REGULATORY CHECKBOOK

Comments to
the Administrative Conference of the United States
on the Draft Report
"The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform,"
by Professor Stuart Shapiro[1]

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President

March 20, 2012

[1] These comments are submitted to ACUS in advance of its scheduled meeting on March 28, 2012 to review this draft report. Pursuant to ACUS' procedures, "[c]omments must be received five days prior to the committee meeting to be guaranteed consideration by the committee."

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Executive Summary

Professor Shapiro has assembled a lot of information in his draft report, some of which the Committee on Administration and Management may find useful. However, Shapiro's research design is such that it cannot support most of the recommendations he proposes, most obviously those which would require congressional action. There is simply no place in a democratic society for legislation founded on the opinions of anonymous sources.

In addition, it appears that Professor Shapiro missed aspects of the Paperwork Reduction Act (PRA) review process that should have been critical to the project. Had they not been missed, his recommendations likely would have been very different.

1. The draft report includes little information concerning the extent to which agencies comply with the PRA. Agencies are required by the PRA to establish and implement an effective information resources management (IRM) program. Have they actually done so? Agencies are required by the PRA to ensure that each information collection meets certain procedural and substantive standards. Do Information Collection Requests (ICRs) actually comply with these requirements?

The draft report contains no information at all concerning the extent to which agencies comply.

2. The draft report includes no information whatsoever concerning the extent to which agencies evade the PRA by conducting "bootleg" (i.e., illegal) information collections. When Congress enacted the 1995 amendments, its floor leaders clearly understood the problem of "bootleg" information collections and sought to ensure that this problem was solved. Has the bootleg problem been solved? How effective has been § 3517(b), the provision Congress added specifically to provide the public a clear way to identify bootlegs and other manifestations of agency noncompliance?
3. The draft report includes very little information concerning the extent to which OMB enforces the law. The PRA sets forth substantive information quality standards, such as the demonstration of actual practical utility and minimization of

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burden. Does OIRA enforce these provisions? Does OIRA ever verify agency answers to the 18 questions for non-statistical collections (and 23 for statistical ones) that Professor Shapiro mentions?

The draft report does not even pose, much less address, whether OIRA has performed as Congress intended. The most relevant thing the report does say is that most OIRA's ICR reviews are perfunctory.

It is impossible to evaluate the costs and benefits of a regulatory regime without ascertaining the extent to which regulated parties comply with it, or the extent to which the regulator enforces it. Both the RFP and the draft report appear to imply that neither of these questions is relevant. Rather, the purpose of this project seems to be all about figuring out how to cut more corners without being too obvious about it.

The Draft Report Is Founded on Dubious Premises

Professor Shapiro's description of the PRA's history omits important facts and creates a few misimpressions that should be corrected. First, his assertion that "[t]he PRA has long been the subject of controversy" (p. 3) is not supported by evidence provided in the draft report, and it is probably unsupportable. According to comments provided to ACUS by Bob Coakley, the 1995 amendments were approved unanimously.[2] As purported evidence of "controversy," Shapiro mentions co-location within OIRA of centralized regulatory review. However, as controversies go, centralized review appears to have been more smoke than fire. It has lasted 31 years, been embraced by five presidents, and withstood three changes in party control of the White House.[3]

Second, it is demonstrably false that controversies related to centralized regulatory review were responsible for the 1986 and

[2] Bob Coakley, 2012. "Comments on the Draft Report to The Administrative Conference of the United States on the Paperwork Reduction Act," (p.1), accessible at http://www.acus.gov/wp-content/uploads/downloads/2012/02/Bob-Coakley-Comments-on-PRA.pdf. Coakley also is critical of Professor Shapiro's lack of familiarity with primary sources. This may not adversely affect his review of contemporaneous conditions, but it cannot help but make problematic his descriptions of the law's origin, history, and congressional intent.

[3] In his assessment of the benefits of the PRA, Professor Shapiro neglects to mention the positive externality that is internalized through co-location of these functions in the same office.

(especially) the 1995 amendments. Making the agency head a Senate-confirmed position while expanding the agency's authority is not supporting evidence of controversy. The practical effect of requiring Senate confirmation is to increase the Administrator's powers across the federal government and within OMB. In 1995, the principal controversy that needed resolution was the Supreme Court decision in *Dole v. Steelworkers* (494 U.S. 26), which by a 7-1 vote third-party disclosures were exempted from the PRA. In the 1995 amendments, Congress expressly overturned this decision.

Third, Professor Shapiro's recitation of the ICR approval process errs by assuming that agencies and OIRA do exactly what the statute and the Information Collection Rule (5 C.F.R. § 1320 et seq.) prescribe. The statute exempts OIRA's approval and disapproval actions from judicial review, thus shielding OIRA from all manner of accountability save congressional oversight. It is therefore not appropriate to simply assume that the process works as promised or as advertised. This speaks directly to the ACUS charge: it simply cannot be determined whether "the statute itself or agencies' practices under the Act could be improved" without first ascertaining whether agency practices (including OIRA's) comply with the law.

Inherent Limitations in Professor Shapiro's Research Methodology

Having decided to employ a confidential interview method, Professor Shapiro has handicapped himself with respect to what is possible for him to accomplish. Substantively, he is little better off than an agency that caps the number of respondents to nine to avoid having to obtain OMB approval.[4] Procedurally he is much worse off, for the promise of confidentiality ensures that his research is neither transparent nor reproducible by qualified third parties. These requirements apply to influential information generally if it is disseminated by a federal agency, including ACUS. It makes the report vulnerable to easy challenge when published in final form; it could be

[4] Ironically, a case can be made that Professor Shapiro's interviews constitute a "bootleg" information collection. ACUS is an agency within the definition of 44 U.S.C. § 3502(1). The only question is whether his survey was a "collection of information" "conducted or sponsored by" ACUS (5 C.F.R. § 1320.3(c)-(d)).

challenged today because ACUS has published it in draft form without a disclaimer.[5]

Professor Shapiro's methodology is best understood as an exploratory data analysis, except that in lieu of data he has assembled anecdotes. These anecdotes might be representative of what could have been obtained with a large budget and a survey researcher as partner. It is also possible that each of the 21 persons he interviewed by telephone would have provided the same information in person; that none responded strategically, or with animus of any kind; and that the interview of "a group of OIRA officials" provided sufficient balance. Nonetheless, it is inappropriate to make any of these assumptions.

It also is risky to use an exploratory method such as this as the basis for developing recommendations for change. Few of Professor Shapiro's recommendations have much to commend them besides the (apparently) supporting opinions of a handful of presumably knowledgeable people. He provides a thoughtful discussion, of course, but that is a thin evidentiary record on which to recommend what are, in some cases, quite radical changes. In my comments below, I provide reasoned arguments supported by evidence showing why ACUS should not endorse most of them.

