Clinton's Regulatory Record

Policies, Process, and Outcomes

William A. Niskanen

Clinton's regulatory record (so far) is better than Bush's. This is the good news. You already know the bad news: the Bush record was *awful*. The Bush administration imposed more costly, new regulatory legislation than that of any administration since Nixon.

And the Clinton record could have been much worse. The Clinton health plan of 1993 would have been the largest single expansion of federal regulatory authority since the New Deal; however, this plan never reached a floor vote in the Democrat-controlled Congress. The Clinton record of course reflects the combined effects of administrative and congressional proposals and decisions. And with the Congress controlled first by the Democrats and then by the Republicans, it is difficult to isolate the effects attributable solely to the administration. However, the record to date shows that federal regulations have increased at a slower rate during the Clinton administration than during the Bush administration.

The Quantitative Record

Let's start with the quantitative record, recognizing the limitations of any one measure of the scope of federal regulations.

- The number of pages containing rules and regulations in the *Federal Register* increased at a slightly higher rate under Clinton than Bush through 1995. In June 1995 however, the administration claimed that it would eliminate sixteen thousand pages of federal rules, so the average increase through 1996 most likely will be lower than under Bush.
- Real outlays and the staff of federal regulatory agencies increased at a much slower rate under Clinton than Bush. Moreover, data for the actual outlays and staff through fiscal year 1996 are likely to show an even slower average increase. (These data are assembled by Melinda Warren at the Center for the Study of American Business.)
- The average real cost per household of federal regulation also increased at a much slower rate under Clinton. (These data are estimated by Thomas Hopkins at the Rochester Institute of Technology.)
- Estimates of the total paperwork burden hours (not shown) reveal a similar pattern—slow growth during the Reagan years, rapid growth under Bush, and moderate growth under Clinton through 1995. (These estimates, however, have not been prepared on a consistent basis across agencies and over time. Thus, they are less reliable than other measures of the burden of federal regulation.)
- Overall however, Clinton and Bush's deregulatory records are more similar to each other than either is to Reagan's. For regulation, as for several other policy dimensions, it is more

William A. Niskanen is chairman of the Cato Institute and editor of Regulation.

Table 1
The Quantitative Record

	Reagan	Bush	Clinton
	Percent Annual Change		
Federal Register pages	-4.5	3.0	3.2[1]
Real outlays	1.1	4.6	2.0[2]
Regulatory staff	-1.9	4.7	1.2[2]
Real cost/household	-2.7	2.8	0.4

[1]Through calendar year 1995.
[2] Based on estimates for FY95 and FY96.

accurate to speak of the Bush/Clinton era than the Reagan/Bush era.

The quantitative record of course provides only rough estimates of the magnitude of federal regulation. It does not reflect the major changes in the composition of regulations or the reasons for them. Over the years analysts of both taxes and regulations should have learned that the devil is in the details.

The Administration's Objective

In June 1993, soon after she was appointed administrator of the Office of Information and Regulatory Affairs (OIRA), Sally Katzen expressed the administration's objective as "...making good regulatory decisions—not proregulation or anti-regulation, but smart regulations." In September 1993 Leon Panetta, then-director of the Office of Management and Budget (OMB), used almost the same language to describe the objective of the new executive order on regulatory planning and review.

At that time I endorsed the new executive order (*Regulation* 1993, No. 3), but expressed three concerns about the administration's approach to regulation.

- My first concern was that the administration set strikingly different regulatory objectives for the public and private sectors. Earlier that month, the National Performance Review set a goal of eliminating 50 percent(!) of the federal regulations affecting the public sector. In contrast, there was a conspicuous absence of a commitment to reduce regulation of the private sector.
- My second concern was that the sensible principles and processes in the new executive order would be brushed aside when they conflicted with the interests of another policy or favored regulator. For instance, the health plan and pesticide legislation proposed that month were strongly inconsistent with both the prior and new executive orders.
- Finally, the regulatory review process seemed to involve only the advocates of more regulation and a neutral review office. Who then, in effect, would be the defense attorney for those who bear the costs of regulation? Who would be the advocate of deregulation? In the absence of an advocate for deregulation, an aggressive regulator would probably carry the day—however smart and conscientious the review office. The regulatory review process may have been designed to reduce confrontation between the agencies and the White House but it did not seem to reinforce the administration's commitment to "smart regulations."

