The Oversupply of Regulatory Reform: From Law to Politics in Administrative Rulemaking

Howard M. Friedman
University of Toledo College of Law, howard.friedman@utoledo.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
The Oversupply of Regulatory Reform: From Law to Politics in Administrative Rulemaking

TABLE OF CONTENTS

I. Introduction ............................................. 1169
II. The Strands of Modern Regulatory Reform .......... 1171
III. The National Environmental Policy Act: The Unlikely Parent of Modern Reform ............................ 1175
IV. The Paperwork Reduction Act of 1980 ................ 1176
V. The Regulatory Flexibility Act .......................... 1177
VI. General Cost-Benefit Analysis and Executive Order 12291 .................................................... 1179
VII. Family Policymaking Criteria in Administrative Rulemaking .................................................... 1181
VIII. Federalism Concerns in Administrative Rulemaking ... 1183
IX. Protection of Property Rights—Avoiding Regulatory Takings .................................................... 1185
X. Control of Agenda Setting—Regulatory Flexibility Agenda, Executive Order 12498 and the Negotiated Rulemaking Act of 1990 ........................................ 1185
XI. Regulatory Moratorium and the Competitiveness Council ......................................................... 1187
XII. What Ever Happened to Judicial Review? ............. 1189
XIII. Why so Much Reform? .................................. 1191
XIV. Is the Problem Only One of Secrecy? ................... 1192
XV. Conclusion ............................................... 1193

I. INTRODUCTION

Public choice theorists have focused upon the reasons for excessive

* Eugene N. Balk Professor of Law and Values, University of Toledo College of Law. Research support for the article was provided by an endowment funded by Eugene N. Balk and The Anderson Group.
governmental output, i.e. for greater than optimal regulation by administrative agencies. A parallel, but largely unexamined phenomenon of recent decades has been the oversupply of regulatory reform. While individual instances of regulatory reform have been the subject of study, commentators have not examined the extent and overlapping reach of all the numerous requirements imposed upon administrative agencies. Whatever the changes wrought by specific instances of reform, the entire package, at least if taken seriously by administrative agencies, substantially changes the nature of administrative rulemaking.

In urging regulatory reform, politicians have shared the view of theorists that government agencies have overregulated. In February 1981, President Ronald Reagan promulgated his now famous Executive Order 12291 requiring federal agencies to engage in a formal analysis to determine that the potential benefits to society of any proposed rulemaking outweigh the potential costs to society that the proposed action would impose. In describing the reasons for Executive Order 12291, President Reagan said:

American society experienced a virtual explosion in government regulation during the past decade. Between 1970 and 1979, expenditures for the major regulatory agencies quadrupled. The number of pages published annually in the Federal Register nearly tripled, and the number of pages in the Code of Federal Regulations increased by nearly two-thirds. The result has been higher prices, higher unemployment, and lower productivity growth. Overregulation causes small and independent business men and women, as well as large businesses, to defer or terminate plans for expansion. And since they're responsible for most of the new jobs, those new jobs just aren't created.

Administrative agencies have always enjoyed a peculiar position in the American governmental structure. Formally lodged in the executive branch, agencies have also been delegated roles that are legislative and judicial in nature. Whatever their roles, however, traditionally agencies have been viewed as operating under a system of law. When in an article written some years ago, Professor Richard Stewart stated that "[i]ncreasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision," he still envisioned that surrogate process as operating within the framework of a previously-determined political

4. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW 4-7 (2d ed. 1984).
consensus that had been embodied, albeit vaguely, into a statutory enactment.

In recent years, critical legal studies theorists have made us acutely aware of the distinction between law and politics. Central to the rule of law is the notion that authority be exercised only according to previously declared general rules. These general rules rarely, if ever, partake of the majestic neutral formalism with which legal theorists once imbued them. Statutory law, especially, is the product of rough-and-tumble political compromise. The results of this compromise, however, are generally recognized as legitimate in our system because those engaged in the fray are actors who have been democratically elected, and they play by pre-determined rules. When sufficient compromise or concession has been obtained to achieve a pre-determined vote by Congress and when the President is in sufficient agreement to acquiesce in the compromise, political position has been crystallized into federal law.

Administrative agencies have traditionally posed a challenge to the notion of the rule of law because of the extensive discretion, and vague direction, often given to non-elected administrators. A renewed interest in constitutional limitations upon legislative delegation of authority has grown up around this problem. The more recent spate of regulatory reform, however, is largely unconcerned with applying the rule of law to limit agency discretion. Rather, it is primarily concerned with interposing values outside those embodied in the original mandate of the agency and introducing perspectives from outside the traditional administrative process. The new reforms, while operating under the guise of legal rules, are in fact largely attempts at political control of administrative rulemaking.

II. THE STRANDS OF MODERN REGULATORY REFORM

Regulatory statutes are vast in number and cover enormously varied subject matters. Indeed, their only common denominator is the delegation by Congress of initial administration, interpretation and enforcement primarily to executive branch personnel in specialized departments and agencies. A large part of the regulatory reform un-

---

dertaken in recent years has been its attempt to impose across-the-board procedural or substantive requirements on all regulatory activity. Rather than focusing on individual regulatory structures, these initiatives have attempted, as did the Administrative Procedure Act in 1946, to impose a uniform group of requirements on vastly different regulatory regimes.

