Intra-Agency Coordination under Deep Uncertainty

Jennifer Nou
University of Chicago Law School
May 8, 2015
Example 1

• Ken Salazar after the 2010 Deep Water Horizon Oil Spill:
Example 2

• *Business Roundtable* (2011)
  • Guidance document to standardize CBA
  • Clearance authority to Chief Economist ("soft veto")

• Contributed to SEC ability to avoid D.C. Circuit reversal
  • E.g., Nat'l Ass'n of Mfrs. v. Sec & Exch. Comm'n, 748 F.3d 359, 369 (D.C. Cir. 2014)
Intra-Agency Coordination

• Agency heads design structures & procedures to process internal information

• As uncertainty increases or priorities change, administrators decrease information-coordination costs

• Constrained by implementation costs and benefits
Why Care about Interagency Coordination?

- Internal controls & institutional roles matter
  - “Stay in your lane”

- Positive aim to explain organizational structures & processes

- Normative concerns about transparency, evasion of oversight, and politicization of expertise
How should agency heads process information under deep uncertainty?
Coordination Mechanisms: Structure

• **Centralization**
  • EPA’s National Center for Environmental Economics within Office of Administrator

• **Intra-Agency Separation**
  • SEC’s Division of Economic and Risk Analysis (DERA) independent from Commissioners

• **Extra-Agency Separation**
  • FDA requests National Research Council report on a “risk characterization framework” for decision-making
  • DHS contracts out terrorism-related uncertainty analyses to private contractors like RAND Corp.
## Structural Tradeoffs

<table>
<thead>
<tr>
<th></th>
<th>Centralization</th>
<th>Intra-Agency</th>
<th>Extra-Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Control v. Independence</strong></td>
<td>Control (accountability)</td>
<td>←</td>
<td>Independent (blame-shifting/validation)</td>
</tr>
<tr>
<td><strong>Agency-specific v. General Expertise</strong></td>
<td>Agency-specific expertise</td>
<td>←</td>
<td>General (higher-quality?) expertise</td>
</tr>
<tr>
<td><strong>Deliberation v. Consultation</strong></td>
<td>Deliberation</td>
<td>←</td>
<td>Static Consultation</td>
</tr>
</tbody>
</table>
Coordination Mechanisms: Process

• Standardization

• Priority-setting

• Clearance procedures
Judicial Review

• Statutory interpretation

• Arbitrary-and-capricious judicial review
  • “Thin rationality review” of *Baltimore Gas*, see Vermeule & Gersen 2015
  • “Hard look” of *State Farm* and *Business Roundtable*
“In some cases, the level of scientific uncertainty may be so large that the [agency] can only present discrete alternative scenarios without assessing the relative likelihood of each scenario quantitatively . . . . [only] qualitatively”
Scenario Analysis

• Qualitative “snapshots of alternative scenarios”

• Plausible images of future

• Not predictions that extrapolate from present

Ex. National Park Service’s Climate Change Scenario Matrices (2011)
Centralization:
Cross-EPA Work Group on Climate Change Adaptation

• Decision-making under deep uncertainty requires “deliberation with analysis”: political judgments

• Chaired by EPA’s senior climate-change-adaptation official

• Representatives from each of EPA’s environmental-program offices
Discussion Questions

• How much can and should agency heads standardize approaches to uncertainty analysis to ameliorate expertise-translation?

• To what extent should uncertainty analyses always be subject to review by the highest-level political appointee?