Can Executive Review Help Prevent Capture?

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INTRODUCTION

Centralized review of federal regulations has become a core institution in the contemporary administrative state. Presidents of both political parties have embraced it, with relatively few changes since President Reagan put in place the basic architecture in 1981. Although the institution of centralized review continues to receive criticism from some quarters, there is broad consensus that it is likely to remain a persistent feature of the administrative state for the foreseeable future.

Since its inception, centralized review has been closely linked with theories of agency capture. Many of its most prominent defenders have grounded the legitimacy of regulatory review in fears that unchecked agencies will be systematically biased in the exercise of their powers, including by accommodating powerful special interests to the detriment of general social welfare. According to this line of thinking, centralized review facilitates presidential control over agencies, which helps to ensure that administrative action is responsive to the broad national constituency represented by the president rather than to parochial special interests.

There are two important problems with this account. First, the background assumption of the conventional account – that the president responds to a national, rather than parochial, constituency – is overly simplistic. Presidents respond to a range of incentives that may not be well aligned with the broad national interest. More important, the Office of Information and Regulatory Affairs (OIRA), which is charged with carrying out centralized review, is not the functional equivalent of the president. Even if increased presidential control is desirable, it is not obvious that OIRA review always achieves this goal.

This does not mean, however, that OIRA cannot and does not play an important role in mitigating the threat of agency capture, but it does so for four reasons unrelated to proximity to the president. First, because OIRA is a generalist institution, it is more difficult to capture than a single-issue agency. By creating a generalist body like OIRA to oversee agency decisions, the institutional structure of centralized review can reduce the potential influence of special interest actors on regulation. Second, OIRA often plays a coordinating role, bringing together different agencies, which are each likely to be influenced by different interest groups. Because this coordination function requires interest groups to capture multiple agencies involved in decision making, it reduces the ability of any one interest group to dictate decisions, by raising the cost of capture. Third, cost-benefit analysis, which is the standard used to conduct regulatory review, is a professionally accepted methodology that is available for public scrutiny. It therefore acts as a check against capture by raising the risk of detection for agencies tempted to massage the economic analysis in response to interest group pressure. Finally, there is a tradition of appointing relatively independent individuals without strong connections to special interest groups to run OIRA, which helps reduce the threat of capture.

Two steps can be taken to expand this anti-capture role. First, retrospective review can require interest groups to continually reinvest in capture to ensure their preferred regulations are not amended or rescinded, which in turn decreases the return on investment of capture and acts as a disincentive to agency capture. A recent retrospective review process initiated by the Obama Administration, however, has focused too much on cost cutting, rather than net-benefit maximization, creating the risk of antiregulatory bias. This process should be reformed to be more balanced, examining how agencies can increase benefits as well as reduce costs. Second, OIRA should expand its review of agency inaction. In large part, OIRA has focused its review on agency action, examining major rules that are proposed by agencies before they are finalized. There has been significantly less review of agency inaction – that is, of the cases where net benefits could be generated through rulemakings in new areas. This bias has historical roots in the original conception of OIRA as a check against overzealous regulators. However, because an agency’s failure to act can be as detrimental to social well-being as overactivity – and can just as easily result from agency capture – it

\[\text{This chapter is adapted from Michael A. Livermore and Richard L. Revesz, "Regulatory Review, Capture, and Agency Inaction," }\text{Georgetown Law Journal} 101 (2013): 1337.\]

\[\text{See, for example, OMB Watch, "The Obama Approach to Public Protection: The Regulatory Process" (Report, 2011); Amy Sinden, Rena Steinzor, Shana Jones, and James Goodwin, "Obama's Regulations: A First-Year Report Card 28–30" (Center for Progressive Reform White Paper No. 1001, January 2010).}\]
is important that OIRA establish an institutional mechanism to ward against both kinds of failure.

This chapter proceeds in three parts. The first part provides a brief overview of the thirty-year history of OIRA oversight of agency rulemaking, discussing and criticizing traditional capture-related justifications for OIRA review. The second part examines the features of OIRA that suggest it can reduce capture risks, focusing on its role as a generalist body, its coordinating function, the nature of cost-benefit analysis, and the tradition of drawing OIRA directors from the academic community rather than from interest groups. The final part of this chapter discusses steps that can be taken to improve regulatory review with an anti-capture role in mind.

TRADITIONAL ACCOUNTS OF REGULATORY REVIEW AND CAPTURE

Brief History

As U.S. regulatory agencies gained new powers over large portions of the economy through statutes meant to address environmental, public health, and workplace risks, presidents engaged in a series of increasingly strenuous efforts to exert centralized executive control over administrative decision making. President Richard Nixon initiated a requirement of interagency comment for certain types of rules, and President Gerald Ford created the Council on Wage and Price Stability, which exercised increased central control over agency rulemaking. President Jimmy Carter went even further with Executive Order 12,044, which required the newly created Regulatory Analysis Review Group to perform an economic analysis for any major regulation, defined as one with a likely impact of more than $100 million. President Ronald Reagan, with his Executive Order 12,291, placed centralized review and cost-benefit analysis at the heart of regulatory decision making.

Reagan’s Executive Order 12,291 created what has become the persistent architecture of regulatory review at the federal level. Utilizing OIRA, a newly created entity within the Office of Management and Budget (OMB), the Executive Order required agencies to conduct cost-benefit analysis of proposed major rules, adopt only those rules with positive net benefits, and submit their analyses to OIRA for review. If OIRA found that a rule was not properly justified, the rule could be sent back to the agency for further analysis. Despite some pushback from Congress, review continued space during the presidencies of Reagan and George H. W. Bush.

After the election of Bill Clinton, many protection-oriented groups were looking for a radical departure on regulatory issues. Indeed, many commentators believed that the election of a Democratic president would result in an overhaul of the process of regulatory review. That is not what happened. Instead, Clinton issued Executive Order 12,866, which replaced and updated Executive Order 12,291 but maintained the same architecture of regulatory review based on cost-benefit analysis. Executive Order 12,866 did include several important reforms, such as transparency requirements, an emphasis on the importance of unquantified costs and benefits, and a place for distributional analysis. However, on the whole, it represented a continuity of approach, rather than a break from the past. The Clinton order was carried over by the Administration of George W. Bush, which implemented a robust practice of regulatory review and cost-benefit analysis.

The Obama Administration, in keeping with three decades of presidential tradition, has maintained this tradition. Through its choice of appointments — most importantly of Cass Sunstein as the head of OIRA — the administration has signaled a commitment to cost-benefit analysis. Soon after taking office, Obama issued a memorandum to the heads of executive departments and agencies stating that “centralized review is both legitimate and appropriate as a means of promoting regulatory goals.” The clearest endorsement of regulatory review by the Obama Administration came on

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6 Exec. Order No. 12,044, 3 C.R.F. 152 § 3.


