

THE GEORGE
WASHINGTON
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WASHINGTON DC

Who's Regulating the Regulators?

Regulatory Policy Commentary

June 30, 2011

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In a [recent meeting](#), the Senate Homeland Security and Governmental Affairs Committee reviewed legislation purported to improve oversight of regulatory agencies, a task delegated to the Office of Information and Regulatory Affairs (OIRA), a little known—yet industrious—group within the Office of Management and Budget celebrating its 30th anniversary this year. Among the proposals were a requirement for increased use of Benefit-Cost Analysis, reduced regulatory paperwork, judicial review and a congressional vote on regulations deemed to have significant economic impact.

Of course, those familiar with administrative regulation will recognize that this concern for regulatory impact is neither novel, nor limited to the legislature. Rather, it is consistent with the historical precedent set by the Executive Branch since the OIRA's establishment in 1981. Indeed, administrations from Reagan forward have expanded OIRA's oversight role, a trend that appears to be continuing under the Obama administration:

Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements. (Excerpt from [Executive Order 13563](#))

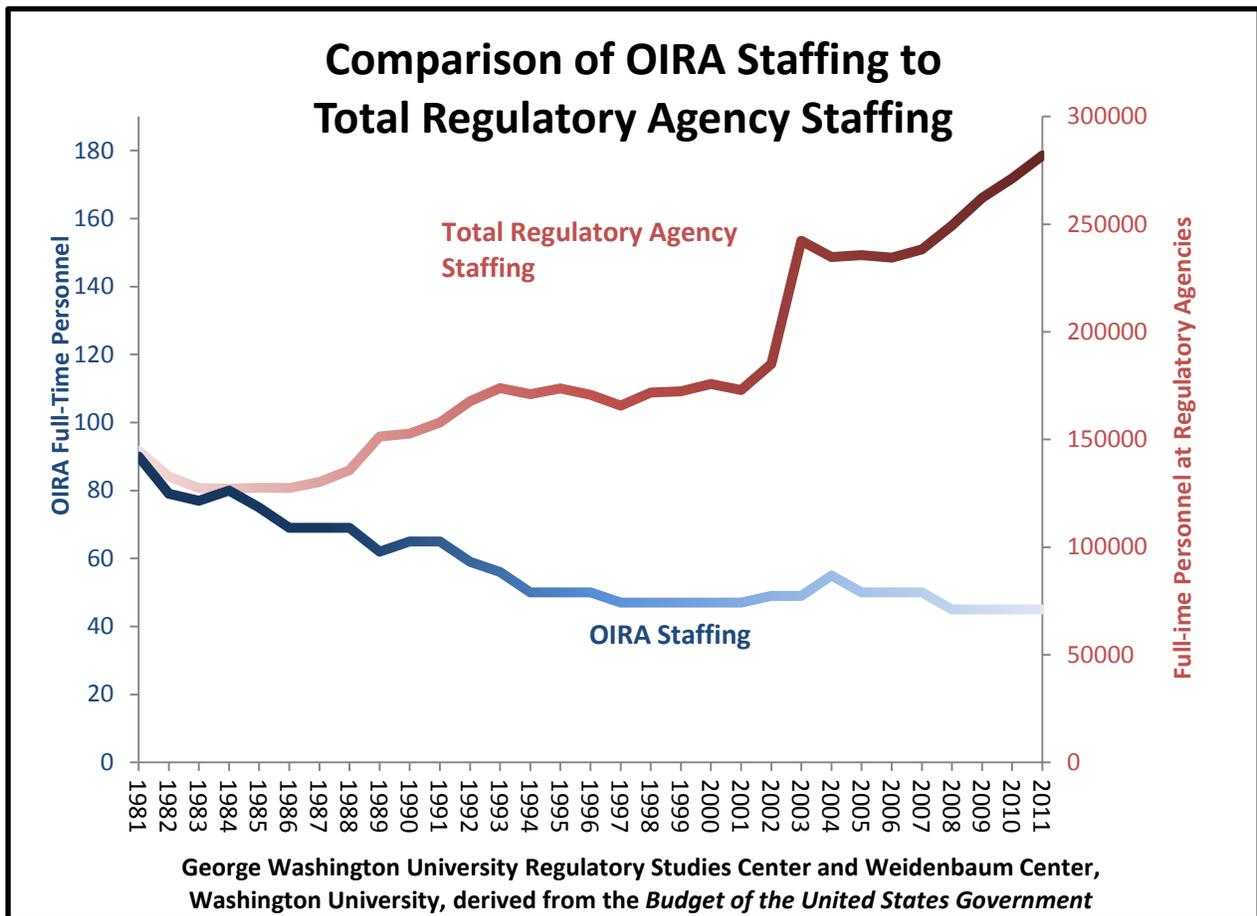
Yet, in the meantime, a more troubling precedent has quietly lurked in the background; as OIRA's duties have been expanded, and its importance emphasized by presidential administrations past and present, its staff has continually diminished since its inception 30 years ago. This is not for lack of regulatory activity, as total regulatory agency staffing has increased markedly over that same period. (See graph on next page.)

Though only one indicator, this suggests an imbalance between the regulators and *their* regulator, which is troubling for three reasons:

First, *agency rules have the force of law*, but legislation (i.e. direct citizen participation) is not a necessary condition for promulgation. In other words, the electoral check on agency authority is indirect—through the nomination (executive) and confirmation (legislative) processes—but the authority of agency rulemaking is no less binding than actual legislation. OIRA, as part of the Executive Office of the President, is more directly accountable to the public for its decision-making, and therefore serves as an important check on agency authority.

Second, while many groups have a vested interest in agency rulemaking, *OIRA is the only Office directly charged with oversight*. The extent that their staff continues to shrink, and general regulatory activity continues to grow, calls into question their ability to effectively review regulations moving forward.

Finally, *recent legislation suggests OIRA’s workload will only increase*. In particular, the passage of sweeping health reform legislation is likely to make heavy use of administrative regulation, increasing strain on an already shrinking OIRA staff. In addition, the regulatory reform legislation mentioned at the outset—while innocuous in intent—may have the opposite of its intended effect if it adds new tasks to the already burgeoning OIRA docket. In an Office where review time is already scarce, additional duties will be performed at the expense of existing ones, diminishing the utility of the legislation.



A few closing considerations:

First, while the impetus for regulatory reform legislation is well-founded, it should avoid confounding work already being done. Second, budget and staffing decisions should match the rhetoric expressed by both the executive and legislative branches. To the extent that oversight reduces the prospect of hasty regulation, increases in regulatory activity should merit increases in oversight staff.

Of course the ideal ratio of OIRA and regulatory agency staff will depend on requirements particular to OIRA and the executive agencies, but at the very least, the current imbalance demonstrates inconsistency between rhetoric—both past and present—and policy. Reconciling the two almost certainly requires increases in OIRA staffing, decreases in regulatory activity, or both. Any policymaker concerned with regulatory burden should revisit the oft-quoted phrase: *Quis custodiet ipsos custodiet*? Who will regulate the regulators? Inasmuch as the answer is OIRA, we should ensure it has the resources necessary to accomplish the task.

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