ALTERNATIVE PATHS TO REGULATORY REFORM

William D. Nordhaus

A. INTRODUCTION

In choosing among principles for arranging economic affairs, the state can rely on some combination of three principal forms of organization. The basic one, of course, is to allow the automatic coordination of markets. When the outcomes here are thought undesirable, then the state can intervene according to one of two mechanisms. The first, one that is thoroughly analyzed in the economic framework, is to change the incentives of private actors and thereby to induce a certain outcome voluntarily. This mechanism takes the form of expenditures (such as buying an airplane or hiring a teacher) or of taxation (such as by investment tax credits or cigarette taxes).

The other form of organization—indeed the oldest one in terms of human civilizations—is to command certain activities by formal or informal channels. Thus, the state can prevent certain activities (such as slavery) or, rarely today, require certain outcomes (such as military service) by command and control of the citizens.
B. WHAT IS REGULATION?

Regulation is a form of this second method of economic control. Regulation is often loosely used to refer to many types of compulsory government actions—including foreign trade controls, taxation, and even the criminal laws. Indeed, in the broadest possible sense, any government pronouncement or edict issued either at the local, state or national level that is backed by the force of law can be said to regulate the behavior of the citizenry. For our purposes, we will discuss regulation in a more restrictive sense as referring to governmental legislation or agency rules having force of law, issued for the purpose of altering or controlling the manner in which private and public enterprises conduct their operations. ¹

There is a general perception that the United States has been poorly served by its regulatory system. Regulatory reform has been high on the public agenda of late. Congress has recently scaled back the regulation of four major industries—airlines, trucking, finance and railroads—and is considering legislation that would alter the way in which all regulations are developed. Four successive administrations have launched their own regulatory reform programs. Most recently, the Reagan Administration has cut the operating budgets of several key regulatory agencies, slowed the pace at which new regulations are issued, and ordered that all regulations promulgated by executive branch agencies pass a cost benefit test.

A common complaint is that the regulatory system is wasteful because it is insufficiently supervised. Although many individual elements are supervised—individual regulations by the Office of Management and Budget, specific regulatory appointees by the Senate, and operating budgets of the many regulatory agencies by both the Executive and Legislative branches—no branch of the federal government systematically examines the overall regulatory effort and the broad priorities within it. Indeed, no branch has even attempted to determine the aggregate impact of our regulatory programs, in terms of either their benefits or costs. Imagine that being the case with the federal budget—with no one knowing total expenditures and tax receipts! That is the present state of the regulatory process.

Missing the forest by watching the trees caused little waste when the regulatory agencies were few and their missions modest. In recent years, however, the scope and impact of government regulation have proliferated. Depending on how they are counted, there were fewer than ten agencies prior to 1900 charged with regulatory responsibilities; today the number stands at over 80. This growth in the number of regulatory agencies is reflected in the substantial cost imposed by federal regula-
Table 1. Summary of Regulatory Cost Estimates
(Billions of 1977 dollars)

<table>
<thead>
<tr>
<th></th>
<th>Cost as Percent of 1977 GNP</th>
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<tbody>
<tr>
<td>Environmental Regulation</td>
<td>13.4–37.9</td>
</tr>
<tr>
<td>Health and Safety Regulation</td>
<td>7.4–17.1</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>13.9–35.6</td>
</tr>
<tr>
<td>Total</td>
<td>34.7–90.6</td>
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Source: Litan-Nordhaus, Reforming, Table 2-7

tion. As Table 1 shows, the total costs lay in the range of 1.8 to 4.8 percent of GNP in 1977.

Federal regulation has become a central feature of the government landscape that even the Reagan Administration’s broad “regulatory relief” effort will not remove. This status has been achieved, however, in piecemeal fashion. As difficult social problems have unfolded—the specters of monopoly, concerns over impurities in our food, fear of health hazards from dirty air, nuclear power, or toys—Congress has responded by creating new agencies with separate and broad statutory mandates. To each of these agencies, Congress has delegated legislative tasks—the development of specific rules to cover particular situations or developments that Congress either had insufficient time, foresight, or zeal to address.

The nation’s regulatory effort has thus evolved into a diverse set of statutes managed by numerous separate agencies, each promulgating dozens of rules each year. Who oversees all of this activity? Certainly not the courts, which have the power only to review the individual regulatory decisions brought before them. The Congress—through its controls over agency appointments, authorizations, appropriations, and ability to review individual rules—has the potential for exercising oversight over the regulatory process. But as we show later, Congress is busy and its powers are not used effectively. Nor can they be in the absence of an institutional mechanism requiring the proper type of oversight. Only the President—through his Executive Office—has taken steps to establish an oversight procedure through the supervision of the development of individual rules by agencies within the Executive branch. But the Executive still lacks a broad effort to establish priorities among regulatory programs.

