

Real Regulatory Reform

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Federal regulation has grown enormously in recent decades and is today more costly than all federal domestic discretionary spending combined. Yet regulation is subject to none of the institutions that govern and moderate direct federal spending. The expenditures mandated by federal rules are realized almost entirely within the private sector—they are free of spending authorizations, limits on available tax revenues, and review and appropriations by Congress, and budget control by a central budget office.

The absence of financial constraint is the source of many problems. These include the tendency of regulatory requirements to grow without limit in number and detail; the tendency of single-purpose agencies to be overzealous, extravagant, and sometimes abusive in the pursuit of their statutory purposes; and the tendency for policy to be manipulated and distorted by special-interest groups (including, of course, business groups). The problems are systematic, not the product of crazed bureaucrats or to one political party controlling the executive branch. Imagine if federal spending agencies were free to set their own spending levels and to assess their own taxes, with no budget control by Congress or OMB. That is approximately the situation with regulation today.

The regulatory reform bills pending in Congress would alleviate this problem by requiring regulatory agencies to demonstrate that the social costs of their rules were justified by the social benefits. Cost-benefit analysis is far from perfect, but its shortcomings are mainly those of regulation itself—uniform government rules are always "too strict" for some people and "too lenient" for others. A cost-benefit standard would screen out clearly excessive rules, while providing a productive framework for debate over close cases in regulatory policy.

The cost-benefit standard has turned out to be highly controversial, in part because of the Clinton administration's outlandish and frequently dishonest campaign against the legislation. For some reason, administration officials have been offering examples of obviously beneficial regulations as reasons not to require regulators to sort out beneficial from harmful rules. But the legislation should not be controversial. Cost-benefit analysis, and systematic regulatory oversight by OMB, should be considered rudimentary good practice.

The congressional proposals are not drastic new policy departures that have sprung suddenly from the Republicans' "Contract with America" or from the new party composition of the Congress. *Every* president since Richard Nixon has required regulatory agencies to assess the benefits and costs of their rules and

submit them for review by the Executive Office of the President. Legislation to make the cost-benefit standard the norm of federal rulemaking and subject to judicial review (something an executive order cannot do) has been championed by Democrats as well as Republicans and by academics and professionals from across the philosophical spectrum. One such bill, similar albeit weaker and less exacting than the current ones, passed the Senate 94-0 in 1982.

Opponents of cost-benefit analysis argue, inconsistently, (a) that it is an arcane, technocratic exercise—policy by computer—which would strip government officials of the ability to make nuanced, socially aware policy decisions; and (b) that measuring private-sector costs and benefits is too slippery and subjective to be worth the effort. Both criticisms are exaggerated, and each is beside the point.

Cost-benefit analysis does involve a few distinctive techniques. The most important are "discounting" future costs and benefits to present values so that they can be usefully compared, and estimating the value to individuals and populations of such non-market goods as reductions in risk to life and health and increases in amenity and recreational opportunities. But these techniques are fairly elementary and conventional: they can be mastered in a few hours time, they are routinely taught in college and graduate school courses, and they ought to be generally understood by anyone in a position to make \$50 million policy decisions. If legislators and regulators cannot understand that spending \$100 twenty years from now is less costly than spending \$100 today, or that it is important to consider how many lives we might save with a given investment of resources, then one is at a loss to know how regulatory goals and priorities are to be determined. Cost-benefit analysis is not an abdication of human judgment; it is the rigorous application of that judgment.

Cost-benefit analysis does involve uncertainties and opportunities for subjective judgments—opportunities that can be used to twist the conclusions of a study to fit the preconceptions of a regulatory official, an OMB official, or a senator. The most important difficulty is that interests and preferences vary widely with respect to most of the things government regulation is concerned with. Different people attach different values to, and are willing to pay different amounts for, somewhat cleaner lakes or additional safety gear on automobiles—because of differences in income, occupation, age, skill (driving skill for example), health, and taste. Any attempt at estimating the social costs and benefits of a uniform government rule will obscure these differences to some extent.

But these and similar criticisms of cost-benefit analysis miss the central point, which is that the problems are not in the effort to measure costs and benefits but in the nature of government regulation itself. To say that individual preferences differ in ways a cost-benefit assessment cannot capture is the same as saying that a uniform government rule will necessarily be too strict and costly for some people and too lenient and cheap for others. There is simply no escaping the need for averaging and approximation where government has some legitimate

regulatory role (meaning that the absence of regulation would leave even more people less well off). The question is, how is the best balance to be struck? The purpose of cost-benefit analysis is not to provide the answer but to frame the debate in a useful and productive way.

