REG-MARKETS CENTER
AEI Center for Regulatory and Market Studies

The Future of the Bush Administration Regulatory Reforms

Stuart Shapiro*

Regulatory Analysis 08-05

December 2008

*Stuart Shapiro is assistant professor at the Edward J. Bloustein School of Planning and Public Policy at Rutgers University.

REG-MARKETS CENTER

AEI Center for Regulatory and Market Studies

The Reg-Markets Center focuses on understanding and improving regulation, market performance, and government policy. The Center provides analyses of key issues aimed at improving decisions in the public, private and not-for-profit sectors. It builds on the success of the AEI-Brookings Joint Center. The views expressed in this publication are those of the authors.

Publications can be found at: www.reg-markets.org

Executive Summary

The past eight years have been busy ones for aficionados of the regulatory process. Not since the late 1970s and early 1980s have as many requirements been imposed upon agencies writing a regulation. These include the implementation of the Information Quality Act, regulatory peer review, Executive Order 13422, and electronic rulemaking requirements among others. Since many of these requirements were imposed by executive order or other presidential action, the new administration will have important choices to make about whether to weaken, maintain, or strengthen these requirements. These decisions will affect nearly every area of regulatory policy This paper examines the Bush reforms by asking whether an incoming administration with different regulatory priorities will find the increased presidential power over regulatory agencies worth the other potentially deleterious effects of the reforms. I argue that several of the Bush reforms, the use of prompt letters and control over guidance documents will prove attractive to the Obama Administration, while others such as regulatory peer review and the non-guidance components of Executive Order 13422 will not.

The Future of the Bush Administration Regulatory Reforms

Stuart Shapiro

1. Introduction

The administration of President-Elect Obama will have many policy choices to make once it takes office. Some such as policy in Iraq and legislative initiatives on health care, will receive a great deal of attention. Others, such as regulatory policy at EPA and OSHA, will receive some attention. Within the regulatory arena, decisions about whether to retain, modify, or eliminate the Bush administration's changes to the regulatory process will receive minimal media attention.[1] However, some of these decisions will affect policy in a wide variety of areas and deserve careful consideration.

The regulatory process changed more under George W. Bush than at any time since the beginning of the Reagan Administration.[2] 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 changes by the Bush Administration were praised by opponents of agency regulations and criticized by regulatory supporters. Supporters of the changes hailed them as bringing rationality to the regulatory process and predicted that they would lead to smarter regulations (Graham, Noe, and Branch 2006). Opponents derided the changes as intended to make it harder for agencies to promulgate regulations (Michaels 2008). These same groups are likely to pressure the new president to modify or eliminate these procedures, or to strengthen them.

The most important effect of these procedures is to empower the President's ability to oversee agencies. This is not a partisan impact. All presidents have an interest

[1] It is true that one of the first announcements to come from the Obama transition team was a commitment to review all of Bush's executive orders. The media coverage of these orders though have focused on Executive Orders on stem cell research and abortion. See e.g. http://www.washingtonpost.com/wp-dyn/content/article/2008/11/08/AR2008110801856.html (last viewed November 11, 2008).

[2] The period 1980-1981 saw the passage of the Regulatory Flexibility Act and the Paperwork Reduction Act and the issuance of Executive Order 12291 which institutionalized cost-benefit analysis in the regulatory process.

in ensuring that agencies take actions that support the president's policies. So, the question facing President-Elect Obama and his top aides is whether these procedures have costs that outweigh their benefits to the President through improved oversight. The Bush Administration procedures vary in the extent to which they empower the President and also vary in the magnitude of their potential negative effects.

This article examines the individual Bush Administration reforms and evaluates the tradeoff between the gains to presidential power and the negative impacts of the procedures. I am assuming that President-Elect Obama will see increased presidential oversight of agencies as a positive trait as every president since Nixon, regardless of party, has attempted to increase presidential control of agencies. The article proceeds as follows: Section II reviews the role of procedures in the regulatory process. Section III sets out the Bush reforms, evaluates each one, and recommends whether the new administration should retain or discard it. Section IV offers concluding thoughts on approaches to the regulatory process that President-Elect Obama should take.

2. Evaluating Regulatory Reforms

In both the academic literature and in political discourse, evaluations of regulatory reforms are generally concerned with three points: One is the efficacy of the new procedures in controlling bureaucratic decision making. Another is the degree of improvement in the quality of regulatory outputs. The third is the length of time or money that will be spent implementing the new reforms and whether they will delay the issuance of regulations.

