Improving the Accountability of Federal Regulatory Agencies

Part III: What Reforms Work Best

Abstract

Eight major U.S. government reform initiatives failed to significantly improve the accountability of federal agencies. This third of a three-part series identifies (1) lack of sustained leadership and (2) unfaithful execution by agencies as two reasons for these failures. The problem of inadequate leadership could be addressed by adopting more modest reforms (incrementalism) and/or codifying the reform(s) into law. The obstacle of unfaithful execution could be overcome by creating or engaging an objective third party to implement or enforce implementation of the reform and/or creating competition among agencies that provides incentives for embracing reform. Using these lessons, three characteristics of regulatory reforms that will work are identified: codification in law; creation of an independent organization to help execute the law; and establishing a framework for interagency competition.

Washington Wants to Improve Regulatory Accountability

In the United States, congress and the president show significant interest in improving the accountability[1] of federal regulatory agencies. For instance, Congress has considered several bills that would strengthen regulatory accountability by, for instance, increasing requirements for regulatory analyses, expanding judicial review, and creating a regulatory budget.[2] Likewise, in 2011 and 2012 President Barack Obama issued three Executive Orders expanding requirements for regulatory agencies to assess the performance of existing and new regulations.[3]

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[1] An accountable organization is one that takes responsibility for the results of its actions.

[2] For a discussion of recent proposals to increase regulatory accountability see Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," *Case Western Reserve Law Review*, 65:4 (2015), pp. 1051-1056 (accessed July 7, 2016). http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1006&context=caselrev

[3] See, Executive Order 13563, "Improving Regulation and Regulatory Review," January 18, 2011; Executive Order 13579, "Regulation and Independent Regulatory Agencies," July 11, 2011; and Executive Order 13610, "Identifying and Reducing Regulatory Burdens," May 10, 2012.

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These reforms are intended to make regulators assess and take responsibility for the results of their actions. Accountability reforms enjoy bipartisan support[4] and are desirable for at least two reasons. First, the public have a right to know what results their government is achieving.[5] Second, accountability leads to better performance. When an organization takes responsibility for the outcomes of its actions it is making a commitment to improve those outcomes, especially if they are poor.[6]

Learning from Eight Government-wide Reforms

A number of studies have examined past regulatory reforms in the United States, such as the Paperwork Reduction Act of 1980, to help guide new accountability reforms at regulatory agencies.[7] However, none has examined the record of past *government-wide* reforms, which included, but were not limited to, executive branch regulatory agencies, for the same purpose.

The first part of this three-part *Regulatory Insight* series[8] identified and described eight significant government-wide reforms that could help inform future regulatory accountability initiatives. These government-wide reforms included many of the same accountability methods that are being considered in current regulatory reform proposals such as strengthening quantitative analyses, requiring the comparison of multiple policy options, and/or encouraging a greater focus on the actual outcomes of federal programs. For instance, the first government-wide reform examined, President Lyndon Johnson's Planning-Programming-Budgeting System (PPBS), mandated the quantitative calculation of the costs and benefits of alternative budget proposals. (See Table 1 for other similarities between government-wide reforms and current regulatory proposals.)

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[4] See, for instance, Kevin Madden and Howard Wolfson, "Embracing the Politics of Moneyball" in Jim Nussle and Peter Orszag eds., *Moneyball for Government*, Disruption Books: Middletown, DE, 2014, pp. 60-81.

[5] For a discussion regarding the obligation of government to inform the public on the results of its actions see David Walker, "GAO Answers: What's in a Name?", *Roll Call*, June 19, 2004 (accessed 4 June 2016). http://gao.gov/about/rollcall07192004.pdf

[6] Many management experts argue that taking responsibility for outcomes is a prerequisite for any organization to improve. See, for instance, Dave Ulrich, Jack Zenger and Norm Smallwood, *Results-Based Leadership*, Harvard Business School Press: Boston, MA, 1999, pp. 17-20, William Gorham, "Foreword" in Harry P. Hatry, *Performance Measurement: Getting Results*, The Urban Institute Press: Washington DC, 1999, p. xix, and Robert Shea, "Performance Budgeting in the United States," *OECD Journal on Budgeting*, 8:1 (2008), p. 2 (accessed June 4, 2016).

[7] Three recent studies, for instance, include: Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," *Case Western Reserve Law Review*, 65:4 (2015), pp. 1051-1056; Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution," *Working Paper No. 14-03*, Mercatus Center, February 2014; and Stuart Shapiro and Deanna Moran, "The Checkered History of Regulatory Reform Since the APA," *NYU Journal of Law and Public Policy*, 19:1 (May 2016), pp. 141-182.

[8] Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies Part I: A Review of Government-wide Efforts," *Regulatory Insight*, The George Washington Regulatory Studies Center, June 22, 2016 (accessed July 7, 2016).

TABLE 1: Similarities of government-wide reforms and current regulatory reform proposals

Government-wide Initiative	Requirement(s) similar to current regulatory reform proposals
Planning-Programming-Budgeting System (PPBS)	Mandated the quantitative analysis of the costs and benefits of budget proposals.
Management By Objective (MBO)	Centralized decision-making and focus programs on outcomes.
Zero-based Budgeting	Required quantitative analysis of costs and benefits of different budget proposals establishing "doing nothing" as a baseline.
Grace Commission	Solicited and attempted to implement expert third party recommendations from outside government.
Government Performance and Results Act (GPRA)	Refocused programs on outcomes. Required transparent goals, measures and performance reports. Increased accountability to Congress.
National Performance Review[9] (NPR)	Refocused programs on outcomes. Provided flexibility to managers to improve outcomes and efficiency. Mandated cost reductions.
Program Assessment Rating Tool (PART)	Refocused programs on outcomes. Required public assessments of agency performance.
GPRA Modernization Act (GPRAMA)	Mandated greater internal use of performance data. Increased accountability to Congress.

The second part of this three-part series of *Regulatory Insights*[10] examined the extent to which these eight reforms succeeded in improving the accountability of government agencies. Based on both public polling data and expert reviews of each reform (and the reforms as a whole) it was determined none of the reforms succeeded in substantially increasing government accountability in the long-term. For instance, two experts described government-wide reforms as "hollow

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[9] In 1998 the National Performance Review was renamed the National Partnership for Reinventing Government.

[10] Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies Part II: Assessing Eight Government-wide Accountability Reforms," *Regulatory Insight*, The George Washington Regulatory Studies Center, 28 June 2016.
https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/RegInsight_Peacock-Reforms-Improving-Accountability_pt2.pdf

monuments to great expectations."[11] This *Regulatory Insight* examines the primary reasons these eight reforms failed to meet expectations, what can be done to address these problems in proposals aimed at improving the accountability of regulatory agencies.

Two Reasons Reforms Fail: Leadership and Execution

As presented in a previous *Regulatory Insight*,[12] government reform experts examined each of eight government-wide programs. Numerous reviewers offer many different reasons for why any one of the eight failed. For instance, Lyndon Johnson's PPBS was found to: be too contrary to some agency cultures;[13] lack adequate technical assistance;[14] and suffer from staff shortages.[15] Ronald Reagan's Grace Commission effort[16] was found wanting because it greatly exaggerated potential savings[17] and was perceived by many in Congress to be ideological,[18] criticisms that were also later leveled at the NPR.[19] Nonetheless, across all eight reforms two reasons for failure consistently crop up: inadequate leadership and a lack of faithful execution. Based on this sample of eight major government-wide initiatives, these two hurdles will be universal problems for implementing any regulatory accountability reform.

Inadequate Leadership Stopped Major Reforms

The first reason these eight government-wide reforms failed was a lack of sustained high-level leadership. As a general matter, most experts accept that the significant reform of any organization requires the strong and persistent support of top leaders. For instance, in the 1980s, management expert William Medina concluded, "Virtually all writers on organizational change

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[11] George W. Downs and Patrick D. Larkey, *The Search of Government Efficiency: from Hubris to Helplessness*, First Edition, Random House: New York, NY (1986), p. 237.