11 Exec. Order No. 12,866 §§ 1(a), 1(b)(3), 6(b)(4).


January 18, 2011, when the president issued Executive Order 13,563, which “is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review” from the Clinton order. Obama’s order has left the same structure of review in place with some minor — but important — improvements, such as greater emphasis on distributional analysis, enhanced transparency in enforcement actions, and a renewed focus on retrospective analysis (which is discussed in more detail in the third part of this chapter).

As OIRA’s role in regulatory review has gained a seemingly permanent place in the architecture of administrative decision making, it has drawn its share of detractors. Over the past thirty years, opponents of regulatory review have engaged in a (perhaps quixotic) campaign to reduce the influence of OIRA. Citing a range of concerns, including delay, political meddling, and solicitousness to industry, commentators and advocacy organizations have argued that OIRA plays a pernicious role in the regulatory system that undermines the legitimacy and effectiveness of government action. The proposed solution is a radical rethinking of OIRA’s role that essentially strips the office of genuine oversight authority.

At the same time, a group of staunch defenders has arisen who provide support for OIRA and the practice of executive review of agency action. Representing diverse points on the political spectrum, commentators and former executive officials from both parties have argued that OIRA plays a productive, even essential, role in the administrative process. Drawing from both personal experience and academic literature, OIRA’s defenders have provided a range of rationales for why the growth of regulatory review over the past several decades represents an important and positive development in administrative decision making.


Can Executive Review Help Prevent Capture?

Capture and Presidential Power

The threat of capture has played an important role in justifying OIRA’s oversight authority. The explanations of regulation given by Stigler, Posner, Pelzman, and Becker, among others, promoted the idea that government institutions — including both legislatures and regulatory agencies — respond primarily to demand for regulation from regulated industries themselves, which seek ways to restrict competition from new firms or otherwise transfer wealth from consumers to producers. Proponents of the “economic theory of regulation” helped formalize the model of government decision makers — and especially agencies — as primarily responsive to pressure from outside interest groups. With their examples of blatant government failure, these scholars also helped contribute to both popular and expert concerns that agencies could not be trusted to protect the public welfare against rapacious private interest.

Concerns related to the influence of well-organized special interests over regulatory decisions have come to be roughly grouped together under the rubric of capture. As has been discussed elsewhere in this volume, finding a useful definition for capture has been a consistent problem. In the worst cases, the term is “sometimes little more than an insult” applied to a policy choice that someone dislikes. Political aims can fall out of line with the public good for a variety of reasons having nothing to do with organized special interest power. Similarly, the mere influence of organized interests is not always normatively undesirable: there are many reasons why the regulated community, for example, should be a welcome contributor to deliberation over public policy, including providing information that regulators need and helping to facilitate voluntary compliance.

There have been several recent attempts to specify the term more carefully. Bagley referred to capture “as shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure

favorable agency outcomes at the expense of the diffuse public." 26 In Chapter 11 of this volume, Susan Webb Yackee defines capture as "control of agency policy decision making by a subpopulation of individuals or organizations external to the agency," and in the Introduction to this volume, Daniel Carpenter and David Moss define capture as "the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself."

Taking a relatively broad view, then, capture can be understood to occur when organized groups successfully act to vindicate their interests through government policy at the expense of the public interest. Agency capture is a special case in which regulators within the bureaucracy have been influenced by organized special interest groups to adopt policies that are out of line with the broad public interest. Of course, there remains the considerable problem of generating an acceptable account of the public good. Nevertheless, although everyone may not agree exactly on what the public interest entails, there is broad consensus on some very bad outcomes that most people (if not everyone) would prefer to avoid, such as massive oil spills, worldwide financial crises, or direct wealth transfers from relatively poor consumers to well-off and well-connected capital owners. How much one is willing to pay to avoid those risks, and how best to reduce them, are of course questions of value and policy on which reasonable people are likely to disagree. The most egregious cases, however, in which very little is done to address a large risk, or much is done to address risks of small magnitude, are likely to be widely recognizable.

Organized special interest groups are the cause of regulatory capture. Traditionally, regulated industry was viewed as the most likely culprit; these actors have the incentive, the know-how, and the lowest barriers to overcoming collective action problems to organize well-funded special interest groups. For Stigler and his contemporaries, industry sought regulation to protect itself from competition. More recently, the possibility that industry would use its influence to avoid regulation has also been recognized—Carpenter and Moss refer to this possibility in the Introduction to this volume as "corrosive capture." During the late 1970s and early 1980s, groups representing broad, diffuse interests—such as environmental preservation and consumer protection—came to be seen as threats as well. Writing in the 1970s, Weidenbaum, a conservative economist and the first head of


President Reagan's Council of Economic Advisors, crystallized the view in which "the villain ... has become a self-styled representative of the Public Interest, who has succeeded so frequently in identifying his or her personal prejudices with the national well-being." 27 The apogee of the public interest capture theory is perhaps the "bootleggers and Baptists" coalition, 28 in which protection-oriented groups and regulated industry team up against consumers and new market entrants by erecting regulatory barriers. Borrowing from classic capture theory, the idea is that public interest groups could work in tandem with incumbent market actors to erect regulatory protections that are relatively easier for existing firms to comply with and that therefore serve as a barrier to entry for new firms. 29

The story is augmented by theories on why agencies are such easy prey for "self-styled" public interest advocacy organizations. Most influential has been the self-aggrandizement hypothesis, championed by Niskanen, in which bureaucrats seek to increase the budgets and mandates of their agencies, ultimately leading to inefficiently high levels of regulation. 30

Additional theories have been forwarded for why both career staff and political appointees end up identifying with the agency's mission, leading to overly zealous agency action. According to one line of reasoning, agencies such as the Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration attract career employees whose personal policy preferences track the agency's mission 31 and who may use their positions of authority to promote their own, perhaps idiosyncratic, views of the public interest. These career employees in turn influence political appointees, who may end up "go[ing] native" 32 or "succumb[ing] to the pressures of the entrenched ideologue to sustain the preexisting mission of

32 E. Donald Elliott, "TQM-ing OMB: Or Why Regulatory Review under Executive Order 12,291 Works Poorly and What President Clinton Should Do about It," Law and Contem-
the agency even when it deviates from the administration’s agenda.” Agencies, then, are susceptible to the influence of public interest organizations that push them in the direction they are already inclined to go.