The Administrative Procedure Act, however, attempted to create procedures to permit agencies to operate within their previously articulated legal mandate. The hallmark of the new era of regulatory reform is that procedures are created to bypass the original political consensus. It is interesting to note that those proposing regulatory reform, both before and after Reagan, generally did not accuse administrative agencies of straying from their original mandate. Rather they have argued that the costs imposed by regulation have been ignored and that society-wide countervailing values, such as those of economic growth, economic stability, and full employment should take precedence over the narrower health, safety or welfare goals of particular agencies. It is this which impels much of modern administrative reform to be structural in nature.

In enacting a particular regulatory statute, Congress has not only created a regulatory structure, but has generally chosen with some care the agency or department in which to lodge responsibility for administration of the statute. It is no accident that enforcement of provisions relating to worker safety was lodged in OSHA and not in the Small Business Administration or in the Department of Commerce. Nor is it chance that the responsibility for environmental protection was lodged in the EPA and not in the Department of the Interior. Recent literature has suggested that the original understanding of Congress can be preserved not only by specific delegations of authority, but also, and perhaps as importantly, by the design of the particular administrative agency which is created to implement a newly enacted regulatory structure. Thus, allegiance to the original political compromise that was crystallized into law involves more than allegiance to specifically mandated results. It also involves the lodging of discretion in the decisionmaking body to which it was originally

---

Agencies tend to become partisans for the regulatory goal they were created to implement. When new regulatory statutes are enacted, it becomes important to choose carefully the agency or department that will assume responsibility for them. A particular agency becomes a lobbyist for the interests it is charged with protecting. Its top officials inevitably assume a role consistent with the purposes of the agency, driven in that direction by a non-partisan civil service dedicated to the goals of the agency. Once we understand that the rule of law includes both the mandated goal and the specified decision maker, we can then see that tinkering with either undercuts the rule of law. Changing the decision maker can create political interference with the rule of law just as directly as can interference with the delegated goals of an agency. Many of the modern attempts at regulatory reform are political in the sense that they attempt to introduce both new values and new participants into the rulemaking process, often without achieving sufficient political consensus to enact new legislation. Even where the reforms are legislative in nature, many of them have avoided reaching any new consensus on a particular regulatory structure. Rather new goals are articulated only in the abstract and their relationship to existing agency mandates are left deliberately vague.

By the 1980s, a broad consensus had developed regarding the use of market based strategies in economic regulation. No comparable consensus existed, however, regarding social regulation. Each regulatory statute was originally enacted only after a broad agreement had developed regarding the inadequacy of an unregulated regime to achieve important policy goals. Whether the concern was environmental pollution, workplace safety, product safety, or a variety of other perceived evils, a politically acceptable regulatory approach ultimately developed. However, over time, new or changing values are often perceived. How and to what extent can and should those new or changing priorities be introduced into pre-existing regulatory structures?

19. Id. at 80-85.
21. See Murray J. Horn & Kenneth A. Shepsle, Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 VA. L. REV. 499, 501-04 (1989); Jonathan R. Macey, supra note 15 at 98-99; Kenneth A.
The Administrative Procedure Act of 1946 created a rather straightforward method for administrative agencies to consider conflicting interests and values. Public notice of a proposed rule was to be given, and those interested were allowed an opportunity to submit comments.\textsuperscript{22} This procedure assumed confidence in the administrative agency to adequately consider and weigh comments and objections, and assumed that the comment procedure would produce for the agency the relevant competing viewpoints. Modern regulatory reform results from the breakdown of these assumptions. Both Congress and the President have superimposed new layers of procedure on top of the original Administrative Procedure Act. These new requirements reflect increasing frustration with the regulatory process, as they require more and more explicit consideration of competing interests which one might suppose would have been exposed through existing procedures. Thus explicit requirements to consider environmental impact, the impact of regulation on small business, family values, federalism issues, and protection of private property emerged. Also, procedures to stimulate more and earlier comment on rulemaking alternatives by affected groups were instituted. In a final act of desperation, a regulatory moratorium was imposed on most new rulemaking that was perceived by the White House to be impeding economic growth. These procedures all tend to operate outside of the original political consensus embodied into regulatory statutes. In essence they permit shifting priorities to be imposed in place of the ones embodied in authorizing legislation.\textsuperscript{23}

Together, then, a crazy-quilt pattern of directives has been given to administrative agencies:

(1) Carry out the mandates of the original regulatory statutes which were assigned to you.
(2) In furthering the goals originally assigned to your agency, temper them by all costs that the imposition of those goals would impose. Do this by drawing up an elaborate cost-benefit analysis for each proposal.
(3) In addition to considering all costs and benefits, consider specially a variety of other values or concerns.
(4) After you have done all of this, expose your conclusions to public comment so that you can consider any costs or benefits that you may have ignored.
(5) But before you do any of this, be certain to give certain specified types of advance notice of what you plan to propose.

(6) But do not do any of this, at least for a time, unless an emergency exists or your regulation will foster economic growth.

