



Testimony of J. Robert Shull,
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before the
Subcommittee on Federal Workforce and Agency Organization
of the House Committee on Government Reform

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Thank you, Mr. Chairman and members of the Subcommittee on Federal Workforce and Agency Organization, for this opportunity to testify today about sunsets and reorganization. My name is Robert Shull, and I am the Director of Regulatory Policy for OMB Watch, a nonprofit, nonpartisan research and advocacy center that for over 20 years has promoted an open, accountable government responsive to the public's needs. I also coordinate Citizens for Sensible Safeguards, a coalition of labor, environmental, consumer, and other public interest groups with millions of members nationwide, which formed in the 1990s to stop the anti-regulatory components of the Contract With America and has remained active ever since to address policies that affect the government's ability to protect the public.

H.R. 3276 and 3277, the official subject of this hearing, are only two of several legislative proposals and a White House proposal that would dramatically transform the management of government programs. Because they are part of a larger trend, I would like to focus my remarks on the twin concepts of mandating automatic sunsets for government programs and giving the White House new powers to reorganize government programs.

Today, I would like to address three major points:

- (1) The basic approach being discussed today — power to shut down government programs through a mandatory sunset process, and power to push sweeping reorganization plans through Congress on a no-discussion, take-it-or-leave-it basis — will not meet the proffered goals of improving government management and could, in fact, make government less effective.
- (2) The specific sunset and reorganization proposals in H.R. 3276 and H.R. 3277 are particularly flawed ways of implementing the notional goals of those proposals.
- (3) There are better ways of achieving the goals of accountability and effective management of government so that federal programs can respond to public needs.

I. SHUTTING DOWN PROGRAMS THROUGH SUNSETS AND TAKE-IT-OR-LEAVE-IT REORGANIZATION POWERS WILL NOT EFFECTIVELY SERVE THE GOALS OF IMPROVED GOVERNMENT.

These proposals are not new, and I anticipate that we will hear today some species of the same arguments that have been proffered in the past in support of sunset and reorganization programs. Those arguments typically invoke principles like accountability and effective management that, at the right level of abstraction, are unimpeachable virtues. Nonetheless, the sunset and reorganization approaches are the wrong way to achieve those goals, and they suffer at the outset from a distorted vision of the role of government.

A. The sunset and reorganization proposals will not improve government programs to meet the public's needs.

Advocates of sunsets and take-it-or-leave-it reorganization invoke important goals of accountability, responsive government, and effective government management that are not well served by those approaches. In fact, the sunset and reorganization approaches can run counter to those goals.

Keeping government accountable

The sunset and reorganization approaches are not the best way to keep government accountable. The vision of sunsets is that programs will be forced to stop everything and plead for their lives on a periodic basis, such as the 10 years in H.R. 3277. Taking the advocates' arguments in their best light, the ideal is that programs will be forced to measure their effectiveness in the years leading up to a sunset date and will be forced to make a compelling case in order to continue to exist. Likewise, the reorganization proposals typically link reorganization plans with performance measurement data, which notionally measure programs' effectiveness. In each case, the avalanche of information triggered by the sunset and reorganization processes will, conceivably, leave us in a better position to hold our government accountable.

These approaches start from one correct premise: that information can help us hold government accountable. The problem is that, in each case, the information comes at an enormous cost. Forcing programs to divert their resources into proving the case for their continued existence means taking resources away from addressing the public's needs. In most cases, there is no need to prove that a program should continue to exist. Consider, for example, all the Department of Education programs that help families put their children in college; or the Occupational Safety and Health Administration, which is charged with keeping workplaces safe for the men and women in America who work for a living; programs that help the poor and disadvantaged find housing; programs that ensure at least one hot, nutritious meal for children in America's public schools; and on and on. There is no need to prove that we need these programs, and forcing programs to spend their resources to prove what we already know will waste resources which should instead be flowing to the programs' missions.

Moreover, the information produced by these processes could, in fact, be meaningless. Take the performance data that H.R. 3276 or 3277 would demand. These proposals would force performance assessments of many programs every single year. There would not be any way to conduct real performance assessments that matter and produce real, meaningful information for so many programs in any year, and the result would be one-size-fits-all, simplistic rubrics like OMB's Program Assessment Rating Tool. PART, as we now know from several years of implementation, is simply useless and is far more political than meaningful;¹ there is no basis for us to believe that any successor to PART, under these circumstances, could improve those results.