[12] Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies Part II: Assessing Eight Government-wide Accountability Reforms," *Regulatory Insight*, The George Washington Regulatory Studies Center, June 28, 2016.
https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/RegInsight_Peacock-Reforms-Improving-Accountability_pt2.pdf

[13] William A. Medina, *Changing Bureaucracies: Understanding The Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), pp. 68-69.

[14] Aaron B. Wildavsky, "Rescuing Policy Analysis from PPB", *Public Administration Review*, 29 (March-April 1969), p. 193.

[15] William A. Medina, *Changing Bureaucracies: Understanding the Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), p. 80.

[16] Formally called the "Private Sector Survey on Cost Control."

[17] A joint analysis by the Congressional Budget Office and General Accounting Office concluded that actual savings would be about a third of what the Commission claimed. See Congressional Budget Office/General Accounting Office, "Analysis of the Grace Commission's Major Proposals for Cost Control," February 1984, p. 1. http://gao.gov/assets/200/190441.pdf

[18] See Donald F. Kettl, *Politics of the Administrative Process*, Sixth Edition, CQ Press: Washington DC (2015).

[19] See, for instance, Steven Greenhouse, "Savings Vastly Overestimated in Streamlining Plan, Agency Reports," *The New York Times*, November 17, 1993, p. A22 (accessed 1 September 2016).
http://www.nytimes.com/1993/11/17/us/savings-vastly-overestimated-in-streamlining-plan-agency-reports.html

concur on the importance of the commitment of top management to effective organization change."[20]

Researchers and practitioners have generally continued to hold this point of view. In the 1990s, for example, in examining the "reengineering" of organizations, management experts Michael Hammer and Steven Stanton asserted "It is an unalterable axiom of reengineering that it only succeeds when driven from the topmost levels of an organization."[21] More recently, Mario Morino, who leads a group helping nonprofits improve their accountability, concluded, "The number one prerequisite for high performance is courageous, relentless leadership."[22]

This general conclusion seems to hold for federal government organizations as well. In 1981 the General Accounting Office (GAO) was asked to make recommendations as to how federal agencies could incorporate a desire for better productivity into federal operations. The GAO presented "seven key elements of success" to changing agency culture. The first two items on the list were (1) designating a manager to focus on reform and (2) "top level support and commitment" from the agency head or president.[23] In assessing the NPR in 1995, political scientist Carolyn Ban came to the same conclusion, "Long-term culture change requires long-term leadership commitment."[24] To this day GAO maintains that "strong and inspirational leadership" from top officials, such as the agency head, "is indispensable" to achieve organizational transformation[25] and "sustained priority attention" from leaders is a prerequisite for successfully reforming federal agencies.[26]

It is important to point out that some experts reject that top leadership support is necessary for significant change, at least in the federal government. Most notably, public management expert Steven Kelman has pointed out that change can come from much lower down in organizations if enough employees create a "change vanguard" that welcomes, but does not rely on, top-level support.[27] Kelman cites the example of procurement reform in the 1990s as evidence of this and

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[20] William A. Medina, Changing Bureaucracies: Understanding The Organization Before Selecting The Approach, Marcel Dekker, Inc: New York, NY (1982), p. 27.

[21] Michael Hammer and Steven A. Stanton, The Reengineering Revolution, HarperBusiness: New York, NY (1995), p. 34.

[22] As quoted at Leap of Reason, http://leapofreason.org/ accessed September 1, 2016. See also Wes Trochlil, "Effective Change Requires Leadership," Effective Database Management, November 7, 2011 (accessed July 21, 2016). http://effectivedatabase.com/effective-change-requires-leadership/

[23] GAO, "Increased Use of Productivity Management Can Help Control Government Costs," November 10, 1983, p. 36 (accessed September 1, 2016). http://gao.gov/assets/150/141019.pdf

[24] Carolyn Ban, "Unions, Management, and the NPR," in Donald F. Kettl and John J. DiIulio, Jr., *Inside the Reinvention Machine*, The Brookings Institution: Washington DC (1995), p. 149.

[25] GAO, "Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations," July 2003, p. 9 (accessed 1 September 2016). http://www.gao.gov/assets/240/238749.pdf

[26] GAO, "Small Business Administration: Leadership Attention Needed to Overcome Management Challenges," 6 January 2016, p. 2 (accessed 1 September 2016). http://www.gao.gov/assets/680/674514.pdf

[27] Steven Kelman, *Unleashing Change: A Study of Organizational Renewal in Government*, Brookings Institution Press: Washington DC (2005), pp. 41-42.

there certainly other instances where workers at lower levels spearheaded improvements in accountability.[28]

The motivation for change among public servants lower down in an organization may stem from their intrinsic desire to create greater public value. Public management expert Mark Moore has argued this causes them to become "political entrepreneurs" who convince their political leadership to change, rather than the other way around.[29]

The argument as to whether active support from the top is a prerequisite for significant reform need not be settled here. For the purpose of examining the lack of success of the eight major government-wide reforms that are the subject of this series, none of them came from the "bottom up." Six were imposed at the top, by the President,[30] and two (GPRA and GPRAMA) were codified in law. Tellingly, all six of the White House led reforms were discontinued before, or at the beginning of, the next Administration. The termination of these six reforms before, or not long after, their presidential sponsor left office is not unusual. While the Director of the Office of Management and Budget (OMB) in 1988, Joseph Wright Jr. asked one of his aides to determine whether *any* previous presidentially-sponsored management initiatives had survived from one president to the next, regardless of whether the president was from a different political party. The aide could not find a single management initiative that continued to the next Administration.[31]

In the context of the eight accountability reforms examined in this three-part series of *Regulatory Insights*, inadequate leadership at the top stemmed from two problems: lack of sustained commitment and the turnover of agency leaders. Regarding the first limitation, the active support of a U.S. president and their appointees is difficult to maintain. Harold Macmillan, former Prime Minister of the United Kingdom, is reputed to have been asked what causes governments the most trouble. "Events, dear boy, events," he supposedly replied.[32] "Events" tend to distract political leaders from pursuing reform over the long-term. For instance, researchers found

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[28]   For a comparison of how the managers and staff in different programs at the same agency may voluntarily embrace, or avoid, program improvement methods, see Nicholas R. Hart, "Evaluation at EPA: Determinations of the U.S. Environmental Protection Agency's Capacity to Supply Program Evaluation," Doctoral dissertation, The George Washington University: Washington DC, August 31, 2016, pp. 355–358 (accessed September 1, 2016). http://pqdtopen.proquest.com/doc/1812333751.html?FMT=AI

[29]   Mark H. Moore, *Creating Public Value: Strategic Management in Government*, Harvard University Press: Cambridge, MA (1995), pp. 151-162.

[30]   One could argue many elements of the NPR, such as procurement reform, welled up from the employees. However, these elements were part of a much larger initiative that was clearly launched, organized, and driven by the White House. Participation by agencies and their employees was not optional. See William Jefferson Clinton, "Remarks Announcing the National Performance Review," March 3, 1993 (accessed September 1, 2016). https://www.gpo.gov/fdsys/pkg/PPP-1993-book1/pdf/PPP-1993-book1-doc-pg233.pdf

[31]   Joe Wright Jr., conversation with the author, July 21, 2005. Note this review did not include other types of reform, such as regulatory reform. Other types of reform have benefited from incremental implementation. See footnote 73.