Benefits and Costs of the PRA

I agree generally with Professor Shapiro's qualitative review, and most importantly, with his observation that the proper way to examine any proposed change is by examining its marginal benefits and costs. To do this requires a clear understanding of the baseline, and here is where Shapiro's draft report falls far short of the mark. For most of the margins on which he proposes changes, his report does not accurately characterize the baseline.

Benefits of Statistical Policy Review

Professor Shapiro says his interviewees believe that OIRA's statistical policy reviews provide the greatest return on investment, but he also notes that there is a disagreement on this point. His

[5] Office of Management and Budget, 2002. "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication." *Federal Register*, *67*(36), 8452-8460. Though required by law, ACUS does not appear to have issued its own agency-specific information quality guidelines.

discussion is revealing. He says, "scientific agencies in particular chafed at the statistical standards imposed by OMB" (p. 13), quoting one such interviewee as follows:

> For an evaluator[,] there is a lot of work you do where you can't expect a response rate like that. We understand the limits and we do non-response analysis. You get one where you get a 30-40% response rate. You take that and weigh it appropriately. We know how to do that. We grew up with that. . . . Purposive sampling can be better than random sampling[,] and you can't calculate confidence intervals for purposive sampling (p. 14).

This interviewee unwittingly makes OIRA's case, not his own. OIRA's guidance does not forbid surveys that are projected to yield only 30-40% response rates. Rather, it requires that surveys with such low response rates include analysis of nonresponse bias sufficient to demonstrate that the sponsor really does know how to "take that and weigh it appropriately."[6] If the interviewee is being truthful that his agency performs credible nonresponse bias analysis, then OIRA's standards could not be overly stringent because they do not impose any additional agency burden.

The answer to this conundrum might be found in what Professor Shapiro does not include in his report: the extent to which agencies don't really comply with OIRA's statistical policies and standards, including the conduct of credible nonresponse bias analyses. The suggestion at the end of the quote—that the interviewee's agency prefers "purposive sampling" (through convenience samples? quota samples?)—raises serious doubt that it would perform surveys properly if it did not have to deal with the OIRA statistical policy branch. The best spin that could be given is that the interviewee's agency has adopted OIRA's statistical policy standards but isn't very happy about it. A more plausible story is that it would abandon these standards in a heartbeat if only it could get away with it.

And some agencies flagrantly get away with it. An excellent recent example is the Defense Department's surveys conducted in support of the Comprehensive Review of the Issues Associated with a

[6] Office of Management and Budget, 2006. "Standards and Guidelines for Statistical Surveys." *Available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/statpolicy/standards_stat_surveys.pdf.

Repeal of "Don't Ask, Don't Tell".[7] As reported in the Executive Summary of the working group's November 2010 report, in addition to this review, "[t]he Secretary also directed it to develop a plan of action to support implementation of a repeal of Don't Ask, Don't Tell." In short, the purpose of the survey was not to inform policy; it was to justify a policy decision that had already been made on other grounds. OIRA statistical policy review was unable to achieve normal quality improvements because it was shut out of performing a serious review.

What did the Defense Department do? It evaded the PRA. The survey had a "Main Survey" of active duty and reserve component Service members and a "Spouse Survey." The Main Survey was exempt from OIRA review because Service members are federal employees. Of course, had DoD wanted to ensure that the Main Survey met the highest quality standards, it would have foregone this exemption. It didn't.

The Spouse Survey was not exempt, however. To achieve the practical equivalence of exemption, the Defense Department sought and obtained an "emergency" clearance from OIRA even though it met none of the criteria for such a clearance.[8] OIRA could have issued the emergency exemption negligently, not realizing that the survey didn't qualify. But it's much more likely that OIRA was ordered to issue an emergency clearance.

Exemption resulted in the same poor performance in the Spouse Survey that was ignominiously achieved in the Main Survey. The Main Survey yielded response rates among active duty Service members ranging from 19% (Army) to 54% (Coast Guard). Response rates among reserve components ranged from 22% (Army National Guard) to 38% (Air Force National Guard). The weighted average was 28%.

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[7] See http://graphics8.nytimes.com/packages/pdf/politics/20101130-military/DADTReport.pdf. This review was commissioned by then-Secretary Robert Gates in March 2010 to "assess the impact of repeal of Don't Ask, Don't Tell on military readiness, military effectiveness, unit cohesion, recruiting, retention, and family readiness; and recommend appropriate changes, if necessary, to existing regulations, policies, and guidance in the event of repeal."

[8] The criteria for "emergency" clearance are set forth in 5 C.F.R. § 1320.13: "(i) Public harm is reasonably likely to result if normal clearance procedures are followed; (ii) An unanticipated event has occurred; or (iii) The use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed."

The Spouse Survey had response rates ranging from 25% (Army) to 39% (Coast Guard), with a weighted average of 30%.

Eight in 10 active duty servicemembers and seven in 10 spouses declined to participate. Given the obvious salience of the issue to respondents, one would have expected a very high voluntary response rate if respondents believed they were free to be candid and that their views mattered. Apparently, one or both of these conditions were widely believed to be false.

One would also think that nonrespondents might have different views than respondents, which is why OIRA statistical policy guidelines call for a nonresponse bias analysis. Volume 1 of the survey report says that one was conducted, and says it was reported in Volume 3. DoD did not make Volume 3 public, however.[9] It is reasonable to infer that the nonresponse bias analysis yielded devastating results.

To cover up this fatal flaw, the Defense Department touted the response rate as "average for the U.S. military." If that is true, it is surely a scathing indictment of the Department's survey methods, and probably also of the federal employee exemption. To create the false appearance of high quality, Secretary Gates ordered that the sample size be doubled, apparently judging correctly that a 20% response from a sample of 400,000 servicemembers would look more impressive and credible than a 20% response rate from a sample of 200,000.

The abysmal response rate was not the surveys' only defect. Their entire structure lacked merit. As I wrote in a December 2010 review:

> When the Surveys' methodology is examined, it is clear that they are unfit for the purpose of informing Congress with respect to whether gays and lesbians ought, or ought not, be allowed to serve openly in the military. The Surveys cannot predict the effects of repeal on military readiness, military effectiveness, unit cohesion, recruiting, retention, and family readiness. Surveys can be useful for capturing opinions and values, but it is inappropriate to ask respondents, as these

[9] See Department of Defense, 2010. "Don't Ask, Don't Tell Is Repealed," accessible at http://www.defense.gov/home/features/2010/0610_dadt/. In a section on the lower right side of the page titled "More Reports," links to Volumes 1 and 2 (but not Volume 3) are provided.

> Surveys do, to speculate about hypothetical future events over which they have no perceptible influence, much less control.[10]

That is, the surveys were designed not to obtain the improvement in information quality that Professor Shapiro's interviewees identified as the predominant benefit of OIRA statistical policy review. They were designed to justify a policy decision that had already been made.

