
James E. Anderson

This article examines the attempts between 1978 and 1998 to enact general regulatory procedural reform legislation. Two decades of on-again, off-again legislative efforts have yielded only fragments of reform. A major explanation for this, despite the official popularity of reform, seems to be the inability of putative reformers—traditionalists, populists, and restrictivists—to agree among themselves on the direction and content of general reform legislation. This experience raises a number of important theoretical issues for students of regulation, including the ethicalness of using procedural restraints deliberately to disrupt or impede the regulatory process and the impact of procedural controls on regulatory policy.

Governmental regulation of private economic activity substitutes the judgment of public officials for that of private parties. By prescription and proscription, requirements and restrictions, regulation limits the discretion of businesses and individuals to make economic decisions in order to achieve public purposes, such as maintenance of competition and the protection of consumers against fraud and deception (cf. Stone, 1977). Although governments in the United States always have engaged in some control of economic activity, regulatory activity by the national government was minimal until late in the nineteenth century.

The first major surge in national activity occurred during the Progressive Era. It established two basic principles—the national government would exercise control over the economy to ensure the dominance of political power over economic power, and regulation would be the dominant method for handling economic problems. Some of the major regulatory laws adopted dealt with railroads, banking, the maintenance of competition, and consumer protection. A second major surge in regulation occurred during the New Deal years. Many of the New Deal regulatory programs focused on particular industries—broadcasting, banking, motor carriers, stock markets, airlines, agriculture—and placed reliance on regulation rather than competition to protect public interests. Regulatory agencies typically were assigned much discretionary authority in controlling entry, rates, or prices, and other matters. This pattern of regulation later came to be designated economic regulation.

A third major surge in regulatory activity took place between the mid-1960s and the mid-1970s. Focused on protecting the quality of life and manifesting distrust of the business community, this surge produced many detailed statutes intended to protect consumers, workers, and the environment. Some industries—automobiles and chemicals, for example—that previously had been touched comparatively lightly by regulation now became regulated extensively by the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, the Environmental Protection Agency (EPA), and other new agencies. Also, the Federal Trade Administration became revitalized. The pattern of regulation involved here soon was tagged social regulation.
Before this third surge fully had run its course, a movement for regulatory reform or change emerged, occasioned at least in part by the surge. President Gerald Ford can be credited with putting regulatory reform on the national policy agenda. In an address to Congress in October 1974, he called for the elimination of unnecessary rules and regulations to reduce consumer costs and to help combat inflation, which then was of major concern to the public. Further, he recommended the creation of a National Commission on Regulatory Reform to study the independent regulatory commissions, and stated that his administration would appraise the inflationary effects of rules emanating from executive branch agencies. Throughout his term, President Ford continued to call attention to the need for regulatory reform, including deregulation. Following the president's lead, and sensing the popularity of the issue, Congress also took up the hunt for regulatory reform legislation.

Myriad regulatory reformers produced numerous and varied reform proposals. Professor David Welborn (1977) has identified three orientations among the reformers—traditionalist, populist, and restrictivist. Traditionalists generally believe that government regulation is needed to correct imperfections in the economic system and to protect the public interest. Although mostly comfortable with existing regulatory programs, they believe that the performance of regulatory agencies could be strengthened by better personnel, increased budgets, better statements of statutory authority, improved procedures, and better internal agency organization and management. They also favor stronger presidential direction of regulatory agencies, especially the independent commissions, to ensure responsible and coordinated action.

Those taking a populist orientation also accept the need for much regulation. However, they are quite suspicious of corporate power; in their view, big business often uses its political power to bend regulation to its will. Consequently, populists want to lessen the influence of business interests on regulation, as by prohibiting ex parte communications with regulatory agencies and closing the "revolving door" through which regulatory officials go to work for corporations they have regulated previously. On the other hand, populists seek to enhance public influence through such means as open meetings laws, subsidized public participation in rulemaking, and the creation of consumer counsel offices in agencies. Populists also favor eliminating some economic regulatory programs, such as in transportation, that they believe served business interests rather than the public interest.

Restrictivist reformers, who frequently are much influenced by microeconomic theory, disapprove of much regulation, viewing it as a cause of inefficiency and the misallocation of resources, preferring to place more reliance upon the unregulated market. They favor the repeal of anticompetitive regulatory programs, the use of cost-benefit analysis and risk analysis to assess the impact and desirability of regulatory programs, and greater use of economic incentives rather than administrative regulation to achieve public purposes.

All regulatory reformers and reform proposals, of course, cannot be squeezed neatly into one or another of these categories. However, the categories do help us get a handle on the variety of reform proposals under consideration and the underlying motives of their proponents. Truly, regulatory reform in all of its variety was a leading issue on the national policy agenda throughout the 1970s. In Congress there was strong antiregulatory sentiment in the ranks of both political parties.
Although Jimmy Carter had not said much about regulation in the course of his presidential campaign, he made regulatory reform one of the central features of his administration. It pursued a three-pronged approach to the problem of regulatory reform.

(1) Presidential supervision of the agency rulemaking process (Anderson, 1991). Executive Order (E.O.) 12044 provided that executive branch agencies had to prepare regulatory analyses for all major rules and to select the most cost-effective alternative for dealing with a problem. The Regulatory Analysis Review Group, composed of top-level administration officials, and the Office of Management and Budget (OMB), supervised this process. Later, the Regulatory Council was established to publish a semiannual regulatory agenda and to coordinate regulatory activity.