I believe that the absence of adequate oversight has major political and
economic implications. In the political realm, it has meant that decisions of fundamental political importance are left to unelected agency bureaucrats or not decided at all. For example, how much should the nation spend to pursue its various regulatory objectives? Which of these objectives deserves the highest priority? Which groups in society deserve to benefit first? From an economic perspective, the absence of a workable oversight process has led to inefficiency, since bureaucrats have been given little or no incentive to balance regulatory costs and objectives against each other and thus to require private dollars to be spent first on those programs producing the greatest benefits.

From this economic perspective, then, the United States' need for a central process for coordinating regulation to parallel that of expenditures becomes readily apparent. The question to ask concerning current reform proposals, then, is whether they would require a systematic and continuous examination of the competing national goals sought through regulation? Would they establish an institutional mechanism, suited to the competences of each branch of government, to help the nation to set its regulatory priorities in order to channel scarce national resources first toward meeting the problems of greatest importance?

C. REFORM PROPOSALS

The recent growth in regulatory activity has spawned interest from all political quarters in streamlining the regulatory process and in improving the public accountability of the regulatory agencies. In what follows, I examine the major proposals:

1. those that would reverse the over-delegation of authority to the regulatory agencies, by relying on one of the three major branches of government,
2. those addressing inefficiencies in particular regulations, and
3. the Reagan Administration's strategy of providing "regulatory relief," or rolling back the scale of the entire regulatory effort.

A variety of elected officials, judges, and analysts have argued that there is a need to redress the overdelegation of regulatory authority to the administrative agencies. There is much less agreement, however, as to who should assume a greater share of regulatory responsibilities. Some have suggested that if the source of the problem is too much delegation by Congress, then Congress itself should reassert authority in the area. The American Bar Association has recommended that the appropriate remedy lies in enhanced Presidential control over the reg-
ulatory process. Many in the Senate, led by Senator Bumpers of Arkansas, have suggested that the difficulties arising from delegation could be cured by tighter judicial scrutiny of administrative decisions. Others argue that there should simply be less regulatory activity.

Despite the wide differences between these proposals, all share the objective of reducing the power of the regulatory agencies. The difficulty, I will argue, is that none would do so by establishing a systematic process of review that would require decision-makers in both political branches of government to compare the costs and benefits of different regulatory programs and to make tradeoffs among those programs within and across agencies.

1. Reasserting Congressional Authority

In many ways, the most obvious remedies are those that call for an enhanced Congressional role in the regulatory process. If regulators are deemed to have too much discretion, it is only because Congress has permitted that result. Moreover, to the extent that regulatory decisions require the resolution of fundamental political issues, what better branch of government to resolve those issues than the Congress?

There is a difference of opinion, however, as to at what point in the regulatory process it would be most appropriate for Congress to attempt to take back its delegated authority. At one extreme are the suggestions that Congress start at the beginning of the process by “filling in the blank checks” in certain of its statutory authorizations. At the other are the proposals to have Congress play a greater role at the end of the process, by empowering itself to veto final agency decisions before they take effect.

Tightening up the vague and often loosely worded statutory delegations of regulatory authority has been favored in some legal circles as the appropriate means by which Congress can correct the current imbalance. As the Court of Appeals for the District of Columbia recently held in striking down the constitutionality of the legislative veto:²

If Congress has given away too much power, it may by statute take it back or may in the future enact more specific delegations.

A similar theme was struck in Justice Rehnquist's dissenting opinion in the “Benzene” case, which argued that the “feasibility” requirement applicable to OSHA's toxic exposure standards was too incomprehensible to be a constitutionally valid delegation.³

Although correcting specific regulatory characters has a strong surface appeal, it does not resolve the overdelegation problem. After such
modifications are made, it is unlikely that legislators would become involved in regulatory decisions on a more regular basis. This is likely to be particularly true where Congress has deliberately restricted the agencies in some manner from balancing costs against benefits, posing a difficulty not of too much agency discretion, but too little. To correct this problem solely by expanding the agencies' ability to balance would thus aggravate the real concern raised by delegation in the first instance—the transfer of decision-making responsibility for fundamental political issues from the political to the bureaucratic arena. Put another way, if the necessary amendments to statutes which now inhibit balancing were in fact implemented, there would be even a greater need for an institutional mechanism that would increase the political accountability of the regulatory agencies.

Indeed, there is strong reason for believing that without the systematic involvement of elected officials in making regulatory decisions, the political constituencies supporting the necessary statutory changes simply will not be formed. The reluctance of the Reagan Administration to amend the Clean Air Act to permit balancing illustrates the difficulties that such amendments have in drawing political support. The reasons are not hard to understand. Since no mechanism now exists to force elected decision-makers to make tradeoffs between regulatory objectives, support for reopening a particular statute can easily be characterized as an attempt to "weaken" that statute. Even a modest proposal to permit agencies greater freedom to make tradeoffs in reaching regulatory decisions, therefore, can be made to appear as promoting "dirty air" or "unsafe workplaces". If, instead, Congressmen were able to tell their constituents that the pursuit of cleaner air must be balanced against safer workplaces and a whole host of other regulatory objectives—just as Congress must now choose between "guns" and "butter" in authorizing federal expenditures—the difficult political issues involved in amending restrictive statutes would be easier to face.