Political and Policy Constraints on OIRA Review

The DoD vignette illustrates a much larger problem. The benefits of OIRA review are severely constrained by the fact that information collections often are appendages to policy decisions. Although OIRA is supposed to make an independent determination of practical utility,[11] this is rarely possible. It is unrealistic to expect OIRA to determine that an information collection lacks practical utility if the agency says it needs the information to enforce a regulation it has already promulgated, even if the claim is demonstrably false. Of course, this dilemma arises because the process reviewing ICRs contained in regulations is subordinated to the regulations themselves. The practical utility hurdle is presumed to have been met even if the regulation has no merit.

Professor Shapiro's report would be greatly improved if he dealt with operational constraints such as these instead of imagining that ICR review occurs in a vacuum, or perhaps a sheltered workshop. To increase the net social benefits of ICR reviews, the review process would have to be significantly altered. For example, social benefits might be obtained if the review of ICRs contained in rules was conducted publicly before rules were submitted for Executive order review.

As for politically motivated ICRs, such as the Defense Department surveys discussed above, there is probably no feasible remedy. All the process reforms in the world will be ineffective when an Administration has made a policy decision and concludes that it needs "data" to support it. Still, it is important not to impute failure or

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[10] Richard B. Belzer, 2010. "Don't Ask, Don't Tell": Two fatal statistical defects in the DoD surveys, Neutral Source (December 16). Accessible at http://www.neutralsource.org/content/blog/detail/1556/.

[11] 5 C.F.R. §1320.5(e): "OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions." That is, the agency decides on the information collection, but OMB makes a determination whether that collection "is necessary for the proper performance of the agency's functions."

ineffectiveness to procedures that are evaded for political reasons. The logical reason why these procedures are evaded is that they might work—a scenario to be avoided at all costs.

Professor Shapiro notes correctly that OIRA has but a handful of staff to review thousands of ICRs each year, a number that has not changed much since the 1995 amendments, if not before, and therefore OIRA must expend its resources very selectively. This is made more challenging by the slow but steady decline in the size of the OIRA professional staff and the steady expansion of its responsibilities. It's not clear just how large the staff would have to be to conduct serious reviews on even half of the 5,000 ICRs submitted each year. A fair projection is that the staff would have to be perhaps a hundred times larger.

That being fantastically infeasible, it means we can draw at least three important inferences about the social benefits of the PRA:

1. Social benefits are capped by the decision to employ far too small a staff to achieve the PRA's objectives via centralized review. This could be because Congress, a succession of presidents, or both really are not as interested in the control of paperwork burdens as they profess themselves to be. Or it could be because Congress, a succession of presidents, or both have grossly underestimated the scale of the task.
2. The existing ICR review model can generate substantial social benefits only with an extraordinarily high degree of voluntary compliance among agencies. Professor Shapiro's draft report suggests that this assumption is highly unlikely to be true, for he makes it clear that agency burden estimates—the only part of the exercise that is unambiguously quantifiable, and thus subject to independent review and reproduction—are wholly unreliable. Peculiarly, he proposes reforms that would exacerbate agency noncompliance by abandoning OIRA review in favor of allowing agencies even wider latitude not to comply.
3. Given the cap on OIRA staff and little persuasive evidence that agency compliance is more than superficial, the information quality improvements that the ICR review process is supposed to achieve cannot be obtained without

> a radical change in incentives. At best, OIRA can perform an auditing function much like the Internal Revenue Service does for tax returns, which deters but cannot prevent tax evasion. The IRS would deter nothing if, like OIRA, it was unable to impose penalties for noncompliance.

Nothing in Professor Shapiro's draft report suggests to me that he has drawn any of these inferences.

Social Benefits Not Mentioned in the Draft Report

If it is presumed that the control of federal paperwork burden has social benefits (a conclusion Congress reached in 1980, 1986, and 1995), and it is presumed that centralized regulatory review has social benefits (a conclusion five presidents have reached), then it follows that there are likely to be co-benefits resulting from the co-location of these review functions. This important, and perhaps crucial, category of benefits isn't mentioned in the draft report.

Centralized review only comes up in the draft report primarily as a purported source of controversy rather than a vehicle for increasing social benefits. If these benefits are real, then it follows that controversy over the co-location of ICR and regulatory review may be due to organized opposition to the realization of these social benefits. Professor Shapiro's final report should recognize these potential co-benefits and plumb the transcripts of his interviews to ascertain what his handful of experts thought on the subject.

Public Participation

Professor Shapiro focuses on public comments to agencies in response to 60-day notices and to OIRA in response to 30-day notices, within the context of the social benefits of the PRA (pp. 15-17). Unfortunately, he misses the most important aspects of the story.

Agency noncompliance

Agency 60- and 30-day notices are usually inscrutable, deterring all but the most knowledgeable or intrepid from submitting comments. Agencies very often are unresponsive to the public comments they receive. For its part, OIRA does not hold them accountable. Similarly, OIRA does not conduct its ICR reviews transparently. It is characteristically unresponsive to public comments it receives. Meanwhile, the PRA shields OIRA from accountability by exempting its decisions from judicial review. Under these conditions, it is not at all

surprising that so few public comments are submitted on ICRs. What's surprising is that so many comments are submitted anyway.[12]

To evaluate the effectiveness of the PRA's notice and comment requirements, the first step in any reasonable research strategy would be to examine 60- and 30-day notices to ascertain if they are sufficiently informative that comment is even feasible. These notices disclose the barest of details about the context of an information collection and only the vaguest description of practical utility.[13] Notices usually include uninformative burden estimates, such as the range of average burdens for multiple components of the information collections that could span two or more orders of magnitude. Rarely does a notice include "[a] specific, objectively supported estimate of burden," or for existing collections, "an evaluation of the burden that has been imposed by such collection" previously.[14] This information is required by OIRA's Information Collection Rule, but OIRA does not enforce compliance.[15]

Having usually provided the public virtually nothing useful about practical utility and burden, every notice then includes the same formulaic request for comment on practical utility and burden.

This is a process agencies implement in order to fail. The 60-day notice was supposed to help agencies identify problems early to improve information quality, reduce burden, and comply with other aspects of the PRA. It appears, however, that agencies generally are uninterested in obtaining this assistance. After all, if they were interested they would publish informative 60-day notices in the Federal Register, re-publish them on heavily trafficked web sites, and provide a knowledgeable and responsive point of contact. They would

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[12] Commenting on proposed rules makes some sense because final rules are subject to challenge in federal court. Though the hurdle is low, there is some degree of agency hostility to public comments that would cause a federal judge to rule that the agency's action is arbitrary and capricious. For comments on ICRs, there is no degree of agency hostility so great that a judge could so rule, because no one has standing to even bring the matter before a court.

[13] 5 C.F.R. § 1320.3(l). Practical utility is defined as the "actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects."

[14] 5 C.F.R. § 1320.8(a)(4).

