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# The Regulatory Reform Recommendations of the National Performance Review\*

Jeffrey S. Lubbers\*\*

## Introduction

I have been asked to summarize recommendations of Vice President Gore's National Performance Review (NPR) — specifically regarding regulatory reform. As an "alumnus" of that effort, I am pleased to do so, but first let me introduce my "home" agency, the Administrative Conference of the United States (ACUS).

ACUS was established as a permanent independent agency by the Administrative Conference Act of 1964,<sup>1</sup> following two successful temporary administrative conferences in the Eisenhower and Kennedy Administrations. Its mission is to be the federal government's in-house expert and advisory agency on the administrative process. Its organization is designed to tap the expertise of government "members" from every significant agency in the executive branch and outside experts. Conference procedures are designed to produce consensus on the knotty procedural problems of the day.

ACUS has made nearly 200 recommendations to agencies, the President, Congress and the Judicial Conference on subjects ranging from government-wide issues such as administrative rulemaking, adjudication, judicial review, enforcement, risk communication, and open government procedures, to program-specific reforms pertaining to occupational safety, taxes, environment and social security.<sup>2</sup> Many

\* Views expressed, except where indicated, are solely those of the author. *See also, Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 Duke L.J. 1165 (1994) (a more heavily documented version of this paper).

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<sup>1</sup> Pub. L. No. 88-499, now codified at 5 U.S.C. §§ 591-596.

have proved influential, leading to legislative and administrative reforms that have improved government efficiency and fairness. Although its Chairman is appointed by the President, the agency has always operated in a nonpartisan, objective fashion — attempting to serve all three branches to produce better government.

I was pleased to participate in NPR's large-scale, serious, scrutiny of federal operations. Although several previous administrations had undertaken similar studies, the NPR was different in that it relied primarily on career government civil servants to perform the scrutiny.

About 200 employees from all over the federal government were assembled, on loan from their home agencies, to work from March 3, 1993 to September 7, 1993 when the report was issued. They were organized into a series of agency-specific and governmental systems teams. Also, the President asked his cabinet to create internal "reinvention teams" to work in parallel and create "reinvention laboratories" to begin experimenting with new ways of doing business. Finally, the Vice President personally held "town meetings" at each cabinet department, heard from tens of thousands of citizens and led reinventing government conferences in Tennessee and Philadelphia.

The report was published on time and became a best seller at the Governmental Printing Office,<sup>3</sup> on the Internet and in two private paperbacks. It describes about 100 of the most significant actions and recommendations of the task force and lists hundreds more in appendices. Most NPR members returned home after the report's publication, but a residual staff of about 50 continues under NPR aegis to seek implementation of the recommendations.<sup>4</sup>

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<sup>2</sup> A list of Conference recommendations can be found at 1 C.F.R. § 305. Copies are available from the Conference: (202) 254-7020.

<sup>3</sup> From Red Tape to Results — Creating a Government That Works Better & Costs Less (NPR Report). For information on how to order it, contact the National Performance Review offices at (202) 632-0150.

<sup>4</sup> Through a Memorandum for heads of Executive Departments and Agencies, Vice President Gore, on Jan. 3, 1995, launched the Second Phase 2 of the NPR to: examine the basic missions of government, looking at every single government program and agency to find and eliminate things that don't need to be done by the federal government. ... Phase 2 will also review the federal regulatory process to... get better results for the public with less interference in their lives.

### The Improving Regulatory Systems Team

One of the eleven “systems reinvention teams” was the “Improving Regulatory Systems” team. When I was recruited as leader in April, I noticed that its name was a bit more modest than some of the other teams that sported ambitious gerunds such as “transforming,” “reinventing,” “rethinking,” “redesigning” and “reengineering.” Whether intended or not, this turned out to be consistent with one of our basic conclusions: Relieving the burden of regulatory process on both the regulated and the regulators lies in *improving* the current system rather than in radically *restructuring* it.

The only limit on the “reg-systems” (shortened to avoid becoming the “IRS”) team was not to duplicate the efforts of a White House task force concurrently developing a new executive order on centralized review of agency regulations for the Administration.<sup>5</sup> Our team concentrated on the process within agencies, while the task force focused on Presidential (OMB) review.

