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REGULATORY REFORM IN THE REAGAN ERA

THOMAS O. MCGARITY*

I. INTRODUCTION

The three great social reform movements of the twentieth century—the Progressive movement at the beginning of the twentieth century; the New Deal of the 1930s; and the Civil Rights/Consumer/Environmental movements of the late 1960s and early 1970s—were social responses to perceived abuses of economic and political power by private entities. "Fairness," "justice," "equality," were dominant themes of these movements. The reforms accomplished by these movements are etched in the laws of the land and institutionalized in regulatory agencies such as the Interstate Commerce Commission, the Federal Trade Commission, the Food and Drug Administration, the Environmental Protection Agency, and the Occupational Safety and Health Administration.

Lawyers dominated the process of institutionalizing reforms. They wrote the laws that empowered the regulatory agencies; they were often chosen to lead those agencies; and they have dominated the intricate process of crafting the thousands of rules, regulations, and guidelines that constitute the vital connective tissue between the social commands embodied in the reform legislation and the socially desirable conduct of the regulated industries.

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During the late 1970s and early 1980s, we have observed the stirrings of a social movement of a very different sort. This budding movement has developed in response to perceived weaknesses in the regulatory process as it has evolved through the years. Government power, not private power, is the concern of these new reformers. "Freedom," "accountability," "efficiency," and "economic growth" are the dominant themes. The regulatory agencies that were once the temples of the earlier social reform movements have become the targets of the modern "regulatory reform" movement.

The regulatory reformers are not for the most part lawyers. The new movement is dominated by economists and policy analysts. The new movement is supported not by unions, civil rights groups, consumer and environmental groups, and other activists, but by businessmen, state and local officials, and trade associations. These regulatory reformers have a positive antipathy for lawyers, with their nitpicking concern for precision in crafting regulatory requirements and their preoccupation with "enforceability." They hold the view that incentives, not rules, should guide business conduct and that negotiation among the principals, not litigation between the lawyers, should determine disputes. Most importantly, the regulatory reformers believe that there should be fewer rules and, consequently, fewer lawyers.

What, then, is this social phenomenon that threatens to put so many attorneys out of work? What is the nature of this reaction against the institutional embodiment of the earlier social reform movements? What are the characteristics of this regulatory reform movement? And how should we react to it?

II. Economic Regulation and Social Regulation

A good starting point is the familiar distinction between two types of regulation—economic regulation and social regulation. Economic regulation is concerned with preventing undue economic concentration, regulating natural monopolies, eliminating economic windfalls, ensuring adequate distribution of goods and services, and reducing fraud in economic transactions. Economic regulation comprised the bulk of the social reforms of the Progressive and New Deal eras, although there are exceptions such as the Pure Food and Drug Act. Economic regulation is typically implemented through "independent" commissions composed of several members who are

not subject to the direct control of the President. These commissions are typically given a broad mandate to regulate "in the public interest." 2 Revisionist historians have suggested that some of these agencies, such as the Interstate Commerce Commission and the Federal Maritime Commission, may have been created at the behest of the regulated industries to protect individual companies from competition. 3 Certainly a case can be made for the proposition that over time, the economic agencies lost their regulatory fervor and became captives of the industries that they were charged with regulating. 4

Social regulation, by contrast, is concerned with reducing health and environmental risks, preserving civil rights and equal opportunity, and generally controlling the extent to which one group of persons enjoys the benefits of a technology or enterprise without sharing in its costs. Much of the current social regulation arises out of statutes that were enacted in the early 1970s as a result of the social ferment of the 1960s.

These newer social regulatory agencies, with some minor exceptions, are not independent multimember agencies; rather, the heads of these agencies serve under a cabinet secretary or directly under the President. The discretion of the social regulatory agencies is often cabined by explicit statutory directives, and it is even further limited by provisions empowering ordinary citizens to sue the agency heads to compel them to perform their duties. 5

This distinction between economic regulation and social regulation is important for an examination of any regulatory reform efforts because the two types of regulation invoke wholly different kinds of policy considerations and interest groups. The Reagan Administration's regulatory reform efforts have achieved a greater degree of success in the area of economic regulation in part because the interplay of policy considerations and interest groups has not generated the same resistance to change in that area as it has in the area of social regulation. This Article, however, will focus upon social regulation, in part because the Reagan Administration's efforts

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2. See generally G. EADS & M. Fix, supra note 1, at 12-15 (distinguishing between economic and social regulation); R. LITAN & W. NORDHAUS, supra note 1, at 6 (same).
5. See generally G. EADS & M. Fix, supra note 1, at 12-15 (identifying characteristics of social regulation).
to implement social regulation have been more controversial and, therefore, offer more opportunities for insights into the process of regulatory reform.

