Independent Regulatory Oversight: A New Path to Regulatory Reform

A Presentation by Richard B. Belzer
to the American Farm Bureau Federation
in Albuquerque, New Mexico,
January 12, 1999.

CSAB Forum
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Center for the Study of American Business
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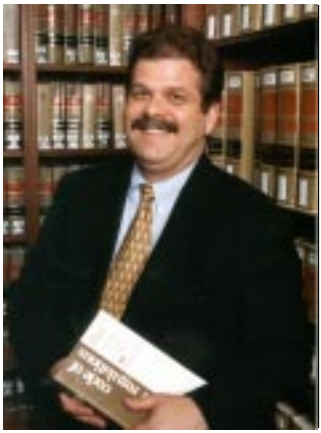


Richard B. Belzer, Ph.D.

Richard B. Belzer is Visiting Professor of Public Policy and Regulatory Program Manager for CSAB. He heads the CSAB's satellite office in Washington, D.C. He is the principal investigator on a major new CSAB program on regulatory oversight and regulatory reform. He also conducts original research in a number of areas related to environmental policy, health and safety risk, methods of benefit-cost analysis, and risk analysis.

Prior to joining CSAB in 1998, Dr. Belzer served for nearly 10 years as an economist in the Office of Information and Regulatory Affairs, within the Office of Management and Budget. Dr. Belzer's primary responsibilities included analytic oversight of several regulatory programs of the Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and the Departments of Agriculture, Commerce, and Interior. He was also responsible for improving the quality of data collected by federal agencies or through federally sponsored research programs.

CSAB's Regulatory Oversight Project is a two-year endeavor to analyze comprehensively how federal regulatory agencies comply with the array of procedural, analytic, and substantive requirements that currently exist under various statutes and Executive Orders. These requirements have been frequently cited as providing an effective means of regulatory oversight through which the efficiency and common-sense character of federal regulation are enhanced. Further, it has often been argued that because these requirements adequately protect the public interest from both regulatory excess and special-interest capture, there is no need to enact additional regulatory reform legislation.

Evidence supporting these claims is largely anecdotal, however, and unsupported by systematic analysis. CSAB's Regulatory Oversight Project will, for the first time, evaluate the effectiveness of these oversight requirements by systematic examination of agency performance.

Dr. Belzer holds B.S. (1979) and M.S. (1980) degrees in Agricultural Economics from the University of California at Davis, a master's degree in Public Policy from the John F. Kennedy School of Government (1982) and a Ph.D. in Public Policy from Harvard University (1989).

It is a pleasure to be with you today, in a place far away from our nation's capital. I want to thank John Hosemann for his kind invitation to speak to you today about a subject near and dear to me.

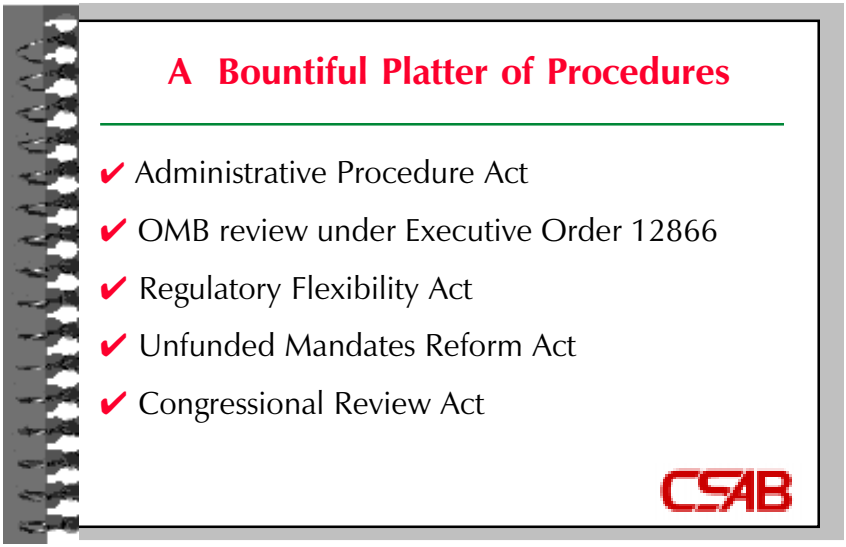
The question asked by the title of this session is: "Can you expect any significant regulatory relief this year from the Congress, the courts or the administration?"

The short answer, of course, is: "Chances are slim and none." But I would be performing a disservice if I left you only with that glib quip. There are reasons why I believe regulatory reform is not on the horizon this year, and it is important that I present these reasons in a careful, systematic way.

It is also important that I describe for you a new path toward regulatory reform. It may not be the only path, for I am mindful that dedicated folks like the professional staff members from the Congress here today continue to try to deliver significant regulatory reform legislation.

Nevertheless, I believe that the path I am about to describe is fundamentally correct. I believe this so strongly that last September I quit my comfortable, lifetime sinecure as an economist at the Office of Management and Budget in order to pursue it.

Let me begin by presenting a systematic look at what ails us.



