CONGRESS AND THE CLINTON OMB

UNWILLING PARTNERS IN REGULATORY OVERSIGHT?

by Susan E. Dudley and Angela Antonelli

FOR OVER TWENTY-FIVE YEARS, the White House has maintained some form of centralized mechanism for executive oversight of regulations proposed by federal agencies. President Clinton's Executive Order 12866, Regulatory Planning and Review, issued on 30 September 1993 continues the tradition.

Despite oversight, the cost and burden of federal regulations has increased over the last twenty-five years. Indeed, after the burden eased between 1977 and 1990, it again mushroomed, and it is expected to reach $800 billion by the year 2000. While the cost of economic regulation, such as price and entry controls, has declined over the past twenty years, those reductions have been more than offset by an explosion in costs of new social regulation aimed at environmental protection and health and safety risk reduction. According to Thomas Hopkins of the Rochester Institute of Technology, between 1977 and 1997, the costs of social regulation grew from $80 billion annually to more than $240 billion, a threefold increase. Unfortunately, Americans cannot expect escalating regulatory costs to be halted in the near future.

Both Congress and the White House share responsibility for expanding the burden on American consumers. The current efforts of the Clinton administration under E.O. 12866 to ease the burden have certainly been spotty and inadequate when compared to efforts by the Reagan administration. Further, Congress has done an inadequate job of holding the administration to the standards it mandated.

EXECUTIVE OVERSIGHT

When President Clinton took office, he rescinded Executive Order 12291, which had guided regulatory review for the previous twelve years under Presidents Reagan and Bush. In its place, he issued Executive Order 12866. Since that time, the OMB has published agency guidelines for conducting economic analysis of regulations under E.O. 12866 and issued three reports on its progress under that Executive Order.

Congress also has given the OMB additional oversight responsibilities. The OMB is now required to report annually on the implementation of its responsibilities under the Unfunded Mandates Reform Act (UMRA) of 1995. Most recently, Congress required the OMB to issue a report to Congress by 30 September 1997 on the costs and benefits of federal regulations. A closer examination of how the OMB has carried out its responsibilities explains why executive branch oversight has been ineffective at checking the escalating costs of federal regulations.

In many ways, E.O. 12866 mirrors its predecessor. It reinforces the philosophy that regulations should be based on an analysis of the costs and benefits of all available alternatives, and that agencies should select the regulatory approach that maximizes net benefits to society, unless constrained by law. While the expressed principles for regulating are similar to E.O. 12291, E.O. 12866 differs in subtle but important ways.

First, while not eliminating the role of the OMB's Office of Information and Regulatory Affairs (OIRA) in regulatory oversight, the order has subtly transformed that role to one of coordination, rather than substantive review of regulation. That transformation occurred consistent with the purpose of the Executive Order to "reaffirm the primacy of Federal agencies in the regulatory decisionmaking process."

Second, E.O. 12866 has shifted the emphasis of oversight from a goal of maximizing net benefits to society—with OIRA as the watchdog for social welfare—to a preference for negotiated rulemaking and involvement of interested parties. That is unfortunate, since agreement among organized parties does not necessarily reflect the public interest—consumers are notoriously underrepresented at such negotiations. Under E.O. 12866, the OMB no longer has authority to detain issuance of a rule until agencies can demonstrate that social welfare would be enhanced (i.e., that the rule's benefits are expected to exceed its costs).

The deterioration of OIRA's role appears to have accelerated since 1996, when congressional Republican efforts to put into statute basic cost-benefit principles were resoundingly defeated by the Administration and congressional Democrats. Agencies' lack of compliance with E.O. 12866 and the OMB's guidance, as well as three recent OMB reports, provide clear evidence of a fundamental shift in regulatory philosophy.

ECONOMIC ANALYSIS GUIDANCE

In January 1996, the OMB published Economic Analysis of

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Federal Regulations Under Executive Order 12866, commonly referred to as the "EA Guidance." It is the product of an interagency working group chaired by representatives from OIRA and the Council of Economic Advisors that provides solid guidance for developing new regulations and revisiting existing ones. It elaborates on the principles presented in E.O. 12866, making some more concrete. For example, while the order mentions "the failures of private markets or public institutions" as one possible justification for regulating, the EA Guidance emphasizes more strongly that a market failure should be identified as a prerequisite to regulation. The document provides detailed guidelines for estimating costs and benefits for a range of regulatory options and it includes sound guidance for treating risk and uncertainty, discounting future benefits and costs, and analyzing opportunity costs and market transactions.