### III. An Anatomy of Regulatory Reform

Given the wide variety of approaches that we have developed for regulating undesirable social conduct, it should not be surprising that regulatory reform is not a monolithic notion. The term "regulatory reform" masks a host of sometimes complementary and sometimes contradictory notions. Therefore, before examining regulatory reform in the specific context of the Reagan Administration, I would like to suggest a simple "taxonomy." The various approaches to regulatory reform can be divided into five broad categories: (1) goal-oriented substantive regulatory reform; (2) means-oriented substantive regulatory reform; (3) structural regulatory reform; (4) procedural regulatory reform; and (5) cognitive regulatory reform. The following discussion will elaborate on these five categories.

#### A. Substantive Regulatory Reform

Substantive regulatory reform, which includes both goal-oriented substantive regulatory reform and means-oriented substantive regulatory reform, involves changing the substantive output of an agency's decisionmaking process. Substantive regulatory reform can be accomplished directly through changes in the statutes that an agency administers, or it can come about through changes in the administration of those statutes. Legislative changes result from the pulls and tugs of the political process. Administrative changes can be effected in a number of ways, such as through personnel changes, direct supervision of upper level decisionmakers, budget cuts, and failure to enforce existing standards. An agency's discretion to bring about substantive regulatory reform administratively, however, is limited by the terms of the statutes that it administers.

1. **Goal-Oriented Substantive Regulatory Reform.**—Goal-oriented substantive regulatory reform, as the term implies, is aimed at changing the long-range goals that an agency seeks to implement. Since most statutes do not have a single goal, proponents of goal-oriented substantive regulatory reform frequently urge that the

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6. See generally Id. at 163 (noting the Reagan Administration's choice of a primarily administrative, rather than legislative, approach to regulatory change).
agency adopt a different mix of its often competing goals. The electric utility industry, for example, does not maintain that the goal of the Clean Air Act should no longer be to clean the air. Rather, the industry maintains that economic progress is also a goal of the Act, and is one to which the EPA is giving short shrift.

2. Means-Oriented Substantive Regulatory Reform.—Means-oriented substantive regulatory reform does not disturb the agency’s predetermined goals, but focuses upon changes in the vehicles for attaining those goals. Economists, for example, have long argued that effluent charges or marketable pollution permits would achieve the same degree of environmental quality as current technology based standards at a fraction of the cost.\(^7\) Similarly, some regulatory reformers have suggested that a lottery or an auction for allocating scarce spots on the radio frequency spectrum would be greatly preferable to lengthy licensing proceedings, in which an agency must decide which among many competing candidates will best serve the “public interest.”\(^8\) Other regulatory methods include voluntary standard-setting by trade associations or other private entities, and standard-setting through negotiations among the affected parties.\(^9\)

B. Structural Regulatory Reform

Structural regulatory reform involves altering agency decision-making structures so that different institutional actors play greater or lesser roles. Structural regulatory reformers stress the concept of “accountability.” One example of structural regulatory reform would be a proposal to convert an “independent” agency into an executive agency. Independent agencies are less accountable to the President because their members cannot be hired and fired at will.

Agencies already within the executive departments can be made more accountable to the White House through mechanisms for executive review. If, for example, the agency rulemaking process is structured in a way that requires White House sign-off before the

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agency may propose a rule, White House officials as a practical matter can achieve a greater degree of policy input than they could were they relegated to the status of an equal participant in the rulemaking process.

Similarly, structuring the process so that either Congress or a congressional committee has veto power over agency rulemaking can enhance agency accountability to Congress.\(^{10}\) Even in the absence of a direct veto, Congress and its committees can still enforce agency accountability through legislative oversight and active involvement in the appropriations process. In either case, by holding the agencies to account, members of Congress expand their influence over the agencies' substantive output.

Judicial review is another vehicle for structuring accountability into the agency decisionmaking process. Judicial review ensures agency fidelity to the terms of its statutory commands and forces the agency to measure its actions against indicia of the public interest that are not overtly political. In addition, judicial review requires the agency to lay a factual predicate for its actions or to explain why prudent public policy must substitute for facts when the state of scientific or economic knowledge is too uncertain to support hard findings of fact. Judicial review, therefore, is a way of holding an agency accountable not to a particular institution, but to an ideal of structured, rational thought.

A final vehicle for structuring accountability into the agency decisionmaking process is direct public participation in that process. Allowing representatives from all potentially affected constituencies to participate in an open decisionmaking process helps ensure that all relevant points of view are considered and enhances public acceptance of the outcome.

