



Osservatorio sull'Analisi d'Impatto della Regolazione

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The introduction of  
Regulatory Impact Assessment  
in American Independent  
Regulatory Commissions

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## 1. Introduction

The Regulatory State has expanded the powers of the executive branch; thus, administrative discretion has been limited by a set of procedural burdens, which are able to influence the policy outcomes of the administration.

This essay aims at suggesting what impact would cause the introduction of an important procedural tool – the Regulatory Impact Assessment (RIA) – towards American independent regulatory commissions (IRC).

Recently, some senators have tried to pass a Bill that would force IRCs to assess the impact of their most relevant rules and to submit them to OIRA, a Cabinet office of the President. Surprisingly, though the USA have been pioneers in the introduction of RIA, they have limited its enforcement to federal agencies, whereas most Western countries have far back compelled their regulatory bodies to meet such requirements.

The resistances to change rest on the fear that the reform would curb and centralize the regulatory power IRCs hold<sup>1</sup>. Indeed, governments can manipulate RIA to meet multiple objectives<sup>2</sup>, such as controlling the bureaucracy, introducing reforms or rationality in the administration, or simply giving constituencies the impression of fulfilling their demand for better regulation.

Therefore, the outcome United States want to pursue largely depends on the institutional framework and on how RIA requirements are shaped. Thus, after presenting the different functions of impact assessment (§2) and the institutional framework (§3), the essay will focus on the different impact of RIA on federal agencies (§4) and independent commissions (§5-6). In conclusion, the essay will explain that, whereas RIA has traditionally served political control objectives, its enforcement toward independent commissions might promote rationality and efficiency within the administration.

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1 On OIRA's power to affect the quality and quantity of regulations, P.A. MCLAUGHLIN, J. ELLIG, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis-Evidence from the Final Year of the Bush II Administration*, in *Admin. L. Rev.*, 2011, 63, 179. See also R. H. PILDES, C. R. SUNSTEIN, *Reinventing the regulatory state*, in *The University of Chicago Law Review*, 1995, 1-129, defending OIRA's role and suggesting that "an institution in OMB to oversee and coordinate regulatory policy is, at least potentially, highly salutary".

2 The impact of regulatory oversight on constitutionalism is analyzed by C. M. RADAELLI, A. MEUWESE, *How the Regulatory State Differs: The Constitutional Dimensions of Rulemaking in the European Union and in the United States*, in *Rivista italiana di scienza politica*, 2012, 42.2: 177-196.

## 2. The regulatory impact assessment as a tool for political control

What is the aim of impact assessment techniques? International actors welcome RIA as a tool to enhance the transparency, social efficiency and legitimacy of regulatory policies. Namely, in official documents RIA is considered the main feature of better regulation<sup>3</sup>, thus an instrument introduced in the interest of citizens<sup>4</sup>. The opening statement of President Clinton's Executive Order (EO) 12866 affirms: «The American people deserve a regulatory system that works for them, not against them». When introducing Impact analysis in the European Union – by COM/2002/0276 – the Commission launched it as a part of the Better Regulation Action Plan, to «improve the quality and coherence of the policy development process». UK Better Regulation Executive presented in 2006 a deed on “The tools to Deliver Better Regulation”, portraying the Impact Assessment as the cornerstone of better regulation<sup>5</sup>.

However, what political scientists read between the lines of the law is that these procedural requirements are tweaked to primarily grant politicians the control over the bureaucracy<sup>6</sup>. “Better regulation” then, is the promotional label of a product that actually has multiple ingredients and hidden side effects.

In particular, RIA can be tuned by governments, depending on the purposes they want to pursue and on the influences of the institutional framework. Specifically, RIA can be used as a tool for rational policy-making, symbolic politics, administrative reform and the political control of the bureaucracy<sup>7</sup>.

3 Nonetheless, some scholars think that RIA leads to inefficient and pedantic regulatory procedures and ultimately, to de-regulation. See R. BALDWIN, *Is better regulation smart regulation?*, in *Public Law*, 485-511; R. BALDWIN, M. CAVE, M. LODGE, *Understanding regulation: theory, strategy, and practice*, Oxford University Press, 2011.

4 See THE WORLD BANK INSTITUTE, *Doing Business Report 2014*, October 29th 2013 and WORLD ECONOMIC FORUM, *The Global competitiveness report 2013-2014*.

5 BETTER REGULATION EXECUTIVE, *The tools to deliver better regulation*, 2006.

6 J. MASHAW, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, in *Journal of Law, Economics and Organization*, 6, 1990; M. D. MCCUBBINS, R. G. NOLL, B. R. WEINGAST, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, in *Virginia Law Review*, 1989, Vol. 75, No. 2, , pp. 431-482; ID, *Positive and normative models of procedural rights: An integrative approach to administrative procedures*, in *JL Econ & Org.*, 1990, 6, 307; E. POSNER, *Controlling agencies with cost-benefit analysis: A positive political theory perspective*, in *University of Chicago Law Review*, 2001, 1137-1199.

7 This distinction can be found in C. M. RADAELLI, *The political consequences of regulatory impact*

Rational policy-making is a frequently declared purpose of RIA. Most of the time, the assessment involves analyses, models and economic theories, as well as the acquisition of relevant information through public participation. RIA's discipline compels regulators to follow a certain path when considering whether to issue a new measure. Once all relevant features are collected, the regulatory alternatives are assessed and the best net benefit-cost measure is chosen. Therefore, RIA brings rationality into the decision-making process, since it allows to issue only relevant regulations, and only when a full appreciation of the main risks is done<sup>8</sup>. Rationality is also encouraged through transparency: the entire process that leads to the final choice must be justified explicitly, in order to demonstrate that the proposed regulation is necessary and affordable. Moreover, the exchange of data and extended participation of stakeholders in the process partially compensate the agency's lack of information and make the final decision more objective<sup>9</sup>. Rationality, transparency and participation also enhance the legitimacy of new regulations introduced by independent regulators, whose direct political accountability towards constituencies is null<sup>10</sup>. Therefore, procedural fairness substitutes the political connection between the constituency and the regulator.