[32]   Robert Harris, "As Macmillan never said: that's enough quotations," *The Telegraph*, June 4, 2002. http://www.telegraph.co.uk/comment/personal-view/3577416/As-Macmillan-never-said-thats-enough-quotations.html

support for PPBS, Management By Objective (MBO), and the NPR was diverted or undercut by the Vietnam War,[33] Watergate,[34] and the Monica Lewinski scandal[35] respectively.

Likewise, the turnover of political leadership, especially cabinet and sub-cabinet officials who might be expected to have more time to implement the president's initiatives, was identified as a fatal problem. For instance, in a review of MBO, William Medina found, "The fate of MBO in the agencies also seemed to be very sensitive to departmental personnel changes. In the Labor Department, Under Secretary Richard F. Schubert left, and MBO went into limbo because he had been the driving force in the department."[36]

In discussing the federal government's particular problems sustaining leadership commitment, government management expert Bob Behn points out that public executives tend to have a shorter tenure than those in business. "In the United States, elected chief executives can think not more than four years into the future, and their appointed department heads may have even shorter time horizons."[37] Indeed, the turnover of political appointees has increased over time to the point where the median term is about 2.5 years.[38]

At least with regard to the six White House-led accountability efforts, inadequate leadership appears to be a fatal flaw for major administrative reforms. (The two reforms required by law, GPRA and GPRAMA, are discussed below.) If the sustained support of top political leaders is a prerequisite for permanent change, the nation's political system sets too high a bar for success. Presidents simply cannot focus on major reforms for a long enough period of time to make them stick and turnover of their appointees, who are closer to the point of execution, is too high.

This presents a conundrum for presidents. They may want to significantly reform the Executive Branch but the bigger the desired change the less likely they are to succeed. If the reform is too ambitious they will waste considerable time and resources getting little or no lasting change. This *presidential reform conundrum* should drive presidents to seek smaller changes and incrementalism. Nonetheless, there may be both political and practical reasons for future presidents to continue to pursue major reforms, especially regulatory reforms.

Politically, government reform proposals have been popular with the public. For instance, initial implementation of the NPR is estimated to have helped boost President Bill Clinton's popularity

[33] William A. Medina, *Changing Bureaucracies: Understanding The Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), p. 75.
[34] Shelley Lynne Tomkin, *Inside OMB: Politics and Process in the President's Budget Office*, ME Sharpe: Armonk, NY (1998), p. 194.
[35] John Buntin, "25 Years Later, What Happened to 'Reinventing Government'?" Governing, September 2016 (accessed September 1, 2016). http://www.governing.com/topics/mgmt/gov-reinventing-government-book.html
[36] William A. Medina, *Changing Bureaucracies: Understanding The Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), p. 111.
[37] Robert D. Behn, *The PerformanceStat Potential: A Leadership Strategy for Producing Results*, Brookings Institution Press: Washington, DC (2014), p. 327.
[38] Matt Dull and Patrick S. Roberts, "Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989-2009," *Presidential Studies Quarterly,* 39 (2009) pp. 432-453.

by 13 percentage points.[39] It is not surprising that elected leaders, regardless of political party, show an interest in government accountability reforms. Presidential candidates may well continue to promise and, eventually, try to implement ambitious reforms for political gain despite knowing there may be little or no chance of success. Unfortunately, as discussed below, the perception that a reform may be politically-motivated can contribute to its ultimate failure.

Despite a very low probability of success, there are also practical reasons for a president to pursue an ambitious accountability effort. Notably, the president may see it as a strategy for getting the reform, or something like it, accepted and/or codified into law. For instance, Jeff Rosen recently suggested the next president take such an approach for garnering acceptance for a regulatory budget.[40]

Lack of Faithful Execution Impeded Reforms

The lack of faithful execution of reforms by the agencies that are expected to implement them is a consistent and troubling problem cited by government experts.[41] For instance, in his assessment of PPBS (or what he calls "PPB"), Allen Schick noted that it failed because "the PPB'ers didn't know how to break down the resistance."[42] Likewise, Don Kettl concluded one vital reason the NPR did not result in lasting reform was because it did not win the cooperation of middle managers.[43] More recently the GPRA and it amendments (GPRMA) continue to be ongoing examples of the execution.

As noted earlier in this series, GPRA mandates that agencies produce information so that they can be held accountable for getting results. In the event, however these data have obscured rather than clarified performance. Indeed, the data are viewed as so unreliable or irrelevant that most of them are not used to make decisions.[44] As one budget official explained, "Agencies have every

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[39] Richard Benedetto, "Key to Gaining Ground Is Sticking to Basics," *USA Today*, September 27, 1993, p. A8.

[40] Jeff Rosen, "Putting Regulators on a Budget," *National Affairs*, Spring 2016 (accessed September 1, 2016). http://www.nationalaffairs.com/publications/detail/putting-regulators-on-a-budget

[41] The problem of unfaithful execution has already been cited many times as a problem in *regulatory* reform. For instance, poor implementation of cost benefit analyses conducted under presidential Executive Orders has resulted in suggestions for reform. See Ted Gayer, "A Better Approach to Environmental Regulation: Getting the Costs and Benefits Right," Discussion Paper 2011-06, The Hamilton Project May 2011, pp. 5-6 (accessed 1 September 2016). https://www.brookings.edu/wp-content/uploads/2016/07/05_environment_regulation_gayer_paper.pdf

[42] Allen Schick, "A Death in the Bureaucracy: The Demise of Federal PPB," *Public Administration Review*, 33:2 (Mar-April 1973), p. 149. https://www.jstor.org/stable/974211?seq=1#page_scan_tab_contents

[43] Donald F. Kettl, "Building Lasting Reform: Enduring Questions, Missing Answers," in Donald F. Kettl and John J. DiIulio, Jr., *Inside the Reinvention Machine*, The Brookings Institution: Washington DC (1995), pp. 46-47. The problem extended beyond middle management. A lack of cooperation throughout all levels of the workforce was demonstrated, for instance, by the failure of workers to accept "risk" coupons for testing out new reforms (see Beryl A. Radin, "Varieties of Reinvention: Six NPR 'Success Stories'," in Donald F. Kettl and John J. DiIulio, Jr., *Inside the Reinvention Machine*, The Brookings Institution: Washington DC (1995), p. 114).

[44] Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies Part II: Assessing Eight Government-wide Accountability Reforms," The George Washington University Regulatory Studies Center, June 28, 2016, pp. 8-9.

incentive to make the measures trivial and uninteresting and unimportant because, as far as they are concerned, it is pure-make work, and they don't really use them."[45]

Unfaithful execution by implementers represents a critical problem—perhaps *the* critical problem—with government-wide reforms, rendering them, in general, "hollow monuments to great expectations."[46] It seems to be a barrier even when there is sustained leadership and even when reforms are codified in law.

In many ways, the NPR marked the best one could hope for in top leadership support of a government reform campaign. It had the ongoing attention of the president and an unprecedented and significant commitment from Vice-President, Al Gore. Gore gave impassioned speeches at each major Department and each Secretary made commitments to the effort. Some Cabinet members even signed written performance agreements with the president. The media campaign was the best ever launched for a government reform initiative. The Vice-President made a number of high profile appearances on television including a stellar performance on *Late Night with David Letterman* that has been watched, even though more than 20 years have passed, thousands of times on YouTube.[47] Perhaps even more stunning, the first NPR report quickly climbed onto the *New York Times* best sellers list. Political scientist John Dilulio, Jr. concludes that "no previous government or private commission on the federal service… captured public attention in quite the way the National Performance Review did." NPR advisor Don Kettl claims, "No executive branch reform in the twentieth century—indeed, perhaps in the Constitution's 210 years—has enjoyed such high-level attention over such a broad range of activities for such a long period of time."[48]

And yet, within a few years of its launch the effort began to fade and finally disappeared "without much evidence of significant improvement."[49] As noted above, despite unprecedented support at the highest levels, like the efforts before it, the NPR suffered from a lack of internal cooperation, particularly from middle managers, which resulted in its ultimate evaporation.