[15] OIRA also purports to require agency burden estimates to be transparent and reproducible, but I have yet to see a burden estimate that complies. OIRA accepts agency "certifications" of compliance in lieu of actual compliance.

undertake significant additional consultation. Few ICRs would be controversial on submission to OIRA, and OIRA review would be less time-consuming. How much delay "caused" by the PRA and the 60-day notice requirement in particular is really attributable to strategic agency behavior cannot be gleaned from the draft report because Professor Shapiro did not address the issue.[16]

OIRA non-enforcement

OIRA rewards endemic agency noncompliance with no enforcement. It could, but does not, ensure that agency 60-day notices contain enough information and context to make public comment feasible. It could, but does not, require agencies to address the comments it does receive. Inexplicably, OIRA even keeps the public comments it receives secret until it takes action on the ICR.[17] If OIRA asks agencies to respond to these comments, it does not make that fact known. When agencies do respond, it does not make their responses public. OIRA review is almost totally opaque, even though there is nothing about it that warrants protection as a deliberative process.

Despite agencies' and OIRA's best efforts to discourage public participation, Professor Shapiro's interviewees guestimate that between 5% and 10% of ICRs still attract public comment, a figure he considers low but I find amazingly large, if true. And ACUS Public Member Jim Tozzi says Shapiro's interviewees' guesstimates are low. Relying on data from reginfo.com, not merely anonymous interviews of uninformed individuals, Tozzi estimates that the public comments on about 30% of ICRs not exempt from the 60-day notice requirement.[18] This means that, in the face of a dysfunctional regulatory system and

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[16] There is no reason why the 60-day notice requirement should cause any delay whatsoever. In these cases, delay occurs because of negligent agency information resources management. OIRA grants many "emergency" clearances in which agency IRM mismanagement is the cause of the "emergency."

[17] Comments submitted to OIRA are said to be promptly uploaded to the database at reginfo.gov. However, this database contains embedded instructions preventing comments from being publicly visible until OIRA approves or disapproves the ICR.

[18] Jim Tozzi, 2012. "Comments on the Draft Report to The Administrative Conference of the United States on the Paperwork Reduction Act," accessible at http://www.acus.gov/wp-content/uploads/downloads/2012/02/ICR-Comment-Period-Analysis.Jim-Tozzi-r..pdf. Tozzi's data may understate the public comment rate. He mistakenly believes that comments submitted to OIRA during the 30-day comment period accompanying ICR submission are promptly uploaded.

persistent bad faith, the public still holds out hope that the ICR review process has some potential value.

Professor Shapiro's interview methodology misses these crucial facts of the ICR review process. It cannot be discerned whether he failed to ask the right questions or his interviewees behaved strategically. The problem is that neither explanation is consistent with his acknowledged personal experience as an OIRA desk officer. That should have made it easy to ask the right questions and virtually impossible for him to have been manipulated by strategic behavior.

This discussion in Professor Shapiro's draft report foreshadows his recommendation that the PRA's 60-day notice and comment requirement be eliminated. Presumably, Shapiro agrees that public comments are a good thing but considers a 5-10% participation rate too low to justify the purported delays that the requirement imposes.[19]

Reducing Burden

Professor Shapiro says, "the evidence is mixed at best" with regard to whether the PRA reduces burden (p. 17). This conclusion is surely impossible to reach based on Shapiro's research methodology, and it might be impossible to reach based on any alternative method. Shapiro's interviewees confirm what he knows from personal experience—that agency burden estimates are "highly questionable at best and random numbers at worst" (p. 21). But it is impossible to know whether review reduces burden if burden estimates are nothing more than random numbers.

Costs of the PRA

Direct Costs

The only quibble I have with Professor Shapiro's back-of-the-envelope direct cost estimates to the government is that they are overly precise, thereby implying greater certainty than is warranted. Shapiro reports his estimates with precision ± $500, which simply

[19] Interestingly, others complain that the problem with public comment is agencies get too much of it—so much, in fact, that they are overwhelmed by "excessive information." See Wendy E. Wagner, 2011. "Administrative Law, Filter Failure, and Information Capture." *Duke Law Journal*, vol. 59, pp. 1321-1432. Wagner proposes something akin to the "fairness doctrine," in which agencies would implicitly or explicitly ration participation to ensure "equal" representation of competing views.

cannot be correct even if there were no biases in his method (which there are).[20]

Indirect Costs

More telling is Professor Shapiro's solicitude about the indirect social costs of information collections that are delayed or abandoned without regard for whether these collections have merit.[21] Delay and abandonment have net social benefits in any case where the burden, correctly estimated, exceeds the practical utility. If Congress had believed that unmeritorious information collections were rare, why did it prescribe a regime in which OIRA is responsible for reviewing virtually all of them?

The most glaring defect of Professor Shapiro's analysis is he misses the direct and indirect costs borne by the public by attempting to participate in the review process. This is the kind of error characteristically made by OMB budget examiners, not OIRA desk officers, who by training or temperament are able to recognize that there are real costs besides those borne by government agencies. The absence of private costs renders Professor Shapiro's estimates utterly unreliable.

Effects Incorrectly Characterized as Costs of the PRA

I disagree with Professor Shapiro with regard to whether agencies' peculiar preference for sample sizes of less than 10 is properly characterized as an indirect cost of the PRA. The low-quality information agencies succeed in obtaining this way is an indirect cost of the threshold that permits sample sizes less than 10 to escape review. It is no more attributable to the PRA than is the low quality of the Defense Department's exempt surveys mentioned earlier. When agencies take advantage of loopholes or use political muscle to evade the PRA, the social costs of low quality are attributable to the agency's decision to evade the law, not a defect in the law itself.

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[20] For example, Shapiro appears to include only the salary (not fully loaded costs) of federal employees, and he ignores spending on contractors.

[21] To his credit, Professor Shapiro acknowledges that information collections may not have merit (pp. 25, 27). However, nowhere in the draft report does he provide similar cocktail-napkin estimates of the social benefits of preventing or delaying bad information collections.

Costs of the PRA Not Accounted For

Agency staff understand that voluntary information collections do not elicit the same response rates as mandatory collections. A logical thing to do, therefore, is to make voluntary information collections more salient to respondents so they are more willing to devote the time and energy to reply. Sometimes agency staff make this effort; sometimes their efforts are believed to be cynical (see, e.g., the DoD surveys). But other times agencies do whatever it takes to make voluntary collections appear to be mandatory when they are not. This is an obvious reason why survey recipients often think they are obligated to respond, a problem Professor Shapiro notes in his draft report but without recognizing the reason.

A much more cynical agency practice is to hire a sister agency to conduct a survey on its behalf where the sister agency happens to have plausible authority to make responses mandatory. The sponsoring agency can effectively "rent" the statutory authority of the sister agency. A well-known example of this phenomenon is the U.S. Environmental Protection Agency's Pollution Abatement and Expenditures Survey ("PACE"), which EPA has hired the Census Bureau to implement. EPA has no authority to make the survey mandatory. However, by hiring the Census Bureau EPA hopes to benefit from provisions of law that make other Census Bureau surveys mandatory. The Census Bureau plays along—renting out its statutory authority is, after all, a valuable profit center—misinforming the public that compliance is required when in fact it is not.[22]

As before, this social cost should not be attributed to the PRA. Rather, it should be attributed to agency mischief that OIRA chooses not to police.