Political Control

Using procedures to influence the decision making by agency officials goes back at least to Congressional passage of the Administrative Procedure Act (APA), which created the modern rulemaking process (McNollgast 1999). In the academic literature, the chief proponents of the idea that making bureaucrats go through procedures when writing rules will help ensure politically preferred outcomes has been the trio of scholars McCubbins, Noll, and Weingast – usually dubbed “McNollgast” (1987). They argue that procedures are put in place by legislative coalitions to create a decision making

environment that mirrors the climate in which legislatures make decisions. Creating this environment will make 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.[3] Most trenchant are the arguments that it slights the role of the President, who engages in executive oversight of agency officials (Moe 1989), and the argument that the procedures are left in the hands of future coalitions of political officials who may choose to use them in ways contrary to those envisioned by the coalition that created them (Horn and Shepsle 1989).

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 agencies. Some do so directly, like Executive Order 13422, which requires political appointees in agencies to sign off on regulatory decisions. Some do so indirectly, like the information-quality guidelines, which give OIRA the ability to oversee agency responses to interest group complaints about agency information disseminations.

The criticism by Horn and Shepsle (1989) remains relevant, however. The Bush Administration will disappear in January 2009, and the myriad procedures it has put in place will fall under the control of President-Elect Obama. The new President will be able to use these procedures to facilitate policy goals that may be very different than those desired by the Bush Administration that put them in place. This was demonstrated when President Clinton used OIRA regulatory review, created by President Reagan with deregulatory intentions, to further a pro-regulatory agenda (Kagan 2001). A crucial component of the Obama Administration's decision whether to maintain or revoke the Bush reforms will be the degree to which these procedures will facilitate President Obama's ability to exercise influence over regulatory agencies and achieve his regulatory policy goals.

[3] These criticisms focus both on whether McNollgast correctly divine the intention of procedures and whether procedures effectively accomplish the goal of influencing agency officials.

Delaying or Ossifying the Regulatory Process

In both academic (primarily legal) and political circles, regulatory procedures have been criticized for lengthening the regulatory process. In a seminal article, McGarity (1992) coined the term "ossification of the regulatory process" to refer to the purported impact of judicial-review and analysis requirements – making writing regulations so difficult that agencies were turning away from the regulatory process. McGarity built on work by Mashaw and Harfst (1990), who described a "retreat from rulemaking" at the National Highway Traffic and Safety Administration (NHTSA).

The delay argument has been a part of every debate on new regulatory procedures. In 1946, opponents of the APA voiced concern about that notice-and-comment would delay agency actions (Coglianese 2008). In 2003, critics of the Bush Administration's regulatory peer-review proposal complained that it would devastate rulemaking at agencies that relied on scientific information.[4]

The empirical evidence for regulatory delay and ossification is limited. While Lubbers (2008) has argued that regulatory volume has decreased, Croley (2007) has shown it remaining relatively steady. Coglianese (2008) has argued that while each new regulatory procedure has brought fears of the demise of regulations, there is little evidence that any such demise has occurred. Shapiro (2002) looked at regulatory procedures on the state level and concluded that decisions to refrain from regulation were influenced far more by politics than by the requirements of the regulatory process. Shapiro (2007) has also found that the time to complete a regulation did not appreciably vary between the Clinton and Bush (43) administrations.[5]

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 so many additional procedures imposed on the regulatory process by the Bush Administration, it is possible that a threshold has been reached and these effects will begin to manifest themselves. In evaluating the Bush Administration procedures, I will consider the

[4] See any of the negative comments on the OMB proposed peer review bulletin at http://www.whitehouse.gov/omb/inforeg/2003iq/iq_list.html (last viewed November 6, 2008).
[5] Although none of the procedures in question here were in effect for the Bush regulations studied by Shapiro.

amount of delay they are likely to cause with a skeptical eye toward claims that the delay will be extreme. Delay will be considered a negative aspect (although delay of bad regulations could be seen as positive) because of the likely regulatory agenda of President Obama.

Obtaining/Generating 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. There is often some other stated reason that the procedures are imposed, usually with some theoretical or academic support. Such reforms are supposed to make regulations "better," in some meaningful way. Classically requiring cost-benefit analysis 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. OMB described the "primary focus" of E.O. 13422 as "improving the way the Federal Government does business with respect to guidance documents." Many of these 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 this 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 innovation (Davis 1969) and derided as "kabuki theater" (Elliott 1992). Cost-benefit analysis has been hailed for its potential to improve the economic efficiency of agency regulations (Hahn and Litan 2005) and criticized as likely to subvert regulations designed to improve public health (Heinzerling and Ackerman 2005).

