

What will President Obama do with the tools that he's inherited?

The Fate of Bush's Regulatory Reforms

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President Obama has entered office with the clear intention of altering many policy choices of the previous administration. New policies on Iraq and health care will attract a great deal of public and media attention. Regulatory policies involving the Environmental Protection Agency and the Occupational Safety and Health Administration will also receive attention. However, President Obama's decisions on whether to retain, modify, or eliminate the Bush administration's many changes to the regulatory process will get little notice. This is unfortunate because those decisions will affect policy in a wide variety of areas, and they deserve careful consideration.

The regulatory process changed more under George W. Bush than at any time since the beginning of the Reagan administration. President Bush, through his administrators of the Office of Information and Regulatory Affairs (OIRA), John Graham and Susan Dudley, added procedures to the regulatory process and expanded the reach of the Executive Office of the President into agency information disseminations and guidance documents.

With one or two exceptions, the Bush administration changes were praised by opponents of agency regulations and criticized by regulatory supporters. Supporters hailed them as bringing rationality to the regulatory process and predicted that they would lead to smarter regulations. Opponents derided the changes as intended to impede the promulgation of regulations. Those same groups are likely to pressure the new president to, respectively, strengthen the procedures or else to modify or eliminate them.

The most important effect of regulatory procedures is to empower the president's ability to oversee federal agencies. All presidents have an interest in ensuring that agencies take actions that support the president's policies. The question facing President Obama and his top aides is whether the Bush

procedures have costs that outweigh their benefits to the president through improved oversight. The Bush procedures vary in the extent to which they empower the president and also vary in the magnitude of their potential negative effects.

EVALUATING REGULATORY REFORMS

In both the academic literature and in political discourse, evaluations of regulatory reforms are generally concerned with three points:

- The efficacy of the new procedures in controlling bureaucratic decisionmaking.
- The cost in time and money of implementing the new reforms, and in the subsequent issuance of new regulations.
- The resulting change in the quality of regulatory outputs.

Let us consider each of those points more carefully.

POLITICAL CONTROL Using procedures to influence agency decisionmaking goes back at least to congressional passage of the Administrative Procedure Act in 1946, creating the modern rulemaking process. It is argued that making bureaucrats go through procedures when writing rules will help ensure politically preferred outcomes. In the academic literature, this view is associated with scholars Matthew McCubbins, Roger Noll, and Barry Weingast — indeed, the three have been collectively dubbed “McNollgast.” They argue that procedures are put in place by legislative coalitions to create a decisionmaking environment that mirrors the climate in which legislatures make decisions. This environment supposedly makes it more likely that bureaucrats will make policy decisions the same way that those who supported the enabling statute would make them.

The McNollgast argument has been subject to numerous criticisms. For one, it slights the role of the president, who engages in executive oversight of agency officials. For another, it places regulatory procedures in the hands of future coalitions

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of political officials who may choose to use them in ways contrary to those envisioned by the coalition that created them.

While Congress created numerous regulatory procedures in the 1990s, the 2000s have seen most regulatory reforms originate in the executive branch. The procedures put in place by the Bush administration all help to facilitate executive control of federal agencies. Some do so directly, like Bush Executive Order 13422's requirement that political appointees in agencies sign off on regulatory decisions. Some do so indirectly, like the information-quality guidelines that give OIRA the ability to oversee agency responses to interest group complaints about agency information disseminations.

regulations so difficult that agencies were turning away from the regulatory process. McGarity built on work by Jerry Mashaw and David Harfst, who described a "retreat from rulemaking" at the National Highway Traffic and Safety Administration.

The delay argument has been a part of every debate on new regulatory procedures. In 1946, opponents of the Administrative Procedures Act voiced concern that the notice-and-comment requirement would delay agency actions. In 2003, critics of the Bush administration's regulatory peer-review proposal complained that it would devastate rulemaking at agencies that rely on scientific information.

The empirical evidence for regulatory delay and ossification

The criticism regarding future coalitions remains relevant, however. The myriad procedures put out by the Bush administration are now under the control of the Obama White House, and the new president is able to use those procedures to facilitate policy goals that are very different than those desired by the previous administration. This has happened before, when President Clinton used OIRA regulatory review (created by President Reagan with deregulatory intentions) to further a pro-regulatory agenda. A crucial component of the Obama administration's decision on whether to maintain or revoke the Bush reforms will be the degree to which the Bush procedures will facilitate President Obama's ability to exercise influence over regulatory agencies and achieve his regulatory policy goals.