Voluntary Collections

OIRA's previously stated interest in exempting voluntary information collections suggests more interest in reducing its workload

[22] U.S. Census Bureau, 2007. "Pollution Abatement Costs and Expenditures Survey," accessible at http://bhs.econ.census.gov/BHS/PACE/About.html. The Census Bureau characterizes the PACE survey as a mandatory information collection authorized by 13 U.S.C. §§ 131, 182, 193, 224, and 225). A more recent web page on PACE is worse because it cites Title 13 generically. See U.S. Census Bureau, n.d. "Pollution Abatement Costs and Expenditures Survey," accessible at http://www.census.gov/econ/overview/mu1100.html. Nothing in Title 13 actually applies to PACE.

and lowering expectations than in improving its performance. This could be a reasonable second-best position based on a recognition that it will never have adequate staff to fully perform the function Congress intended. Alternatively it could be because OIRA officials would rather devote staff resources to other tasks.

In my comments on OIRA's 2009 request for suggested reforms, I characterized its proposal as a solution in search of a problem. That is, it was motivated by

> purposes other than improving the administration of the Paperwork Reduction Act, which include minimizing paperwork burdens on the public; ensuring the greatest possible public benefit from and maximizing the utility of this information; and strengthening decision-making, accountability, and openness in Government and society."[23]

I also noted that some who recommend the exemption of voluntary collections do so primarily to avoid having to comply; others do so because they have an unrelated objective of destroying the Information Quality Act; and still others do so because they despise OIRA.

I illustrated the best of these motivations by referring to a monograph whose authors conveniently sought to exempt the surveys they themselves perform. Ironically, it was the historical abuse of similar surveys by the sponsoring agency that led OIRA to impose demanding quality standards on the genre across the board. The agency had sponsored surveys for strictly methodological purposes, then misused them for purposes that demanded much high quality standards. Tellingly, the authors of the monograph displayed no qualms about committing the same error.[24]

If voluntary information collections were exempted from OIRA review, the result would be a huge expansion in the quantity of paperwork burden accompanied by plummeting information quality.

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[23] Richard B. Belzer, 2009. Letter to Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, December 28, 2009 (internal citations omitted). Reliably accessible at http://www.rbbelzer.com/uploads/7/1/7/4/7174353/091028_comments_on_omb_pra_request_for_comment_final-1.pdf.

[24] Ibid., pp. 3-7.

Dubious Recommendations for ACUS in the Draft Report

Professor Shapiro is obligated to propose recommendations to ACUS pursuant to his contract, and I comment on each recommendation below. Some would be radical changes in the ICR approval process that are terribly ill-advised, and unjustified by the limited research and analysis presented in the draft report.

> *Recommendation 1. "OMB should solicit comment from agencies on the applicability of the PRA to Special Government Employees and provide guidance on the matter."*

Professor Shapiro's analysis shows convincingly that Special Government Employees do not pose a significant PRA problem:

> My interview subjects provided little clarification as none of them recalled an issue with a collection of information from SGEs (p. 32).

Shapiro notes that some agencies treat SGEs as covered by the PRA and others do not, but he was unable to discover any concern about the matter at OIRA. Given its scarce resources, it is obvious this is so low a priority that it never would have arisen except for the fact that ACUS required Shapiro to address it.

> *Recommendation 2: "OMB should delegate to several pilot agencies review of information collections below a particular burden-hour threshold (recommended to be 100,000 hours) that do not raise novel legal, policy, or methodological issues. OMB should audit the results of delegations after two years; then, if abuse of delegation authority has not occurred, and time savings have resulted from the delegation, OMB should expand the delegation to all agencies. Regular audits of agency review processes should then follow."*

The Information Collection Rule includes limited delegation to certain independent agencies. These provisions are intended to manage the presumptive conflict between these agencies' independence from the Executive branch and the plain language of the law, which subordinates them to the President with respect to information resources management. Thus, there is no logical basis for OIRA to delegate review authority to any Executive branch agency. Any such delegation must be grounded on an analysis showing that the purposes of the PRA would be better served by delegation than by

continued OIRA oversight. Professor Shapiro's draft report is bereft of any such evidence.

Exemption thresholds based on burden-hours make no sense and are unsupported by the draft report

Even if some ICRs could be safely exempted from OIRA review, it is inconceivable that they could be safely defined solely in terms of a burden-hour threshold. Professor Shapiro's interviewees exhibited no confidence in agency burden-hour estimates, and he acknowledges that agencies have demonstrated a notorious inability to estimate burden-hours accurately. He describes exactly how agencies would game such an exemption ("setting an exemption at 10,000 hours would likely lead to a large number of collections asserted to require 9,900 burden hours," p. 34). Even if burden-hours were estimated accurately, the value of a burden-hour ranges from trivial to astronomical, depending on whom the burden is imposed. A fixed threshold would perversely give the most discretion to agencies that impose the most costly burdens.

The proposed pilot program for delegated review has the same defects, and more

Professor Shapiro then proposes that OIRA conduct a pilot program based on precisely the same burden-hour threshold whose fatal defects he previously identified. For damage control, he proposes to limit the pilot to agencies whose IRM offices meet the stringent criteria of PRA § 3507(i). This is too clever by half.

OIRA lacks the resources to credibly ascertain whether an agency satisfies § 3507(i). Moreover, it's not clear that any agency—even independent agencies to which review authority has been delegated for strictly political reasons—actually satisfies § 3507(i). It is not in an agency's interest to have an IRM office that is "sufficiently independent of program responsibility to evaluate fairly whether proposed collections of information should be approved and has sufficient resources to carry out this responsibility effectively," as § 3507(i) requires. It is much more likely that Executive branch agencies would be invited into the pilot program based on an asserted equivalence to independent agencies irrespective of whether any of these agency IRM programs meet the § 3507(i) criteria. Further, it is highly dubious that OIRA would ever have the institutional capacity to perform the audits Professor Shapiro envisages, or have the political support to do anything if even rampant abuse was detected. The most

plausible scenario is the pilot program Shapiro proposes would be an abysmal failure mischaracterized as success, and then extended government-wide.

Tiered review like Executive Order 12,866 is no better

Finally, Professor Shapiro discusses a tiered review scheme analogous to the centralized regulatory review process in Executive Order 12,866 (pp. 34-35). Inexplicably, he proposes to base this tiered review on … burden-hour thresholds, an approach he earlier admits has no merit.

A tiered ICR review scheme modeled on Executive Order 12,866 might "have numerous advantages" (p. 35), but it would be impossible to implement successfully because of burden-hour gamesmanship. Detecting gamesmanship requires OIRA to conduct the reviews the tiered scheme is intended to make superfluous. The agencies might save time, but OIRA would not. Retaining the discretion to review "information collections that it felt raised novel legal, policy, or methodological issues" does no good unless OIRA devotes the time to determine whether any of these thresholds is triggered. Agency cost savings are accompanied by OIRA cost increases.

