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OA/ID Number: 29163
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OIRA Reauthorization (1990)

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Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Paper	OIRA Reauthorization: Next Steps (2 pp.)	n.d.	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: OIRA Reauthorization (1990)

Open on Expiration of PRA
(Document Follows)
By JF (NLGB) on 5/12/05

Date Closed:	12/10/2004	**OA/ID Number:**	29163-007
FOIA/SYS Case #:	1998-0004-F[1]	**Appeal Case #:**	
Re-review Case #:	2005-0426-S	**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
AR Case #:		**MR Case #:**	
AR Disposition:		**MR Disposition:**	
AR Disposition Date:		**MR Disposition Date:**	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P-3 Release would violate a Federal statute [(a)(3) of the PRA]
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
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(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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OIRA REAUTHORIZATION: NEXT STEPS

Top-levels in the Administration have taken a firm position against weakening Presidential regulatory oversight authority through undesirable disclosure requirements, even at the risk of losing Paperwork Reduction Act disapproval authority and possible funding for OIRA.

Darman and Gray personally explained to Sam Nunn that any reauthorization bill containing regulatory disclosure provisions was unworkable and unconstitutional, and would be vetoed. (Darman has sent two veto letters to Chairman Glenn.)

Governor Sununu and Gray explained to Chairman Conyers (and Gray later explained to Conyers' staff, and then wrote two letters to Conyers and Ranking Minority Member Horton) that an administrative policy of similar disclosure provisions was unacceptable.

Darman stated to Sam Nunn that the President can constitutionally and will continue regulatory oversight and, if OIRA is not funded, transfer this Presidential function to another office, and that Congress and the public will lose more from the loss of OIRA oversight functions than the President.

There is a counter-attack. Chairmen Conyers and Bingaman (and their ideological staff) have escalated political rhetoric; staff to Senator Sam Nunn (who are working to preserve OMB authority under the Paperwork Reduction Act) seek support from the Administration; and OMB staff, as a consequence, seek guidance on how firmly we should hold to our position supporting Presidential prerogatives.

Just at the time the Administration has finally taken a firm position is not the time to initiate compromises. Premature (and unauthorized) agreement with the House to a disclosure "side-bar" agreement has permitted the Senate to whip-saw the Administration into an untenable public position.

OIRA, through its paperwork and existing regulatory disclosure procedures, is the only "window" to EXOP regulatory and other executive oversight that Congress now has. Small business and others burdened benefit from EXOP paperwork oversight. Through a weakening or elimination of OIRA, only Congress and the public lose.

The issues and effort by those seeking to weaken OIRA are serious. The controversy is fed by environmental and AFL-CIO efforts, supported by disgruntled agency staff, to trim Presidential oversight of health, safety, and environmental regulations.

Unless, however, democratic congressional leadership become personally involved, such an effort to trim Presidential prerogatives is not a priority congressional issue (except to Congressman Horton, who is personally committed to the Paperwork Reduction Act, and OMB oversight of agency information collections).

<u>There is no need to move quickly</u>. We have taken a strong public position. We should talk and negotiate, but not start compromising until long-term, effective reauthorization legislation is agreed to.

In the next two weeks, Senator Kohl replaces Bingaman as Subcommittee Chairman. Chairman Glenn, however, will try to keep Bingaman as the activist spokesman for the OIRA reauthorization.

We need time to assuage and work with Congressman Horton to rebuild his confidence and support.

Sam Nunn is supporting the Paperwork Reduction Act out of loyalty to former Senator Chiles. Nunn needs Administration support on many other serious matters involving defense; high-level negotiation will assure his continued support.

We need to continue to work with the principles to reach a desirable conclusion. Neither Glenn nor Conyers is invested; Bingaman is leaving (but still interested, at least in a short OIRA reauthorization period). Nunn and Horton support the Paperwork Reduction Act because of the help it brings valued small and other business constituents.

<u>We need to react to the counter-attack without compromising our existing position</u>. We need to change the terms of negotiation. We can and need to take charge of what will happen with OIRA's reauthorization. Presidential regulatory or other oversight authority should not be held captive to some relatively trivial reauthorization; maintaining OMB (and OIRA) appropriations is only a matter of executive commitment. (There exists small business and other support for continued regulatory and paperwork oversight by OIRA.)

We should not be on the defensive concerning the role of OIRA. EXOP has an obligation, right, and need to understand and control regulatory policies adopted by line agencies, and to coordinate between them. The public press concern over "reregulation" points out that the agencies lack ongoing, effective, Presidential policy guidance on what to do (and what not to do).

As the recent note from the President suggests, the President needs to state publicly the need for efficient and sensible regulations that are not unreasonably burdensome; the need to have agencies work with EXOP in a timely and cooperative manner to coordinate regulatory actions; and the ongoing responsibility of OMB to assure that this happens.