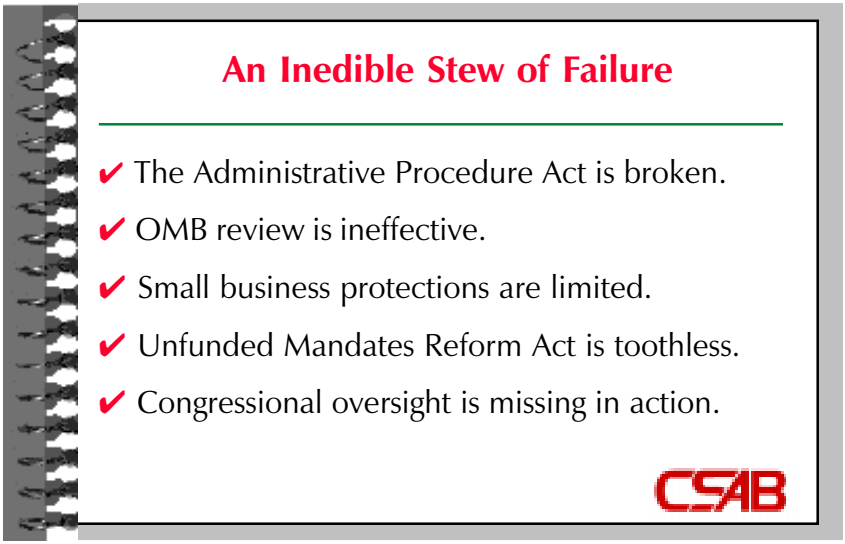
Let's start by acknowledging that we have in place a bountiful platter of procedures—procedures that are supposed to provide multiple layers of protection from overzealous regulators.

First, we have the Administrative Procedure Act. The APA established the ground rules for how federal regulators write regulations. Regulators must give public notice of what they intend to do, take public comment on what's foolish about what they intend to do, and respond to these public comments prior to taking final action.

Since 1981, we have had a system of centralized review of executive branch rulemaking. The Office of Information and Regulatory Affairs, located within the Office of Management and Budget, exercises this authority under Executive orders signed by the President of the United States. That office is staffed with the most dedicated public servants I have ever known.

We also have the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. "Reg Flex" is supposed to ameliorate disadvantages small businesses face just because they are small. UMRA is supposed to relieve state and local governments of costly federal edicts delivered without the funds to pay for them.

Finally, we have the Congressional Review Act, the freshest side-dish on the platter. The CRA reasserts Congress' authority and responsibility for regulatory legislation. It sets out expedited procedures for Congress to disapprove regulations.



Despite this bountiful platter, what seems to be served up is an inedible stew of failure.

The Administrative Procedure Act is broken. Regulators long ago mastered these procedures and endure them as a cost of doing business. Regulators still thwarted by the APA are incompetent, a fact for which we should all give thanks.

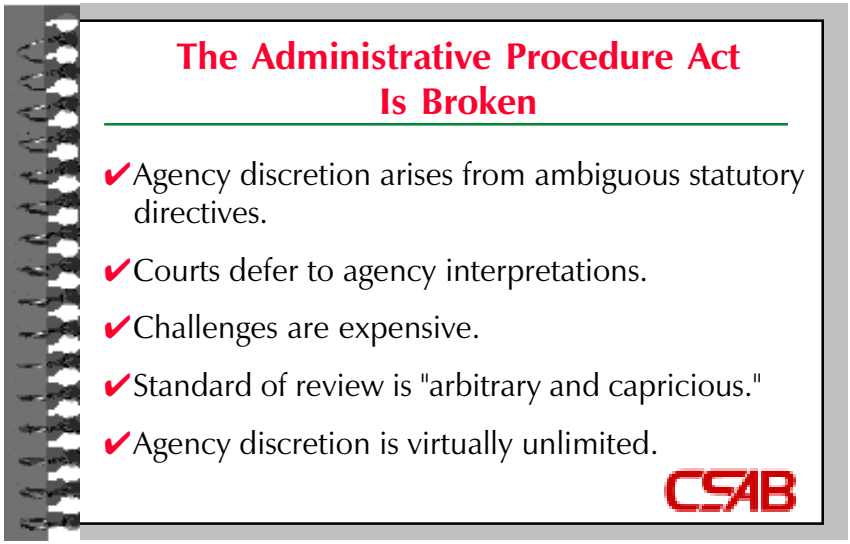
OMB review of regulations is ineffective. Most rules are no longer sent to OMB for review; the regulators are supposed to police themselves with respect to these so-called "non-significant" regulations. For the subset of rules that OMB does review, it is incapable of enforcing any of the procedural, analytical or substantive provisions of the Executive order under which that review takes place.

The small business protections of the "Reg Flex" Act are limited and expensive to claim. It is so expensive to claim these protections that only those businesses that aren't supposed to be eligible for small business protection seem to be able to afford to protect themselves.

The Unfunded Mandates Reform Act is simply toothless. It cannot even gum the regulators to death.

Finally, Congressional oversight is missing in action. Remember that most members of Congress are born regulators. They go to Washington to write legislation, which is simply regulation on a grander scale.

Let's quickly examine each of the ingredients in this inedible stew.