Tiered review makes sense if and only if the tiers are well-defined and very difficult or impossible for agencies to game. If an agency was caught improperly assigning an information collection into a lower tier to evade OIRA review, it must suffer an automatic penalty so severe that it would not consider risking detection. This penalty could not be left to OIRA's discretion. I am aware of no instance in which OIRA has taken drastic action under current procedures, even in cases where an agency knowingly perpetrated an egregious bootleg. As the annual ICBs show, when OIRA discovers a bootleg it quietly works with the agency to correct the problem in a way that causes embarrassment to no one.

As for the Executive Order 12,866 model, there is no evidence that tiered review has accomplished anything except remove 90% of all draft rules from OIRA oversight. Nor is there evidence that regulations are consistently assigned to the correct tier. Agencies make initial classifications at the Regulatory Agenda a stage, the point in the process where they have the least reliable information concerning which tier is most appropriate. OIRA has the authority to override agency misclassifications, but it rarely does so at least in part because it lacks superior information. The same staff review the ICR

and the draft regulation, but they overlook, tolerate, or endorse brazen classification errors.[25]

> *Recommendation 3: "OMB should issue guidance to make clear that investigations by Inspectors General are exempt from the requirements of the PRA so long as they meet the requirements of 5 CFR 1320.4(a)(2)"*

Given that inspectors general appear to be here to stay despite their dubious constitutionality, Professor Shapiro's advice seems entirely reasonable. It is a much better recommendation than simply exempting them in toto, for the IGs on occasion have been known to engage in activities that go beyond their charge. There is nothing to be gained by encouraging or incentivizing the IGs to push the boundaries of their authority.

> *Recommendation 4: "Amend the Paperwork Reduction Act to allow OMB to approve collections for up to five years."*

The benefits to agencies of this recommendation are obvious, and in principle it would reduce OIRA's workload by perhaps 40%. These savings are illusory, however. A five-year review period would make each review more challenging, especially to the extent that OIRA staff had experienced turnover. Also, nothing would compel OIRA to perform more intensive reviews if the number of ICRs declined. It's just as plausible that OIRA would apply the same review intensity to fewer ICRs.

Professor Shapiro puts too much weight on the data recorded in reginfo.gov in his justification for such a proposal. While it may be true that 50% of resubmissions are approved without change (p. 38), it is not obvious that these resubmissions actually meet the substantive requirements of the PRA or that approval without change maximizes

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[25] This is commonplace, not an historical horror story. On February 9, 2012, the U.S. Patent and Trademark Office published one of several notices of proposed rulemaking that the Office expects to promulgate to implement the Leahy-Smith America Invents Act of 2011. See U.S. Patent and Trademark Office, "Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions," 77 Fed. Reg. 6879. In the included 60-day notice, the USPTO estimates this rule will impose paperwork burdens alone valued at over $190 million per year (p. 6905). Nonetheless, the USPTO also classifies the proposed rule as merely "significant" (p. 6902). With paperwork burdens this great, it is certain, not merely likely, that this proposed rule is "economically significant." OIRA is negligently or knowingly allowing the Patent Office to dodge its responsibility under Executive Order 12,866 to conduct a Regulatory Impact Analysis.

net social benefits. To the extent that OIRA has to pick its battles, these resource allocation decisions do not mean the ICRs that OIRA chooses to "approve without change" don't require changes to be compliant with the substantive requirements of the PRA.

Given the pace of change in information technology, the alternative case might be made as well—that the maximum approval period should be reduced rather than increased. A five-year approval period creates a perverse incentive for agencies to delay incorporating burden-reducing improvements in information technology. Shapiro's recommendation requires that we ignore respondent burden, consider only government burden, and within that category give weight to agency costs while largely ignoring costs to OIRA.

> *Recommendation 5: "Eliminate the 60-day comment period from the Paperwork Reduction Act. Encourage agencies and OMB to use alternative means of reaching the public (in addition to a formal Federal Register notice) during the 30-day comment period that occurs simultaneously with submission to OMB."*

This recommendation is appallingly misguided, and on multiple levels. As I've already noted, a huge gap in Professor Shapiro's analysis is the absence of any critical review of the quality of agency 60-day notices, or the propensity of agencies to ignore comments because OIRA does not compel them to take comments seriously. The 60-day notice requirement was added to the PRA in the 1995 amendments because the 30-day notice procedure occurred so late in the process that OIRA had to resolve controversies that should have been handled by the agency prior to submission. It is unfortunate that the agencies have rendered the 60-day notice procedure ineffective. Still, when a process has been sabotaged by its opponents, rewarding the saboteurs is not a credible way to fix it.

An alternative recommendation the Committee should consider is eliminating OIRA's discretion to permit agencies to game the 60-day notice provision. If OIRA had no choice but to automatically disapprove ICRs submitted subsequent to inscrutable 60-day notices, 60-day notices would experience a sudden and substantial improvement in transparency and utility. If OIRA also automatically disapproved ICRs in which the agency had not responded in good faith to public comments, there would be a sudden and substantial increase in the supply of quality public comments. The 60-day public comment procedure has not failed; OMB has failed to implement it effectively.

In addition, Professor Shapiro's recommendation that "agencies and OMB … use alternative means of reaching the public" ignores the fact that the PRA currently requires agencies to do this—in the same provision that mandates the 60-day notice!

> Before an agency submits a collection of information to OMB for approval, and except as provided in paragraphs (d)(3) and (d)(4) of this section, the agency shall provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information…[26]

How an encouragement to do what the law already requires would improve effectiveness is impossible to comprehend.

In short, Professor Shapiro's recommendation to eliminate the PRA's 60-day notice and comment requirement must be abandoned with extreme prejudice. It is unsupported by his research methodology; it is based on a counterfactual assumption concerning the purpose of the 60-day notice, an assumption that is especially remarkable coming from a former OIRA desk officer; and it completely ignores the extent to which its ineffectiveness is the result of malign neglect.