A reasonable interpretation of the administration's objective, then, is that regulation should be consistent with the principles and processes defined in the new executive order. A question posed in OIRA's first-year report to the president, however, remains unanswered: "Are we really getting smarter regulation? This is a difficult question to answer because . . . there is no direct measure of performance that we can use."

The Legislative Record

The most surprising dimension of Clinton's regulatory record is that the administration initiated

very little regulatory legislation. The major exception of course was the massive health program proposed in September 1993. Most environmental legislation is due for reauthorization but, as I write, only the Safe Drinking Water Act and a comprehensive pesticide bill are expected to be approved by the current Congress. The administration interestingly did not press for an increase in the minimum wage when the Democrats controlled the 103rd Congress, but it did force an election year split on this issue by the Republican majority in the 104th Congress.

As it turns out, Congress has had a full regulatory agenda during the Clinton years. The administration supported some of these bills, opposed others, and sometimes stood by without conveying any clear policy direction. Clinton supported the only two proposals passed by Congress that increased regulation—the Family and Medical Leave Act and the minimum wage increase.

On several issues the administration sent mixed signals. Clinton supported the deregulation of intrastate trucking but basically remained silent on the bill that terminated the Interstate Commerce Commission. He supported eliminating restrictions on interstate banking but would not take a position on the New Deal restrictions on bank powers. The Clinton administration also supported the requirements for benefit/cost analysis as part of the legislation that restricted unfunded mandates on state and local governments, but it opposed a comprehensive regulatory reform bill on the grounds that it would create an inflexible review process—"paralysis by analysis." Clinton finally accepted most of the proposed regulatory reform measures but only as part of the bill passed to increase the federal debt limit. Clinton supported reauthorization of the Paperwork Reduction Act but the administration has been very slow to implement the paperwork reduction goals therein (See "The Paperwork Burden").

The administration also has had a mixed record on the most important deregulatory measures originating in Congress. Clinton vetoed the bill that restricted frivolous shareholder suits, but his veto was overridden by a broad bipartisan majority. He also vetoed a bill to reform product liability law and this veto was sustained. Likewise the 104th Congress initiated and approved the most important agricultural and telecommunications bills in sixty years without significant administrative input.

Administrative leadership is neither necessary nor sufficient for good regulatory legislation, but one might hope to see a general pattern of legislative priorities. The apparent pattern is based on only a few cases. The administration seems to favor regulation of the labor market, as indicated by its support of the family leave and minimum wage legislation and Clinton's veto of a bill that would have relaxed the restrictions on labor-management teams in nonunion firms. The administration seems to oppose measures that would restrict the business of trial lawyers, as indicated by Clinton's vetoes of the shareholder suits and product liability bills. The legislative record of the Clinton administration is consistent with its own rhetoric—it is neither proregulation nor antiregulation. However, the administration's criteria for determining "smart regulations" are still unclear.

The Administrative Record

The record of administrative regulation on Clinton's watch is the result of a complex interaction between the White House, the regulatory agencies, and the affected parties. The White House attempted to shape this process with public and private communications by the president and vice president, by two sets of guidelines to the agencies, and by the conduct of its review agents. For the most part, the executive order released in September 1993 is very similar to the two Reagan orders that it replaced. The exceptions however are important: OIRA's review powers would be limited to "significant regulatory actions." The emphasis on openness and accountability was designed to protect the review process against charges of backdoor deals with favored interests. There is also a new emphasis on "consensual mechanisms for developing regulations, including negotiated rulemaking." In January 1996 the OMB issued a set of more detailed guidelines on how to conduct economic and risk analyses consistent with the executive order.