There is, however, a means by which federal employees can be compelled to execute particular tasks even when leadership flags, and that is through statute. Unlike the six presidentially-sponsored reforms that solely relied on top leadership support, two of the government-wide

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https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/RegInsight_Peacock-Reforms-Improving-Accountability_pt2.pdf
See, also, ongoing problems with the implementation of GPRAMA at GAO, "Performance.gov: Long-Term Strategy Needed to Improve Website Usability," August 2016. http://www.gao.gov/assets/680/679395.pdf

[45] A "budget professional" quoted in Scott Lilly and Eleanor Hill, *Broken Budgeting: A View of Federal Budget Making from the Trenches*, Center for American Progress, August 2012, pp. 16-17.

[46] George W. Downs and Patrick D. Larkey, *The Search of Government Efficiency: from Hubris to Helplessness*, First Edition, Random House: New York, NY (1986), p. 237.

[47] https://www.youtube.com/watch?v=TO7ei2YTrM8 (accessed 19 August 2016).

[48] Donald F. Kettl, "Reinventing Government: A Fifth-Year Report Card," The Brookings Institution, September 1998, p. v.

[49] Peter H. Schuck, *Why Government Fails So Often And How It Can Do Better*, Princeton University Press: Princeton, NJ (2014), p. 197.

reforms examined in this three-part series of *Regulatory Insights*, GPRA and the GPRAMA, are codified in law. However, even codification does not guarantee tasks will be performed in a timely fashion and, even when they are finally implemented, they may not faithfully execute the spirit of the law.

The initial hopes for GPRA were high. One Senate Committee declared, "This reform has the potential to make a significant change in the way that managers, policymakers, and the American people think about what services the government should provide, and how well it does at providing them. The legislation will provide the information necessary to strengthen program management, to make objective evaluation of program performance, and to set realistic, measurable goals for future performance."[50] The *Washington Post* reported "For the first time, the American people will be told what levels of service and program results they can expect from the tax dollars, followed by reports on what was actually achieved. It may sound like common sense for government to do this—and it is—but it has not been done before by the federal government."[51]

But the overriding lesson of GPRA, and, subsequently, GPRAMA, is that Congress can't legislate honest self-assessment. Just because the top leaders of some excellent organizations hold quarterly meetings where they pour over performance measures with their managers does not mean forcing every federal agency to hold the same types of meetings, as GPRAMA does, will achieve excellence at federal agencies. In the words of Bob Behn, this type of strategy amounts to mindless mimicry.[52]

In federal agencies, Donald Moynihan points out, "The use of information cannot be rendered by rules, since it is an action that requires some measure of innovation. Flesh-and-blood managers are the essential ingredient in developing creative solutions to foster process change and performance improvement."[53] Federal managers, who are the key to reform, also, unfortunately, know better than anyone else how to meet the letter of the law without honoring the spirit of greater accountability.

Poor self-reported government data is not a new problem. Over a hundred years ago an English judge supposedly observed, "Public agencies are very keen on amassing statistics – they collect them, add them, raise them to the nth power, take the cube roots and prepare wonderful

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[50] US Senate Government Affairs Committee, "Government Performance Results Act of 1993: Conference Report together with Additional Views to accompany S. 20," Report 103-58, 1993. https://www.whitehouse.gov/omb/mgmt-gpra/gprptm#h1
[51] Stephen Barr, "Performance Measures Expand their Horizons," *Washington Post*, 3 February 1994 (accessed 1 September 2016). https://www.highbeam.com/doc/1P2-874086.html
[52] Robert D. Behn, *The PerformanceStat Potential: A Leadership Strategy for Producing Results*, Brookings Institution Press: Washington, DC (2014), p. 255.
[53] Donald P. Moynihan, *The Dynamics of Performance Management: Constructing Information and Reform*, Georgetown University Press: Washington DC (2008), p 191.

diagrams. But what you must never forget is that every one of those figures comes in the first instance from the village watchman, who just puts down what he damn pleases."[54]

Perhaps the earliest example of a government-wide reform thwarted by juked data in the United States was in 1891 when President Benjamin Harrison directed all departments of the federal government to adopt an efficiency personnel rating system. No one wanted to look bad compared to anyone else so the ratings were gamed to the point that everyone was rated near the top of the scale—showing very little distinction between employees.[55] The reform was subsequently dropped.

Such unfaithful execution stems from the mixed incentives of federal employees. The debate about why federal employees do what they do has been the subject of decades of research which can be simplistically boiled down to the two competing theories of "public choice" and "public interest." The former theory posits that workers make decisions based on self-interest while the latter focuses on workers' desire to create public value, taking actions that improve society as a whole.[56] One reason this is a simplistic dichotomy is that no agency, no program, no office takes actions that consistently follow one motivation when it comes to increased accountability. Within the U.S. Environmental Protection Agency, for instance, there are significant differences among offices regarding the capacity to perform, and desire to use, program evaluation to improve accountability.[57]

However, the review of the eight government-wide accountability reforms examined in this three-part series show there are, consistently, too few employees willing to commit to faithful execution and too many who are apathetic or will even subvert reform. Many reasons account for this. For instance, as mentioned above, presidentially-sponsored reforms are often perceived by many workers as politically-motivated and not worthy of their own commitment. Regarding PPBS, for example, Joon-Chien Doh concluded that the President did not personally push agencies about implementing PPBS after its inauguration, thus cueing everyone that he was really not relying on its products in his decision making. The agencies came to see the maintenance of PPBS as a "façade."[58] In other cases, such as MBO[59] and the PART,[60] the

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[54]   Josiah Stamp, *Some Economic Factors in Modern Life,* P. S. King & Son: London (1929). pp. 258–259.

[55]   George W. Downs and Patrick D. Larkey, *The Search of Government Efficiency: from Hubris to Helplessness*, First Edition, Random House: New York, NY (1986), p. 192.

[56]   An very good and accessible discussion of the incentives of federal workers including public choice and public interest theories can be found at Peter H. Schuck, *Why Government Fails So Often And How It Can Do Better*, Princeton University Press: Princeton, NJ (2014), pp. 128-160.

[57]   See Nicholas R. Hart, "Evaluation at EPA: Determinants of the U.S. Environmental Protection Agency's Capacity to Supply Program Evaluation," dissertation The George Washington University, August 31, 2016. Pp. 349-351.

[58]   Joon-Chien Doh, The Planning-Programming-Budgeting System in Three Federal Agencies, Praeger: New York, NY (1971).

[59]   William A. Medina, Changing Bureaucracies: Understanding The Organization Before Selecting The Approach, Marcel Dekker, Inc: New York, NY (1982), p. 73.

[60]   Donald P. Moynihan, The Dynamics of Performance Management: Constructing Information and Reform, Georgetown University Press: Washington DC (2008), p 146.

initiative was subverted because some managers perceived it as an attempt to shift power away from departments to the White House. Yet other reforms, such as the NPR, sent inconsistent signals to managers regarding their value to the extent that many decided to balk.[61] The NPR, and other reforms, also left it unclear to managers how they would be held accountable for performance when state agencies were often responsible for program implementation.[62]

Of particular concern to modern reformers, some experts believe the constant string of unsuccessful accountability initiatives now dooms future reforms as failure becomes the self-fulfilling expectation of experienced federal employees who suffer from "reform fatigue."[63] With regard to the NPR, Don Kettl noted some employees had already learned two lessons from previous reforms, "Bold rhetoric often had little substance behind it" and "new revolutions soon replaced old ones, so that they could easily wait out any new reform."[64] Federal workers simply became tired of reinvading the same beach.