If agencies are subject to capture from interest groups on both sides of the political spectrum, defenders of greater presidential authority of all political stripes can claim that increased White House control over the regulatory process will improve outcomes. Indeed, the standard defense of OIRA authority starts with the notion that the president is uniquely situated to remedy the particular failures of capture and narrow-sightedness that hamper agency decision making. In their important defense of OIRA, former OIRA Administrators Christopher DeMuth and Judge Douglas Ginsburg argued that “because the President is responsible to a national constituency, he (or she) will be less sensitive to the kinds of special-interest pressure that might dominate the agencies.” As stated by now-Justice Elena Kagan in her defense of presidential power over administrative agencies, “[t]ake the President out of the equation and what remains are individual and entities with a far more tenuous connection to national majoritarian preferences and interests.”

Under this line of thinking, OIRA mitigates capture by facilitating the exercise of presidential power. DeMuth and Ginsburg argued that OIRA will implement the president’s will “in a way that the heads of the program agencies cannot be counted upon to do.” In support of this claim, they introduce several pieces of evidence. They note that “with centralized review [the president has] control only one rather than many agency heads.” As the number of agencies grows, it becomes more costly for the president to monitor their activities and ensure their loyalty. Far easier for the president to identify a single, central agent and focus monitoring resources on ensuring its compliance.

They also argued that the director of OMB “invariably has a closer working relationship with the President than has the head of any regulatory agency.” Because OIRA is subject to OMB oversight, this is thought to create a relatively close relationship between the president and the regulatory review process. On the other hand, the authors claim that agency heads often have “neither a tie of personal loyalty nor a regular relationship with the President,” with opportunities for contact potentially limited to “ceremonial occasion[s], such as … attendance at the White House Christmas party.” Although the president will seek to appoint agency heads that “share his policy perspective,” he may have few “particular idea[s]” about how a particular agency should exercise its authority other than “a [general] sense that the agencies have been ‘too lax’ or ‘too aggressive’ during the preceding administrations.”

Contrasting the limited contact of the president with the stew of pressures faced by agency heads, DeMuth and Ginsburg concluded that “the president has much less control over agency heads than he does over OIRA.” Because of the variety of ways that interest groups can pressure agencies, “the president is just one, and often not the most influential, of the agency’s constituencies.” As a result of the comparatively closer relationship between the president and OIRA, the argument goes, the process of centralized review can reduce the impact of agency capture by pushing agencies to adopt policies that are more palatable to the president and to his national constituency.

Problems in the Presidential Power Justification

There are two broad problems with the presidential power anti-capture justification for OIRA. First, the president’s responsiveness to a national constituency is not always altogether clear. In recent years, the Electoral College has delivered a president who lost the popular vote, and in the twentieth century alone, seven presidential elections were settled with a plurality winner. National elections are subject to a variety of distortions, including private expenditures, the vagaries of the primary process, and

37 Ibid., 903.
38 Ibid., 904.
39 Ibid., 905.
40 Ibid., 904.
41 Ibid., 906.
a lack of participation by eligible American voters. Debate tends to focus on highly salient, emotionally laden issues 46 and the personality and character traits of the candidates, rather than on specific policy proposals. Broad macroeconomic factors are strongly correlated with election outcomes, indicating that the actual content of a candidate’s proposals may have little effect on voters’ choices.

Once elected, the president must secure his agenda and ensure reelection; both goals may cause the president’s interest to diverge from that of a national constituency. The president’s policy preferences may represent his electoral constituency rather than his entire constituency because the winner-take-all Electoral College system gives the president an incentive to pursue policies favored in the swing states needed for reelection. 49 The president may also direct regulatory policy to curry favor with certain legislators needed to advance his legislative agenda by promising regulatory concessions to a legislator in return for his support on a piece of legislation or appointment. Finally, the president may be more beholden to his political party than to a broader national constituency and may support regulations that tend to favor his party. 51

The second, and more important, problem is that the administrator of OIRA has no stronger claim to directly represent a national constituency than the head of any other agency. Indeed, at least in the appointment process, the link between national electorate and the head of OIRA is similar to that of other agency heads: they are all nominated by the president and confirmed by the Senate. During times of divided government, the president does not have full control over the person chosen to run OIRA and must negotiate with members of the opposition party to fill the

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position. It is not clear that it would be wise to devote greater presidential cognitive resources to selecting and monitoring the OIRA administrator than the head of any other agency. OIRA is a small office, employing only a couple of dozen professional staff and operating under a budget that is a rounding error of the federal budget. Administrative agencies are vast bureaucracies, employing tens of thousands of people, with sprawling offices, satellite branches across the country, and far larger budgets. OIRA’s main role is in formally reviewing agency regulatory decisions, a process that typically spans only a few months, plus some informal inputs here and there during the rulemaking process. Agencies are responsible for the all-important task of crafting rulemaking agendas. They collect and analyze the data supporting their proposals and develop records that can run into the thousands of pages. They decide which congressional deadlines to follow or put off until another day. Outside the rulemaking context, they decide how and against whom enforcement actions will be carried out, who will get permits on what timescale, and how grants will be allocated—all decisions that are essentially unreviewable. It may be the case that OIRA is easier to monitor than agencies, if only because it has such a larger range of activities that are carried out. However, this comparative advantage is relatively insignificant, because the total amount of time the president has for monitoring either agencies or OIRA is extremely small.

Proximity is another argument offered in favor of a tighter president-

OIRA connection. According to this logic, the Executive Office of the President (EOP), which houses OIRA, is more likely to understand and carry out the president’s will because it is located close to the White House and is populated with various political appointees. High-level political advisors to the president are nearby, along with staff at the White House coordinating offices, such as the Domestic Policy Council and Council of Economic Advisors, which interact with the president on a more regular basis. The OMB director—often closely consulting with the president, especially during the budget cycle—plays a supervisory role over OIRA, potentially communicating information and perspectives from the president.

This argument is difficult to evaluate, in part because it relies on a cultural dynamic that would be hard for an outsider to directly observe and also because officials within the EOP have an incentive to overstate their relationship with the president. To the degree that EOP officials are widely perceived as genuinely faithful agents of the president, it will be easier for them to exert influence over various actors in the executive branch.
First-hand reports from inside the EOP that confirm a close relationship with the president, then, provide only moderately useful evidence. Potential cultural influences at play within OIRA could also pull the administrator away from presidential preferences. A number of commentators have raised concerns about agency heads going "native" in response to interaction with civil servants within their departments. There are indeed a wide number of mechanisms that career personnel have at their disposal to influence political appointees at the agency, including controlling the flow of information, arranging meetings, or prompting actions by outside interest groups. Gaining the trust and loyalty of career staff is also essential for the success of the political appointees: those appointees whose views more closely align with the staff may find their projects running more smoothly, on faster timelines, and with fewer bureaucratic hassles. This creates a subtle incentive to consider the views of staff when forming policy preferences. Daily contact with the staff—who are extremely knowledgeable about their subject areas, are often very dedicated public servants, and have become experts at interacting with (sometimes inexperienced) politically appointed supervisors—may also engender trust and a greater willingness to consider staff opinions.