The political problems of introducing greater flexibility in regulatory charters could be circumvented, of course, through amendments which would clearly narrow agency discretion. This would respond directly to the concerns of those who believe that Congress has delegated too much authority to the agencies. For example, Congress itself has set numerical fuel economy and emissions standards for automobiles. Alternatively, it can withdraw agency jurisdiction altogether, as the Congress did with the FTC—in revising the FTC's authority to investigate the insurance industry and children's advertising and in prohibiting the agency from issuing rules in the area of unfair advertising.

The major defect with proposals to substitute Congressional for bureaucratic decision-making, however, lies in their failure to respect Con-
gress' budget constraint—the very scarce time available for careful debate and decision-making. Congress cannot enact into law the entire Code of Federal Regulations. The piecemeal substitution of Congressional for bureaucratic judgments—whether through rule-writing by the Congress itself or through the chipping away at the regulatory edifice by withdrawing agency jurisdiction on a case-by-case basis—does not respond to the need for a process that would require decision-makers to make tradeoffs between various regulatory objectives and to make mid-course corrections as new data arrives. In short, statutory amendments to particular regulatory charters should be justified on their own merits and be limited to those cases of great importance or urgency. Such amendments should not be advocated as part of a broader strategy to cure the fundamental defects plaguing the regulatory process.

A second general approach to overdelegation has been definitely disposed of—the Congressional or “legislative” veto. Under this mechanism, Congress granted itself the authority to veto final regulations before they take effect. In fact, Congress has enacted over 200 veto provisions in a wide array of areas, including educational assistance, foreign assistance, energy policy, agriculture, trade agreements, and arms control. Most recently, Congress subjected all substantive FTC rules to a two house veto process.

The proponents of the veto as a method of checking agency power went further, however, by proposing a “generic” veto provision applicable to the rules of all agencies. The “generic” legislative veto proposals have several common features. Newly promulgated rules would generally not become effective if (1) within a certain period, such as 90 or 120 days of continuous Congressional session, one or both houses adopt by majority vote a resolution of disapproval, or (2) within a certain period, one House adopts a resolution of disapproval which is itself not overturned by the other House. Emergency regulations would not be subject to the veto procedure, but could only remain in effect for a limited period. Finally, some of the legislative veto proposals “sunset” the veto procedure after four years.

This entire route is no longer open to regulatory reformers. In July, 1983, the Supreme Court held the one-house legislative veto to be unconstitutional.

Even if there were some constitutional way of rehabilitating a veto procedure, however, it would be a poor mechanism for remedying the central defects in the current regulatory process. Like the proposals to amend individual regulatory charters, the legislative veto introduces Congress into the regulatory decision-making arena on a sporadic basis. True, a veto process permits Congress to let off steam by blocking particularly controversial rules. But that is all it does. Unlike the Presidential
veto of an appropriations bill, which is generally exercised to further the larger objective of overall budget restraint, the legislative veto of individual rules takes place in a vacuum. Since the veto mechanism provides no “big picture” perspective analogous to the expenditure budget, it does nothing to encourage individual Congressmen, let alone Congress as a whole, to develop interest or expertise in making tradeoffs between regulatory objectives. Rather, because the veto allows Congress the choice of only affirming or nullifying a final agency rule promulgated after extensive rulemaking proceedings, the veto of any individual rule can easily be transformed into a symbolic referendum on the operation of the agency—or even of the President himself—rather than on the merits of any particular rule.

In sum, both the constitutional and the now-defunct veto proposals for increasing Congressional involvement in the rulemaking process miss the heart of the current problem. Each would ultimately be used infrequently at a time when a broader structural framework is needed to confront decision-makers with tradeoffs between regulatory objectives. Each would involve only the Congress and exclude the Executive, whose coordinating function is needed to provide Congress with a comprehensive set of choices among a wide variety of regulatory alternatives—within and across regulatory programs and statutes. And neither suggestion would involve Congress in the rulemaking process in a way that would be most useful—in determining broad regulatory priorities among regulations, and between regulation and other approaches to economic and social problems. Correcting specific statutory charters may be a worthwhile enterprise by itself, but it is extremely limited and still leaves the agencies substantial discretion to make rules thereafter without effective Congressional supervision.

2. **Enhancing Presidential Authority**

The recent regulatory reform report issued by the American Bar Association’s Commission on Law and Economy has addressed the political accountability problem from a somewhat different direction. The Commission points to many of the same problems with the current regulatory process identified here, including the need for a mechanism to balance diverse national goals and policies. But unlike the advocates of greater Congressional activism who have urged that the Congress take the lead in any suggested procedure for addressing these problems, the Commission expresses the view that the President should be at the heart of that process. Individual agencies have single missions to pursue; so, often, do Congressmen. Since only the President is responsible to a national constituency, the Commission recommends that a mechanism
should be established to resolve conflict among regulatory objectives and
that the President—through his Executive Office—should assume pre-
cisely that role.