I believe that intelligent debate over the merits of regulations inevitably concerns costs and benefits. If you ask someone who says he is opposed to cost-benefit analysis—say a representative of the Sierra Club or the AFL-CIO—to explain why he favors a particular EPA or OSHA rule, he will invariably respond with assertions about the harms being suffered under current circumstances and the benefits that will result from changing those circumstances. This is casual cost-benefit analysis; more formal cost-benefit exercises are simply efforts to understand the assumptions and completeness of casual assertions as thoroughly as possible.

Regulatory cost-benefit analysis, correctly understood, performs two critical political functions. The first is to screen out clearly excessive rules and thus to counteract the natural tendency of single-mission regulatory agencies to be overzealous ("overzealous" meaning forcing private expenditures that are well in excess of what informed citizens—even the very wealthy, risk-averse, and environmentally sensitive citizens—would support for the object at hand). The regulatory "horror stories" that have been offered by proponents of regulatory reform legislation in recent weeks are largely of this variety. I am convinced from personal experience in government that the mere obligation to explain publicly the likely benefits and costs of a dubious rule (to try "to pass the hee-haw test," as they say in the bureaucracy) is a useful counterweight to the mission-centric incentives that exist in all program agencies.

The second function is to provide a productive framework for debating the merits of the many close cases in regulatory policy, where reasonable people will differ on what the correct policy should be. Government rulemaking, despite all its trappings of procedure and formal findings and rationality, is a competitive process: not only regulatory officials but also members of Congress, members of the president's administration from other agencies and from the president's Executive Office, representatives of groups directly affected by a rule, and members of the general public will typically have important views and interests which they legitimately wish to be taken into account. It has been, however, a slanted and imperfect sort of competition. The opaqueness and obscurity of traditional rulemaking has tended to narrow the scope of debate to the views of those most immediately affected—well organized and funded interest groups, the professional staffs of program subcommittees in the Congress, and the bureaucracy itself—excluding those whose interests are more general and therefore more balanced. This is the institutional source of the problem of regulatory "capture" and undue interest-group influence.

The regulatory reform bills would oblige regulators to explain their estimates of

the likely benefits and costs of a proposed course of action, to identify alternative policies for achieving the objective at hand, and to choose the policy with the greatest net public benefits. These requirements would address the systematic problems of government regulation in two ways: by widening effective participation in regulatory debate and by focusing that debate on the general public interest. It is not adventitious that the regulatory reform bills combine the cost-benefit standard with procedures for regulatory review by the president, the Congress, and the courts. The standard and the procedures are integral parts of making regulation more effective and public-spirited. Together they establish the following policy: a federal regulation may be issued only when a regulatory agency can persuade informed, disinterested officials outside the agency that the regulation will be beneficial to society as a whole. This is a moderate policy, and as close to the established constraints on taxing and spending as one can get in the case-by-case world of regulation. It would not be a revolution, but anyone familiar with federal rulemaking today knows that it would be a substantial improvement.

Critics of the regulatory reform bills are fond of saying that the bills would produce "more bureaucracy, not less," as if this assertion were enough to stop the reformers in their tracks. This criticism, like the criticisms of cost-benefit analysis, is exaggerated and ultimately irrelevant. The federal regulatory agencies have been doing cost-benefit assessments of their major rules for years. Doing it better and more routinely, explaining assumptions and conclusions more clearly on the public record, and then actually heeding the conclusions, will be somewhat more costly but not much. If the regulatory reformers are correct that many rules could not survive a conscientious assessment of their benefits and costs, then there will be fewer rules and fewer people writing and enforcing them.

The proper question, moreover, is not how many government employees are needed to generate regulations, but what is the sum of the government and private-sector costs of regulation (and whether the resulting social benefits are worth these costs). The private-sector costs of complying with federal regulations are incomparably larger than the budgets of the agencies issuing the rules; this huge "leverage" suggests that investments in improving the substance of federal rules can have large total payoffs.

In any event, the size and social importance of the federal regulatory establishment is today so great that extended controversy over major rules—involving the Congress, the president's immediate office, interest groups, and the general public—is a certainty, not something contingent on new legislation. The important questions are: What should be the terms of the debates? What kind and detail of information should the agencies provide to those involved in the debates? And what standards should the agencies and the courts apply in making final decisions? The regulatory reform bills provide the right answers to these questions.