One of the most commented-upon aspects of modern regulatory reform has been the centralization of White House control over the rulemaking process. This aspect of reform began early. President Nixon and President Ford both instituted programs for White House review of proposed rules in light of then existing White House priorities. This approach has not been limited to Republican or conservative administrations. President Carter perceived many of the same problems and approached them in a similar fashion. The technique was refined under President Reagan and modified again under President Bush.

These approaches take control from the agencies whose structures often assure adherence to their original goals, and shift them to those who more directly share a "broader" vision. Particularly in periods in which different political parties control the White House and Congress, this is the vision of a President alone. Thus began a number of reforms which shifted control of much rulemaking from particular agencies to the Office of Management and Budget, and then to the Council on Competitiveness.

III. THE NATIONAL ENVIRONMENTAL POLICY ACT: THE UNLIKELY PARENT OF MODERN REFORM

The techniques of broad regulatory reform are often procedural in nature. Instead of mandating particular results, administrative agen-

25. Nixon's Quality of Life Review Process was established by memoranda issued by the Office of Management and Budget. See, EADS & Fix, supra note 13 at 46-50.
28. See Macey, supra note 15; McCubbins, et al., supra note 16.
30. The Council on Competitiveness, formed by President Bush in April 1989, is chaired by the Vice President, and includes as members the Attorney General, the Secretary of the Treasury, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, the Secretary of Commerce, and the Chief of Staff to the President. Briefing by Marlin Fitzwater, April 4, 1989, available in LEXIS, Nexis Library, Federal News File.
cies are required to institute a process that ensures consideration of specific approaches or values. This technique originated in the National Environmental Protection Act as a means of protecting against under-regulation. The Act requires that each agency, after consultation with the federal agencies having jurisdiction or special expertise with respect to the environmental impact involved, prepare an environmental impact statement to accompany every major proposal that is made which would significantly affect environmental quality. As originally proposed, the establishment of a new executive branch agency, the Council on Environmental Quality, was the primary focus of NEPA. However, concern that such an agency would not receive strong support from the White House led to the creation of a mechanism designed to force individual agencies to implement Congress’ environmental policy on their own. Each agency would be required to evaluate the impact of their proposals on the quality of the environment.

Of course, mandating consideration of environmental concerns does not guarantee that those concerns will prevail. It does however at least ensure that they will not be totally overlooked in a period of resistance to environmental concerns. Mandated procedures serve as something of a check upon underregulation. It is perhaps ironic that this technique—the mandated preparation of impact statements—came to be used often in the 1980s and 1990s to combat over-regulation. Indeed, much of the regulatory reform of the modern era is primarily negative in nature. Unlike the National Environmental Policy Act, the goal of later reforms has been to delay or prevent, rather than spur, agency action.

IV. THE PAPERWORK REDUCTION ACT OF 1980

The Paperwork Reduction Act of 1980 was a reflection of the attitude of President Carter, as a small businessman and as a non-lawyer, toward government regulation: that regulation was too burdensome on small business and requirements were incomprehensible to the average American. As he phrased it:

I have often said that the American people are sick and tired of excessive

Federal regulation... As a farmer and small businessman, and later as a Governor, I shared this resentment and frustration. I resented the cost of Government redtape, the interference it represented in my business and personal life, and not least of all, having to deal with the bureaucratic gobbledygook itself.  

The Act requires approval of the Office of Management and Budget (OMB) before any agency can adopt new forms, questionnaires, reporting requirements, or recordkeeping requirements. Any proposal for new forms or other paperwork requirements must be submitted in advance to OMB along with an explanation of the extent to which the agency has attempted to use other existing sources of information within the federal government to obtain this information, an explanation of the extent to which the proposal attempts to reduce the burden on those who must supply information, and a plan for tabulating the information in a way that makes it useful to other agencies and the public.

Submissions to OMB must also be accompanied by publication of information regarding the submission in the Federal Register. OMB may give the agency and other interested parties an opportunity to be heard or to submit statements in writing on the proposed new forms or informational requirements. The agency may not implement its proposal unless it is approved by OMB. However, an independent regulatory agency may, by majority vote of its members, override OMB's disapproval.

V. THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act, also enacted by Congress during the Carter Administration, was an attempt to require administrative agencies to give greater attention to the disproportionate impact of their proposed rules on small businesses, small non-profit organiza-

36. The Office of Information and Regulatory Affairs of OMB is to be delegated the authority within OMB to administer the Act. 44 U.S.C. § 3503 (1988).
tions, and small governmental jurisdictions. Congress appeared to be motivated by two rather differing notions. First was the notion that small entities often do not create the type of problem at which the regulatory statute was directed. Second was the notion that even where small entities do raise the same type of problems as large ones, the disproportionate cost of compliance in relation to the resources of the regulated entity calls for different treatment of the small entity.

When proposing a rule, the Act requires that the agency also prepare and make available for public comment an “initial regulatory flexibility analysis.” This analysis, or a summary of it, is to be published in the Federal Register along with the proposed rule. Also a copy is to be transmitted to the Chief Counsel for Advocacy of the Small Business Administration.