The President's authority, however, is circumscribed by the Constitu-
tion. In the case of the independent agencies, the President clearly lacks
the authority, in the absence of explicit statutory direction, to direct the
outcome of a regulatory decision. The ABA Commission asserts that the
same may also be true in the case of executive branch agencies, although,
as we discuss below, recent case law would appear to give the President
broad authority in this area.

To remedy the problem, the Commission has urged the adoption of a
"report and wait" procedure under which the regulations of indepen-
dent and executive agencies would take effect automatically after certain
periods of time unless Congress passes legislation to the contrary. Be-
cause the legislation may be vetoed by the President, "report and wait"
provisions are clearly constitutional, differing sharply from legislative
vetoes, which are not subject to Presidential veto.

The "report and wait" procedure recommended by the ABA Commis-
sion contains three essential features:5

1. a statutory grant of carefully limited Presidential power to direct certain reg-
   ulatory agencies to take up and decide critical regulatory issues within a spec-
   ified time period, and to modify or reverse certain agency actions relating to
   such issues;
2. an executive or statutory requirement that, before completing major actions,
   regulatory agencies prepare analyses and conduct interagency reviews under
   Presidential auspices appraising the impact of the proposed action on all stat-
   utory goals;
3. an appropriate and constitutional opportunity for Congressional review of each
   Presidential exercise of the power of intervention proposed above and of Con-
   gressionally delegated authority.

Whatever position one may take as to the merits of the ABA proposal,
it is an exceedingly modest step. Indeed, with one exception, it does not
even make a material change in existing law. Since the "report and wait"
mechanism permits Congress to modify agency action only by passing
legislation, the procedure does nothing more than institutionalize a for-
mal schedule for the exercise of normal Congressional powers. The
proposal adds little to Presidential powers as well. Both the Carter and
Reagan Administrations have strongly backed—and the courts have up-
held—the President's constitutional right to direct the non-adjudicative
decisions of executive branch regulatory agencies, even when authority
to make such decisions has been delegated by the Congress to subordi-
nate Executive officials. In practice, it is difficult to conceive that a Presi-
dent, who has the authority to hire and fire his Cabinet officers, may not
influence the outcomes of important regulatory decisions that must be made by executive branch agencies.

These remarks should not be taken as an indication of skepticism about Executive Branch regulatory oversight. Ultimately, an effective and coherent program must be directed by the Presidential staff; and under the Reagan Administration this approach has begun to take root. But strong Presidential oversight alone will not meet the need for elected officials in both political branches of the federal government to make regulatory decisions in a broad context that requires tradeoffs to be made between regulatory programs. Thus, even where a Presidential or Congressional action on an individual rule is grounded in a careful, thorough analysis of all relevant costs and benefits, both branches still lack an overall perspective of competing regulatory objectives and the economic impact of regulatory action. Neither the “report and wait” mechanism recommended by the ABA nor greater Congressional activism would provide that perspective which is essential to correcting both the political and economic defects now plaguing the current process.

3. Relying on the Courts

Both the legislative veto and the ABA Commission proposal have been proposed as means of restoring greater political accountability to the regulatory process. Senator Dale Bumpers (D-Ark.) has suggested that the delegation problem be confronted instead by enhancing the power (and responsibility) of the courts to review agency decisions.

The vehicle for implementing this suggestion has come to be known as the “Bumpers Amendment.” Under its original version—which passed the Senate in 1980 as an amendment to the Federal Courts Improvement Act—agencies would be required to meet much stiffer tests than the existing “arbitrary and capricious” or “substantial evidence” standards before the courts would be authorized to uphold their rules. Specifically, reviewing courts would have been directed to uphold challenged regulations only if the agencies could support the factual underpinnings of their rules by a “preponderance of the evidence.” In addition, the amendment would have required courts to judge legal issues independently, and not to defer to prior agency practice or “expertise.”

Despite its popularity in the Senate, the “strong form” of the Bumpers Amendment was opposed by both the Carter and Reagan Administrations, as well as by some thoughtful judicial observers. Why should judges, whose primary expertise lies in reviewing agency compliance with procedural requirements, be any better in deciding substantive reg-
ulatory issues than knowledgeable experts in the agencies? Moreover, stronger standards of judicial review could very well encourage the filing of additional legal challenges to agency decisions, placing further strain on a judicial system already overburdened. The skepticism of the Reagan Administration was particularly ironic: although political conservatives had generally been sympathetic to higher legal standards of review for regulations, they realized that during the Reagan period any new “legal hurdles” would only frustrate efforts to roll back rules already on the books.

