capita. That is not occurring. We have been pulling away over the last ten years, especially against Germany and Japan and old Europe.

Studies by the World Bank, and particularly "Doing Business in 2005" that just came out, the OECD, the Heritage Foundation, and the Frazier Institute in Vancouver, have all found that countries with flexible and efficient regulatory systems coupled with strong property rights have by far the best records on, not just per capita income, but also on economic growth, life expectancy, and the U.N. Human Development Index. The World Bank has ranked 145 countries according to their regulatory burden, how long it takes to start a business, for example, and five or six or seven other indicators. This is all quantitatively done. The study found that if you move the bottom three-quarters to the top quarter of least regulatory burden of the 145 countries, moving those countries to that top quartile will result in a 1.7 percent increase in annual economic growth. And this is even after controlling for other growth factors such as education, investment and income. It's a very interesting study.

Fifth Slide; International Imitation

So obviously other countries around the world have seen what's been happening in the United States and they've been very interested in, in particular, two parts of our regulatory oversight program. Regulatory oversight from the Center for Government (most of the other countries have a parliamentary system and they don't have oversight at the center of government) and the fact that we have a strong requirement for a benefit-cost analysis or regulatory impact analysis. We have over the last 10, 15 years – Sally knows this – have hosted – dozens of countries' high-level administrators, and we have sent, and she has sent me to other countries around the world to brief them about our

particular regulatory reform and oversight system and how a benefit-cost analysis can help in decision-making.

In 1997, the OECD at a Ministerial-level meeting established seven principles to increase regulatory quality. The first two were: adopt programs of regulatory reform at a high political level, and second, adopt a regulatory impact assessment program. APEC, the Asia-Pacific Economic Cooperation group has been working now with the OECD to also reaffirm these principles, and actually monitor them in the countries that are members of those two groups. And by the way, the EU is also looking at adopting a RIA requirement. It has begun a program with the beginnings of central oversight review of regulations. In fact, my boss, John Graham, is over there right now at an EU meeting talking about regulatory impact analysis and regulatory oversight. And my deputy, Alex Hunt, is at the OECD at a similar meeting. There's a lot of interest in what the United States has been doing. Imitation is the best of kind of flattery.

Sixth Slide: Regulations Reviewed

Let's look at results of the regulations reviewed. Has ossification slowed things down? In particular, the pamphlets that the CPR group has written are much more anti-Bush Administration and anti-regulatory reform than they've indicated here. So I've compared the second Clinton administration with the first Bush administration, number of rules issued and time of review. This is from our database of rules reviewed by OMB. The 48 days on the slide is how long it's taken us to review. You can see that in the Bush administration there's actually been more both economically significant and not economically significant regs issued in less time compared to the last four years for the Clinton Administration. This shows that "ossification" and "procedural and analytical complexity" has not slowed downed the rate of rulemaking in the Bush Administration. There was no major change in the number of regulations issued and the time it took to review them between the two Administrations. Again, they're operating on the same Executive Order.

Seventh Slide: Results- Costs and Benefits

Under results, again, let's look at the actual output in billions of 2001 dollars. In our report to Congress that's required by the Regulatory Right to Know Act that we've been doing since 1997 – since Sally made me do it back in 1997 and then she re-edited it so it actually contained prose. See, economists are really disadvantaged because we like numbers, and lawyers love prose, and they're so much better at it, so when we get up on a debate with them we usually get wiped out. So I'm going to stick with the numbers. This is s very interesting. These are – over the last 10 years, the range of benefits based on the regulatory impact analyses that we have looked at. These RIAs contain both cost and benefit estimates. So this leaves out the unquantified benefits and it leaves out costs of regulations that don't have benefits. In other words these are just regulations that have costs and benefits quantified to a pretty large extent. Benefits are 68 billion to 260 billion, a wide range. There's a lot of uncertainty in benefit estimation. Costs range from 35 to 40 billion. And just last year, the benefits ranged from 13 billion to 109 billion, and costs were about 4 billion. Now, these high numbers are due to EPA regulations. I hope

that Tom and Sid are happy with that – (laughter) – especially in the environmental air area.

Eighth Slide: Results-Net Benefits of Regulations

These numbers, by the way, are in our latest draft report to Congress which came out just last week when I was on vacation, so I hope these numbers are still correct. In that draft report, we've also looked at regulations going back a little bit. For the first time we've gone back to 1981 to look at the costs of regulations. It's the first time that someone has actually looked systematically at the costs of regulations back in the early Reagan Administration.

