

Antonin Scalia on Independent Agencies

ANTONIN SCALIA: I also want to respond to Jim Tozzi's points. There is an explanation other than isolation from OMB for the relative deregulatory lethargy of the independent agencies in the present administration.

It has to do with a division within the ranks of the administration's regulatory reformers though not, in my opinion, the split which George Eads suggests between a "regulation-should-be-efficient" group on the one hand and a "regulation-is-inherently-evil" group on the other. I see the division this way:

One group consists of what you might call "principled deregulators" -the Chris DeMuths and Jim Tozzis who want market-based solutions, cost-benefit analysis, elimination of entry and exit barriers, and so forth. Then there's another regulatory reform group, forming a much older part of the traditional Republican constituency. It consists of the business interests, large and small-people who haven't given any systematic thought to regulation in general, but know that in the past few years things have gotten out of hand. And the respects in which it has gotten out of hand have nothing to do with the old "economic" regulation-the entry barriers and anticompetitive restraints directed by the ICC, the banking agencies, and so forth. Towards those aspects of regulation this business-oriented group is at least indifferent, and perhaps even well disposed. When they talk about deregulation, they're talking about the health and safety regulation that has burst forth in the past decade-the National Environmental Policy Act, the Occupational Safety and Health Act, the Consume\Product Safety Act, and so forth.

There is, by the way, a similar split within the regulatory reform ranks in the Democratic party. There also the "principled deregulators" are represented (George Eads and Fred Kahn surely qualify). But their colleagues in reform are almost the opposite of the second Republican group-the generally anti-business, no-growth, "consumerist" forces typified by Ralph Nader. These people can see quite clearly the inefficiencies of the old economic regulation (or at least many of them), but are generally well disposed towards health and safety regulation. I would not go so far as to say that the "principled deregulators" in either party are unable to make any progress on their own, but they can move much more rapidly in the particular areas favored by their respective allies. So one would expect the Democrats to make their best progress at deregulation in certain economic fields, and the Republicans in the areas of health and safety.

All this is relevant to the performance of independent regulatory agencies as compared with that of executive branch agencies in the current administration for a simple reason: It so happens that a disproportionate amount of the old economic regulation is administered by the independents (ICC, FERC, SEC, FCC, FHLBB, et cetera) while almost all of the health-and-safety regulation is administered by executive branch agencies (OSHA, EPA,Interior, NHTSA, et cetera). That, more than the lack of direct OMB contacts with the independents, accounts for the varying record to date