While much rhetoric has been directed at the impact 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.[6] Even for the older regulatory procedures, like notice- and-comment and cost-benefit analysis, there is little analysis. What analysis does exist (Shapiro 2002, Golden 1998, Hahn and Tetlock 2008) suggests that many of these procedures play less important a role than the heated debate over their existence suggests.[7]

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 the measure of the quality of regulations, although this is clearly only one of several possibilities. 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 impact on the quality of regulations and that their impact regulatory substance will be limited to the degree that they help the President impose his policy preferences

Thus we are left with only two relevant factors: delay and the impact on the degree of executive control.[8] The analysis in section III 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 decision making is worth a possible delay in agency completion of presidential priorities.

3. What Should Be Done With 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 (1)

[6] This is true because many of them have not been in place long enough to generate meaningful sample sizes of regulations affected.

[7] The literature on notice-and-comment rulemaking is particularly ambiguous. Yackee (2006) argues that comments make a difference in low salience rulemakings or when commenters agree (also see Golden 1998). Shapiro (2008) finds they make a difference in regulations dealing with technically complex issues. Others (e.g., West 2005) find limited influence in most circumstances.

[8] There may be those who argue that some of the regulatory procedures have inherent value. For example, notice-and-comment can be supported by citing the benefits that participation has for those who participate. To my knowledge, none of the Bush reforms have been defended with this argument so I do not include it in this analysis.

enhances presidential power and (2) delays regulations that the new administration may favor. I will conclude the discussion of each reform by evaluating the tradeoff (where it exists) between enhancing presidential power and delay and recommending whether the reform should be retained, changed, or eliminated.

Note that this is not an analysis of whether the reforms increase social welfare. Rather, I assess these 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 most of these procedures harm overall social welfare and should be eliminated. Similarly, if regulations on average have costs that exceed their benefits and therefore making them more difficult to issue enhances social welfare, then most of these reforms should be maintained.

Prompt Letters

One of the earliest reforms put in place by the Bush Administration was the creation of prompt letters by the Office of Information and Regulatory Affairs (OIRA). These letters suggest to agencies that they begin work 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 FDA 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 the regulatory process rather than slow it down. Hence this is the easiest regulatory reform to evaluate. It enhances presidential control of agencies and it has the potential to speed up the regulatory process. The next President 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.

Verdict: Keep prompt letters.

Information Quality Act

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 was the responsibility of 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 would have to meet in order to be considered of high/sufficient quality and set expectations for these standards; they also create a procedure whereby members of the public can challenge information disseminated by the agency.[9] 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,[10] it is not clear that agencies have a significant incentive to make changes to their policies based on these complaints.

Empirical analysis of the results of IQA regulations has been largely conducted by OMB and by interest groups opposed to the Act. OMB issued a report in 2004 characterizing the number of correction requests made under the new agency quality guidelines as "relatively small." OMB also argued that contrary to critics' concerns, (1) it was not only industry but also pro-regulatory groups that had requested corrections; (2) the guidelines had not slowed down the regulatory process; and (3) the guidelines had not chilled agencies' disseminations of information (and by implication agency regulatory efforts) (OMB 2004). OMB Watch, a liberal watchdog group, sharply challenged these conclusions. According to the OMB Watch report, three quarters of information

[9] Different types of information are held to different standards with information used to support significant regulations held to the highest standards. For more details see the OMB guidelines at http://www.whitehouse.gov/omb/inforeg/iqg_oct2002.pdf (last viewed November 21, 2008).
[10] Operation of the Missouri River Sys. Litig. No. 03-MD-1555 (2004).

correction requests have in fact been submitted by industry, and the total number of requests is triple that claimed by OMB (OMB Watch 2004; McGarity et. al. 2005).

In an update published in the 2008 Draft Report to Congress on the Costs and Benefits of Regulations, OMB noted that agencies had received twenty-one information-correction requests in 2007. Of these, only one has to date resulted in a correction, while 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 impact. 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 Atrazine by EPA[11]) that have been cited by critics of the IQA appear to be isolated.

By requiring agencies to report information-correction requests to OMB, the IQA regulations do enhance presidential control. They inform OMB (and hence the Executive Office of the President) of potential concerns earlier in the regulatory process. Of course, as there are many other avenues for OMB to learn about potential problems, 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 wanted to change the IQA regulations, simply revoking them would not be an option; they would have to issue new regulations in their place. This would be more cumbersome than changing many of the other Bush reforms. Because of the limited impact 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.

---

[11] See http://www.boston.com/news/globe/ideas/articles/2005/08/28/interrogations/ (last viewed November 6, 2008).