Even assuming that the Sunset Commission envisioned by H.R. 3277 or the ad hoc Results Commissions of H.R. 3276 could produce information that would be meaningful, there are limitations on the government's ability to collect the needed data. The Paperwork Reduction Act imposes serious limitations on agencies' ability to collect information of any sort — even information that is critically important to protecting the public health, safety, civil rights, and the environment. The White House Office of Management and Budget has unchecked powers to review agency information collections, even to the point of being able to change or pick and choose the questions that can be asked or rejecting an agency information collection outright. OMB could therefore politicize the information that would be used to make important decisions that the bills attempt to de-politicize by design. Another obstacle is the Data Quality Act, a piece of midnight legislation that creates a public challenge process that constrains agencies' ability to even *publish* information. Until these barriers are removed, there is little likelihood that H.R. 3276 and H.R. 3277 will yield the information we need to hold our government accountable.

Keeping government up-to-date

Another recurring argument in favor of the sunset/reorganization approaches is that we must keep our government up-to-date by deleting obsolete programs. The sunset approach disserves the goal of keeping government up to date in two significant ways:

- It is overbroad and wasteful. If there are obsolete programs that no longer serve any need, it would seem most appropriate to find some way to identify and respond to those squandered resources without wasting resources government-wide on forcing programs with proven and undisputed missions to prove that they serve real needs.
- It is a one-way ratchet biased in the direction of eliminating government programs. Government programs exist to address the public's needs. The goal of keeping government up-to-date means not just responding to obsolescence but also responding to unmet needs and emerging problems. Sunset may address obsolescence, but it does not even contemplate unmet needs. When we take the ideal of a

1. See Adam Hughes & J. Robert Shull, *PART Backgrounder* (April 2005), available at <<http://www.ombwatch.org/article/articleview/3022/1/369?TopicID=3>>.

responsive government as our starting point, the greater need is not for a sunset process but, instead, for a process of identifying unmet needs.

Keeping government efficient

There is little to argue with the ideal of efficiency: of course government should not squander the resources with which it is entrusted. Efficiency in the private sector typically refers to profit: businesses have an incentive to receive the highest possible revenues for the lowest possible cost, in order to realize the best bottom line. The bottom line is quite different in the public sector: what matters is less whether the programs currently in place are doing their work with a minimum of resources but, rather, whether our government is doing the most it can to address the public's needs.

When the public interest is the bottom line, all the arguments about efficiency turn on their heads. Costs do not matter in the abstract but instead in the context of government responsiveness. We must, therefore, be wary of any processes that, in the name of accountability or efficiency, come at the cost of reducing government's ability to meet the public's needs.

From this public-minded perspective on efficiency, the sunset and results processes turn out to be inefficient. The overbroad approach of government-wide sunsets will force all programs to plead for their lives—even programs for which there is no real question that we need them. The sunset process would waste government resources to prove what we already know, and the opportunity cost that comes from diverting resources away from meeting the public's needs are costs that we should not bear. Moreover, the fast-track, take-it-or-leave-it process of reorganization plans in H.R. 3276 will surely be efficient in some purely abstract way — after all, democratic deliberation is slow and rarely efficient — but it comes at the cost of democratic and responsive government, a cost that is too high for the paltry benefits from swift review of a Results Commission plan.

Keeping government effective

The primary argument for the reorganization authority of H.R. 3276 is that it will empower the White House to reorganize government programs so that they can operate more effectively. The truth in this idea is that organizing programs in the federal system can have enormous implications. Consider, for example, the case of the Federal Emergency Management Agency. Established as an independent agency — in part because the large amount of money it grants to the states was intended to be shielded, to the extent possible, from partisan politics — it was recently swept into the new Department of Homeland Security. The crisis of Hurricane Katrina has made clear that FEMA's resources were brought intact into DHS, but FEMA's mission was not.²

2. Bringing FEMA into DHS appears to have distorted its mission into a single-minded focus on terrorism at the expense of disaster preparedness. For example, "local officials complained that once FEMA's grant-making authority to state and local governments had been centralized in [DHS], you could get money for protective chemical suits but not for flood control." Elaine Kamarck, "Centralized Essentials," *American Prospect* Online, Sept. 22, 2005, available at <<http://www.prospect.org/web/printfriendly-view.ww?id=10346>>.