DELAY In both academic (primarily legal) and political circles, regulatory procedures have been criticized for lengthening the regulatory process. In a seminal article, Thomas McGarity coined the term "ossification of the regulatory process" to refer to the purported effect of judicial review and analysis requirements — making writing

is limited. Steven Croley has shown that the level of rule-making has remained relatively steady despite procedural changes. Cary Coglianese has argued that while each new regulatory procedure has brought fears of the demise of regulation, there is little evidence that any such demise has occurred. Still, it is hard to argue with the intuitively plausible prediction underlying the ossification argument. If the cost of regulating goes up, then the quantity of rulemaking should go down or the time to complete a rule should go up. There have been so many additional procedures imposed on the regulatory process by the Bush administration, it is possible that a threshold has been reached and those effects will soon begin to manifest themselves even if they haven't before. Still, in evaluating the Bush administration procedures, the Obama administration should consider the amount of delay the procedures are likely to cause, with a skeptical eye toward claims that the delay will be extreme. Delay would be considered a negative aspect (although delay of bad regulations would be

variation and derided as "kabuki theater." Cost-benefit analysis has been hailed for its potential to improve the economic efficiency of agency regulations and criticized as likely to subvert regulations designed to improve public health.

While much rhetoric has been directed at the effect of regulatory procedures on actual regulations, there is little empirical evidence to support any of the competing hypotheses. It is probably too soon for valid empirical analysis of the Bush reforms, as opposed merely to anecdotes about particular regulations, because the reforms haven't been in place long enough to generate enough of a sample size for a valid analysis. Even for the older regulatory procedures, like notice-and-comment and cost-benefit analysis, there is little analysis. Much of the analysis that does exist suggests that the procedures play less important roles than the debate over their existence suggests.

So should an evaluation of the Bush reforms include some criteria of whether they make regulations "better?" One could use the economic efficiency of regulations as a measure of the

Is the gain in presidential control over agency decisionmaking worth a possible delay in agency completion of presidential priorities?

a positive) because of President Obama's regulatory agenda.

BETTER REGULATIONS Many procedural changes to the regulatory process have the stated purpose of improving regulations or other regulatory documents. Much like Congress never asserts that the purpose of legislatively imposed procedures is enhanced legislative oversight, the president, except in rare instances, does not claim that the purpose of his reforms is enhanced presidential power. Usually, some other justification is used, often with some theoretical or academic support. Such reforms are supposed to make regulations "better" in some meaningful way. Requiring cost-benefit analysis, for instance, is intended to improve the economic efficiency of regulations.

The reforms enacted over the past eight years are no different. The Bush administration peer-review guidelines stated that they were intended to "enhance the quality and credibility of scientific information" supporting agency regulations. The Office of Management and Budget described the "primary focus" of EO 13422 as "improving the way the Federal Government does business with respect to guidance documents." Many of the reforms are also couched in the rhetoric of increasing economic efficiency by making regulations "smarter."

There is considerable theoretical dispute about whether these procedures improve regulations. Most of the dispute has centered on two of the regulatory process's older procedural controls: the notice-and-comment process and the requirement that agencies conduct cost-benefit analyses. Notice-and-comment has been praised as a critical governmental inno-

quality of regulations, although this is just one of several possible measures. However, given the lack of empirical evidence that earlier procedural reforms have affected the substance of regulations either in the manner that their advocates had hoped or by improving the economic efficiency of regulations, I am going to operate under the assumption that the Bush reforms will have only a minimal effect on the quality of regulations and that their regulatory substance will be limited to the degree that they help the president to impose his own policy preferences.

Thus we are left with only two relevant factors: delay and the effect on the degree of executive control. The next section evaluates the potential tradeoff between executive control and delay in issuing regulations. In other words, the dispositive question for the Obama administration in determining whether the Bush reforms are worthy of retention is whether the gain in presidential control over agency decisionmaking is worth a possible delay in agency completion of presidential priorities.

HOW SHOULD PRESIDENT OBAMA VIEW THE BUSH REFORMS?

This section identifies the more notable reforms to the regulatory process put in place by the Bush administration. For each reform, I discuss the degree to which it enhances presidential power and the delays it may cause for regulations that the new administration favors. I will conclude the discussion of each reform by evaluating that tradeoff (where it exists) and predicting which side of the tradeoff would win over President Obama.

