Reflections on the Bush Regulatory Record

The Good, the Bad, and the Ugly

Michael J. Boskin

Federal, state, and local governments regulate too much private activity too inflexibly. The direct negative impacts of specific regulations (with the important exception of those on financial markets and institutions) generally are confined to adding unnecessary costs, stifling innovation, and redistributing profits among producers or between producers and unionized workers in specific industries. The complex web of rules, regulations, court decisions, ownership restrictions, and the like inhibiting the growth of the U.S. telecommunications industry, for example, is creating substantial costs due to the industry's interaction with the rest of the economy. But a change in regulatory policy—unlike in monetary, fiscal, or trade policy—will generally *not* have sufficient short-run impact on the economy to cause a recession. The exception is financial regulation: credit controls implemented to deal with double-digit inflation were a proximate cause of the 1980 recession, and wide swings in financial institution supervisory policy and its implementation, from too lax in the late 1980s to too tight subsequently, contributed to the slow growth of the early 1990s.

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Economists, policymakers, and the public often underestimate the impact of regulatory policy. The *cumulative* effect of overregulation is hundreds of billions of dollars added to the cost of doing business, dragging down productivity and innovation, and raising prices to consumers through a kind of giant covert tax. Hence, regulatory policy is enormously important to the efficient functioning and long-run growth of the economy.

Economists have long recognized that government regulatory failures can sometimes be as bad as or worse than the results of imperfect markets. The acceleration of regulation in the 1970s, especially new social regulation on issues such as the environment, health, and safety, was one of the causes of the great slowdown in productivity growth of the past 20 years. The government ought to deregulate where competition or its prospect is likely, and find ways to achieve necessary regulatory goals that are less costly to consumers and firms and less stifling of innovation. At the same time, it should expand efficiency incentives for regulated firms, such as incentive rate regulation and trading and netting mechanisms to reach performance targets.

President Bush took office with a strong record as an opponent of unnecessarily costly and inflexible regulation after chairing the task force on regulatory relief as vice president under Ronald Reagan. Despite some notable accomplishments, the Reagan administration was not always able to muster enough political support, especially on Capitol Hill, to accomplish its full objectives. For example, while the deregulation of interest rates and financial markets in general has been a tremendous boon to savers, investors, and the economy, it brought substantial unintended consequences. For example, the deregulation of S&Ls should have tied deposit insurance premiums to risk, as President Bush's task force recommended in the mid-1980s. Failing to do so left deregulated S&Ls free to invest in risky ventures in a heads we win, tails the taxpayers lose put option on the Treasury. This exacerbated the horrible situation of the S&L industry caused by the high inflation and interest rates in the 1970s, which wiped out about a third of the value of their primary asset, long-run fixed-rate mortgages. Perhaps three-fourths of the cost of the S&L depositor bailout accrued in the high-inflation 1970s.

The record of the Bush administration was mixed as well. Too much new regulation was added, and not enough effort was placed on deregulation and regulatory reform, but some substantial achievements did indeed occur. It says much that President Clinton saw fit to retain some of Bush's most high-profile regulators.

The two major new regulatory burdens placed on the U.S. economy during the Bush years were the Clean Air Act Amendments of 1990 and the Americans with Disabilities Act. Each of those pieces of legislation will impose very large costs on the private sector. While each was enacted for ostensibly noble goals—a cleaner, healthier environment, and easing disabled Americans' participation in the mainstream of American life—both produce their benefits at far greater cost than necessary. My view is that the Clean Air Act Amendments started out as a $50 billion command-and-control central planning scheme, and were reduced to a $30-billion-per-year program of part central planning, part markets. The estimates of the benefits by independent sources generally fall well short of estimates of cost, but there is no doubt in my mind that there were some legitimate environmental issues being addressed. Unfortunately, the best available evidence on the scientific realities on the environment was often not heeded. For example, the most thorough study of the effects of acid rain indicated that those effects are far less severe than generally thought, yet this was ignored by Congress.

From the first, my own goal, along with my talented Council of Economic Advisers (CEA) colleagues Tom Moore of the Hoover Institution, Richard Schmalensee of MIT, and David Bradford of Princeton, plus several outstanding senior and junior staff economists, was to eliminate the most egregious and costly features of the program while trying to implement more market-oriented principles. To that end, we developed an emissions trading system that if fully implemented (and that is at serious risk from state regulatory agencies) will reduce the costs of the sulfur dioxide reductions in the acid rain title of the Clean Air Act Amendments by about 20-30 percent. As it became clear how expensive the bill would be to the economy (most congressmen and senators think of costs only in terms of direct budgetary costs, not in terms of the resources the economy will have to use to meet mandates and regulation; this is one of the great areas of economic illiteracy among citizens as well as politicians), several of us convinced President Bush to tell the congressional leadership he would veto any bill whose cost came in 10 percent higher than the bill that he originally proposed, which included many cost-reducing mechanisms.

