

NLWJC - Kagan

DPC - Box 055 - Folder-010

Regulatory Reform

1/15/96 Reg Reform - Hillery/Walker/McBain/Higgins

Levin bill - presumed content - written already

1) Cost-benefit Anal -

(?) not decisional criteria / not just review of this
don't have to find how justify costs
just have to say numbers

2) Risk Assessment

skipped down version of last one
health/safety/lev. } limited to
major

3) Look-back

Advisory committees w/ schedule
No automatic termination

4) Codify CRA - w/ expanded jurisdiction

Expand review to indep ags - FCC/SEC/etc
Codify time limits + disclosure principles

?? 5) Peer review

Prob apply only to
health/safety/lev
major

NFIB / NAM / skill concerning
deciding

(Pres. vouchable work Levin - trying to hold back aggressive bill)

McBain - Levin def. wants to do

Thompson - ex-specter?? (Gov after cute - will be there
Levin trying to get / cute to get this)

267d strategy

1) what Levin expect to not to roll out - work
him where we can live w/

2) No. 8 - remain - opposed to sweeping TR bills

More bureaucracy; litigation etc.

Thomson - My Levin/Thomson of → 100-0
Levin - ^{will} can go ahead w/out us
Prob going to happen

Lines in sand -

1) Decirical criteria of IR

hit old bill had this
winded off it
will be more back

2) Politics & to have rule reviewed
creating more bureaucracy

3) Risk assessment -

Making things more complicated

smaller

Melutosh - bigger line in sand - not just these minor things,
Broader - we don't like any of these approaches.

Melutosh will take anything that
comes out of Senate

Kitty/Katie - med principals discuss -
big political/substantive g.

THE WHITE HOUSE
WASHINGTON

FEB 12 1997

MEMORANDUM TO ERSKINE BOWLES

FROM: John Hilley and Sally Katzen
SUBJECT: Regulatory Reform Developments

cc: Elena
FYI Mike
Bruce -
FYI. To the extent the recommendation says anything, I agree with it. The summary chart of the Levin bill seems overly generous to me.

Elena

Subsequent to your conversation with Senator Levin, you asked for a status report on regulatory reform legislation. This very divisive, contentious issue from last year is upon us again. There are different views as to substance and strategy.

BACKGROUND

104th Congress

As you recall, regulatory reform was an important component of the Republican agenda in the 104th Congress, with the House quickly passing comprehensive and extremely burdensome legislation as part of the Contract With America. There were more moderate versions of comprehensive reg reform legislation introduced in the Senate, with Democratic support, but action ultimately gravitated to an "extreme" Dole-sponsored bill that we were able to stop three times on cloture votes. By overreaching on this issue, the Republicans were tagged as anti-environment (anti-clean air and water) and anti-safety (dirty meat) by the mainstream media and the electorate. Both the Administration and Congressional Democrats benefited politically from their stand against extreme Republican reg reform initiatives.

Comprehensive vs. Statute-By-Statute Reform

Many Members, including a number of Democrats, believe that there should be legislation that imposes more discipline on agencies (particularly environmental, health, and safety agencies). We achieved notable bipartisan successes by proceeding statute-by-statute, program-by-program -- for example, the Food Quality Protection Act and the Safe Drinking Water Act at the end of the last Congress -- although Superfund and Clean Water Act reforms never got off the ground. The advantage of proceeding statute-by-statute is that the authorizing committee generally has a fuller understanding and appreciation of the complexities and nuances of the particular programs, and they can craft more tailored provisions. The other approach is so-called "comprehensive" legislation, which contains requirements applicable to all regulatory actions (or to all health, safety, and environmental regulatory activity). These proposals necessarily use a "one-size-fits-all" approach. Two such bills were enacted in the 104th Congress with Presidential support -- the Unfunded Mandates Reform Act and the Small

Business Regulatory Enforcement Fairness Act (SBREFA), which includes the Congressional review provisions.

The leading Democratic proponent of comprehensive legislation is Senator Levin, who has sponsored or supported a variety of regulatory reform bills since the early 1980s. Shortly after the 1996 election, he made clear his continuing interest in enacting comprehensive legislation to codify E.O. 12866, including specifically the requirement for cost-benefit analysis.

Recent Developments

Sen. Levin has drafted a bill that he believes is good government. His staff have shared language with the staff of Governmental Affairs Committee Chairman Thompson, and Thompson has indicated that the bill is "in the ballpark." Thompson has stated through a press release (among other means) that regulatory reform will be at the top of his committee's agenda and that he intends to hold hearings within the month. If Thompson were to sign on to the Levin bill (Sen. Glenn is also likely to be a co-sponsor), the legislation would almost certainly pass the Senate overwhelmingly. In addition, the House Republican leadership has signaled that they will wait for the Senate on comprehensive legislation and will accept whatever reg reform bill comes out of the Senate.