Many discussions about the size of government proceed as though size were all that matters. For example, Paul Light has tracked for several years what he calls the “thickening of government,” observing, for example, that the number of executive titles has grown from 17 in 1960 to 64 in 2004, and that the USDA has the “widest” department with 299 senior titles, compared to 173 at the Department of Commerce. The underlying fault of this approach is that it treats government programs and their growth as a single generic question divorced from any context. The generic approach treats all programs and programmatic growth across departments without regard for the specific context in which growth is meaningful. For example, the nature of the diverse needs addressed by the Department of Agriculture is incommensurable with the needs served by the Department of Commerce. What matters is whether we have a government best positioned to meet all the needs pressed upon it, not whether one department is bigger than another.

The generic, decontextualized approach encourages a devotion to streamlining. “Streamlining” or reducing the multiplicity of federal programs into a smaller number appeals to a desire for elegance but may not serve the needs of a responsive government that meets the public’s needs. The creation of the Department of Homeland Security and the establishment of the Federal Motor Carrier Safety Administration as a distinct agency are just two recent examples of an impulse to *expand* government, at least in terms of the numbers of agencies and political appointees, in order to better meet the public’s needs. In each case, those in favor of the new institutions argued that an urgent national need demanded dedicated resources to a responsive federal agency that could coordinate national efforts and address the particularities of a specific issue with the necessary expertise. Creating a new agency not only assures leadership for a particular issue but can also help to establish national priorities, such as the emergent need of greater homeland security after September 11.

Reorganization does not necessarily, however, produce better results. We have already seen how FEMA has been hobbled in part by its reorganization into DHS. The Federal Motor Carrier Safety Administration, for its part, has failed to produce the benefits expected by its redevelopment as a discrete agency; it has acted to make American highways safer by adjusting the hours of service requirements for truck drivers only because it was dragged into court and forced to do its job, and then it failed to do its job effectively (by actually *increasing* the maximum hours that trucking companies can force their drivers to work, to as much as 77 hours in a 7-day period). Structural issues clearly cannot be segregated from issues of substance, but they also cannot be a substitute for a commitment to make government address the public’s unmet needs.

B. The sunset and reorganization approaches proceed from the wrong starting points.

The basic premises of the sunset and reorganization approaches lead us to these misdirected proposals. For example, they take as a given that government can be treated as conceptually autonomous, as an end to itself without regard for the purposes or political contexts in which government programs are managed. They also assume it will be easy to import models from other jurisdictions and contexts — such as the sunset approach that is modeled on a Texas state government initiative, or the results commission proposal which is clearly inspired by the private sector CEO who has unrestrained power to shift resources — without considering the specific context of the American

federal government.

There are better ways to think of management reforms for the federal government. Here are just a few principles we suggest, based on OMB Watch's more than 20 years of experience in calling for an open, accountable government that is responsive to the public's needs.

- (1) Government in America is not independent of the people but is, instead, the embodiment of the will of the people. We use government institutions to pool our collective resources into forces strong enough to act against the larger forces that isolated individuals cannot surmount. FDR explained it best in a July 1933 fireside chat: "It goes back to the basic idea of society and of the nation itself that people acting in a group can accomplish things which no individual acting alone could even hope to bring about."³ The federal government is a powerful way for the people to "act[] in a group" on a national basis to meet national needs.
- (2) The unparalleled aggregation of resources that we have in our federal government entails a responsibility to use those resources to identify our unmet needs and to continue to act so that long-resolved problems do not erupt into new crises.
- (3) Government programs are purposive institutions created by democratically elected representatives and their agents to respond to the public's needs. Those institutions develop, over time, capacity for action and expertise; as the public's needs change over time, programmatic capacity and expertise often are deployed for additional or revised purposes, beyond or in addition to the original purposes that animated the creation of those programs. This evolution of government programs is an efficient way to use institutional capacities and expertise that are already in place to address emerging problems.
- (4) Social problems are complex, and government may need to attempt multiple approaches to solve them. When those approaches require a range of different competencies and distinct types of expertise, it may prove worthwhile to have multiple programs, even spread across multiple departments of governments or levels of government (federal, state, local), all charged with action on an issue.
- (5) Some populations are particularly vulnerable and may be so structurally disadvantaged that even programs that are effective on a national basis may fail to deliver their benefits to them. A national government has an obligation to serve the needs of the nation's

3. See FDR, Fireside Chat, July 24, 1933.

populace, at all social and economic strata, and may need to create additional programs that target the particular needs of the most disadvantaged or subordinated, even if other programs are already in place to address those needs for the larger population.