There are a lot of cost savings in these numbers because of deregulation. But I only have benefits back to 1992. This is the third of charts from the report. It's a little bit misleading because for 1993 and 1995, there should be negative numbers. This slide didn't come out exactly right for some reason. This is a slide of the net benefits of regulations, major rules from 1992 to 2004. It includes regulations that have costs but no benefit, so it actually understates the net benefits. Overall, benefits are three times the level of costs. And you can see that 1992 and 2004 are very high benefit years. These high benefits are due to EPA regulations. 1992 was Bush administration 41, and 2004 is 43. , This is a draft chart, and there are a couple other charts like it that are in our report to Congress. It's out for comment, so we'd love to hear some comments about it, and we will take them into account at the final stage.

Ninth Slide: Academic Evaluations

Let me go to academic evaluations. Now, ideally, of course, you would want a randomized control study, or at least a natural controlled experiment, but alas we obviously do not have that. Scott has struggled to try to come up with something, but we don't have that kind of evidence. But let's do some thought experiments. How many of you think there's been no ossification with the first two years after 9/11? Do you think that regulations are of higher quality? I'm not going to say what I think, but I want you all to think about it. What about the independent agencies? They have less oversight, less requirement for RIAs. Do they do a better job? What about the IRS? A lot of people don't like some of the IRS regulations. We don't really review those regulations. They're not required to do that kind of analysis. Thought experiments.

Tenth Slide: Academic Evaluations

But let's go on – there's a recent paper by Harrington and Morgenstern of the "Resources for the Future," which surveys evaluations of regulatory impact analyses. They divided evaluations into three types of categories. The first one is control tests, but that's a misnomer. That should be content tests. They cite Bob Hahn's article which uses a checklist of good qualities for regulatory impact analyses. Did they do alternatives? Did they quantify all benefits? Did they quantify costs? Did they use a proper discount rate?

Those studies have found that the regulatory impact analyses are of an uneven

nature, and he's a little bit critical of them. The second approach is an outcomes test. Here they cite Harrington, Morgenstern and Nelson's famous article in the Journal of Policy Analysis and Management in 2001 where they looked at the ex ante versus ex post regulatory impact analyses and asked were costs overestimated? Now, the critics of regulatory reform always point to this article saying that it showed that costs were overestimated ex ante compared to ex post studies. Ex post they were much less. But what you really have to look at is cost per unit of benefit. When you look at that, there's no overestimation, and that's because – and this is in the article – and that's because not only do the agencies overestimate total costs, they also overestimated total benefits. So when we look at costs per unit of benefit, it's about the same. The one agency that may overestimate costs they found was OSHA. The reason is that there's not full enforcement and that seems to reduce the overall costs in the ex post case. And we have John Mendeloff here who also did a study of OSHA recently with a colleague and looked at whether OSHA overestimated benefits, and he did find they did significantly overestimate benefits in looking at the ex post versus the ex ante situation.

Another thing I just noticed while doing some work on the ergonomic standard -- the ergonomic standard, as you know, was repealed by a Congressional Review Act Resolution. It's interesting that since the repeal the number of ergonomic injuries has declined at a more rapid rate than OSHA predicted would occur with the regulation. So I don't know what that means, but John Mendeloff probably has already studied it.

And finally, Scott Farrow has already talked a little bit about the so-called function test. Do regulation review programs really make the output better? , So I won't really go into that. But Dick Morgenstern did edit a book in 1997 – which is quite influential; 12 case studies of EPA regulations where each study found that there was some material improvement in the regulation as a result of the analysis and the use of the analysis at EPA. And in particular, they cite the Lead Phase-Down case and CFCs as being very good examples of where analysis improved the outcome.

Eleventh Slide: Academic Evaluations

Several other people have cited their own work, so I might as well cite mine. I wrote an article in 1986, which looked at the cost per life saved, which has already been mentioned, of regulatory rulemaking. It has been criticized by many, many people in the last – for some reason just the last five years. The first 15 years no one seemed to criticize it. They just quoted it. But now Lisa Heinzerling – who is at CPR as is McGarity and Shapiro, and Richard Parker at Connecticut Law School, have criticized my work as well as others that have done similar work on what are called league tables: rankings of cost per life saved. So I responded with a paper that was published in the Journal of Risk and Uncertainty in 2003, where I look at the cost per life saved implied by 76 regulations issued between 1967 and 2001, and also responded to some of the nitpicking criticism of the law journal article, which was 100 pages long with 500 footnotes. And so I wasn't able to check every single footnote, but the ones I did, they didn't always seem to support what she was saying, but anyway. I guess that happens when you have 500 footnotes to an article.