COMPLIANCE WITH THE OZONE AND PARTICULATE MATTER STANDARDS MIGHT WELL REQUIRE MAJOR LIFESTYLE CHANGES FOR MOST AMERICANS.

Adherence to the EA Guidance would be a positive first step toward ensuring that federal regulations actually maximize net benefits to society. Unfortunately, agencies do not appear to be conducting the analysis necessary to meet even the most elementary aspects of the guidelines. More disconcerting, executive review of agency actions has done virtually nothing to effect any discipline or integrity in agencies' analyses. A review of the extent to which recent agency rulemakings have complied with the key principles in E.O. 12866 and its guidance illustrates those concerns.

Arguably the most basic and most important of the OMB's principles is that agencies consider a broad range of alternative regulatory options before selecting a preferred regulatory approach. Yet that principle appears to be almost universally ignored. Our review of recent major rules suggests that agencies often select a preferred regulatory alternative first, then evaluate its costs and benefits. For example, the final Regulatory Impact Analysis (RIA) for the Department of Transportation's Roadway Worker Protection rule estimated benefits and costs only for the approach favored by that agency. Similarly, the final RIA supporting the EPA's regulation of lead-based paint in certain housing examined only the standards and requirements imposed by the rule. Clearly, agency staffs have little incentive to present policymakers with estimated costs and benefits that might favor options they do not prefer. Executive oversight of individual agencies is essential to thwart such biases.

Not only are agencies not evaluating alternatives to proposed actions, they often do not quantify the costs and benefits of the action they select. Of the twenty-two major rules the OMB reviewed between April 1996 and March 1997, only eight were supported with benefits estimates expressed in monetary terms. Among those, approaches to estimating benefits varied considerably, and estimated benefits were based on tenuous links between the regulatory action and the predicted benefits. For example, USDA admits in its Hazard Analysis and Critical Control Point Systems rule that it is "without the knowledge to predict the effectiveness of the requirements in the rule to reduce foodborne illness" (the goal of the rule). Before imposing rules that are expected to cost Americans hundreds of millions of dollars a year, agencies should have a better idea of whether they will be effective.

Agencies are also failing to measure the opportunity cost of their actions. The EA Guidance states, "The concept of opportunity cost is the appropriate construct for valuing both benefits and costs." Yet agencies almost always limit cost analysis to direct compliance costs. That is especially problematic for certain kinds of rules. For example, compliance with the ozone and particulate matter air quality standards might well require major lifestyle changes for most Americans. Or in the case of the Occupational Safety and Health Administration's ban on methylene chloride, the most likely substitute poses a greater imminent hazard. Serious attention to opportunity costs might have headed off those costly regulations.

Those examples illustrate that, while the OMB's EA Guidance reflects sound principles and practices for regulatory analysis and review, the Clinton administration has limited the OMB's authority to enforce them. Evidence abounds that agencies are ignoring the guidance, and are issuing rules without regard to whether they will cause more harm than good.

THE OMB'S THIRD ANNIVERSARY REPORT ON E.O. 12866

In December 1996, the OMB issued its third anniversary report on E.O. 12866, entitled "More Benefits Fewer Burdens: Creating a Regulatory System that Works for the American People." In the report, the OMB claims:

> More streamlined and more sensible regulations. More cooperation between the Federal government and the affected parties. A more efficient regulatory process. Less paperwork. And more information, in a more useable form, for those who need it. . . these are just a few of the improvements that the Clinton Administration has made to the regulatory system.

It also observes that, "the number of regulations reviewed under the OMB's more selective process has gone down and, at the same time, the number of regulations modified by agencies during the reviews has gone up—all without undue delays in the rulemaking process." The actual statistics presented in the report, however, suggest that while the percentage of rules that were modified by agencies during the course of the OIRA review has increased since 1994 (and earlier), that is due to a significant decrease in the number of rules reviewed, rather than an increase in the number of rules modified. The number of rules reviewed declined from 1,1145 in 1994 to 498 in 1996. Contrary to the OMB's claim, the reported percentage increase in rules modified actually translates into a decline in the actual number of rules modified since 1994, from about 380 in that year to 250 in 1996.

