The administration has shown a strong commitment to developing more cost-effective regulations, but its commitment to federalism appears mixed.

A Mid-Term Grade for the Bush Administration

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CHANGING THE DIRECTION OF FEDERAL government policy is no simple task, even if you focus just on the executive branch, and even if you are the president, in whom all executive power is constitutionally vested. In addition to making wise appointments, the president must monitor and manage the departments and agencies. Every president since Richard Nixon has had some central process within the Executive Office of the President to review federal regulations and provide policy guidance and feedback to the agencies that issue them.

When President George W. Bush entered the White House, it was clear to observers that he wanted to pursue a different regulatory review philosophy than his predecessor. (See "The Clinton Regulatory Legacy," Summer 2001.) So what has the Bush administration done since arriving in Washington? What grade should we give its performance? By examining the administration's use of the regulatory review process, we can evaluate its attempts to change regulatory policy and the principles it uses to resolve controversial questions.

MIDNIGHT REGULATIONS

In the final weeks of the Clinton administration, federal regulatory agencies hastily issued a large number of controversial rules. On the afternoon of January 20, 2001, Bush chief of staff Andrew Card issued a memo freezing those "midnight regulations" pending review by Bush appointees.

One such regulation was the Occupational Safety and Health Administration's ergonomics standard. The Bush administration did not challenge this standard directly; instead, Congress quashed it in a rare — indeed, the only — use of the Congressional Review Act, which gives Congress a fast-track opportunity to overturn an administrative regulation before it becomes effective. The ergonomics standard had strong union support but was very costly and of doubtful effectiveness, and it had numerous opponents in Congress.

The Bush administration's cooperation was essential in overturning the ergonomics rule. An incumbent president typically would veto any bill that reversed his own administration's regulatory decisions; hence, the Congressional Review Act is likely to be effective only during a presidential transition, when both the new Congress and the new president may share a desire to repeal a specific regulation.

Another midnight regulation that was a tempting target for the Congressional Review Act was the Environmental Protection Agency's Total Maximum Daily Load (TMDL) rule. (See "The Trouble with TMDLs," Spring 2001). The TMDL rule requires states to set water quality standards for waterways and develop policies to limit discharges in places where the water quality is below standard. The rule had drawn criticism for expanding EPA's controversial discharge permit regime and for constraining the development of an allowance market for

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discharges. Like the ergonomics standard, the TMDL rule had numerous congressional opponents; however, a second attempt to use the Congressional Review Act to block the regulation was unsuccessful. The TMDL rule and other last-minute rules were left for the Bush administration to address.

The quick action by the Bush administration to halt the implementation of TMDL and other Clinton midnight regulations and provide for future review represented a good start, and at least provided the opportunity for his appointees to assert control over the regulatory process. However, after two years, Bush's appointees have made few major changes to the regulatory initiatives begun in the final months of the Clinton administration, nor have they successfully changed the terms of the debate. It is probably true that, under Bush, some of the midnight regulations will be implemented with more deference to federalism and private property than would have been the case under Clinton, but that is difficult to document.

Grade: Incomplete

GUIDANCE TO AGENCIES

All recent presidents have issued executive orders to establish the principles by which regulatory decisions will be made, as well as the procedures for reviewing regulations. Bush could have initiated his own, but he did not. The reason appears to be that President Clinton's Executive Order on Regulatory Planning and Review was a good one. According to that order,

> Federal agencies should promulgate only such regulations as are required by law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.

Clinton's Office of Management and Budget later released more detailed guidance for agencies:

> Even where a market failure exists, there may be no need for Federal regulatory intervention if other means of dealing with the market failure would resolve the problem adequately or better than the proposed federal regulation would. These alternatives may include the judicial system, antitrust enforcement, and workers' compensation systems.

The OMB guidance also recommended regulation at the state or local level, when feasible, rather than at the federal level.

In practice While there is some wiggle room in this language, overall it is a good description of how federal agencies should approach the task of writing regulations. It is not, however, an accurate description of how the Clinton administration actually practiced the art of regulation. The Clinton executive order and accompanying OMB guidance may simply have been window dressing because they were never seriously enforced.

If Bush had issued a new order, it would not have sounded very different from what Clinton wrote, but nonetheless would have become a target for critics on the left ("gutting regulations," "turning back the clock," etc.). By leaving the Clinton order in place, Bush effectively made the point that the principles of good regulation are nonpartisan — they only need to be observed and enforced.

The Bush administration also considered whether to write a new Executive Order on federalism, which would have been enforced by OMB's Office of Information and Regulatory Affairs as it applies to federal regulatory policy. But the president's staff abandoned the effort when it met with strong opposition from manufacturers and other businesses who dislike differing state and local regulations (an attitude that has been dubbed "patchwork-phobia"). The end result is that, while the Bush administration may be more sincerely committed to the principles of federalism and sound regulatory policy, on paper the expressed policies have not changed significantly.

Grade: B

ORGANIZATION OF OIRA

Previous presidents have found it convenient to delegate to their vice presidents the task of supervising regulatory policy. George W. Bush has found other tasks to occupy Vice President Cheney, however. Executive Order 13528 removes the vice president from the regulatory review process and instead vests responsibility in the director of OMB (initially Mitchell E. Daniels, Jr., now Joshua Bolten) and in the administrator of OIRA, John D. Graham.

Graham has instituted several changes in the way OIRA operates. He places a great deal of emphasis on transparency, and his office's activities may easily be reviewed on its web site (*www.whitehouse.gov/omb/inforeg/regpol.html*). This is notable because previous presidents frowned on the public disclosure of interagency policy disagreements. Within limits, President Bush appears to be more able to tolerate the public airing of intramural debates. For regulatory policy, this is undoubtedly an improvement.