Perhaps most important for those considering regulatory reform, employees may view the initiative as a threat to their program or job and, therefore, will actively work to subvert change. This is an example of the "principal-agent" problem in organizational theory.[65] The reform, advanced by the president and/or congress (the principal), relies on information that must be provided by government workers (the agent). But the agent may perceive the reform as not being in their self-interest[66] and/or in the interest of their other principals. Therefore, federal agencies may simply "feed the beast" as a part of what other researchers have called "feigned acquiescence" or "malicious compliance."[67] Worse, they may create misleading information that

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[61] Government expert Paul Light convincingly argues that many large government-wide reforms conflict with one-another perversely resulting in a degradation of government performance over time (see Paul C. Light, The Tides of Reform: Making Government Work, 1945-1995, Yale University Press: New Haven, CT (1997)). Consequently Light has recommended a moratorium on new government reforms for at least four years (see Paul C. Light, A Government Ill Executed: The Decline of the Federal Service and How to Reverse It, Harvard University Press: Cambridge, MA (2008), p. 235.

[62] See, for example, Douglas S. Eisinger, "Smog Check: Science, Federalism, and the Politics of Clean Air," RFF Press: Washington DC (2010), pp. 157-158.

[63] Robert D. Behn, The PerformanceStat Potential: A Leadership Strategy for Producing Results, Brookings Institution Press: Washington, DC (2014), p. 45.

[64] F. Kettl, "Building Lasting Reform: Enduring Questions, Missing Answers," in Donald F. Kettl and John J. DiIulio, Jr., Inside the Reinvention Machine, The Brookings Institution: Washington DC (1995), p. 21.

[65] For background on the principal-agent problem and an example regarding a regulatory agency, see Barry R. Weingast, "The congressional-bureaucratic system: A principal-agent perspective (with applications the SEC)," Public Choice, 44 (1984), pp. 147-191 http://www.jstor.org/stable/30023940?seq=1#page_scan_tab_contents

[66] Self-interest can include a myopic interest of the organization which may suffer from "tunnel vision" due to too much emphasis on a particular mission or point of view. This may be particularly true of regulatory agencies that were created to reduce specific types of risks and give lesser regard to the potential negative impacts of their decisions. See, for instance, recent criticism of the Securities and Exchange Commission at Stephanie Russell-Kraft, "Rakoff Continues Crusade Against SEC Admin Courts," LAW360, 21 November 2014 (accessed 21 August 2016). http://www.law360.com/articles/598561/rakoff-continues-crusadeagainst-sec-admin-courts

[67] See Marshall E. Dimock, "Bureaucracy Self-Examined," *Public Administration Review,* 4:3 (Summer 1944), p. 203 and John S. Carroll, "Organizational Learning Activities in High-Hazard Industries*," Journal of Management Studies*, 35:6 (November1998), p. 713.

advances their own agenda. In particular, some federal programs have manipulated data to show false progress or support larger budgets.[68]

These results do not settle the conflict between public choice and public interest theories. However, they do point to a conclusion that initiatives that involve greater accountability are more prone to apathy or outright resistance. Initiatives aimed at other "good government" goals, such as greater efficiency in operations or reducing corruption, may not meet the same level of apathy or outright resistance.

Solutions to Inadequate Leadership

The experience of eight government-wide reforms indicates a lack of sustained leadership at a high level can be a significant barrier to improving agency accountability. This section considers two possible solutions to this problem: incrementalism and codification.

Incrementalism

The larger the reform, the more leadership is necessary for success. Some reforms are so ambitious the president will never be able to muster enough leadership to make them stick. As noted above, the failure of the NPR, despite significant support by the President and Vice-President, show the limits of White House led reform. This is the presidential reform conundrum: what level of change can a president reasonably expect to make permanent, yet is also worth the effort to pursue?

This does not mean ambitious reforms are a waste of time. First, bold reforms provide important support and embolden those federal workers who are constantly looking for new ways to improve. For instance, the NPR became a vehicle for many smaller initiatives, such as procurement reform, that were already in the works, to reach fruition.[69] Reform initiatives also help train and develop new analysts, such as program auditors or economists, who can continue to advance accountability methods in the future.[70] Finally, big reforms, even if unsuccessful, can offer lessons about what may, and may not, work. As noted above, the president may launch a big reform as part of a strategy to "sell" it to congress.

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[68]   There are numerous examples of such behavior. For instance, Bob Stone has described how the U.S. Army gamed PPBS to try and justify sixteen additional divisions of troops (see Bob Stone, *Confessions of a Civil Servant*, Rowman & Littlefield: Lanham, MD (2003), pp. 6-8.) but a recent and notorious example is the manipulation of appointment data at Veteran's Affairs hospitals in order to meet a GPRA goal. See Department of Veterans Affairs Inspector General, "Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practices at the Phoenix VA Health Care System," August 26, 2014, p. iv (accessed 2 September 2016) and Scott Bronstein**,** Drew Griffin and Nelli Black, "VA deaths covered up to make statistics look better, whistle-blower says," *CNN*, June 24, 2014.

[69]   Christopher H. Foreman, Jr., "The NPR Meets Congress" in Donald F. Kettl and John J. DiIulio, Jr., *Inside the Reinvention Machine*, The Brookings Institution: Washington DC (1995), p. 163.

[70]   William A. Medina, *Changing Bureaucracies: Understanding The Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), p. 81.

But no one should expect a major White House-sponsored accountability reform to survive to the next administration. In the face of this problem it may make much more sense for the president to embrace incrementalism: adopt smaller changes that move agencies in the right direction even if the results are modest. This was arguably the strategy used to advance important elements of regulatory reform. Starting with Lyndon Johnson, a string of presidents each modestly increased the centralized review of federal regulations allowing Ronald Reagan the ability to eventually house a formal regulatory review function in the White House without the change appearing too radical.[71] This also appears to be happening in the area of performance management. Both George W. Bush and Barack Obama have pursued creating and enhancing a centralized a performance management structure that will likely survive, and continue to evolve, in the next administration.[72]

Codification

An ironclad means of making sure a reform survives a change of administration is codification. None of the major reforms examined in this three-part series that were solely created and implemented by the Executive Branch survived a change in president. For a major reform to stick, it must be made part of the operating instructions for the Executive Branch. It must be put in law.

This is no easy task, nor should it be. Democracy is fundamentally incremental. Through a system of checks and balances, the U.S. Constitution establishes a conservative system of change more likely to adopt small improvements than grand solutions to large problems. Virtually every major White House-sponsored reform is eventually proposed as legislation, in some form. But a combination of apathy and partisanship generally result in such legislation not being adopted.[73] It is not a coincidence that the two government-wide reforms examined in this three-part series that were codified into law, GPRA and GPRAMA, were enacted when one party (Democrats) controlled both congress and the White House (in 1993 and 2010 respectively).

The experience of GPRA and GPRAMA demonstrate that codification does not necessarily lead to success, but it does provide an important bridge between White House transitions, circumventing a lack of leadership, and offering an ongoing opportunity for future presidents to breathe new life into underutilized or disused accountability tools.

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[71] See Jim Tozzi, "OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding," Administrative Law Review 63:37 (2011), pp. 37-69 (accessed 2 September 2016). http://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf

[72] See "History of the Council" at pic.gov (accessed September 1 2016). https://www.pic.gov/who-we-are/the-council#fpid-1

[73] A form of the PART process, for instance, passed out of a House Committee on a party-line vote but was never considered on the floor of the House. https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt768/html/CRPT-108hrpt768.htm

Solutions to Unfaithful Execution

The experience of the eight government-wide reforms examined in this three-part series, especially GPRA and GPRAMA, indicates unfaithful execution by federal workers will likely be the greatest barrier to the success of any new major accountability reform at regulatory agencies. There are simply too many federal workers who are not willing to earnestly implement changes that increase accountability. This section provides two recommendations for solving this problem: independent review and competition.

