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# Hyper-Partisanship and the Law

## “Is the Execution of the Law Hyper-Partisan?”

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Is the execution of the law hyper-partisan? In examining this question, I will focus on the role of federal regulation in executing the law. I will further narrow my remarks to executive branch agencies, as distinguished from independent regulatory agencies, which my fellow panelists will address.

When it comes to federal regulation, we certainly see some *hyperventilating*, with shrill debate on regulations’ merits and burdens, but I would not characterize regulation as *hyper-partisan*.

This is partly due to the fact that the executive branch derives its authority to issue domestic regulations from the legislative branch. While partisanship can certainly play a role in the passage of authorizing statutes, the authority delegated to executive agencies, as well as oversight from the judiciary, imposes some constraints on how they execute the law.

Another factor is that executive agencies are staffed by career civil servants, many of whom remain in their positions across many administrations. Political appointees come and go, but it is the career bureaucrats who are largely tasked with analyzing, developing, and enforcing the regulations.

This doesn’t mean that presidents have no influence over regulations issued by their departments and agencies. Every modern president has established philosophies to guide regulations and procedures for presidential oversight. But these too could not be called partisan.

For over thirty years, presidents of both parties have relied on the same general principles for determining when regulations are appropriate, how they should be designed, and how their effects should be analyzed.<sup>1</sup> Indeed, one could say that the normative principles for analysing regulations and understanding their effects are *nonpartisan*.

President Reagan first required regulations to be reviewed by the Office of Information and Regulatory Affairs in the Executive Office of the President in 1981.<sup>2</sup> The principles he articulated for that review were consistent with Executive Orders issued by President Carter, which in turn were built on the policies of Presidents Nixon and Ford before him.<sup>3</sup> All subsequent presidents,

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1. See, for example, pieces by Christopher DeMuth, Wendy L. Gramm, Jim Tozzi, Thomas D. Hopkins, James C. Miller III, Sally Katzen, and Susan E. Dudley in *Colloquium, OIRA Thirtieth Anniversary Conference*, 63 ADMIN. L. REV. (SPECIAL EDITION) 1 (2011).

2. Exec. Order No. 12291, 3 C.F.R. 127(1982)

3. See Thomas D. Hopkins, *The Evolution of Regulatory Oversight—CWPS to OIRA*, 63 ADMIN. L. REV. (SPECIAL EDITION) 71 (2011); Jim Tozzi, *ORIA’S Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding*, 63 ADMIN. L. REV. (SPECIAL EDITION) 37 (2011)

Democratic and Republican, have continued OIRA's review authority, and endorsed and expanded upon these basic principles. President Obama did just last year.<sup>4</sup>

The tools that presidents of both parties have relied on to implement these principles are also nonpartisan. Regulatory impact analysis, which includes benefit-cost analysis, provides a transparent accounting of the information available regarding the need for and consequences of a regulatory proposal and its alternatives. It lays out for policymakers information on the risks and tradeoffs of different policy paths. Further, the analytical constructs articulated in guidance issued by OIRA and the agencies in different administrations track those in textbooks on policy analysis.<sup>5</sup>

While there are those who object to attempts to quantify the impacts of regulation<sup>6</sup> and the role presidents have taken in regulatory oversight,<sup>7</sup> entities with widely different views on the merits and consequences of regulation are increasingly relying on benefit-cost analysis to make their cases.<sup>8</sup>

I don't want to leave the impression, however, that execution of the law through regulation is always based on evidence and solid benefit-cost analysis. While all administrations have endorsed these nonpartisan principles, all have also strayed from them.

This is due, in part, to the fact that regulations are constrained by their authorizing statute. Some statutory mandates don't permit the use of regulatory impact analysis, which makes it very hard to devise a regulation that will provide net benefits.<sup>9</sup>

But another factor is the enormous and pervasive pressure to regulate. This

4. See Exec. Order No. 13563, 756 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 11, 2011).

5. See Office of Mgmt. & Budget, *Circular A-4*, WHITEHOUSE.GOV (Sept. 17, 2003), [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4](http://www.whitehouse.gov/omb/circulars_a004_a-4).

6. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 11 (2004) (arguing that cost-benefit analyses trivialize values underlying health and environmental policies and advocating for a more holistic approach).

7. See *CPR's Eye on OIRA: Public Scrutiny for an Unnoticed Regulatory Powerhouse*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/eyeonoiracfm> (last visited July 4, 2011) (asserting that OIRA wields extraordinary power and subjects regulations to "systematically flawed cost-benefit analysis"); *White House Subverting Health, Safety, & Environmental Protection*, OMB WATCH (Sept. 4, 2002), <http://www.ombwatch.org/node/1008> (arguing that OIRA creates barriers to health, safety, and environmental protections despite its lack of statutory authority to shape regulation).

8. See RICHARD L. REVEZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 10 (2008) (arguing that OIRA and the courts should change how cost-benefit analysis is used in reviewing regulations because the implementation of the analysis is biased against regulation, despite that the methodology of cost-benefit analysis is not); see generally CASS SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT (2004) (proposing an improved system of regulations); MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006) (justifying cost-benefit analysis as a decision procedure to the "extent that it advances overall well-being").

9. Section 109 of the Clean Air Act, for example requires the EPA to set National Ambient Air Quality Standards (NAAQS), expressed as ambient concentration levels based on levels "requisite to protect" human health and welfare. 42 U.S.C. § 7490(b)(1) (2006).

pressure is driven more by advocacy and faction politics (with a little *p*) than by partisanship.

The conventional wisdom is that Democrats are more supportive of regulations because their constituents—labor unions, environmental interests, etc.—benefit from them. Republicans are perceived to be less regulatory than Democrats because they look out for businesses interests and businesses are thought to oppose regulation.