Notice that this is not an analysis of whether the reforms increase social welfare. Rather, I assess the reforms from the perspective of a president who wants to control agency actions but disdains delay in the regulatory process. As described above, I expect the effect of the reforms on regulatory substance or economic efficiency, apart from these two impacts, to be minimal. If presidential control of agencies results in harms to regulatory substance or democratic governance, then the procedures harm overall social welfare and they should be eliminated. Similarly, if reforms on average have benefits that exceed their costs and therefore enhance social welfare, then the reforms should be maintained.

PROMPT LETTERS One of the earliest reforms put in place by the Bush administration was OIRA's creation of prompt letters. The letters suggest to agencies that they begin or speed up work on a particular regulatory effort. After several high-profile letters in 2001 (one suggesting that OSHA encourage defibrillators in the workplace, and one urging the Food and Drug Administration to quickly promulgate their rule on trans-fatty acid labeling), the pace of prompt letters slowed and none were issued after April 2006.

The prompt letters are unique among the Bush administration reforms in that they attempt to speed up the regulatory process rather than slow it down. Hence this is the easiest regulatory reform to evaluate. It enhances presidential control of agencies, and yet it endeavors to speed up the regulatory process. President Obama should revive the use of prompt letters. They are a way to call attention to issues that are presidential priorities and overcome the torpor that occasionally bedevils agency bureaucracies.

Prediction: The Obama administration will utilize prompt letters.

THE IQA The Information Quality Act (IQA) was passed as a rider to an omnibus appropriations bill in the waning days of the Clinton administration. However, the IQA was vaguely worded and the details of its implementation were left to the Bush administration. OIRA wrote the implementing regulations for the act and issued final guidelines in 2002. The guidelines instruct each agency to develop its own standards that scientific information has to meet in order to be considered of high/sufficient quality, and they set expectations for those standards. The guidelines also create a procedure whereby members of the public can challenge information disseminated by the agency. Agencies are only supposed to use information of sufficient quality to justify their regulatory efforts. Over 130 agencies have issued their own "information quality guidelines" in response.

The IQA regulations were issued amidst considerable controversy. Critics feared (and supporters hoped) that they would be used to challenge the scientific underpinnings of regulations and delay or prevent their issuance. However, because agency disposition of complaints under the IQA was determined to not be judicially reviewable, it is not clear that agencies have a significant incentive to make changes to their policies based on those complaints.

Empirical analysis of the results of IQA regulations has been largely conducted by the OMB and by interest groups opposed to the act. The OMB issued a report in 2004 characterizing the number of correction requests made under the new agency quality guidelines as "relatively small." It also argued that, contrary to critics' concerns,

- Pro-regulatory groups, as well as industry, requested corrections.
- The guidelines had not slowed the regulatory process.
- The guidelines had not chilled agencies' disseminations of information (and, by implication, agency regulatory efforts).

OMB Watch, a liberal watchdog group, sharply challenged those conclusions. According to an OMB Watch report, three quarters of information correction requests have in fact been submitted by industry, and the total number of requests is triple that claimed by the OMB.

In an update published in the 2008 Draft Report to Congress on the Costs and Benefits of Regulations, the OMB noted that agencies received 21 information-correction requests in 2007. Of those, only one has resulted in a correction, though eight are still pending a determination. While parties that file a request are allowed to appeal a denial, the 2008 OMB report also makes clear that in the absence of judicial review, few appeals will succeed.

By any measure, the correction requests permitted by the IQA have had a minimal effect. Without judicial review, agencies have been required to implement very few corrections. Further, because so few requests were submitted, it is hard to argue that the IQA has delayed regulatory efforts. The one or two instances of IQA-induced delay (e.g., in the regulation of the herbicide Atrazine by the EPA) that have been cited by IQA critics appear to be isolated.

By requiring agencies to report information-correction requests to the OMB, the IQA regulations do enhance presidential control. They inform the OMB (and hence the Executive Office of the President) of potential concerns earlier in the regulatory process. However, there are many other avenues for the OMB to learn about potential problems, so it is unclear that the IQA is necessary for this function.

Unlike many of the other Bush administration reforms, the IQA regulations are based in statute. If the Obama administration wants to change those regulations, simply revoking them would not be an option; new regulations would have to be issued in their place. This would be more cumbersome than changing many of the other Bush reforms. Because of the limited effect of the IQA to date, modifications are probably not worth the effort.