In interviewing regulators and regulated parties, we invariably found that the first item on their agenda was “OMB review of rules.” Fortunately, our limitation precluded discussions of this politically-charged issue and enabled us to develop consensus recommendations more easily. Yet, it became clear that our team and the task force needed to know what each other was doing, so I was invited to task force meetings. As a result, the NPR report contained an outline of the pending Executive Order, and, when issued on September 30, the Order included some of our team’s ideas.<sup>6</sup>

Scheduling demands necessitated by our deadline made empirical research impossible. We therefore reviewed past studies (including, of course, those done by ACUS) and conducted a series of interviews with business groups, public interest lawyers, and agency and Congressional staffs about perceived regulatory problems to begin making (and auditioning) lists of problems and potential solutions.

<sup>5</sup> See, e.g., Linda Jo Schierow, *Senator Johnston’s Proposals for Regulatory Reform...*, 6 Risk 1 (1995) (Johnston’s proposals for EPA are compared and contrasted with Reagan, Bush and Clinton Executive Orders).

<sup>6</sup> E.O. 12,866, 58 F.R. 51735 (1993).

In June we received a major boost with the release of a three-year study by a panel of the Carnegie Commission on Science, Technology and Government, headed by former EPA Administrator Douglas Costle.<sup>7</sup> The panel was exceptionally distinguished and included, Judges Stephen Breyer and Patricia Wald, Professors Donald Elliott and Richard Merrill, and former duPont Chairman, Irving Shapiro, among others. Its report was quite thoughtful and consistent with our findings, and we drew heavily from it.

So where did we come out? Overall we concluded that many complaints about the substance of regulations were exacerbated by problems with the regulatory process. Regardless of general views about regulation or deregulation, most interviewees agreed that:

- Regulation is too often uncoordinated and duplicative
- Regulators and Congress should be more selective and sophisticated in the choice of regulatory approaches
- Better and earlier opportunities to participate in the rulemaking process would be valuable
- Agency clearance procedures should be streamlined for less significant rules
- Negotiated rulemaking, although not a panacea, is a technique worth promoting
- Risk prioritization imposes needed discipline on regulatory agencies
- Agencies need to find better ways to import good science into regulatory decisionmaking
- Agency heads and regulators need more training in the process and substance of regulation
- Agency regulators and congressional personnel need to talk to each other more frequently and effectively

That consensus led us to believe that we could recommend reforms that, neither pro- nor anti-regulation, would produce better regulations. Also, it reinforced our belief that the foundation prescribed by the Administrative Procedure Act is basically sound and that a radical restructuring of the process is unnecessary.

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<sup>7</sup> Carnegie Comm'n on Science, Tech. & Gov't, *Risk and the Environment: Improving Regulatory Decision Making*, (1993).

## The Recommendations

Our review resulted in ten recommendations approved by the Vice President for the NPR report.<sup>8</sup> I will discuss each, noting any action already taken to implement them.

### *Create an Interagency Regulatory Coordinating Group*

This recommendation,<sup>9</sup> in a sense, sets the stage for the others. In urging creation of a forum for agencies to discuss overlapping policy issues and cross-cutting process issues, we hearkened back to President Carter's U.S. Regulatory Council, headed by Douglas Costle, that improved coordination in several areas and showed much promise before it was disbanded after the 1980 election.

We concluded, that the need for coordination, if anything, had increased in the intervening years. We were pleased that President Clinton agreed and in E.O. 12,866 directed the establishment of an interagency Regulatory Working Group (RWG) chaired by the OIRA Administrator. The RWG has already had numerous meetings and has created task forces on risk assessment, use of cost-benefit analysis, streamlining agency rulemaking and using information technology in regulation. This should help implement other recommendations.

### *Encourage More Innovative Approaches to Regulation*

As our report emphasizes, one of the biggest challenges regulators face is choosing the best tool to solve a problem.<sup>10</sup> In many instances, a nonregulatory solution may be best. Examples include efforts to spur technological innovation (e.g., EPA's "Golden Carrot" program to encourage development of an environmentally friendly refrigerator), information disclosure and consumer education. Where action is needed, market-oriented approaches are sometimes preferable. We urged high-level encouragement for agencies to consider this. Again, President Clinton's E.O. 12,866 directs agencies to do so.