How do you compel a person to do something they don't want to do? There are dozens of models of organizational change strategies[74] but a simple model, adequate for this discussion, is offered by management expert William Medina. Medina notes, there are three ways to change people's behavior in organizations:

- compel them (forced change);
- persuade them (through education); and/or
- change their incentives.[75]

First, the president and/or Congress can try and compel federal employees to comply with new accountability processes, rules, and reporting. However, the evidence from government-wide reforms shows this is a particularly weak approach if enough workers conclude compliance is not in their interest. As noted above, the attention of those who might cajole or enforce new requirements is limited—political appointees and elected leaders are easily distracted and turn over too frequently. Even with the added compulsion of the reform being a legal requirement, such as GPRA, it is difficult to force agencies to embrace the spirit of the law. Dissatisfaction with the implementation of GPRA, for instance, lead to further amendments to the law,[76] but even these "fixes" are being slow-walked and circumvented.[77]

The second method of change, persuasion, was a strategy strongly pursued during the NPR. NPR reformers, led by the Vice-President, tried to convince enough employees that it was in their interest to take risks by breaking established procedures. In the end, enough of them were unwilling to do so and lasting reform fizzled.

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[74] See, for instance, Achilles A. Armenakis and Arthur G. Bedeian, "Organizational Change: A Review of Theory and Research in the 1990s," *Journal of Management*, 25:3 (June 1999), pp. 293-315.

[75] Adapted from William A. Medina, *Changing Bureaucracies: Understanding The Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), pp. 118-119.

[76] Robert D. Behn, *The PerformanceStat Potential: A Leadership Strategy for Producing Results*, Brookings Institution Press: Washington, DC (2014), p. 22.

[77] As discussed in the second part of this series, GPRAMA has not generally increased the use of performance data, a primary goal of the statute. Further, a recent study shows that six years after its enactment, important elements have still not been implemented (see GAO, "Performance.gov: Long-Term Strategy Needed to Improve Website Usability," August 2016. http://www.gao.gov/assets/680/679395.pdf

Finally, reformers can use a third strategy: changing incentives. As William Medina observes, "The self-interest of the executors is a critical factor in sustaining a change effort, and it is often directly related to the influence of the consequences."[78] Tellingly, none of the eight government-wide reforms examined in this series focused on significantly changing the consequences of compliance (or noncompliance) with the reform such that worker motivations would be altered in favor of compliance.[79] They largely left the existing incentives of federal workers unaffected.

Unfortunately, in general, current incentives leave too many federal employees too averse to cooperating with reforms that increase accountability because they fear the outcomes of greater scrutiny. This is especially true in regulatory agencies that operate in some of the most politically contentious environments in government.[80] Changing existing incentives, or creating new countervailing incentives, would be a logical solution to this problem.

That is easy to say, but much harder to do. There has been, for instance, a long-standing effort to increase incentives for better performance by adopting so-called "pay for performance" schemes in various government agencies.[81] These systems offer monetary bonuses or higher pay for employees who achieve certain performance targets and/or receive high performance ratings. However, among other problems, performance targets are often gamed or set too low[82] and/or the majority of employees receive such high ratings there is little way to distinguish them,[83] thus these schemes end up providing little additional incentive to employees.

Independent Implementation or Review

One solution to unfaithful execution is to give the responsibility for faithful implementation to an independent third party. If federal agencies cannot be trusted to deliver meaningful performance

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[78] William A. Medina, *Changing Bureaucracies: Understanding The Organization Before Selecting The Approach*, Marcel Dekker, Inc: New York, NY (1982), p. 118.

[79] Notably, NPR reformers tried to affect incentives by simply asserting to workers that they should not fear implementation, but, ultimately, not enough workers believed it. See Beryl A. Radin, "Varieties of Reinvention: Six NPR 'Success Stories'," in Donald F. Kettl and John J. DiIulio, Jr., *Inside the Reinvention Machine*, The Brookings Institution: Washington DC (1995), p. 114.

[80] See Paul R. Lawrence and Mark A. Abramson, *Succeeding as a Political Executive: 50 Insights from Experience*, Rowman & Littlefield Publishers: Lanham, MD (2016), p. 110.

[81] For a brief history of attempts to introduce merit- or performance-based pay into the federal government see Steve Nelson, "Performance-Based Pay in the Federal Government," *Working Paper 2008-05*, National Center on Performance Incentives, February 2008, pp. 1-7.
https://my.vanderbilt.edu/performanceincentives/files/2012/10/200805_Nelson_PerfBasedPayFed.pdf

[82] See Harry P. Hatry, "Governing for Results: Improving Federal Government Performance and Accountability -- Suggestions for the New Federal Administration," paper prepared for the 2008 Government Performance Workshop, Urban Institute, November 2008, pp. 6 and 8 (accessed September 2, 2016).
http://www.urban.org/sites/default/files/alfresco/publication-pdfs/901197-Governing-for-Results-Improving-Federal-Government-Performance-and-Accountability.PDF

[83] For instance, in agencies that have a five-level rating band, over 70 percent of employees fall into the top two categories. See *Letter from Robert Goldenkoff, GAO Director of Strategic Issues, to Senator Ron Johnson*, 9 May 2016 (accessed September 2, 2016). In other words, it's 1891 all over again (see footnote 58).
http://www.gao.gov/assets/680/676998.pdf

data, a disinterested but competent third party may be able to do so.[84] There are a number of historical examples of this in the federal government. For instance, during World War I Congress and the president became convinced the Executive agencies could not be trusted to audit their own expenses or provide honest and coherent estimates of future budgetary needs. The result was the creation of the General Accounting Office and the Bureau of the Budget which were both charged with performing work previously left to agencies.[85]

A less ambitious, and cheaper, alternative to taking a task out of the agencies' hands is to create an entity whose sole purpose is to enforce faithful execution of government rules by the agencies. In other words, "trust, but verify." Instead of giving the task of reform to an entity who has less self-interest in defeating change, congress or the president can create a compliance monitor who can alter the consequences of unfaithful execution by agencies. For example, the European Commission, exhausted by a chronic lack of compliance among members,[86] created an independent Regulatory Scrutiny Board that reviews agency analyses of European Union rules.[87]

The U.S. federal government has a long history, starting with the creation of an Inspector General (IG) in 1777,[88] of charging independent parties or organizations with internally enforcing adherence to government policies. The success of early IGs and the growth of the federal government subsequently lead to the creation and strengthening of other third-party monitors including, but not limited to, the federal courts, internal affairs divisions, and centralized offices such as the Office of Information and Regulatory Affairs and the Office of Federal Procurement Policy.

Despite their proliferation, compliance enforcement offices have received significant criticism. In particular, because they generally rely on negative sanctions—creating fear of noncompliance as a counterweight to the fear of faithful compliance—many experts view this method as

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[84] Michael Greenstone has observed, "the process of self-evaluation is challenging for all organizations, as it requires complete objectivity. Indeed, history is unkind to organizations that fail to get outside reviews of their work." Statement of Michael Greenstone before the United States Senate Subcommittee on Regulatory Affairs and Federal Management Roundtable on "Examining Practical Solutions to Improve the Federal Regulatory Process." June 4, 2015, p. 4. http://www.hsgac.senate.gov/hearings/examining-practical-solutions-to-improve-the-federal-regulatory-process

[85] Both organizations were created in the Budget and Accounting Act of 1921 (Public Law 67-13). The General Accounting Office, now Government Accountability Office, was required to review every single government expense voucher until, during World War II, this became an overwhelming task. The Bureau of the Budget, now the Office of Management and Budget, was, and remains, solely responsible for submitting executive agency budget requests to Congress. See Frederick C. Mosher, *A Tale of Two Agencies*, LSU Press: Baton Rouge, LA (1984), pp. 26-32 and 79.