The President could state this position in a memo to the heads of agencies establishing a more active role for the Vice President's Cabinet Council on Competitiveness in resolving regulatory issues.

Any subsequent OMB issuance of disclosure and other regulatory review procedures should be tentative, non-categorical, to assure careful and workable compliance.

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From Frank Hodsoll to John Sununu Re: Decision Memorandum - OIRA Reauthorization: Next Steps (9 pp.)	5/10/90	~~P5~~	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 10, 1990

MEMORANDUM FOR: GOVERNOR SUNUNU
DICK DARMAN
BOYDEN GRAY

FROM: Frank Hodsoll
Jim MacRae
Jeff Holmstead

SUBJECT: Decision Memorandum --
OIRA Reauthorization: Next Steps

I. ISSUE

Should the Administration (A) refuse to discuss Executive Branch regulatory review procedures with Congress, or (B) enter into "discussions" with the Senate and House on the nature of a unilaterally issued Executive Branch memorandum/bulletin/ executive order that would restate the 1986 Gramm memorandum and set out other "benign" OIRA regulatory review procedures that we can live with?

II. ACTION FORCING EVENT

Thanks to Senator Nunn's intervention, markup of the Senate version of OIRA reauthorization (S. 1742) has been postponed, most recently from May 8. The next scheduled Committee markup (not necessarily for OIRA reauthorization) is May 23, but Nunn's staff informs us Bingaman may try for markup the week of May 14. Chairman Glenn's staff has said they will not move forward to markup without Democratic unanimity.

Nunn's Staff believes that forward movement by the Administration will be needed no later than the end of this week if we expect Nunn to continue to work with us across the board, and not just on the bill's paperwork provisions.

Although Nunn has been primarily concerned with certain paperwork review provisions in S. 1742, he has also tried to work with us to remove the bill's unconstitutional disclosure provisions. After being pressured by the AFL-CIO, however, he has said that he is in favor of more disclosure than is currently required under the Gramm memorandum. He nevertheless remains sympathetic to our "practical" concerns about the disclosure provisions, and is probably prepared, if he thinks the Administration is being reasonable, to help us in Committee and on the Floor on these matters.

According to a Nunn staff memo, Nunn wants to give us a reasonable chance to "complete any on-going development of a substantively enhanced and more formal 'Gramm Memorandum,' or offer any other alternative, before focusing on the practical problems" which S. 1742's disclosure provisions present.

III. BACKGROUND

A. State of Play

OIRA's last reauthorization (in 1986) expired September 30, 1989.

House

Last year, House Government Operations Committee Chairman Conyers requested a block on FY 90 appropriations for OIRA pending reauthorization; the House Appropriations Committee was prepared to accede to Conyers' request. Conyers, however, withdrew the request based on his belief that he was reaching a "side-bar" agreement with the Administration regarding regulatory review procedures in return for his reporting out an acceptable bill. (It should be noted that Glenn had written the Senate Appropriations Committee urging that OIRA funds not be cut off.) Conyers and Ranking Minority Member Horton reported out what is in large part such a bill (H.R. 3695) on March 13, 1990.

Notwithstanding Conyers' belief, the "side-bar" proved unacceptable to the Administration. As Boyden Gray wrote Conyers and Horton on April 30, the "side-bar" would "seriously interfere with the President's constitutional duty to supervise the Executive Branch," and "fundamentally disrupt the President's exercise" of these responsibilities.

Conyers and Horton wrote Senators Glenn and Roth on May 2, indicating the White House had, in their view, "rescinded" the "side bar" agreement. They stated this "about-face... is especially troubling when you consider that the agreement was negotiated with OMB, the agency with responsibility over OIRA and with coordinating Administration policy on all legislative matters." The letter also stated Conyers-Horton's view that these facts called into question the Committee's ability to work with the Administration on other matters.

It should be noted, however, that the need for Governor Sununu and Chairman Conyers to speak on these matters had been communicated to Conyers prior to markup. Hodsoll told Conyers' staff on March 12 that there were problems with the "side-bar" that needed to be discussed between principals. When asked whether this meant the Administration was going to break the deal, Hodsoll said he couldn't speak to that, but that there needed to be a conversation between principals. Conyers, nonetheless, avoided returning the Governor's telephone calls notwithstanding repeated efforts directly and through staff to get him to do so. Conyers finally met with Sununu at the White House a few weeks after Conyers' Committee had voted to report out the bill.

Senate

The Senate Committee on Governmental Affairs has for the past several months been discussing S.1742 (produced by Senator Bingaman). S. 1742 is considerably worse, from our point of view, than the House bill and "side-bar." So far, with the exception of Senator Nunn, Senate Democrats have refused to consider regulatory review procedural requirements outside statute (a veto item for us).