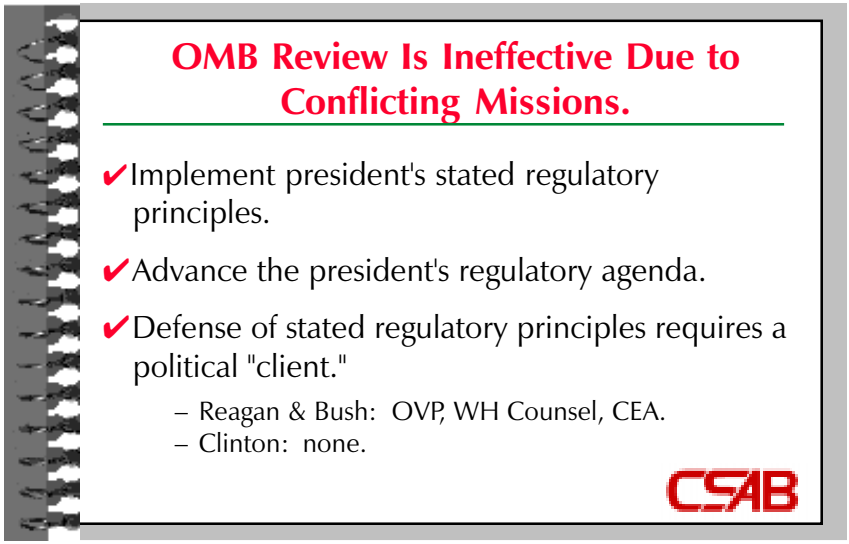
The Administrative Procedure Act is our government's attempt to use law—in this case, a law about administrative process—as a means to regulate people—in this case, bureaucrats and political appointees of the president. Private actors covered by regulation frequently search far and wide for loopholes. They stop searching for loopholes when the threat of detection and meaningful punishment becomes acute. Regulators are people, too, equally motivated to exploit loopholes. But regulators face limited risk of detection and virtually no chance of punishment.

Regulators have substantial discretion in the way they design regulations. Congress has delegated that legislative discretion to them. Congress says "protect human health and the environment," but does not say which people, what environments, how much protection, or what should be spent to pursue them. Just yesterday afternoon we had a seminar on the Food Quality Protection Act of 1996. The Congress told EPA to regulate pesticides according to a new safety standard: "reasonable certainty of no harm." But the Congress left to EPA the discretion to decide the definition of "harm," how little of it means "no harm," and what constitutes "reasonable certainty."

The courts defer to regulators for expertise. In the face of ambiguous legislative directives such as this one, the regulatory agency becomes the legislature. If the Congress is unhappy with what the regulators decide, it has an array of instruments available. It can cut the agency's budget, place riders on the agency's appropriations, or beat up on agency political appointees in public. It can even rewrite the law. All of these are hard.

Legal challenges are very expensive. To win, you have to find a mistake in administrative procedure—which is usually difficult—or show that the agency clearly misinterpreted the law—which is nearly impossible. It is nearly impossible because the standard of judicial review is "arbitrary and capricious." Basically, this means the agency action must be both stupid *and* mean before a court will overturn it.

In sum, whenever regulators have discretion, you can expect them to exercise it in ways that are consistent with their own policy agendas and the agendas of their primary constituents. There is no reason to believe that they will instead exercise their discretion as a majority of members of Congress might have intended.

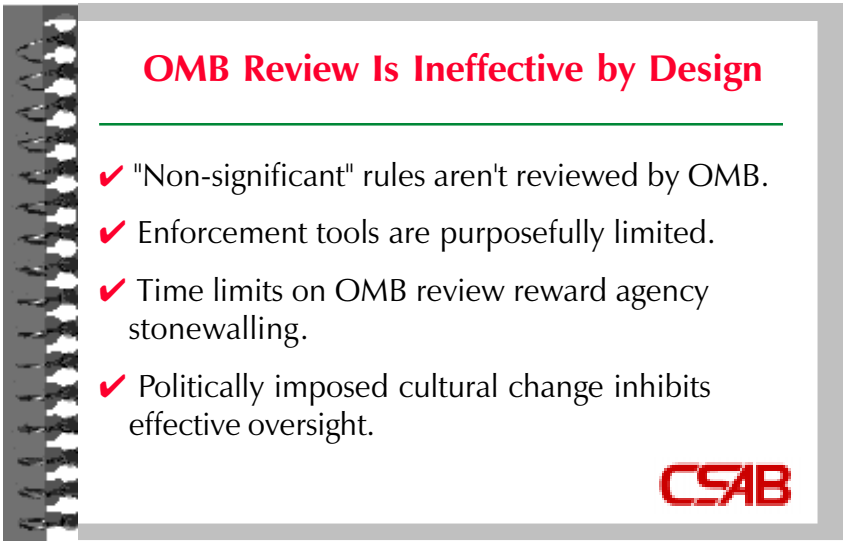


OMB review has proven to be ineffective. The fundamental problem is that OMB's non-political regulatory reviewers serve two competing masters. They are supposed to implement and enforce the president's stated regulatory policy, a set of noble principles embodied in Executive order, but at the same time they must advance the president's policy agenda.

These missions have frequently collided head-on. I served under three presidents, about five years under each party. Over that time, I can think of few instances in which the political interests of the administration in power were sacrificed on the altar of noble principles found in some Executive order.

For noble principles to prevail, OMB's non-political analysts need a powerful political client and protector within the Executive Office of the President willing to stand up for these principles. In the Reagan and Bush administrations, the Vice President's office, the White House Counsel's office, and the Council of Economic Advisers frequently acted as OMB's clients and protectors when it sought to defend these principles. I say "frequently" but by no means "always," and especially not when these noble principles collided with the president's policy agenda.

OMB has no such client in the Clinton administration. The Vice President is well-known to be hostile to these principles, particularly when it comes to environmental protection, health and safety. The White House Counsel's office is busy trying to keep the impeachment wolves at bay, and the Council of Economic Advisers, although usually sympathetic, walks on eggshells like everyone else in fear of the Vice President, always keeping in mind that the Vice President could become president at any time.