What I found from this paper (Morrall "Saving Lives: A review of the Record "in *the Journal of Risk Uncertainty*) that's relevant to this group here is that I found no significant trend – time trend in the cost per life saved. So does that say that we haven't been effective over this period? Well, I would say no, for two reasons. You would expect the cost per life saved implied by government regulations, if they're being done rationally, to increase over time because you would start in the early years with the most cost-effective regulations.

You would hope Congress and the bureaucrats and all of us would address the worst cases first, and I think they probably – probably have. Second, as income increases, and given that there are pretty good estimates in the literature by Viscusi and Aldy that the income elasticity of the value of statistical life is .5 to .6, you would think that over time as income increases the demand for more and more protection, more and more safety would increase and that should also lead to a higher – if government is responsive, implied cost per life saved estimates over time. , But that's not occurred. So I think that means that we have done a better or more cost-effective job regulating. , We have actually done better over time.

Twelfth Slide: Academic Evaluations

Finally, the article made some recommendations for four regulatory actions that would save lives very cost effectively based on my own calculations. One of the criticisms of my original article was that it was just – it was like an article that just said, no, these are all – these regulations are from a limited sample of only regulations that were issued or were about to be issued. What about all the regulations that have not been issued that should have been issued? So I went around looking for some, and I found some, some of them in agencies' calculations and some of my own.

This led to prompt letters, which is an innovation of John Graham, where OIRA writes to the agencies and says, what about regulating in this area, or what about doing something in this area? We think it might be very cost effective or it might be useful to look into it. So we have sent three prompt letters and agency action has occurred in all four. That's reducing trans fat with labeling from FDA; AEDs in the workplace. There's been no regulation but there's certainly been activity and advocacy of AEDs and guidance from OSHA. There has been dietary guideline changes that promote Omega-3 intake found in oily fish, And then bar codes for drugs and biologics used in hospitals is also very cost effective. So what I think this indicates is that good analysis can lead to and speed up good regulation.

Thirteenth Slide: Conclusion

So let's conclude. Thirty years of trying to promote the public interest through good analysis and regulatory review has not been in vain. I've been doing it for 30 years. So long live procedural and analytical complexity.

DR. KERWIN: Let's start with Jim Tozzi first.

Q: It seems to me that ossification is a result of a fossil-like mechanism in existence, and that fossil-like mechanism is the APA. I say this because we're approaching the 60th birthday of the APA, and when I got in the regulatory business it was 15 years young. At that point in time there was no doubt that the end of the public comment period and the final rulemaking was synonymous. Things moved very fast when you end the comment period, and you got a rulemaking.

What has happened now some 40 or 50 years later, there's no doubt there's a big extension between the end of the public comment period and when the rule goes out. And what has occurred is that there's a lot of stakeholders that want to play in the rulemaking process between the end of the notice and comment period and when the rule comes out. That occurs for two basic reasons. First, technology has brought instant data to all of us constantly, and the e-docket process is going to make it even more profound. Second, the agencies, as a number of you said, are bypassing the APA, even legally because stand-alone reports are not subject to APA review. They have huge regulatory implications.

So I think the question before the group is, stakeholders want to play in the regulatory process after the notice and comment. A lot of these statutes that you say are ossification really allow stakeholders to participate in the rulemaking process after the notice and comment period. And I think to – so what you call ossification I would call rejuvenation.

DR. KERWIN: Tom, it looks like you want to comment.

TOM MCGARITY: Sure. Well, I think you're right empirically that lot of the time consumed – I don't know if that's ossification or whatever – between the notice of proposed rulemaking, let's start that as a beginning point; maybe even between the time that the agency sort of lists it on its regulatory agenda and the time that a final rule is promulgated and survives judicial review, a huge portion of that is the time between the end of the notice and comment period and the publication of the final rule. That is a large hunk of the time; always has been since the 1970s. Part of that was documented up above in the earlier presentation.