> *Recommendation 6: "If Recommendations 2 and 4 are adopted, OIRA should devote some of the resources that have been saved to providing compliance assistance and training for agencies. If they are not adopted, then OIRA staff should be expanded in order to facilitate this function."*

This is a fine sentiment, but there is no reason to believe OIRA management would agree to invest any cost savings in increased ICR review. A more plausible inference is that OIRA currently devotes what it believes to be the minimum amount consistent with maintaining the illusion that it takes paperwork burdens seriously, and that if it could reduce the cost of ICR review it would reprogram the savings elsewhere. And there is no assurance that any cost savings Recommendations 2 and 4 might achieve would even be retained by OIRA. There is a fair likelihood that the OMB Director would reprogram

[26] 5 C.F.R. § 1320.8(d)(1), emphasis added. A similar requirement applies to ICRs cleared under "emergency" procedures. See 5 C.F.R. § 1320.13(c): "The agency shall submit information indicating that it has taken all practicable steps to consult with interested agencies and members of the public in order to minimize the burden of the collection of information." How often agencies comply with this provision is not publicly known.

these savings to an activity he judges to be more important. Finally, if OMB budget did not commandeer the savings, Congress might do so and either spend them elsewhere or make a symbolic reduction in the budget deficit.[27]

Professor Shapiro's alternative recommendation, for the scenario in which Recommendations 2 and 4 are not adopted, is mere wishful thinking. Congress has underfunded OIRA for decades; why should it reverse course now? What ACUS needs, and Professor Shapiro should supply in a revised paper, are innovative strategies for making the most of OIRA's scarce resources—assuming of course that ACUS agrees with OIRA's statutory mission to reduce paperwork burden and improve information resources management. Chief among these innovative strategies would be ways to leverage OIRA's ability to enforce the PRA without having to acquire additional resources.

I am struck by another aspect of Professor Shapiro's analysis that I find confusing—the notion that agencies should need "compliance assistance." The PRA has been in place for 31 years, during which time it has been modified only rarely. Both the statute and OMB's Information Collection Rule were last revised in 1995. How is it possible that, after all this time, federal agencies do not understand what the law and OMB's regulations require?

> *Recommendation 7: "Congress should change the annual reporting requirement for OMB to include only a reporting and analysis of the data on reginfo.gov and a discussion of developments in government management and collection of information. OMB should not solicit information from agencies for the report except as necessary to report on these two areas."*

I agree with Professor Shapiro that the social benefits of the Information Collection Budget probably do not justify its costs. Indeed, to the extent that the public or Congress mistakenly relies on its burden-hour estimates, the ICB probably has net social costs.

At the same time, it is an axiom of effective management that measurement is essential for improving performance. If reporting of burden-hours is abandoned, there would be no incentive at all to reduce them. Perhaps a better ICB would include audits of a sample of ICRs from each agency's inventory to ascertain the validity of agency

[27] Persistent deficit spending is a key reason why OMB and OIRA are denied more staff. It is unseemly for OMB to increase its own size while imposing staffing reductions on Executive branch agencies.

burden estimates and practical utility claims. OIRA could use "purposive" samples, such as the convenience sampling recommended by one of Professor Shapiro's interviewees (p. 14). These samples could be obtained by nomination from the public to highlight information collections with the greatest room for improvement.

Generalizing from such samples is, of course, problematic at best. Alternatively, OIRA has ample professional expertise to devise a stratified random sample with no nonresponse bias. OIRA could reduce the burden of performing these audits without introducing bias by annually publishing the listing of ICRs scheduled for audit, and soliciting public comment from respondents.

> *Recommendation 8: "Congress should allocate additional funding to support the integration of life-cycle management of information into the existing information collection process. OMB should revise Circular A130 and agencies should redo their Strategic IRM plans to make clear how they are complying with the PRA and implementing a life-cycle approach.*

It is intriguing that information resources management, which comprises the vast majority of new statutory text in the 1995 amendments, is nowhere to be found in the ACUS project. Professor Shapiro thus deserves credit for raising the bigger picture by including IRM in his draft report. It ought to be the predicate for every information collection, not the mere afterthought it has become.

With this in mind, it is worth noting that attention continues to be directed to burden-hours because they can be quantified and monetized, however poorly. Even if the actual quantification of burden-hours yields nothing more than "random numbers" (p. 21), they at least can be counted and estimation methods can be improved, which is more than can be said about IRM generally because it is much less susceptible to consistent and useful measurement.

Professor Shapiro correctly notes that information collections should be evaluated based on "how the information will be used, disseminated, stored, and disposed," "making approval of information collections contingent upon detailed answers to these questions from the agencies" (p. 50). Yet several of these factors already are criteria for approval in the PRA and OIRA's Information Collection Rule. Why don't they matter as much as they should?

There are at least three major reasons. First, OIRA does not often or consistently enforce these criteria. Criteria that are not

enforced are nothing more than check boxes on a form. Shapiro says there are 23 and 18 questions agencies must answer for statistical and non-statistical collections, respectively. How often are these answers transparent or truthful? OIRA does not often make the effort to find out; a meaningless certification by an agency official is good enough.

Second, no one validates that an agency actually adhered to the terms of clearance or the scientific or technical protocols that are integral to an information collection. What is the point of maximizing the net social benefits of an information collection before approval if the agency is going to ignore any requirements it finds inconvenient?

Third, there is no way under the PRA to ensure that the best IRM planning is faithfully implemented. When a survey is approved solely for exploratory, hypothesis-generating research purposes, nothing prevents an agency from using the results for an inappropriately more demanding informational purpose, such as estimating paperwork burden or the costs or benefits of a regulation. In its 2009 solicitation of ideas for improving the effectiveness of the PRA, OIRA invited the public to suggest ways to make IRM worse. Many commenters happily supplied suggestions, which Professor Shapiro sort of notes in his draft report with apparent favor, but without noticing the irony.[28]

Recommendations that Are Missing in Action

If Professor Shapiro's research methodology is adequate to support the recommendations he puts forward in his draft report, it is probably sufficient to support other recommendations that are absent. I suggest three.

Recommendation 9: "If the ICR approval process is not working well, try a little enforcement."

OIRA has developed the bad habit of treating the PRA as something of a nuisance that interrupts more important or interesting work, such as regulatory review. OIRA staff could raise their expectations concerning the level of performance they expect from their agency counterparts. For example, OIRA staff could enforce the requirement that agencies include within their Supporting Statements

[28] Shapiro characterized these comments in general as "a fertile source of ideas about reform" (p. 9), but did not cite any of these comments specifically except in the context of the ill-advised idea of exempting voluntary collections from the Act.

a record supporting each of the required certifications.[29] OIRA staff could insist on objectively-supported burden-estimates[30]—not estimates based on speculation, beliefs, hopes, wishes, or March Madness office pools. OIRA staff could refuse to approve information collections lacking persuasive evidence of "actual, not merely theoretical or potential" practical utility.[31] OIRA staff could demand proof that the agency has a "plan for the efficient and effective management and use of the information to be collected, including necessary resources,"[32] thereby striking a blow for better IRM.

Unless and until OIRA enforces the law, it is premature to talk about weakening the law because it's not working.

> *Recommendation 10: "Revise the Information Collection Rule to fully incorporate information OMB's 2002 quality principles and standards."*

It has been 10 years since OMB issued government-wide guidelines on information quality pursuant to its statutory authority under the PRA.[33] Almost every federal agency has complied procedurally with these guidelines by issuing its own agency-specific guidelines and establishing administrative procedures whereby any person may seek and correct information believed to be erroneous. ACUS is a notable, and ironic, exception.