Even if some version of the Bumpers Amendment passes, it should be clear that more active participation by courts in reviewing agency rules would do nothing to address the fundamental political problems with the regulatory process we have identified. The courts can do nothing to alter restrictive statutory mandates. Moreover, they are not permitted (nor should they be) to compare and trade off the effectiveness of diverse regulatory efforts. The Bumpers Amendment should thus be recognized as an attempt to pass the buck for addressing the problems that have surfaced with the regulatory process to the courts—without charging both political branches of the Federal government to take greater responsibility for the manner in which society’s resources are allocated through regulatory decisions.

The great irony, however, arises in the inconsistency of the Bumpers approach with the widespread anathema to judicial activism. Just as one group of Senators is attempting to strip from the courts the authority to rule on such diverse subjects as busing or abortion, another equally conservative group would encourage greater activism in reviewing any regulations written to implement the wide variety of regulatory statutes.

4. Regulatory Analysis: Addressing the Inefficiency of Individual Rules

The current regulatory process suffers not only from insufficient political attention but also from inefficiency. A primary reason for this second shortcoming is that neither political branch of the government currently compares the costs and benefits of different regulatory programs with a view toward channeling national resources to those areas where the potential social benefits per dollar expended are the greatest.

Moreover, neither branch of government now pays attention to what I label the “macro-allocational” issues—those involved in looking across both regulatory and expenditure programs. The progress that is being recorded is concentrated at the program (or micro-allocational) level, improving the effectiveness of individual rules through requirements that agencies thoroughly analyze the consequences of regulatory proposals before putting them into effect.
The “better analysis” approach to regulatory reform has been at the heart of recent Congressional efforts to pass “omnibus regulatory reform” legislation. The Carter Administration made a strong effort to convince Congress to pass its own proposal (S.755) that essentially would have enacted the Carter Executive Order 12044 into law and extended its regulatory analysis requirements to the independent agencies. Similar bills, proposed during the Carter Administration by Senators Ribicoff (S.262) and Culver (S.2147), would have charged a central agency—OMB, the Comptroller General, or a new Regulatory Policy Board—with responsibilities for overseeing agency compliance with the analysis requirements. On the House side, Representatives Rodino and Danielson introduced H.R. 3263, which tracked its Senate counterpart in mandating that regulatory analyses be performed for “major” rules but was amended in committee also to contain a “modified” Bumpers provision and a two-house legislative veto procedure.

The prospects for passage of some type of regulatory reform package appeared bright when President Reagan assumed office in 1981. The President had made regulatory reform a major campaign theme. After consideration by both the Senate Judiciary and Government Affairs Committees, the full Senate passed S.1080—with some important modifications—in March 1982. S.1080 shares the major features of earlier bills: it codifies the regulatory analysis requirement—the latest version set forth in the Reagan Executive Order (12291)—and extends that requirement to the independent agencies.

The major innovation in S.1080 is that it permits a limited degree of judicial review of agency determinations as to whether a rule is “major.” The Senate bill also went beyond its predecessors in institutionalizing the broad oversight role accorded to OMB by the Reagan Executive Order. Thus, not only would OMB have the authority to oversee the rulemaking activities of both the executive branch and independent regulatory agencies, but it would be able to exercise the powers it implicitly holds under the Reagan Executive Order actually to alter agency rulemaking proposals. The only restriction on OMB provided under the Senate bill is that changes in proposed regulations resulting from OMB intervention would have to be noted in the agency’s public rulemaking file.

It is difficult to quarrel with the major thrust of the omnibus bills: that by requiring agencies to analyze their regulatory proposals—and by authorizing OMB to supervise that process—better and more efficient regulations will emerge. At best, however, such legislation represents only an incremental step toward the fundamental system-wide reform that is necessary. Moreover, the “better analysis” approach to the reform of individual regulations—and the accompanying oversight provided by
OMB—casts no role for Congressional participation in regulatory decision making.

In short, nothing in the omnibus bills would establish a framework in which both political branches would be required to set priorities across the entire regulatory effort. The regulatory reform package may ensure the health of many individual regulatory trees, but it provides for no one to watch the forest.

5. Providing Regulatory Relief: Dismantling Regulatory Programs

A third category of measures that have recently been characterized as "regulatory reform" consists of steps simply intended to scale back the regulatory effort. The Reagan Administration has made no secret that reducing regulation—or providing "regulatory relief"—is a major element of its overall economic recovery program. As President Reagan stated on June 13, 1981:

During the Presidential Campaign, I promised quick and decisive action. Since taking office, I have made regulatory relief a top priority. It is one of the cornerstones of my economic recovery programs.7

Consistent with this objective, one of the Administration's first acts upon assuming office was to lift the previous price controls on crude oil and petroleum products. Contrary to the fears of critics, the price deregulation did not lead to significant price increases, a result largely attributable to the soft world oil market caused by the recession. Unfortunately, the Administration had displayed less zeal in seeking the dismantling of other economic regulatory programs.