(2) Deregulation. President Carter was an active proponent of deregulation for economic regulatory programs. Accomplishments in this area included the Airline Deregulation Act, the Natural Gas Policy Act, the Staggers Rail Act, the Motor Carrier Reform Act, and the Depository Institution Deregulation and Monetary Control Act. (The last statute, coupled with another statute and regulatory neglect by the Reagan administration, led to the savings and loan association debacle.)

(3) Regulatory procedure reform legislation. In the late 1970s the enactment by Congress of major regulatory procedure reform legislation appeared a certainty. Questions related primarily to the precise form it would take. The Carter administration pushed legislation here that would incorporate the provisions of E.O. 12044, make them permanent, and extend them to the independent regulatory commissions.

The remainder of this article examines the struggle over the enactment of general legislation to reform regulatory procedure, beginning with the Carter administration. The story is pursued into the Reagan administration, where it ends temporarily in 1982 without the passage of general legislation. In one sense this is an analysis of legislature failures, of why the campaign for procedural reform legislation yielded only limited results, but as will be seen that is only one side of the story. The Carter administration did succeed in forestalling the adoption of objectionable legislation containing such provisions as the legislative veto of rules. How this came about is worth knowing in itself.

I pick up the story again in 1995, when the new Republican congressional majorities initiated another major effort to enact procedural reform legislation. Three years later, it, too, had yielded only piecemeal results. Here, of course, I do not have access to presidential documents, so the discussion centers on Congress. In the final section, I draw some conclusions from these two reform episodes and comment on the theoretical and research implications of this study.

The Carter Administration and Regulatory Reform

No specific focusing or triggering events put regulatory procedure reform on the national policy agenda in 1978. Rather, as the cliche has it, it appeared to be an idea whose time had come. The expansion in the number and extent of regulatory programs; a multitude of business complaints about regulation and its costs; some overreaching by regulatory agencies—for example, the poorly thought out adoption of several hundred “consensus” health and safety standards by the Occupational Safety and Health Administration; the emergence of a conservative
mood in the nation—all these and more seemed to have combined to put regulatory reform on the agenda. Support for regulatory reform was widely perceived as good politics.

Sometime around the middle of 1978 a decision was made by the Carter administration to begin formulating a regulatory procedure reform bill. Aware that there was much congressional interest in procedural legislation, the administration saw itself as having essentially two options: It could react to congressional proposals and seek to improve them, or it could work with key legislators and others to design its own proposal, thereby demonstrating commitment to regulatory reform and putting itself in better position to fend off unwanted amendments such as the legislative veto (Neustadt, 1978). The administration chose the second option. (Table 1 lists some of the regulatory reform bills introduced in Congress.) The Domestic Policy Staff (DPS), an Executive Office of the President (EOP) unit directed by Stuart Eizenstadt, who had a close relationship with the President, took the lead role in developing regulatory reform legislation. Eizenstadt’s principal assistants in this area were Simon Lazarus and

<table>
<thead>
<tr>
<th>Table 1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regulatory Reform Bills, 1979–1980</strong></td>
</tr>
<tr>
<td><strong>S755 and HR3263.</strong> Carter administration Required agencies to conduct economic analyses, streamlined proceedings, mandated periodic review of rules, funded public intervenors, and more.</td>
</tr>
<tr>
<td><strong>HR6768.</strong> Carter administration Evaluated administrative law judges.</td>
</tr>
<tr>
<td><strong>S262.</strong> Senate Committee on Governmental Affairs Called for general procedural reform, similar to Carter bills.</td>
</tr>
<tr>
<td><strong>S445.</strong> Percy-Byrd Called for sunset review over 8 years of 32 regulatory agencies.</td>
</tr>
<tr>
<td><strong>S51, S52, S53, S54.</strong> Bentsen Provided for regulatory budget, economic analyses, OMB coordination of agencies.</td>
</tr>
<tr>
<td><strong>S299.</strong> Culver Required agencies to tailor regulations to small business (regulatory flexibility).</td>
</tr>
<tr>
<td><strong>S2.</strong> Muskie Called for sunset review of regulatory programs.</td>
</tr>
<tr>
<td><strong>S93.</strong> Eagleton Called for sunset review of regulation with an economic impact of more than $100 million.</td>
</tr>
<tr>
<td><strong>HR1776.</strong> Levitas Called for one-house legislative veto of rules.</td>
</tr>
<tr>
<td><strong>S1291.</strong> Kennedy Required agencies to assess competitive impact of regulations.</td>
</tr>
<tr>
<td><strong>S2147.</strong> Senate Judiciary Committee Provided for comprehensive regulatory reform and Regulatory Policy Board.</td>
</tr>
<tr>
<td><strong>HR4660.</strong> House Small Business Committee Lightened regulatory burden for small businesses.</td>
</tr>
<tr>
<td><strong>HR6410.</strong> House Government Operations Committee Provided for paperwork reduction.</td>
</tr>
</tbody>
</table>
Richard Neustadt. The Regulatory Reform Working Group, an informal group that drew members from DPS, OMB, and the Council of Economic Advisers also was much involved. In time, a Regulatory Process Bill Task Force was formed that went beyond the EOP, drawing representatives as well from the Federal Trade Commission, Department of Transportation, Department of Justice, EPA, and the Office of the Special Assistant to the President for Consumer Affairs.