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While we did whittle away some excesses, we did not meet Bush's goal. I explained to the president that the bill was going to be too costly, and that I would have to recommend vetoing it unless we found ways to implement and administer many of the major features of the act in a more flexible, less costly manner than usual. In short, there should be fewer specific command-and-control requirements, and many more sensible and flexible performance targets. In response to my intention to threaten veto (since the president was going to sign the bill, this was my only leverage), the administrator of the Environmental Protection Agency (EPA) announced his intention to implement the Clean Air Act Amendments, to the maximum extent permissible by law, in accordance with 16 specific cost-reducing proposals we developed. A considerable amount of the time spent by the Council on Competitiveness, so ably chaired by Vice President Quayle, working with the White House Counsel's office, the CEA, the Energy Department, and the EPA, dealt with attempts to work out specific language to implement the 16 areas agreed in EPA Administrator William Reilly's letter to me. In the end, the nation could have had 90-95 percent of the environmental benefits for about 30 or 40 percent of the costs imposed by the Clean Air Act Amendments. (There are some who would say that there are no environmental benefits. I disagree.)

President Bush strongly favored an Americans with Disabilities Act. The original bills floated on Capitol Hill were outrageously expensive. The extreme activists wanted the disabled entitled to do *every* single thing that those who are not disabled do. For example, they wanted every single building in the United States retrofitted for access for the disabled. That would have cost tens of billions of dollars. They wanted every entrance to every building to be accessible to the disabled. They wanted every car on every train accessible to the disabled. Once it was clear there was going to be a bill, we at CEA focused on the really expensive items and tried to reduce their costs: for example, one entrance rather than every; some requirements on new construction, rather than the enormous expense of retrofitting everything. We helped reduce the cost to about one-quarter of what the original bills would have cost. But the expense of the Americans with Disabilities Act is still quite large. Worse yet, the costs of the Clean Air Act

The costs of the Clean Air Act Amendments and the Americans with Disabilities Act can't be assessed accurately until it is clear how the potential abuse of the judicial system by various claimants will play out in the courts.

Amendments and the Americans with Disabilities Act can't be assessed accurately until it is clear how the potential abuse of the judicial system by various claimants will play out in the courts. For example, the courts could revert to a "the disabled are entitled to identical treatment regardless of cost" interpretation, which could multiply the already large costs by a factor of ten.

The Clean Air Act Amendments and the Americans with Disabilities Act are the items most damned by critics of Bush's regulatory record. In my view, banking regulation and supervision presented a worse problem, and while some in the administration should have been on top of this issue sooner and more aggressively, it was primarily Congress's fault. The new regulations of S&Ls and commercial banks turned out to be far more expensive and cumbersome than any other regulatory policy, and in combination they exacerbated the recession by restricting the credit supply as the economy was heading into a downturn. Banking supervision was too lax on the way up in the late 1980s, but overreacted on the way down. This wild swing severely damaged certain sectors of the economy and regions of the country.

But there were some important achievements during the Bush years, including cutting off many bad ideas. For example, we scotched increasing corporate average fuel economy standards to 40 mpg, which may be technically infeasible and at the margin conserves fuel at the cost of $80 per barrel of oil. At the CEA, we felt like we were wielding a machete in a jungle chopping down dozens of bad regulatory proposals every week, usually with help from other agencies; I don't have the space to go into all of them here. The executive branch needs an effective set of organizations and, more importantly, people in positions of power and influence who have the intellectual capability, political skills, and guts to stand up to the nonsensical regulations that percolate up from the agencies, down from Capitol Hill and—even in a Republican administration—from cabinet level or above. Vice President Quayle's Council on Competitiveness acted as a final executive branch regulatory arbiter. Under his leadership, numerous improvements were made in the regulatory scene, from biotechnology to speeding the drug approval process for life-threatening diseases.

Among the major achievements during the Bush administration, I should indicate that after extensive prodding by myself and others (including Boyden Gray, William Kristol, and Vice President Quayle), President Bush launched a regulatory reform initiative that Boyden Gray and I co-chaired. It included a moratorium on any new regulation that was not essential for health, safety, or national security, a review of all existing regulation with an eye toward eliminating redundancy, and revising unnecessarily costly regulations. The initiative led to hundreds of reforms, the detailing of which is beyond the scope of this brief article. The spirit of the regulatory reform initiative did catch on at many of the agencies, and we were very pleased with the results.

Had President Bush been reelected, much bolder action, from sunsetting provisions to dramatic revision in the assessment and management of risk, would have been undertaken. Included below are some of the highlights of the Bush administration's regulatory reforms (many of these are the good part of packages that include good, bad, and ugly features):

• The first large-scale trading regime for a pollutant (sulfur dioxide), implemented in the Clean Air Act Amendments.

• The Federal Communications Commission (FCC) moved from a system of rate-of-return regulation to price caps for the regulation of AT&T in 1991.

• The Agenda for Civil Justice Reform in America, 1991, which proposed to accelerate dispute resolution and to discourage waste in litigation. These included a cap on punitive damages, use of alternative dispute mechanisms, requiring payment for discovery above a certain level, and a modified English (loser pays) rule.

• New merger guidelines in 1992 that bring enforcement up to date with current thinking on industry behavior and ensure a consistent policy between the Department of Justice and the Federal Trade Commission.

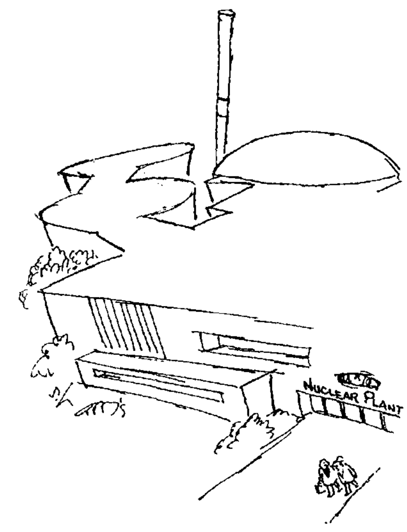
• Mobile-stationary source trading, the EPA's "cash-for-clunkers" program. Under this program, a company could offset increased emissions by purchasing and removing from the road pre-1980 vehicles that emit a disproportionate share of auto pollution.

