

Bigger Stones for David: Tools to Give OIRA More Leverage in Regulatory Review

By: Jerry Ellig | October 2, 2019

“We are outgunned ... outmanned ... outnumbered ... outplanned.” Those are the first words General George Washington utters when he makes his initial appearance on stage in the hit Broadway musical [Hamilton!](#) He was speaking of the Continental Army, but he could just as well have been predicting the position the president’s Office of Information and Regulatory Affairs (OIRA) would find itself in *vis a vis* federal regulatory agencies in the 21st century.

Based on full-time equivalent figures in the [FY 2019 Regulators’ Budget](#), I estimate that OIRA’s staff is outnumbered by executive branch regulatory agency staff by a factor of 3600 to 1. (That figure excludes independent agencies and the Transportation Security Administration, whose workforce consists largely of inspectors at airports rather than regulators.) As the accompanying graph shows, OIRA’s staff is slightly over half its size in 1980, while the headcount at executive regulatory agencies has risen by 67 percent during that same time period.

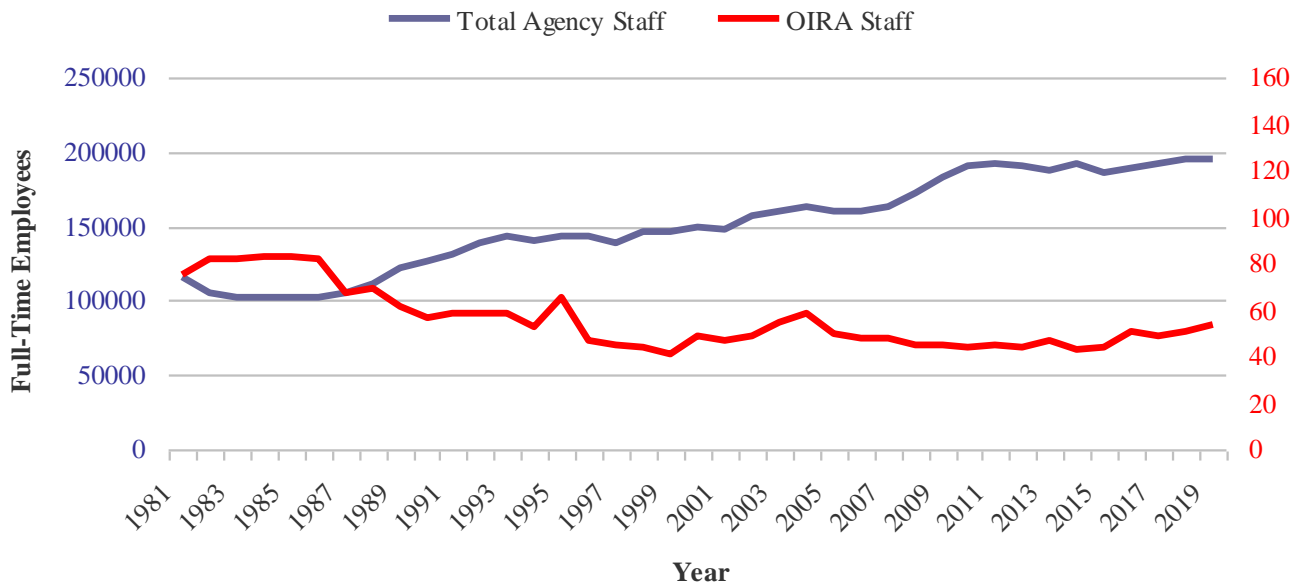
With such a size disadvantage, how can OIRA hold agencies accountable for evidence-based regulation? In [“David vs. Godzilla: Bigger Stones”](#) (a paper presented at a [conference](#) sponsored by the [C. Boyden Gray Center for the Study of the Administrative State](#)), Richard Williams and I suggest some managerial reforms any administration could make to give the small office more leverage in its dealings with regulatory agencies. Simply put, if regulatory review is linked to agencies’ strategic planning and both have budgetary consequences, regulatory agencies are more likely to listen to OIRA.