The Reagan reforms in the area of social regulation have been spearheaded by Reagan Executive Order 12291, mandating the performance of cost-benefit analyses by executive branch agencies of major regulatory proposals. The Executive Order does not per se provide relief. The principles of cost-benefit analysis are neutral with respect to whether or not a particular rule is desirable. If a particular regulatory proposal promises benefits exceeding costs and is designed in the most cost-effective manner, then it should be implemented, even if it adds a "burden" of compliance for certain firms in the private sector.

Despite the Executive Order's apparent neutrality as to the costs and benefits of particular roles, the order has largely been used by the Reagan Administration to curtail the scope of federal regulatory activity. More specifically, the Administration's relief program has consisted of four principal elements:
- A reexamination of existing rules with a primary emphasis toward providing regulatory relief;
- A marked slowdown in the issuance of new major regulations;
- Substantial relaxation of efforts to enforce existing rules; and
- Significant cuts in the operating budgets of regulatory agencies.

The details of each of these elements are elaborated below.

**a. Review of Existing Rules.** That the Reagan Administration would make the review of existing rules a major part of its regulatory relief effort was evident even before it assumed office. The new Administration has since claimed considerable success in accomplishing this objective. In a “Fact Sheet” distributed on December 30, 1981, it announced that 2,715 of the 2,781 regulations that had been “received for review” had in fact been reviewed. Of those regulations reviewed, 91 were returned to or withdrawn by the agencies.

In accord with its support of regulatory analysis, the Reagan Administration has justified the rescissions and modifications of existing rules on a cost-benefit basis. In some cases, however, such as NHTSA’s, rescission of the passive restraint regulations, the agency’s cost-benefit determinations have been strongly and successfully contested. In addition, the Administration has made little effort to hide the fact that its reviews of some rules have been designed primarily to provide relief to a troubled industry. Thus, a significant number of the reviews have been concentrated on regulations affecting the automobile industry. In another Fact Sheet entitled “Actions to Help the U.S. Auto Industry” (April 6, 1981), the Administration proclaimed:

> The Presidential Task Force and the Executive branch regulatory agencies will give high priority to relief for the auto industry. These measures will result in considerable savings in capital costs to the industry and even greater savings to consumers.

The Fact Sheet listed 34 specific EPA and NHTSA regulations affecting the automobile industry that were targeted for rescission or modification. This list included such significant regulations as NHTSA’s passive restraint standards and a variety of EPA air pollution standards that have since been rescinded or altered.

Other reviews appear less motivated by the intention simply to provide relief and more by an effort to trim wasteful programs. These include the elimination of DOT’s equal access rule for the handicapped; the rescission of FDA’s trial program requiring patient package inserts for prescription drugs; proposals by HHS to modify its procedural rules and survey and certification requirements for nursing homes; Labor’s proposed changes in the Davis-Bacon regulations (requiring that work-
Table 2. Summary of Regulatory Actions during the Reagan Administration, 1981–82

<table>
<thead>
<tr>
<th>Category or Reform</th>
<th>Estimated Annualized Savings (millions of dollars)</th>
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<tr>
<td>Eased Compliance Standards</td>
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<td>Automobiles and Trucks</td>
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<td>Rims and Bumpers</td>
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<td>Handicapped, Building and Subways</td>
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<td>Bilingual Education</td>
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<td>Other</td>
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<td>Reduced Paperwork</td>
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<tr>
<td>Clean Water Act</td>
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<td>Other</td>
<td>460</td>
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<tr>
<td>Elimination of Faulty Guidelines</td>
<td>530</td>
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<tr>
<td>Increased Flexibility</td>
<td>890</td>
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<td>Total</td>
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</table>

Source: Annualized savings in Table 2 are calculated by using the Reagan administration estimates of one-time investment savings and annual savings from Presidential Task Force on Regulatory Relief, *Reagan Administration Achievements in Regulatory Relief, A Progress Report*, August 1982. One-time investment savings are annualized at a 15 percent cost of capital and then added to annual savings to give total estimated annualized savings.

These figures exclude the cost savings under “Salary Requirements,” such as those under Davis-Bacon Act, which are here treated as transfer payments. In addition, when ranges are given in the original, the figures presented are the arithmetic averages of the extremes.

ers on government construction projects be paid the prevailing wage rate); and the repeal of OSHA’s generic carcinogen rule.

Estimates of the net impact of the Reagan program are hazardous, but it appears that the total amount of regulatory relief during 1981–82 (shown in Table 2) was around $8 billion. This amounts to 0.3 percent of GNP and can be compared with the cost estimates of 2 to 5 percent for regulation as a whole.

b. The Slowdown in the Development of New Rules. The second element of the Reagan Administration’s “regulatory relief” package is the marked slowdown in the issuance of new rules. On January 29, 1981, barely one week after assuming office, the President directed all executive branch agencies to postpone for 60 days the effective date of the so-called “midnight regulations” left by the Carter Administration—or all rules then in final form but not yet made effective—and all rules proposed by not yet made final. Two months later, on March 25, Vice
President Bush extended the “regulatory freeze” on 35 specific regulatory proposals and added a list of 27 existing regulations that were scheduled for review.

