

Comments from Professor Peter Strauss on the Draft Report for the Science in the Administrative Process Project

I've read enough of Wendy's paper so far to be deeply impressed by its care and thoughtfulness. The only possible respect in which she did not follow her own good advice was by leaving the NRC section data to one person, a lawyer not a scientist -- I do wish she had had time to talk with some of the science people on the ground at the agency, on ACRS, etc. (I did not notice whether she had interviewed any CASAC members -- that, too, strikes me as useful given how often Congress has found structural provisions like these useful means for providing scientific integrity in the administrative process.)

I have a number of thoughts about the recommendations, which in general strike me as soundly based and sensible. Please make these suggestions as public as the committee's discussions will be.

1) Should there not be a general search-and-replace for OMB, substituting OIRA? Unless I am missing something, no other part of OMB is implicated here.

2) Recommendation IA1, lines 2-3 "... that meet or better OSTP's minimum standards. In addition, before proposing significant changes during the course of its review ... " The point here is that OIRA should not recommend changes without first having tested the science; as it reads, the peer review might not occur until after the changes :are made (and as I understand the [appropriate] convention, what OIRA does is to propose or suggest, not to make changes -- and ACUS should not be speaking otherwise).

3) Recommendation 1A3: Here, as elsewhere, the recommendation does not seem to anticipate the possibilities of redaction -- a document either will be disclosed or it will not be. Perhaps, instead, language on the order of "... directing OIRA to reveal factual/scientific elements of documents it generates in reviewing agencies' science-intensive regulations, limiting any claims of deliberative process or other privilege to those elements of them that might reveal broad policy concerns, classified information, [etc.]" In the following sentence, again, I would substitute "proposed" or "suggested" for "made." And I do not understand why the last sentence of the paragraph is limited to "not economically significant" projects. If it is thought that "economically significant projects" have already been addressed, there should at least be language on the order of "... Executive Order that, subject to the same limited exceptions regarding disclosure ..." Requiring that all communications be made in writing is dubious in general -- and perhaps especially so for matters as to which OIRA has little to say. This sentence is not limited to science-interfering communication, and strikes me as creating real efficiency issues for OIRA.

4) Recommendation IIA7 (strange internal numbering convention): Here as at other places, the diction suggests an action occurring only at or subsequent to decision. Why? E.O. 13563 already soundly counsels agencies to provide access to relevant scientific and technical findings to the extent feasible as part of the comment process. "In making science-based regulatory proposals ..."

5) Recommendation IIA8 -- same point as in 3, above. Only those portions revealing trade secrets should be kept private; I would be prepared to argue that a copyrighted study that is being relied on, to the extent that it does not reveal trade secrets, CANNOT be relied on unless is is revealed -- this is fair use; there is no argument I can think of that the market for purchase of such a study will be impaired by its publication in connection with the rulemaking, other than the market of people who want to participate in the rulemaking and (as is well known) in my judgment this is no basis for withholding it from public view.

6) Recommendation IIB10: Why not end the recommendation at "part of the public record." In my

judgment, the dissenting staff member's control over this important information should be limited to requesting that his or her name be redacted from the dissent. I can promise you that otherwise dissenters will encounter almost irresistible internal pressures to make no request.

7) Recommendation IIC12 As in 3) above, this recommendation should have the voice of limited redaction, not total exclusion, of documents.

Thanks for considering these thoughts. I am sorry I won't be able to be with you, and hope to hear what action is taken on them.

Peter