All of these mechanisms could be expected to work within OIRA as well, notwithstanding its location within the EOP. The flow of information from and to the OIRA administrator will be determined in large part by the staff at OIRA. The administrator, tasked with the Herculean challenge of overseeing the rulemaking activities of the entire federal government, must rely on the staff if he or she is to be successful, which creates a need to establish bonds of loyalty and trust. Many of the career personnel at OIRA have held their positions for substantial periods of time—sometimes decades—and they are all experts in the regulatory process and agency decision making, in addition to working with OIRA administrators of different political stripes. Just as the daily interactions with an expert staff and the need to achieve loyalty may tilt agency heads in favor of the views of career staff, the OIRA administrators may find themselves subject to the same dynamic.

An additional argument that OIRA better represents the president is that its relative insulation from the daily scrum of agency decision making will make it easier for the OIRA administrator to represent presidential preferences, free from the influence of outside interests. Agencies are constantly interacting with interest groups, members of Congress, media figures, and even concerned members of the broader public. Although the OIRA administrator sometimes must appear before Congress and may take meetings with some interest groups, there is much less robust interaction with outside parties. If the OIRA administrator comes into office with preferences that are closer to the president, there are fewer built-in avenues for outside influences to pull or push those preferences in any direction.

At the same time, however, the rulemaking process, and the larger institutional contexts of agencies, with their multiple masters, overseers, and constituencies, may make it easier for agencies to represent the broader national interests and therefore (presumably) presidential priorities, especially as the views of the public evolve as a result of new information and changing circumstances. If OIRA is too insulated from the broader world, it could fail to keep pace with the national conversation. Soliciting the views of a broad array of actors, engaging in the national debate over regulatory issues, and being subject to criticism in media and scrutiny in the public eye may make agencies more likely to make decisions that favor the broadest possible constituency. Even assuming that OIRA is more insulated than typical agencies (which itself is debatable), it is not clear that this will always work in an anti-capture direction.

As Croley has persuasively argued, the structure of the rulemaking process may also facilitate agency independence from special interest influence, making it more likely that an agency's decision will reflect national preferences. The open structure of the notice and comment process, for example, would seem to advantage public interest groups and the public vis-à-vis the legislative process by lowering the cost of information gathering and reducing the benefits associated with larger lobbying budgets. Furthermore, there are procedural mechanisms that facilitate more even-handed participation. Any person can petition an agency for an action or comment on a proposed rulemaking, and "[u]like campaign dollars, the arguments and information that make up rulemaking comments are not fungible, and redundant comments are virtually worthless." In the administrative process, there is a very fast rate of diminishing returns to investment, reducing the value of big lobbying budgets. This reality levels the field for relatively underfunded groups, because a single, well-reasoned set of comments can have influence that is very large compared with its cost of production.

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53 E. Donald Elliott, "TQM-ing OMB," 176.
55 Croley, "Public Interested Regulation," 36.
The relative advantages of the administrative process over the legislative process do not mean that it is perfect, or free from capture risks. Concentrated well-funded interests hold many advantages against public interest groups. However, it does indicate that if OIRA is as susceptible to political influence as agencies (through presidential or congressional mechanisms of control) but less exposed to the administrative process, that may increase the risk of capture for OIRA. In that case, its relative insulation would be a hindrance from a capture perspective, rather than an advantage.

The traditional argument that OIRA oversight mitigates the threat of agency capture by increasing presidential control, then, has serious flaws. Most important, it is not clear the OIRA is a better proxy for the president than the political appointees within agencies. In addition, the president cannot be counted on to simply represent a broad national constituency in all cases.

INSTITUTIONAL FEATURES OF OIRA THAT FACILITATE AN ANTI-CAPTURE ROLE

OIRA, however, has several institutional features that suggest that it can play an anti-capture role. First, because OIRA is structured as a generalist body, capturing it is more difficult and is therefore less likely to occur than at single-mission agencies. Second, the process of OIRA review typically involves coordinating the interests of multiple agencies, each with different perspectives; this coordination can blunt the capture-induced bias of any particular agency. Third, OIRA review focuses on the use of cost-benefit analysis, which requires the weighing of all relevant competing considerations, thereby providing some check against the possibility that particular considerations would be left out of an agency’s decision-making process as a result of capture. Finally, a tradition has developed of appointing OIRA administrators from a pool of individuals who are relatively independent and do not have strong ties to particular interest groups. This tradition would be costly to reverse and helps insulate OIRA from outsized influence of particular interest groups.

Benefits of a Generalist Perspective

One of the core features of OIRA is that, as compared with the various regulatory agencies, it is a generalist institution. The benefits of capturing a generalist institution are comparatively less than those of capturing a specialized institution, because they are diluted by the wide range of matters that are of no concern to a particular special interest group.66 For example, labor unions may be concerned about how regulatory review will influence safety standards promulgated by the Occupational Safety and Health Administration and so could seek to influence the appointment of the OIRA administrator or otherwise build connections to the office. However, OIRA also deals with many other issues. As a result, from the unions’ perspective, their hard fought influence is almost entirely wasted because of the large number of rules that are not important to them.67

At the same time that any one group will be interested only in a small portion of OIRA’s portfolio, there will be many other groups seeking OIRA’s attention. Because of the broad array of issues that OIRA must deal with, attempts to influence the institution will be spread among many different interests. Whereas repeat players will participate in many rulemakings before an agency, the regulatory review process will involve a different set of actors each time. Groups that are repeat players when acting before an agency are thrown in with a larger number of other repeat players during the regulatory review process. Each group then lacks the ability to exert the kind of sustained and continual pressure that is associated with the highest risk of capture.

The incentives to influence OIRA, then, are diffuse and diluted. Although for any particular rule, there may be powerful and concentrated interests before an agency, any incentive to capture OIRA in general will be diffused across many different interests, leading to familiar competitive action problems.68 Interest groups will withhold resources and energy assuming that they can free ride on the efforts of others. Because OIRA deals with such varying issues, each individual interest group will have an incentive to shift the costs of capturing the office to other groups. Although this phenomenon may also exist at agencies, because, for example, EPA regulates entirely different industries under its air quality program and its toxic site cleanup program, the scale of the problem at OIRA is substantially enlarged.

57 See Jonathan R. Macey, “Organizational Design and Political Control of Administrative Agencies,” Journal of Law, Economics, & Organization 8 (1992): 93, 99. It is worth noting that there is some specialization even within OIRA, so that a desk officer will deal with only a handful of agencies. Nevertheless, capture of even the more specialized personnel in OIRA is relatively more costly, and the benefits of generalization are even more clear for the OIRA Administrator.
Disparate interests and free-rider problems stand in the way of having different groups form coalitions to control OIRA. In addition, because OIRA must deal with a large range of interests over time, each of which at any given moment might want to influence it, any attempt to capture the institution would be diluted with many similar attempts coming from other directions at different times.

