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SCIENCE AND REASON MUST GUIDE RULEMAKING IN NEW ADMINISTRATION

by
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Like all of his recent predecessors, President-Elect George W. Bush will need to take stock of how his Administration will govern the regulatory process. With well over 2,000 regulatory pages added by the Clinton Administration in December alone — health care privacy rules, OSHA "ergonomics" rules, USDA "organic foods" rules, EPA diesel emissions rules — the new President and his Office of Management and Budget (OMB) will have their work cut out for them in reviewing what is already on the books, let alone dealing with new regulatory issues. Hundreds of billions of dollars in additional annual compliance costs are at stake.

On paper, the last three administrations have shared common ground in favor of applying cost-benefit analysis and scientific risk assessment principles to agency rulemaking. Presidents Clinton, Bush, and Reagan each called upon OMB to play a centralized regulatory review and approval function. Under President Clinton's regime, OMB's sternly analytical review became significantly more light-handed, and greater regulatory power was exercised by the political players in the agencies and the White House. While President Clinton rescinded President Reagan's famous Executive Order No. 12291 on "Regulatory Review," he issued his own Executive Order, No. 12866, which appeared to subscribe to the same philosophy of issuing rules whose benefits are justified by the resulting costs. The Clinton Administration also appeared to back using scientific risk assessment as the foundation for regulations issued by agencies like EPA, OSHA, HHS, USDA, etc.

In practice, however, that Administration issued numerous rules, like the ozone rule under the Clean Air Act, where the costs were totally out of kilter with the benefits, and also issued rules based on outdated science, like the chlorine disinfectant regulation under the Safe Drinking Water Act. Both of these rules were rejected in court, and scholars have noted that EPA's reversal rate in the D.C. Circuit during the last eight years has been remarkably high — well out of line with the normal deference the judiciary usually accords federal agencies.

To ensure that the American public gets the best bang for its regulatory buck, President George W. Bush should undertake a comprehensive review and overhaul of the regulatory process. Like President George H. W. Bush, he should impose a regulatory moratorium for the first days of his Administration while the review is underway. The new leadership in the agencies should stay the effective date of the recently promulgated Clinton Administration regulations to allow Congress, the courts, and OMB time to determine

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whether the overall regulatory impacts are truly in the public's interest. It is important to understand that onerous regulations that fail to generate benefits commensurate with their costs do not serve the country well. Money wasted on excessive and unproductive additional ozone controls, for example, cannot be spent on more critical health priorities like combating breast cancer and working to reverse the troubling increase in asthma rates. So there is absolutely nothing coldhearted — or "anti-environmental" or "anti-consumer" — about taking a disciplined, results-oriented approach to regulating.

The Administration's next step should be to integrate the existing congeries of regulatory Executive Orders into a unified directive from the President. The new Executive Order should promote cost-benefit analysis and cost-effectiveness as a regulatory objective, provide a refined structure for conducting the environmental impact assessment process, and establish principles for review of federalism, property rights, family issues, social equity, personal privacy, and technology implications. Other principles, like promoting development of electronic government and fostering greater governmental accountability, should also be factored into the new universal Executive Order on regulations.

Perhaps most important, however, the new Executive Order should insist that agencies conduct scientific risk assessments whenever appropriate, and that they rely only on the best available science. This does not mean that agencies must be stymied in the face of scientific uncertainty, which is not uncommon. Rather, agencies would be held accountable for disclosing the true state of the scientific uncertainty underlying their decisions, as well as whatever scientific assumptions, default factors, or policy choices are implicit in their regulatory decisions. The Supreme Court's 1993 *Daubert* decision could provide a great analogy for requiring "good regulatory science" to be the foundation for important agency rulemakings.

Bringing "regulatory *Daubert*" to bear on rulemaking would enhance the process by bringing greater judicial discipline to what one law professor has called "the science charade of toxic risk regulation." But even a vigilant President and judiciary are not sufficient to rationalize the regulatory process. Congress must also play its role in assuring that the public is well served through regulations that are cost-effective rather than counter-productive. To further this objective, the new Administration should review all major existing regulatory statutes to determine how many mandates exist that — believe it or not — actually preclude agencies from exercising common sense. Some laws, like the Clean Air Act, have been construed to prohibit reliance on cost-benefit balancing, scientific risk assessment, and efficiency considerations in setting regulatory standards. President Bush should consider submitting legislation to Congress ending this ridiculous state of affairs and providing clear authority to allow consideration of all reasonable, common sense factors in setting new rules. In truth, reform legislation along these lines need not be controversial — after all, they are the same principles incorporated in President Clinton's existing regulatory Executive Orders. The key to consensus is for Congress not to deem any *one* factor (such as cost-benefit analysis) as dispositive. Agency administrators must simply be *allowed* to consider all of these sound principles, without being obligated to decide exclusively on the basis of any one of them.

Finally, another reform President Bush can undertake is to resist the tyranny of complexity that characterizes the current regulatory arena. Today, agencies like HHS can issue over 1,500 pages of health care privacy regulations without being ashamed of themselves. Even well-intentioned — and well-advised — companies cannot possibly comply with 1,500 pages of intricate, regulatory minutiae 100% of the time. Regulated entities are therefore constantly in peril of having violated some minute criterion, or paperwork obligation, that does not go to the heart of any substantive concern. Such complexity would trip up anyone, so the enforcement regulators always have a trump card. Staying in the good graces of these powerful enforcement agencies — and the criminal prosecutors in the Justice Department — thus depends heavily on regulatory forbearance and "good will" of bureaucrats (and politicians). President Bush can rein in this unaccountable regulatory power by insisting that his administration's rules be simpler, more streamlined, and confined to the substantive requirements necessary to serve the public interest.

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