Senator Nunn and his staff have, for the time being, focused primarily on retaining OMB authority under the Act to review prior paperwork approvals every three-years, and approve or disapprove information collections in regulations. Darman and Gray visited with Nunn on April 27 to stress our difficulty with S. 1742's disclosure provisions. Darman and Gray made clear that the current version of S. 1742, if passed, would result in veto.

Senator Bingaman wrote Nunn on May 4 that he would not accept the more important aspects of the Nunn amendments affecting small business, but Nunn's staff believes that Bingaman will probably accept virtually all of the small business amendments in the end. Bingaman also stated in his May 4 letter that he hoped Nunn's "ongoing discussions with the Administration would not prevent the Committee from reporting the bill."

Bingaman will not be a Member of the Senate Governmental Affairs Committee after May 16; Bingaman is moving to the Committee on Labor and Human Resources. Senator Kohl is expected to become the new Subcommittee Chair. How Kohl and Bingaman will share responsibilities for OIRA reauthorization is not clear, but Glenn staff reports that Glenn is likely to let Bingaman present his case even if off the Committee. Kohl's personal position is unknown, but his staff is very much in favor of the current S. 1742, and it has evidently been agreed that Kohl will keep the members of Bingaman's Committee staff who drafted S. 1742. While we should contact Kohl and learn his interests and priorities, Glenn's and Nunn's staff are pessimistic that Kohl will take on Bingaman's S. 1742 in our favor.

Glenn's staff has in the past indicated interest in the Administration agreeing to an Executive Order setting forth our regulatory review procedures. This was first suggested as something that might be explored at staff level; but when

Director Darman asked Glenn what he thought of the approach, Glenn said he was not interested. When Senate staff since raised this matter with Hodsoll, Hodsoll told them the only way to begin an exploration of this issue, in light of Glenn's reaction to Darman, was for Glenn to call Darman. We are told by staff that Glenn is considering doing so. Such an Order is, however, likely to be acceptable to the relevant Members (and staff) only if it goes beyond the 1986 Gramm memorandum.

B. Substance

The principal problems with the current House and Senate bills are:

House (H.R. 3695)

- Automatic reapproval (*de facto* permanent approval) of information collections contained in existing rules (instead of regular reviews of these collections every three years to see whether they are still needed, non-duplicative, or not unnecessarily burdensome). This would eliminate OMB's ability to require an agency to propose changes in existing regulatory paperwork. (This provision is objectionable to small business.)

- The possibility that Conyers may seek disclosure provisions in statute, now that we have made it clear that we will not negotiate a "side-bar" agreement with Congress on Executive Branch regulatory review procedures. (This is a strictly Presidential prerogative under the Constitution.)

Senate (S. 1742)

- Statutory disclosure requirements, more burdensome than those in the House "side-bar," that (i) require simultaneous (as opposed to after publication) disclosure; (ii) extend the requirements to all OIRA reviews (not just regulatory reviews); (iii) require agency heads (including the President with respect to EXOP activities) to disclose all written materials involving their agencies' activities under review by OIRA; and (iv) extend the requirements to all internal OIRA decision memos.

- A requirement of a budgetary line item within OMB's budget for OIRA's Paperwork Reduction Act efforts (effectively denying use of OIRA funds for regulatory review) and placement of OIRA authority in the hands of the Administrator (rather than the OMB Director).

- o Restraints on OMB reapproval every three years of information collections contained in an existing rule.

- o Retention of ambiguous standards for OMB disapproval of information collections in proposed rules, and expansion of such ambiguous standards to OMB disapproval of information collections in existing rules. This is designed to allow litigation of OMB disapprovals of information collections in new or existing regulations.

IV. OPTIONS

A. Work with Congress to secure our objectives, but do not discuss with Congress any Executive Branch document that would provide unilaterally or otherwise for the procedural safeguards on regulatory oversight that Congress wants.

Pros

- o This option avoids our getting on a slippery slope of agreeing to additional disclosure of Presidential regulatory oversight and then having the Congress want more either in current negotiations or at the next OIRA reauthorization.

- o It avoids any "discussions" or "negotiations" with Congress on those matters that are the President's prerogative.

- o It prevents further legislative linkage of the Paperwork Reduction Act with Presidential regulatory review; i.e., it prevents this legislative OIRA reauthorization being used to limit Presidential regulatory oversight.

Cons

- o If we were to pursue this option, we would lose Senator Nunn's support, except with regard to small business objectives. This would mean, almost certainly, Senate passage of a bill requiring veto and probably amendment of the House bill to include similar provisions.