The anti-capture potential of a generalist institution resembles in some ways the arguments made in favor of presidential power over agencies. Drawing on the logic of *Federalist* 10, defenders of greater presidential power argue that the national constituency will reduce the influence of any particular interest group: "[e]xtend the sphere, and you take in a greater variety of parties and interests." The same basic logic applies for OIRA, but not because of an assumed OIRA-president nexus. Justifying regulatory review based on the generalist design of the review office, rather than institutional features of the presidency, avoids the necessity of grounding the review on the arguably weak claim that OIRA is a better proxy for the president than the political appointees at agencies.

The most obvious way in which a generalist regulatory review agency can help reduce capture risks is by identifying cases in which proposed rules favor a specific interest group at the expense of the public. Because rulemaking takes place in the shadow of review, flagrant attempts to privilege private interests through rulemaking may also simply be avoided altogether as a result of the prospect that such attempts would be identified as such during the review process. Especially over a large number of rules, a reviewing body that is not captured should be able to identify agency tendencies to favor particular interests groups and focus its reviewing efforts accordingly to help rebalance the rulemaking process.

Broad jurisdiction is not necessarily a panacea. When agencies are given several different goals, they can sometimes skew too heavily in favor of one or another, a risk that is especially grave if there are powerful and well-organized interests promoting particular priorities but not others. Congress also sometimes gives agencies mandates that are seemingly contradictory. Agencies carrying out disparate tasks — such as promoting an activity while also issuing safety regulations — may have a tendency to "prioritize one task at the expense of the other," especially when there is consistent pressure to produce results in one area. These concerns may not by overly troublesome for OIRA. Its priority should be clear: maximizing the net benefits of regulation. If it wishes to conduct more than perfunctory review, OIRA has relatively little discretion to shift resources away from review, given the deadlines it faces under governing executive orders and the political pressure to conduct review in a timely fashion. OIRA is a generalist because of its broad jurisdiction over many subjects, not because multiple missions have been combined into a single agency.

### Coordinating Agencies

OIRA review typically involves coordinating the interests of multiple agencies. As part of its review process, OIRA circulates proposed rules and the accompanying regulatory impact statements to other agencies and solicits their feedback on regulatory proposals. This practice provides an important opportunity for each agency to weigh in and express concerns about the regulatory actions being contemplated by other agencies. Agency coordination, in addition, can also have a significant capture-related benefit. Because these agencies each have different perspectives, and likely favor differing interests, parties that otherwise might have been excluded will now have the opportunity to weigh in during the rulemaking process. Coordination can thus blunt the capture-induced bias of any one particular agency.

If, as a general matter, there is no agency that can entirely avoid some degree of capture, the coordinating process, which expands the range of interests that are potentially involved in a regulatory process, should have beneficial effects on capture risks. This dynamic works in a similar fashion to generalization: because different agencies work on a large range of subject matters, it would be difficult for any one interest group to capture all of the agencies that might wish to weigh in on a rule. To the extent that most major interest groups will have some agency to which they can express concern

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over a proposed rule, this coordinating function will reduce the influence of any particular interest group. Although some may be concerned that environmentalists have captured EPA, any rules proposed by EPA will also be examined by the Department of Energy, the Department of Transportation, and the Small Business Administration—and agencies with which environmentalists are not thought to have overly close connections. Similarly, a regulator such as the Federal Energy Regulatory Commission, with a less protection-oriented culture, can be shifted in a more environmentally friendly direction when influenced by agencies such as EPA and their related interest groups. The result of coordination should often be some degree of “policy mediation, in which agencies introduce to other agencies a set of interest that they may otherwise ignore, or treat only lightly.”

To be sure, OIRA’s coordination role is not as developed as it could be. OIRA can use, and has at times used, its coordinating role to centralize power rather than to rationalize policies across agencies. Sometimes, goals such as checking agency action and reducing regulatory burdens have trumped goals such as harmonization or standardization. Experience with several different administrations suggests that the strength of the coordination function of OIRA is largely dependent on how strongly the political leadership in the White House values that function.

There are also other substantive areas in which OIRA could play a role in harmonizing agency policy but has failed to do so. Examples include the methodologies for incorporating distributional considerations into regulatory impact analysis and for valuing the benefits of mortality risk reduction. Since the Clinton Executive Order, there has been specific presidential authorization for agencies to examine the distributional effects of rulemakings, but agency efforts to do so have been scattered and ad hoc, and OIRA has offered scant guidance on the question. Although potentially politically fraught, such an effort could help decrease the appearance of regulatory inconsistency among agencies and allow for comparison of the risk reduction achieved by regulation across agencies.

Despite these shortcomings, agency coordination during the OIRA review process provides a meaningful opportunity to involve parties and interests that otherwise might have been excluded. Bringing together different agencies with different perspectives can minimize the disproportionate influence of any one interest group. When performed in this manner, coordination can have an important and significant role in minimizing the potential for capture in the rulemaking process.

Cost-Benefit Analysis

At the heart of OIRA’s review of agency decision making is the cost-benefit standard, which requires, to the extent possible, that agencies identify and quantify the benefits and costs of proposed rulemakings. This methodology has three important features that have the potential to reduce agency capture: it is comprehensive, requiring the examination of a wide range of regulatory effects; it is standardized and supported by a set of professional norms; and it improves transparency by publishing for public scrutiny agency estimates of regulatory effects. OIRA facilitates the potential for the cost-benefit analysis requirement to reduce the threat of agency capture by ensuring that agencies comply with the requirement, by establishing and enforcing uniform and rigorous methodological standards, and by helping to ensure basic transparency in the process of review.

The basic idea of cost-benefit analysis is simple: the promulgating agency must identify the problem, identify alternative policies for addressing the problem, assess the costs and benefits of each alternative, and select the policy that best achieves its goals. Cost-benefit analysis is meant to be comprehensive, examining the wide range of impacts from a rule on individual well-being and measuring the value of those impacts based on the preferences of the affected parties. In theory, no regulatory effects are excluded from the calculus. In practice, although resource constraints mean that analysis only extends so far, at least all of the most important categories of effects should be considered.

Although some agencies may be inclined to carry out this analysis, others may not. By itself, an executive order is not necessarily sufficient to force agencies to undergo analytic exercises that they are disinclined to carry out. A stark example is Executive Order 13,152 on federalism, signed by President Clinton, which requires agencies to conduct a rigorous consultation process with states for all regulations “that have federalism implications.”

66 DeShazo and Freeman, “Public Agencies as Lobbyists,” 2299.
68 See Letter from Michael A. Livermore et al., Institute for Policy Integrity, New York University School of Law, to Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (May 11, 2012), in the author’s possession.

