



What Makes a Regulator Excellent?

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Although trite, Theodore Roosevelt's adage "keep your eyes on the stars, and your feet on the ground" captures most of the qualities that make a regulatory program or officer excellent. Excellence arises from an unwavering commitment to the overarching goal of advancing the public interest at every turn in the regulatory journey (the "stars"). This focus on advancing the public interest also – consistent with the stars metaphor – brings out the best in regulatory creativity, entrepreneurship, and inventiveness. But the accomplishments must also be grounded. Among the most important feature is the development of decision processes that are expert and as impeccably fair, open, and accessible to the broader public as possible – a commitment that may require analytical and procedural inventiveness. Finally, and this is an addendum to the Roosevelt saying, an excellent regulator moves forward and avoids getting stuck in the morass of regulatory procedures and requirements.

In this short exploratory paper, I elaborate briefly on these general qualities for the excellent regulator. Since my own research has been focused primarily on public health regulation, my illustrations are limited to this specialty field, although hopefully the ideas have relevance in regulatory systems outside of public health protection. The discussion draft then closes with preliminary suggestions about whether or how more objective measures of performance might operate given the open-ended qualities associated with regulatory excellence.

I. Eyes on the Stars: Advancing the Public Interest

In all regulatory work, regulators act on behalf of the public at large, and thus an overarching objective or lodestar for all regulatory decisions, processes, and activities is to ensure that this goal is at the very forefront of all regulatory choices that fall within the statutory directives. Much like Madison's ideal statesman, this excellent regulator will "refine and enlarge the public views" in order to "best discern the true interest of their country."¹ At least three different qualities are essential to ensuring the regulator is able to advance society's interests.

1. *Actively solicit and advance the public interest rather than satisfice or serve the squeaky wheels.*

Professor James Q. Wilson writes that "government management tends to be driven by the *constraints* on the organization, not the *tasks* of the organization."² The possibility that the agency may spend more time with the *constraint* of organizing, processing, and responding to information than actually synthesizing it into a coherent regulatory policy seems more than a

¹ The Federalist No. 10 at 45 (James Madison) (Max Bedoff ed., 1948).

² JAMES Q. WILSON, THE POLITICS OF REGULATION 115 (1980).

hypothetical worry. In this world, incremental muddling through in response to interest group input—or satisficing—will replace comprehensive problem solving.

Excellent regulators rise above simply “satisficing” the vocal participants (including the White House and members of Congress) in their effort to ensure to the greatest extent possible that the priorities, progress, and outcomes of regulation advance the larger public interest. This larger public interest – by definition – consists of all affected by the decisions, including those who may not be actively engaged. Yet identifying the larger public interest and the “optimal” solution in light of competing values and pressures also requires the regulator to place on the table all of the considerations and assumptions, not merely react to those coming at the regulator at high speed. A regulatory outcome that is defended in this way – by an active, comprehensive effort at problem-solving – requires the regulator to not simply serve as the mediator but as the Madisonian public servant who identifies better solutions that may not even be acknowledged by the competing participants.

The regulator’s independent judgment – and efforts to line up policy against the public interest – are critical precisely because of the complexity of social problems and the regulatory state. Regulators who follow the path of least resistance will develop policies that are inconsistent, counterproductive, inequitable, and may undermine the goal of using regulation to improve society. Regulators who acknowledge their larger role in finding public-benefitting solutions to society’s messy problems and who explain their logic and choices are reaching more durable solutions while paving the way for other regulators to follow similar candid, yet comprehensive approaches to regulatory programs.

The excellent regulator will also stay on this celestial course even in difficult times and with challenging pressures. Lawsuits, motions for reconsideration, political pressures brought from the President and Congress, and other battles can serve to cause regulators to drift, sometimes quite far, from this overarching public goal. For example, in public health rulemakings, there is some empirical evidence that agency regulators may find themselves inundated with comments and threats of litigation – throughout the entire rule process (including the NPRM) – from only the regulated sector. Excellent regulators will not only resist these forces but they may need to make extra effort to take risks or even take up the cause of process-reform in the course of “keeping their eyes to the stars.” Only in the most exceptional cases will regulators be forced to abandon their public-interested outcomes. When they do so, however, to prevent a recurrence, the regulator must be vigilant about pointing out not only the shortfall but the institutional incentives that led to its undoing.