The initial regulatory flexibility analysis is to contain the reasons for the proposed rule; a statement of the objectives and legal basis for the rule; a description, and where feasible, an estimate of the number of small entities that will be affected by the rule; a description of the reporting and recordkeeping requirements and the type of professional skills that will be needed to comply with them; and an identification of any existing federal rules that duplicate, overlap or conflict with the proposed rule. The analysis is also to contain a description of any significant alternatives to the proposed rule, including differing or simplified reporting or compliance requirements for small entities, the use of performance rather than design standards, and possible exemptions for small entities.

When a final rule is adopted, it is to be accompanied by an “final regulatory flexibility analysis” which summarizes the comments that were received in response to the initial analysis and the agency’s assessment and response to those, including any changes made in the

44. Among the Congressional findings and declarations in Section 2 of the Act was the following: “[L]aws and regulations designed for application to large scale entities have been applied uniformly to small [entities] . . . even though the problems that gave rise to government action may not have been caused by those smaller entities.” Pub. L. 96-354, § 2(a)(2), 94 Stat. 1165, reprinted in 5 U.S.C.A. § 601 (West Supp. 1992).
45. Among the Congressional findings and declarations in Section 2 of the Act were the following: “[U]niform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small [entities] . . . with limited resources” and “the failure to recognize differences in scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity.” Pub. L. 96-354, §§ 2(a)(3) - (4), 94 Stat. 1165 reprinted in 5 U.S.C.A. § 601 (West Supp. 1992).
47. Id. § 603(b)-(c).
proposed rule as a result of such comments. Also the final analysis is to
describe each of the significant alternatives that was considered to
minimize the economic impact of the rule on small entities, and the
reasons why each was rejected. This final analysis is to be made avail-
able to the public. At the time the final rule is published in the Fed-
eral Register, a description of how the public may obtain copies of the
final regulatory flexibility analysis is to be included.48

VI. GENERAL COST-BENEFIT ANALYSIS AND EXECUTIVE
ORDER 12291

With the end of the Carter administration and the beginning of the
Reagan administration, concern over regulatory reform did not dimin-
ish. President Reagan continued and strengthened49 the policy of
White House review of agency rulemaking begun by his predecessors
by issuing Executive Order 12291. It requires each agency to prepare,
and to the extent permitted by law,50 to consider a Regulatory Impact
Analysis in connection with every major rule proposal.51

The goal of such analysis is to assure that "regulatory action [will] not
be undertaken unless the potential benefits to society for the regu-
lation outweigh the potential costs to society."52 The analysis is to de-
scribe both the potential benefits and costs of the proposed rule
including both beneficial and adverse effects "that cannot be quanti-
fied in monetary terms." From this, the agency is to determine the
potential net benefits of the rule, including those that cannot be quan-
tified in monetary terms, and is to discuss other alternatives which
could achieve the same regulatory goal at lower cost, but which the
agency is not legally authorized to adopt.53

A regulatory impact analysis is to be transmitted to the Office of
Management and Budget at least sixty days before publishing a pro-
posed rule for comment, and at least thirty days before promulgating a
final rule. A proposed rule is not to be published until OMB’s review
is completed. The agency’s notice of proposed rulemaking is to con-
tain a brief summary of the agency’s preliminary Regulatory Impact
Analysis, and the full Analysis (both preliminary and final) must be
available to the public.54 No final rule is to be promulgated either un-

48. Id. § 604.
49. See Eads & Fix, supra note 13 at 108-12.
50. See Alfred S. Neely, Statutory Inhibitions to the Application of Principles of
Cost/Benefit Analysis in Administrative Decision Making, 23 DUQ. L. REV. 489
(1985).
52. Id. § 2(b).
53. Id. § 3(d).
54. Id. § 3(g)-(h).
One of the great virtues of Executive Order 12291 was its apparent neutrality. It articulated seemingly unobjectionable principles such as, "[a]dmnistrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action," and "[r]egulatory objectives shall be chosen to maximize the net benefits to society." However, both in design and in application, the executive order operated in the area of social regulation primarily to create regulatory relief for business. Under President Reagan’s Presidential Task Force on Regulatory Relief and under President Bush’s Council on Competitiveness the authority was given to direct the Office of Management and Budget to designate as a “major rule,” i.e. one subject to cost-benefit analysis requirements, any rule that an agency has not so designated, and authority to direct OMB to require agencies to evaluate additional information, waive provisions of the Executive Order, and require interagency consultation to eliminate duplication, overlap or conflict in rules. Authority was also given to direct OMB to promulgate uniform standards for identification of major rules and uniform rules for the development of Regulatory Impact Analyses, to prepare legislative proposals in consultation with agencies, and monitor agency compliance with the executive order.