This order has, for the most part, been "blithely ignored," in part because there was no White House office ensuring that agencies complied.  

OIRA's role in regulatory review ensures that the cost-benefit analysis requirement is taken seriously by the agencies. The process of review set out in the Reagan Order, and carried through in each successive executive order, creates a clear role for OIRA prior to publication of rulemakings. The vigilance of OIRA has helped ensure that agencies take the cost-benefit analysis directive seriously or risk having their regulations delayed during the process of review. As comparison with the federalism order illustrates, OIRA's role in simply ensuring agency compliance with the cost-benefit analysis requirement has likely been extremely important.

The methodology developed to carry out the cost-benefit analysis directive is, given the detail and scale of many agency rulemakings, quite complex. Agencies employ a large array of experts in a range of fields—including toxicology, risk analysis, engineering, and economics—each with a set of professional norms, to carry out this analysis. As the practice of cost-benefit analysis has developed over the decades, it has become relatively standardized, with a common set of methodologies and approaches that are relied on and that change only slowly through the gradual accumulation of evidence or theoretical innovation. The standardization of the practice of cost-benefit analysis, although far from complete, constrains agencies in the types of analytic choices—in terms of data, models, or assumptions—that can go into the analysis. Although agencies may have some incentives to tweak analysis to arrive at favorable results, there is limited scope for them to do so while using a methodology with relatively clear and well-known parameters.

Cost-benefit analysis is also a relatively transparent process. Although the practice has come under some criticism for its technical nature, which some commentators see as excluding average citizens from decision-making processes, the regulatory impact analyses produced by agencies in support of rulemakings are part of the public record and freely available for any citizen to access. Although there may be only a limited number of people with the expertise to fully digest these documents, interested parties, civil society actors, media outlets, and other institutional actors outside of the government all have the opportunity to examine, comment on, and criticize how well agencies counted costs and benefits. As with other information disclosure requirements—such as the environmental impact statement—requirement of the National Environmental Policy Act—there is always the risk that too much disclosure will trigger information overload. However, at the very least, cost-benefit analysis places information in the public domain, where it can be subjected to some degree of scrutiny. An additional capture-related criticism of cost-benefit analysis is that, because it is a highly technical exercise, carried out by experts and laden with complex jargon and sophisticated methodology, it obscures the value choices made by agencies in an aura of scientific certainty that is both inaccurate and impedes broad-based inclusion in the regulatory process.

According to this argument, regulatory impact statements that can easily run hundreds of pages may do more to alienate the public than facilitate participation.

Information overload is certainly a valid concern, but this critique of cost-benefit analysis can easily be overdrawn, and the appropriate remedy is to improve the communication of results rather than to scale back the analysis. Agencies must communicate with multiple different audiences—Congress, interest groups, and affected individuals—often through intermediary institutions such as trade associations, advocacy organizations, and most importantly the media. Certainly, complex cost-benefit analysis is not the optimal communications medium for all of these audiences, and agencies should include easily understood distillations of results in impact analyses and should continue developing techniques to encourage participation. Complex supporting documents can be extremely important transparency tools, but must be augmented by broader communications strategies. In other contexts, OIRA encourages agencies to distinguish between "summary disclosure" and "full disclosure," where the first is "clear, salient information at or near the time that relevant decisions are made" and the latter is "a wide range of information [that] . . . include[s] far more detail." Summary disclosure should be based on "explicitly" identified goals, should be "simple and specific," and should avoid undue detail or excessive complexity, should "be accurate and in plain language," should include "meaningful" ratings or scales, and also be tested for "how people react to a given

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77 Memorandum from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, for the Heads of Executive Departments and Agencies (June 18, 2010), 3, 6.
piece of information." A similar distinction can and should be made with respect to regulatory impact analysis, in which summary disclosure is used to communicate impacts to a broad audience, and full disclosure is used to facilitate deep participation by intermediary groups including journalists, outside experts, and affected interests.

Appointment of OIRA Administrators

Since Congress created the position of OIRA Administrator in 1980, presidents have tended to nominate to this position relatively independent figures, rather than individuals with close ties to interest groups. This tradition would presumably be costly to depart from, especially because the administrator position is subject to Senate confirmation. If a new president appointed, for example, the head of a trade association representing polluters or the head of an ideological group, there might well be serious political fallout. This appointment practice, which developed over three decades, helps—at least to some degree—insulate OIRA from interest group influence.

Since 1980, there have been eleven OIRA Administrators. By and large these administrators share an educational background in law or economic policy and careers in academia or generalized administrative law practices prior to joining OIRA. Many former administrators enter or reenter academia after leaving OIRA. This trend, which stands in stark contrast to the revolving door between industry and heads of regulatory agencies, bolsters the claim that OIRA administrators tend to be independent.

Of the eleven OIRA administrators, five were trained in economics or public policy. James Miller III received a PhD in economics from the University of Virginia. Wendy Gramm received a PhD in economics from Northwestern University. James MacRae, Jr., holds a Masters in Sociology from Duke University and a Masters in Public Policy from Harvard University. John Graham received a Masters in Public Policy from Duke University and a PhD in Urban and Public Affairs from Carnegie Mellon University. Susan Dudley studied economics as an undergraduate and holds a Masters from the MIT School of Management. Six were trained as lawyers. Christopher DeMuth and Douglas Ginsburg received law degrees from the University of Chicago. S. Jay Plager received law degrees from the University of Florida College of Law and Columbia Law School. Sally Katzen received a law degree from the University of Michigan. John Spotila received a law degree from Yale Law School. Cass Sunstein holds a law degree from Harvard Law School.

These appointees had generalized expertise in administrative law and regulation and tended to join OIRA from academia, think tanks, or the legal profession, rather than from the ranks of industry or particular interest groups. James Miller III was a scholar and then codirector of the Center for the Study of Government Regulation at the American Enterprise Institute. Douglas Ginsburg was a professor at Harvard Law School. Wendy Gramm taught economics at Texas A&M. S. Jay Plager taught law at the University of Florida and the University of Illinois College of Law and was Dean of the Indiana University School of Law. John Graham was a professor of Policy and Decision Sciences at the Harvard University School of Public Health. Cass Sunstein is one of the most important legal academics of his generation, with a distinguished career at University of Chicago School of Law and Harvard Law School.

Administrators with prior careers in the private sector have tended to focus on administrative law and regulation generally rather than on a particular area or industry. Christopher DeMuth worked at Sidley Austin, a law firm based in Chicago, and at Harvard’s Kennedy School of Government. Sally Katzen was a partner at what is now WilmerHale, a D.C. law firm where she had a general administrative law practice. Two served in government prior to joining OIRA. John Spotila served in the Small Business Administration. Susan Dudley served in career positions at several government agencies before leaving to teach at George Mason University and direct the Regulatory Studies Program at its Mercatus Center.