For some reason, OIRA has failed to integrate information quality principles into the Information Collection Rule. This creates the potential for extraordinarily perverse outcomes. It is conceivable, for example, that OIRA could approve an information collection, the sponsoring agency could implement it exactly as approved, and yet the information could be vulnerable to challenge immediately upon dissemination.

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[29] 5 C.F.R. § 1320.9: "As part of the agency submission to OMB of a proposed collection of information, the agency (through the head of the agency, the Senior Official, or their designee) shall certify (and provide a record supporting such certification)…"

[30] 5 C.F.R. § 1320.8(a)(4).

[31] 5 C.F.R. § 1320.3(l).

[32] 5 C.F.R. § 1320.8(a)(7).

[33] Office of Management and Budget, 2002. "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication." *Federal Register*, 2002, *67*(36), 8452-8460.

The reason for this neglect isn't clear. Incorporation of information quality principles in the Information Collection Rule would be easy enough. The minimum that is required is the addition of a pre-dissemination review step as an explicit agency responsibility; the disclosure of this pre-dissemination review in each Supporting Statement; and clear direction from OIRA that adherence with information quality principles is required for approval followed by active enforcement.

> *Recommendation 11: "For information collections that affirmatively comply with information quality principles, grant a rebuttable presumption of information quality compliance when disseminated or used as intended."*

An incentive can help agencies improve their voluntary compliance. A rebuttable presumption of information quality compliance would significantly reduce the risk of controversy and error correction challenges. Of course, it is essential that the burden of proof for rebutting such a presumption be reasonable and grounded in the principles of the PRA. Significant evidence of noncompliance with information quality principles, terms of clearance, or the technical or scientific protocol grounding the information collection should shift the burden of proof to the agency to demonstrate that quality was not harmed, or perhaps was enhanced, by the departures that the agency made. In cases where an agency cannot make this demonstration, the information should be discarded from the agency's inventory.

ACUS has displayed a preference for the adoption of "best practices" that could serve as models government-wide. This reform would establish high quality as a best practice for government information.

Recent Guidance

Professor Shapiro discusses guidance memoranda issued by OIRA Administrator Cass Sunstein, asserting that they have improved PRA implementation. I wish to comment briefly on each.

Generic and Fast-track Clearances[34]

Administrator Sunstein's May 2010 promotion of generic clearances fits a pattern. The Information Collection Rule contains a lot of flexibility, but both agency and OIRA staff may be reticent to take advantage of it. A good reason for reticence is the tendency for flexibility to be abused, as it clearly was by the Defense Department's use of an "emergency" clearance to evade applicable statistical policy standards to manufacture data to support the repeal of 10 U.S.C. § 654(b), and the Department's "Don't Ask, Don't Tell" policy implementing the law.

Generic and fast-track clearances pose a similar risk of abuse. Professor Shapiro reports favorably the near three-fold increase in generic clearances resulting from the Sunstein memorandum. And it is entirely possible that every one of them, plus many more, deserve to be approved under liberally flexible procedures. But it is only a matter of time until an agency abuses the generic clearance process and slips through the OIRA review process an information collection that turns out to be problematic. When that happens, OIRA staff will, either on their own or under the direction of the current or a subsequent Administrator, clamp down across the board on generic clearances in response to the abuse. The temptation to use fast-track procedures to circumvent legitimate oversight is simply too great to imagine that it won't be exploited.

OIRA could plan for this by announcing sanctions that will be imposed automatically on any agency caught abusing streamlined procedures. If the sanctions are severe enough and the threat of imposition credible enough, this would deter abuse and delay the inevitable date when abuse occurs. More importantly, perhaps, it could prevent the imposition of government-wide sanctions due to the conduct of a rogue agency.

[34] Cass R. Sunstein, 2010. "Paperwork Reduction Act – Generic Clearances." http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.

Scientific Research[35]

Professor Shapiro acknowledges that this December 2010 memorandum was "the least well-known" among his interviewees, a fact that he attributes to their lack of involvement in scientific issues.[36] A different explanation is suggested by one of the interviewees, whom Shapiro quotes as saying the memorandum "[h]elped people get into compliance" (p. 45). One way for an agency to "get into compliance" is to recognize that its past practices were in violation of the PRA, in which case an uptick in ICR submissions would occur.

But there is another way to "get into compliance," and that's to be more careful not to trigger (or not get caught triggering) the "conduct or sponsor" test. Recall that it was federally-funded researchers whose objections to legitimate OIRA review led the Administrator to peculiarly ask the public whether voluntary collections should be exempted from review.[37] These surveys were covered because they triggered the "conduct or sponsor" test, and it would not be hard to make them exempt by avoiding that trigger (or avoid being caught triggering it), all to the detriment of effective information resources management.

Social Media and Web-based Technologies[38]

Professor Shapiro indicates that this April 2010 memorandum has freed agencies from the mistaken view that soliciting comments is covered by the PRA, a worthy if perhaps bizarre outcome if true. However, he also quotes an interviewee who unwittingly admits that his agency has abused this liberty by using websites to encourage "open-ended voting and other approaches" (p. 46). What possible practical utility is an information collection relying on open-ended web-based voting?

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[35] Cass R. Sunstein, 2010. "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Facilitating Scientific Research by Streamlining the Paperwork Reduction Act Process." http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-07.pdf.

[36] This fact suggests a selection bias in Shapiro's sample.

[37] See the discussion of voluntary collections beginning on p. 14.

[38] Cass R. Sunstein, 2010. "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act." http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

Summary and Conclusions

Professor Shapiro's draft report relies on an inherently weak research methodology (unstructured interviews) implemented in a way (total confidentiality) that makes the draft report impossible for third parties (or ACUS, or that matter) to validate. It is also possible that Shapiro's research triggers the PRA's "conduct or sponsor" test, in which case OIRA pre-approval of his survey instrument would have been required. It would be an extraordinary irony if ACUS' project on reform of the PRA and its procedures ran afoul of the PRA.

This research method is useful for generating hypotheses that could be tested using more robust methods at a later date. But there is no hint in the RFP or the draft report that ACUS intended this project to have such limited effect. In that sense, the limited practical utility of the project was unfortunately built-in at the outset.

This decision means every recommendation that has even a shred of controversy should be discarded because it cannot be supported by the research Professor Shapiro conducted. If ACUS adopts any of them, it would send the unfortunate signal that it began with conclusions and funded a research project to justify them.

A couple of Professor Shapiro's recommendations may be salvageable because they do not appear to elicit controversy. These are Recommendation 1 (asking OMB to clarify under what conditions Special Government Employees are exempt) and Recommendation 3 (clarifying that activities of the inspectors' general within 5 CFR § 1320.4(a)(2) are exempt). Recommendation 7 (calling for changes in the annual Information Collection Budget) might also qualify, but the specific changes proposed are not the only ones worth considering in a subsequent research project.

Every other recommendation has obvious defects, some of which Professor Shapiro even acknowledges in his draft report, and thus should be discarded. The worst of these is Recommendation 5 (eliminating the 60-day notice), which should be discarded with extreme prejudice.