• Proposing spectrum auctions to accelerate the implementation of new technologies, subsequently passed in the 1993 Omnibus Reconciliation Act.

• Significant reforms in the electric utility industry. In particular, the Energy Policy Act of 1992 introduced Public Utility Holding Company Act reform that encourages competition among firms that generate electricity. Also, there will be a system of more open access in electric transmission. This will allow utilities to gain access to the lowest cost power available.

• Natural gas pipelines restructuring. In 1992, as a result of administrative actions by the Federal Energy Regulatory Commission, local electric utilities, industrial users, and local gas distribution companies will have access to a competitive market for gas. They will now be able to contract directly with producers of gas rather than just from pipeline owners of gas.

• FCC "Video-Dial Tone" policy (1992). Allows telephone companies to act as conduits for carrying video services owned by other companies. However, local telephone companies still cannot



"Of course it's perfectly safe. Any accident would be in complete violation of the guidelines established by the Federal Nuclear Regulatory Commission."

enter directly into the cable industry in their own territory; they are merging and acquiring outside.

• More market-oriented pricing of federal water in California, in the Reclamation Projects Act of 1992.

• The Securities and Exchange Commission began efforts to reform the Investment Company Act of 1940. One of its first actions under this plan was to adopt new regulations that facilitate private securitization.

We insisted on sound science, invested heavily in reducing scientific uncertainty, and adopted low-cost measures while resisting massive carbon taxes and global environmental Marshall plans.

• Implementation of congressional amendments to the Real Estate Settlement Practices Act (1992). The new regulations will allow one-stop shopping for real estate settlement services. This settled almost nine years of indecision over these regulations.

• Endorsing the removal of financial interest and syndication rules. The Justice Department moved to terminate the consent decree establishing those rules. The FCC in 1993 acted to remove its own financial and syndication rules after a court rejected the FCC's modified rules. The "final" legal obstacle was just removed.

• Infrastructure Privatization Executive Order of 1992. This gives state and local governments greater freedom to privatize infrastructure assets. In particular, it requires federal agencies to modify procedures that discourage privatization of assets that received federal financing.

• A balanced approach to global environmental issues, especially potential global climate change. We insisted on sound science, invested heavily in reducing scientific uncertainty, and adopted low-cost measures while resisting massive carbon taxes and global environmental Marshall plans.

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In conclusion, the Bush administration implemented some important regulatory principles economists had suggested for decades and achieved some important deregulation and regulatory reform. But the Congress and administration saddled the American economy—businesses, workers, and consumers—with costs far in excess of the benefits likely to be achieved. A final grade to the overall effort depends heavily on what one assumes about what was achievable, given the tremendous pent-up demand for new regulation and the minority position of the president's party in both houses of Congress. On some absolute scale, one would have to say that the large regulatory costs overwhelm any good that was done. A kinder interpretation is that, if not for the efforts of Bush's team of regulatory reformers, Congress and the regulators would have imposed even larger regulatory costs.

Breaking the Iron Triangle

David McIntosh

Fewer than eight months after Al Gore gleefully announced that he was abolishing the Council on Competitveness as his first act as vice president, he has adopted much of its purpose and some of its anti-regulatory rhetoric. In order to understand both events, it is important to reflect upon what parts of its mission the Council accomplished and what parts it left undone.

David McIntosh served as assistant to Vice President Quayle and executive director of the Council on Competitiveness.

President Bush created the Council on Competitiveness, chaired by Vice President Dan Quayle, to succeed his Task Force on Regulatory Relief. As a subcommittee of the cabinet, its chief responsibility was to coordinate White House procedures for overseeing government regulations to make sure that the proposals crafted by various federal agencies reflected the president's policies. The primary policy directive was to minimize regulatory costs while maximizing social benefits from those regulations.

The Council met as needed to make policy recommendations to President Bush and to resolve conflicts among agencies about specific regulations. The permanent members were senior administration officials (John Sununu/Samuel Skinner, Nicholas Brady, Michael Boskin, Richard Darman, Richard Thornburgh/William Barr, and Robert Mosbacher). Vice President Quayle invited senior White House policy officials (Boyden Gray, Roger Porter, Edy Holiday, Clayton Yeutter) to all the Council meetings, in order both to make sure the Bush team would support the Council and to ensure the Council coordinated with the President's staff. Vice President Quayle used about a half a dozen of his staff to run the Council's day-to-day operations. The staff prepared briefing materials for the members and tried to resolve regulatory conflicts at lower levels whenever possible.

We worked extremely closely with the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), which, since Reagan's first days in office, has had responsibility for preparing cost-benefit analyses of proposed regulations. OMB Director Richard Darman had an ambivalent view of OIRA. He did not want regulatory review battles to interfere with budget negotiations. In most cases he chose not to participate in interagency battles until they were framed as a decision for the senior advisers. In addition, he did not want to expend political capital defending OIRA from attacks from the Hill. In particular, he eventually declined to nominate an administration official to head the office and placed the very able career deputy Jim MacRae in charge. In practice, this meant that the Council served as a de facto political coordinator for OIRA, since Congress refused to confirm one.