The report highlights agency actions that exemplify regulatory successes under the Executive Order. Those achievements include developing better regulations by tailoring rules, relying on alternative forms of regulation, using sound economic analysis, consulting with the public, and coordinating efforts nationally and internationally. It also highlights cases in which existing regulations have been reinvented, and situations in which the culture of the regulatory system has changed.

In general, the actions highlighted in the report represent positive steps toward reform, but they are minor achievements at best, and do not reflect significant or comprehensive efforts to revise or repeal unnecessary or inefficient regulations. For example, the report's examples of the use of sound economic analysis ring hollow. The report makes no attempt to identify the alleged market failures that justify proposed actions, and only one of the highlighted examples suggests that an agency analyzed various options before selecting a preferred approach. In fact, most of the success stories involve improved cost-effectiveness achieved by making process alterations between a proposed and final rule, rather than re-evaluating regulatory goals or strategies.

WITHOUT ANY CHECK TO THEIR REGULATORY AUTHORITY, AGENCIES RUN ROUGHSHOD OVER PUBLIC COMMENT AND STATE AND LOCAL GOVERNMENT VIEWS.

One of the most heralded tenets of the Executive Order encourages regulators to work more cooperatively with the regulated community. The report boasts:

> In the past . . . the agencies had often already made up their minds and were unlikely to make changes based on public comment. That paradigm has changed under the Clinton Administration. . . Agencies now respond to public comments they receive.

In light of that statement, the Administration's adversarial response to comments on the EPA's air quality standards might be amusing if the costs of those standards were not so dramatic. EPA Administrator, Carol Browner, emphasized in a 21 February speech (well before the close of the public comment period) that her mind was made up on the level of the standards, "I will not be swayed. . . I will not be swayed."

The report lists as a success story the Federal Railroad Administration's (FRA) new regulatory approach that relies on an advisory committee of government railroad and labor experts to "reach consensus on the facts to be addressed in rail safety rulemaking before any regulatory proceedings begin." Yet the new regulatory paradigm contradicts and undercuts not only public comment but E.O. 12866 requirements for an analysis of a range of alternatives and a selection based on the alternative that maximizes net benefits. The FRA's recent Roadway Worker Protection rule illustrates those problems. Its economic impact analysis estimates benefits and costs only for the FRA selected approach, and the benefit calculations for that approach seem to be manipulated to just exceed costs. The benefit estimate is dominated by the FRA's unsubstantiated assumption that worker productivity increases by five minutes per day with a safer working environment. That assumption was disputed by comments made by supposed beneficiaries of those productivity increases.

Under the title "Enhancing the Intergovernmental Partnership," E.O. 12866 states as an administration priority, that "our intergovernmental partners deserve special accommodation." Yet the States were so frustrated by the Clinton EPA that at the annual meeting of State environmental officials in March 1997, held in Arizona, T-shirts asserting "States are not branches of the federal government" quickly sold out. The EPA's letter to Governor Tommy Thompson of Wisconsin regarding the agency's desire to list his state's Fox River as a Superfund site over the State's objections is typical of the cavalier attitude that precipitated the T-shirts: "While we ardently seek your concurrence, we are prepared to proceed with the Superfund process independent of the State if that is necessary."

The OMB's attempt to depict a more streamlined and efficient regulatory process in its progress report under E.O. 12866 is not persuasive. The Administration espouses the value of a "centralized review [that] allows for an objective, dispassionate review of agency proposed and final rules to ensure consistency with the President's regulatory philosophy." But executive review has clearly taken a back seat to the "primacy" of agencies in regulatory decision-making. Without any check to their regulatory authority, agencies not only disregard the principles embodied in E.O. 12866, but run roughshod over public comment and state and local government views as well.

THE OMB'S SECOND ANNUAL REPORT ON THE UNFUNDED MANDATES REFORM ACT

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires federal agencies to assess the effects of most of their rules on other levels of government or the private sector. In addition, agencies must identify and consider a reasonable number of regulatory alternatives and select the least costly or burdensome alternative that achieves the desired objective.