In some way, also the symbolic use of RIA can increase the legitimacy of agencies. Symbolic policies are those that confer the appearance of change, allowing policymakers to present themselves as having addressed a problem, but ultimately preserving the status quo<sup>11</sup>. This happens when policies are designed and enacted without providing the appropriate tools that would make them effective. However, symbolic policy does not mean that no impacts occur, but that consequences are independent from the initial purpose of policy-makers: «information is gathered, policy alternatives

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*assessment*, paper delivered to the conference “Governing the Regulatory State”, 2009. See also C. M. RADAELLI, *Rationality, power, management and symbols: four images of regulatory impact assessment*, in *Scandinavian Political Studies*, 2010, 33, 164-188. T. O. MCGARITY, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy*, Cambridge University Press, 1991, outlines three possible functions of RIA: rational policy-making, control of the bureaucracy and legitimacy.

8 From this point of view, RIA procedures enhance the quality of regulations. On this topic, see M. DE BENEDETTO, M. MARTELLI, N. RANGONE, *La qualità delle regole*, Bologna, Il Mulino, 2011.

9 On the positive effects of public participation in regulatory processes, see OECD, *Recommendation of the council on regulatory policy and governance*, Paris, 2012.

10 D.B. Spence, *Agency policy-making and political control: modeling away the delegation problem*, in *J. of Public Administration Research and Theory*, 1997, 2, 199-291

11 On this topic, see M. J. EDELMAN, *The symbolic uses of politics*, University of Illinois Press, 1985; S. L. SUÁREZ, *Symbolic Politics and the Regulation of Executive Compensation A Comparison of the Great Depression and the Great Recession*, in *Politics & Society*, 2014, 73-105

are defined and cost-benefit analyses are pursued, but they seem more intended to reassure observers of the appropriateness of actions being taken than to influence actions»<sup>12</sup>. Therefore, one of the concrete outputs of the symbolic introduction of RIA is policy acceptance. When groups of pressure demand for the enactment of a desired policy, the fulfillment – though only formal – of this request gives the feeling that politicians act in line with stakeholders' needs. In the case of RIA, since it affects administrative activity, its introduction pursuant to popular pressure does not only meet economic actors' expectations towards politicians, but also towards agencies. Thus, it increases agencies' legitimacy and that of their measures.

Stakeholders' pressure is also at the base of the implementation of RIA to produce administrative reform. In particular, RIA has been implemented sometimes to make the administration more competitive and efficient, especially in response to small and medium enterprises' demand for simplification and transparency<sup>13</sup>.

Notably, the image of RIA as a tool for administrative reform has been integrated in the New Public Management movement<sup>14</sup> (NPM) that stresses on the need for a new kind of public governance based on efficiency, thanks to the integration between classic administrative law features and managerial approaches. Ultimately, NPM feasibility rests on public managers' discretion and insulation from political influence.

Stressing on the importance of net benefit-cost measures, RIA mechanisms fits in the NPM model. Moreover, it emphasizes evidence-based decisions of public managers more than their political accountability. From this point of view, administrative reform pattern runs in parallel with the rational policy-making model. It is no coincidence that both models accentuate the value of transparency as well as the political insulation of agencies. However, this has also led to massive

12 J. G. MARCH, J. P. OLSEN, *The new institutionalism: organizational factors in political life*, *American political science review*, 3, 1984, p. 738.

13 See *Conclusions of European Competitiveness Council of Ministers 29-30 May 2013*, approving smart regulation conclusions – such as the enhancement of RIA – to ease the burden for the benefit of the competitiveness of European companies.

14 On NPM, M. BARZLAY, *The new public management*, University of California Press, 2001; P. DUNLEAVY, C. HOOD, *From old public administration to new public management*, *Public money & management*, 1994, 9-16; D. OSBORNE, T. GAEBLER, *Reinventing government: How the entrepreneurial spirit is transforming the public sector*, New York, Penguin Books, 1992; , D. OSBORNE, P. PLASTRIK, *Banishing bureaucracy: The five strategies for reinventing government*, San Francisco, Jossey Bass, 1999; W. DUNN, D. MILLER, *A critique of the new public management and the neo-Weberian state: advancing a critical theory of administrative reform*, in *Public Organization Review*, 2007, 7, 345-358.

criticism around NPM and RIA, since political accountability is traditionally considered an essential feature of administrative action, pursuant to the principle of the separation of powers<sup>15</sup>. On the other hand, administrative structure has experienced some notable changes that has put under discussion this classic view, by introducing in the legal system independent administrative bodies.