Perhaps more important than the structure of the review process was Vice President Quayle's commitment to certain fundamental principles that guided the Council. First, he had a deep faith that the free market and private sector competition would make all elements of society better off. This was accompanied with a healthy Reaganesque suspicion that the government more often than not was the source of the problem. Second, he fought to strengthen the basic institutions necessary to preserve a true market system. He sought to defend private property rights vital to free enterprise and reform the legal system to preserve the rule of law. Third, he understood that the minutiae contained in thousands of pages of regulatory verbiage could cause a policy to sink or swim—the devil is in the details. Finally, he staunchly defended the president's prerogative to have agencies write regulations as the president thought best. Unlike most politicians, his support for these principles did not wax and wane with the rising tide of press commentary about the Council. This consistency of purpose allowed him to exercise leadership in developing administration policy in several areas.

Accomplishments of the Council

Regulatory Moratorium. The regulatory and political systems provide enormous incentives for agencies to add more regulations. Often the purported benefits from the regulations are nil, but the agencies favor them either to please some constituency or to increase the agency's bureaucratic power. The most important accomplishment of the Council was to expose and scrutinize this process. (We did not and could not stop it.)

We did this first by reestablishing the regulatory review process in 1990. During the first year of the Bush administration OIRA had been beaten in several bureaucratic fights with the Environmental Protection Agency (EPA), which began taking the position that it did not need to clear regulations with OMB except at the vary last stages of development and then only in a pro forma manner. In addition, Senator John Glenn (D-Ohio) had sought to emasculate OIRA (and any other part of the White House that might seek to review regulations for the president) in his bill to reauthorize the Paperwork Reduction Act.

Upon receiving the charge to reinvigorate the regulatory review process, Vice President Quayle brought to Washington a close associate from Indiana, Al Hubbard. As a successful small businessman, Hubbard came to Washington with a keen understanding of how costly needless regulations could be for the economy. He used his position as a senior member of Quayle's staff to force the agencies to take OIRA and the review process seriously.

In 1992 President Bush asked each agency to put a moratorium on new regulations (where legally possible), except where needed to protect against immediate threats to health and safety. The agencies were asked during that time to begin eliminating existing regulations that were not cost effective. (I say "begin" because we discovered that it took a new regulation to eliminate old ones and that process often takes six months to a year to accomplish.) This effort may have saved nearly $30 billion dollars in regulatory costs and led to hundreds of regulations being changed.

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Virtually everyone recognizes the need for some level of health, safety, and environmental regulations. But often federal regulations would provide very little health or safety benefit, and cost enormous sums of money. Even more important than the $400-500 billion price tag for federal regulation, the Council focused on the individual human costs of such regulations:

•Workers pay for regulations with their jobs when small businesses reduce their work force because of regulatory burdens.

•Consumers pay higher prices because businesses pass on the costs of regulations.

•Businesses pay for regulations when they cannot compete with foreign manufacturers who do not have to comply with the same regulations. Communities pay as well, when businesses relocate overseas to reduce manufacturing costs.

•Farmers pay for overregulation when their land is taken by wetland permits or Endangered Species Act regulations that prevent the land from being used to produce food.

•Taxpayers pay when cities and towns have to spend huge sums to comply with environmental and other federal mandates. Those costs must be absorbed by the taxpayer eventually. Any mayor will tell you that in many cases they could do far more good by using this money to pay for housing for the poor or to hire more policemen to make the streets safe in their cities.

Although we never calculated the exact amount, a conservative estimate would be on the order of tens of billions of dollars saved in regulatory costs (relative to what otherwise might have happened) each year the Council was active.

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Keeping the Clean Air Act "within Budget." Perhaps the most politically charged regulatory issues of the Bush administration arose out of the Clean Air Act Amendments of 1990. EPA Administrator Reilly had promised to keep the regulatory costs to a minimum, in a letter to the chairman of the Council of Economic Advisers (CEA), Michael Boskin. However, EPA, along with its allies in the professional environmental community, quickly sought ways of using the new act to expand their power. The most drawn-out fight was over the permitting regulations in the Clean Air Act Amendments. For the first time in our history, American businesses (ranging from oil refineries to neighborhood dry cleaners), would have to receive a permit from the government to operate. They would be subject to an 18-month public hearing process, during which every aspect of their business operations would be scrutinized.

The essential disagreement was whether EPA and the state environmental agencies could require notice to environmental groups and pre-clearance every time a manufacturer changed its operations. The EPA argued that such requirements were needed if the Clean Air Act Amendments were to be properly enforced. We countered that this provision was bureaucratic overreaching that would kill off manufacturing in the United States. At one point several senators wrote to warn us that EPA's proposed permitting regulation would force a major computer chip manufacturer to locate its new facilities overseas rather than in California. Ironically, these high-tech computer chip facilities are among the cleanest manufacturing sites in the world, because the presence of even minute flecks of dust will destroy the silicon chip.

In the end Vice President Quayle's position—that we can enforce every provision of the Clean Air Act Amendments without EPA becoming the modern equivalent of Gosplan for the United States—prevailed; but not before the disagreement became quite public, complete with daily predictions by the EPA that the sky would fall if it didn't get its way.