After leaving OIRA, many administrators have gone on to join academia or serve in the nonprofit sector at think tanks. James Miller III eventually ran the Office of Management and Budget before leaving government. Since then he has served as a fellow at the Citizens for a Sound Economy Foundation, the Center for Study of Public Choice at George Mason University, and the Hoover Institution. He has also served as an advisor to several companies, government bodies, and law firms. Christopher DeMuth joined the American Enterprise Institute after leaving OIRA, retiring as its president in 2007. James MacRae III served in the U.S. Department of Health and Human Services for over a decade after serving as acting administrator. Sally Katzen held other positions at the OMB before joining academia as a visiting professor at several law schools. John Graham was dean of the RAND Graduate School in California and is now dean of the Indiana University School of Public and Environmental Affairs. Susan Dudley is a professor.

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78 Memorandum from Sunstein (2010), 3-5.
at the George Washington University Trachtenberg School of Public Policy and Public Administration.

Two administrators were appointed to the federal judiciary. Douglas Ginsburg was appointed to a seat on the D.C. Circuit Court of Appeals after serving as OIRA Administrator. S. Jay Plager was appointed to a seat on the U.S. Court of Appeals for the Federal Circuit.

Wendy Gramm and John Spotila are exceptions to this general rule, as both spent significant time in the private sector after leaving OIRA. Gramm headed the Commodity Futures Trading Commission and served on the Enron Board of Directors during its collapse, before joining George Mason University's Mercatus Center as a senior scholar. Spotila served as the president and COO of GTSI Corp., an information technology provider, and is now the CEO of R3i Solutions, a government-contracting firm.

Rather than appointing individuals with clear connections to the regulated parties or other interest groups, presidents have by and large chosen individuals from the academic arena, who have based their careers on scholarship and general expertise on the regulatory system, for the position of OIRA administrator. This, of course, does not mean that OIRA administrators are mere technocrats, free of political views or policy commitments, or that presidents do not seek to appoint administrators with similar views of the regulatory process. Of course, many OIRA administrators do have quite clear and well-established views that can be gleaned from their writing and public statements. However, the generalist nature of the position makes it difficult for any one interest group to exert very strong influence on the nomination process, and the requirement for someone with broad knowledge of the regulatory system tends to exclude the kinds of specialized appointments that are often associated with interest groups. As a consequence, a tradition of appointing relatively independent voices to the position of OIRA administration has developed that would likely be difficult to break.

**NEXT STEPS**

**Retrospective Review**

In 2011, President Obama issued Executive Order 13,563, supplementing President Clinton's Executive Order 12,866. Among other things, the order required agencies to submit plans to OIRA within 120 days detailing how the agency would periodically review its regulations and determine which could be made "more effective or less burdensome." The order does not detail what agencies are required to do with those plans or specify a role for OIRA beyond serving as a repository for those plans. Cass Sunstein, the OIRA administrator at the time this order was signed, issued a memorandum to agencies and departments that encouraged agencies to publish their plans online, solicit public comment, and finalize plans within eighty days of initial publication. The plans submitted by agencies vary greatly in terms of the details offered and number of potential regulations targeted.

Transparent, robust retrospective review can raise the cost of capture to interest groups in two important ways. First, retrospective review helps ensure that regulations initially passed through capture face a threat of future review. By forcing interest groups to reinvest in capture at each interval of retrospective review, the present value of capture to interest groups decreases. Rather than a one-time investment that leads to persistent benefits with relatively small monitoring costs, interest groups would be faced with the prospect of (potentially) making substantial, continual investments over time to protect whatever favorable regulatory treatment they were able to extract during the bargaining process over the initial rule. This possibility could substantially reduce the incentive to invest in capture, so long as the risk of retrospective analysis is sufficiently high.

Second, a robust practice of retrospective review means that regulations are more likely to be reviewed by agencies under different and potentially less favorable administrations later on. Political control of the White House tends to shift over time, and although there is some overlap within the coalitions that make up contemporary political parties, there are also substantial differences. A robust practice of retrospective review facilitates oversight by both political parties. For special interest groups to enjoy durable results, they could not limit their investment to a single party but would have to ensure against reviews by both parties. Especially for groups seeking treatment that conflicts with the core ideologies of either party, this prospect could be especially daunting. The risk of having the efforts of capture...
overturned by a subsequent administration may deter investment in capture ex ante.

Based on the experience of previous attempts at retrospective review, OIRA can play an important role in ensuring that the process maximizes its anti-capture potential. As with the cost-benefit analysis requirement, agencies are more likely to engage in rigorous and sustained retrospective analysis if OIRA uses its position to encourage agencies to do so. Past efforts to require retrospective review, including one stated in the Clinton Order, have languished or been largely ignored by agencies. A substantial push by OIRA, however, improves the chances that agencies will actually carry out the new retrospective review requirements.

In addition, OIRA can provide guidance to agencies to standardize the retrospective review process. A 1997 Government Accountability Office study of agency retrospective review found that “the units of analysis that agencies used in their reviews, and the scope of individual reviews, varied widely.” As discussed previously, an established process makes deviations owing to capture by interest groups more likely to be noticed, and OIRA could improve the value and credibility of retrospective reviews by issuing guidelines for the reviews, as it did with Circular A-4 for agency cost-benefit analyses. A systematic approach to retrospective review by agencies would ensure that the regulations targeted for review are likely to be those of economic significance for which there is real opportunity for efficiency gains.

OIRA can also facilitate the disclosure to the public about the scope, nature, and progress of retrospective reviews. The same 1997 GAO study noted that agencies did not adequately notify the public when reviews were initiated or what the results of reviews were. OIRA’s involvement in previous attempts at retrospective review suffered the same problems. Transparent retrospective review also mitigates the risk that the review process itself might be captured by industry groups seeking a chance to initiate challenges to regulations they previously failed to prevent or pressure agencies to drop a review already initiated. To avoid this threat, OIRA should take on an information gathering and publishing role.

Unfortunately, throughout the Order’s early implementation, much of the focus from agencies and OIRA has been on “small-bore red tape-snipping” with very little emphasis on expanding rules where they have proven effective or testing agencies’ ex ante predictions of regulatory costs and benefits against ex post data. This emphasis on cost-cutting threatens to undermine the ability of retrospective review to serve a balanced, anti-capture purpose.

In a second order, President Obama moved retrospective review even further in an antiregulatory direction. Executive Order 13,610 states that, when “implementing and improving their retrospective review plans . . . agencies shall give priority . . . to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork.” No similar language is included requesting that agencies emphasize rules that would increase regulatory benefits at low cost. This language places a permanent tilt in the process of regulatory review away from net benefits maximization and toward simple cost-reduction, a move that may result in a long-term antiregulatory bias within regulatory review.