2. *Engage the public in the journey*

Since a regulator must make decisions that affect large segments of society, the regulator should engage the public in the journey. It is not only the choices that should be made with the public interest in mind, but the agency’s work should engage and inform society, including those groups who otherwise might be under-represented and yet impacted by agency decisions. As discussed below, at a bare minimum, regulators must ensure that the most important factors and bases for their decision – as well as their decision itself – are shared openly with the wider community. But, excellent regulators will also identify those most impacted by the decision and

attempt to educate these groups to ensure they both understand the alternatives and weigh in in a timely and meaningful fashion. In complex, science-intensive rules governing air toxics, for example, the purpose of the rules is to minimize air toxic exposures in industrial corridors. Since communities living in these corridors are the primary beneficiaries, an excellent regulator will not only actively solicit their engagement but educate them as to the choices and ensure they have engaged in the deliberations.

3. Adaptive Regulation

Excellent regulators must constantly recalibrate their programs to ensure that the right processes, standards, and approaches are working. Foibles in requirements must be corrected. Assumptions that turn out to be too conservative – and that allow for considerably more regulatory requirements in light of these changes – or conversely assumptions that are too stringent will need updating. Regulatory excellence thus requires the agency to devise means for learning of and identifying important, significant changes in public attitudes, technology, scientific techniques, and a whole range of other developments that must be confronted if their rule is to advance the public good in the long-term. Precisely because the goal is nimble reform, the benchmarks used by the regulator can be general and applied voluntarily. Rather than formalistic triggers for self-assessment, this recalibration process should be fluid, voluntary, and transparent.

While attentive regulators remain attuned to significant technological or policy shifts that may affect their regulatory programs, they also exercise their expert judgment in deciding when or whether a shift in policy warrants a change. In this way, the excellent regulator is able to distinguish fires from fire drills and avoid fostering a policymaking environment in which priorities are renegotiated on a daily basis.

II. Feet on the Ground

Regulatory agencies in the U.S. are the fourth branch of government and it is critical that they employ exemplary deliberative processes that are informed, accessible, and equitable. If agencies do not have their feet on the ground, even the most ingenious and public-advancing policies will lack democratic legitimacy and political support.

1. A Commitment to professionalism and expertise

Excellent regulators will develop decision processes that build on and engage the top experts in the field to ensure that the scientific information used in regulatory decisions is as rigorous as possible. Science-intensive rules should meet if not exceed the standards for scientific reliability set in the scientific community. This expert engagement should also help underscore those decisions, choices, and issues that fall outside empirical knowledge in order to highlight their political nature.

EPA's revised process for setting NAAQS standards illustrates this type of empirically grounded approach. The NAAQS process is broken into four distinct analytical stages – scoping, literature search, modelling, and policy implications – and at each of these stages, the public and experts are provided with at least one opportunity to offer comments. EPA also draws on the

larger expert community by tasking them with authoring literature reviews – with attribution so that their own contributions are acknowledged and rewarded – and by soliciting iterative peer review throughout each step of the process. In this way, EPA’s process becomes heavily mediated by the views of the operative expert community rather than running in parallel to or separate from this community.

Excellent regulatory processes – particularly for science and technical decisions – are thus marked by a full-fledged commitment to organized, vigorous skepticism from a broad and diverse group of experts and affected parties. Indeed, the regulatory process will not be complete without this meaningful organized skepticism.

But EPA’s analytical processes do still more – they not only offer a method by which excellent work and research can be integrated into the agency’s choices, but they help to isolate the work of the staff relative to the work of the political appointees in these science-intensive decisions. Without this demarcation, the science could operate as camouflage for embedded political judgments. Instead, in EPA’s process, the discretion is highlighted and the science-policy choices made at the scientific and staff level are acknowledged and defended. Moreover, the primary opportunities for larger policy-based choices are reserved at the end of the process for political decision-makers. While the political officials’ deliberations may be shrouded in deliberative process, the ultimate result – their choice of a standard from among a range – will be identified in ways that help underscore the work of the political process versus the work of regulatory staff.

