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# OBSCURE BUT POWERFUL: WHO ARE THOSE GUYS?

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In 2001, Senator Richard Durbin, commenting on the nomination of John Graham as Administrator of the Office of Information and Regulatory Affairs (OIRA), referred to OIRA as “obscure but powerful.”<sup>1</sup> It is this epithet, used often to describe OIRA, about which I would like to make some remarks.

The phrase’s origins probably lie with OIRA’s founding Jims, Jim Miller and Jim Tozzi,<sup>2</sup> who testified before a presumably puzzled and perhaps appalled Congress in 1981 that OIRA was going to be a junkyard dog (powerful) that left no paw prints (obscure). During OIRA’s turbulent 1980s, Congress focused on the Office as a constitutional abomination and attempted to defund it until a bargain was struck in 1986.<sup>3</sup>

This agreement resulted in disclosure procedures that were for the most part the same as the transparency provisions of Executive Order 12,866 that are in effect today.<sup>4</sup> In the 1990s, during the Clinton Administration,

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1. Dick Durbin, Editorial, *Graham Flunks the Cost-Benefit Test*, WASH. POST, July 16, 2001, at A15.

2. For their contributions to the OIRA 30th Anniversary Conference, see Jim Tozzi, *OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37 (2011), and James C. Miller III, *The Early Days of Reagan Regulatory Relief and Suggestions for OIRA’s Future*, 63 ADMIN. L. REV. (SPECIAL EDITION) 93 (2011).

3. For descriptions of this chapter of OIRA history, see Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 151–54 and Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 39–40.

4. See Memorandum from Wendy L. Gramm, OIRA Adm’r, to Heads of Dep’ts and

many of those who had been OIRA critics during the Reagan and George H.W. Bush presidencies were now part of, or at least sympathetic with, the new Administration. Consequently, OIRA migrated from being obscure but powerful in a bad way, to obscure but powerful in a good way—that is, rightfully obscure and not so powerful in the eyes of the Clinton Democrats. However, with the election of George W. Bush OIRA's identity as a dark and clandestine body returned, and with it the epithet used by Senator Durbin quoted above.

OMB Watch demonstrated its apprehension about John Graham in 2001 by noting his role as “administrator of an *obscure but powerful office*”<sup>5</sup> and in 2006 bid him good riddance from his tenure at that “*obscure but powerful office*.”<sup>6</sup> The Union of Concerned Scientists referred to Susan Dudley in 2007 as an OIRA administrator who “brings a radical agenda to this *obscure but incredibly powerful office*.”<sup>7</sup> In 2010, the Center for Progressive Reform fretted about Cass Sunstein as Administrator of “this *obscure but powerful office*.”<sup>8</sup>

These nearly identical epithets raise the question, how can an office that is reported as “obscure” so many times still be obscure? When Senator Durbin made his reference to OIRA in 2001, OIRA was celebrating its twentieth anniversary. Its disclosure procedures had been written into Executive Order 12,866 since 1993, and similar procedures had been in existence for seven years before 1993. How could OIRA's authority, which

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Agencies Subject to Exec. Order Nos. 12,291 and 12,498, Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 [Revised] (June 13, 1986), *reprinted in* OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. AND BUDGET, THE REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT APRIL 1, 1988–MARCH 30, 1989, at 529–31 app. III (1988). The Gramm procedures had been preceded by an earlier set of disclosure provisions instituted between OIRA and the Environmental Protection Agency (EPA). See Memorandum from Robert P. Bedell to OIRA Staff on OIRA Procedures 3 (May 30, 1985) *reprinted in* THE REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT APRIL 1, 1988–MARCH 30, 1989, *supra*, at 537–539 app. III. Finally, see Exec. Order No. 12,866, § 6(b)(4), 3 C.F.R. 638, 646–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745, 748–49 (2006).

5. *Graham Reasserts White House Regulatory Review*, OMB WATCH (Feb. 25, 2002), <http://www.ombwatch.org/node/357> (emphasis added).

6. *Graham Weakened Safeguards, Gutting Government Capacity to Protect Public*, OMB WATCH (Jan. 31, 2006), <http://www.ombwatch.org/node/2766> (emphasis added) (referencing a statement by Robert Schull, OMB Watch's regulatory policy director).

7. *Presidential Mandate Centralizes Regulatory Power, Endangers Citizens*, UNION OF CONCERNED SCIENTISTS, [http://www.ucsusa.org/scientific\\_integrity/abuses\\_of\\_science/presidential-mandate.html](http://www.ucsusa.org/scientific_integrity/abuses_of_science/presidential-mandate.html) (last visited Sept. 18, 2011) (emphasis added).