Verdict: Keep the guidelines but fight any effort at judicial review.

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, OMB published revised guidelines in a bulletin in January of 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 either pro-regulatory effects (if peer reviewers are favorably disposed to regulation) or anti-regulatory ones (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 (Shapiro and Guston 2007).

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 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 impact 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, merely requiring issuance of a bulletin. Taking this simple action would be beneficial to the Obama Administration.

Verdict: Revoke the peer-review bulletin.

Guidance Documents

Critics of procedural requirements imposed on regulators have long argued that one of their impacts has been to drive agencies away from rulemaking and toward more informal avenues of policymaking, such as the issuance of guidance documents. Agencies claim that they issue these guidance documents to help regulated entities comply with regulations but critics claim they impose new requirements. Reflecting this concern, the Bush Administration proposed guidelines for agency guidance documents in 2005, and finalized them as part of Executive Order 13422 in January 2007. The E.O. put in place, for the first time, requirements on federal agencies issuing guidance documents. They apply to a subset of guidance documents – those that are "significant" or "economically significant" -- and largely involve solicitation of public input and reporting to OMB.

Before the issuance of this bulletin, guidance documents were largely outside the reach of OMB. This bulletin is one of the Bush Administration's largest expansions of presidential power in the regulatory arena. It therefore clearly increases presidential influence over agencies. Also, by raising the cost of issuing guidance documents, the bulletin may give 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, for example, issuing guidance documents.) This in turn will increase transparency and accountability in policymaking, and as a result also enhance President-Elect Obama's supervision over agency actions.

The new rules for guidance documents will undoubtedly delay the release of the most significant ones. That is, after all, its explicit intent. However, it is unlikely that top priorities of an Obama Administration would be implemented through guidance. The

delay would be more likely to affect documents that serve priorities of the agencies rather than those implementing objectives of the President. Therefore, the tradeoff between enhanced supervision and delay should be an easy one for the new President.

Verdict: Keep the guidelines on guidance documents in place.

Risk Assessment Guidelines

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

Verdict: Do not issue new guidelines on risk assessment.

Executive Order 13422

In January 2007, the Bush Administration issued an executive order making three changes to the regulatory process. One of these is the enhanced oversight of agency guidance documents discussed above. The other two changes were to require agencies to identify a market failure on any significant regulation they issue and to require regulatory agencies to have a presidentially appointed "Regulatory Policy Official" sign off on all agency regulations.

Coglianese (2008) has analyzed the executive order and the controversy surrounding it and concluded that the effects of the order will be minimal. I believe this conclusion is true both as it pertains to regulatory delay and to presidential control. Nothing in the order is likely to lengthen the regulatory process for agencies. While the presence of a Regulatory Policy Official may superficially enhance presidential control,

agency heads are already presidentially appointed and it is hard to imagine that any significant regulatory efforts are promulgated without their approval. The presence of one more appointee in the agency process will 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 change to Executive Order 12866, requiring 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" is also likely to have a minimal effect. Many regulatory solutions can easily be cast as responses to market failures[12], and it is unlikely that any regulations that the Obama Administration wants to promulgate will be deterred or delayed by this requirement.

Verdict: It doesn't matter but for symbolic reasons, reversing the order may have political advantages.

A Word on Electronic Rulemaking

The movement of the rulemaking process to the Internet is different than the other reforms discussed here. Unlike many of the other procedures implemented by the Bush Administration, the movement to electronic rulemaking is widely regarded as inevitable and potentially beneficial by many parties regardless of ideology. Many criticisms of the recent movement toward electronic rulemaking have involved its implementation rather than the ideas behind it. The most strident criticisms have described steps to implement electronic rulemaking as merely moving the current regulatory process online (Noveck 2004).

There have many academic articles written with ideas for how the rulemaking process could be made more participatory, more efficient, and more likely to lead to good policy by using the internet (see e.g. Noveck 2004). 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

[12] Nearly all environmental regulations are responses to externalities, food and drug labeling requirements are responses to asymmetric information problems, and species preservation examples can be seen as provision of public goods to cite a few examples. For those regulations where the connection to a market failure is more tenuous, agencies will likely be able to rely on the argument that the regulations are required by statute and so are exempt from the market failure requirement.

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, any new 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 Office of Management and Budget can do much to encourage such experiments. At the same time, OMB should review electronic rulemaking efforts to date and evaluate the criticisms of those changes already made. While not wanting to "start over" and lose eight years of work, reforms that could be made easily and improve efficiency should be taken.

Verdict: Undertake an evaluation of electronic rulemaking efforts to date and encourage agency experimentation with electronic rulemaking.