By the end of the year the Administration was able to claim that the number of new major regulations issued in 1981 had been cut in half compared to the number issued the previous year. This decline was reflected in one of the Administration’s favorite yardsticks of success—the number of pages in the Federal Register—which the Administration claimed had fallen by one-third during the first ten months of 1981 as compared to a similar period of the previous year. There was also a 50 percent decline for the whole year in the number of judicial challenges to agency decisions in the D.C. Circuit (where most challenges to regulatory decisions are brought). A more recent report, issued in August 1982, claimed that the flow of new rules had been reduced by one-third. In addition, no major new areas of Federal regulation were opened up during the first two years of the Administration—a fact often touted by Administration officials as one of the Administration’s major achievements in the regulatory area.8

c. Relaxed Enforcement. Regulations impose no costs and produce no benefits if they are not enforced and complied with. Thus, even if new regulations continued to be issued at the same rate—with the same potential impact as in previous years—“relief” could be provided through relaxation in enforcement.

There are signs that this method of providing relief—called “statutory impoundment”—has been a major element of the Administration’s overall relief package. The following trends in enforcement activities at various executive branch agencies have been apparent:

- At NHTSA, the number of formal investigations into potential car defects had fallen from an annual rate of 15 during the Carter Administration to approximately 5 during the Reagan period.
- At OSHA, the number of monthly inspections had fallen 17 percent compared to the previous year. The fall-off in average monthly follow-up inspections was even greater (68 percent) while the number of serious citations issued dropped by 27 percent.

Perhaps the most public attention has been given to EPA’s apparent relaxation of enforcement efforts. During the first ten years of its existence, EPA referred an average of 200 enforcement actions a year to the Department of Justice for prosecution. As of November 1981, the annual rate of EPA referrals had fallen to 30. Although by the end of the year that rate had increased to 79, this level was 60 percent below the 252 cases that had been referred in 1980.9
This decline in enforcement activity is troublesome in two respects. First, it does not resolve the ultimate issues and may increase the uncertainty about regulatory programs; at some point, a more sympathetic administration will arrive to enforce the statutes. Second, this apparent inattention to enforcing the law can only help foster an increasingly casual attitude toward compliance with inconvenient statutes.

d. Cutbacks in Agency Operating Budgets. The final and perhaps the most publicized prong of the Reagan Administration's regulatory relief program has been the effort to cut the operating budgets of both the executive branch and independent agencies. This effort has not been pursued in a vacuum, of course, since budget cuts in non-defense programs have been a major element of the Administration's overall economic recovery package. Nevertheless, there is little doubt that the cuts made of regulatory programs, in particular, have been part of an independent effort to restrain the regulatory agencies from raising private sector compliance costs by issuing new major regulations or enforcing old ones.

Table 3 shows federal outlays for major regulatory programs since 1959. These tables display the comparative severity of the proposed cutbacks in regulatory agency operating budgets. Thus, the Reagan Administration's proposed budget for fiscal year 1983 called for $3,389 million in regulatory spending, compared to $4,019 in fiscal 1981. This 15 percent cutback compares to a 15 percent increase in the overall budget in nominal terms.

| Selected Regulatory Outlays | $176 | $579 | $2,965 | 4,019 | $3,389 |
| National Defense Outlays | 46,426 | 81,240 | 117,681 | 159,765 | 221,068 |
| All Other Outlays | 34,095 | 102,737 | 273,027 | 493,420 | 533,181 |
| Total Outlays | 80,697 | 184,556 | 493,673 | 657,204 | 757,638 |

AS PERCENTAGES OF TOTAL OUTLAYS

| Selected Regulatory Outlays | 0.22 | 0.31 | 0.60 | 0.61 | 0.45 |
| National Defense Outlays | 57.5 | 44.0 | 23.8 | 24.3 | 29.2 |
| All Other Outlays | 42.3 | 55.7 | 75.6 | 75.1 | 70.4 |

Note: Details may not add to totals due to rounding
In real terms, the budget proposed a 26 percent decrease in regulatory expenditures. This cut compares with a nearly unchanged overall budget over this same period, with real defense outlays rising while non-regulatory civilian outlays were scheduled to fall 6 percent over the 1981–83 period.