Drug approval. The Council worked with the Department of Health and Human Services and the Food and Drug Administration (FDA) to speed up the drug approval process. We announced an ambitious agenda with a target date of 1994 for reducing the time it takes to develop a new drug by 45 percent (from 9.5 to 5.5 years). The recommendations included:

•Accelerated approval for drugs to treat life-threatening or incurable diseases, using private universities for some review of data with the FDA retaining final approval.

•Allowing drugs approved in other industrialized nations to be sold in the United States.

•Reducing the FDA's role in determining whether a drug works and redirecting their regulatory efforts to testing for safety.

These reforms have the potential to save millions of lives and billions of dollars, as new drugs become available quicker. We were most successful in persuading the FDA to implement the accelerated approval for AIDS drugs.

Agenda for Civil Justice Reform. Vice President Quayle triggered a national debate on the role of lawyers in his famous speech to the American Bar Association on the need to reform our civil justice system. We proposed 50 reforms ranging from fairly technical changes in legal procedures to fundamental shifts in incentives for lawyers to file lawsuits. Those reforms were implemented for government attorneys by executive order, and became the basis for a federal legislative proposal, model state statutes, and recommendations to the Supreme Court for changes to the Federal Rules of Civil Procedure. Probably the most significant reform was the proposed "loser pays" rule for legal fees (often referred to as the English Rule). Not surprisingly, the bar reacted to these proposals with horror. Perhaps this was to the legal profession's detriment, since lawyer jokes have now become the most popular form of humor in America. Regrettably, the legal community seems to miss the point entirely—witness the recent proposal, made seriously by the California bar, to make it a hate crime to tell lawyer jokes.

Property Rights. The Council oversaw the efforts by the EPA and several other agencies to rewrite the wetlands manual. Right after the 1988 election, those agencies used President Bush's promise of "No Net Loss" to expand the definition of what is a "wetland" and hence subject to federal land-use control. That effort created a tremendous backlash among farmers, developers, and homeowners who suddenly could not use their property. The battle was between pro-government intervention advocates who wanted to broaden an expansive definition of what is a "wetland" and pro-property rights advocates who wanted keep the federal government out of land-use regulation. The specific dispute involved several complicated ways of defining wetlands.

The issue came down to how to treat marginal land that was dry most of the year, but had some of the characteristics of a wetland—do you presume such lands are wetlands or presume they are not subject to regulations? The Council decided in favor of protecting property rights. The EPA published the rule our way, but then worked with environmentalists to create public opposition. Farm groups and developers supported the new rule and Congress passed an appropriations rider prohibiting enforcement of the old manual. Eventually, the administration compromised on a revision that was somewhere in the middle between the Council's version and that of the EPA. When the dust settled, as many as 20 million acres were "grabbed" by the federal government—a net gain for Uncle Sam.

Opposition to the Council

The popular press portrayed the Council at various times as: "a back door for business" to get regulations changed; a vast, powerful super agency that rewrote regulations; a secret star chamber that was running the Bush administration and ________ (fill in the blank with your favorite evil activity—gutting the Clean Air Act Amendments, etc.)

The Council was opposed by various entrenched power centers in Washington. Special interests (particularly environmental groups, labor unions, and Naderite consumer groups), their allies among liberal Democratic members of Congress (e.g. Henry Waxman (D-Calif.)), and bureaucrats who had their agendas put on hold all attacked the Council. Vice President Quayle often referred to these groups as the "Iron Triangle."

Often the political heat generated by the Iron Triangle was used by Bush appointees in the agencies to deflect responsibility for decisions that were unpopular with particular special interests. For example, the Agriculture Department abolished

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marketing orders for oranges and other fruits grown in California. The White House signaled that the decision whether to do so or not would be left to the department (as a result, earlier efforts to abolish the quota system had always been killed). Rather than take the political heat for doing so, the department let it be known that it had been strongarmed by the Council into taking this stand against marketing orders. We heard similar reports about agency political appointees who would take an action that they themselves promoted within the administration, but then tell opponents they had no choice because the Council pressured them into it.

Before the Council became active, the members of the Iron Triangle controlled most regulatory decisions and could use them to pursue their own agendas at the expense of the public interest. So, for example, the environmentalists pushed for more permitting controls that would give them leverage over business to extract more environmental concessions. The FDA favored regulations that gave them more discretion in approving drugs. And congressmen protected both agencies and then went to businesses to say "Pay into my PAC or you'll be in big trouble the next time we pass legislation regulating your industry."

By taking on the Iron Triangle, the Council drew a great deal of fire. The press loved it—either because they agreed with the opponents, or in most cases, because it made for a great story about a fight inside the Bush administration.

In many ways this attention was actually helpful. First, the Council was unknown, even among agencies, when it started. So much of what we did was ignored until the press attention provided notoriety. Second, it would have been impossible to review all regulations and prevent all of the bad ideas generated by the agencies. The press attention (especially articles claiming that we were an enormously powerful organization) sent the signal to the agencies, which in turn self-enforced the regulatory review process to keep excessive regulation under check.

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Finally, there were efforts in Congress to stop the Council. The first tactic was to demand that all Council papers be turned over to various committees. The White House Counsel fended off those fishing expeditions in order to protect the president's executive privilege. We were in a better position than agencies to withstand this congressional encroachment into executive authority. Second, the supporters of special interests in Congress tried to prevent funds from being spent on the Council by restricting executive branch appropriations. This galvanized support for the Council among citizens groups, the business community, farmers, and conservatives on Capitol Hill. We eventually defeated the proposal in the Senate.