Interestingly, adaptors can tune RIA in order to serve a given purpose as well as its opposite. In fact, if under the idea of administrative reform RIA favours agencies' independence, it has also been classified as a political control device<sup>16</sup>. The need to control future policies through administrative procedures arises from the delegation chain. Historically, the delegation chain has followed two paths: the first one is a consequence of the rise of the Welfare State, while the second one marks the transition to the Regulatory State. Welfare State aims to promote economic growth and to meet the social needs of the population. Firstly, governments have tried to achieve these goals by direct interventionism in the Economy. However, this has caused a massive growth of the bureaucracy, as well as the awareness of the better suitability of administrative measures – compared with the complexity of statutory law – to promptly fulfill social needs. Thus, great powers have been delegated to administrative agencies. However, delegation causes discretion and facilitates political insulation, thus elected officials become concerned with the problem of assuring administrative policies' conformity to their ideas. Traditional principal-agent audit procedures – monitoring, rewarding and punishment – might work, but only when law explicitly provides such powers, and only as long as elected officials are in charge<sup>17</sup>. Procedural rules, on the contrary, bind decision-making process to a certain path, allowing indirect and subtle control, even when the political scenario changes. Moreover, RIA, since it is implemented for a great variety of rules, can assure agencies'

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15 J. A. ROHR, *Public service, ethics and constitutional practice*, in University press of Kansas, 1998; W. WONG, E. WELCH, *Does E-Government promote accountability? A comparative analysis of website openness and government accountability*, in *Governance*, 2004, 2, 275-297.

16 R. CALVERT, M. MCCUBBINS, B. WEINGAST, *A theory of political control and agency discretion*, *American journal of political science*, 1989; M. MCCUBBINS, R. G. NOLL, B. R. WEINGAST, *Structure and process, politics and policy*, cit; T. O. MCGARITY, *Reinventing rationality*, cit; C. M. RADAELLI, f. DE FRANCESCO, *Regulatory impact assessment, political control and the regulatory state*, in 4th general conference of the European consortium for political research, 2007; C. M. RADAELLI, *The political consequences of regulatory impact assessment*, cit.

17 C. M. RADAELLI, *Evidence Based Policy and Political Control: What Does Regulatory Impact Assessment Tell Us*, in *Workshop on*, 2008, p. 16; C. M. RADAELLI, *Regulating Rule-Making via Impact Assessment*, in *Governance*, 2010, 23 (1), 89-108; C. M. RADAELLI, A. MEUWESE, *How the Regulatory State Differs*, cit; C. A. DUNLOP, M. MAGGETTI, C. M. RADAELLI, D. RUSSEL, *The many uses of regulatory impact assessment: A meta-analysis of EU and UK cases*, in *Regulation & Governance*, 2012, 6(1), 23-45.

compliance without determining or knowing in advance the desired outcome<sup>18</sup>. Furthermore, open participation allows pressure groups to intervene promptly in the process, influencing the contents of the proposed regulation.

Finally, impact analysis - especially in the shape of retrospective impact assessment – fosters de-regulation: additional requirements and external controls can lead to “procedural ossification”, making more difficult to produce rules<sup>19</sup>. On the other hand, retrospective analysis has the declared purpose of removing unnecessary regulations and streamlining the body of rules that rests on the Market.

The theory of political control has been originally drawn out from a context in which the principal-agent relationship was clear, because Congress and the President directly exercised their power over agencies.

However, the institutional framework suggests also another model, in which this control is not as much visible. With the advent of the Regulatory State, policy-making powers have been also delegated to independent bodies. Therefore, several doubts arise for what regards the validity of principal-agent mechanisms and political control theories when considered in relation to them. Nonetheless, if we admit that RIA can be implemented towards IRCs as a control device, this might threaten the necessity to keep these agencies insulated from elected bodies.

Whatever is the aim to introduce RIA, the different purposes can interact. The symbolic use of RIA can meet political control objectives: while the “unbiased” adoption of RIA favours democratic and shared decisions<sup>20</sup>, the opposite happens when political rationales are introduced. In this case, elected officials are not primarily interested in measuring the impact of rules, but they determine in advance the desirable outcomes of future policies and shape procedural requirements consequently. Therefore, RIA significance is both political and symbolic.

Similarly, rational policy-making and administrative reform are strictly connected under the common principles of transparency and reasonableness of administrative action.

Therefore, it is important to understand to which outcome the introduction of RIA for regulatory

18 M. D. MCCUBBINS, R.G. NOLL, B.R. WEINGAST, *Administrative procedures as instruments of political control*, in *Journal Econ. & Org.*, 1987, 3- 243.

19 T. O. MC GARITY, *Some thoughts on “deossifying” the rulemaking process*, Duke LJ, 41, 1385; S. SHAPIRO, *Assessing the benefits and costs of regulatory reforms: What questions need to be asked*, AEI-Brooking Joint Center on Regulation, 2007.

20 G. D. MAJONE, *Regulating Europe*, London, Routledge, 1996, stressing on the importance of procedural transparency to make regulations more credible.

commissions would tend. Indeed, the institutional framework plays a key-role in determining that outcome<sup>21</sup>.

### 3. The institutional framework in the American legal system

An important publication spread by the OECD in 2008 gives advice to policymakers on “Building and institutional framework for Regulatory Impact Analysis”<sup>22</sup>. Therefore, the shape of the institutional architecture determines not only the outcomes but also the successfulness of RIA procedures. To this purpose, it is necessary to analyze the institutional and constitutional framework of the United States<sup>23</sup>, especially for what regards the federal government. If we understand the institutional balances that exist among powers, we can infer how these can change when a new administrative reform is introduced.

United States are a federal republic and its structure was built around two pillars: the division of authority and the separation of powers.

The first pillar lays the foundations for federalism, namely the power of each State over local affairs. The second one creates a clear separation between the executive, legislative and judicial power, both at central and local level.

At central level, the Congress wields the legislative power<sup>24</sup>, the President leads the executive branch<sup>25</sup> and the judiciary is vested in the federal Courts<sup>26</sup>.

The Congress - divided into Senate and a House of Representatives - deals with all matters of national concern<sup>27</sup>. The most important power of the Chambers involves financial and budgetary

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21 See C. M. RADAELLI, A. MEUWESE, *How the Regulatory State Differs*, *cit.*

22 OECD, *Building and institutional framework for regulatory impact analysis (RIA): a guidance for policy makers*, 2008.