The Act requires OIRA to report annually to Congress on agencies' compliance with Title II. To date, the OMB has produced two annual reports, one in March 1996 and one in April 1997. Some noteworthy differences in the two reports get to the heart of the change in the role of executive branch oversight, even in the last year.

In the first annual report, the OMB failed to provide the Congressional Budget Office (CBO) with timely documentation as required under the Act. Consequently, there were probably more rules containing mandates than were identified by the OMB in its report. Nevertheless, the OMB did conclude that in a number of instances, agencies had not met their responsibilities under the law. Specifically, for fourteen rules with private sector mandates, the OMB concluded that for only two of the five final rules and only two of the nine proposed rules did the issuing agencies satisfy the Act's requirements. While the OMB

did little to make agencies meet the requirements, its admission in its first annual report was telling.

The second annual report, in contrast to the first, merely described agency consultation efforts and analyses of rules. It did not offer any conclusions about how well agencies met their obligations under the law. Rather than providing strong executive oversight of agency actions, the Administration chose to withhold from Congress any discussion that might suggest agencies are not fully complying with UMRA. By retreating from recognizing agency noncompliance with the law, the OMB's most recent report undermines the intent of UMRA to maximize public accountability of federal regulators.

THE OMB CERTAINLY SHOULD DO MORE THAN SIMPLY ECHO AGENCY ESTIMATES.

THE OMB'S REGULATORY COST-BENEFIT REPORT

In September 1996, Senator Ted Stevens (R-Ala.) sponsored an amendment to the Treasury, Postal Services, and General Government Appropriations Act of 1997 (P.L. 104-208). The amendment directs the OMB to submit to Congress by 30 September 1997 (after public notice and comment) a report providing: (1) estimates of the total costs and benefits of federal regulatory programs; (2) estimates of the costs and benefits of economically significant rules, defined as those imposing annual costs of $100 million or more; (3) an assessment of the direct and indirect impacts of federal rules on the private sector, as well as federal, state and local governments; and (4) recommendations for reforming or eliminating inefficient or ineffective federal programs.

The Stevens report, dated 30 September 1997 but issued one week late, barely addresses the latter two mandates. It provides no quantitative assessment of the indirect effects of federal regulatory actions and no recommendations for regulatory reform. That glaring omission is consistent with the administration's unwillingness to hold agencies accountable for ineffective regulations or analyses.

The report does provide some estimates of the aggregate costs and benefits of federal regulation. It pegged the total costs of federal regulations at $280 billion per year and estimates corresponding benefits of over $300 billion. That cost estimate is considered low, compared, for example, to Thomas Hopkins' over $700 billion cost estimate. One reason the report likely understates costs is that it excludes those associated with transfer effects and paperwork burdens on the grounds that they "are not what one usually thinks about when worrying about the cost of regulation." Yet, the OMB took the opposite position in its "More Benefits, Fewer Burdens" report, taking credit for the administration's efforts to reduce paperwork costs, observing "[w]hen people of speak of regulatory burden, they are usually referring to recordkeeping or reporting requirements i.e., paperwork."

The report limits its benefits and costs estimates to a small subset of the rules subject to its mandate. Rather than examining all significant rules currently on the books, as Congress ordered, the OMB addresses twenty-two final regulations issued during one year. Furthermore, the OMB merely reports the agencies' estimates of benefits and costs to the extent that agencies provided them during the rulemaking process. The report provides no commentary on the reliability of those estimates or the quality of the analysis underlying them. Particularly in light of agencies' noncompliance with its EA Guidance, the OMB certainly should do more than simply echo agency estimates.

The report's lack of conclusions and lack of independent analysis reflects a retreat from the quality of analysis previously offered by the OMB. For example, Table 1 of the 1987-1988 *Regulatory Program of the United States Government* and similar tables in subsequent reports present an evaluation of agencies' compliance and noncompliance with key elements of regulatory analysis. The table provides a good model of what the MB should be doing at a minimum. In addition, the Federal Budget for Fiscal Year 1992 reported data on the risks and cost effectiveness of selected regulations. The data the OMB collected and analyzed to support those analyses is the same data needed to produce credible estimates of benefits and costs for the Stevens report. By merely summarizing others' estimates, the OMB is missing an opportunity to provide a valuable and comprehensive overview of the costs and benefits of federal regulations, and to make constructive recommendations for regulatory reform.