<sup>8</sup> See NPR Report, Appendix C, at 167-68. The team's report was issued shortly thereafter, see Office of the Vice President, *Accompanying Report of the National Performance Review: Improving Regulatory Systems (1993)* (hereafter *Regulatory Systems Report*). To obtain this report see *supra* note 3.

<sup>9</sup> *Id.* at 17-22.

<sup>10</sup> *Id.* at 23-28.

To help make this a reality, we also urged development of a Deskbook on Regulatory Design for regulators and legislators to have at their fingertips. It would describe alternative regulatory approaches, analyze their strengths and weaknesses, and suggest when to use them and how to combine them. The RWG could sponsor and oversee the development of the Deskbook.

### *Encourage Consensus-Based Rulemaking*

As students of risk regulation know, traditional notice-and-comment rulemaking has too often tended to discourage cooperation by persons who might be adversely affected.<sup>11</sup> This often leads to protracted litigation, especially in controversial areas such as environmental or workplace safety rules.

To counter this, the ACUS developed an approach called negotiated rulemaking (sometimes called regulatory negotiation or "reg-neg").<sup>12</sup> It relies on a convener who holds open sessions with representatives of affected interests and of the agency to produce a consensus-based proposal. It still undergoes the usual comment process, but areas of controversy should be limited, comments few and lawsuits rare. Since 1982, there have been about 35 reg-negs undertaken by about a dozen agencies and most have produced consensus or near-consensus, dramatically reducing litigation.

The report details the benefits and limitations of this approach and urges the President to encourage its use. Again, the President generally advocated reg-neg in E.O. 12,866 and has directed agencies to select at least one pending or proposed rulemaking as a candidate for reg-neg or explain why it is not feasible.<sup>13</sup> Already OIRA and ACUS have held a well-attended symposium to help agencies follow the directive.

### *Enhance Public Awareness and Participation*

One refrain that we heard repeatedly was that agencies need to do more to secure early public awareness of rulemaking and not simply rely on the Federal Register.<sup>14</sup> Negotiated rulemaking is one way to

<sup>11</sup> *Id.* at 29-33.

<sup>12</sup> ACUS Recommendations 82-4, 85-5, 1 C.F.R. § 305.82-4, 85-5 (1993).

<sup>13</sup> Negotiated Rulemaking, Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 F.R. 52391 (1993).

do so, but agencies have also used less formal mechanisms such as policy discussion groups, public meetings, and focus groups to obtain input on advance notices of proposed rulemakings, or on how existing rules are working. Agencies should also consider whether an ombudsman, as used by agencies like the Food and Drug Administration, or a toll-free hotline might improve public participation during the implementation of rules.

This area is one in which the use of new information technologies has great potential for improving public interaction with agencies. The computerization of rulemaking dockets, electronic bulletin boards, even e-mail reg-negs, are ideas that soon may be realized.

#### *Streamline Rulemaking Procedures*

We found that many agencies had great difficulty even describing their internal clearance process.<sup>15</sup> One hired a contractor to produce an 18-foot flow chart with 373 boxes to describe its rulemaking process.

We encouraged the RWG to help agencies develop ways to “tier” their internal review process so that less controversial rules face fewer procedural hurdles. This selective approach mirrors that taken by E.O. 12,866 for OIRA’s review of agency rules.

We also discovered a new idea — new, at least, outside the EPA — “direct final” rulemaking. Under this procedure that EPA uses to issue rules it expects to be noncontroversial, a notice in the Federal Register states that the rule will become effective in 60 days unless someone submits notice within 30 days of intent to object. EPA officials told us they had correctly predicted about 90% of the time and had cut internal review by more than half for such rules. Recently large agencies in the Departments of Agriculture and Transportation announced plans to use this procedure.<sup>16</sup> More generally, President Clinton by directive has required agencies to examine internal rulemaking clearance process and report in six months on steps taken.<sup>17</sup>

<sup>14</sup> Regulatory Systems Report, *supra* note 7 at 35-40.

<sup>15</sup> *Id.* at 41-46.