23 The information regarding the US institutions is available on the website of the White House: [www.whitehouse.gov](http://www.whitehouse.gov).

24 Art. 1, sec. 1, U.S. Constitution.

25 Art. 2, sec. 1, U.S. Constitution.

26 Art. 3, sec. 1, U.S. Constitution.

27 Art. 1, sec. 8 and 9 of the Constitution lists the powers of Congress, as well as the related limits.

control, including the authority to allocate funds to the executive branch<sup>28</sup>. Therefore, the Congress can exercise a deep influence on the executive branch and on regulatory policies<sup>29</sup>. In fact, all regulatory powers originate from an Act of the Congress, defining the objectives of regulation, the body in charge to implement them and the boundaries of that power. To this extent, it can also allocate regulatory powers on new administrative bodies, created by statute.

Despite the Constitution rests on the principle of the separation of powers, the President has a great legislative role and limited judicial powers. Nonetheless, his main duties belong to the exercise of the executive power, since he must “take care that the laws be faithfully executed”<sup>30</sup>. Moreover, he can issue rules, regulations and executive orders, even without the approval of the Congress. In addition, he has the power to appoint high-rank public officials, such as the heads of all executive departments and agencies. The staff of the President is reunited under the “Executive Office”, where the Office of Management and Budget (OMB) deals with budgetary issues. Significantly, a special division of the OMB is the Office of Information and Regulatory Affairs (OIRA), defined as the regulatory cockpit of the nation<sup>31</sup>. Its role is to oversee federal regulations and take down all those proposed measures that do not pass the benefit-cost test.

The governmental policies are carried out within the Cabinet, consisting of 15 departments, created to deal with specific areas of national and international affairs.

Frequently, executive duties are accomplished by agencies, too. There are three types of agencies: executive agencies, independent agencies and independent regulatory commissions<sup>32</sup>. Executive and

28 Article I, Section 9, Clause 7 (the Appropriations Clause) and Article I, Section 8, Clause 1 (the Taxing and Spending Clause).

29 See M.D. MCCUBBINS, *The legislative design of regulatory structure*, *American Journal of Political Science*, 1985, 721-748 exploring congressional control over the bureaucratic selection of regulatory policy.

30 Art. 2, sec. 3, U.S. Constitution (“Take care clause”).

31 In C. SUNSTEIN, *Simpler – The future of government*, Simon & Schuster, 2013, p. 3.

32 The terminology may vary, since the threefold distinction is not always adopted in literature. Frequently, federal departments are also called “executive agencies”. Sometimes the reference is to federal departments “and other executive agencies”. Some scholars distinguish only between executive agencies and independent agencies, or between federal agencies and independent commissions. However, the separation between executive agencies, independent agencies and independent regulatory commissions is more suitable to the purpose of this essay. Executive agencies mirror the traditional administrative model. Independent agencies, on the contrary, work outside of the Cabinet and enjoy a certain independence, but their heads still serve at the pleasure of the President (for example, the Environmental protection agency. See C. W. COPELAND, *Economic Analysis and Independent Regulatory Agencies*, report for the Administrative conference of the United States, August 2013). Independent regulatory Commissions are expressively enumerated in the Paperwork Reduction Act (sec. 3502),

independent agencies are frequently classified as “federal agencies”, in opposition to IRCs, which form the so-called “Fourth Branch” of government.

The federal judiciary system is headed by the Supreme Court, whose decisions bind inferior Courts, pursuant to the principle of the *stare decisis*. The principle also works horizontally: courts follows their own precedents and that of their circuit<sup>33</sup>. Therefore, Courts’ position can interfere with institutional balances, since the interpretation of the law in administrative cases can either counterbalance or reinforce the supremacy of the bureaucracy almost permanently.

From this brief overview, the USA result as a nation with a strong central power, despite the federalist conformation. The Congress is responsible for new legislation, by which it allocate powers and resources to the administration. However, the system revolves around the President, whose prerogatives are able to determine or influence the regulatory policies. Courts also play an important role, since their interpretation of the law shapes the power relationship between the bureaucracy and elected bodies, as well as the link between the former and the people.

#### 4. The introduction of RIA in executive and independent agencies

The executive branch revolves around the strong role of the President, who oversees administrative activity thanks to a permanent balance between delegation and control over the bureaucracy. This paragraph illustrates how RIA requirements act in line with this model.

The legal origins of RIA date back to 1981, when Raegan issued EO 12291, requiring only federal agencies to perform RIA on most significant draft rules and a Retrospective Impact Evaluation on existing measures.

The obligation did not address independent regulatory commissions. The introduction of RIA was part of a great deregulation agenda, including also the reinforcement of the role of OIRA<sup>34</sup>.

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and in every further law establishing new IRCs. Compared to independent agencies, the regulatory commissions enjoy further independence from the presidential power and are not subject to certain requirements, such as the duty to perform RIA. IRC’s characteristics will be further explained and analyzed in § 5 of this work.

<sup>33</sup> On the principle of the *stare decisis* and the consequent behavior of the inferior courts, see J. W. MEAD, *Stare Decisis in the Inferior Courts of the United States*, in *Nev. LJ*, 2011, 12, p. 787-830.