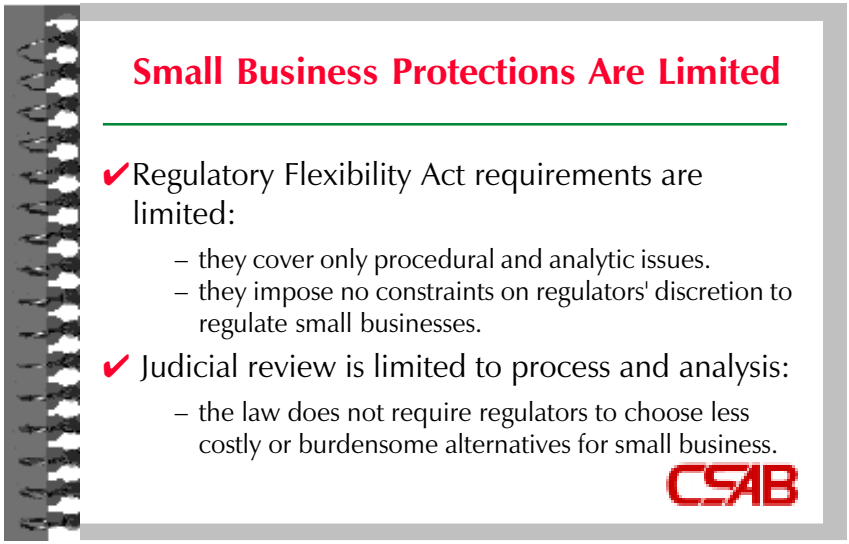
The truly significant change that has occurred since 1993 is more subtle. Whereas OMB oversight has always suffered limited effectiveness due to conflicting missions, it is now ineffective by design.

First, hundreds of so-called "non-significant" rules are not submitted to OMB for review. With surprising regularity, this is where the real action is. It is through these non-significant rules, policy statements and guidance documents that precedents get set, regulatory land mines are buried, and ambiguous regulations are interpreted for enforcement purposes.

Second, OMB's enforcement tools are extremely and purposefully limited and blunt. Because these tools are so blunt they are wielded very infrequently. If an agency's regulatory analysis is so egregiously flawed that the draft rule cannot be intelligently reviewed, there is nothing that the OMB professional staff can do about it.

Third, OMB's reviews are limited to 90 days or less no matter how broad or deep the controversy a regulation generates. Frequently, regulators submit draft rules to OMB just days or weeks before a statutory or judicial deadline requires agency action. Strict time limits on OMB review, combined with very limited enforcement tools, encourage regulators to play hide-and-seek and to stonewall OMB's legitimate requests for information and analysis. A regulatory agency's failure to provide all the information necessary to perform an intelligent, informed review is not by itself sufficient ground for OMB to exercise its blunt enforcement tools.

Finally, the Clinton administration changed the culture of OMB. Traditionally OMB maintained an adversarial relationship with the agencies, a relationship consistent with its oversight function. But in 1994, OMB was reorganized. The administration directed OMB's non-political staff to work cooperatively with their agency counterparts. This quietly converted OMB from an oversight agency into a clerical and administrative office.



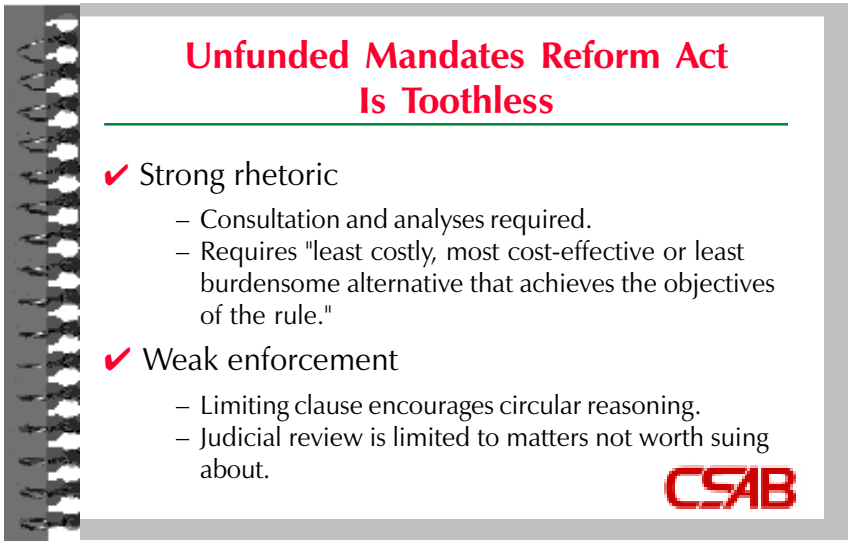
Recent amendments to the Regulatory Flexibility Act have significantly increased the potential procedural and analytic burdens regulators face in writing regulations that adversely affect small business. When the "Reg Flex Act" was first enacted in 1980 it lacked any enforcement mechanism at all. Regulators responded by producing boilerplate documents that satisfied the letter but not the spirit of the law, or they simply ignored the law altogether. When the "Reg Flex Act" was strengthened in 1996, agencies could no longer ignore the law, and their ability to offer token compliance was significantly diminished.

Nevertheless, even the toughened "Reg Flex Act" does not actually require agencies to make decisions differently than they used to. They must document the extent to which they have accommodated small business concerns, but they don't actually have to make any accommodation.

Frequently, regulators do offer relief for small businesses. However, this relief often takes the form of allowing greater time for small businesses to come into compliance with the same standards that apply to large businesses. Rarely does relief entail standards that are tailored for small business.

One reason is that regulators generally prefer large businesses to small businesses. This preference arises because it is much less expensive for the regulators to administer and enforce regulations on a handful of large firms than it is to monitor hundreds or thousands of companies, farms and sole proprietorships.