- While we could probably sustain a veto of such a bill, if it passed both Houses, OIRA's appropriations ($4.2 million in FY 91) would be at risk; it is also possible (based on staff threats) that the Appropriations Committees might insist that no OMB funding could be used for regulatory review. (N.B. While this would prevent OMB from conducting regulatory review, such review could be lodged in some other part of the Executive Office.)

B. Develop an "understanding" with Congress on an Executive Branch "unilateral" action regarding regulatory review procedures and acceptable legislation regarding the Paperwork Reduction Act and OIRA reauthorization. This option, which we would pursue while working with the appropriations committees to reduce the risk of a cut-off of OIRA's funds should this Option fail, could proceed along the following lines:

- OIRA develops a draft OMB Bulletin (to be signed by the Director) which (i) restates the 1986 Gramm memorandum, (ii) applies Gramm provisions to the agencies, (iii) includes certain other non-controversial procedures that OIRA currently employs, (iv) adds deadlines for OIRA review, and (v) adds disclosure of agency reasons for changes (without attribution of source) between a rule as initially published and the final rule. (N.B. OIRA currently complies with (i) and (iii); (ii) evens OIRA's playing field vis-a-vis the agencies; (iv) and (v) could be added without substantially changing OIRA's way of doing business.)

- Following Administration clearance, the Administration would sell to Nunn its potential issuance of such a Bulletin as an alternative to the disclosure provisions in S. 1742. If Nunn agrees, we would make sure the Senate Republicans are on board. (N.B. It may be desirable not to surface the elements of such a Bulletin all at once, so as to provide negotiating room.)

- If Nunn and the Senate Republicans come on board, the Administration would sell the proposed Bulletin to Horton. If Horton agrees, we would work with Horton to sell Conyers on the Executive Branch's unilateral issuance of a Bulletin as a substitute for the "side bar." (N.B. Conyers' staff has indicated to us that Conyers would like to find a way out that would let Conyers save face. Horton's staff has already broached an idea similar to that contained in this Option to Conyers' staff, which they are currently thinking about.)

- If Nunn, Senate Republicans, Horton and Conyers all agree with the approach outlined above, the Administration would then commit to publishing the Bulletin unilaterally if Congress passes a bill acceptable to the Administration (including a reauthorization that lasts more than two years).

- It should be noted that, in order to get an acceptable bill, it will still be necessary for the Senate to delete the OIRA line item and retain statutory authority in the Director (a matter of Senior Advisor veto threat) and fix certain other more minor provisions in the Senate bill. It will also be necessary to remove from the House bill the provision which precludes automatic three year review of agency regulatory paperwork burdens.

    - If we cannot get the OIRA line item and transfer of authority from the Director to the Administrator out of the Senate bill before it passes, we would retain our veto threat on that, hopefully with the understanding that this provision could be compromised in Conference. Similarly, we would work in Conference to remove the House prohibition on three year paperwork review.

- Finally, it would be desirable under this scenario to limit the impact of the Supreme Court's decision in Dole v. Steelworkers which interprets the current Paperwork Reduction Act as not providing for paperwork burden review in the case of information collections that are not designed for agency use. We would work with Senator Bumpers and others to add a provision to S. 1742 to counter the case on the Senate floor.

Pros

- This option gives us our best chance of preserving OIRA's role in both paperwork reduction and regulatory review.

- If successful, this Option would add no significant additional burdens to OIRA's current procedures regarding regulatory review.

- The unilateral nature of a Bulletin avoids the Constitutional problem inherent in any Executive Branch-Congressional "side-bar" agreement.

- The Option helps counter the growing perception that the Administration does not intend to follow the 1986 Gramm "side-bar" agreement and the concern that the Administration cannot be trusted in other ongoing negotiations.

- Even if this Option should ultimately fail to produce a satisfactory bill, it would show a good faith effort to find a reasonable solution. This should have a favorable impact on the appropriations committees.

Cons

- Even if we succeeded with this Option, we could in a short time be back in the same box, with yet additional demands being made.

- While the appearance would be one of unilateral declaration in a Bulletin, the reality would remain one of negotiation with Congress on a matter that is essentially within the President's prerogative.

C. Same as Option 2, but be prepared to raise Bulletin to Executive Order, providing Congress is willing to agree to a long-term OIRA reauthorization (say, 5-10 years).

Pros

- Raising the level of unilateral action in return for additional time before Congress would revisit this matter would work toward stabilizing the structure and process of regulatory review.

Cons

- Detailed procedural requirements are normally not put in Executive Orders, and this approach would elevate considerably the importance of procedures which are largely already defined by the Administrative Procedures Act.

V. DECISION

We suggest that the three addressees of this memorandum meet before the end of this week to resolve this matter so that we can communicate to Senator Nunn the Administration's position.

Option 1 ______________

Option 2 ______________

Option 3 ______________

cc: Bill Kristol