The Administration's regulatory reports reveal two things: (1) agencies are regulating without an adequate understanding of whether the benefits of their actions will exceed the costs; and (2) under the current system, executive oversight is incapable of effecting improvements in regulatory analysis.

In its efforts to restore the primacy of regulatory agencies, the Clinton administration has taken the teeth out of executive review. The OMB appears powerless to enforce the most basic principles of sound regulatory analysis and agencies are proceeding with ill-advised rules that are likely to cause more harm than good.

The OMB is an executive office, so its actions cannot be expected to be independent, but rather to reflect the President's agenda. As the OMB notes in its "More Benefits, Fewer Burdens" report: "Centralized review allows for an objective, dispassionate review of agency proposed and final rules to ensure consistency with the President's regulatory philosophy." Apparently, the current President's philosophy is to permit agencies to push forward rules that serve special interests, without regard to their overall effect on social welfare.

CONGRESSIONAL OVERSIGHT

Congress must take a considerable amount of responsibility for the continued expansion of the regulatory burden. Congress passes laws, often with little regard to their costs or benefits, and delegates implementation of those laws to federal agencies.

Congress has enacted modest and incremental pieces of legislation meant to make regulators more accountable. Most noteworthy are 1) The Unfunded Mandates Reform Act of 1995; 2) the Small Business Regulatory Enforcement Fairness Act (SBREFA), including the Congressional Review Act (CRA) of 1996; and 3) the Government Performance and Results Act (the Results Act) of 1993.

In response to complaints from states and localities about unchecked and costly federal mandates, Congress passed the Unfunded Mandates Reform Act of 1995. President Clinton signed it on 22 March 1995. One of the Act's objectives is to develop estimates of the costs of proposed legislation to enable more informed deliberation among Members of Congress. Armed with information on the costs of new mandates, Congress would be less likely to make state and local governments and the private sector pay for programs and projects it refuses to pay for itself.

THE PRESIDENT'S PHILOSOPHY IS TO PERMIT AGENCIES TO PUSH FORWARD RULES THAT SERVE SPECIAL INTERESTS, WITHOUT REGARD TO THEIR OVERALL EFFECT ON SOCIAL WELFARE.

Since 1 January 1996, the Congressional Budget Office has been providing congressional committees with estimates of the direct costs of mandates in bills reported out of committee and, to the extent practicable, for conference agreements. The early months of implementation of UMRA showed that the additional deliberations and consultation that came out of CBO's analyses resulted in policy changes (*Regulation*, 1996, No. 2).

Unfortunately, by the end of the 104th Congress, Members had become much more willing to accept costly new private sector mandates. For example, although Congress and the American people had rejected just two years earlier the Clinton administration's attempt to establish government-controlled health care, Members have begun, measure by measure, benefit by benefit, to federalize and standardize private health insurance. Kidcare begins to bring Clinton-care in through the schools. Other Congressional efforts are under way to establish new health benefit mandates as well as the extension of family and medical leave.

At the same time, the OMB was giving little attention to complying in good faith with Title II of the Act, and Congress was doing little to hold the OMB accountable for shirking its responsibilities.

Legislation to strengthen UMRA's ability to address the burden of private sector mandates, sponsored by Sen. Spencer Abraham (R-Mich.) and Rep. Gary Condit (D-Calif.), has received little support in either the House or the Senate. In the Senate, the Budget Committee and its chairman, Pete Domenici (R-N. Mex) have refused to consider the bill. At the same time, the 105th Congress has enacted numerous new mandates, most notably new health care benefits mandates.

Although Congress has led the American public to believe that it is genuinely interested in controlling the proliferation of federal mandates, the willingness of the 105th Congress to disregard the Unfunded Mandates Reform Act illustrates the hollowness of its commitment.