More important perhaps, OIRA tried to change the "culture" of regulatory review from a confrontational process (between OIRA, the agencies, and the affected parties) to a consensual process. The agencies were encouraged to solicit early input from the affected parties, to consider alternative measures to achieve statutory goals, and to achieve a balance of interests

among the affected parties. In that sense, OIRA functioned more as a counselor during the review process than as an enforcer of the executive order. For some, this approach to regulatory review may seem like a "Renaissance Weekend" form of conflict resolution. For others, this approach seems to define the public interest as an agreement of the organized parties, even though some consumer groups are notoriously poor agents of consumer interests and some businesses use regulation to raise the relative costs of their competitors' products. The proof of the pudding, however, is whether the outcomes of this approach are generally satisfactory.

What have been the major effects of this process on administrative rulemaking in the Clinton administration to date? Foremost, this process has not stopped regulatory agencies from aggressively interpreting the extent of their own authority under existing law.

The rulemaking process has not stopped regulatory agencies from aggressively interpreting the extent of their own authority under existing law.

- Some of the rules considered were silly or trivial. The Department of Transportation, for example, considered applying hazardous materials' regulations to the shipment of butter and salad oil. The Consumer Product Safety Commission asked for comment on how to design five-gallon buckets to reduce the number of toddler drownings, including one suggested alternative that such buckets not hold liquids.
- Some new rules imposed substantial costs before being relaxed. More aggressive enforcement by the National Highway Traffic Safety Administration resulted in a 20 percent increase in auto safety recalls in 1993. The Community Reinvestment Act was reinterpreted to force several large banks to increase their lending to minority borrowers; this new interpretation of a relatively obscure law was stalled only when the largest Florida bank hired Clinton's personal lawyer as counsel on these regulations.
- In several cases, regulations now under consideration have the most tenuous statutory authority. These include the major restrictions on tobacco marketing now being considered by the Food and Drug Administration. More recently, the Occupational Safety and Health Administration asked for comments on draft guidelines to reduce workplace violence in night retail stores, claiming that the general duty clause of its enabling legislation provides sufficient authority even without promulgating a formal regulation.
- Furthermore, several types of evidence suggest that the Environmental Protection Agency is nearly exempt from the administration's general regulatory guidelines. The pesticide legislation proposed in 1993 would have eliminated consideration of the economic benefits of pesticide use except in exceptional cases and only in the first five years—a position contrary to the net benefit criterion in both the prior and new executive orders. A study by the Institute for Regulatory Policy reviewed all of the significant EPA rules that were reviewed by OIRA from April through September 1994. Of the forty-five significant rules reviewed, a need for evaluation was found in nineteen cases; positive net benefits were demonstrated in six cases; only two rules were withdrawn by the EPA; and no rules were rejected or returned by OIRA. This is a disturbing but limited finding; there is no similar study of significant rules proposed by the EPA in other periods or by other agencies during the Clinton years. The finding that no EPA rules were returned or rejected by OIRA, however, is very different from the review record under Reagan or Bush.

  In April 1996 the EPA issued new draft guidelines for assessing cancer risk that would eliminate statistical significance as a basic requirement for determining causality. This position is strongly contrary to the EPA's 1986 guidelines, the 1991 recommendations of the National Research Council, and the January 1996 OMB guidelines on economic and risk analyses. In summary, the EPA has sought authority to exempt itself from the economic and statistical criteria for beneficial regulation. Even more disturbing, the EPA seems nearly exempt from the Clinton administration's own guidelines on these issues.

The Paperwork Burden

OIRA's other major responsibility is to monitor and

discipline the increasing burden of federal paperwork. For two reasons this has been a difficult task. First, measures of the paperwork burden have not been consistent across agencies or over time. Most of the increase in burden hours reported in 1989 and 1995, for example, reflected an accounting change in the treatment of information provided to third parties and the public. Second, the demands for information by both the public and the government continue to increase. The Clinton administration strongly supported the reauthorization of the Paperwork Reduction Act in 1995. This act requires OIRA to achieve a 10 percent reduction in the government-wide paperwork burden in fiscal years 1996 and 1997 respectively, and a 5 percent reduction in each of the next four fiscal years. It also requires that agencies reduce the annual paperwork burden to "the maximum practicable" extent.

