



How Will Congress Review Rulemaking?

New Power Could Improve Regulations

by Heather L. Ross

Federal agencies write regulations to implement the laws enacted by Congress. Last spring, Congress gave itself the power to review the results of agency actions. Will this new review authority be a turning point in regulatory reform—and, if so, in what direction?

The 104th Congress devoted a lot of attention to regulatory reform in 1995-96, particularly to omnibus bills modifying the regulatory process as a whole (See RFF President Paul R. Portney's related article in *Resources*, Fall 1995, no. 121). Failure to enact those centerpiece bills became the headline story of the lengthy legislative debate. However, with less notice, two smaller initiatives were approved—the Unfunded Mandates Reform Act and the Small Business Regulatory Enforcement Fairness Act. The latter statute contains some really big regulatory news—a largely unheralded provision called “Congressional Review of Agency Rulemaking.”

President Clinton signed this new provision into law on March 29, 1996. It grants members of Congress sixty days to review major new regulations before they can become effective. It also establishes expedited procedures through which Congress may enact joint resolutions to disapprove such rules. These arrangements for disapproving individual rules are the legislative equivalent of the President’s line-item veto of individual budget expenditures.

How will Congress use these new teeth? Many people say it won’t. They see the sixty-day review as just another formality that federal agencies will have to observe as part of the rulemaking process. Many oth-

ers say that Congress shouldn’t use the review powers. They see the sixty-day period as a window of opportunity for special-interest lobbying on the part of those who were unsuccessful when the laws were written and/or when the regulations were formulated by agencies like the Environmental Protection Agency, the Occupational Safety and Health Administration, or the Food and Drug Administration. But there are some people who are thinking about how the new review can be used to leverage improvements throughout the regulatory system. While the latter may be difficult to achieve, it is neither impossible, nor unprecedented.

The Need

The need for improvement in the regulatory system can be stated simply: good regulation requires good information. Proposed rules must be routinely accompanied by good descriptions of their potential outcomes—both favorable and unfavorable—and good estimates of their likelihood of occurrence for anyone to make a responsible judgment on their merits.

Since regulatory merit is principally substantive, not procedural, useful regulatory review is also necessarily substantive. There must be a mind at work looking at the content of a regulatory agency’s decision and the information supporting it. Given the breadth

of federal regulatory activity today, no generic checklist of steps and decision rules can be used to grind out a sound conclusion on the merit of specific actions.

Herein lies the rub. How can good substantive oversight be exercised—by Congress or anyone else—in a regulatory system whose principal failing is a lack of adequate information upon which to base good decisions in the first place? Evaluations of the regulatory process show that decisionmakers often do not receive information of the quality that could and should be used to support major decisions. In those cases where they do receive it, such information is seldom instrumental in their decisions. Successful oversight must introduce into the system precisely the information—and its use—that is now systematically missing.

Why is that information presently missing? Limited resources (and occasionally limited skills, too) play some role. By far, however, the biggest problem is compartmentalization. The special-purpose missions of regulatory agencies and narrow focus of most authorizing legislation rigidly elevate particular regulatory objectives over other considerations and put a minimal or even negative value on information that would recognize tradeoffs in the overall public interest. Oversight must be a countervailing force, pushing the regulatory system in the direction of breadth and balance.

The Executive

In the first instance, regulatory oversight is an executive branch concern—indeed, a presidential concern, since the chief executive appoints the top officials of regulatory agencies. A special White House unit—the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget—provides assistance, and recent presidents have issued executive orders—currently President Clinton's E.O. 12866—that lay out how regulatory development and review are to proceed in their administrations.

Apart from judicial oversight, this White House review is the only governmental consideration that regulatory activity receives outside the agencies' own processes. Historically, these reviews have varied widely—contrast the industry-oriented activism of President Bush's Competitiveness Council with the sit-lightly sentinel that OIRA is today. These swings may be seen as inevitable in a process that takes place inside the White House, and some would consider them desirable. But it is hard to argue that the welfare of the public is as volatile. Notwithstanding the com-

peting horror stories of regulatory excess on the one hand and deregulatory endangerment on the other, there really is some persistent, balanced understanding of the public interest. Big swings in oversight deny that truth and undermine reform.

The Congress

If the need in regulatory oversight is to take a broad, objective view across competing interests and continuing political cycles, what is the basis for thinking that Congress could perform any better than the executive branch? How can it be a constructive influence, operating in the last sixty days of an elaborate and often very technical rulemaking process, engaging people who have not been involved in that process and whose principal duties lie elsewhere?