<sup>34</sup> For an overview on regulation and RIA in the United States, see F. SARPI, *La continuità istituzionale come garanzia di successo dell’AIR: il caso statunitense*, in C. M. Radaelli (edited by) “L’analisi d’impatto della

As anticipated, OIRA is a regulatory oversight body - introduced in 1981 by the Paperwork Reduction Act - set within the OMB, a body of the Executive Office of the President. OIRA supervises agencies' draft rules and, if it finds the RIA inappropriate, it can send it back to the agency for review. This system has been abused by OIRA in order to strike down undesired regulation by continually sending it back to the agency<sup>35</sup>. To overcome this obstacle, in 1993 Clinton issued EO 12866 ("Regulatory Planning and Review", substituting EO 12291). According to it, OIRA must conclude the review within 90 days, at the end of which the President settles any disagreement between the agency and OIRA. Furthermore, controversies related to the Act are not covered by any kind of judicial review (sec. 10). In addition, EO 12866 promotes transparency. On one hand, OIRA's remarks have to be published, in order to illustrate the reasons undergoing the changes proposed. On the other hand, the agency's analysis must be subject to public comments and have to show the impact of the rule on the markets, on the enhancement of health and safety, on the protection of the natural environment, on the enterprises, bureaucracy and society.

As per EO 12866, any performed RIA has to show that the benefits of each submitted rule exceed the likable costs. Following this intent, the Unfunded Mandates Act of 1995 limited the power of federal agencies to issue unfunded mandates, imposing the performance of a cost-benefit assessment before issuing any rule, and the choice of the least costly alternative within a range represented by the Congressional Budget Office foreseen costs.

One year later, the Congressional review Act established a mechanism by which Congress can review and disapprove, by means of an expedited legislative process, virtually all federal agency rules<sup>36</sup>.

The role of Congress has also been strengthened by the Regulatory Right-to-Know Act of 2000, requiring the OMB to submit to Congress an annual report on the costs and benefits of federal regulations for the previous year, as well as some related recommendations.

In 2003, OMB issued Circular A-4, providing guidance to federal agencies for the development of good regulatory analysis. The Circular points out the functions of RIA: not only it allows to choose the best net-benefit and cost-effective measure, but it also enhances transparency towards government and people about the agency's activity. Thus, every step of the process (the identification

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regolazione in prospettiva comparata", Dipartimento della Funzione Pubblica, Rubbettino Editore, 2001.

35 See E. KAGAN, *Presidential administration*, in *Harvard Law Review*, 2001, 2245-2385.

36 The rule is defined in the text as "the whole or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy." (5 U.S.C. 551).

of the problem and its causes, the legal basis of the measure, the possible alternatives, the related benefits and costs, the final choice) must be justified, in order to demonstrate that the final regulation is necessary and affordable<sup>37</sup>. Special advices are also given for non-quantifiable or non-monetizable costs and benefits, which shall be considered as well. In addition, the results of the analysis must be reproducible and available for public comments.

Similarly, EO 13563 of 2011 (Improving Regulation and Regulatory Review) stresses on the engagement with prior and retrospective cost assessment, on flexible approaches, participation and transparency.

EO 13609 of 2012 (Promoting International Regulatory Cooperation) promotes common international regulatory policies, since “in some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary”, especially when regulations have significant international impacts. It also requires agencies to revise existing regulations and to report the forthcoming activity in a Regulatory Plan.

With reference to the theories on the different functions of RIA explained above, it is now possible to draw conclusions on the institutional implications of the introduction of RIA for federal agencies<sup>38</sup>.

In particular, rulemaking requirements strengthen the accountability of federal agencies towards the Congress and the President<sup>39</sup>. Through RIA and OIRA supervision, elected bodies control agencies activity and have the power to promote deregulation and to strike down what is not in line with their regulatory or budgetary priorities<sup>40</sup>. However, this is constitutionally justified by the ancillary role vested by federal agencies. This also explains why judicial review is excluded: RIA is more about power relationships than about open democracy. Therefore, any hypothetical disagreement does not require the intervention of the judiciary, since it must be solved within

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37 On the structure and utility of RIA, see C. R. SUNSTEIN, *Cost-benefit default principles*, in *Michigan Law Review*, 2001, 1651-1723.

38 See C. M. RADAELLI, A. MEUWESE, *How the Regulatory State Differs*, *cit.*; C. SCOTT, *Regulatory governance and the challenge of constitutionalism*, in D. OLIVER, T. POSSER and R. RAWLINGS (eds.), *The regulatory state: constitutional implications*, Oxford university press, 226-245.

39 On congressional control and the relationship with the President, see T. O. MCGARITY, *Presidential Control of Regulatory Agency Decisionmaking*, in *Am. UL Rev.*, 1986, 36, 443; M.D. MCCUBBINS, *The legislative design*, *cit.*

40 M. A. LIVERMORE, *Cost-Benefit Analysis and Agency Independence*, Virginia Law and Economics Research Paper, 2013, challenges that view, arguing that cost-benefit analysis in fact helps preserve agency autonomy in the face of oversight.

the executive branch. On the other hand, procedural rules stress on the importance of efficiency and rationality. However, rationality is not targeted to meet reasonableness objectives with regards to stakeholders needs, but only intended to “improve the internal management of the federal government”<sup>41</sup>. This confirms the self-referentiality of the rules and therefore their implementation as a tool to enhance reform, political control and rational policy-making<sup>42</sup>.

However, when the institutional actors change, relationships change too, along with the likely implications of the introduction of new procedural burdens.

## 5. The role of independent commissions

This paragraph analyses the role of IRCs in the American legal system, as well as the factors that determine their legitimacy.

Independent Commissions present two main features: the exercise of broad powers and the formal insulation from elected bodies<sup>43</sup>. In particular, they usually exercise quasi-judiciary, adjudicative and rulemaking powers in the same economic sector. Secondly, the head of the Commission is not represented by a single official, but by a multi-member board<sup>44</sup>; the Commissioners are appointed by the President, with Senate approval, but he can remove them only for specific causes (the “for cause” provision)<sup>45</sup>. In addition, the commissioners cannot have any personal, political or

41 EO 12866, sec. 10.

42 This reasoning is corroborated by empirical studies by C.M. RADAELLI, *The political consequences of regulatory impact assessment*, cit.