The Obama administration should, however, fight any effort to permit judicial review. In addition to eroding presidential control over agencies, judicial review could significantly delay agency action by forcing agencies to take more time to respond to information-quality complaints to ensure that their responses will pass judicial muster.

Prediction: Since the IQA regulations are required in statute and their effect to date has been minimal, the Obama

administration will not make their modification or elimination a priority. It will fight any attempt at judicial review of agency responses to Information Correction Requests.

REGULATORY PEER REVIEW The Bush administration followed the IQA regulations with controversial guidelines requiring agencies to subject “significant” scientific documents to expert peer review. The guidelines outlined the peer review requirements, specifying who could serve as a peer reviewer and identifying the categories of technical information to which peer review would apply. After two rounds of public comment and considerable criticism, the OMB published revised guidelines in a bulletin in January 2005.

The debate on regulatory peer review mirrored the debate on information quality, with many of the same opponents and proponents voicing similar positions. Because the final implementation of the peer review guidelines occurred several years later than that of the IQA guidelines, and because it will take longer to see evidence of the effect of the peer review guidelines, there have been no empirical analyses of regulatory peer review.

Regulatory peer review could conceivably have effects that are either pro-regulatory (if peer reviewers are favorably disposed to regulation) or anti-regulatory (if peer reviewers are unfavorably disposed to regulation). However, more clearly than any of the other Bush reforms, regulatory peer review has the potential to cause significant delay in the regulatory process. Thoughtful peer review and thoughtful responses to peer review take time. In the academic and grant-writing contexts, peer review typically takes three to six months. And there is every reason to think that the science underlying regulations will be more complicated and will take more time to review than a typical grant or academic article.

Though it causes delay, regulatory peer review also serves the purpose of increasing executive control over agencies. By identifying possible problems with the science underlying a regulation, peer reviewers provide information that will be useful to the OMB in its eventual review of the regulation. However, between public comments, information-quality correction requests, and the analyses agencies are required to perform in support of regulations, it is likely that this information will be available from other sources. The effect of regulatory peer review on executive oversight will be positive but small.

Given the extensive delay likely to result from peer review and its minimal effects on executive control, there is little reason for a president with numerous regulatory priorities to keep the peer-review guidelines in place. Further, revocation or suspension of the guidelines would be easy to achieve, as that would merely require issuance of a bulletin. Taking that simple action would be beneficial to the Obama administration.

Prediction: The Obama administration will likely revoke the peer-review bulletin.

RISK ASSESSMENT GUIDELINES The OMB proposed guidelines for agencies conducting risk assessments in January 2006. The risk assessment guidelines were criticized by the scientific community, with the National Academy of Sciences calling them “fundamentally flawed.” The OMB withdrew the

guidelines and, in their place, issued a set of principles in September 2007. The guidelines as originally proposed would have led to significant delays in some rules that relied upon risk assessments.

The guidelines on risk assessment were redundant (from an executive control standpoint) in view of the issuance of the information quality guidelines, and other longstanding regulatory procedures such as notice-and-comment and OMB review. It is unlikely that the OMB gained any additional supervisory powers under the risk assessment guidelines that it did not have authority for elsewhere. There is little argument for reinvigorating the risk assessment guidelines.

Prediction: The Obama administration will not issue new guidelines on risk assessment.

EO 13422 In January 2007, the Bush administration issued an executive order making three changes to the regulatory process. The order put in place, for the first time, requirements on federal agencies issuing guidance documents, applicable to a subset of guidance documents — those that are “significant” or “economically significant” — and largely involving solicitation of public input and reporting to the OMB. The other two changes were the requirement that agencies identify a market failure as part of any significant regulation they issue, and the requirement that regulatory agencies have a presidentially appointed “regulatory policy official” sign off on all agency regulations.

Coglianesse has analyzed the executive order and the controversy surrounding it, and concluded that the effects of the order were minimal. I believe this conclusion was true for the non-guidance portions of the Order. The “regulatory policy official” requirement was unlikely to lengthen the regulatory process. While the officer’s presence may have superficially enhanced presidential control, agency heads are already presidentially appointed and it is difficult to imagine that any significant regulatory efforts are promulgated without their approval. The presence of one more appointee in the agency process would at most lead to minute increases of presidential influence on a process where the Executive Office of the President already has tremendous power.