These four devices for enhancing structural accountability can, of course, conflict with one another. For example, a conservative

President may not want the executive agencies to be more accountable to a liberal Congress, and vice versa. Similarly, enhanced judicial review may frustrate the political agenda of either the President or the Congress, and full public participation can hamper the behind-the-scenes activity that enables congressional and executive actors to have a substantive impact on an agency’s output.

C. Procedural Regulatory Reform

Suggestions for procedural regulatory reform fall generally into two categories. Many regulatory reformers would have us (1) reduce the extensive information requirements that agencies place upon regulated entities, and (2) simplify the often convoluted and costly procedures that impede administrative decisionmaking.

Although information is the lifeblood of a regulatory agency—and the primary source of any agency’s information is the regulated industry itself—furnishing an agency with vital statistical information often results in burdensome paperwork requirements on the regulated companies. The regulatory reform issue here is not whether the regulated industry should be required to provide information to the agencies; rather, it is whether the marginal value of a particular informational requirement exceeds its marginal cost to the industry.

Similarly, while the purpose of administrative procedures is to foster a sense of fair treatment in both the regulated industry and the public, procedural protections can also cause, and even invite, costly delay. The issue is whether devices for greasing the procedural skids can be found that do not unduly impede the legitimate expectations of all affected parties to have a fair opportunity for input into the decisionmaking process.

Like structural accountability devices, procedural reforms can have an important impact upon the agency’s substantive output. Cutting off an agency’s information flow can leave it “at sea” with no sense of direction. Conversely, providing more information to an agency can incite it to action. Thus, manipulating administrative procedures can frustrate an active agency or stimulate a moribund one. As Congressman Dingell has aptly put it, “I’ll let you write the substance on a statute and you let me write the procedure, and I’ll screw you every time.”

D. Cognitive Regulatory Reform

According to many prominent regulatory reformers, the problem with regulation is that it is not sufficiently analytical.\(^2\) The agency’s thinking process is constantly muddled. Agencies do not establish clear goals and priorities and measure their everyday decisions against those overarching considerations. Because agencies do not ask the right questions, their information-gathering efforts are often wasted. They do not process the information that they do have adequately by using all available quantitative techniques, and they do not structure the regulatory issues in ways that are meaningful to the decisionmaker. Most importantly, agencies do not think rationally. Extraneous political considerations cloud clearheaded policy analysis. According to these reformers, agencies must change the way that they address regulatory problems. The answer is a greater reliance upon the budding art of “regulatory analysis.”

Many cognitive regulatory reformers are economists and graduates of schools of public policy. The brand of analysis that they advocate is not unlike the “legal analysis” that law professors attempt to pound into first-year law students. Problems are broken down into their constituent parts and analyzed. Alternative solutions to the problems are identified, and the policy implications of the options are carefully scrutinized. An acceptable solution is ultimately arrived at and explained. However, cognitive regulatory reformers would add to this thinking process a healthy dose of quantitative analysis. Rather than analyzing the broad “pros” and “cons” of alternative regulatory approaches, cognitive regulatory reformers would have the agencies quantify their “costs” and “benefits” and thereby, in the minds of some critics, eliminate from the equation unquantifiable variables such as “justice” and “fairness.”\(^3\)

IV. Regulatory Reform at the Outset of the Reagan Era

Having established an analytical framework for comprehending the wide variety of ideas that fall under the umbrella of “regulatory


reform," it is now possible to examine and evaluate the Reagan Administration's regulatory reform efforts in a more thoughtful manner. While the following description is by no means intended to be a comprehensive description of those efforts, it should convey the flavor of the major thrusts of the Reagan Administration in the area of regulatory reform.

At the outset of the Reagan Administration, regulatory reform had an extremely high priority. President Reagan made "regulatory relief" one of the four "cornerstones" of his "economic recovery program." He created a highly visible Presidential Task Force on Regulatory Relief, which was charged with coordinating the Administration's regulatory reform efforts. The Task Force was also charged with resolving interagency disputes as they arose in the context of particular rulemaking initiatives.

The primary focus of the Reagan Administration's early efforts at "regulatory relief" was goal-oriented substantive regulatory reform of social regulation. Rather than recasting regulation in order to make it more efficient and effective, the Reagan Administration at first attempted simply to eliminate it. Indeed, a convincing case can be made that the Reagan Administration, at the outset, intended to use every regulatory reform tool available to it in a single-minded effort to change the regulatory goals mandated by Congress during earlier periods of social reform to parallel more closely the needs and desires of the regulated industries.


