Executive Regulatory Review: Disconnects Between Theory and Practice, and How to Repair Them

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Regulatory Checkbook
Washington, DC

APPAM 2002
November 8, 2002

THEORY

Time requires me to be blunt, so I will bluntly summarize the theoretical underpinnings of OIRA review as follows.

"Agencies are out of control."

OIRA was established by leading Democrats in 1980, most notably Sen. Lawton Chiles of Florida. I have in my files a long list of quotations from leading Democrats saying that the federal bureaucracy was out of control.

"Only the White House can control them."

The White House was supposed to break the infamous Iron Triangle. Any day now, that's going to happen.

"Put review authority in OMB and make the agencies run its gauntlet."

OIRA was created by the Paperwork Reduction Act of 1980. It opened for business on April Fools' Day, 1981 - an unusually auspicious date.

Finally, to make all this work we only have to

"Enforce the president's will with an iron fist."

It's all very simple.

PRACTICE

Reality is more complicated.

AGENCIES ARE ONLY OUT OF THE PRESIDENT'S OF CONTROL

Regulatory agencies behave rationally in accordance with their interests, which aren't always those of the president. Some agencies are harder to manage than others, especially those that attract "true believers." Some have characterized OIRA as brimming with "true believers." Were that only so. I haven't met a single impressionable adolescent, including my own three, who dreams of becoming an OIRA Desk Officer. I have met many who want to be EPA enforcement agents, like Steven Segal in "Fire Down Below."

THE WHITE HOUSE HAS WEAK INCENTIVES TO "CONTROL"

The White House has weak incentives to "control" agencies. Admitting the need to do so implies that the president made major personnel errors. Presidents don't make mistakes.

BUDGET RULES OVER ALL THINGS AT OMB

The budget rules over all things at OMB. Creating OIRA to oversee regulation did not change this. In early 2001 I sent a congratulatory note to a certain newly appointed OMB Associate Director. He was an OIRA Desk Officer with whom I worked in the late 1980s. I reminded him that he was obligated by OMB tradition to undermine OIRA at every opportunity. He replied, "You mean OIRA still *exists*?"

Within OMB, OIRA has only fair weather friends.

Putting regulatory review within OIRA was a marriage of convenience of the paperwork and regulatory review functions. It is true that they make sense to be together. Some arranged marriages prove to be successful, too. Twenty years later, however, they still sleep in separate bedrooms.

The "iron fist" approach to regulatory oversight quickly encountered the tempered steel of agency and Congressional power. In its heyday OIRA returned only a couple percent of the rules it reviewed. In many years, the number of rules returned could be counted on one hand after several digits had been amputated.

WHEN IRON FISTS MEET TEMPERED STEEL, BET ON STEEL

When iron fists meet tempered steel, bet on steel.

COMMON IMPLEMENTATION PROBLEMS (1)

Belzer's Trinitarian Axiom says that the maximum number of items a child, male spouse, or political appointee can remember is three. Today I am providing a list of 10. If you're going to break a hallowed rule, one must do so in a blaze of glory.

1. OIRA has a limited and progressively smaller review staff

The size of the OIRA staff has steadily declined over the year, from over 80 FTEs to less than 50. OIRA slots have been cannibalized for other OMB objectives. John Graham has begun to reverse this. It is slow going.

2. OIRA is transaction-driven, and hence inherently reactive

Other people fill your in-box in OIRA. They do an excellent job of it. There is virtually no time to plan for the next week, much less farther into the future.OIRA review occurs after decisions have been made

OIRA rarely sees a draft regulatory action until after an agency official has already made at least a preliminary decision. The strength of commitment to that decision makes all the difference for the effectiveness of OIRA review.

4. OIRA suffers asymmetrical rules of engagement

By rules of engagement I have two different dimensions in mind -- first, OIRA's relationship to the agencies it oversees, and second, OIRA's relationship to the public. With respect to the agencies, it has a strange mixture of authority and subordination. With respect to the public, its contacts are either required by law or prohibited by Executive order. It's Dr. Jeckyl and Mr. Hyde, squared.

5. OIRA has limited enforcement tools

OIRA can give in to an agency. It can persuade it to change course. Or it can return a rule for reconsideration. That's it.

Between July 1, 2001 and November 1, 2002, OIRA returned 21 rules. The pace has slowed down; 16 rules were returned during the first six months. Only one rule has been returned in the last six months.