If this occurs, it will represent a major lost opportunity to use this tool to protect administrative agencies against capture. Indeed, by providing regulated industry with an additional opportunity to seek less stringent regulation, without providing protection-oriented groups with a similar opportunity to increase regulatory benefits, the retrospective review process may ultimately increase the susceptibility of the administrative state to capture.

Agency Inaction

Because both over- and under-activity can have detrimental effects on social well-being, it is important for OIRA to engage in review of both agency action and agency inaction. The current system of regulatory review, in which OIRA review is triggered only when proposed rules are sent to the

85 Government Accountability Office, “Assessing the Impacts of EPA’s Regulations Through Retrospective Studies” (GAO/RCD-99-250, 1999), 17 (criticizing EPA’s “ad hoc approach” to retrospective review – less than 5 percent of the economically significant rules promulgated over the seven-year study period were reviewed – because it offered “no assurance that economically significant regulations will be subjected to review”).
87 Richard L. Revesz and Michael A. Livermore, Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health (New York: Oxford University Press, 2008), 155–56 (describing earlier attempts by OIRA to coordinate the review and elimination of inefficient regulations through the use of a “hit list” of regulations that was not publicized or tracked).
White House, is inadequate to the task; therefore, reforms should be considered to expand OIRA’s review powers to cases in which agencies fail to act.

Since the time of the Reagan Order, when Niskanen’s self-aggrandizing bureaucrat hypothesis held broad sway in the White House, OIRA review had tended to focus on ensuring that regulatory costs did not exceed benefits. It is agency action that is typically subject to review, to ensure that overzealous regulators do not generate overly burdensome requirements for businesses. In general, the lion’s share of OIRA’s regulatory review resources are devoted to this checking function that is meant to rein in costly rules.

This institutional arrangement would be well justified if agencies had a systemic tendency to overregulate or provide insufficiently high levels of protection against environmental, public health, or safety risks. However, in fact, there are a variety of reasons to expect that agencies would be just as likely to suffer from a bias toward inaction, rather than overactivity. When agencies act, they face a wide range of potential criticisms from powerful interest groups, as well as in review in court, the executive, and from Congress.⁹⁰ The failure to act, although it may generate some complaints, is not accompanied by the same level of scrutiny.⁹¹ This fact alone would tend to drive risk-averse agency officials toward delay and ossification.⁹² A host of other factors, from a desire to please regulated industry with lax standards, to an internal ideological commitment to a light government touch, might push agencies away from aggressively carrying out their mandate.⁹³

To deal with the reality that agencies can err by regulating too little as well as too much, OIRA review of inaction is appropriate. There is some precedent for this type of review. Under Administrator John Graham, OIRA instituted a limited practice of issuing “prompt letters” to agencies concerning areas in which additional rules could be useful. These prompt letters represented an important innovation in regulatory review: it was the first time that OIRA took a proactive role in prodding agencies forward.⁹⁴ Graham’s prompt letters were an important step in balancing the function of review to recognize that agencies could also, for a range of reasons, fail to take useful steps in providing cost-beneficial public protections. Prompt letters are an insufficient solution to the problem of agency inaction, however, because most of OIRA’s resources are dedicated to keeping up with its regulatory review duties. As a result, prompt letters have tended to be issued only in an ad hoc fashion.

One difficulty in structuring review of inaction is that there are a potentially limitless number of “inactions” that could be the subject of review. There need to be some mechanisms to cabin that review and channel it in a direction that will ultimately be useful in the administrative process. One potential mechanism that could help give OIRA a more proactive role toward agencies would be through OIRA review of petitions for rulemaking. All agencies have some process where individuals or groups can petition that agency for a rulemaking. Under the Administrative Procedure Act, agencies are required to respond to these petitions and there must be some reasoned explanation if the petition is denied – although courts are highly deferential with respect to both the timeline and the standard of review of petition denials. Even given judicial deference to agencies in this area, petitions have had an important action-forcing effect on agencies: the most famous example is Massachusetts v. EPA,⁹⁵ in which the Supreme Court found that the EPA had not provided appropriate justification for its decision not to regulate greenhouse gases emission from motor vehicles under the Clean Air Act.⁹⁶

Each year in an annual report to Congress, OIRA compiles a list of the regulations that were adopted in the past year, aggregates costs and benefits, and makes recommendations to agencies regarding improvements in their process of regulatory decision making. This annual review provides a procedural opportunity for OIRA to collect information about petitions that are currently pending before agencies and, when appropriate, examine petitions that are either languishing or that have been denied without adequate justification. Through this review mechanism, OIRA can use information generated by private actors to identify areas in which action is needed but agencies have failed to move forward. In this way, some OIRA review of agency inaction will help balance the existing structure of regulatory review, which focuses almost exclusively on agency action.

Complete review of agency inaction is implausible. There are a potentially limitless number of potential regulations that agencies could adopt but do not. At the same time, OIRA’s exclusive focus on agency action tends

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to tilt the institution of centralized regulatory review in an antiregulatory direction; it checks agency action but does not spur agencies forward. This system would make sense if there were good reason to believe that agencies are more inclined toward overregulation than under-regulation, but there is not. In fact, the variety of motivations and influences affecting administrative agencies are just as likely to produce too little regulation or ineffective tools to meet legitimate goals. A more balanced OIRA review will be better structured to overcome the range of obstacles that can undermine efficient decision making by administrative agencies.

CONCLUSION

Despite the shortcomings of the traditional justification for OIRA's anti-capture role, this chapter has nonetheless argued that OIRA plays an important anti-capture role for other reasons having to do with four important institutional features of the office. First, the generalist nature of OIRA's mandate and activities reduces the potential influence of special interest actors on regulation. Second, the coordinating role OIRA plays during the regulatory review process brings together different agencies, each of which will likely to be influenced by different interest groups, thereby reducing the ability of any one group to capture the multiagency process. Third, because cost-benefit analysis must be done according to an accepted methodology, is conducted in a relatively transparent manner, and is standardized across agencies through the OIRA review process, it acts as a check against capture. The nature of cost-benefit analysis raises the risk of detection of regulations unduly influenced by interest group pressure. Finally, the tradition of appointing relatively independent OIRA administrators helps ensure that OIRA is not subject to the policy priors of an administrator who came from an interest group, which is one source of interest group pressure that may influence other agencies.

In addition to offering a new defense for OIRA's anti-capture role, this chapter noted two opportunities for OIRA to expand that role. First, a greater role for retrospective review, recently initiated by the Obama Administration, may help augment OIRA's anti-capture role. Second, more robust OIRA review of agency inaction is needed to balance OIRA's role by addressing both over- and under-regulation by agencies.