A. Goal-Oriented Substantive Regulatory Reform

The Administration "hit the ground running" with its "regulatory relief" efforts. It placed at the head of the important social regulatory agencies hard core but inexperienced "regulatory relievers." Although ideologically committed to rolling back regulatory burdens, these appointees were, with a few important exceptions, unaware of or uninfluenced by the historical context of the institutions that they were appointed to lead. Some were unsympathetic to the earlier social movements that resulted in the creation of their agencies. Many were distrustful of their career staffs. They were aloof, politically unsophisticated, and to a surprising degree unqualified to perform their statutory responsibilities.18

The budgets of all the important social regulatory agencies were cut severely in the first Reagan budget.19 While this budget-cutting was part of an overall effort to reduce government spending, it is clear that the Administration had a second agenda. An early Office of Management and Budget (OMB) briefing package boasted that "fewer regulators will necessarily result in fewer regulations and less harassment of the regulated."20 This prediction became reality when several of the major regulatory agencies went virtually moribund as they attempted to absorb severe budget cuts during the first two years of the Administration.21

Many of the social regulatory agencies also cut back severely on their efforts to enforce regulations that were currently on the books.22 At times, agencies were so confident that a particular rule would soon be amended that they would decline to enforce it during the rulemaking process.23 This approach, however, exposed the agencies to charges that they had prejudged the outcomes of future rulemaking efforts and that they were failing in their duty to enforce

18. See G. EADS & M. FIX, supra note 1, at 145 (Reagan Administration appointed personnel "with surprisingly little experience in the technical fields regulated by their agencies or offices").
22. See generally G. EADS & M. FIX, supra note 1, at 191-206 (discussing new enforcement policies and practices under the Reagan Administration).
23. See A SEASON OF SPOILS, supra note 16.
the law. At other times, the agencies would explain that they preferred the less adversarial approach of working with regulated industries to solve their problems.\textsuperscript{24} This approach resulted in complaints that the agencies were "coddling" lawbreakers.\textsuperscript{25} Viewed broadly across many agencies, it became increasingly apparent that some were attempting to alter their administrative goals through the exercise of their discretion not to enforce rules that had been adopted in pursuit of goals that the agencies now rejected.

The actions that the agencies did take during those early years were often deregulatory in nature. The incoming Administration placed an immediate "freeze" upon the Carter Administration's ill-conceived "midnight regulations"\textsuperscript{26} and a Task Force on Regulatory Relief, headed by the Vice President, promulgated several "hit lists" of other regulations that were especially displeasing to the regulated industries.\textsuperscript{27} In particular, the automobile industry was the target of a special regulatory relief effort: an Auto Industry Task Force worked with the Presidential Task Force to assemble a list of changes in existing regulations aimed at reducing regulatory costs for the industry.\textsuperscript{28} Moreover, throughout the government agencies obligingly began to dissemble the existing regulatory fabric by proposing revisions to existing rules and refusing to enforce them while the revisions were pending.\textsuperscript{29}

Potentially the most significant action during this period was the signing of an executive order that required agencies to calculate the costs and benefits of each regulatory option for major rules and

\textsuperscript{24} See, e.g., Wines, They're Still Telling OSHA Horror Stories, But the "Victims" Are New, \textit{13 Nat'l J.} 1985 (1981).


\textsuperscript{27} During 1981 and 1982, the Task Force on Regulatory Relief designated a total of 119 rules and regulations for agency reconsideration. \textit{TASK FORCE REPORT, Aug. 1983, supra note} 26, at 5. See generally G. Eads & M. Fix, \textit{supra note} 1, at 118-119 (discussing broad measures of the activities and influence of the Reagan regulatory oversight process).

\textsuperscript{28} See Office of the White House Press Secretary, Summary Fact Sheet, President Reagan's Program for the U.S. Automobile Industry, \textit{reprinted in Regulatory Relief Materials, supra note} 14, at 103.

forbade agencies to adopt an option whose benefits did not exceed its costs, unless specifically required to do so by statute.\textsuperscript{30} The order further required the agency to adopt the \textit{most} cost-beneficial option.\textsuperscript{31} While the new executive order was perhaps more important as a vehicle for cognitive regulatory reform and, to a more limited extent, structural regulatory reform, it had the practical effect of virtually guaranteeing a slow-down in the issuance of new social regulations. Deregulatory actions, on the other hand, breezed through the review process established by the executive order.\textsuperscript{32}

Finally, the Administration established a legislative agenda for regulatory relief.\textsuperscript{33} At the top of the list was the Clean Air Act.\textsuperscript{34} All of the major players, both inside and outside the government, watched the progress of the Administration's Clean Air Act initiative as a bellwether for how the Administration's other regulatory relief efforts would fare. The Environmental Protection Agency (EPA) leadership carefully solicited the input of the regulated industries and was chary of the advice of the EPA professional staff.\textsuperscript{35} At the same time, the Administration encouraged the new Senate Subcommittee on Regulatory Reform to draft an omnibus regulatory reform act incorporating several prominent reform initiatives into the Administrative Procedure Act, which would make them binding on all federal regulatory agencies.\textsuperscript{36} Although not directed to any particular substantive statutory commands, most of the prominent changes in administrative law featured in the proposed legislation would have the practical effect of impeding the flow of federal regulations.