John Graham also has resurrected the tool of writing letters for purposes other than returning rules for reconsideration. Five such letters have been sent, only two of them during the past 12 months.

6. OIRA enforcement has limited utility

The penalty on an agency for failing to comply with Executive order 12866 is unclear. It can range from extreme condemnation to equally extreme approbation. A rebuke from OIRA can be very embarrassing. Sometimes, it is exactly what an agency head wants.

7. **Presidential initiatives are exempt**

No matter which party is in the White House, the president's own initiatives are exempt from serious

internal review. If the president asks for your opinion, he's looking for affirmation, not information.

8. Congressional sensitivity is unbounded

Congress hates Executive review of agency rulemaking. It always has, and it always will.

9. Statutory/judicial deadlines trump OIRA review

If there is a statutory or judicial deadline, an agency can run roughshod over Executive review simply by delaying its submission until the deadline.

10. OIRA has limited political and public support

Like the rest of OMB, OIRA's institutional role is to say "no." Even the kindler and gentler OMB of the 1990s said, "Prove it." There are few organized interest groups in favor of either "no" or "prove it." This is compounded by the fact that OMB historically runs one of the worst spin machines in Washington. It is tough to compete in the Washington spin cycle when all you have to say for yourself is "no comment."

COMMON IMPLEMENTATION PROBLEMS (1)

In the interest of time, I will focus today on ways to make some headway on a couple of these problems. Most of them have no solution, however. Presidents will always exempt their own initiatives from serious internal scrutiny. Congress will always get huffy about OMB overseeing regulatory agencies. For some congressmen, beating up on the Executive branch is what they live for. With impending Republican control of both houses of Congress, we can expect much of this to be suppressed just as it was in 1993-94 when Democrats held all power.

MANY REMEDIES HAVE BEEN TRIED

Many remedies have been tried. Each had the best of intentions, but nevertheless went a bit awry, consumed by the Law of Unintended Consequences.

NEGOTIATE AND PERSUADE requires OIRA and the agencies to share the same objectives. They don't. This leads to *Let's Make a Deal* Syndrome, which undermines the role of impartial analysis. Worse, it invites contending parties to exaggerate their arguments. On several occasions during the first Bush administration, OIRA submitted to baseball-style arbitration over which party had the best science and economic analysis. After a short string of victories, agencies now refuse to play.

SECURING OIRA PARTICIPATION IN AGENCY WORK GROUPS enables an OIRA staffer to shape a rule and prevent serious conflicts later on. Agencies hate it. They consider OIRA staff to be the opposition, if not the enemy.

OMB's 1990 RIA GUIDANCE helped set government-wide standards for analysis, but compliance has been spotty. In 1996, OMB issued what it called a BEST PRACTICES DOCUMENT. Most of document actually consists of minimum practices--things like using the same baseline for estimating both costs and benefits; discounting both costs and benefits; and discounting them at the same discount rate. These are fundamental principles in benefit-cost analysis, not "best practices."

"Best practices" are things we aspire to, not things we intend to achieve. Any guidance that sets forth "best practices" establishes a ceiling for quality, not a floor. Ironically, the term "best practices" is found in only one place in the body of the 1996 guidance--in a section on the use of contingent valuation methods. It required agencies to use best practices. That is, it set a floor, not a ceiling.

RETURNing a rule TO SENDER is OIRA's most powerful weapon. It is public and transparent. It also can be

embarrassing. But, sometimes a rebuke from OIRA is exactly what an agency head wants. Returning a rule isn't such a great strategy when an agency heads want to be thrown into that briar patch.

NEW IDEAS

I want to focus today on some mostly new ideas. I will quickly dispense with two and offer a prediction about a third. Then I will focus on three for which I accept responsibility.

REGULATORY BUDGET

The regulatory budget idea isn't really new, but I include it here because it hasn't been tried. Its principal defect is that it doesn't have a prayer of working. It has all the defects of fiscal budgeting with a host of additional problems. In particular, it would create incentives for especially perverse strategic behavior. Imagine the outrage that would occur if OMB tried to block an agency from responding to a genuine problem because it had consumed all its "regulatory dollars."

REGULATORY ACCOUNTING

Regulatory accounting has been with us for a few years now. We're still waiting for something useful to come out of it. As long as its objective is to count the total costs and benefits of regulation, it will fail. OIRA is dependent on agency RIAs for these estimates. Many, perhaps most, of these documents are seriously flawed. Many regulations, such as those issued by independent commissions, have no RIAs.