Unfinished Agenda of the Council

There were several initiatives that the Council was unable to complete:

Clean Air Regulations. In the end, EPA prevailed on most of the Clean Air Act Amendments regulations. It successfully resisted our efforts to expand pollution trading regulations (that dramatically reduce the costs of clean air by allowing companies who can clean up their emissions more cheaply to overcomply and sell credits to companies whose compliance costs are much higher). Ironically, the Clinton administration seems to be adopting the Council's positions by expanding the trading program to include additional pollutants.

Civil Justice Reform Legislation. The administration was never able to get the bill taken seriously by the congressional judiciary committees. Although there was a close vote on product liability legislation in the Senate, this too did not pass.

The Biodiversity Treaty. The White House prevented EPA Administrator Reilly from agreeing to a biodiversity treaty that would have killed the U.S. biotechnology industry. However, the uproar that was generated created enormous pressure for the government to sign, which Clinton has done. Nonetheless, Clinton only did so after the treaty language was changed to ensure that patents and other intellectual property rights were protected—thus vindicating the Council's position that the original treaty was bad for the United States.

The FDA. On food labeling regulations, the FDA prevailed over our objections and has greatly restricted the type of information that can be placed on labels unless it is pre-cleared by the FDA. In addition, they are now starting to regulate restaurant menus—something we had stopped early on. Finally, many of the drug approval reforms died a slow death in the FDA's hands. The reciprocal approvals with foreign countries and contracting out drug reviews were two reforms that FDA Administrator David Kessler had agreed to only reluctantly, and then only to stave off more far-reaching reforms. (For example, the Commerce Department seriously proposed privatizing the FDA along the lines of the Underwriters Laboratory mechanism used to review the safety and efficacy of electrical equipment.) So it was no surprise that the agency never implemented the reciprocity and contracting out proposals—although they kept telling us they were making progress on writing new regulations to do so.

Ironically, the current administration has found that it cannot easily control the federal leviathan without a Competitiveness Council or its equivalent operating at the highest levels within the White House. Vice President Gore's effort to reinvent government can only succeed if the president has an ongoing operating council to ensure that its goals are implemented in the thousands of regulatory and policy decisions made by the agencies every day. Perhaps more important, the task of reinventing government cannot succeed without a commitment to the fundamental principles of limited government and cost-benefit analysis which can serve as a guide to determine what activities the government should undertake as well as how they can be done most efficiently.

Lessons

C. Boyden Gray

President Bush's record on regulation was mixed. There were some good developments, but the fact remains that the Bush administration lost the deregulatory momentum of the Reagan years. This is curious, since President Bush himself was in charge of the Reagan deregulatory program as vice president. It is important to try to understand why, lest the mistake be repeated in the next Republican administration.

Overall, the Bush record is defensible in terms of the productivity growth in manufacturing, one of the best measures of the effectiveness of regulatory oversight. The recent McKinsey study of international competitive trends put the United States far in front of its trading partners in competitiveness—an important conclusion that got lost during the last campaign. The reason cited by the study was the relatively high rate of productivity growth in manufacturing, which is partly attributable to the lower level of regulatory interference by the U.S. government compared to that of other governments.

The stories about the productivity-led recovery in 1992 only confirmed this hopeful trend in the American economy. This was especially good news when considered in light of our much-criticized international environmental record. The fact is that we are way ahead of our trading partners on the quality of the air we breath, which is probably the best measure of environmental quality and also the most expensive to achieve.

Achieving the number one position internationally in both air quality and productivity-led competitiveness is a major accomplishment. But we are plainly not doing well enough. Our current levels of growth and job creation are simply untenable, even if they exceed the levels of most of our trading partners. To be sure, their regulatory burdens and unit labor costs are even higher; hence, BMW and Mercedes are locating new manufacturing plants here, not in Germany. But Europe's insensitivity to overregulation is no excuse for our own. Take, for example, the approval of new medical devices, which is slower here than in most countries and is now leading people to rethink the prospects for this U.S. industry, once a star exporter. Take a look, as well, at the lengthy new drug approval process, where reform seemed to be on its way but never truly materialized.

The number of major rules costing more than $100 million jumped by more than 40 percent in the beginning of the Bush administration in the absence of any clear public need.

The Bush administration's difficulties went beyond lost opportunities. Across the board, regulators got out of hand; the number of major rules costing more than $100 million jumped by more than 40 percent in the beginning of the Bush administration in the absence of any clear public need. And notwithstanding some important innovations in the Clean Air Act Amendments of 1990, the unnecessary bureaucratization introduced by the suffocating permitting provisions, which were slipped into the legislation without any debate in either the executive branch or Congress, will cause red tape fits for small and medium-sized businesses for years. One illustration of how much the bureaucracy got out of hand was the recent near-revolt

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against the Environmental Protection Agency (EPA) on the floor of the Senate in connection with the EPA cabinet status bill, where Senator Glenn (D-Ohio) actually had to endorse Reagan's Executive Order 12291 in order to fend off legislative changes he viewed as being even more distasteful.