It has become unfashionable to speak of “values” in analyzing public policy choices made by regulatory agencies. As economists have increasingly wrested control from lawyers, cost-benefit analysis has been touted as not only a preferred, but as a value-neutral mode of analysis. But economic analysis is subject to its own version of Gresham’s law: hard data drives out soft data. This is especially so

---

55. Id. § 3(f).
56. Id. § 2.
57. This is emphasized by the fact that barely four weeks before issuing Executive Order 12291, President Reagan announced the establishment of a Presidential Task Force on Regulatory Relief, to be chaired by the Vice President. The Task Force was charged with making recommendations that would “cut away the thicket of irrational and senseless regulation.” Presidential Task Force on Regulatory Relief, Remarks Announcing the Establishment of the Task Force, PUB. PAPERS 30, 30 (Jan. 22, 1981).
61. But see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 46 (1991)(“It is unrealistic to draw a sharp line between personal preferences and political values. . . .”).
when it is assumed that certain kinds of costs and benefits are not subject to quantification. Although complex methods exist to attempt to assign "shadow values" to intangibles that are not normally the subject of pricing in our economic system, in general cost-benefit analysis under Executive Order 12291 is not that sophisticated. The Administrative Conference of the United States has recommended merely that "regulatory analysis documents . . . [should] describe important decisionmaking variables that are not subject to quantitative analysis." Therefore, cost-benefit analysis is likely to create a kind of false precision and lead policy makers to assume that economic efficiency as measured by quantifiable data is all that counts. The difficulties in quantifying other humanistic values inevitably leads to such values being ignored.

The imprecision in cost-benefit analysis stems in large part from uncertainty regarding the value to be attached to the benefits of regulation. Economic value changes as society's perception of the importance of a particular benefit changes and as wealth distributions change. Regulatory reforms of recent years have often been attempts to assure that regulators will give greater weight to new or changing societal concerns.

VII. FAMILY POLICYMAKING CRITERIA IN ADMINISTRATIVE RULEMAKING

Just as prior presidents were concerned with specific policy goals, not just general balancing of costs and benefits, so was the Reagan

---

65. See EADS & Fdx, supra note 13, at 14:
As far as economists are concerned, the problems of environmental pollution, excessive levels of workplace hazards, or unsafe consumer products exist largely because "commodities" like environmental quality, workplace safety, and product safety do not trade in markets. Economists work hard to devise ways to simulate markets for such commodities . . . ."
66. Cf. Guido Calabrese, Ideals, Beliefs, Attitudes, and the Law 69-86 (1985)(failure to compensate for certain kinds of injuries leads society to become accustomed and callous to such injuries). For the position that attempts to simulate markets for such items is inappropriate because the values being pursued should not be seen as economic in nature, see Sagoff, supra note 62.
67. It is possible to define cost-benefit analysis in theory to take into account "any relevant attitude, opinion, argument, or belief that a person might conceivably be willing to back up with money. When analysts expand the notion of an externality in this way . . . . they make a bald attempt not to inform but to replace the political process. . . ." Sagoff, supra note 62, at 37.
administration. However, different value judgments took center-stage. Thus, despite the seemingly all-encompassing requirements of Executive Order 12291, President Reagan additionally issued a series of executive orders focusing on specific, difficult-to-quantify, concerns.

Few rallying cries were more persistent and more vague during the Reagan presidency than that of “family values.” In 1987, President Reagan issued Executive Order 12606 in order to “ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies.”

The Order first set out certain questions to be asked by each agency “[i]n formulating and implementing policies and regulations that may have significant impact on family formation, maintenance, and general well being.” Most of these are questions which do not readily lend themselves to quantitative cost-benefit analysis. Were it otherwise, already mandated Regulatory Impact Analyses would adequately factor them into rulemaking.

The family value questions, as set out in the Executive Order are:

(a) Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?
(b) Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?
(c) Does this action help the family perform its functions or does it substitute governmental activity for the function?
(d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?
(e) Can this activity be carried out by a lower level of government or by the family itself?
(f) What message, intended or otherwise, does this program send to the public concerning the status of the family?
(g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?

As with other similar executive orders, an implementation mechanism was created which essentially centralizes enforcement of the Executive Order in the Office of Management and Budget. The Executive Order first requires each department or agency to identify every proposed regulation (as well as proposed legislation) that may have “significant potential negative impact on the family well-being.” The agency or department must provide an adequate explanation of why the proposal is being made. Also, the agency or department head must certify in writing to the Office of Management and Budget that, to the extent permitted by law, the proposal has been subjected to the questions set out in the Executive Order and must

---

70. Id.
71. Id.
certify how the proposal will enhance family well-being.72

VIII. FEDERALISM CONCERNS IN ADMINISTRATIVE RULEMAKING

Executive Order 12612, also issued in 1987, was intended to restore the original intent of the framers of the Constitution regarding federal-state relationships to rulemaking by administrative agencies.73 This was, of course, a tall order given the changed role of the federal government that led to the modern administrative state. Nevertheless, the Executive Order provides that Executive departments and agencies are to be guided by specific federalism principles in formulating and implementing policies.

These principles articulated by the Executive Order embody very traditional notions of federalism:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of national government.
(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.
(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.
(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.
(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are 'the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies.'
(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.
(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.
(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.
(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties re-

72. Id.
regarding the legitimate authority of the national government should be resolved against regulation at the national level.\textsuperscript{74}

The Executive Order focuses primarily on federal action that limits the policymaking discretion of the states, providing that such federal action is justified only when the problem is of national scope. It distinguishes national problems from those that are merely “common to” all the states.\textsuperscript{75} Further, it limits federal action to situations in which constitutional authority for the federal action is “clear and certain.” This is defined as situations in which authority may be found in a specific constitutional provision, no constitutional provision prohibits such action, and it does not encroach on authority reserved to the states.\textsuperscript{76} This formulation appears significantly narrower than the usual scope of federal power articulated through the “necessary and proper” clause of the Constitution.\textsuperscript{77}