A June 1996 report by the General Accounting Office (GAO) concludes however that these goals probably will not be met. The Internal Revenue Service, which accounts for about 80 percent of the total burden hours, plans to reduce its paperwork burden by 0.9 percent in fiscal year 1996, and claims that it cannot do much more without substantive changes in the tax code. The EPA claims that it will reduce its burden by 25 percent in calendar year 1996 but reports that these reductions will be offset largely by increases in information collections required by law, such as the expansion of the chemicals subject to the Toxic Release Inventory. On net, GAO estimates that the total federal paperwork burden will be reduced by about 1 percent in fiscal year 1996.

The total burden of federal paperwork is now about seven billion hours per year—a proper focus for congressional and administrative concern. An attempt to control this burden by paperwork reduction goals, however, is probably futile without reducing the demands for information in substantive legislation. It is too early to determine whether the administration has made a conscientious effort to meet the new paperwork reduction goals. My tentative judgment is that the paperwork reduction goals are unrealistic, and that the most conscientious effort would not significantly reduce the paperwork burden without major changes in the tax code and other substantive legislation.

Conclusion

Any evaluation of Clinton's regulatory record depends critically on the standards by which it is judged.

The administration endorses the legitimacy of regulation as an instrument of federal policy without any apparent judgment that there is too little or too much regulation of the private sector. The administration's announced objectives include "reinventing" regulations and the regulatory process, and achieving more effective, efficient "smart" regulations. In pursuit of these objectives OIRA has worked diligently to change the "culture" of the regulatory process, to strengthen the trust of the affected parties, and to restore the primacy of the regulatory agencies and the legitimacy of centralized review.

Faced with the difficulty of documenting a record of "smart regulations," the administration has chosen to defend its record in terms of indirect procedural objectives: The culture of the regulatory process has clearly changed; the regulatory agencies no longer consider OIRA an adversary; regulated industries have gained some flexibility in the design and enforcement of regulations at the expense of losing a court of appeals in the office of the vice president; advocates of regulation have lost some voice in the design of regulations in exchange for a more receptive office of the vice president; there are no longer any charges of backdoor deals with special interests; and the legitimacy of centralized regulatory review is no longer a partisan issue.

One wonders, however, whether the institutionalization of consensual rulemaking masks an erosion of the criteria for smart regulations. The limited evidence available suggests that many final rules do not meet the administration's own regulatory guidelines. Moreover, there appear to be only a few examples of the "smart" regulation that was supposed to be the object of changes in the regulatory process. Two chapters of the 1996 *Economic Report of the President* summarize the case for smart regulations but identify few that have been implemented on Clinton's watch. The most important of these initiatives is probably the auctioning of selective spectrum rights. Only a few others merit attention: two experimental EPA programs that invite businesses to propose more efficient means to achieve performance standards; two Department of Agriculture programs to reduce environmental damages; and a Corps of Engineers initiative to streamline the wetlands permitting procedures for small tracts. In several dimensions, this is small change.

Despite these experimental initiatives, the most disturbing fact is that the EPA continues to seek exemption from both the economic and the statistical criterion of smart regulation.

The perspective of this outsider is that the Clinton regulatory record reflects the interaction of thoughtful, conscientious review agents and aggressive regulators. In this situation, without very clear signals from the boss, the good guys sometimes win—but more often lose. Yes, the Clinton record is better than the Bush record, primarily because little costly, new regulatory legislation has been approved. Yes, the Clinton record would have been much worse if his health care proposal had passed. The Clinton record also could have been much better had its key officials acknowledged that smart regulation sometimes, and maybe more often than not, means *less* regulation.

Selected Readings

Niskanen, William A. "The New Regulatory Order." *Regulation* (3) (1993).

General Accounting Office. "Paperwork Reduction: Burden Reduction Goal Unlikely to be Met." Testimony presented to the Senate Committee on Small Business, Washington, D.C., June 5, 1996.

Gough, Michael and Steven Milloy. "The Environmental Cancer Epidemic that Never Was." *Regulation* (2) (1996).

Institute for Regulatory Policy. "Ensuring Accountability in Developing Well-Founded Federal Regulations." Washington, D.C., April 1995.