Many ideas were floating around in the regulatory reform policy soup and were culled over by administration officials (Morris, 1978). Some were accepted; others were rejected as too controversial (the regulatory budget) or unlikely to be workable or have the desired effect (a prohibition of duplication or overlapping regulation) (Lazarus, 1978a). By year’s end the regulatory reform bill was beginning to take shape; preliminary drafting of some provisions was under way.

In January 1979 Eizenstadt and OMB director James McIntyre sent the president a memorandum describing the elements of a proposed regulatory bill. Preliminary conversations about the proposal had been held with key congressional and private groups, whose reactions were described as “generally ... positive, though tentative.” The president gave his approval to all of the proposal’s components, which included a requirement for regulatory analysis, periodic review of regulations (“sunset”), speedier and simpler procedures, support for public participation, and improved oversight and management of regulatory agencies. Eizenstadt and McIntyre noted that they did not recommend the legislature veto, the regulatory budget, and greater presidential intervention in agency proceedings (Eizenstadt & McIntyre, 1979).

There was considerable support from the Economic Policy Group (EPG), the administration’s top-level economic advisory body, for an across-the-board requirement of cost-benefit analysis and for the creation of an office for regulatory analysis in the EOP. These ideas were opposed by the DPS, which was able to exclude them from the proposal sent to the president. Indeed, it was Lazarus’s opinion that EPG should not have anything to do with regulatory reform (Lazarus, 1979a; Neustadt, 1979).

The administration’s proposed regulatory reform package was circulated for comment among a wide range of agencies, private groups, and congressional personnel. Some members of Congress thought the proposal’s regulatory analysis requirement went too far; others thought that it did not go far enough. The National Association of Manufacturers and the National Federation of Independent Business liked most of the bill; however, they opposed public participation funding. A United Autoworker’s representative was concerned that the bill would get loaded down with bad amendments in Congress and that the President still might sign it. Secretary of Agriculture Bob Bergland expressed the view that many of the bill’s procedural requirements were too specific and that it unwisely altered the procedural requirements of the Administrative Procedure Act. The general counsel for the Consumer Product Safety Commission criticized the “negative and defensive tone” of the bill toward government regulation and raised questions about the cost to the government of complying with it, while supporting the provisions intended to speed up agency proceedings. Some adjustments were made in the final form of the bill as a consequence of such commentary (Bergland, 1979; Lazarus, 1978b).

In late March the administration finally had its bill, the “Regulatory Reform Act,” ready to go to Congress. It provided for economic analysis of new rules; selection of the least burdensome alternative for handling a problem; regular review and elimination of outdated rules; streamlined procedures to reduce
regulatory delay; and more opportunity for public participation in rulemaking. (Table 2 presents a fuller statement of the bill.)

In a memorandum to the president, Eizenstadt (1979) characterized the bill as proposing the "most far-reaching changes in the regulatory process in decades." There was, he said, much press interest, and groups like the Business Roundtable and Common Cause were likely to endorse it. That there would be criticism from labor and environmental groups was a certainty. Eizenstadt (1979) continued: "But at least some of them recognize that this is a necessary and responsible alternative to reactionary anti-regulatory bills." In a handwritten note on the memorandum, Eizenstadt (1979) added: "This will be the most important anti-regulation thing we will do in your first term. It fits in exactly with the themes you're stressing."

In his message to Congress that accompanied the bill, President Carter stated that though much regulation was of vital importance to society, the overall regulatory system had become "burdensome and unwieldy." Following a discussion of actions that his administration already had taken to improve the

Table 2
The Regulation Reform Act

| **Regulatory analysis.** Agencies were required to prepare preliminary and final analyses for each major rule. The least-cost alternative for handling a problem was to be selected; if another alternative was chosen, an agency explanation was required. |
| **Regulatory agenda.** Agencies were directed to publish at least semiannually in the Federal Register an agenda of major rules they expected to propose or issue during the coming year. |
| **Regulatory structure.** Each agency was to create a single office with primary responsibility and management of the agencies' regulatory activities. It would apply statutory standards in supervising the insurance of significant rules (more numerous and less costly than major rules). |
| **Improved procedures.** Agencies were to set deadlines for the completion of rulemaking procedures and explain failure to meet deadlines. Formal or trial-type hearings were to put less reliance on cross-examination. Prehearing conferences, discovery, and other means could be used to quicken decisions. |
| **Review of existing rules.** Under the supervision of OMB, agencies were to review all major rules every 10 years. |
| **Judicial review.** Initial review of all rules was assigned to courts of appeals rather than district courts, as usually was the case. Regulatory analyses were not subject to review. |
| **Public participation.** Agencies were authorized to provide financial assistance to participants who would add to the fairness of the hearings or who personally could not afford to participate. |
| **Administrative law judges (ALJs).** More flexibility was provided for the selection and evaluation of ALJs, who would serve 7-year terms. They would be under the jurisdiction of a reconstructed Administrative Conference of the United States. |
regulatory system, he turned his attention to the future. He recommended that Congress take action on procedural reform, paperwork reduction, and the revision of individual regulatory statutes, as through the practice of sunset review. Concerning his procedural reform bill, he asserted that legislation was needed to set uniform standards for regulators and to help them continue to improve the regulatory process (Public Papers, 1980, pp. 491-495):

This bill strengthens the reforms introduced by E. O. 12044, makes them permanent, and applies them to the independent regulatory commissions. It also overhauls key parts of the Administrative Procedure Act, for the first time since 1946. It sets vital new rules for the regulators.