\textsuperscript{31} \textit{Id.} at 128 §2(d).
\textsuperscript{32} \textit{Cf.} J. CLAYBROOK, \textit{supra} note 17, at xxv (cost-benefit analysis not applied to programs favored by business).
\textsuperscript{33} James C. Miller, Administrator for Information and Regulatory Affairs, Office of Management and Budget, testified that the Administration feels strongly that "there is a need for substantive reform of the organic statutes, that is where the key payoff is going to be." Regulatory Procedures Act of 1981: \textit{Hearings on H.R. 746 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 97th Cong., 1st Sess.} 686 (1981).
\textsuperscript{34} \textit{See} Statement by the Vice President Regarding Progress Made in Achieving the President's Goal of Regulatory Relief (June 6, 1981), \textit{reprinted in Regulatory Relief Materials, supra note 14}, at iv.
\textsuperscript{35} \textit{See} A \textit{Season of Spoils, supra} note 16, at 31-38.
\textsuperscript{36} \textit{See S. 1080, 97th Cong., 1st Sess., 127 CONG. REC.} 7938 (1981); Statement by the Vice President Regarding Progress Made in Achieving the President's Goal of Regulatory Relief (June 6, 1981), \textit{reprinted in Regulatory Relief Materials, supra} note 14, at iii.
B. Means-Oriented Substantive Regulatory Reform

The early Reagan Administration initiated some modest means-oriented substantive regulatory reform efforts with respect to social regulation. EPA successfully expanded the "bubble concept"—allowing increases in emissions from one unit in an existing source so long as they are offset by reductions from another unit within the same source—to areas of the country that had failed to attain air quality standards. 37 EPA also established an Office of Regulatory Reform to explore other market-oriented alternatives to "command and control" regulations. Agency policy analysts persuaded the technical staff in the Office of Mobile Sources to allow refineries to "trade" allowable amounts of lead in gasoline as a method for ameliorating the harsh immediate impact of the agency's lead phasedown rule. 38 The Office of Safety and Health Administration (OSHA) suggested several "performance based" options for its hazard identification standard for warning workers of toxic substances in the workplace. 39 In addition, the Consumer Product Safety Commission began to experiment with voluntary standard-setting. 40 None of these relatively modest reforms, however, found its way into legislation.

C. Structural Regulatory Reform

The Reagan Administration's efforts at structural regulatory reform have been devoted almost exclusively to increasing executive oversight of the executive federal agencies. Executive Order 12,291 required that every proposed and final rule be submitted to OMB for review, and OMB was empowered to return the rule to the agency if it found the rule to be inconsistent with the Executive Order. 41 Through this vehicle, OMB became very active in the rulemaking process, although the full extent of its participation has been a matter of some debate. To a much greater extent than in previous administrations, however, the OMB review role was played

38. Telephone interview with Robert Weissman, Special Assistant to the Director, Mobile Source Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (Jan. 6, 1984).
behind closed doors\textsuperscript{42} and as a result, beneficiaries of social regulation and the general public could not hold OMB accountable. Moreover, although agency heads usually won when they cared enough about an issue to pursue it at higher levels within the Administration, OMB undoubtedly had a profound impact upon the substance of agency rules, if only because of the \textit{in terrorem} advantage it possessed as the organization that set agency budgets.

The Administration in general adopted a very one-sided approach toward public participation as an accountability device. Representatives of the regulated industries participated in assembling the Vice Presidential Task Force’s “hit list.” They were also afforded unprecedented access to the decisionmaking process of many social regulatory agencies. For example, EPA held private “decision conferences” with representatives of pesticide registrants to discuss the regulatory actions that the agency should take.\textsuperscript{43} In addition, industry critiques of both proposed and final rules were welcomed at OMB during its review process. On the other hand, representatives of groups that benefitted from social regulation were initially excluded from the decisionmaking process. Finally, the Administration was ambivalent toward enhanced judicial review of administrative actions and actively opposed the congressional veto before its somewhat unexpected demise.\textsuperscript{44}

\textbf{D. Procedural Regulatory Reform}

Early in its tenure, the Reagan Administration initiated extensive paperwork reduction efforts,\textsuperscript{45} and although it can point to these efforts as one of its “success stories,” it has done very little in the way of simplifying agency procedures. The Administration’s only major effort in this area has been an attempt by the Nuclear Regulatory Commission to streamline the procedures for licensing

\textsuperscript{42} See G. EADS \& M. FIX, supra note 1, at 108.