THE SBREFA AND THE CONGRESSIONAL REVIEW ACT

On 29 March 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (P.L. 104-121), which included the Congressional Review Act (CRA). The Act has two major goals. First, it seeks to make federal agencies more responsive to the impact of rules on small business and not-for-profit organizations, most notably by allowing for judicial enforcement of the Regulatory Flexibility Act of 1980, as amended, which requires agencies to analyze the burden of regulation on small businesses. Second, the CRA allows Congress to use expedited procedures to veto agency rules, giving it ultimate accountability for ensuring that regulations are necessary and work in the most cost-effective and least burdensome manner. Congress has at least sixty calendar days to review a major rule, during which time it can pass a joint resolution of disapproval under expedited procedures. A joint resolution is subject to presidential veto and the opportunity for a veto override.

One of the biggest problems facing the implementation of SBREFA is that many small businesses are not aware that it exists. Organizations representing small businesses have spent a considerable amount of time and resources educating their members about their new rights under the law, and their efforts appear to be paying off. The most noteworthy recent examples concern the EPA's new final standards for particulate matter and ozone that were issued in July 1997. The American Trucking Association, the U.S. Chamber of Commerce, and the National Coalition of Petroleum Retailers, among others, have petitioned the U.S. Court of Appeals for the District of Columbia circuit to review the EPA's new standards under SBREFA. The EPA has claimed that its standards impose no costs on small business, but, rather, that states will impose the costs when they implement the new federal mandate. As one small business owner notes, that is "the equivalent to saying they kicked you out the window, but it was the concrete that killed you." Even the Clinton Administration's own Small Business Administration threatened to take the EPA to court over the rules. Additional lawsuits have been filed on behalf of other small business organizations.

Other successes under SBREFA are more difficult to identify. Because SBREFA allows small entities to recover attorney's fees and costs attributable "to a substantially excessive and unreasonable demand by an agency," some federal agencies may think twice about pursuing enforcement actions. A 25 March 1997 *Wall Street Journal* editorial told the story of one small business owner who was engaged in a messy battle with the U.S. Equal Employment Opportunity Commission (EEOC) over his hiring practices. After a few years and thousands of dollars, the EEOC mysteriously dropped its case shortly after the passage of SBREFA. How many other exam-

ples like that exist is unclear, but if more businesses know about SBREFA and threaten to use it, it may have a deterrent effect on overzealous enforcement by federal regulations.

Unlike the small business provisions of SBREFA, the CRA has failed to meet its potential, in large part due to a lack of congressional commitment to its implementation. Congress has made no effort to put in place any structure, such as a coordinated committee review mechanism, to help carry out the law. As a result, many Members of Congress were not even aware of their authority, to say nothing about what rules were being sent to them for review. Though Congress received more than sixty-one hundred final rules for review between 1 April 1996 and 1 October 1997 it did not disapprove a single one. A handful of resolutions of disapproval were introduced, but none came close to a floor vote. Congress' lack of commitment includes a deliberate effort to avoid using the CRA to strike down the EPA standards for particulate matter and ozone, the most expensive EPA regulations ever issued.

While Congress has not used the Act, it has resulted in the production of some valuable information. The U.S. General Accounting Office has drafted summary reports of agencies' regulatory analyses for major rules and has compiled a database of all final regulations issued by federal agencies since the law was passed. That list will soon be available to the public on the GAO website.

THE GOVERNMENT PERFORMANCE AND RESULTS ACT

A Democrat-led Congress under President Clinton passed the Results Act in 1993 because of an increased awareness that the American public wants, and is entitled to, a less wasteful and more accountable federal government. To identify targets for reform, the Results Acts established a framework for setting goals and measuring outcomes that can help determine whether federal programs are necessary and, if so, whether they are achieving their intended objectives. The Act required federal agencies to submit strategic plans to Congress by 30 September 1997 that clearly specify their mission and goals. The agencies also are required to submit annual performance reports.

The draft plans submitted during the early implementation of the Results Act were fraught with ill-conceived missions, goals, and objectives, as well as faulty tools of measurement, and clear signs of waste and duplication. In June 1997, the GAO reported that agency plans "will not be of a consistently high quality or as useful for congressional and agency decisionmaking as they could be." Some examples:

(1) The Department of Housing and Urban Development identified as one of its two key missions "restoring the public trust by achieving and demonstrating competence." As GAO points out, that "does not define the agency's basic purpose or focus of its core programs."