43 See M. J. BREGER, G. J. EDLES, *Established by practice: the theory and operation of independent federal agencies*, *Administrative Law Review*, 2000, 1111-1294; E. KAGAN, *Presidential administration*, cit. On the opposite, in K. DATLA, R. L. REVESZ, *Deconstructing independent agencies (and executive agencies)*, in *Cornell Law Review*, 2013, 98, 4, the authors reject the distinction between independent and executive agencies since “there is no single feature that every agency commonly thought of as independent shares”. See also A. B. MORRISON, *How independent are independent regulatory agencies*, *Duke LJ*, 1988, 252, stating that “while the independents are more independent than the executive agencies, the difference in my view is not substantial” (p. 253).

44 However, other independent regulatory agencies have maintained a single - administrator asset, such as the Consumer Financial Protection Bureau (CFBP).

45 Usually, removal causes are listed by law, and consist in inefficiency, neglect of duty, or malfeasance in office. However, some statutes do not specifically individuate conducts, but generally refer to the ability of the

economic interest in the holding of such office.

The delegation of broad regulatory powers to a qualified and independent body should grant the efficiency of its expertise members, with no threat of being removed by the President for political reasons<sup>46</sup>.

However, this has also raised the idea of IRCs as a “Fourth Branch” within the State, set outside the democratic circuit outlined by the Constitution. Therefore, the “non-delegation doctrine” has initially defended the separation of powers against the legitimacy of IRCs’ independence and extended powers<sup>47</sup>.

However, a practical approach has later prevailed and Courts eventually have endured the passage to a less formal interpretation of the separation of powers, since IRCs exist precisely to maintain either an a-political or politically balanced delivery of services<sup>48</sup>. Moreover, administrative efficiency objectives justify the delegation of broad powers to agencies, making “constitutionally sufficient” if Congress clearly delineates “the general policy, the public agency which is to apply it and the boundaries of this delegated authority”<sup>49</sup>. Therefore, the judiciary has ceased to seek for institutional links between agencies and the representative circuit, and has focused on the statutory boundaries of their power. However, the judicial interpretation of the legislative boundaries can

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President to remove officials only “for cause”. See E. KAGAN, *Presidential administration, cit*, stating that the power of removal is the “core legal difference” between independent and executive agencies; Similarly, see J. E. GERSEN, *Designing Agencies: Public Choice and Public Law*, Research Handbook in Public Law and Public Choice, D. Farber & A. O’Connell, eds., Edward Elgar, 2010 and C. R. SUNSTEIN, *Paradoxes of the regulatory state*, U. Chi. L. Rev., 1990, 57, 407. See also P. R. VERKUIL, *The Purposes and Limits of Independent Agencies*, in *Duke LJ*, 1988, vol. 37, pp. 257-279.

46 G. D. MAJONE, *Evidence, Argument and Persuasion in the Policy Process*, Yale University Press, 1989.

47 On the non-delegation doctrine see *Wayman v. Southard* 23 U.S. 1 (1825); *Field v. Clark*, 143 U.S. 649 (1892); *Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935).

48 See *Humphrey’s executor v. United States*, 295 U.S. 602 (1935). For some criticism around it, see G. P. MILLER, *Independent Agencies*, in *Sup. Cr. Rev.*, 1986 41. See also *Bowsher v. Synar*, 478 U.S. 714 (1986) in which Justice White’s dissenting opinion pointed out that “with the advent and triumph of the administrative state and the accompanying multiplication of the tasks undertaken by the Federal Government, the Court has been virtually compelled to recognize that Congress may reasonably deem it “necessary and proper” to vest some among the broad new array of governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President”. See G.O. ROBINSON, *Independent Agencies: Form and Substance in Executive Prerogative*, *Duke LJ*, 1988, 238. The author defends the status of independent agencies, arguing that leading them back under political control would not have any practical or organizational benefit.

49 *Mistretta v. United States*, 488 U.S. 361 (1989).

vary considerably, from deference<sup>50</sup> to harder scrutiny<sup>51</sup>. For this reason, the judicial review actually rests on further elements, concerning how the power is performed.

Therefore, procedural requirements - mandatory consultation, duty to give reasons, transparency – represent a legislative counter-balance to forms of great discretion, especially when supported by the judicial review of “arbitrary and capricious”<sup>52</sup> measures. There are different views about who takes advantage of this limitation of discretion.

According to the theory of political control over the bureaucracy and to the principal-agent model, the judicial review of administrative procedures is a powerful means in the hands of the principal to maintain indirect ascendancy over the agency. Procedures are shaped so that policy-makers act in line with some political objectives; the judicial review sanctions any drift from that path.

From a different perspective, procedural rules promote clear-cut democracy. Indeed, in the Regulatory State, the democratic principle concerns not only political, but also administrative bodies<sup>53</sup>, since the latter have inherited the duty to build up and maintain the general welfare. In addition, regulators exercise adjudicatory and quasi-judicial functions, too. This explains why they are not dependent from any kind of power, since they are a direct expression of it. Therefore, they need to receive some kind of legitimation from the people. This legitimation cannot derive from elections, since formally IRCs are administrative entities, thus they have to be appointed by a political body. However, after the initial political appointment, IRCs depart from the representative circuit and get attracted downwards by procedural rules that make their activity controllable from the end-users of a rule. The conservation of this relationship with stakeholders is guaranteed by

50 The so-called *Chevron Deference* (*Chevron USA Inc v NRDC*, 467 US 837 (1984)). According to it, the Court cannot simply impose its construction of the Statute but must defer to agency’s interpretation if the agency acts with the force of law, the statute is ambiguous, and the agency’s interpretation is reasonable. See A. SCALIA, *Judicial Deference to Administrative Interpretations of Law*, in *Duke Law Journal*, 1989, 511-521; D. M. GOSSETT, *Chevron, take two: Deference to revised agency interpretations of statutes*, in *U. Chi. L. Rev.*, 1997, 64, 681. However, Chevron Deference rests on the separation of powers and on agencies’ accountability towards the President, who is, on turn, directly accountable towards people. Since in the case of IRCs these elements lack, the Chevron Deference construction is not suitable.