What happened? The most important problem was the relaxed commitment to oversight in the Executive Office of the President. Part of this, in turn, was Congress' refusal to confirm a head of the Office of Information and Regulatory Affairs (OIRA). But the administration never pushed hard, and Vice President Quayle's Competitiveness Council swung into high gear too late to put the reregulatory genie back in the bottle. The lesson for the future is simple: absent an enforceable regulatory budget, there is no substitute for disciplined White House regulatory vigilance, despite the mind-numbing attention to detail that is required and the threat of the usual mau-mauing from Congress.

A couple of comments about the much criticized Clean Air Act Amendments are relevant, because not everything about it is negative. The first thing to understand about the Clean Air Act Amendments is that their costs cannot be assessed in a vacuum as though the legislation were the first air quality statute enacted in the United States. To the contrary, the costs (and benefits) must be compared to the regime that was replaced, which, it should not be forgotten, was totally unworkable and dreadfully expensive. The Supreme Court's refusal to review the D.C. Circuit's vinyl chloride decision in 1987 was about to impose costs in the billions of dollars for control of air toxins—well beyond any expense that could be justified by the risks involved. In addition, the irrationality of the ozone rules was triggering highly costly yet ineffective controls, as well as a literal federal government takeover of major metropolitan areas, including Los Angeles and Chicago.

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The air toxins rewrite in the Clean Air Act Amendments was no thing of beauty, but it will be much more cost effective and cost beneficial to implement than the predecessor statute. The cost-benefit ratio will very quickly get out of line, however, if the Clinton administration ignores the statute's command that risks be realistically reassessed before imposing a second round of regulatory controls. Similarly, the ozone nonattainment provisions brought much-needed relief to an impossible situation, but that relief can disappear in a flash if the administration ignores the statute's safeguards.

The acid rain provisions were the only substantive rules that broke new ground, calling for a 10-million-ton reduction in sulfur dioxide emissions over a 10-year period at an estimated cost of $3 billion a year, with no clear offsetting benefits. But the statute also created a market incentive program for achieving those reductions by way of a sophisticated allowance trading system. This highly innovative approach to environmental regulation is in fact turning out to be incredibly successful, doubling the expected tonnage reduction for the first phase of the program and cutting the anticipated costs by two-thirds to three-quarters.

This combination of reduced costs and accelerated reductions is unheard of. Because the air toxins and ozone provisions contain authorization for the development of similarly innovative and cost-cutting market incentive approaches for their implementation, careful and prudent administration of the act could result in huge net savings over the regulatory situation that existed when President Bush took office.

But the adoption of market approaches is not self-implementing, nor is the statute's command that risk be realistically reassessed. There are signs that the new crop of regulators want to go back to the old way of command-and-control regulation, not only to halt the adoption of market approaches in the ozone and air toxins section, but to reverse the huge gains already made in acid rain control. Governor Cuomo has led an assault on the acid rain success, and the Clinton White House has blocked the formation of the risk-assessment commission established by the statute. Thus, gains may not be secure.

On the other hand, there are positive signs.

For example, as noted above, Senator John Glenn has recently praised Executive Order 12291 and its cost-benefit requirements as sound policy. A new OIRA head has been confirmed for the first time in more than four years; she has already managed the issuance of a successful executive order that maintains the thrust of the old one. This follows Senator Bennett Johnston's (D-La.) resounding 95-3 Senate vote for a provision requiring the EPA to provide the public with realistic risk assessments that are based on sound science and that compare sensibly with ordinary risks people face in everyday life. But Congressman Waxman has declared war on this sensible provision; the FDA is continuing its war against medical devices; and new fields like biotech are under attack by anti-science Luddites. Only time will tell where the center will come to rest in the current administration. Meanwhile, the Republicans in waiting should be learning from the mistakes of the last administration.

Suggestions

John E. Robson

Despite struggles on the part of President Bush's Council on Competitiveness to stop it, overregulation marches on. Economists estimate the gross annual costs of all regulation at about $500 billion dollars, much more than we spend on national defense. That is staggering, and amounts to a hidden regulatory tax of well over $5,000 a year for every American family.

And the costs of excessive regulation are not remote. They show up in daily life—in the employer's cost of doing business and, therefore, in the price we pay for every product and service we buy, in the cost of homes and education, in inflation rates, interest rates, and the availability of credit. They also will help decide the future place of American business in a fiercely competitive global marketplace.

Examples of regulatory excess abound. Take the new regulations Congress has just imposed on banks, regulations that are on top of already existing regulatory burdens that the banking industry estimates cost around $10 billion a year—nearly 60 percent of the entire industry's profit in 1991. These new congressional mandates authorize regulators to set salaries for every bank employee from CEOs to tellers, dictate bank office operations, and prescribe duplicative annual federal examinations even if a bank has already been through a state regulatory examination.

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Or take the example of a sick person who needs a prescription drug. Sometimes the prescription drug works wonders; sometimes it doesn't. But what that sick person may not realize is that often, when the drug doesn't do what you and the physician hope, there is a pharmaceutical product that *could* work already in use for patients in Canada and Europe. But that drug is not available in the United States because of the Food and Drug Administration's timid and outrageously slow regulatory process. For example, in Canada a schizophrenia drug called Risperdal is available at half the cost of FDA-approved treatments in the United States, and without the need for weekly blood tests.