Where federal action is called for, the Executive Order discourages nationally uniform policies. It encourages programs in which each state develops its own policies to achieve federal program objectives, or at least in which states have maximum administrative discretion and have input into formulation of the federal standards.\textsuperscript{78} It also provides that administrative agencies should not construe federal statutes as pre-empting state law, or as authorizing pre-emption of state law by rulemaking, unless the federal statute expressly provides for pre-emption “or there is some other firm and palpable evidence compelling the conclusion” that Congress intended pre-emption.\textsuperscript{79}

Each agency is to appoint an official who is responsible for implementation of the Executive Order. Where proposals have sufficient federalism implications, the agency must include a Federalism Assessment as part of its cost-benefit analysis submitted to the Office of Management and Budget under Executive Order 12291. This Assessment is to identify any portions of the proposal that are inconsistent with the federalism principles enunciated in the Executive Order, the extent to which the proposal imposes additional costs or burdens on state, the likely source of funding for the states, states’ ability to fulfill the purposes of the proposal, and the extent to which the proposal would affect states’ ability to discharge traditional functions of state government or other aspects of state sovereignty.\textsuperscript{80}

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 300-05 (2d ed. 1988).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
IX. PROTECTION OF PROPERTY RIGHTS—AVOIDING REGULATORY TAKINGS

Executive Order 12630,81 issued after two major U.S. Supreme Court decisions interpreting the scope of the Fifth Amendment's taking clause,82 was designed to limit the extent to which administrative agency regulations might inadvertently impose obligations on the federal government to compensate landowners. The Executive Order reflects a very broad view of those actions which might constitute a regulatory taking. Not only is physical invasion or occupancy of property covered, but so is any regulation that would substantially affect the value or use of property, even though less than a complete deprivation.83

Like other Executive Orders mandating particular value-laden considerations, an official with responsibility for complying with the executive order is to be appointed and an impact analysis is required. The Executive Order provides that before imposing health or safety regulations on private property, the administrative agency in internal deliberative documents, in notices of proposed rulemaking, and in any required submissions to the Office of Management and Budget must focus on certain Fifth Amendment considerations. The agency must identify clearly and specifically the public health or safety risk being addressed; determine that the proposed regulation is substantially related to protecting against that risk and that any restrictions on use of private property are not disproportionate to the risk created by that use; and estimate the potential cost to the government in the event that compensation for the taking is required.84 The Attorney General was mandated to draft further Guidelines to implement the Executive Order.85

X. CONTROL OF AGENDA SETTING—REGULATORY FLEXIBILITY AGENDA, EXECUTIVE ORDER 12498 AND THE NEGOTIATED RULEMAKING ACT OF 1990

The greatest impact on rulemaking occurs when relevant view-
points are injected early in the process. By the time that public comment is sought under the Administrative Procedure Act, many alternatives have already been eliminated.86 Some of the regulatory reforms of recent years have been aimed at gaining access at an earlier stage for groups with certain types of interest in a rulemaking proposal.

As part of the Regulatory Flexibility Act of 1980, Congress required that twice a year each agency must publish in the Federal Register a so-called “regulatory flexibility agenda.” The “agenda” is to include a description of the subject of, objectives of, and legal basis for any rules likely to impact small entities which the agency expects to propose; a schedule for action on the rule; and the name and telephone number of an agency official who may be contacted regarding the proposal. This agenda is also to be transmitted to the Chief Counsel for Advocacy of the Small Business Administration, and to small entities or their representatives through direct notification or publication.87

Executive Order 12498, issued by President Reagan in 1985, extended the concept of the Regulatory Flexibility Agenda to all proposed rulemaking and again centralized control in the Office of Management and Budget.88 Each agency is required to submit to the Office of Management and Budget an annual statement of its regulatory policies, goals and objectives, and information on all pending or planned regulatory actions. OMB is to review this information to determine whether the agency’s proposals are consistent with Administration policies and priorities and is to identify further action that may be necessary to achieve such consistency. Further review may take place at the Cabinet or Presidential level. After the review process is completed, the agency is to submit its final regulatory plan which will be incorporated as part of the Administration’s Regulatory Program for the year. If an agency later proposes to take a regulatory action that is materially different from that described in its final regulatory program, it must first submit it for review by OMB. Otherwise, except in unusual circumstances such as new legal requirements or unanticipated emergencies, OMB will return for reconsideration any non-conforming proposal submitted later under Executive Order 12291.

A more elaborate procedure which agencies are permitted, but not required, to use was established by the Negotiated Rulemaking Act of 1990.89 Where there are a limited number of identifiable interests that will be significantly affected, the agency may create a committee with balanced representation of those interests to negotiate to reach a con-

86. See McGarity _supra_ note 64, at 1260.
sensus on a rule that will be proposed for comment under the Admin-
istrative Procedure Act. The Negotiated Rulemaking Act sets out pro-
ocedures for notice regarding the proposed committee and for appli-
cations or nominations for membership by those who believe that their interests will not otherwise be adequately represented.