51 However, an excessive restriction of their space for maneuver can contrast with the reasons undergoing their existence and their wide discretionary powers. See L. AL-ALAMI, *Business Roundtable v. SEC: rising judicial mistrust and the onset of a new era in judicial review of securities regulation*, in *U. of Pennsylvania Journal of Business Law*, 2013, 541-564.

52 According to the Administrative Procedure Act, 5 U.S. Code, § 706.

53 See M. A. LIVERMORE, *Cost-Benefit Analysis and Agency Independence*, *cit.*

the judicial review of IRCs' activity<sup>54</sup>. In other words, procedural safeguards reconnect agencies to people, and judicial review seals this connection.

Either we choose one theory or the other, they both prove the substantive impact of procedural safeguards on the contents of the rule and thus on agencies' discretion. In addition, they also demonstrate that procedural rules allow to reconnect IRCs to the constitutional framework, reinforcing their link with the representative circuit or the people. The shape of this connection depends on how new procedural requirements change IRCs' interaction with the original institutional scenario and therefore on how this influence IRC's duty to "maintain either an a-political or politically balanced delivery of services".

## 6. The introduction of regulatory impact assessment in independent commissions

Currently, only executive and independent bodies are subject to RIA requirements and OIRA's centralized review, whereas IRCs have been just encouraged to assess the impact of their most important rules<sup>55</sup>.

This difference is relevant, especially considering the economic and social impact of their regulations.

In August 2012, three Senators introduced a Bill to the Congress (S. 3468, the Independent Regulatory Agency Analysis Act), to affirm the authority of the President to command IRCs to comply with regulatory analysis requirements and to submit to OIRA the most significant rules to review.

The Bill died after being referred to Committee, and was reintroduced with minor changes in 2013 as Bill of Senate 1173.

As seen above, federal agencies and independent commissions have different structure and

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<sup>54</sup> This idea is confirmed by E. JORDÃO, S. ROSE-ACKERMAN, *Judicial review of executive policymaking in advanced democracies: beyond rights review*, *Administrative Law Review*, 2014, 66.1.

<sup>55</sup> As written in the Unfunded Mandates Reform Act, its provisions do not concern "...rules issued by independent regulatory agencies". EO 13579 states that IRCs should comply with the general requirements set by EO 13563 for executive agencies, because "wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation" (sec. 1). Similarly, according to EO 13609, IRCs are "encouraged to comply with the provisions of this order" (sec. 5).

different roles; the former put into practice the public policy, whereas the latter are a collateral, technocratic expression of it. Therefore, policies towards them should vary accordingly.

However, Bill 1173 appears to simply extend to independent commissions those procedural rules initially created for federal agencies. For this reason, they fear that the impact that RIA exercises on federal agencies, especially in terms of political control, could now unbalance the relationship between IRCs and elected bodies. Indeed, the restoration of the unity of the executive branch would remove the constitutional issues raised by the separation of powers. However, if the inner goal is the reunification of the executive branch, this involves institutional and constitutional balances that question the existence of the Regulatory state and therefore it should be achieved with structural and systematic reforms. Therefore, the purpose here is to investigate if the Bill would actually cancel the main difference between federal agencies and IRCs or if, on the contrary, other structural and institutional elements exist in order to prevent from this consequence.

To do so, the new legislation must be investigated, especially for what regards its three pillars: a full technical analysis of the impact of the rule, OIRA's centralized control and the absence of judicial review. What would be the impact of these factors on IRC's institutional role?

The required assessment is similar to the one "applicable to other agencies". Thus, it is complex, since it does not involve only economic aspects, but it measures also the social and environmental impact of rules. This implies also the consideration of non-quantifiable and non - monetizable costs, as well as the formulation of judgments of value. Some studies related to federal agencies performance, have explained that such analyses tend to be imprecise and less objective than what is commonly expected. However, its implementation at least has forced the administration to consider the likeable – not exact – impact of a rule, to assess feasible alternatives, to collect information from the public. Therefore, it surely promotes rationality or, at least technocratic approach in contrast with the traditional political decision-making. In addition, the Bill also stresses on the opportunity to conduct retrospective analysis over the existing rules and on other de-regulatory expedients, such as self-regulation and "nudging"<sup>56</sup>. Therefore, the analysis aims at achieving the reduction of costs, regulations, potential litigation and administrative inefficiency. Consultations with the public are envisaged, though in the sense of providing information and regulatory alternatives to the agency.

Therefore, RIA is conceived as an internal instrument to improve administrative performances,

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56 R. H. THALER, C. R. SUNSTEIN, *Nudge: Improving decisions about health, wealth, and happiness*, Yale University Press, 2008

both in general and in relation to businesses' demand for simplification. The goal is not to provide a democratic justification of the rule, but to assess its feasibility. Therefore, the aim is to introduce reform, and rationality has been chosen as the most appropriate tool to spread it.