Also, large businesses often have staff offices dedicated to regulatory compliance. Many of the people who work in these offices are more sympathetic to the aims of the regulators than they are to the objectives of the firms that employ them.



The Unfunded Mandates Reform Act, one of the first bills the 104th Congress enacted in 1995, sailed through the House and Senate before being signed by the President. The reason it sailed through is that it enjoyed enormous bipartisan support. It enjoyed enormous bipartisan support because it had the perfect combination of strong rhetoric and weak enforcement.

UMRA requires agencies to consult with affected state and local governments and analyze the potential financial effects of their actions. But the law established no standards defining adequate consultation or regulatory analysis, and it didn't delegate to anyone the authority to write such standards.

UMRA also directs agencies to choose the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule." While the first part of this directive is noble, that concluding clause provides regulators with a mammoth loophole. Regulators can always assert that only the specific option selected "achieves the objectives of the rule." No one systematically evaluates the merits of such claims.

When regulators choose to take advantage of this loophole, there is no legal recourse. Regulators' determinations of what is "least costly," "most cost-effective," or "least burdensome" are not judicially reviewable. Nor can one legally challenge a regulator's claim that only the specific option selected "achieves the objectives of the rule."

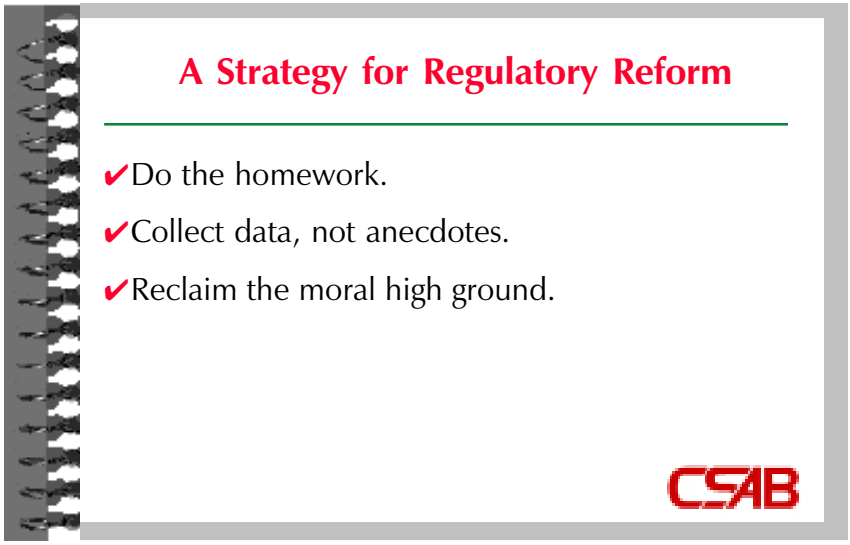
The only issue on which an affected party can sue is whether the agency published the required statement. The only relief a court can award is to order the agency to publish it forthwith. It is not worth the expense of litigation just to get these crumbs.

The Congressional Review Act of 1996 established new requirements for agencies to submit regulations to the Congress prior to promulgation. It also devised expedited procedures for the Congress to enact legislation disapproving regulations it doesn't like. To pass constitutional muster, these procedures also require that any such resolution be signed by the President, or, if vetoed, be overridden by the usual two-thirds majority. In an era of divided government, one can expect these procedures to be used rarely. When government is not divided, there shouldn't be any need to use them at all.

Complicating these procedures are certain cultural characteristics of the Congress. For example, authorizing committees may well support an agency action that a majority of both houses would oppose. Committee chairmen jealously guard their turf from encroachments by other members and committees, thus impeding coordinated action.

Regulators' capacity to win the public relations battle with the Congress should never be underestimated. Regulators command the facts, as well as assertions of fact that cannot be readily disproved. Moreover, they cast themselves as protectors of the public interest against the political machinations of others. To defend a rule intended to reduce air pollution, for example, it is easy to arrange photo ops with attractive, wheezing children. Even if the regulation will make these children's lives worse, it is extremely difficult to counteract this visual imagery.

Finally, most members would rather legislate than conduct oversight. Remember, legislation is regulation on a grand scale. It's popular; it's sexy; it's fodder for reelection. Oversight? That's unpopular, boring and fodder for your opponents who say you're a do-nothing senator or representative.



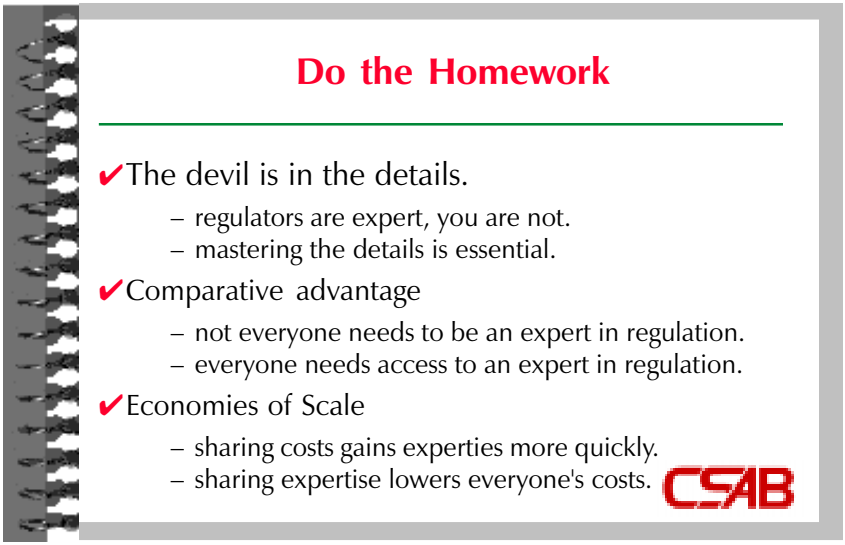
Okay, enough about what ails us. How do we get well?