He concluded with a plea to Congress to refrain from including the legislative veto in reform legislation.

In the Senate, where interest in procedural reform was strong, hearings were slated quickly by the Governmental Affairs Committee, chaired by Senator Abraham Ribicoff (D, CT). Earlier in 1979, Ribicoff and Senator Charles Percy (R, IL), the ranking minority member on Governmental Affairs, had introduced their own reform bill (S262), which was very similar to the Carter administration's. Hearings also were conducted by the Judiciary Committee, which shared jurisdiction over regulatory reform. Senator Edward M. Kennedy (D, MA), the Committee's chair, was afflicted with presidential aspirations and wanted to counter the notion that he was too liberal by pushing regulatory reform. In the House, hearings were not held until November because the Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations was concerned with lobbying reform and other issues (Light, 1979, p. 2544).

Some of the ingredients in the regulatory reform policy soup were anathema to the Carter administration. However, there was substantial support in Congress for some of these ideas. The administration's bill provided a handy legislative vehicle that the proponents of these schemes could use in trying to secure their adoption. I will comment on some of these ideas here.

The Legislative Veto

Proposals here would permit one or both houses of Congress to veto particular rules proposed by regulatory agencies. The strongest version—the one-house veto—was promoted tirelessly by Representative Elliott Levitas (D, GA). President Carter was opposed adamantly to the legislative veto. In a June 1978 message to Congress, he denounced it as an "intrusive device" that infringed on the President's responsibility to execute the laws faithfully. Further, he contended, it would produce uncertainty, delay, and harm in the rulemaking process ("Carter sets stage for fight over congressional vetoes," 1978, pp. 1623-1624).

The Bumpers Amendment

Named for Senator Dale Bumpers, (D, AR), this proposed reform specified that when a regulation was challenged in court, there would be no presumption that it was valid. Moreover, the validity of a regulation could not be upheld unless it was supported by a preponderance of the evidence shown. The Bumpers Amendment was intended to abolish the traditional practice of judicial deference to the expertise of administrative agencies and make it easier to challenge
a regulation successfully (Lazarus, 1979c). Supporters included the American Bar Association and the Business Roundtable.

**Hybrid Rulemaking**

Favored by various business groups, this proposal to permit oral testimony and cross-examination in notice and comment or informal rulemaking would judicialize most rulemaking proceedings. Public interest groups and regulatory agencies viewed this as an attempt to complicate the regulatory process and ward off new regulations.

**Ex parte Communications**

Intervention by EOP officials in rulemaking proceedings following the close of the public comment period drew the ire of public interest groups and some members of Congress. Further, it was contended that they sometimes served as a conduit for the complaints and antiregulatory perspectives of business groups. One proposal here was that the regulatory agencies should be required to record and make public all communications about pending rules.

**Competitive Improvements**

Essentially, this proposal required that agencies proposing regulations make a finding that they had selected “the least anticompetitive alternative legally and practically available to achieve statutory goals.” To ensure compliance, agency actions would be subject to judicial review (Lazarus, 1979b). Senator Kennedy was a major sponsor of competition improvements legislation.

**Regulatory Policy Board**

This proposed executive office agency would combine the functions of the Regulatory Council, the Regulatory Analysis Review Group, and OMB’s regulatory oversight division. Made up of administration officials, RPB would have been assigned extensive power to supervise regulatory agencies.

**Regulatory Flexibility**

Strongly advocated by small business groups, regulatory flexibility legislation would require regulatory agencies to give special consideration to the impact of proposed rules on small businesses and perhaps tailor them accordingly. One version called for a small business impact statement for every rule with an “adverse impact on a substantial number of small businesses.”

The administration’s strategy during committee deliberations and mark-up of bills was either to prevent unwanted provisions from being incorporated in a general bill or, failing that, to be able to get a provision “domesticated” so that it would be tolerable. Much pulling and tugging went on among administration officials, committee members, and group representatives, especially from the business community, at the committee stage. Here it should be noted that labor, consumer, environmental, and other public interest groups generally were opposed to procedural reform legislation, viewing it as an attempt by the opponents of regulatory programs to sandbag them through procedural complexity and delay.