2. Accessible and Transparent Decision Processes.

Existing administrative processes are designed to provide open access to all participants and this is accomplished in part by making the information the agency relies on accessible, demanding explanations from the agency to support its choices, and providing opportunities for engagement in the decision-making process. In reality, however, the complexity of the decisions, coupled with the voluminous records and less-than-clear explanations, can serve as a barrier to engagement. To be equitable and fair in practice, the excellent regulator will devise processes that illuminate the choices and solicit input from affected parties who might not be actively engaged in the decision-making because of the practical costs associated with the complex regulatory decisions.

At the same time that the excellent regulator actively solicits engagement from all affected parties and takes that input into account (regardless of threats of litigation or political pressures), the excellent regulator also resists the temptation to use backroom negotiations or log-rolling to reach decisions that are then misrepresented to be the result of rigorous public deliberative processes. If the White House, for example, changes the terms of a rule, the excellent regulator will find a way to ensure that its own processes are not manipulated to obscure this fact. Powerful regulated parties will not be successful in causing the excellent regulator to compromise in invisible ways that are not identified clearly and accessibly. Thus the excellent regulator will not only refuse demands that it advance backdoor deals but will call out these episodes to deter them from taking place in the future.

III. Forward Movement and Not Getting Stuck in the Mud

The agency's overarching task is to take care that the laws are implemented and enforced consistent with the broad directions laid down by Congress and to do so in ways that engage society in a larger conversation about the challenges ahead. Yet in carrying out this assignment, regulators often find themselves encumbered and in some cases even impeded by a long list of often well-meaning legal and related requirements that can get in the way of this overarching goal. Dozens of regulatory assessment requirements make it difficult to promulgate protective rules, despite legislative mandates that expect swift regulatory action. Pluralistic processes designed to keep agencies operating in accountable ways can in practice lead to one-sided pressures on agencies – in many cases backed by threats of litigation – that can provide them incentives to instead satisfice and compromise public interest goals. The understanding of agencies as expert analysts who examine and synthesize competing positions and voluminous and sometimes conflicting research corresponds with a sense that agencies will do this work in clear and comprehensive ways. Yet processes and administrative incentives may reward agencies for instead obfuscating or at least jumbling their findings, rationales, and even their final decisions.

Put another way, over time it is becoming increasingly clear that administrative processes – at least in some settings like public health regulation in the U.S. – may be inadvertently designed in ways that not only do not reward agencies for regulatory excellence but actually incentivize subpar engagement with the problems. Agency explanations and analyses that are incomprehensible, delays in promulgation, satisficing the squeaky wheels, and attending more to immediate metrics and demands than to the realities of what is needed to move regulatory tasks forwards can be traced, in part, to design choices made in administrative law. Regulatory excellence, as discussed below, may be actively discouraged.

It is not necessarily the case that these various design features be corrected or addressed in order to allow regulatory excellence to occur (exceptional people and teams can do exceptional things). But it is critically important in assessing regulatory excellence that one appreciates that some of the overarching qualities recommended for the excellent regulator will force regulators to swim against the tide of institutional structures and requirements. Indeed, an excellent regulator will ideally identify the various ways that their effort to follow the “stars” is being impeded and will contribute to a larger conversation about ways that processes should be revised and reinvented, at the same time that they make progress on their work.

An excellent regulator tasked with advancing the public interest in today's world must thus be creative, determined, entrepreneurial, and able to seize opportunities and run with them. Excellent regulators are not robots; they instead navigate various impediments in order to service the public consistent with their legislative mission. This can mean advancing regulatory goals in ways that are not conventional or jumping frames and taking risks in a way that is guided by the stars. The FTC, for example, acknowledges that it can set policies more swiftly and effectively through enforcement cases than rulemakings. OSHA suggests that parties reveal conflict of interest disclosures in their submissions, a novel approach that borrows from scientific journals. OIRA developed a practice of prompting agencies to identify ways to advance the public interest within their mandates in ways that would appear to require little time or resources. In implementing a statutory mandate that required EPA to promulgate health-based standard for the

toxics on land, EPA recognized the failure of predecessor programs and adjusted the program to instead be based on technology-based standards. The FCC appreciates that as it revises broadcast rules, not all issues may be ripe for proposals and/or the communities might be too divided to engage in all issues at once. As a result, the FCC tiers the deliberations, knocking off a new issue every several years without attempting to resolve all issues at once.