The above examples are only a tiny fragment of those we could select from the wax museum of regulatory horrors, but they illustrate the diversity of costs associated with excessive regulation. How have we come to be mired in the current debilitating state of overregulation? I would identify several reasons:

- The fact that regulation, by and large, has its inspiration in laudable motives and so acquires popular political force and immunity from attack.
- A Congress dominated during the past half-century by majorities committed to a "big-government-can-fix-it" philosophy and the

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creation of a risk-free world.

- The near-total absence of any significant business experience on the part of regulatory bureaucrats, members of Congress, regulatory activists, and the regulation-infatuated media.
- The influence of lawyers, accountants, and other professional technicians who feast at the table of regulatory growth and complexity.
- The stealthy nature of regulatory increase, which tends to occur one new regulatory requirement at a time, until the accumulated regulatory burdens become suffocating.
- The American compulsion to rush in and correct every problem, with its concomitant notion that for every problem there is a tidy man-made solution.

The dynamics of the regulatory process itself are key to understanding overregulation. Regulatory behavior is strongly driven by what the regulators perceive to be politically correct, and by an overwhelming desire to protect their own backsides from criticism by the politicians in power, the media, or the regulatory activists. Regulators don't ignore what happens on C-SPAN.

If powerful coalitions can be mobilized on issues such as drunken driving, muscular dystrophy, the environment, and animal rights, it surely must be possible to do so to combat overregulation.

Those dynamics drive the regulators to take a no-risk approach that stops decisions and actions from occurring, or slows them down, if they present any risk, even if significant benefits are also present (for example, the approval of a new life-saving drug). They also induce regulators to take the most stringent positions in implementing statutorily mandated regulation, even where there is latitude to adopt a more balanced approach. Only the mistakes of *under*regulation count politically. A regulator would rather see a loan denied than see one made that might later go sour. Loans denied aren't counted; neither are lives not saved by drugs trapped in FDA regulation, nor jobs not created due to the imposition of excessive regulatory burdens.

What can be done about overregulation? I have some suggestions.

The first and essential task is to organize a national Coalition for Common Sense Regulation, a diverse and powerful political action and public information group concerned about economic growth and dedicated to stamping out excessive regulation. If powerful coalitions can be mobilized on issues such as drunken driving, muscular dystrophy, the environment, and animal rights, it surely must be possible to do so to combat overregulation. A companion task, of course, is to find some political champions for this cause—senators, congressmen, state legislators, governors, and mayors—so that the battle is fought across a broad political front that reaches the breeding grounds of overregulation. Then this coalition must embark on a massive public and political education campaign directed at three central issues.

First, the coalition must educate the American people about the real costs and effects of excessive regulation in their daily lives.

Second, the coalition must dissipate the misleading and polarizing notion that the population divides neatly into two groups, "consumers" (whose interests are allegedly protected by regulatory activists), and another group whose alleged aim is to exploit and harm the first. This is, of course, preposterous. We are all consumers. And nearly every one of us is also a producer, a job holder, a user of natural resources, and a potential prey to disease. The multitude of roles that we all play, and the range of sometimes conflicting interests that require balancing, needs to be grasped by the public. If the regulatory activists continue to be allowed to divide the universe into "consumers" and "enemies of consumers," they will make it difficult for foes of excessive regulation to gain the moral and political high ground.

Third, the coalition must erase the notion that government can create a risk-free world. No one argues that we ought not take reasonable precautions or that we should allow dangerous, preventable risk. But there is a balance between excessive risk and excessive regulation. A balanced regulation of risks that measures costs and benefits must be portrayed not as inhuman, but as constructive and virtuous. After all, a world free of risk is also a world free of progress.

After forming our national coalition and mounting an attack on the ideas that underlie excessive regulation, we need concrete, systemic antidotes. This problem cannot be addressed by tinkering with one bad regulation at a time. We must attack the system. So here are some ideas for what we might call a Regulatory Bill of Rights.

First, we must make it more difficult for legislators to impose regulatory requirements. For example, a supermajority could be required for any new regulatory legislation. And suppose, before Congress acts on any legislation creating or expanding regulation, that the Joint Economic Committee must publish an analysis showing whether the annual benefits for the new regulation exceed its costs. We might also require calculation of the overall cost of regulation already existing in the area where the new regulatory legislation is proposed in order to show the marginal impact of the new burden.

We should also hold members of Congress and other politicians accountable by requiring their regulatory votes and actions to be on the record. This information could then be used in a public rating system for legislators, governors, cabinet officers, and other regulatory officials, just as the Americans for Democratic Action, the AFL-CIO, and the National Rifle Association do for their agendas.

Next, suppose we require every federal agency to establish a minimum risk threshold below which it will not impose regulation. For example, the Environmental Protection Agency might not regulate an activity below the point of reducing the risk of cancer to the risk of a person being struck by lightning.

Regulatory agencies could also be required to publish a cost-benefit analysis with every proposed regulation and solicit comments on the analysis as well as other aspects of the proposal. And agencies could adopt overall "cost of regulation" budgets. Under this approach, an agency could not impose any regulation that resulted in costs exceeding its budget unless the increased cost is offset by reducing regulation in other areas.

Finally, we need to get the legal system reformed to deter the welter of senseless and costly lawsuits. And we need to pay more attention to the regulatory philosophy of men and women considered for judicial appointments. Certainly we do not want on the bench judges who are creating new opportunities for regulatory mischief by expansive interpretations of the law.

We as citizens can arrest overregulation if we muster the political will and take resolute action.