The absence of judicial review confirms the auto-referentiality of the impact assessment. As for federal agencies, RIA is treated as an organizational rule, an intra-executive operation; therefore, no rights arise from it. The limitation prevents to set aside any new regulation inconsistent with the requirements of the Bill. However, this does not exclude that the rule can be challenged otherwise and, in such case, the analysis becomes part of the agency's record. Therefore, it gives more material for the review of the final decision, leaving the possibility for the recipients to obtain the judicial elimination of it because of other procedural infringements. The reference is, again, to the Administrative Procedure Act and to the heightened scrutiny that Courts exercise on "arbitrary and capricious" measures<sup>57</sup>. However, the introduction of some guidelines on the performance of RIA might work as a limit to the creativity of Courts and so to the political employment of judicial review. Moreover, the tendency of Courts to extend their review to the cost-benefit analysis and, in general, to the decision-making process is not new<sup>58</sup>; the Bill would only confirm or, at least, give more precise guidelines for the exercise of their scrutiny. The point here is not endorse this tendency or not, but to affirm that the introduction of the Bill would not overturn the current tendency of judicial review of administrative activity, especially when it affects private interests.

The main concerns regard OIRA's review and, namely, the duty of each federal agency to submit an assessment of every economically significant rule to OIRA, the possibility for the Office to make comments or eventually take down the proposed measure, and the power of the President to settle any disagreement between OIRA and the agency. This system has allowed the President to replicate through procedural requirements the traditional tools of political control over the bureaucracy – direction, control and punishment – and has provided him elements about appointed officials' behavior, for the exercise of the power of removal. However, political control objectives were explicit: as written in EO 12866, "Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set

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57 See S. A. SHAPIRO, R. E. LEVY, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, in *Duke Law Journal*, 1987, 387-455 and the case-law cited in L. AL-ALAMI, *Business Roundtable v. SEC. cit.*

58 See the case-law cited in L. AL-ALAMI, *Business Roundtable v. SEC, cit.* see also P. RAVEN-HANSEN, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, *Duke Law Journal*, 1983, 285-353.

forth in this Executive order”.

On the contrary, Bill 1173 reduces the impact of OIRA’s oversight. No provision allows the Office either to take down the proposed or final measure or to submit it to the President, in case of disagreement on the compliance with the Executive Order. The IRC shall only provide an explanation for the noncompliance with any of the procedural and analytical requirements. Therefore, whereas procedural burdens are the same as those of EO 12866, OIRA’s assessments of IRCs’ analyses are “nonbinding”.

At the same time, the Bill does not specify at which step of the procedure the public must be involved, however public participation is intended to provide alternatives to the rule (sec. 3b), hence it is likeable that it will take place at least “before issuing a notice of proposed rulemaking”, as per EO 12866. According to the theory of political control, public participation assures lobbies’ pressure on the agency, hence the influence of the politicians linked with them. When a federal agency’s position differs with that of the lobby and of the related political party, OIRA’s review and the presidential settlement power solve the conflict. Therefore, lobbies receive a double-step protection, if they meet presidential policy views: the first one via public participation and the second one via centralized review. However, OIRA’s “nonbinding” power towards IRCs interrupts this link and gives more discretion to the Commission, which can surely take advantage of the information collected through the notice and comment procedure, but is bound, in the end, only by the results obtained with the analysis. This incentives OIRA’s collaborative, non-adversarial role and makes the Commission alone the body which is actually in charge with the determination of the final rule.

## 7. Conclusions

Relying on previous assumptions, it is now possible to draw some conclusions on the impact of the introduction of RIA towards independent commissions.

RIA can be edited to suit the political purposes of the adopters. In the United States, regulatory analysis and OIRA oversight aimed at ensuring the political accountability of federal agencies, as well as increasing the rationality and efficiency of administrative activity. Therefore, RIA has been tuned as a complex and complete tool of rule evaluation, directed to give to OIRA and to the President the proof of its necessity. On the other hand, stakeholders’ contribution has been intended as mainly

dialectic, not committed to make the final decision shared and accountable. The exclusion of the judicial review reflects this idea.

For what regards Independent commissions, their role requires a different perspective. Bill 1173 forces IRCs to carry out the same kind of impact analysis, which stresses on the importance of the economic and technical evaluation of policies. However, it does not give the President any explicit mandate to empower OIRA to take down the proposed measures that do not comply with the requirements of the new discipline. In addition, judicial review is excluded.

Therefore, the overall discipline tries to pursue administrative efficiency through the predominance of technical decision-making processes. In the design of the Bill, OIRA should act more like a technical body of experts, than as the herald of the President. OIRA's nonbinding advice would keep the balance of the current institutional relationship between elected bodies and independent commissions. Indeed, their insulation from the political power is not reduced; furthermore, their accountability towards rule-takers must rest on a different legal basis - the Administrative Procedure Act - which has already allowed Courts to extend their review to the economic impact of a rule.

In conclusion, the Bill seems to follow the pattern of the New Public Management model and rational analysis theories, whereas it mitigates the risk of political control. As seen above, the NPM model promotes the activity of politically insulated bodies, because they can enhance administrative efficiency by assuring an a-political fulfillment of the public interest.

Nonetheless, the actual outcomes of this new policy largely depend on two additional elements, which might occur in the future: the issue of the subsequent Executive Order by President Obama and the response of Independent Commissions and Courts to the new requirements. For what regards the Executive Order, the legislative mandate seems to narrow the possibility of the President to bypass OIRA's weakened role. Courts' attitude, on the contrary, might be more unpredictable, since it depends on the evolution of the cost-benefit scrutiny doctrine and on how RIA's discipline will be interpreted to serve that theory. Therefore, further empirical analyses must take place in order to depict the future impact of RIA on the American regulatory system.