In early April 1980 the Senate Committee on Governmental Affairs finally was able to complete action and report out S262, which was quite similar in content to the administration’s bill. However, a month later, when the Senate Judiciary Committee reported S2147, jointly sponsored by Senator John Culver
(D, IA) and Senator Paul Laxalt (R, NV), the committee's ranking minority
member, the administration's fortunes took a downturn. Included in S2147 were
provisions providing for the Bumpers Amendment, hybrid rulemaking, a
Regulatory Policy Board, and the transfer of many cases involving regulations to

In a draft memorandum to the president, McIntyre, Eizenstadt, and Frank
Moore, the legislative liaison director, said that a "preliminary assessment" of the
bill's future indicated that, if passed, it would probably include expanded judicial
review of agency decisions, hybrid rulemaking, and a government-wide executive
veto. "Plainly, this prospect means that the Administration must now examine
whether it is possible or realistic to continue attempting to enact an acceptable
regulatory reform bill, or to stop promoting the progress of this legislation." Until a decision was made on this issue, they said, the administration should
"continue to participate actively in Hill consideration to maintain maximum
leverage" and "authoritatively set out criteria for an acceptable bill—in part to help
us get a good bill, but also to establish a politically persuasive basis for
withdrawing support for the project, if that becomes necessary. Much would
depend upon House committee action on the bill" (McIntyre, Eizenstadt, &
Moore, 1980).

Action on regulatory reform slowed during the summer of 1980. Negotiations between the Senate Government Affairs and Judiciary committees
dragged on for 2 months, with the participants becoming increasingly irritable.
Business groups and the Republicans attacked the administration for holding up
action on reform legislation. Indeed, the administration's strategy was to hold the
reform bill in the House Judiciary Committee, according to Lazarus. Also, they
wanted to stretch out Senate negotiations. He continued (Lazarus, 1980a):

To keep up the illusion that we are trying to move and improve our
own bill—and because we are highly likely not to be able to stop it ...
we continue to try as hard as we can to get legislative veto, Bumpers,
and the miscellaneous procedural junk off the regulatory reform bill
while slowing it down as much as possible. On this point, both
Culver and Laxalt now appear to want to pass the regulatory reform
bill, and the BRT really wants it; they have indeed just retained Tommy
Boggs to help them.

Dissension now appeared in the administration's ranks, with OMB pursuing a
strategy of trying to kill the reform bill. Although Lazarus thought that this
might not be a mistake, "the visibility and single-mindedness with which it is
being pursued is at least premature." He went on to explain OMB's position
(Lazarus, 1980a):

Various officials in OMB have come to this posture for varying
reasons: McIntyre, who could care less about legislative veto and
Bumpers, is paranoid about the RPB. Harrison [Wellford] is
philosophically opposed to the bill, and is sincerely worried about the
anti-regulatory junk that could get loaded onto the bill on the floor.
Jim Tozzi, a senior career official influential in their Regulatory Policy
Branch, wants to stop the bill so that he can mastermind a more right-
wing regulatory proposal next year. John White is generally fed up
with the whole mess. Grandquist has the same general view that I do—
that we need to keep our options open—but he is considered by McIntyre to be soft on DPS.

The administration now shifted its efforts toward securing the enactment of a moderate regulatory flexibility bill. The president had pledged his support for it to small business groups. Work on regulatory flexibility was done quietly to avoid attracting what were called “potential Christmas tree decorators,” who would try to attach their pet regulatory remedies to the bill (Lazarus, 1980b):

There will be no chance of our getting a tolerable bill down here if the current efforts become known beyond what we believe to be the small circle of people who are aware or suspect them. Within the government only OMB and ourselves know about these discussions. Outside, only the AFL-CIO knows.

Regulatory flexibility legislation passed the Senate and the House by voice votes on August 6 and September 9, respectively, and was signed into law by the president. Its enactment helped satisfy the desire for regulatory procedure reform. The Regulatory Flexibility Act specified that rulemaking actions likely to have a significant economic effect on a substantial number of small entities must be accompanied by analyses of those impacts. An analysis must include a statement of significant alternatives designed to minimize the economic impact on small entities that were considered and the reasons for rejection of any. Action or inaction under the Act is not subject to judicial review (Office of Management and Budget, 1980). Some members of Congress criticized the Act as weak and ineffectual, and as an attempt by the administration to derail more comprehensive reform legislation (Murray, 1980a, p. 2725). In practice, regulatory agencies often have responded perfunctorily to regulatory flexibility (United States General Accounting Office, 1995).

The House Judiciary Subcommittee on Administrative Law and Governmental Relations, chaired by Representative George Danielson (D, CA), reported the general regulatory reform bill on March 27, 1980. Efforts to attach a one-house legislative veto and the Bumpers Amendment to the bill in subcommittee were defeated, the former by a one-vote margin because of a telephone call by President Carter to the deciding voter. Action on the bill by the full Judiciary Committee was stalled by the efforts of the AFL-CIO and the administration, who did not believe that the committee could report a bill without objectionable amendments. In late August Rick Neustadt (1980) reported:

The bill remains on hold in the House Judiciary Committee. Rep. Danielson keeps saying that he can arrange things to keep legislative veto and other harmful amendments off the bill, but no one else sees how. (The only decent strategy in prospect now is to take a Senate-passed bill to the House at the end of the session and try to get the House to take it as is.)

The regulatory reform bill was reported by the House Judiciary Committee on September 28. It included provisions for a two-house legislative veto requiring the president’s approval and a weakened version of the Bumpers Amendment. Through some parliamentary maneuvering, however, Representative Levitas ensured that the bill would be open to a one-house veto amendment on the House floor. Because this version of the legislative veto was highly unacceptable
to the president and his congressional supporters, the House Rules Committee chose to prevent the reform bill from reaching the House floor (Murray, 1980b, p. 3576). Also, labor unions and public interest groups strongly opposed a provision that required agencies, when they adopted an alternative that was not the most cost-effective, to explain “how the regulatory aims of the relevant statute required the choice of the alternative” (Lazarus & Ludlam, 1980).