(2) One of the EPA's proposed objectives is to "reduce transboundary threats consistent with our trust responsibility to tribes," and to reduce pollutants "by improved cultural practices, enhance public education."

(3) Food safety is addressed by sixteen different agencies including the Departments of Health and Human Services and Agriculture.

(4) The EPA has established an initiative to increase wetlands by 2005 "by at least 100,000 acres per year." How that will be done without any further takings of private property is not clear.

(5) The U.S. Fish and Wildlife Service has set as a performance measure "By 2002, twenty threatened or endangered species are recovered and delisted under the Endangered Species Act." It is not hard to imagine how that ambitious measure could translate into even more aggressive federal takings of private property—assuming no unnecessary species are listed.

The explosion of regulatory costs likely will continue if the Results Act is simply neglected by the administration. And Congressional neglect is tantamount to approval of those plans. Without aggressive congressional oversight, federal agencies no doubt will use their strategic plans to expand their authority and budgets and to establish priorities inconsistent with congressional intent, but with Congress' tacit blessing.

Ultimately, Congress must exercise its power over agency budgets to hold agencies accountable for their performance. The Results Act provides a potentially powerful tool for identifying waste, duplication, and inefficiency but, it could easily backfire. If Congress is truly serious about managing a smaller government, it should take its responsibilities under the Act seriously.

THE OUTLOOK FOR REGULATORY ACCOUNTABILITY

Both the Executive Branch and the Congress share responsibility for the increased federal regulatory burden. While both

have potentially valuable tools in place to oversee regulatory decisions and ensure that they make American people better off, those tools are not being used effectively.

OIRA's first administrator, Jim Miller, once joked that his office was the "biggest kid on the block," so other agencies had to respond to issues it raised. That is clearly no longer the case. Not only is the Clinton Administration's OIRA unable to convince agencies to follow its sound guidance for economic analysis, but it also shrinks from reporting blatant inadequacies in the rulemaking process. Rather than being the biggest kid on the block, OIRA now appears to be the timid neighborhood kid who retreats from expressing an opinion that might be construed as critical.

Neither OIRA's ineffective review of rules under its executive order, nor the toothless Stevens Report stem from a lack of knowledge regarding how quality analysis should be done- its EA Guidance reflects sound principles for regulatory analysis and review. Nor does it reflect a lack of competence; many of OIRA's career civil servants are well-respected scholars in the field of regulatory analysis. Thus, the mere establishment of more guidelines or review requirements is unlikely to improve the review process.

The problem is that OIRA has conflicting roles, and it always has. OIRA is supposed to simultaneously provide independent and objective analysis, and report to the president on the progress of executive policies and programs. When those functions conflict, the presidential agenda will most certainly prevail over independent and objective analysis. The reports described above, and OIRA's impotence in enforcing E. O. 12866 simply show how severe the conflict has become.

Congress does have the power to improve regulatory oversight under UMRA, SBREFA, the CRA, and the Results Act. But it must be willing to assert that authority, and perhaps put in place a mechanism for effectively carrying out its authority. It might consider establishing a joint committee, modeled on the Joint Committee on Taxation or the Joint Economic Committee, to coordinate the regulatory review and oversight process. In addition, Congress might consider establishing a congressional office of regulatory analysis, modeled on the CBO, as proposed in H.R. 1704, sponsored by Representatives Sue Kelly (R-N.Y.) and Jim Talent (R-Mo.).

One ray of hope could be emerging from the otherwise dark regulatory landscape. The various reporting requirements and procedures instituted over the last three years are forcing agencies to expose the fact that they often cannot explain or justify their actions Those strategic reports and analyses may enable individual members of Congress to call agency officials to account for particularly ineffective regulatory programs. Such negative attention could provide incentives for agencies to exercise their authority in a less arbitrary manner, or to focus more of their efforts on activities they can justify rather than on those they cannot. Over time, the procedural reforms of the past three years could begin to hamper and box in bureaucrats the way the steady growth of regulations and red tape has restricted private sector activities.

The regulatory process reforms of the past few years have not begun to slow the growth of the regulatory burden. If the administration does not have the intent and Congress does not have the will, little real reform can be expected in the future.

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