We need a strategy for regulatory reform, not just a grocery list of changes we'd like to see enacted or noble principles we'd like to see followed. Noble principles are already in place.

The strategy I recommend has three parts:

1. Do the homework;
2. Collect data, not anecdotes; and
3. Reclaim the moral high ground.

I'm going to elaborate on each of these elements. Then, I'll tell you what I am doing to execute this strategy in my capacity as Regulatory Program Manager for the Center for the Study of American Business at Washington University in St. Louis.



First, "doing the homework" means mastering the details, because everybody knows that it is in the details where the devil resides. With very few exceptions, the regulators are expert in the rules they write. You are not. And this is by design, not happenstance. If they wanted you to understand their regulations, they would write them in plain English.

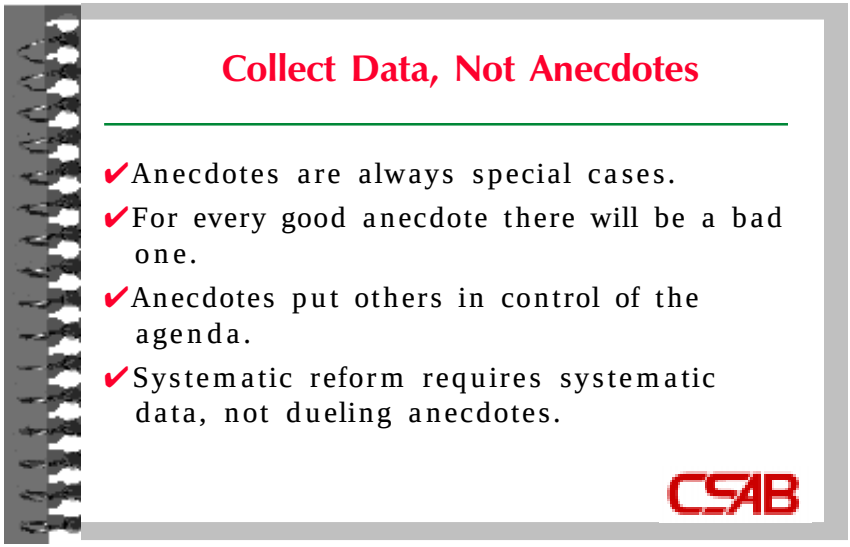
The good news is that not everybody has to bear the ugly burden of "doing the homework." It's much more efficient when you rely on those with a comparative advantage in this sort of thing. Most of you are busy trying to run farms and businesses, and it's a big distraction to try mastering regulatory minutiae. But some of us have a passion for solving the mystery wrapped in an enigma that is government regulation. We enjoy the challenge and consider the *Federal Register* light bedtime reading.

Also, there are economies of scale in gathering and disseminating information about regulation. Sharing the cost enables experts to become expert more quickly, and sharing this expertise lowers everyone's cost of becoming informed. These scale economies are lost when regulated parties focus solely on their own competitive advantage, and regulators are expert in playing you off of each other for precisely that purpose.

In yesterday afternoon's seminar on the Food Quality Protection Act, Bill Spencer related his experience as Farm Bureau's representative on the Vice President's Tolerance Reassessment Advisory Committee. He told you about the "risk cup," the device EPA intends to use to cap exposure to each family of pesticides. He also told you that EPA wanted Farm Bureau to join a "round table discussion" in which grower groups would be forced to fight it out among themselves as to which crops would get to remain on the label and which crops would not.

Both of these strategies—the "risk cup" and the "round table discussion"—are classic ways in which regulators play divide-and-conquer. They prey upon your tendency to seek out competitive advantage rather than unite in a common purpose.

The other side is united in just such a common purpose: the elimination of pesticides from U.S. agriculture. You cannot do battle with them, much less prevail, unless you remain united as well.

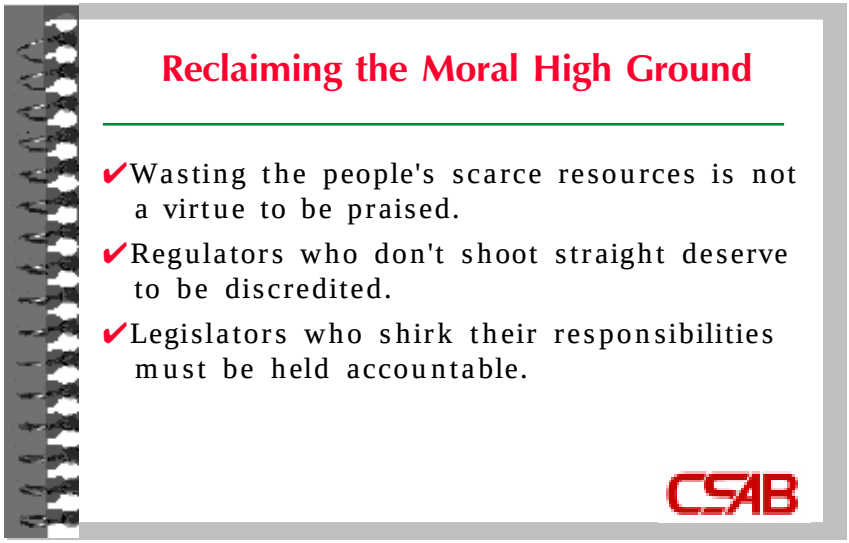


The history of regulatory reform during the 104th and 105th Congresses was a titanic battle of anecdotes. While it's perversely satisfying to find horror stories of regulatory excess and governmental abuse, one should keep in mind that the reason we call them horror stories is that they are special cases. Not only can the other side successfully disparage horror stories for being exceptional, they also have no difficulty coming up with horror stories of their own.