I will now make a few cautionary predictions about

PROMPT LETTERS

And move on to

PUBLISHED TECHNICAL REVIEWS OF RIAs,

RIA BLUEPRINTS, and

INTEGRATING PAPERWORK AND REGULATORY REVIEWS

"PROMPT" LETTERS

This is an innovation of new OIRA Administrator John Graham.

A "prompt" letter is an open invitation for an agency to take regulatory action in a specific area. The agency

may have been unaware of the issue for any number of reasons, or aware of it but slow to act.

Dr. Graham has insisted that he is not opposed to regulation per se, and in fact in favor of regulation that is cost-effective or whose benefits justify the costs. Prompt letters clearly are an effort to prove to his critics that he is sincere. I am dubious. Some people didn't need to be persuaded of this. Others will never be persuaded.

Prompt letters also provide a way to overcome the end of pipe character of Executive review. They provide a tool for encouraging agencies to act, and for communicating early and publicly what OIRA thinks is important.

There is a significant danger that a "prompt" letter may be misconstrued as a blank check. It would be troubling if an agency responded by plowing forward with a regulatory approach that was ineffective, inefficient, or otherwise distasteful.

Worse, an agency could celebrate its good fortune by cutting short research and analysis. It might do this to avoid learning anything that could undermine the case for

regulating. Scientific and analytic stasis result if agencies conclude that ignorance is, indeed, bliss.

For any regulation covered by a "prompt" letter, OIRA needs to oversee its development very carefully to prevent this good intention from going awry.

OIRA issued eight prompt letters, none since June 7, 2002. No final regulation has yet been issued in response to any of these letters.

I will now proceed to my own recommendations.

First, let me note that OIRA staff develop significant expertise and insight, then hide it under a bushel. This reflects OMB tradition, the wealth and sensitivity of inside information it gleans, and the legitimate need to protect Executive branch deliberations.

But it undercuts the political legitimacy of Executive review, and it prevents OIRA from getting a fair hearing on the merits.

What can be disclosed without compromising legitimate confidentiality concerns? An evaluation of the technical merits of an agency's RIA.

PUBLISH TECHNICAL REVIEWS OF AGENCY RIAS

Publishing technical reviews would greatly increase transparency. They would provide a useful new way to expose poor analyses and to reward excellence.

Technical reviews also provide a logical basis for OIRA's regulatory accounting reports. I myself have been merciless in my public comments on these reports. So far, they have been merely clerical compilations of agency estimates with little value added. Technical reviews provide the foundation for truly informative reports.

At the top of my list of potential risks is the risk that OIRA could be wrong. Ten years ago John Graham called me after discovering that I was the author of an unsigned article on federal agency risk assessment practices in an issue of the *Regulatory Program of the United States.* He asked me if the article had been peer reviewed. I answered with well-inculcated OMB disdain, "John, OMB doesn't have any peers." If OIRA were to publish technical reviews of agency analyses, it would not be able to get away with this. I am very fond of this idea now that John is in OIRA and I am sort of an academic.

A second threat is that EOP officials might prefer that OIRA be less candid in its appraisals. There are many things policy officials are happy to know in confidence but would rather not see in print.

Third, a poor technical review could supplant the return letter as the most embarrassing outcome of OIRA review. Agency heads might prefer that rules be quietly returned instead.

Finally, praise bestowed on an agency analysis might be taken out of context and abused. OIRA might commend an agency for using a particular analytic approach in, say, Regulation "A." The agency might then use this as a precedent for Regulation "B" where it doesn't belong. This is a bit like the "prompt" letter problem, insofar as agencies misinterpret early encouragement as an unqualified endorsement.RIA BLUEPRINTS

A second innovation I recommend is RIA Blueprints. I first recommended this publicly in my comments to OIRA in July 2001 on that year's draft regulatory accounting report. I am reiterating it today because I enjoy being a lone voice in the wilderness.

It is an open secret that RIAs are prepared to justify decisions, not to inform them. Errors are tough to fix when they are the foundation of a decision.

RIAs ought to be performed first. They ought to be policy-neutral portrayals of the likely consequences of regulatory decisionmaking. They ought to inform an agency decision-maker, as much as that can be done, so that a choice can be made intelligently.

Of course, that's not the way things are actually done.