Late in September the Senate Governmental Affairs and Judiciary Committees finally were able to resolve their differences. Their compromise bill, however, proved to be unacceptable to business groups. The Business Roundtable and the AFL-CIO then reached separate agreement on another version of the bill. This version of the reform bill, in turn, was deemed unsatisfactory by the Governmental Affairs Committee and the Carter administration (Murray, 1980b).

When the 96th Congress adjourned, all of the general regulatory procedure reform bills expired. Congress, however, had adopted a second, more specialized piece of legislation that was tied to regulatory reform—the Paperwork Reduction Act. Signed into law by President Carter over the opposition of several executive departments, the act set as a goal a 25% reduction over the next 3 years of the paperwork burden imposed on the public by federal agencies. An Office of Information and Regulatory Affairs was established in OMB to review all information requests made on the public.

The Reagan Administration and Regulatory Reform

During his successful campaign for the presidency in 1980, Ronald Reagan had much to say about the need to reduce the burden that regulation imposed on the economy. Once in office he moved decisively and quickly to change the regulatory system. E. O. 12291, issued in February 1981, decreed that for all major rules (e.g., those with annual cost of $100 million or more) agencies had to perform a regulatory impact analysis, which included a cost-benefit analysis. Agencies were directed to select the alternative that imposed the least cost on the economy. OMB’s Office of Information and Regulatory Affairs was given broad power to supervise agency compliance with the E. O. (Friedman, 1995; McGarity, 1991). Secondly, an interagency Task Force on Regulatory Relief, chaired by Vice President George Bush, was created to monitor regulatory activity, review regulations already in effect, and recommend cancellation of unnecessary or excessively costly regulations. Thirdly, many of the people who were appointed to positions in regulatory agencies were unsympathetic with their regulatory programs.

Regulatory reform occupied a high spot on the congressional agenda again in 1981. Although there was some speculation that the Reagan administration was not strongly interested in reform legislation, preferring to accomplish its goals through administrative action, that seems not to have been the case. Administrative officials were opposed to the inclusion of the legislative veto and expanded judicial review of rules in legislation because they feared that these could interfere with executive actions. Business groups had lost none of their enthusiasm for procedural reform legislation, however.

In the Senate the Republicans now were in the majority. Senator Laxalt was chair of both the Judiciary Committee and its subcommittee on Regulatory Reform. Patrick J. Leahy (D, VT) was the ranking minority member. William V. Roth, Jr. (R, DE) was the new chair of the Governmental Affairs Committee.
All were committed to the enactment of regulatory reform legislation, as was Thomas F. Eagleton (D, MO), the ranking minority member on Governmental Affairs. A notable spirit of comity on the issue of reform appeared to prevail within the ranks of both committees (Weiss, 1981). Working with administration officials, the two committees were able to produce reform bills that were similar in most respects. A major difference was that the Governmental Affairs bill provided less opportunity for judicial review (by eliminating much of the Bumpers Amendment) than did Judiciary’s. A compromise bill subsequently was crafted by the committees’ staffs.

In March 1981, the reform bill went to the Senate floor for debate. By a voice vote, the Bumpers Amendment was attached to the bill. Another successful amendment provided for a two-house legislative veto of proposed rules. Subsequently the measure passed by a 94-0 vote.

The Senate version of the regulatory reform bill provided for some streamlining of procedures but also permitted cross-examination of witnesses for major rules. Agencies were directed to make preliminary and final analyses of major rules, including the use of cost-benefit analysis. Unless otherwise prohibited by law, the final analysis had to show that benefits would exceed costs and that the rule adopted was more cost-effective than the alternatives. (This essentially duplicated the requirements of E. O. 12291.) Agencies were directed to review existing major rules every 10 years. Courts were prohibited from making a presumption either in favor of or against an agency action. Moreover, a rule could be struck down by the courts if it were found to be arbitrary or capricious, unsupported by substantial evidence, or unsubstantiated by facts. Proposed rules were subject to a two-house legislative veto that did not require presidential approval. The bill covered most of the independent regulatory commissions as well as executive branch agencies (Granat, 1982b). In all, this bill would have been quite objectionable to the Carter administration.

In the House, the Judiciary Committee produced a more moderate bill. Many independent agencies were exempted from the cost-benefit analysis requirement. OMB was authorized to oversee, but not to enforce, compliance of executive branch agencies with the cost-benefit analysis requirement. Any exchange of documents between agencies and OMB on rulemakings was to be open to public inspection. Rules could be struck down by the courts if they were found to be arbitrary and capricious but not on the ground that they were not supported by substantial evidence (a more lenient standard). Proposed rules were subject to a two-house legislative veto that required the president’s approval. Representative Levitas was ready to offer a stricter legislative veto amendment whenever the bill reached the House floor.

The House bill was reported out on February 25, 1981. A few days later, its chief sponsor, Representative Danielson, resigned from the House to accept a California judgeship. This left the House bill without a strong advocate.