A regulatory entrepreneur also remains aware of and attentive to the larger political, regulatory, and legal context within which he or she operates. An excellent regulator seizes on opportunities to advance one of the many public-oriented projects when the political conditions are right. Rules that have been sitting in the pipeline can be pushed to the top of the agenda when they prove valuable to prevent crises or disasters that have made headline news. Presidential priorities may cause some innovative ideas to be more promising than others at a given time. If President Obama's campaign is based on improving the integrity of agency science, for example, then innovations that advance public health programs could use that criterion to prioritize some projects over others in the short run. Excellent regulators never give up on projects, but they do know which ones are ripe for the picking and which will need more time in the pipeline based on the political climate and other relevant features.

Although excellent regulators will work at the outer edge of what is possible, they will also respect hard legal constraints and will not violate the letter of the law. Excellent regulators instead are careful to identify and respect the line between soft impediments or perverse incentives that undermine public-benefitting regulation and hard legislative constraints. They continue to innovate and imagine possibilities up to that hard edge of statutory limitations. Indeed, they may and perhaps should call attention to legal limits or advocate for renewed thinking about the appropriate regulatory design when it operates in ways that undermine the public interest; but excellent regulators should not act in ways that are blatantly unlawful (or at least this is a very strong rebuttable presumption with respect to regulatory excellence).

Finally, an innovative regulator appreciates that many of the best ideas will emerge from talented staff who are familiar with the issues and not from the top-down and will thus work to inspire her staff to be ingenious, energetic, and professional. In doing this, the excellent regulatory official will provide rewards for those who solve challenges that advance the agency's mission of enhancing the public interest. Employees who do exceptional work – not simply in volume but in creativity and seizing opportunities to make large innovative strides in the agency's work – will be singled out as extraordinary. Those who simply punch the clock or work through the file folders without infusing their own creative ideas into the work – yet operate at levels that would benefit from this ingenuity – will be thanked, at best, in pro forma ways and put in less responsible positions within the agency.

IV. Implications for Performance Measures

In light of these aspirational goals, how can we determine whether an agency regulator is emerging as excellent or is instead falling well below these goals? The varying contexts, situations, and dynamics (not to mention budgets, political pressures, external conditions, interest group pressure, and legal constraints) make it not only difficult but treacherous to try to institute formal "measures" of excellence into regulatory processes. Moreover, innovation – one of the

two most important features of agency policy – flies out the window as the agency becomes judged externally by measures that may impede creative problem solving, seizing opportunities, and thinking outside of the box on substantial public challenges that are so common in regulatory programs.

More simplistic “output” measures that might seem to encourage innovative thinking – such as measures linked to lowering levels of pollution in the workplace – could also frustrate regulators’ efforts to think outside the box. For example, a focus on lowering pollution levels could prevent the exploration of processes that abandon the use of certain chemicals entirely. Perhaps even more problematic, excellent regulators may not be able to control the output on which they are measured. Despite courageous and innovative policies, poor results may be achieved for any number of reasons that have nothing to do with the choices the regulator has made.

Rather than developing quantitative measures to evaluate regulatory excellence, it may be more practical to devise litmus tests for identifying particularly bad regulatory behavior. While identifying the worst isn’t necessary an incentive to become the best, doing so may be useful in categorizing and even stigmatizing practices that are not excellent. As just a few examples, subpar regulation could be identified by:

- Documentation that key public beneficiaries of rules are not engaged or solicited to participate in rules that affect their interests.
- Agency rules that involve political decisions, hidden by the deliberative process privilege, at points in the process and on choices that appear to be and/or are presented as predominantly technical or scientific in nature.
- Inaction in effectuating mandates in ways that are not explained solely by budget limitations or other unmovable constraints and that undermine the legislative goals of advancing the public interest.
- Judicial decisions reversing and remanding agency rules because they not only are not in keeping with the terms of the statute but do so in ways that undermine the interests of the diffuse public.

In addition to highlighting negative practices, some positive examples of excellent regulation could also be identified by a neutral, expert group of analysts to hold out as models of excellent regulation. These positive case studies could highlight ways regulators did keep their eyes to the stars, engaged the larger community, remain grounded, and overcome obstacles.