OIRA often asks for additional analysis during its end of pipe review. This happens because the agency has chosen not to evaluate an obviously interesting alternative, or it has used bad data and methods, or because it has embedded in the RIA policy preferences that conflict with EO principles.

Agencies hate these requests and call them "late hits." Sometimes they are. Executive review can be a full contact sport.

RIA Blueprints are the solution because they are responsive to both sides' complaints. Good analysis can precede decisionmaking, and late hits can be disallowed.

An RIA Blueprint needs to have fairly detailed information concerning what alternatives will be analyzed; and what data, models and default assumptions will be used in the analysis.

In addition, a Blueprint should clearly specify procedures that provide flexibility:

1. When will default assumptions give way to empirical data?
2. When will new data or models be used instead?
3. Under what other conditions will both parties agree to alter the Blueprint?

Each of these issues must be addressed.

Finally, an RIA Blueprint should have clear milestones for completion and publication of all components. Public disclosure should not be delayed until after decisions have been made.

RIA Blueprints would be written at the pre-rule stage, well before an agency has enough information to credibly know what its decision would be. Many will have prior beliefs about what analysis will reveal. That's fine so long as there are no thumbs on the scale.

The process should be open to public participation under joint OIRA/agency leadership, perhaps a bit like a SBREFA panel. But the final text ought to be decided by OIRA and the agency, and requiring a stakeholder consensus like a regulatory negotiation would be a mistake.

RIA Blueprints should be published online and clearly noticed in the Federal Register as a memorandum of understanding.

What does the agency get out of this?

OIRA's review of the RIA at the end of the process would be limited to evaluating the agency's compliance with the Blueprint. OIRA would be fully justified in returning a rule that is accompanied by a noncompliant RIA, but of course it would have to provide a public explanation. To ensure that this never occurs, an agency might want to include milestones in the process whereby OIRA signs off, certifying that RIA components do in fact comply.

RIA Blueprints can't eliminate policy conflicts. But they can substantially reduce the clutter of analytic disputes so that policy officials can focus on policy issues.

The RIA Blueprint achieves the elusive goal of securing early involvement of OIRA and sister agencies, which otherwise might be excluded. Yet it does so in a way that preserves the agency's need to keep its own counsel.

It provides for much more public participation and transparency. And it takes away the advantage interest groups have in obtaining secret, privileged access to the regulatory development process—whether at an agency or the White House, and irrespective of which party is in power. To those who distrust OIRA review, I ask you to join me in supporting this recommendation.

RIA Blueprints provide an early opportunity to identify data gaps and respond to them. Agencies can use the PRA process to fill these gaps. Alternatively, interested parties might respond on their own to generate new data, safe in the knowledge that there is a structured process to ensure that scientifically superior data will be used.

Finally, the RIA Blueprint finally overcomes the longstanding problem of RIAs being prepared after decisions have been made.

There is no question that devising RIA Blueprints could be time-consuming, especially at first. It would divert some staff time from their current tasks, though it should save time later in the process. It also might require more staff, with greater technical training.

Of course, the process could be short-circuited by politics. There will always be an interest group that will want to scuttle the process once it appears to be heading in a direction it doesn't like. This is unavoidable, but it isn't any worse than the status quo. I think it's better. The opportunity to participate in a public RIA Blueprint process provides a kind of procedural fairness that currently does not exist. It can't prevent someone from alleging that a grave injustice has been committed, but it reduces the credibility of such complaints.

INTEGRATE REGULATORY AND PAPERWORK REVIEWS

My final proposal is to integrate the regulatory and paperwork review processes.

Let me first say what this proposal is not. It is not some backdoor scheme for using the Paperwork Act to rescind or repeal a regulation. Frankly, I think this issue is a red herring. OIRA does not have the statutory authority to

disapprove the collection of information that is required by law.

A genuine problem is that the process of developing and reviewing a regulation is too often disconnected from the process of collecting data that would inform decisionmaking. I cannot count the times when agency personnel told me that certain information—information that we all agreed would be very useful—was not in fact available, and that there was no time left to collect it.

So let's fix this.

- **With bad data, good decisions require dumb luck.**
- **Obtaining good data requires early anticipation of future data needs.**
- **The paperwork review process is the best available opportunity to anticipate these future data needs.**

This means identifying data gaps early and taking action to plug them. It also means identifying weak information collections, and either improving them or terminating them.

Finally, to firmly establish the credibility of these data, we must

- Document compliance with ICR supporting statements and research protocols when they are used for an RIA.