- (6) The American democratic system is unique and may not readily accommodate ideas that have proven successful in the quite different contexts of for-profit corporations, foreign nations, or even state or local government approaches here in the United States. The corporatist model of the free-wheeling CEO who manipulates and moves resources at will is particularly inapposite given the American principles of separation of powers, in which power is shared and lines of accountability are drawn between three coequal branches, and diffusion of powers, in which authority within a branch is carefully spread so that power is not concentrated too intensely in any single office. However thrilling the experience of a management reform initiative in some other jurisdiction, we must ask whether those initiatives will be appropriate in the American federal system and comport with the basic principles of responsive government, deliberative democracy, openness, and equity.⁴
- (7) Accountability means helping the people maintain control over their own government. Accountability should not, however, be the excuse for policies that divert government resources away from the important work of addressing the public's unmet needs. Given the risk that policies instituted in the name of accountability could come with costs that keep government from being responsive, it is important for any major accountability initiatives to build in reflexivity: checks that count the costs of accountability reforms, assess the performance of performance measurement rubrics, and make sure that reforms are not obstacles in the way of responsive government.

These principles should be the starting point for any serious consideration of government management and structure. They are basic considerations that are systematically ignored by the sunset and reorganization approaches. Ignoring them puts people at risk of losing the responsive, accountable government that they need and deserve.

4. At a minimum, we should at least know more about the experience of those reforms on the ground. A recent survey conducted for a National Conference of State Legislatures conference revealed that, of 45 states responding, 32 states had at some point instituted a sunset process — of which 16 still maintained those processes, while *an equal number reported having eliminated their sunset programs*. At least one state reported that the sunset audits were too costly for the low return from the process. See <<http://www.ncsl.org/programs/nlps/training/annmeet/annmt01/thesing/sld011.htm>>.

II. H.R. 3276 and H.R. 3277 WILL GET IN THE WAY OF A RESPONSIVE GOVERNMENT THAT MEETS THE PUBLIC'S NEEDS.

The sunset and reorganization approaches of H.R. 3276 and H.R. 3277 are wrong-headed. It should be clear, then, that these bills will not advance the goal of improving government services. As specific instances of the flawed sunset and reorganization approaches, these bills are deeply flawed. Both H.R. 3276 and H.R. 3277 would imperil the balance between the executive and legislative branches by concentrating power in the White House free of democratic accountability and would expose long-standing public protections to powerful special interests and industry insiders.

H.R. 3276, the "Government Reorganization and Improvement Performance Improvement Act," authorizes the President to establish a Results Commission, appointed by the President in consultation with Congress, which will review proposals submitted by the President for government reorganization. The Results Committee may amend or add to the proposal. The resulting proposal would then be fast-tracked through Congress with very limited time for debate and no option for amendments.

H.R. 3277, the "Federal Agency Performance Review and Sunset Act," requires agencies to regularly justify their continued existence. The bill establishes a Sunset Commission that will review executive agencies and programs on a ten-year schedule. Fortunately, H.R. 3277 does make an exemption for regulations that protect the environment, health, safety or civil rights. As with H.R. 3276, H.R. 3277 mandates an expedited vote, stymieing deliberation and forcing a "take-it-or-leave-it" vote with no possibility of amendments.

H.R. 3276 and H.R. 3277 are completely unnecessary; Congress already has the power to reorganize government programs when it determines the need to do so. Congress creates the agencies by statute in the first instance, and it revisits their effectiveness and continued existence each year through the budget process. The White House proposal embodied in these bills would usurp power from Congress by entrusting unelected commissions with important decisions about the structure and function of all government services. Such decisions are too important to be ripped from the representatives who have been democratically elected to make them. Decisions this crucial — about the priorities of the government on issues such as health care, retirement security, environmental protection, and even homeland security and defense — deserve the full debate and consideration of elected bodies. The proposal gives the White House the power to ram its proposals through Congress and imposes such severe limitations on debate that it would effectively muzzle elected representatives from speaking on these vital issues.