\textsuperscript{44} The Regulatory Reform Act: Hearing on S. 1080 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 548 (1983) (statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy). See also R. LITAN \& W. NORDHAUS, supra note 1, at 118-19 (discussing alternative proposal to enhance judicial review of agency decisions).

nuclear power plants.\textsuperscript{46} However, this effort has not had a noticeable impact on the speed with which the Commission awards operating licenses for plants currently under construction. Moreover, it is unlikely to have an impact on decisions to build new plants because utility companies will probably not schedule new plant construction until they are satisfied that they can recover their costs from consumers.

\textbf{E. Cognitive Regulatory Reform}

Perhaps the most important component of Executive Order 12,291 was its requirement that agencies prepare a regulatory analysis of all "major" rules.\textsuperscript{47} This requirement has been strictly enforced by OMB during the rulemaking review process. Although the regulatory analysis requirement originated in earlier administrations, the Reagan Administration elevated it to a position of greater prominence. Moreover, the new Executive Order explicitly required the agencies to analyze the benefits of their regulations as well as the costs, and OMB further required that the benefits be reduced to present value using a very high discount rate of ten percent.\textsuperscript{48} OMB thus forced agencies to attach monetary values to human morbidity and mortality, and it ensured that measures designed to protect humans in the distant future would not count for much in the present cost-benefit calculus.

The agencies quickly began to implement the analytical requirements by hiring additional professionals skilled in policy analysis and contractors with analytical expertise. Indeed, one could call Executive Order 12,291 a "policy analysts full employment act."

As more and more programs began to institutionalize the regulatory analysis requirements, analysis became an integral part of the decisionmaking process in most agencies. Although many Regulatory Impact Assessments were no doubt post hoc rationalizations for decisions reached on other grounds, my examination of the process over a two-year period has convinced me that the requirement has resulted in many genuine efforts to obtain relevant information,

\textsuperscript{47} Exec. Order No. 12,291, 3 C.F.R. 127, 128-30 § 3.
analyze that information, probe alternatives, and reach sound regulatory decisions. Whether the effort is worth its substantial costs, however, is open to debate.

V. REACTION AND RETRENCHMENT

The Reagan Administration's regulatory relief efforts had been underway for barely a year when affected constituencies began to react. The early "regulatory relief" activities created a strong public impression that the Administration was placing the narrow economic interests of regulatees above the broader "public interest." This perception was extremely useful to representatives of beneficiary groups as they attempted to stem the tide of regulatory reform. In the area of social regulation the Administration was beaten back on almost every front.

The Administration's legislative efforts to achieve goal-oriented substantive reform of social regulation can only be characterized as a rout. When environmental groups and sympathetic members of Congress became aware of the Administration's behind-the-scenes efforts to redraft the Clean Air Act, they accurately charged that the Administration was attempting to "gut" the Act. The environmental groups then seized control of the political agenda. The draft amendments were not characterized in the media as regulatory reform, or even as regulatory relief for an ailing industry. Rather, they were painted as an attempt to undo the reforms of the early 1970s, which, of course, they were. The much-vaunted 1981 Clean Air Act initiative died aborning.

The defeat of the Clean Air Act paved the way for further legislative defeats. The Consumer Product Safety Commission escaped the Administration's attempt to dismantle it and fold its remaining regulatory functions into the Commerce Department. Congress rejected administration and industry regulatory reforms of the Clean Water Act and the Federal Insecticide, Fungicide and Rodenticide Act. And the Omnibus Regulatory Reform Act, which

50. See G. Eads & M. Fix, supra note 1, at 257-58.
52. Id. Nov. 19, 1982, at 3.
53. 41 CONG. Q. 846 (1983) ("House Committee May Reverse CPSC Cuts").
54. [Current Developments] ENV'T REP. (BNA) 397 (July 23, 1982).
passed the Senate, died in the House, never to rise again.\textsuperscript{57} Interestingly, by late 1983, all of the Administration’s documented success stories and pending statutory initiatives were in the area of economic regulation.\textsuperscript{58}