<sup>16</sup> See, e.g., Agricultural Marketing Service, Policy Statement on Use of Direct Final Rulemaking, 59 F.R. 51083 (1994); Federal Aviation Administration, Notice of Proposed Rulemaking on Direct Final Rulemaking Procedure, 50 F.R. 50676 (1994).

*Encourage ADR when Enforcing Regulations*

We hope the term “alternative” dispute resolution (ADR) will soon be a misnomer as, e.g., mediation, arbitration, minitrial or early neutral evaluation become part of agencies’ everyday menu for resolving disputes, along with adjudication.<sup>18</sup> Yet, the acronym “ADR” may be saved by substituting “appropriate” for “alternative.”

Certainly the movement toward ADR by federal agencies accelerated with passage of the 1990 Administrative Dispute Resolution Act<sup>19</sup> that removed some hurdles. Unfortunately, despite clear success in, e.g., the EPA and the Departments of Health & Human Services and Labor, some agencies have given ADR a limited reception. We asked the President to give it a high-level push — especially in the area of budgetary and personnel incentives — and to make it easier to hire neutrals.

We were especially pleased that the NPR Report specifically supported expanded use of ADR and its rulemaking cousin, reg-neg.<sup>20</sup> The Administrative Conference is continuing to actively promote these recommendations. Also, NPR selected ACUS to develop a pilot project to use e-mail to connect agency ADR programs and to place on-line an extensive library of resources concerning ADR.

*Rank Risks and Engage in “Anticipatory” Regulatory Planning*

Improved long-range strategic planning was a theme of NPR, leading in part to the Government Performance and Results Act of 1993<sup>21</sup> that authorizes agencies to create pilot projects on performance-based strategic planning initiatives. Our specific recommendation<sup>22</sup> grew out of the success of the EPA. That agency, in 1987, asked 75 senior career managers to compare and rank the relative risks posed by 31 agency-regulated problems. This pointed out not only disparities between the rankings and the legislatively-

<sup>17</sup> See Memorandum on Agency Rulemaking, 29 Weekly Comp. Pres. Doc. 1933 (Sept. 30, 1993).

<sup>18</sup> Regulatory Systems Report, *supra* note 7 at 47-52.

<sup>19</sup> 5 U.S.C. §§ 571-583 (Supp. IV 1992).

<sup>20</sup> NPR report, *supra* note 3 at 118-19.

<sup>21</sup> Pub. L. No. 103-62, 107 Stat. 290 (1993).

<sup>22</sup> Regulatory Systems Report, *supra* note 7 at 53-57.

mandated resource allocation at EPA, but also variance between public and “expert” perceptions of risk. In 1990, EPA’s Science Advisory Board made further recommendations to the Administrator on how to prioritize risks. We joined the Carnegie Commission in applauding this as a “groundbreaking enterprise”<sup>23</sup> and urged the other 20 or so agencies that regulate health, safety or environmental risks to follow.

Related to risk-prioritization is a need to anticipate future problems. EPA is also a leader here. It has established a “futures staff” to anticipate problems such as one it failed to anticipate — mercury in discarded cool fluorescent lamps. Had this been anticipated, lamps could have been made without mercury. The futures staff has already identified a similar problem with lithium in electric cars. We suggested that regulatory agencies be encouraged to develop processes and devote resources for ranking risks and anticipating future regulatory problems.

#### *Improve Regulatory Science*

Most decisions are made by agency heads who are normally not scientists, relying on advice of officials more likely to be lawyers than scientists.<sup>24</sup> When such decisions are challenged in court, they are reviewed by judges, who rarely have scientific training. This process is understandably regarded as deficient among scientists.

Scientific advisory boards are a partial solution. EPA has a large-scale, well-funded Science Advisory Board (SAB) that advises the Administrator on scientific and technical aspects of environmental problems. FDA has recently followed suit with a 12-member board.

We joined the Carnegie Commission to urge agencies to improve their scientific capabilities. We urged regulatory agencies that depend heavily on scientific information to create such a board or explain why not. The President has taken this advice by creating a National Science and Technology Council within the White House<sup>25</sup> as well as the President’s Committee of Advisors on Science and Technology<sup>26</sup> made up of his Science Advisor and fifteen outside scientists.

<sup>23</sup> Carnegie Comm’n, *supra* note 6 at 81.