[86] See, for instance, EU Court of Auditors, "Special Report No 1/2006 on the contribution of the European Social Fund in combating early school leaving," *Official Journal of the European Union*, 2006/C 99/01 (accessed September 2, 2016). http://www.eca.europa.eu/Lists/ECADocuments/SR06_01/SR06_01_EN.PDF

[87] See http://ec.europa.eu/info/law-making-process/regulatory-scrutiny-board_en

[88] In December of 1777 the Continental Congress created the "Inspector General of the Army" (an Army General in charge of inspecting troops, supplies, finances, etc.) stating that this was "essential to the promotion of discipline in the American Army, and to the reformation of the various abuses which prevail in the different departments." See *Journal of the Continental Congress*, Volume 1, December 13, 1777, p. 386.

inhibiting better government performance.[89] Workers who might otherwise use their own discretion to improve government work, instead go "head down and pencil up."[90] The additional monitoring also adds yet more internal red tape to government bureaucracies,[91] further slowing down work and frustrating workers.[92]

Other critics contend these monitoring offices, far from stirring fear in agencies, are frequently too weak and become co-opted by the programs they are intended to oversee[93] or become politically-motivated to selectively investigate, or ignore, noncompliance.[94] For example, the Bureau of the Budget, originally created to provide honest budget figures to Congress, had, by the early 1970s, become a willing handmaiden of the president[95] to the extent that Congress, among other reasons, felt compelled to create its own budget agency, the Congressional Budget Office (CBO).[96]

Thus, compliance organizations present a trade-off. They attain greater accountability, but at the same time hurt performance by demanding an agency use more resources and limiting its discretion. As Laurence Lynn, Jr., realized some time ago, in government "a fundamental conflict arises between, on the one hand, innovation, which requires autonomy, decentralization, risk taking, and unprogrammed tasks, and, on the other hand, accountability, which requires predictability, standardization, replicability, and stability."[97] Lynn concluded the conflict was intractable, no solution could satisfy both needs. If that is the case, and I think it is, the problem becomes finding an acceptable balance of both accountability and management discretion.

At least with regard to the eight government-wide reforms examined in this series, agencies appear more willing to subvert attempts to improve accountability rather than embrace

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[89]   See, for instance, Robert D. Behn, *The PerformanceStat Potential: A Leadership Strategy for Producing Results*, Brookings Institution Press: Washington, DC (2014), pp. 59 and 236.

[90]   Steven Kelman, *Unleashing Change: A Study of Organizational Renewal in Government*, Brookings Institution Press: Washington DC (2005), pp. 54-55.

[91]   See Michael Power, "The Theory of the Audit Explosion," *The Oxford Handbook of Public Management*, edited by Ewan Ferlei, Laurence, E. Lynn, and Christopher Pollitt, Oxford University Press: Oxford, UK (2005), p. 335.

[92]   Al Gore, *Common Sense Government Works Better and Costs Less*, Random House, Inc., New York, NY (1995), p. 54.

[93]   Mark Flatten, "Watchdogs or lapdogs? A system meant to protect the public has been co-opted by the feds," *Washington Examiner*, December 1, 2014. http://www.washingtonexaminer.com/watchdogs-or-lapdogs-a-system-meant-to-protect-the-public-has-been-co-opted-by-the-feds/article/2556687

[94]   For example, see Robert Walker, "Another Politically Motivated Investigation of Nonprofits?" *The Huffington Post*, August 15, 2013. http://www.huffingtonpost.com/robert-walker/another-politicallymotiva_b_3750315.html

[95]   Members of Congress became particularly inflamed when the White House budget office attempted to hide $18 billion in spending President Richard Nixon was attempting to impound. OMB tried a similar strategy, garnering the same sharp reaction from congress, under Ronald Reagan in 1981 (see David A. Stockman, The Triumph of Politics, Harper & Row: New York, NY (1986), pp. 336-337.

[96]   The Congressional Budget and Impoundment Control Act of 1974 (Public Law 93–344). http://legislink.org/us/pl-93-344

[97]   Laurence E. Lynn, Jr., "Innovation and the Public Interest: Insights from the Private Sector," in Alan A. Altshuler and Robert D. Behn, *Innovation In American government: Challenges, Opportunities, and Dilemmas*, The Brookings Institution Press: Washington DC (1997), p. 99

accountability using their discretion. Indeed, to slightly twist an observation of Bob Behn, if agencies wanted to improve accountability for their performance, they do not need Executive Orders, OMB Circulars or GPRA to "help" or "require" them to do so. They would just do it.[98]

To the extent the public and their elected representatives continue to desire more accountability, the trade-off continues to be in favor of increased monitoring. Independent organizations created to perform, or enforce, government rules continue to be generally viewed as successful in fulfilling their primary goal of producing greater adherence to government requirements.[99] Despite the fact the government already boasts over 70 IGs, Congress continues to be interested in strengthening their powers.[100] While they arguably can suffer from the same "tunnel vision" and weaknesses as other government organizations, independent monitors present a known solution to reducing the gaming or avoidance behavior that allows agencies to subvert the faithful execution of accountability reforms.

Importantly, the adverse effects of creating a third party could be limited in two ways. First, the impact on agencies could be minimized if the third party is left to implement the reform rather than monitor an agency's compliance with it. Creation of the CBO, for instance, acts as a counterweight to the White House OMB without inhibiting OMB's discretion or function. Second, even if the entity is set up as a compliance monitor, if the task is limited to, for instance, solely providing data or performing or checking agency calculations, the adverse consequences of monitoring may also be minimized.

Competition

It would be a mistake to assume that creating an independent organization would completely solve the problem of unfaithful execution. As mentioned above, such organizations have their own limitations and for various reasons can fall short of expectations. For instance, despite its other attributes, the Office of Information and Regulatory Affairs has been unable to enforce faithful adherence to the production and use of regulatory impact analyses[101] or the retrospective review of regulations.[102] Even the CBO, considered by many to be one of Washington's most

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[98] Robert D. Behn, *The PerformanceStat Potential: A Leadership Strategy for Producing Results*, Brookings Institution Press: Washington, DC (2014), p. 308.

[99] See, for example, New York Times Editorial Board, "Let Inspectors General Do Their Job," *The New York Times*, March 9, 2016. http://www.nytimes.com/2016/03/09/opinion/let-inspectors-general-do-their-job.html?_r=0

[100] Wendy Ginsberg and Michael Greene, "Federal Inspectors General: History, Characteristics, and Recent Congressional Actions," Congressional Research Service, June 2, 2016, pp. 10-14. https://www.fas.org/sgp/crs/misc/R43814.pdf

[101] Patrick McLaughlin, Jerry Ellig, John Morrall, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations," *Regulation and Governance*, June 1, 2013. http://onlinelibrary.wiley.com/wol1/doi/10.1111/j.1748-5991.2012.01149.x/full

[102] Sofie E. Miller, "Learning from Experience: Retrospective Review of Regulations in 2014," *Working Paper*, The George Washington University Regulatory Studies Center, November 1, 2015. https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/Retrospective%20Review%20in%202014_MillerS_11_3.pdf

objective institutions,[103] is limited in what results it can present and how it must perform many of its calculations.[104]

Further, standing up a third party to enforce requirements can increase agency conformity but also solidify agency resistance. Federal programs may perceive the third party as an adversary rather than a facilitator of compliance. While the third party may initially reduce, for instance, the gaming of agency reported data, the agency may respond by increasing its effort and sophistication at circumventing the spirit of the rules it is supposed to follow.