The Administration’s \textit{administrative} efforts at goal-oriented substantive regulatory reform also collapsed. Its tactic of regulatory-relief-through-reduced-enforcement generated attacks on the agencies for playing political favorites and for failing to observe the rule of law. Administrator Gorsuch’s leadership at EPA came to an ignominious end in a bitter separation of powers dispute between the Administration and the House of Representatives over enforcement documents.\textsuperscript{59} Long before the end of the first Reagan Administration, most of the heads of the major social regulatory agencies were gone. The Vice President’s Task Force heeded Senator Leahy’s advice to President Johnson on Vietnam — it declared victory and went home.\textsuperscript{60}

By mid-term, the agency budgets were on their way back up to Carter Administration levels.\textsuperscript{61} While many of the administrative regulatory relief efforts were successful, the agencies had reversed field on several important deregulatory efforts, such as the EPA’s proposal to repeal its regulations phasing lead out of gasoline\textsuperscript{62} and OSHA’s hazard identification regulations.\textsuperscript{63}

OMB continued to review agency rulemaking, but the agencies began to place OMB’s comments in the public record.\textsuperscript{64} Several congressional committees became intensely interested in OMB’s

\textsuperscript{57} See Granat, \textit{Rules Committee Fails to Act; Regulatory Reform Stalled}, \textit{40 Cong. Q.} 3029 (1982).


\textsuperscript{59} A \textit{Season of Spoils}, \textit{supra} note 16, at 73-81.


\textsuperscript{61} Washington Post, June 3, 1983, at A1, col. 3.


\textsuperscript{63} Hazard Communication Standards, \textit{supra} note 39.

role in the rulemaking process, and in the case of one Department of Agriculture program, simply took away OMB's power of review. As previously mentioned, the Administration's efforts to institutionalize OMB review in the Omnibus Regulatory Reform legislation failed in the House of Representatives, in part because of congressional doubts about that review process. The Supreme Court also struck an early blow at the Administration's reform efforts by holding that Congress did not intend to permit OSHA to employ cost-benefit analysis in setting health standards. The Court later found that the National Highway Traffic Safety Administration's initial effort to repeal its passive restraint standard was "arbitrary and capricious." In the latter case, the Supreme Court further warned that future deregulatory efforts would face the same "hard look" in reviewing courts as initial rulemaking.

VI. Conclusion

What accounts for this astonishing defeat of a major policy initiative of a popular Presidency? Why have the efforts that were nearest and dearest to the hearts of the regulatory reformers incoming in 1981 not become institutionalized, as have the goals of earlier reform movements?

One explanation is that the Reagan Administration simply blew it. It assigned to ideologues lacking in political savvy the task of institutionalizing regulatory reform. During the early months of the Administration when large legislative victories were possible, the politically more astute policy officials in the White House were preoccupied with the budget, while regulatory reform languished on the back burner. The thrust of this argument is that the Administration's regulatory reform efforts failed because they were too brash and too obviously one-sided. As a result, politically skillful activist groups seized the initiative and redefined the issue from "government overreaching" to "abuse of trust."

Under this view, the Administration has lost the first foray, but

65. See Inside the Administration, September 7, 1984, at 3.
67. SUBCOMMITTEE ON RULES OF THE HOUSE COMM. ON RULES, 97TH CONG., 1ST SESS., BACKGROUND INFORMATION ON REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES 6-7 (Comm. Print 1981).
can still win the war during the remainder of its tenure. Many regulatory reformers believe that the public still desires a relatively radical shift in the substantive goals for regulation and a gradual dismantling of many of the institutional structures that are the legacy of earlier reform movements.\(^70\) If the job is approached in a more politically astute fashion, the new "regulatory relief" team of the second Reagan Administration can accomplish lasting regulatory reform.

While I think that a great deal can be said for this view, I believe that it misreads the public mood on the issue of regulatory reform, insofar as one can speak of a public mood in this fractious, pluralistic nation. I believe the calls for regulatory reform in the late 1970s and early 1980s reflected a genuine feeling that the means that agencies used to implement the social reform legislation of the late 1960s and early 1970s had become too intrusive.\(^71\) I do not believe, however, that the public desired dramatic departures from the goals of the earlier reform legislation. The earlier social reform legislation was meant to protect individual members of the public from fraud and manipulation, from unnecessary risks to their health and well being, and from irrational discrimination. While most people probably believe that these goals can be achieved in a more efficient and effective fashion, I do not believe that they want to depart from the goals themselves.\(^72\) Nor do I believe that they want to temper those goals greatly with other considerations, such as the costs that achieving them might place on the regulated industries.