Operationally the answer must lie in leverage. Using its veto threat, Congress could encourage good regulatory analyses inside the agencies, where the greatest ability to perform and use these analyses resides. The National Environmental Policy Act (NEPA) serves as illustration. Under that law, the threat agencies faced that their actions could be stopped—in that case by the courts—was sufficient over time to generate an array of agency-developed information on likely environmental impacts, as well as procedures for scoping, developing, and reviewing it, that had until then been missing in agency decision-making.

Substantively, the answer must lie in information. Again, there is a precedent—the Congressional Budget Office. Congress created the CBO to bring to the legislative branch of government expert, objective information concerning the federal budget. It has succeeded, and the CBO's output provides the authoritative base for budget deliberations year after year. Success in the case of regulation will come from getting agencies to do good analyses, not from doing them independently. But the central element of success will remain the same—a way for Congress to get timely, expert, nonpartisan information on highly technical, highly charged issues.

The Outlook

Getting to this point may be a tall order, but not because the analytic capability is a reach. The state of the art of risk assessment and benefit-cost analysis is far beyond what occurs in most rulemaking deliberations today. And the resources required to do better—

it is emphatically a question of doing better, not more—are relatively modest. Many agencies can already supply much of the capability required, despite a certain atrophy in periods of weak demand from their own leadership. The challenge is to create a consistent demand for that capability, as NEPA has for environmental impact analysis, and a sustained capacity to evaluate the results, as CBO has for the budget process.

NEPA has shown us the power of credibility. Courts, responding to interested parties and conducting no analyses of their own, can nonetheless be relied upon to stop proposed actions lacking adequate analytic support. Agencies have recognized NEPA's requirements as a significant hurdle, not a peripheral "speed bump," and have changed their behavior accordingly.

NEPA also illustrates the power of example. While some federal programs were held up as agencies figured out what the law required, government action by no means came to a halt. A handful of major test cases stopped the clearest violations and helped define compliance for the mass of ongoing federal activity. Similarly, identifying and stopping regulations for which there is virtually no justification can prevent the worst regulatory excesses while influencing the terms of debate and the standard of merit throughout the system.

Regulatory oversight is different from review under NEPA in that it is substantive. It goes beyond asking "is the analysis adequate" to "is the action justified." Congressional review is the time to watch for rules that are clearly unjustified and these generally stand out even on a weak record. Identifying these outliers is a substantive task, requiring analytic skill which is presently lodged principally in the regulatory agencies. Congress must now acquire some of that skill itself to execute the oversight role it has assumed.

CBO shows that Congress can build such an analytic capability and use it in a nonpartisan way. A Congressional Regulatory Office (CRO) could be established and patterned after CBO, if much smaller in size. Such a new office could learn from the elements of CBO's success: a committed set of congressional champions, a committee structure to direct and utilize its work, a first-class director in the tradition of Alice Rivlin, and a high-quality, purpose-built staff—the peer of OIRA as CBO is of OMB. It could also use

an advisory group with respected membership from across the spectrum of regulatory interests and expertise to give support and counsel.

A CRO would need a home, either as an independent unit or as part of some other entity. Two candidates for the latter are the General Accounting Office, which presently provides Congress with brief letter reports on individual rules under the sixty-day provision, and CBO, which has new regulatory analysis responsibilities under the Unfunded Mandates Reform Act. Locating a CRO where it would perform most effectively would be an important part of Congress' organizing itself to handle the regulatory responsibilities it is beginning to take on. This organizing task needs to be accomplished soon, before further regulatory assignments proliferate and before resolutions to disapprove of particular regulations start to come up for votes. The latter may happen as early as this summer, when EPA is scheduled to promulgate new ozone and particulate standards under the Clean Air Act that some members have already cited as a disapproval candidate.

One of the first things a CRO would face is the degree to which bad rules are legislatively driven. From limiting the ability to balance costs and benefits to specifying inefficient command-and-control mechanisms to micro-managing myriad administrative processes, Congress itself is easily the single greatest source of excess costs in the system. Thus another major measure of sixty-day review success, as important as altering agency behavior, will be spurring Congress to right its own wrongs. This is a further difference from NEPA. Not only must Congress exercise substantive judgment, not just procedural oversight, but it must pass that judgment on itself, not just on agencies.

To many, this will seem like mission impossible. But it is worth noting how much more effective and far-reaching both NEPA and CBO have become than even their proponents first imagined. Sixty-day review is historic in its power to move beyond jawboning and put real teeth in regulatory reform. It should be honed in the public interest, not left to become a toothless wonder or to provide special interests with a final bite at the regulatory apple.

Heather L. Ross is a visiting scholar in RFF's Energy and Natural Resources Division.