Opponents of regulatory reform legislation were able to keep the bill bottled up in the House Rules Committee. A coalition of environmental, labor, civil rights, and consumer groups contended that the bill would prevent adoptions of regulations needed to protect the public health and safety. A half dozen House committee chairs argued that it would undermine statutes within their jurisdiction, create delays in rulemaking, and give too much power to OMB. Although President Reagan said that he continued to want Congress to pass regulatory reform legislation, it no longer seemed to be of vital concern to the administration (Granat, 1982a). However, business groups continued to press for its enactment,
to ensure the permanence of changes in the regulatory process that were to their liking. They feared that future administrations might not be as favorable to their viewpoint on regulation.

The 97th Congress adjourned with the regulatory bill still lodged in the House Rules Committee. It dropped off of the policy agenda.

Reprise, 1995–1996

The 1994 congressional elections awarded the Republican party control of both chambers of Congress for the first time in four decades. The Contract with America, which most Republican House candidates had signed in September 1994 as a campaign ploy, called for the House to vote on a wide range of issues during its first 100 days. Regulatory reform was among them, because Republicans had longed to do something about the regulatory agencies. Among Republican ranks in the Senate, there also was much enthusiasm for regulatory reform. There were numerous tales of regulatory abuses and calls for action to bring the agencies to heel (O’Leary & Weiland, 1996).

In the House, Speaker Newt Gingrich (R, GA), floor leader Dick Armey (R, TX), and other leaders gave strong direction to the reform effort. A vast array of conservative and business groups, and some conservative Democrats, provided support. A bill providing for regulatory overhaul was put together quickly from ideas that had been floating around in the policy soup for years. These included requirements for risk assessment, cost-benefit analysis, compensation for the government’s “taking” of private property, and paperwork reduction (Congressional Quarterly Almanac, 1996, pp. 3.3–3.15). (The reform package is summarized in Table 3.) This legislation was given cursory committee consideration and passed by overwhelming House majorities. Most efforts by opponents—almost entirely Democrats—to moderate the legislation were rejected.

<table>
<thead>
<tr>
<th>Table 3</th>
<th>House Regulatory Reform Program, 1995</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk analysis for all rules with an annual impact of $25 million or more. Much of the data and variables to be considered were specified.</td>
<td></td>
</tr>
<tr>
<td>Cost-benefit analysis of all rules with an annual impact of $50 million or more. Agencies directed to explore alternatives for action, including nonregulation.</td>
<td></td>
</tr>
<tr>
<td>Agencies could be sued because proper risk analysis and cost-benefit analysis procedures were not followed.</td>
<td></td>
</tr>
<tr>
<td>Peer review of health, safety, and environmental rules with an annual impact of $100 million or more. Persons with financial interests in regulations could participate as long as their interests were disclosed.</td>
<td></td>
</tr>
<tr>
<td>If government actions under the Endangered Species Act and some other laws reduced the value of affected property by more than 20%, government compensation was required.</td>
<td></td>
</tr>
<tr>
<td>Small businesses could sue to enforce requirements of the Regulatory Flexibility Act.</td>
<td></td>
</tr>
<tr>
<td>Agencies should reduce the paperwork burdens that they imposed on businesses and individuals.</td>
<td></td>
</tr>
</tbody>
</table>
In the Senate, majority leader Bob Dole (R, KS), who was influenced by presidential aspirations, sponsored a sweeping reform bill similar to the House bill. A couple of other bills, somewhat more moderate than Dole’s bill, also were given some consideration. When Dole’s bill reached the Senate floor, he made some changes in it to pick up moderate Republican support and to overcome a Democratic filibuster. Three attempts to end debate by cloture failed, however, the last by a 58-40 vote, with all of the “no” votes cast by Democrats. Dole declared the bill dead for the year and it has not since been revived. Although the Clinton administration opposed the Republican regulatory reform program, this did not appear crucial in its failure to win enactment.

The 104th Congress did pass two more limited pieces of legislation. Strongly supported by both parties, as well as the Clinton administration, the Paperwork Reduction Act was renewed in April 1995. It strengthened the original act and set paperwork reduction goals for agencies of 10% each for 1996 and 1997 and 5% annually for the years 1998-2001. Paperwork reduction is not restricted to regulatory agencies; indeed, the vast share of government paperwork is generated by the Internal Revenue Service. In any event, paperwork reduction has high symbolic value.

In March 1996, more important regulatory reform legislation was enacted as part of a law increasing the national debt limit. This legislation, which also received strong bipartisan support, was entitled the Small Business Regulatory Enforcement Fairness Act (SBREFA). The first part authorized lawsuits to compel agency compliance with the Regulatory Flexibility Act, directed agencies to get advice from small businesses to improve regulatory impact analysis, and created an ombudsman in the Small Business Administration to work with agencies to protect small business interests. This part is testimony to the political influence within Congress of small business interests (Sargentick, 1990).

The second part of SBREFA provided for congressional review of new rules emanating from regulatory agencies. (In the Senate, this was approved initially by a vote of 100-0.) All rules must be submitted for review by the General Accounting Office and Congress, along with such information as a “concise general statement” about a rule and a cost-benefit analysis, if any. Major rules (those having an annual impact of $100 million or more) are delayed for at least 60 days before they take effect. If Congress passes a joint resolution of disapproval for a rule, and it is not vetoed by the president, the rule perishes. An agency may not reissue a rule “in substantially the same form.” Actions under this review process are not subject to judicial review (Cohen, 1997).