4. Conclusion

It will be tempting for President-Elect 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 these 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 be able to help the new president achieve his policy goals. By improving executive oversight of regulatory agencies, President-Elect Obama will be able to better ensure that his goals for these agencies are being achieved and that they are being achieved promptly. President Clinton found that regulations were an important path to notable accomplishments. 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 have potentially deleterious effects. Regulatory peer review clearly falls in this category

and the Information Quality Act could as well if judicial review of information corrections was instituted. President-Elect Obama should rescind the bulletin on regulatory peer review, the non-guidance provisions of E.O. 13422, and ensure that the impact of the IQA continues to be small. These actions will both please his supporters and would be the first actions ever taken to actually simplify the regulatory process.

References

Coglianese, Cary. 2008. "The Rhetoric and Reality of Regulatory Reform" *Yale Journal of Regulation* 25:85.

Croley, Steven. *Regulation and Public Interests: The Possibility of Good Regulatory Government* Princeton University Press 2007.

Davis, Kenneth Culp. 1969. *Discretionary Justice: A Preliminary Inquiry.* Urbana: University of Illinois Press.

Elliot, E. Donald. 1992. Reinventing Rulemaking. *Duke Law Journal* 41:1490.
Golden, Marissa Martino. 1998. Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard? *Journal of Public Administration Research and Theory* 8:245.

Graham, John, Paul Noe, and Elizabeth Branch. "Managing the Regulatory State: The Experience of the Bush Administration." *Fordham Urban Law Journal* 33:953 2006.

Hahn, Robert and Paul Tetlock. 2008. Has Economic Analysis Improved Regulatory Decisions? *Journal of Economic Perspectives* 22:67.

Hahn, Robert and Robert Litan. 2005 Counting Regulatory Benefits and Costs: Lessons for the US and Europe Journal of International Economic Law 8:473.

Heinzerling, Lisa., and Frank Ackerman Priceless: On Knowing the Price of Everything and the Value of Nothing New Press 2005.

Horn, Murray and Kenneth Shepsle. 1989. Comment on McNollgast *Virginia Law Review* 75:499.

Kagan, Elena. 2001. Presidential Administration *Harvard Law Review* 114:2245.

Lubbers, Jeffrey. "The Transformation of the U.S. Rulemaking Process – For Better or Worse" *Ohio Northern University Law Review* 34:469 2008.

Mashaw, Jerry and David Harfst. (1990) *The Struggle for Auto Safety* Basic Books: Cambridge.

McCubbins, Matthew, Roger Noll, and Barry Weingast. 1987. Administrative Procedures as Instruments of Political Control. *Journal of Law Economics and Organization* 3:243.

_____. 1999. The Political Origins of the Administrative Procedure Act. *Journal of Law Economics and Organization* 15:180.

McGarity, Thomas. 1992. Some Thoughts on Deossifying the Rulemaking Process, *Duke Law Journal* 41:1384.

Thomas McGarity, Sidney Shapiro, Rena Steinzor. Joanna Goger, and Margaret Clune 2005. *Truth and Science Betrayed: The Case against the Information Quality Act* . Center for Progressive Regulation CPR Publication #502

Michaels, David.2008. *Doubt is Their Product How Industry's Assault on Science Threatens Your Health* Oxford University Press.

Moe, Terry. 1989. The Politics of Bureaucratic Structure. In *Can the Government Govern?* (John Chubb and Paul Petersen eds.). Brookings Institution.

Noveck, Beth Simone. 2004. The Electronic Revolution in Rulemaking *Emory Law Journal* 53:433.

OMB Watch, *The Reality of the Data Quality Act's First Year: A Correction of OMB's Report to Congress.* July 2004.

Shapiro, Stuart. 2002. Speed Bumps and Roadblocks: Procedural Controls and the Regulatory Process, *Journal of Public Administration Research and Theory* 12:29.

_____. 2007. Presidents and Process: A Comparison of the Regulatory Process Under Clinton and Bush (43) *Journal of Law and Politics* XXIII:393.

_____. 2008. Does the Amount of Participation Matter: Public comments, agency responses and the time to finalize a regulation. *Policy Sciences* 41:33.

Shapiro, Stuart and Guston, David. 2007. Procedural Control of the Bureaucracy: Peer Review and Epistemic Drift. *Journal of Public Administration Research and Theory*. 17:535.

West William. 2004. Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis. *Public Administration Review* 64:66.

Yackee, Susan Webb. 2006. "Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking"; *Journal of Public Administration Research and Theory,* 26:103.