In other words, we should integrate the paperwork and regulatory review processes so that the best possible scientific and economic data are generated in time to be used for regulatory decisionmaking.

What a revolutionary concept!

To make this work, participation in the PRA needs to be revitalized. OIRA is required by law to encourage public participation in paperwork review, but public participation is severely restricted under Executive review. This has been the case since the mid-1980s, when what we called the "Wendy Gramm Procedures" were implemented. These extremes are hard to manage under the best of circumstances. When a regulation contains a paperwork that is itself the crux of the rule, the system just breaks down.

Almost everyone is completely baffled about how the Paperwork Reduction Act works. That is by design. We should change the design and make these procedures coherent.

Legitimate confidentiality needs of Executive review can be protected best by maximizing the transparency of the rest of the process—especially information collection activities that occur long before there should be any concern about *ex parte* communication.

Integrating these functions makes it much more possible for OIRA to manage its increasing array of responsibilities, many of which it did not have 20 years ago when the current structure was established.

There is a consensus that OIRA's procedures ought to be more transparent. As its responsibilities grow, the need for transparency only increases.

There is another consensus that high quality science and economic analysis ought to play a larger role—if not actually guiding decisionmaking, then at least for understanding the consequences of regulatory choices. Improving the quality of science and economics used in regulation requires restructuring procedures so that high quality information is obtained in a timely manner.

Integration probably requires more staff, and perhaps staff with more specialized training and skills. It will also require much better information systems. We have noted that OIRA is currently at half its maximum strength. Its staff structure is essentially unchanged. And OIRA depends on information systems for managing its paperwork and regulatory reviews that were developed in 1980 and 1981, respectively.

Integrating paperwork and regulatory reviews will increase transparency. A clear risk posed by transparency is that politics becomes more visible. Otto von Bismarck is credited with having said, “The less people know about how sausages and laws are made, the better they'll sleep at night.” Von Bismarck was not big on transparency.

For 20 years I have heard people say how important it is to have high quality science and economics. But let’s not kid ourselves. The more important they are, the more they will become political battlegrounds. Peer review is widely believed to be the solution for this, but I am skeptical. I have yet to see a peer review model that works well consistently and I’ve seen plenty that work rather badly. This is the next area where structural changes are probably needed. That’s a topic for another day.

CONCLUSIONS

It's time that I sum up.

First:

Executive review works, but clearly could work better.

This is so obvious that the General Accounting Office could have written a hundred page report with this title.

Second, I want to say what we all know but try to ignore:

The Law of Unintended Consequences applies to all reform proposals.

That surely applies to my proposals as well as to those I have criticized today.

Finally, I want to sum up my collection of proposals as succinctly as possible with a coherent theme:

Procedural changes that make OIRA more transparent where it can be transparent, and that enhance early and sustained participation by OIRA and the public, have the greatest potential for success.

Sisman

- irrationality of procs
- rising MC, declining NB
- Sound signals; peer review, transparency
- discretion is out
- backdoor
  - guidance
  - biased execution of discretion
- legislation needed?
  - EOs ineffective — Mendoza Line = Hall of Fame blindfolded AL pitcher
  - no agency discipline
- big objective is competitive
  - agencies are unwilling providers
    oversight is only tool avail
    why not open the door to comp.?

Each of my three proposals serves to advance one or both of these fundamental objectives. I will be the first to admit that problem solving is dangerous business. But I am not in government any longer, so I feel comfortable taking risks.

Thank you very much for your kind attention.

Internal Inconsistencies

- PRA v EO
- Deliberative v. Public
- Analysis v. Policy Execution

Remedies

- RIA Blueprints before decision
  - Public process
  - Enforceable commitment
  - Aim for DQ improvement

  } more public less deliberative

- Publish analysis of RIA compliance
- Integrate PRA & Reg review, emph on DQ improvement

Legislation ✓ supermandate; sign depends on burden of proof (preponderance of evidence?)

?

McGarrity – ok

- no Congressional complaints from Dems 1993-01
- "extrastatutory" interpretation
- hierarchical model
  - top down or bottom up?
    - staff driven eg EPA
- "industry data also bad"
- = myth of Lone Desk Officer / grasping small "economist
- "ossification" – Best example is NEPA
- objection to quantification
- WTP v WTA (why WTP, not WTA?)

Hahn: "intellectually dishonest" ad hominem

BCA legitimacy established under Clinton admin – AO2 revisions