XI. REGULATORY MORATORIUM AND THE COMPETITIVENESS COUNCIL

The politicization of regulatory reform reached its height during
the administration of George Bush. In his January 1992 State of the
Union Message, President Bush announced:

I have, this evening, asked major Cabinet departments and Federal agen-
cies to institute a 90-day moratorium on any new Federal regulations that
could hinder growth. In those 90 days, major departments and agencies will
carry out a top-to-bottom review of all regulations, old and new, to stop the
ones that will hurt growth and speed up those that will help growth.

This moratorium, which was extended for another 120 days upon its
initial expiration, and then was extended until the end of George
Bush's term as president, is in a sense the ultimate admission of frus-
tration and defeat. The long series of prior regulatory mandates had
not accomplished their purposes. According to Vice President Quayle,

92. President's Address Before a Joint Session of the Congress on the State of the
93. President's Remarks on Regulatory Reform, 28 WEEKLY COMP. PRES. DOC. 726,
94. The final extension of the moratorium was announced by President Bush in his
acceptance speech at the Republican National Convention, Remarks Accepting
the Presidential Nomination at the Republican National Convention in Houston,
White House spokeswoman stated that the announcement at the convention had
functionally extended the moratorium, even though no formal Presidential mem-
orandum had yet been issued. Government Operations, Regulatory Moratorium
Executives (BNA)(Sept. 1, 1992). On November 20, 1992, Vice President Quayle
issued a memorandum to all department and agency heads stating that agencies
“should continue to follow the procedures and substantive standards established
by the president” in his original regulatory moratorium. Quayle Sends Memo
Reminding Agencies to Comply With Regulatory Moratorium, Washington In-
Choate: “What is sad but amusing is to hear this president and his Cabinet of-
ficers, as a regular part of their speeches, lament the management of the federal
cost-benefit review by the Office of Management and Budget had become lax under the Reagan administration. A reversal of regulatory inertia to reflect values of the executive branch could be accomplished only through a new centralization of power, now lodged in the Competitiveness Council chaired by the Vice President.

The moratorium was imposed so that each agency could identify regulations and programs that impose substantial costs on the economy, and could decide whether those were justified in light of a group of criteria similar to those already found in President Reagan's original executive order mandating cost-benefit analysis and those found in the Regulatory Flexibility Act. The specific criteria are:

(a) The expected benefits to society of any regulation should clearly outweigh the expected costs it imposes on society;
(b) Regulations should be fashioned to maximize net benefits to society;
(c) To the maximum extent possible, regulatory agencies should set performance standards instead of prescriptive, command-and-control requirements, thereby allowing the regulated community to achieve regulatory goals at the lowest possible cost;
(d) Regulations should incorporate market mechanisms to the maximum extent possible;
(e) Regulations should provide clarity and certainty to the regulated community and should be designed to avoid needless litigation.

During this moratorium period, not only are agencies to conduct a review of existing rules, but they are to refrain from issuing any new rule proposals or adopting any new final rules unless the agency determines, after consultation with a special working group of the Council on Competitiveness co-chaired by the Chairman of the Council of Economic Advisers and the Counsel to the President, that the new rules will foster economic growth or that they are essential to criminal law enforcement. The only exceptions to this pre-screening by the Competitiveness Council are regulations that are subject to a statutory or judicial deadline that falls during the moratorium regulations that respond to emergencies such as imminent danger to human health or safety, military or foreign affairs regulations, regulations related solely to agency organization, management or personnel, and formal regulations required by statute to be made on the record after opportunity for an agency hearing.

The role of the Competitiveness Council has made this moratorium particularly controversial. The Council was originally established by President Bush in 1989 to review regulatory issues and other matters government when, by this point, every single top person from a GS-14 on was hired and appointed by them."

98. Id. at 233-34.
that bear on the competitiveness of the United States economy. A year later, the President designated the Council as the appropriate body to review issues raised in connection with the regulatory program under Executive Order 12498 and directed it to exercise the same authority over regulatory issues as did the Presidential Task Force on Regulatory Relief under Executive order 12291. This meant, among other things, that the Competitiveness Council was to review each agency's annual draft regulatory program to determine its consistency with administration policies. However, the Council became most controversial because of its informal and non-public intrusion into agency rulemaking decisions. Seen as a method for business interests to bypass the normal rulemaking processes, the House of Representatives in July 1992 voted to cut off funding for the Competitiveness Council. However, the Senate restored funding and prevailed in the Conference Committee. As a final compromise, though, a manager's statement drafted in the Conference Committee requested that all activities of the Competitiveness Council be made available for public review.

XII. WHAT EVER HAPPENED TO JUDICIAL REVIEW?

When rulemaking is governed by the rule of law, judicial review of rulemaking procedures operates to ensure that agencies comply with the mandates of law that have been previously established. However, so long as procedural requirements have been met, substantive rulemaking determinations will be overturned generally only if they

are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In essence, agency rulemaking is subject to reversal by the courts only if the agency acted unreasonably. This minimal review of substantive results emphasizes the importance of the identity of the governmental agency which exercises judgment in originating and choosing among rulemaking alternatives.

A hallmark of the new regulatory reform, however, has been the extent to which it is shielded from judicial review even of procedural requirements. Those reforms which have been instituted by executive order have routinely provided:

This Order is intended to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Courts have generally accepted at face value this preclusion of judicial review.