The language of both bills leave many terms only loosely defined, opening the door for a wide array of possible interpretations. What does it mean for a program to be "ineffective," "wasteful" or "duplicative"? Isn't it possible—if not likely—that more than one agency is necessary to meet a national objective, with each approaching a difficult problem with its own perspective and expertise? Whether a program is considered to be ineffective or wasteful is often dependent on the parameters set, and as is evinced during each appropriations process, lawmakers differ wildly on their perception of a program's success. Even the term "program" is loosely defined. The ambiguous language would allow the commission, appointed by the President, to determine a program's fate based on its own

agenda rather than some sort of neutral standard. Even the Congressional Research Service realized that ambiguous criteria for evaluation would hamper the success of the commissions. In a report last April, CRS explained, “General consensus among stakeholders and researchers might exist on how to make these determinations for some ‘programs’ But consensus might be lacking for other programs.”⁵

Though supporters claim that these proposals will simply streamline government and increase the effectiveness of agencies and programs. In reality, this proposal would decrease their effectiveness by distracting them from their mission of protecting the public. Agencies would be required to comply with requests from sunset and results commissions for data and any other information the unelected commissions demand — even information the agencies would have to create or obtain from scratch. The result is that agency staff would be forced to divert time, energy, and resources that should be devoted to their congressionally-mandated missions of protecting the public interest. Imposing yet more analytical requirements will induce paralysis by analysis.

Although H.R. 3277 has exempted the abolition of agencies to the extent that they enforce regulations that protect public health, safety, civil rights, and the environment, those agencies are still vulnerable to reorganization by the Results Commission. Thus, even though they would not face automatic expiration every ten years, they still would be at the mercy of a commission with the power to possibly restructure them into irrelevance.

The proposal for the commissions does not stop at bypassing Congress — it also seeks to exclude public stakeholders from commenting on the priorities of the government. Both the results and the sunset commissions would be exempt from the Federal Advisory Committee Act, thus freeing them from balance and openness usually required of official government advisory panels. This would create the ultimate opportunity to put foxes in the henhouse as industry lobbyists and other special interests would have the opportunity to pack the panels and fast-track their wish-lists as legislative proposals. There are provisions for stakeholder participation and public comment periods, but they are merely optional.

III. THERE IS A BETTER WAY.

We do not need H.R. 3276 or H.R. 3277. For every goal offered as a justification for those bills, there is a better way to achieve that goal and maintain an effective, accountable, and responsive government that meets the public’s needs. Here are just a few of the ideas we should instead pursue.

Keeping government accountable

Information is the key to accountability, and one simple—and much less costly—way to get there is to strengthen the Freedom of Information Act. For example, the OPEN Government Act, H.R. 867 and S. 394, would strengthen the implementation of the Freedom of Information Act and

5. Congressional Research Service, “Proposals for a Commission on the Accountability and Review of Federal Agencies (CARFA) and ‘Results Commissions’: Analysis and Issues for Congress,” updated April 1, 2005.

help the people get the information that they want. Moreover, we could remove existing barriers to the accumulation, production, and publication of information: chief offenders are the Paperwork Reduction Act and the Data Quality Act. Additionally, we could use institutions like the GAO and the Inspectors General, which have been proven to be effective in ensuring that our government programs are accountable and address the needs that called them into existence.

Keeping government up-to-date

An effective government is not necessarily small or large, but rather it is one that is responsive to the needs of its citizens. An assessment of government should not simply look for ways to cut corners but should also seek to identify and meet the unmet needs of the public. It should determine how to better invest in America not just how best to cut back. Sunset and results commissions only attack half of the problem. A real assessment of government would seek not only to eliminate and realign government programs but would also seek to fill the gaps or reinforce programs that are underfunded or underutilized.

Keeping government efficient

Government waste is not exclusive to government programs. A proposal that was truly committed to sussing out government waste and inefficiency should also seek to eliminate corporate subsidies that fail to benefit the public. Loopholes in the tax code also provide breaks to large corporations and special interests while failing to benefit the public.

Keeping government effective

The real test of government effectiveness is whether a program is meeting the public's needs. From enforcing environmental protections to creating schools, parks, roads and hospitals to providing services to needy or at-risk communities, the federal government is many things to many people. A one-size-fits-all approach to federal management cannot address the myriad functions the federal government is asked to serve. Evaluation of programs and agencies must be individualized and responsive to the mission and purpose of the specific program. Moreover, we must be sure that our management reforms are themselves effective: we must count the costs of cost-benefit analysis, assess the results of performance measurement, and sunset any sunset processes.

I thank you for this opportunity to address the committee, and I am happy to answer any of your questions.