Even good anecdotes have the disturbing characteristic of putting others you don't know in control of your agenda. Farmer John, who has a great story to tell about how he's pursued night and day by malevolent enforcers of the regulatory state, may turn out to be a deadbeat dad, and a closet member of the Ku Klux Klan cheating on his wife and taxes.

When an issue has been reduced to dueling anecdotes, don't expect sensible policy to be the result. In a war of anecdotes, the press will probably take the other side. When the dust settles you may be worse off than when you started.

Collecting data means being statistically rigorous, systematic and disciplined. In the case of pesticides, for example, it means collecting actual exposure data from real people, especially infants and children who live on farms where pesticides are used. Real exposure data runs a sweep around all the models and assumptions that EPA uses to get its worst-case risk estimates.

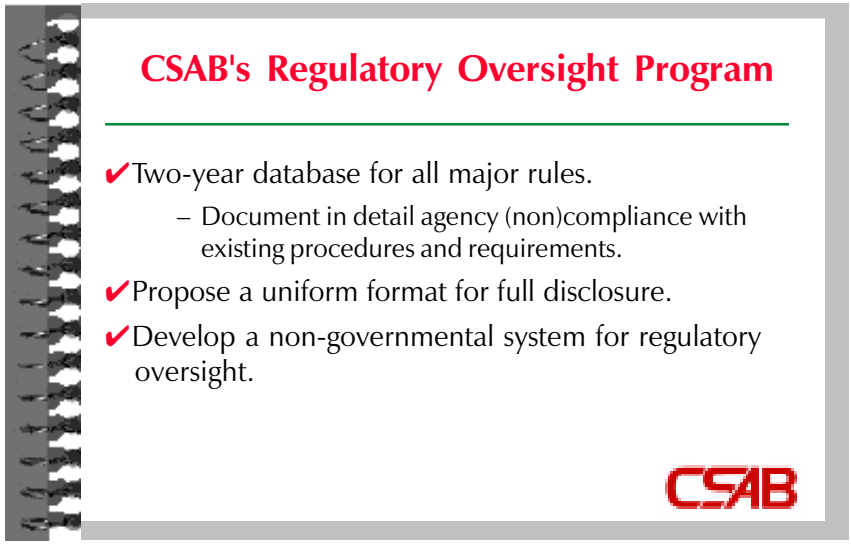


The other side has had a long free ride on the moral high ground. It's time to vigorously and relentlessly challenge their claims as the rightful owner of this stronghold.

Probably most of you believe that regulations which have more costs than benefits are bad social investments. That's because you believe that projects that cost more than they are worth are bad *private* investments. It is enormously peculiar, therefore, that when it comes to government policy, the senseless suddenly becomes sensible. Wasting the people's scarce resources is not a virtue to be praised. Activists who propound such wasteful policies should never be allowed to wrap themselves in the holy cloth of righteousness.

Much of regulation is suffused with deceit, misrepresentation and obfuscation. But regulators lose their status as valiant defenders of the public interest once their deceit, misrepresentation and cover-up is publicly exposed. Regulators who don't shoot straight deserve to be discredited.

The Congress is slowly coming to understand that delegating to regulators the discretion to work out the details is a prescription for regulatory mayhem. But they have only themselves to blame. They need to articulate precisely what they want the regulators to achieve, and specify with equal clarity exactly how we'll know when the regulators have completed their task. Legislators who shirk this responsibility must be held accountable for inviting yet another round of uncontrollable regulatory excess.



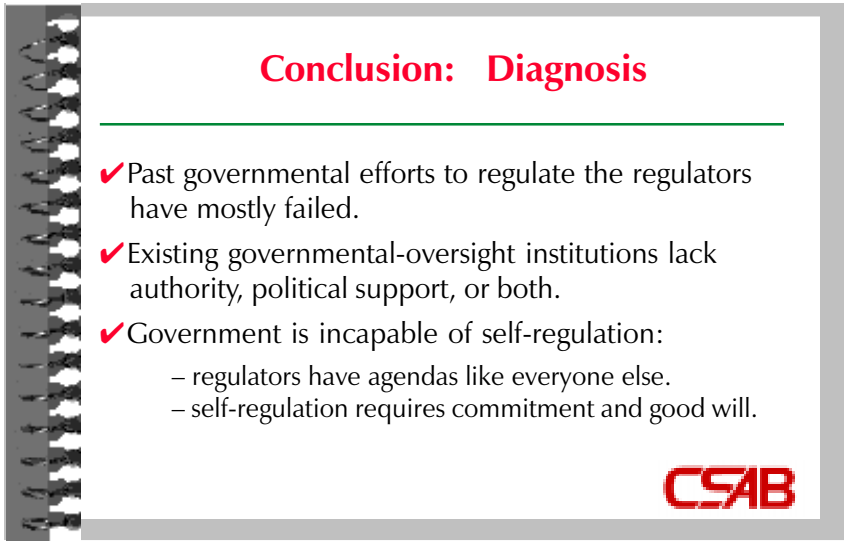
When I joined the Center for the Study of American Business last September, I began a project that will, for the first time, subject the regulators to systematic and comprehensive oversight independent of any political interest. Call it a "regulatory right-to-know program" that will enable the public to see what their government is actually doing.