Graham has been much more active than his immediate predecessors in returning regulations to the agencies for revision, and has instituted "prompt" letters to make pro-active suggestions to the agencies about what their regulatory priorities should be. (See "Bush's Rejuvenated OIRA," Winter 2001.) Under Graham, the office has reversed the decline in staffing and added scientists and engineers to the economists and statisticians who were already on board. Graham's own background is in public health, and his staffing strategy seems designed to equip OIRA to help make better risk management decisions and generally to "regulate smarter." While there is certainly much to be accomplished along those lines, it generally casts OIRA in the role of advocating good — not necessarily smaller — government.

Grade: B+

REVIEWS OF SPECIFIC RULES

It is OIRA's responsibility to review proposed and final regulations before they are published. Traditionally, its response has fallen into two categories: return letters that ask an agency to make changes before publication, and post-review letters that convey OMB's views but do not ask for immediate changes. John Graham has added a third instrument: "prompt" letters that are sent before an agency even sends a draft rule. Some of those letters are assessed here.

> The Bush administration may be more committed to the principles of federalism, but its policies as expressed on paper are similar to its predecessor.

Return letters During the eight years of the Clinton administration, a total of nine regulations were returned to federal agencies for reconsideration by the reviewers at OIRA, and none during Clinton's last three years. By January of 2003, the Bush administration had issued 21 such letters.

One of the return letters involved EPA's Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards. The letter's main point was that EPA should engage in further consultation with Indian tribes and states before finalizing its water standards. This language conveys a relatively "soft" version of federalism in which state, local, and tribal governments are viewed as "interests to be consulted" in the course of federal policymaking, rather than as competing levels of government whose interests may sometimes be superior to those of the federal agencies. While OIRA was right to return the rule to EPA, it did not use the opportunity to make a stronger statement about federalism.

Return letters undoubtedly provide only a partial view of the effect of regulatory oversight on rulemaking. It may be that OIRA's review is causing federal agencies to change their rules either before they are submitted, or to change them by withdrawing and revising them before review is completed. "Recently we have witnessed some agencies simply withdrawing rules rather than face a public return letter," said Graham in a speech to the Society of Automotive Engineers.

Post-review letters Many regulations emerge from regulatory review as "approved with changes," and it is difficult to track

exactly where the changes took place and at whose initiative. Occasionally, however, OIRA will approve a regulation but at the same time send a "post-review" letter to convey its views to the agency. The first time the Bush administration used this tool, it concerned EPA's new rule on the Control of Emissions from Non-road Large Spark-Ignition Engines and Recreational Engines (Marine and Land-Based).

OIRA's letter pointed out particular flaws in EPA's benefit-cost analysis. In its cost estimates, EPA had counted the increased engineering and manufacturing costs of small engines that would be subject to the rule. But it failed to consider the costs to the consumer. Many of the small recreational engines presumably have highly elastic demand; if they become more expensive, consumers would buy fewer of them. The resulting losses in what economists call consumer surplus could be quite significant.

That is a very important and general point that applies to more than just environmental rules. For example, Food and Drug Administration regulations can reduce "consumer surplus" — including consumers' lives — by holding beneficial drugs off the market. OIRA should continue to make this point — forcefully — about the unseen costs of regulation.

The second environmental rule to receive a post-review letter was a Coast Guard regulation that requires leak detection systems on oil tankers. OIRA's Letter to the Department of Transportation on "Tank Level of Pressure Monitoring Devices" states, in part:

> We recognize that the Department is striving to meet a judicial deadline…. However, it appears that none of the options under the statute would result in net benefits to society…. Based on the rulemaking record, we would also appreciate Departmental views on whether the Administration should seek legislative relief in order to mitigate these adverse impacts….

This, too, is an important general point often overlooked by regulatory agencies. If an agency is issuing a bad rule because Congress or the courts require it, then the agency should explain that to the public and recommend that the law be changed.

Prompt letters Prompt letters are an innovation introduced by Graham, and they have caused some puzzlement among observers of regulatory policy. In the past, federal agencies have been the source of new regulatory initiatives and OIRA has been the voice of restraint. This comports with OMB's traditional role of setting limits on the budgetary aspirations of agencies. The appearance of prompt letters suggests that the old model of checks and balances is being re-thought. It is unclear at this point whether this new, proactive role for OIRA will produce better outcomes.

Taken as a whole, OIRA's handling of the regulatory review function does not suggest a dramatic shift in policy. It does, however, contrast sharply with the previous administration, in which OIRA rarely challenged an agency initiative on any grounds. It appears that the cop is back on the beat.

Grade: B

OVERALL PERFORMANCE

The Bush administration has clearly made an effort to take charge of federal rulemaking, investing both resources and political capital in the process of regulatory oversight. With the addition of science to its portfolio and the appearance of prompt letters that break new regulatory ground, OIRA's mission seems to have shifted its focus: The primary emphasis is on cost-effectiveness and on advancing public health. While this strategy holds the potential for making large improvements in regulatory effectiveness, one result is that OIRA's conversations with the agencies about regulatory policy tend to be either technical or procedural. What we do not see is much evidence that OIRA advocates for market solutions, property rights, individual choice and responsibility, or federalism. If OIRA is a champion of free market principles, it is a rather quiet one.

In the second half of its term, the Bush administration has a chance to raise its grade and revive its commitment to principles of free markets and private property rights. It will continue its work on new guidelines on the application of benefit-cost analysis to regulations, including such controversial topics as "contingent valuation" methods for assigning value to environmental amenities (see "The Planner's Paradox," Summer 2003), and on the strengthening of scientific peer review in regulatory policymaking. The outcome of thoese efforts and other regulatory review activities will figure heavily in the administration's "final grade."

Overall mid-term grade: B