I don't think that is largely attributable to people taking second hits at the rule. I'm not sure that's what you meant, but if what you meant was people are coming in and they're lobbying the agency after the end of the comment period and slowing things down there, I attribute it much more to the difficulty that the agency has in analyzing the comments and in responding to each and every one, knowing that they're going to be subject to what I call a blunderbuss attack on judicial review, and since all important rules are judicially reviewable you don't know what some industry or environmental group is going to find with your response to a particular comment, so you're going to answer each one in huge detail, and I think that takes a lot of time.

DR. KERWIN: Okay. I'm going to take two more. And let's see, Sally, and then the individual behind her.

Okay. Sally, you want to go first?

Q SALLY KATZEN: Thank you. And I'd like to address most of my comments to the person who invoked my name most frequently, John – (laughter) – for whom I have a lot of respect. But I have a couple of questions.

The net benefit table that you showed, the slide, am I correct that that is based on the quantified costs and benefits?

JOHN MORRALL: Yes.

Q: And that being the case then, those regulations that were justified on qualitative grounds or included as part of their justification qualitative grounds, are simply missing?

JOHN MORRALL: Well, not quite. If there was some quantification of costs or benefits, they would have been included. But not the –

Q: But if –

JOHN MORRALL: – qualified amount of benefits.

Q: If it's qualified.

JOHN MORRALL: If you can't measure it –

Q: And therefore –

JOHN MORRALL: – you can't include it.

Q: Therefore, that is simply costs and benefits that have been quantified and then monetized, period, and wipes out all of the other factors that might be considered. I think that's important to note. And I would say that it was not just the Clinton years in which there were a lot of qualitative benefits derived from the regulations, but having reviewed your reports to Congress I note that virtually every homeland security regulation that has been cleared by this administration has been missing either benefits or costs, and that you have not imposed the cost-benefit analysis on homeland security regulations, which may be why you asked the intuitive questions, do you think they're any good.

Finally, let me just note that the decline in the reported incidents of repetitive stress injuries may be a factor of the fact that OSHA has discontinued — collecting information – (laughter) – on that, having eliminated the paperwork requirement because there are no standards, and therefore we don't know what the incidents might be.

Thank you. (Laughter.)

DR. KERWIN: John, you want to respond?

JOHN MORRALL: Well, the last point, no, that's not quite correct. The ergonomic data does go up through 2003, and I took it off their website, and it is being reported. Obviously, you can't measure things you can't measure and so I suppose I should have pointed out that there are qualitative benefits as well as qualitative costs. I think those are the main reasons. This is just what can be measured. And just as there are imperfect problems with accounting federal register pages or accounting changes in the code of federal regulations, this is what we have, this is the data that's been provided.

About homeland security, very, very briefly, we have tried our best to get agencies to quantify costs and benefits, and they've been working hard at doing it. They're much better at quantifying the costs obviously. If you can – and we've asked in our report to Congress if anybody can come up with ways to quantify the benefits of some of these homeland security actions which are often compelled by public opinion and Congress, please give us comments. We have asked for that. It's very difficult to quantify these very small, narrow risks, so that is a big problem, and I think it does show though that regulatory impact analysis and strong regulatory oversight, when it can be used, can provide beneficial results, and when it's not used, look what happens.

DR. KERWIN: Okay. One last one.

Q: Comment for Sidney Shapiro. You mentioned the CPSA, the consumer Product Safety Act, sort of like the regulatory scourge of hell for regulators. And having spent the early part of my career there, a lot of the cost-benefit analyses were based on qualitative arguments, both the costs and the benefits, and those arguments were based on reasoning based on economic theory, so economists can also reason, and attorneys don't have a monopoly on reasoning.

Also, one thing I think Dr. Morrall would probably want to defend this a little bit better, if you look at A4, while the A4 circular does ask you to try to quantify if possible, they're trying – they don't want you to do what I call a Virginia Tech and come up with some hokey numbers. If you can do a qualitative argument, they'd prefer you to do that. But he should defend that one. I just wanted to do that as a point of order on the CPSA.

DR. KERWIN: Fair enough.

Sid?

SID SHAPIRO: Was that more comment than a question I take it?

Q: I'm not going to stand in front of all these people and their lunch. (Laughter.)

DR. KERWIN: There is a panel that follows the lunch in the room where we're having lunch and then we'll be back up here. But I have folks outside this door to your right – to my right, your left, that'll direct you down to Mary Graydon Center Rooms 5 and 6. That's the University Center. If you get lost, just ask for Graydon Center and people will direct you.

(End of panel.)