These cutbacks are not evenly distributed across all regulatory agencies. A significant portion of the cutbacks represents the winding down of economic regulatory agencies whose mandates were reduced by actions during the previous administration. The cuts in energy regulation and the Civil Aeronautics Board account for over $100 million of the $600 million cut in regulatory spending. Better indications of the Reagan Administration’s regulatory philosophy are the cuts in the National Highway Traffic Safety Board and the Environmental Protection Agency. The President has proposed cutting NHTSA’s budget by a third, a savings of $93 million between 1981 and 1983. This agency has been in the forefront of the Administration’s effort to modify or rescind existing rules as well. EPA’s operating budget (which excludes non-regulatory activities) would drop 21 percent between 1981 and 1983, were the President’s budget to be approved. Even this figure—a $281 million drop—narrows a marked cutback in research funds at the agency; research and development outlays were proposed to drop from $247 million to $166 million between fiscal 1981 and 1983—a 33 percent decline. This decline in research and development is puzzling in light of the Administration’s commitment to thorough analysis of both the costs and benefits of regulatory proposals.

What is the verdict on the use of “regulatory relief” as a means of achieving regulatory reform? The record is clearly quite mixed. The most important step has been the establishment of high-level central Executive Branch review, analysis, and decision-making in OMB. The need for such authority has been recognized for some time (it was proposed in October 1978, but was washed overboard by a wave of regulators’ indignation). While currently understaffed, the OMB unit—or something like it—will be the kernel for any future larger Presidential oversight in the regulatory arena. In addition, the endorsement (in spirit if not in action) of weighing costs and benefits has laid the foundation for a more balanced approach to determining the proper stringency of rules.

Second, the substantive record on social regulations has been mixed. No major monstrosities have been born, and some old ones have been put to rest. But the level of activity thus far has been surprisingly subdued. The lack of enforcement and budget cuts are particularly disturbing, however, for they open up a serious gap between what is illegal and what is enforceable.
Third, in the area of substantive economic regulation, the record is also mixed. After an early start in speeding the decontrol of oil prices, little has been accomplished. If anything, there has been regression at the ICC, which has slowed deregulation of trucking and railroads, and in the financial area, with the Administration’s refusal to allow decontrol of interest rates of the thrifts. While the latter has some economic justification due to the fear of the demise of the thrift institutions, the former appears as a payoff to political allies.

Further, in the legislative arena the Administration has accomplished little. The most serious missed opportunity was the Administration’s inability to shape a consensus on revising the Clean Air Act—a law filled with economic inefficiencies and anachronisms. Moreover, the Administration has not taken the lead on any process or generic reforms, such as the ones discussed above. Viewed in the perspective of its entire program, it is clear that the Reagan Administration chose to concentrate its legislative efforts on its tax and expenditure programs and to use its existing authority to trim back regulatory costs.

Whatever one may view as the merits or demerits of the Reagan relief effort, the measures just described as “regulatory relief” clearly do not respond to the need for an institutional mechanism for monitoring and allocating private sector compliance expenditures devoted to the pursuit of regulatory objectives. Although reductions in agency operating budgets may translate into reductions in costs incurred by the private sector, they affect both costs and benefits in a highly haphazard and undiscriminating fashion. The burden of regulatory review is also highly haphazard and fragmented—the bulk of it in 1980 providing relief to the auto industry.

Moreover, while portions of the Reagan program are beneficial, I believe there is a danger in clothing the pro-business program in the garb of “neutral” cost-benefit analysis. Such a course is certain to taint the worthwhile portions of the Reagan regulatory reform effort—to issue only cost-beneficial rules—with the more controversial desire by the Administration to dismantle social regulatory programs. When the counter-counter-reaction to the Reagan regulatory policies comes—and it will—there is now a danger that the commitment to sound analysis and innovative regulatory tools will be sacrificed as Reagan regulatory relief policies are reversed.

D. SUMMARY

There has been a pervasive view among politicians, analysts, and citizens that the regulatory process is excessively burdensome and inefficiently
managed. In response to this perception, numerous regulatory reform proposals have been put forward. These fall into five general classes: reasserting Congressional authority; enhancing Presidential authority; relying on the courts; regulatory analysis; and regulatory dismantling.

These reforms are generally useful and tend in the right direction. They suffer from a common defect that they do not go to the root cause of the defect—the overdelegation of quasi-legislative powers to independent or semi-independent agencies. Or more precisely, they do not return the legislative powers conferred by regulatory overdelegation to elected officials in the Executive and Legislative branches.

Other proposals have been put forth that do attempt to meet this objective—the most recent being the Regulatory Budget and the Legislative Regulatory Calendar. Such approaches would vest effective power in the elected rather than the selected by allowing the complex multidimensional regulatory choices to be summarized by its dollar consequences. Choices among competing programs could then be made in terms of their summarized costs and benefits—which would allow harried legislators to make quick summary judgments.

I believe that use of budget-like structures for regulation would be a more successful device for imposing political control over regulation. But this is another topic for another occasion.

**NOTES AND REFERENCES**

POSTSCRIPT


Many of the ideas in this paper are developed at greater length in Robert Litan and William Nordhaus, *Reforming Federal Regulation* (New Haven: Yale University Press, 1983).