8. John D. McKinnon, *Businesses Encouraged by Regulatory Nominee*, WALL ST. J., May 13, 2009, <http://online.wsj.com/article/SB124216908634512665.html> (emphasis added).

it had been exercising every day since 1981, be regarded as a surprise to anyone?

I want to make three points about this perplexing question: (1) OIRA is obscure but powerful primarily to Democrats during Republican administrations; (2) being obscure but powerful is a compliment, and OIRA should be pleased to accept such approbation; and (3) ironically, the disclosure procedures actually support OIRA's exercise of power in obscurity.

First, the *but* in "obscure but powerful" deserves attention. Most offices in the federal government are obscure except to those affected directly by that office. Who knows about the International Broadcasting Bureau except international broadcasters? And most offices are not "powerful" outside their generally narrow missions. Such offices do not generally affect broad national policy issues, though they may well be deeply involved in the implementation and enforcement of such policies. Other government offices are powerful and well-known for their use of authority. The Internal Revenue Service (IRS) comes to mind, as does the Department of Justice's Office of Legal Counsel.

*Obscure but powerful*, however, denotes a fundamental conflict in American democratic politics: namely, the concept runs counter to the general predilection in American government in favor of openness, particularly for offices that exercise significant authority. *Obscure but powerful*, then, connotes an unsettling state of affairs, and that is exactly what is meant when the phrase is used by Democrats to describe OIRA under a Republican administration. To a Republican administration, however, OIRA is obscure *and* powerful, though usually not as powerful as some in the administration would wish. During Democratic administrations, OIRA is still obscure (though not obscure enough for many Democratic policy advocates), but its power is controlled in a manner that lessens the disparity between power and obscurity. To Republicans during a Democratic administration, OIRA's obscurity connotes a power that should be—but is not—used, which to the Washington cognoscenti is the same as not having any power at all.

Second, the term *obscure but powerful* is a complimentary one to any OIRA staff person. Many in Washington seek the limelight. Some of these individuals are powerful—that is, have substantial influence on policymaking—but most are not. Many others labor in obscurity, some in frustration and others by design. Some of them, too, are powerful, but most are not. OIRA, like the rest of the Office of Management and Budget (OMB), carefully avoids the limelight and exercises its power as a direct agent of the President. OMB is generally well-known for being a powerful institution, though generally this authority is derived from its work with the

federal budget. However, the work of its mostly career staff is done in a carefully maintained obscurity. The first thing that a new OMB staff member learns is that your job is never to speak in public for the Administration, and if you do, you may well be speaking next from the comfort of your home as an ex-OMB staff member. This discipline enables OMB and OIRA staff to serve different presidents of different parties, and encourages the trust that develops between the White House political officials and the OIRA civil servants who work in the intense, power-sensitive political atmosphere of the Executive Office of the President.

Finally, despite the mostly critical depictions of OIRA as obscure, OIRA's disclosure procedures make it one of the most transparent offices in the Executive Office of the President. These procedures provide freight-car loads of paper documents (now gigabytes) about OIRA's business. The information about the rules under review, including access to drafts of agency rules before and after OIRA review, has become increasingly available through improvements in electronic access. This transparency was originally demanded by Congress as the price for continued funding; however, it has not prevented the continued use of word *obscure* to describe OIRA.

Nevertheless, the transparency under which OIRA operates reduces fears that OIRA's work is really a satanic secret, a black box inside a black hole. (In the interests of historical accuracy, it must be acknowledged that OIRA was at least to some extent a black box, much to Jim Tozzi's great (though predisclosure) delight.) With such extensive disclosure, why is OIRA's work still considered obscure? I suspect it is because that transparency reveals what OIRA's daily work actually is—difficult, complex, frustrating, and demanding analytic work in the vast briar patch of executive branch regulatory detail. It turns out that scarcely anyone is actually interested in the details of this work. Few have the interest, the stamina, or the will to labor thus among the thorns. Critics may disapprove of OIRA's work, using it as a surrogate for their disagreement with the Administration. But in the face of the disclosure procedures, they have to disagree with OIRA's treatment of those pesky, arcane, and often boring details in which they are usually loath to become entangled. Thus, under the procedures originally drafted by Bob Bedell in 1985 and Wendy Gramm in 1986 and memorialized in Executive Order 12,866 by Sally Katzen in 1993, OIRA has continued to transparently exercise its power in obscurity.