Those reforms that have been instituted by statute have similar provisions to preclude review. The Paperwork Reduction Act includes a provision that "[t]here shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule." The Regulatory Flexibility Act provides that an agency's regulatory flexibility analysis and its compliance or noncompliance with the Act are not subject to judicial review. However, when an action for judicial review of a rule is instituted, any regulatory flexibility analysis for the rule will constitute part of the whole record of agency action in connection with the review. Under the Regulatory Flexibility Act, the courts have held that while compliance with the Act is not reviewable, the content of the analysis may be considered in determining whether the rule is reasonable. In the absence of an analysis prepared by the agency, similar issues may be raised by public comment, and the failure to adequately respond to public comment may be the basis for ju-

This limited review of administrative rules, and of the transfer of control from specific agencies to the White House highlights the political nature of the new administrative reforms. Within a broad range of reasonable alternatives, agency action will stand.

XIII. WHY SO MUCH REFORM?

Why has there been such an oversupply of regulatory reform? At least four interrelated explanations can be advanced. First, new societal concerns have arisen which were not considered by the drafters of original regulatory statutes. The original statutes mandated certain goals without taking account of these new considerations. The environmental concerns embodied in the National Environmental Policy Act are a prime example. Here action is clearly needed to obtain a proper weighing of these new concerns. However, whether an across-the-board approach permits a sufficient integration of new values into existing legislative mandates is open to serious question.

A second generator of regulatory reform during the Reagan and Bush administrations was divided government, i.e. the control of Congress by a different political party than controls the White House. In this posture, the Executive Branch with different priorities and policies is often unable to obtain amendment or repeal of regulatory provisions. Therefore, it attempts to use other means to shape the output of government agencies.

Third, regulatory reform is impelled by the differences in perspective of regulators and the White House. Regulatory agencies are rightfully advocates for the mandate that has been given to them. Whether the mandate is workplace safety, drug safety, or environmental protection, the agency's outlook is narrower, and more committed to a cause, than is the President's. In particular, the President is often intensely concerned with issues of economic prosperity. It is natural for regulation to appear to be an impediment to growth. By its nature, regulation adds cost. Immediate expenditures required of identifiable businesses, often exaggerated in amount by those subject to regulation, appear overly significant when balanced against future potential injuries to unknown victims. It is for this reason that an agency or department was given the institutional role of advocate for regulatory implementation. When that role is subject to control by the White House, an anti-regulation bias is inevitably injected.


Finally, the new regulatory reform can be seen as a product of political hypocrisy. Politicians are able to advocate social reform in general terms, but block it in specific cases through impact analyses. The White House is able to enunciate policies, such as family values or federalism, or property rights in general terms, without concern about the problems of embodying them in specific instances.

The non-partisan civil service—a descriptive term seldom heard today in governmental circles—has become the whipping boy for the inability of elected officials to reach a consensus on deep issues of policy and values. "Bureaucrats" become easy targets of presidents and legislators who have assigned conflicting and difficult roles to administrative agencies. Only political leadership that reaches a consensus on the major policy confrontations of our day promises to reduce the continual outpouring of half-hearted and insincere administrative reform.

XIV. IS THE PROBLEM ONLY ONE OF SECRECY?

Much of the criticism of regulatory reform has focused upon the secrecy of the input from OMB or the Council on Competitiveness in the development of rules. Some have suggested that all communications from these agencies be made part of the public record. One proposed bill introduced into Congress would have required a public record of all significant communications between White House review bodies and rule-making administrative agencies. But is disclosure enough? It is generally agreed that changing the locus of decision-making can have a significant impact on results. Since courts are severely limited in their review of the substance of agency rules, mere disclosure that a particular focus was the result of comments from other parts of the executive branch may not be a sufficient safeguard.

Critical to the protection of health, safety, or environmental concerns is the fact that a particular agency and its staff have developed both an expertise in and support for the mission of the agency. Early portions of the rule-development process have been recognized as critical. When particular options are ruled in or ruled out at an early stage, it is difficult for changes to be made at a late point. Just as the agenda setter has significant control at the legislative level, so the early participants in the rulemaking process effectively act as agenda setters.

OMB or the Council on Competitiveness should be limited to making disclosed written input, and this should be permitted only during

116. See, e.g., Woodward & Broder, supra note 102.
117. See, e.g., Morrison, supra note 29, at 1072.
118. See Holly Idelson, Glenn Trying to Shed Light on Rule-Making Process, 49 CONG. Q. 3449 (1991); see also text at note 107, supra.
119. McGarity, supra note 64, at 1255-56.
120. See Mueller, supra note 1, at 88-89.
the same period that it is permitted to the public. This does not mean that White House influence on administrative rulemaking would disappear. It merely means that the rule drafting process will not be skewed to give White House views undue influence in the regulatory process. Also, the traditionally accepted influence of the White House through the appointment of personnel and the budgetary process, among others, will still furnish ample opportunity for a president to influence agency action in ways that do not undermine the traditional rule of law that is so critical for the administrative process.  

XV. CONCLUSION

Americans generally prefer to substitute procedures for the difficulties of substantive value choices. Until this tendency is overcome, little change can be expected. Value choices are neither easy nor popular. But they are critical to reestablishment of a rule of law in administrative rulemaking.