<sup>24</sup> Regulatory System Report, *supra* note 7 at 59-63.

<sup>25</sup> E.O. 12, 881, 58 F.R. 62491 (1993).

<sup>26</sup> E.O. 12, 882, 58 F.R. 62493 (1993).

*Improve Agency and Congressional Relationships*

Most of what federal agencies do is traceable to their legislative mandates, and it is not unusual for regulators to complain that their hands are tied by overly restrictive, excessively detailed, poorly conceived, or inexpertly drafted legislation.<sup>27</sup>

Wherever blame may lie, communication between agencies and congressional counterparts has broken down. The problem has perhaps been exacerbated by divided political control in recent years. Congress has not trusted agencies, and agencies, for their part, have not been completely forthcoming in the drafting process.

More frequent interbranch forums was an approach our team favored. Specifically, we discovered that it was the exception for agencies to provide drafting assistance to legislative staffs. We recommended that a process be developed by which a designated senior agency official could advise chairpersons and ranking members of Congressional committees as long as appropriate disclaimers concerning the Administration's position (or lack thereof) on pending legislation were respected.

*Provide Better Training and Incentives for Regulators*

We began discussion of our final recommendation with the truism that "a regulatory system is only as good as the people implementing it."<sup>28</sup> Recommendations for improved training are hardly exciting, but we were genuinely struck by the glaring lack of training for presidential appointees — especially given the intensive orientation that members of Congress and the federal judiciary receive. A recent study by the National Academy of Public Administration found that 79% of presidential appointees reported that they received no orientation whatsoever.<sup>29</sup> We are encouraged that the RWG has acknowledged this problem and is exploring ways to address it with the Administrative Conference.

<sup>27</sup> Regulatory Systems Report, *supra* note 7 at 65-68.

<sup>28</sup> *Id.* at 69-73.

<sup>29</sup> *Id.* at 70 (citing Robert S. Adler et al., *Shaping Up Federal Agencies: A Basic Training Program for Regulators*, 6 J.L. & Pol. 343, 364, n.90 (1990), quoting National Academy of Public Administration, *Leadership in Jeopardy: The Fraying of the Presidential Appointments System* 20 (1985)).

At lower levels, there is a good ongoing training program for federal lawyers, the Legal Education Institute in the Department of Justice. Unfortunately, several years ago legislation required the program to move to South Carolina where it is unlikely to attract as many students or pro bono faculty.

Finally, we were inspired by Justice Breyer's suggestion that regulatory professionals be cultivated within the government and encouraged to rotate among the branches as in the French Conseil d'Etat.<sup>30</sup> Our slightly less grand plan would establish at least an "honors" rotation for select mid-level career staffers among agencies with key regulatory mandates. OIRA Administrator Katzen has announced plans to begin such a program.<sup>31</sup>

### Conclusion

We are pleased that some of our recommendations are already coming to fruition. Other teams also proposed regulatory changes. Some, e.g., a suggestion for more reg-neg at the Department of Labor were consistent with ours.<sup>32</sup> Others, e.g., allowing judicial review of agency actions under the Regulatory Flexibility Act,<sup>33</sup> expanded use of waivers,<sup>34</sup> or shifting to self-inspection of worksites under OSHA<sup>35</sup> may need further refinement — in our opinion at least.

Critics may claim that we set our sights too low, ignoring proposals such as a regulatory budget, "sunset" laws, specialized administrative courts or new kinds of impact statements. Yet, we were convinced of the low costs and risks of our recommendations and did not think that more radical approaches were either necessary or feasible.



<sup>30</sup> *Id.* at 71, (citing Stephen G. Breyer, *The Vicious Circle: Toward Effective Rick Regulation* (1993)).

<sup>31</sup> Letter from Sally Katzen to author (and other members of RWG) describing "OIRA's Regulatory Exchange Program" and soliciting participation (Jan. 11, 1994).

<sup>32</sup> NPR Report, *supra* note 3, App. A at 146 (Recommendations DOL03 and DOL04).

<sup>33</sup> *Id.* App. A at 148 ( Recommendation SBA01).

<sup>34</sup> *Id.* App. C at 160 ( Recommendation SMC08).

<sup>35</sup> *Id.* App. A at 146 ( Recommendation DOL10).

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