Our proposed reforms are based on the spirit and text of the [Government Performance and Results Act](#) (GPRA) of 1993 and the [GPRA Modernization Act of 2010](#). GPRA requires federal agencies to develop strategic plans, articulate outcome-based goals, identify how they will measure progress towards those goals, and report publicly on their progress. The GPRA Modernization Act requires agencies to identify high-priority goals and identify every program, tax expenditure, and regulation that contributes toward those goals.

In brief...

Regulatory review of agency rulemaking activity through the Office of Information and Regulatory Affairs should be linked to each agency’s strategic planning, and carry budgetary consequences. This will help agencies to more clearly define their goals, achieve their objectives, and reward positive results.

Executive Branch Regulatory Agency and OIRA Staffing Over Time



Source: [FY 2019 Regulators' Budget](#). Executive Branch figures exclude independent agencies and Transportation Security Administration.

To the best of our knowledge, neither the Obama administration nor the Trump administration fully implemented the requirements of the GPRA Modernization Act as they apply to regulation. Here's how the administration could get going:

(1) Give OIRA authority to ensure agencies define what counts as success when a regulation is adopted and link metrics for success to the agency's strategic goals under GPRA. Too often, agencies adopt regulations without defining what counts as success or how they will measure results after the regulation is adopted. Numerous [experts](#) have called upon agencies to do this in order to facilitate retrospective analysis of the regulation's actual effects. President Jimmy Carter's [Executive Order 12044](#) provided that an agency head could not approve a regulation unless the agency had a plan in place to evaluate the regulation's results, but this requirement was dropped from subsequent executive orders on regulatory analysis and review. Our proposal specifies not just that the agency have "a plan," but that the plan must include an explanation of how the regulation advances one or more of the agency's strategic goals and provisions for measuring the regulation's contribution.

(2) Use presidential budget recommendations to enforce analytical requirements and achievement of agency GPRA objectives. The underlying rationale for GPRA is that successful initiatives should be expanded and unsuccessful ones should be reformed or ended. As part of the Office of Management and Budget (OMB), OIRA is well placed to ensure that presidential budget recommendations reflect evidence-based assessment of the results of regulations. In addition, OMB could provide budgetary consequences for agencies that fail to produce evidence-based regulatory impact analyses that disclose the anticipated outcomes of the regulation and alternatives.

(3) *Combine regulatory budgets with fiscal budgets.* Like fiscal budgets, agency regulatory budgets (caps on the off-budget costs of regulations) should be informed by evidence-based assessments showing whether the agency is achieving its regulatory goals at reasonable cost or is likely to do so in the future. The OMB director should raise or lower an agency’s regulatory budget based on evidence of actual or likely results. Such a process would give agencies a stronger incentive to produce higher-quality RIAs and retrospective analyses of regulations.

(4) *Reward results, not activity.* Fiscal budgets, regulatory budgets, and rewards for individuals in agencies should not be based on metrics like the volume of regulations produced or the speed with which regulatory proceedings are finished. Rewards for agencies and individuals alike should be based on evidence of actual results, or indicators that are reasonable precursors of results if actual results are too difficult to measure or attribute to an organization or an individual.

There is precedent for tighter integration of regulatory review and budgeting. During the Nixon and Ford administrations, centralized review of agency regulations was conducted by the budget side of OMB. [Jim Tozzi](#), one of the officials responsible for these reviews, noted that the involvement of budget examiners “meant that the budget powers of OMB could be brought to bear on the agencies.”

Our proposals bring more of OMB’s budgetary powers to bear on regulatory agencies while ensuring that exercise of that power is informed by OIRA’s regulatory expertise. And we provide a roadmap for implementing a frequently-ignored law that’s already on the books.

Even if OIRA’s staff could somehow regain its original size, it will always play David to the regulatory agencies’ Godzilla. Equipping David with some bigger stones – budgetary consequences – could help make the match more even.