The failure of the 104th Congress to enact general reform legislation and the adoption of these two laws has not quelled interest, especially on the part of Republicans, in regulatory reform. During the 105th Congress (1997-1998), however, it was an issue with reduced salience and support (Freedman, 1998). Once again, the effort to produce general procedural reform legislation fizzled.

The Republicans’ 1995–1996 campaign for regulatory reform was driven for the most part by a desire to restrict and reduce agency regulatory activity. The more zealous antiregulatory activists made no bones about this (Lee, 1995; Wall Street Journal, 1995). Comparatively little was heard about improving the quality of regulations. By imposing a variety of procedural requirements and constraints on agencies, and by creating more opportunities for judicial challenges of their actions, relief in the form of less regulation could be provided for the regulated. Some opponents called this an attempt to produce “paralysis by analysis” in the regulatory process (Vladek & McGarity, 1995).
Concluding Comments

Since the early 1970s, there has been a substantial accumulation of legislative and executive actions imposing procedural requirements and limitations on regulatory agencies. Legislation includes the Federal Advisory Committee Act, Paperwork Reduction Act, Regulatory Flexibility Act, and SBREFA, plus more particularized statutes such as the Federal Trade Commission Improvement Act. Moreover, presidential review of rulemaking, including the use of cost-benefit analysis, has become institutionalized (Duffy, 1997; Friedman, 1995). All of this has added significantly to the procedural requirements confronting agencies, which once were affected primarily by the Administrative Procedure Act.

The impact or consequences of these procedural controls have not been well examined. (Some, of course, are recent in origin.) Do they reduce the quantity of regulation? Do they delay the issuance and enforcement of rules? Do they improve the quality of regulations? Quantitative research can provide answers of a sort to the first two questions, and some such work has been done. It is my belief, however, that not much is to be learned by counting the pages in the Federal Register. Questions such as the third one, on the quality of regulation, are tougher to handle. How does one measure the "quality" of regulations? To what extent are regulations "improved" by cost-benefit and risk analysis? Here are challenges for future researchers.

Underlying the controversy over regulatory procedure reform is disagreement as to what extent government or the "free market" should control the conduct of private economic activity. This issue could be confronted head-on by policymakers and others by focusing on the scope and content of such laws as the Clean Air Act and the Occupational Safety and Health Act. However, because there appears to be much public support for social regulation (Shapiro & Gilroy, 1984), the likelihood of major revisions in such statutes is slim. Consequently, opponents and critics of regulatory programs have sought to achieve their restrictivist goals indirectly, by procedural restrictions, budget cutbacks, restrictive appropriations bill riders, and other means. Their chances of success are greater here because they can capitalize upon public distaste for the bureaucracy, which is an endemic feature of American political culture (cf. Goodsell, 1994).

This raises an issue of political morality. Is it right or appropriate to cripple substantive policies by procedural ploys? What we encounter sometimes is a situation in which Congress enacts important legislation such as the Clean Water Act and at a later point efforts are made to sandbag it by procedural complexities, budget reductions, and appropriations riders, which have lower political visibility and hence some likelihood of success. Is all that is legal or constitutional also ethical, or should public officials be expected to perform at a higher level of morality? Many political scientists, among others, are uncomfortable dealing with ethical issues, yet this matter of indirectly trying to maim or kill regulatory policies begs for more scholarly attention.

A substantial body of literature on agenda-setting is extant, notably on how issues achieve agenda status and, to a lesser extent, why some issues are denied access to the agenda (Cobb & Elder, 1983; Kingdon, 1995). There is nothing of which I am aware, however, that examines why some issues, once prominent on an agenda, fall from grace and lose agenda status. To say simply that they lost political support is superficially to gloss over a complex situation.
Regulatory reform between 1978 and 1982 had much political support, but conflicts between the executive and Congress and within Congress prevented agreement on general legislation. Moreover, the legislative fatigue produced by this struggle, plus the diversionary effect of the Reagan administration's strong posture on presidential review of rulemaking, are at least partial explanations why regulatory reform fell off the policy agenda in late 1982. In 1977, legislation to create an Agency for Consumer Advocacy suffered a surprise defeat in the House and perished. Many issues have suffered defeats, often several, have regained agenda status, and even been enacted into law. Why was one defeat fatal to the proposed Agency for Consumer Advocacy?

Regulatory reform appears in the late 1990s to have lost its priority position on the agenda after clearly having had majority support in both the House and Senate. What is the explanation? The enactment of some minor legislation? The effects of the Madisonian system? Overreaching by regulatory reform (read relief) zealots? Can we develop a theory of agenda status loss not simply for regulatory issues but for issues generally?

As these comments indicate, the struggle over regulatory procedure reform profitably can be viewed from several perspectives, among them the appropriate regulatory role for government, political morality, and agenda status (both gain and loss). These topics merit more attention from public policy scholars.

***

James E. Anderson is professor of political science at Texas A&M University.

References

Policy Studies Journal, 26:3