ADMINISTRATION POSITION

Very shortly, we will be asked for a public statement of where we stand as an Administration on this issue. No matter what we say, someone will be unhappy. Environmental, consumer, and labor groups believe that we won the reg reform battle last Congress and should just say "no." That may be an over simplification of our current predicament because taking such a stand would essentially lock us out of the negotiations on the Hill. If we are presented with a "fait accompli" it will likely contain some provisions that we would oppose, but, because of the dynamics of the bipartisan negotiations, we would be unable to muster the necessary votes to defeat or turn it back. On the other hand, the business community and those who have heard the President's statements in support of sensible reforms believe this is a litmus test for his credibility on good government. These groups have moderated their demands from last year. Some fear that if we accept the current proposal too quickly, the business community may push for more than the Levin bill. These views, and many points in between, are reflected among the members of the Cabinet.

SUBSTANCE

In the past, the substantive disagreements were exceedingly complex, often bordering on the arcane. Sen. Levin's bill endorses cost-benefit analysis and risk assessment with peer review, requires agency reconsideration of some existing rules, and generally codifies regulatory review under Executive Order 12866. He has sought to avoid the veto bait in earlier bills. We have attached a one-page "cheat-sheet" providing brief descriptions of the major substantive issues.

For present purposes, you may assume that the current Levin draft seeks to address our previously articulated concerns.

STRATEGY

The differences in views on the proper strategy are equally as great as the disagreements over substance. Many believe we must be part of the negotiations if a bipartisan bill moves, otherwise we will be irrelevant to the process. Others are concerned about the adverse reaction we will generate from our constituents if we give any support to the process, especially before we know for certain that Sen. Thompson is on board and that the Levin bill will be the vehicle. Either way, a regulatory reform measure will move in the Senate as it is a very high priority on the Republicans' agenda. Our challenge is to devise a strategy that strikes the balance between our acting early enough so that we are at the table if legislation moves, but not so soon that we cause a bill to move that would not have done so otherwise.

RECOMMENDATION

The regulatory agencies generally want us to say that the Levin effort is "premature and ill-advised." We believe we should adhere to our previous position that we do not think comprehensive regulatory reform is necessary, that the best way to proceed is statute-by-statute, program-by-program, and that there have been several new legislative initiatives (including Unfunded Mandates and SBREFA) that should be given a chance to shake out before we enact yet another statute. At the same time, we should say that we would be willing to work with anyone on sensible, bipartisan regulatory reform, and acknowledge our special respect for Sen. Levin. Furthermore, we must be sure that statements of Administration position are well coordinated with the relevant agencies and that Sen. Levin understands the basis for our position. If, however, the Senator goes off on his own, as is likely, we must have maintained close and positive relations so we can affect the outcome of the bill.

**COMPREHENSIVE REG REFORM
MAJOR SUBSTANTIVE ISSUES/CONCERNS**

ISSUE/CONCERN -- DOLE BILL	LEVIN BILL
<i>Decisional Criteria:</i> Agency precluded from promulgating any rule <u>unless</u> the agency satisfies a cost-benefit test (e.g., benefits justify costs; most cost-effective alternative, etc.)	Requires that agencies conduct cost-benefit analyses on all major rules and state <u>whether</u> the benefits justify the costs; requirements <u>not</u> a prerequisite to promulgating the rule
<i>Supermandate:</i> Amends <u>all</u> statutes to require that costs not only be considered, but be prerequisite (see decisional criteria above)	No such provision
<i>Judicial Review:</i> Courts involved in reviewing each step of a cost-benefit analysis and may remand a rule to the agency for any procedural defect	Recodifies existing ad law standard of review -- any analysis by the agency is part of the entire rulemaking record; court reviews final agency action against record as a whole
<i>Petition Process/Review of Existing Rules:</i> Burdensome petition processes to review existing rules would tie agencies in knots and waste scarce resources	Agencies to establish advisory committees to determine which of their rules they should reexamine
<i>Risk Assessment & Peer Review:</i> Very prescriptive and detailed requirements for risk assessments; conflict of interest concerns with regard to peer review	More general and less prescriptive requirements; protections against conflict of interest for peer review; still have several specific language problems
<i>Effective Date:</i> Effective date at or soon after enactment is <u>de facto</u> moratorium on all agency rulemaking	Bill does not take effect for 180 days after enactment and will <u>not</u> apply to any rulemaking for which a notice has been issued on or before that date
<i>Nunn-Coverdale Definition of "Major" Rule:</i> Expands the number of rules subject to the bill's cost-benefit and risk assessment requirements to include up to 150 agency actions that would adversely affect small business	No such provision. Instead, OMB director may designate annually up to 25 additional rules as "major" if they adversely affect the economy, State and local governments, public health or safety, etc.
<i>Changes to Delaney Clause/Toxic Release Inventory (TRI):</i> These are significant substantive, rather than process, issues	No such provisions

<p><i>Affirmative Defenses:</i> Bars penalties where a party “reasonably” relies on a rule inconsistent with the rule being enforced or on the party’s “good faith” interpretation of the rule</p>	<p>No such provision. We will follow a separate bill in the House that addresses this issue</p>
<p><i>Regulatory Accounting:</i> Burdensome and costly “make-work” requirement to calculate annually the costs and benefits of <u>all</u> major rules for 5-year period</p>	<p>No such provision. A less burdensome accounting requirement (imposed on OMB) passed as part of the Treasury-Postal appropriations bill</p>