For at least the next two years, I will be documenting, chapter and verse, the extent to which federal regulatory agencies actually comply with the existing procedures and requirements I mentioned earlier. The existence of these procedures and requirements has been invoked frequently as prima facie evidence for the argument that regulatory reform legislation isn't needed.

That argument would fall apart if systematic analysis demonstrated that agencies routinely fail to comply with these procedures and requirements. Such a record does not now exist. Right now, all we have are anecdotes. While we will limit ourselves at first to major final rules, we hope to expand the project to include proposed rules and many of the so-called "non-significant" rules as well. Eventually we will have a comprehensive record—data on the actual conduct of federal regulatory agencies, not just anecdotes.

In the course of developing this database, we will devise a uniform format for regulatory disclosure. Congress has invited OMB to propose such a format, but that won't happen. If the Congress wants a uniform format, perhaps it will conclude that our format is superior to waiting on OMB.

The final product of this project is a non-governmental system for regulatory oversight, one that does not depend on legislators and statutes and courts and the good will of the regulatory bureaucracy. That's what makes it a new path to regulatory reform: instead of asking the Congress and the administration and the regulators to deliver changes for which there is no broad-based political consensus, it aims to foster the consensus necessary to compel these institutions to act.



In summary, it is important that we have both a good diagnosis of the reasons why regulatory reform hasn't happened and a prescription that is carefully targeted to remedy these specific ailments.

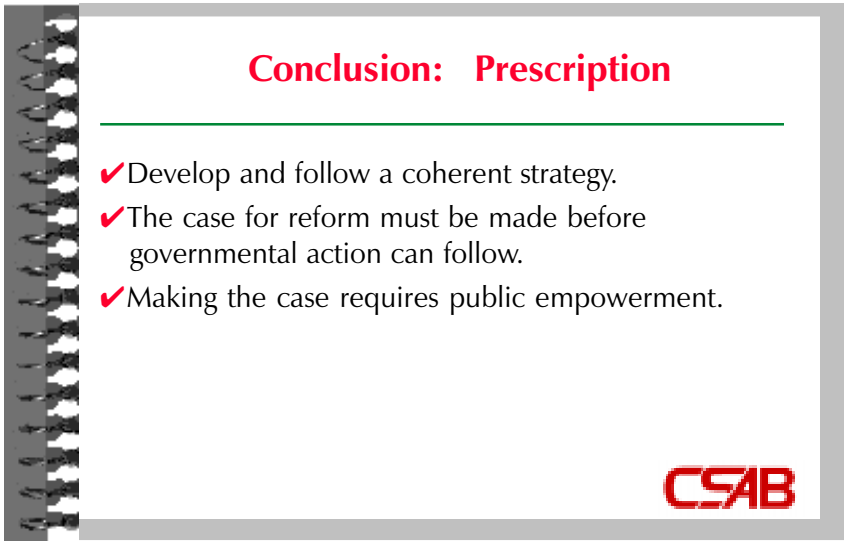
My diagnosis is simple, and it consists of three points:

First, past governmental efforts to regulate the regulators have mostly failed. Examples of success are just anecdotes.

Second, this record of failure has occurred because existing governmental oversight institutions lack adequate authority, political support, or both, to do their jobs. Tinkering with these institutions at the margin may offer some short-term improvement, but in the long run the bureaucracy will adapt to the tinkering in ways that minimize its effects.

Third, governmental oversight ultimately fails because government is incapable of self-regulation. We have a bountiful plate of procedures in place intended to regulate the regulators. Unless these procedures are strictly enforced, efforts to regulate the regulators will fail. The government may be incapable of strictly enforcing these procedures, but those of us outside the government are not.

As all of you in business know, effective self-regulation requires commitment from the top and the goodwill of those below. Government lacks both. Indeed, if we had commitment at the top and goodwill below, we wouldn't be having this seminar on why regulatory reform is stuck in neutral.



My prescription is equally simple, although by no means "easy." It also involves three elements.

First, the cause of regulatory reform requires us to develop and follow a coherent strategy: do the homework; collect data, not anecdotes; and reclaim the moral high ground.

Second, the case for regulatory reform must be made cogently, systematically and relentlessly before there will be a political consensus that reform is necessary. But our strategy cannot depend on government action to make this case. Instead of trying to pressure government to police itself, we must build the capacity for the people themselves to be the watchdogs. Government action will follow.

Third, making the case for regulatory reform requires empowering the people themselves to perform their own oversight. That means developing data on the regulators' actual performance, not just anecdotes.

At the Center for the Study of American Business, we have taken the lead to implement just such a strategy. First, we excel at doing the homework. We are a research-oriented, nonprofit and nonpartisan organization that has published hundreds of policy studies since we were founded in 1975. We have been involved in regulatory reform since the beginning, not just when the issue got hot a few years ago.

Second, we are already collecting the data that will make the case for regulatory reform. We will be the only independent source for truly comprehensive information about federal regulation.

Finally, we are committed to sharing the results of our research as broadly as possible. Each of you can be an effective watchdog in the regulatory junkyard. But you need information, and ready access to it, in order to play your part.

Thank you very much

Previous publications in this series:

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