But this oversimplifies the factors at play. Regulation can provide competitive advantage, so it is often in the self-interest of regulated parties to support it.<sup>10</sup> I'm sure each of us on this panel can point to instances in our government experience where companies lobbied for increased regulation.<sup>11</sup> Particularly when these regulatory demands appeal to popular interests, politicians and policy officials find pursuing them hard to resist.<sup>12</sup>

New crises (real or perceived) inevitably lead to new legislation and new regulations. Once in place, regulations gain a constituency and are almost impossible to dislodge. So we see a ratchet effect,<sup>13</sup> where new regulations are issued, but old regulations are rarely evaluated for effectiveness and even more rarely retired.

Furthermore, advocacy for more regulation does not just come from outside the government. Career staff at agencies contribute to the pressure for more regulation, as they advocate for more resources and more authority for their programs.

This explains why, by any measure you consider (agency budgets and staffing, number of new rules, pages of regulatory code, regulatory costs, etc.), regulatory activity has been on the increase since the early 1970s.<sup>14</sup> Even administrations perceived to believe in free markets find themselves under pressure to support more restrictions on private sector activity. Contrary to popular folklore, the Bush Administration issued some of the most far-reaching regulations addressing air quality, food labeling, and homeland security.<sup>15</sup>

The Obama Administration does seem more enthusiastic about new restrictions on private sector activity than previous administrations. It has issued

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10. George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 4 (1971), [http://www.giuripol.unimi.it/Materiali%20Didattici/Regolazione%20dei%20Mercati%20-%20Ammannati/STIGLER\\_economicRegulation.pdf](http://www.giuripol.unimi.it/Materiali%20Didattici/Regolazione%20dei%20Mercati%20-%20Ammannati/STIGLER_economicRegulation.pdf).

11. See Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 63 ADMIN. L. REV. (SPECIAL EDITION) 113 (2011); Susan E. Dudley, *Lessons Learned, Challenges Ahead*, 32 REGULATION 6 (2009), <http://www.cato.org/pubs/regulation/regv32n2/v32n2-1.pdf> ("The Bush administration issued some of the most far-reaching regulations addressing air quality, food labeling, and (of course) homeland security.").

12. Bruce Yandle, *Bootleggers and Baptists in Retrospect*, 22 REGULATION 5 (1999), <http://www.cato.org/pubs/regulation/regv22n3/bootleggers.pdf>.

13. See Susan Dudley & Bruce Yandle, *Is 9-11 a Crisis to be followed by a Leviathan?* (Sep. 2002) (working paper), available at <http://mercatus.org/publication/9-11-crisis-be-followed-leviathan>.

14. See Susan E. Dudley, *Prospects for Regulatory Reform*, 12 ENGAGE 7 (2011), [http://www.fed-soc.org/doclib/20110603\\_DudleyEngage12.1.pdf](http://www.fed-soc.org/doclib/20110603_DudleyEngage12.1.pdf)

15. The General Services Administration website provides a searchable database of regulations. OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public> (last visited Oct. 20, 2012).

major regulations at a record-breaking pace,<sup>16</sup> has been more responsive to advocates promoting greater government control over individual health decisions, energy production, financial markets, etc, and appears to place less value on economic freedom.

I have also been critical of changes in benefit-cost analysis methods that allow the Administration to claim huge benefits from regulations that reduce consumer choice, and from speculative ancillary benefits that occur as side-effects of other required actions.<sup>17</sup>

The recent increase in regulatory activity has caught the attention of voters, and polls indicate more small businesses and individuals are ranking excessive regulation and regulatory uncertainty as top concerns.<sup>18</sup> This in turn has generated a flurry of regulatory reform bills in Congress, some more bipartisan than others.<sup>19</sup>

For those interested in a more limited regulatory state—one that values individual liberty, federalism, and economic freedom—this is good news.

Despite the trend toward more regulation over the last few decades, we do have an historic model for successful regulatory reform. It was during the 1970s and 80s, when Presidents Carter and Reagan, with bipartisan support in Congress, eliminated unnecessary regulation in several previously-regulated industries, and even abolished entire agencies.<sup>20</sup> They were able to do this despite strong objections from vested interests, and the economic deregulation they achieved has been widely viewed as a success, having brought about dramatic improvements in innovation and consumer welfare.<sup>21</sup>

The key to achieving success in this area—then and now—lies less in overcoming hyper-partisanship, and more in overcoming the advocates and vested interests that inevitably support more regulation.

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16. According the General Services Administration website, 179 major final regulations were issued during the first three years of the Obama Administration, compared to 112 major final regulations during the first three years of the G.W. Bush Administration. *Id.*

17. See Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 BUS. ECON. 165 (2012), available at <http://www.palgrave-journals.com/bel/journal/v47/n3/abs/be201214a.html>.

18. See Alan Hall, *New Poll: 55% of Small Biz Owners Would Not Start Companies Today—69% Say Regulation Has Harmed Their Businesses*, FORBES (Sep. 27, 2012, 11:03 AM), <http://www.forbes.com/sites/alanhall/2012/09/27/new-poll-55-of-small-biz-owners-would-not-start-companies-today-69-say-regulation-has-harmed-their-businesses/>.

19. See *Legislative History of the Major Regulatory Reform Bills in the House of Representatives: 112th Congress*, U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/issues/regulatory> (last visited Dec. 14, 2012); *Regulatory Year in Review: 2012*, REDBLOG (Dec. 25–27, 2012), <https://www.law.upenn.edu/blogs/regblog/2012/12/regulatory-year-in-review-2012.html>.

20. See generally MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985).

21. See Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSPS. 89, 89–110 (1998).