In short, I do not believe that the regulatory reform movement is a strong social movement, like those that resulted in the enactment of earlier social legislation. Rather, it is a reaction to those earlier movements and a signal to the agencies not to overdo it. The public wants more intelligent, not less, regulation—regulatory reform, not regulatory relief.

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\(^70\) Christopher De Muth, Regulatory Chief, OMB, recommended that during 1984 the Administration consider reform of basic regulatory laws including the Food, Drug and Cosmetic Act and environmental laws. Inside the Administration, Feb. 10, 1984, at 1.

\(^71\) Cf. G. Eads & M. Fix, supra note 1, at 92-95 (critics of regulation as a tool of social control also raised arguments based on the apparent inability of regulations to alter behavior and the difficulty of fulfilling the vast information requirements of regulation).

\(^72\) See also id. at 254-55 (in 1983, EPA Administrator Ruckelshaus admitted that his predecessor "had 'confused' the public's wish to improve the way in which government protects the environment and public health with the Administration's own desire to change the goals").
Under this latter reading of the public mood, the Reagan Administration has achieved some important successes, despite the general defeat that it suffered on the regulatory relief front. It has successfully implemented a device for screening government information requirements under the Paperwork Reduction Act.\(^7\)

Although reasonable minds may differ at the margin, most people believe that many government paperwork requirements were unjustified and needed closer scrutiny.

Perhaps the most successful regulatory reform of the first Reagan term was the institutionalization of the regulatory analysis process. Although that process had its origin in the Ford Administration and was considerably refined during the Carter Administration, the Reagan Administration institutionalized it by ensuring that every regulatory agency had on board personnel with regulatory analysis capabilities. These "institutional skeptics" ask hard questions about the need for regulatory requirements, and then make the social costs of various regulatory options clear to the regulators. Regulatory analysis can lead to more intelligent regulation and can help ensure that current social goals are achieved as efficiently as possible.

The regulatory analysis reforms, however, may bear the seeds of their own destruction. Regulatory analysis can be pushed past its natural limitations. There is a great tendency among economists and policy analysts to attempt to quantify every conceivable variable and to ignore those that cannot be quantified. Policy analysis can also turn on hidden assumptions about how society ought to be arranged that are not immediately apparent to agency decisionmakers and the public.

Because regulatory analysis is a very inexact art, it can be manipulated toward substantive ends. There is strong evidence, for example, that OMB has attempted to exploit its role in reviewing regulatory analysis in order to influence the substantive nature of the rules that it reviews.\(^74\)

While this approach is entirely consistent with OMB's accountability function, it can be very destructive of the agencies' analytical efforts. When, as is currently the case, the policy analysts in the agencies believe that a good analysis will earn bad marks in OMB if it supports a substantive result that OMB dislikes, then there is little incentive to do the kind of objective analysis that


\(^74\) Hall Hearings, supra note 11, at 429 (statement of Edward Durkin, Food and Beverage Trades Department, AFL-CIO).
can be of real aid to good faith upper level decisionmaking. If the Administration is truly committed to regulatory analysis as a tool for cognitive regulatory reform, it must take care not to destroy the credibility of regulatory analysis by using it as a covert vehicle for goal-oriented substantive regulatory reform.

The regulatory reform efforts of the Reagan Administration also have implications for administrative lawyers. First, the events of the first Reagan Administration have demonstrated that the jobs of administrative lawyers are not in jeopardy. Their skills are still needed. But if things go as I have predicted, lawyers will have to add to their statutory interpretation skills the ability to read and critique regulatory impact assessments. They will have to understand and be able to communicate in the economists' jargon as well as the technical jargon of the agencies with which they deal.\textsuperscript{75}

In addition, the nature of the case that the lawyer must make before the agency will change somewhat. Rather than making a straightforward appeal that the regulatory option in the client's interest also furthers the agency's statutory goals, the attorney must now be prepared to argue that his or her client's approach is the one that most effectively achieves those goals. Rather than launching blunderbuss attacks on every conceivable aspect of a proposed regulation, lawyers will better serve their clients by suggesting less expensive routes to the same substantive ends. In the process, the lawyer must be prepared to demonstrate that the less expensive route is also "enforceable." Lawyers may even come up with novel enforcement devices—such as environmental audits, for example—that will convince the agency to choose the less expensive route.

In sum, successful regulatory reform during the remainder of the Reagan era will reflect a greater appreciation of the needs, perceptions, and desires of the general public. And lawyers representing regulated industries before the administrative agencies, who can expect a sympathetic ear from the upper level decisionmakers, will find that finesse, not force, is the most effective strategy.

\textsuperscript{75} See generally B. Ackerman, Reconstructing American Law 105-10 (1984) (warning that lawyers may lose social power to technocrats).