Rather than solely rely on independent organizations to defeat unfaithful execution of accountability reforms, it may be more effective to fold the narrow incentives of various agencies back on themselves by making them compete with each other or other entities. Competition is recognized as an extremely powerful motivator not only of profit-seeking organizations[105] but can strongly affect federal agencies.[106] Indeed, public agencies are using competition to strongly influence individual behavior to promote the public interest.[107]

While it may not seem obvious, federal agencies already compete with each other. They are in a constant and robust competition to increase their budgets. Among the dozens of annual draft budgets from agencies that the author reviewed during eight years at OMB, it was extremely rare for an agency to propose a flat or declining budget. In almost every instance, agencies proposed an increase. While the budget office has historically provided some control over these excesses, members of Congress have noticed the same problem. As one member of the Appropriations Committee once complained, "When you have sat on the Committee, you see that these bureaus are always asking for more money – always up, never down. They want to build up their organization. You reach the point – I have – where it sickens you, where you rebel against it."[108] This long running competition has resulted in a panoply of clever strategies among agencies to maintain or increase funding.[109]

How then does one create a healthy competition among federal agencies, one that provides proper incentives that increase accountability? One way may be to use comparison data. While

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[103] See for example, FactCheck.org. For a history of how CBO became and remains largely independent.

[104] See, for instance, Rudolph G. Penner, "How the Budget Baseline Favors Spending," TaxVox: Individual Taxes, 2 July 2008. http://www.taxpolicycenter.org/taxvox/how-budget-baseline-favors-spending

[105] Stephen J. Nickell, "Competition and Corporate Performance," *Journal of Political Economy*, 104:4 (August 1996), pp. 724-746

[106] William A. Niskanen, "Competition among Government Bureaus," in Carol H. Weiss and Allen H. Barton, editors, Making Bureaucracies Work, Sage Publications: Beverly Hills, CA (1980), pp. 167-174.

[107] See, for instance, Mark Clayton, "Energy use falls when neighbors compete," *The Christian Science Monitor*, 30 September 2009. Also see Alan S. Gerber, Donald P. Green and Christopher W. Larimer, "Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment," *American Political Science Review*, 102:1 (February 2008), pp. 33-48.

[108] Aaron Wildavsky, *The Politics of the Budgetary Process*, Fourth Edition, Little, Brown and Company: Boston, MA (1984), p. 19.

[109] Aaron Wildavsky, *The Politics of the Budgetary Process*, Fourth Edition, Little, Brown and Company: Boston, MA (1984), pp. 64 – 84.

their effects may vary, comparison data can be a strong motivator in government[110] particularly if the data are accessible and trustworthy. Indeed, federal agencies themselves are increasingly using comparison data to encourage more accountability among everything from colleges[111] to nursing homes.[112]

One idea would be to look for federal programs that have very similar goals but achieve them in different ways, such as through grants, regulations, tax credits, and loan guarantees. A third party, GAO or CBO, for instance, could then roughly estimate how productive each program is. This may mean, for instance, estimating how many homeless families are provided long-term shelter for each dollar spent, or how many unemployed persons get and retain a job for each dollar spent. One might initially expect large differences in the results. For instance, in 2003 a back of the envelope comparison of flood mitigation programs showed that for the same federal expenditure[113] a Department of Agriculture grant program appeared to produce 40 percent more floodplain protection benefits than a Federal Emergency Management Agency grant program.[114]

The periodic publication of such data from a reliable source would result in agencies attempting to achieve better and better results under such comparisons.[115] Even if there may be important and valid reasons why one agency's program may never appear the "best," using such a measure would likely cause agencies to manage the program in such a way as to achieve the "best" rating it can under the circumstances.

Such comparisons could be eventually taken a step further and opened up to third parties, such as non-governmental organizations, who could be offered the opportunity to achieve even greater results at less cost compared to federally operated programs. This, for instance, could be done by advancing social impact bonds also known as pay-for-success schemes.[116] This would more fully harness the benefits of competition.

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[110]   See E. Blaine Liner, Harry P. Hatry, Elisa Vinson, Ryan Allen, Pat Dusenbury, Scott Bryant, Ron Snell, "Making Results-based Government Work," The Urban Institute, April 2001, p. 18. http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310069-Making-Results-Based-Government-Work.PDF

[111]   The U.S. Department of Education's "College Scorecard" (accessed 2 September 2016). https://collegescorecard.ed.gov/

[112]   The Medicare program's "Nursing Home Compare" ratings (accessed 2 September 2016). https://www.medicare.gov/NursingHomeCompare/About/Ratings.html

[113]   While this comparison just looked at federal expenditures, a productivity measure should consider all costs to society, especially if it includes a regulatory program.

[114]   US Office of Management and Budget, Addendum to the Fiscal Year 2006 Budget (accessed 2 September 2016). https://www.whitehouse.gov/omb/memoranda_m02_06_addendum

[115]   In some respects, the "Best Places to Work in the Federal Government" rankings released by the Partnership for Public Service provide a model for such a system of comparison (accessed 2 September 2016). http://bestplacestowork.org/BPTW/

[116]   Ashley Pettus, "Social Impact Bonds," *Harvard Magazine*, July-August 2013 (accessed 2 September 2016). http://harvardmagazine.com/2013/07/social-impact-bonds

Three Recommendations for Regulatory Reform

Examination of eight government-wide reform initiatives indicates they failed due to a lack of sustained leadership and, in particular, unfaithful execution by agency personnel. These problems can be at least partially addressed by codification of the reform into law, charging independent third parties with execution (or enforcement of the faithful execution) of reforms, and/or creating healthy competition between agencies that motivates desired changes. The application of these lessons to proposed regulatory accountability reforms can be instructive and indicate how some proposals are likely to be more successful than others at achieving significant and lasting change.

First, the next president should eschew attempting large lasting changes through purely administrative means unless an initiative is part of a strategy to eventually have the reform codified or is based on existing legal authority (such as Articles 4 or 10 of the Constitution regarding federalism) that has a good chance of being upheld by the courts. This does not mean the president should avoid any changes that increase regulatory accountability. But these efforts should focus on *incremental changes* that are more likely to survive changes in administration.

Second, legislative accountability proposals need to treat agencies as interested stakeholders, not disinterested experts. Improvement in regulatory accountability should not solely rely on regulatory offices to implement the reforms but should *create or expand independent organizations* to fulfill that requirement or, at least, enforce faithful execution. Some proposals requiring the retrospective review of regulations create a new temporary commission to identify and review regulations and make recommendations directly to Congress.[117] Other proposals would create a new division at CBO to provide the independent review of some agency rules.[118]

Third, it is highly advantageous if regulatory reform proposals can establish and encourage *competition* among regulatory agencies that ultimately provides incentives to embrace, rather than avoid, greater accountability. As noted above, the goal of accountability reforms are to create regulators who assess and take responsibility for the results of their actions. Competition can create an environment where regulators must "own" their results and have strong incentives to actively improve them.

A regulatory budget, which has been proposed by a number of elected representatives,[119] is a good example of a framework that creates competition between regulatory agencies. In general regulatory budget proposals cap the regulatory costs the federal government imposes on society such that the government may need to offset the estimated costs of new regulations by amending

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[117] See, for instance, in the 114th Congress, S. 708, the "Regulatory Improvement Act" and S. 1683, the SCRUB (Searching for and Cutting Regulations that are Unnecessarily Burdensome) Act.

[118] See, for instance, S. 2294, "The SCORE Act of 2015" introduced by Senator Amy Klobuchar on 17 November 2015 (accessed 4 September 2016). https://www.congress.gov/114/bills/s2294/BILLS-114s2294is.pdf

[119] For instance, the "Article I Regulatory Budget Act of 2016" was introduced by Senator Mike Lee in the U.S. Senate and Representative Mark Walker in the House of Representatives during the 114th Congress.

or repealing existing regulations. This would encourage agencies to hold themselves more accountable for seeking ways to make their regulations, new and old, more efficient at achieving desirable outcomes.