Similarly, the requirement that “Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address” would also have had a minimal effect. Many regulatory solutions can easily be cast as responses to market failures, and it is unlikely that any regulations that the Obama administration wants to promulgate would be deterred or delayed by that requirement.

The provisions on guidance documents, however, had the potential to be more important. Before the issuance of this bulletin, guidance documents were largely outside the reach of the OMB. This bulletin was one of the Bush administration’s largest expansions of presidential power in the regulatory arena. It therefore clearly increased presidential influence over agencies. Also, by raising the cost of issuing guidance documents, the bulletin may have given agencies the incentive to use the regulatory route to make policy. (This makes sense, of course, only if one accepts the hypothesis that agencies were

“retreating from rulemaking” by issuing guidance documents.) This in turn would have increased transparency and accountability in policymaking and, as a result, would have enhanced President Obama’s supervision over agency actions.

The new rules for guidance documents would have undoubtedly delayed the release of the most significant ones. That was, after all, the bulletin’s explicit intent. However, it is unlikely that top priorities of an Obama administration would be implemented through guidance. The delay was more likely to affect documents that serve priorities of the agencies rather than those implementing objectives of the president.

EO 13422 is the first Bush regulatory reform on which we have information about President Obama’s preferences. On February 4, 2009, President Obama issued EO 13497 revoking EO 13422. The day before, President Obama asked the director of the OMB to examine regulatory review and President Clinton’s EO 12866. Given the discussion above, it is unlikely that the provisions on identifying market failures or regulatory policy officers will be reissued in any form by President Obama. However, the new president may reconsider his views on guidance documents, either as part of the review on EO 12866 or after a few guidance documents that embarrass his administration are issued.

Prediction: The market failure identification and regulatory policy officer provisions of EO 13422 are history, but the Obama administration may decide to exercise oversight of guidance documents at some point in the next four years.

ELECTRONIC RULEMAKING The movement of the rulemaking process to the Internet differs from the reforms discussed above. Unlike many of the other procedures implemented by the Bush administration, electronic rulemaking is widely regarded as inevitable and potentially beneficial by many parties, regardless of ideology. Criticisms of this idea have focused on its implementation rather than the ideas behind it.

Many academic articles espouse ideas for how the Internet could be used to make the rulemaking process more participatory, more efficient, and more likely to lead to good policy. In terms of the framework used in this article to evaluate regulatory reforms, electronic rulemaking has the potential to add delay to the rulemaking process by increasing the number of public comments that agencies receive. It also does little to enhance executive control of agencies (except in the sense that making the public comment process more efficient

may improve the ability of the executive office to sense public opinion on regulatory issues).

However, given that some degree of electronic rulemaking is inevitable, the Obama administration has an interest in making sure it works as well as possible. Many of the ideas proposed by academics for electronic rulemaking are probably best tried on an experimental basis, and the OMB can do much to encourage such experiments. At the same time, the OMB should review electronic rulemaking efforts to date and evaluate the criticisms of policies that have already been adopted. While not wanting to “start over” and lose eight years of work, reforms that could be implemented easily and improve efficiency should be taken.

Prediction: The Obama administration will undertake an evaluation of electronic rulemaking efforts to date and encourage agency experimentation with electronic rulemaking.

CONCLUSION

It will be tempting for President Obama to attack the Bush changes to the regulatory process with a hatchet rather than a scalpel (to borrow a phrase from the 2008 presidential debates). Many of Bush’s changes have been widely derided by the interest groups that supported Obama’s election, and the political cost of eliminating them will be relatively small.

However, some of the Bush regulatory reforms may actually help the new president achieve his policy goals. President Clinton found that regulations were an important path to notable accomplishments, and to achieve them he used regulatory tools that he inherited from his Republican predecessors. Being able to successfully manage the regulatory state helps a president make public policy. Improved oversight over guidance documents, prompt letters, and judicious implementation of electronic rulemaking can serve as important components of a successful management strategy.

On the other hand, several of the Bush reforms do little to enhance oversight but may make it harder for agencies to follow through on the president’s priorities. Regulatory peer review clearly falls in this category, and the IQA could as well if judicial review of information corrections is instituted. President Obama will likely rescind the bulletin on regulatory peer review and ensure that the effect of the IQA continues to be small. Those actions will both please his supporters and would be the first actions ever taken to actually simplify the regulatory process. **R**

Readings

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