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### Better Regulations: The National Performance Review's Regulatory Reform Recommendations

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## **BETTER REGULATIONS: THE NATIONAL PERFORMANCE REVIEW'S REGULATORY REFORM RECOMMENDATIONS**

JEFFREY S. LUBBERS†

### INTRODUCTION

When the editors of the *Duke Law Journal* invited me to Durham to discuss the National Performance Review's regulatory reform recommendations, they mentioned that Vice President Gore had quite naturally been their first choice. So I'm both honored and a bit apprehensive to be here in his place. There is something we both have in common, however: a reputation for being a stiff speaker. His, of course, is undeserved, as those of you who saw him dismantle Ross Perot in the NAFTA debate or banter with David Letterman can attest. I especially liked when Letterman asked him how he would like to be addressed: Mr. Vice President? Mr. Gore? Al? He responded that "Your Adequacy" would be just fine.<sup>1</sup> So that is what I am trying to live up to today.

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† Research Director, Administrative Conference of the United States; J.D., University of Chicago; B.A., Cornell University. The author served as team leader for the National Performance Review's Improving Regulatory Systems team. Other members of the team were Don Arbuckle, Office of Management and Budget (OMB), Neil Eisner, Department of Transportation (DOT), Lorie Schmidt, Environmental Protection Agency (EPA), Kathy Ting, U.S. Department of Agriculture (USDA), and Magnolia Samadani (White House Intern). The views expressed in this Address, except where indicated, are solely those of the author. This Address was presented at a symposium on the National Performance Review at the Duke University School of Law on January 20, 1994.

1. *Late Show with David Letterman* (CBS television broadcast, Sept. 8, 1993), available in LEXIS, News Library, Script File.

The Vice President's National Performance Review (NPR, with apologies to National Public Radio) involved a large-scale, serious, intensive scrutiny of the federal government's operations.<sup>2</sup> Although several previous administrations have undertaken studies of executive branch operations,<sup>3</sup> the NPR was different in the breadth of its scope and in that it was executed primarily by career civil servants.

The formal work of NPR lasted for six months. On March 3, 1993, about 200 employees on loan from agencies throughout the federal government assembled to begin work on the project. These workers were organized into a series of agency-specific and governmental systems teams.<sup>4</sup> In addition, the President asked his cabinet to create internal "reinvention teams" to work parallel to NPR, and to create "reinvention laboratories" to begin experimenting with new ways of doing business.<sup>5</sup> Finally, the Vice President personally held "town meetings" at each cabinet department, heard from tens of thousands of citizens, and led national conferences on reinventing government in Tennessee and Philadelphia.<sup>6</sup>

The highly readable report, *From Red Tape to Results—Creating a Government that Works Better & Costs Less*, not only was published on time but also became a best seller at the

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2. See AL GORE, THE NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993) [hereinafter NATIONAL PERFORMANCE REVIEW].

3. See, e.g., PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL: A REPORT TO THE PRESIDENT (1984) ("Grace Commission Report"); PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE REORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) ("Ash Council Report"); SUBCOMMITTEE ON ADMIN. PRACTICE & PROCEDURE, SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) ("Landis Report"); COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF GOV'T, *Legal Services and Procedures* (1955) (second "Hoover Commission Report"); COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, *The Independent Regulatory Commissions: A Report to the Congress* (1949) (first "Hoover Commission Report"); ATTORNEY GENERAL'S COMMITTEE ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 10, 77th Cong., 1st Sess. (1941); PRESIDENT'S COMMITTEE ON ADMIN. MGMT. IN THE FED. GOV'T, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937) ("Brownlow Committee Report").

4. NATIONAL PERFORMANCE REVIEW, *supra* note 2, at i. For a listing of the agency-specific teams and their recommendations, see *id.* app. A at 133. For the governmental systems teams and their recommendations, see *id.* app. C at 159.

5. *Id.* at i.

6. *Id.* at i-ii.

Government Printing Office, on the Internet, and in two private paperback editions. It describes about 100 of the most significant actions and recommendations of the task force, listing several hundred more in appendices.<sup>7</sup> Most of the members of NPR returned to their home agencies after the report's publication, although a small residual staff of about fifty continues under the NPR aegis to seek implementation of the report's recommendations.

### I. THE IMPROVING REGULATORY SYSTEMS TEAM

One of the eleven "governmental systems teams" created under the NPR was the Improving Regulatory Systems team. When I was recruited as the team leader, I noticed that the team name was a bit more modest than those of some of the other teams, which sported ambitious gerunds such as "transforming," "reinventing," "rethinking," "redesigning," and "reengineering." Whether this cue was intended or not, it turned out to be consistent with one of our team's basic conclusions, that relieving the burden the regulatory process imposes on both the regulated and the regulators<sup>8</sup> lies in improving the current system, rather than in radically restructuring it.<sup>9</sup>

Other than the name of the team (which we shortened to the "reg systems" team to avoid being called the "IRS" team), the only limit to our mandate was the instruction not to duplicate the efforts of a White House task force. The task force was concurrently developing an executive order on centralized review of agency regulations for the new administration to replace similar orders enforced by the Reagan and Bush administrations.<sup>10</sup> The White House task force was headed by the Vice President's Counsel and Chief of Staff, Jack Quinn, and later cochaired by Sally Katzen, the new Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and

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7. *Id.* at ii.

8. See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 11-13 [hereinafter IMPROVING REGULATORY SYSTEMS].

9. See *id.* at 3 (stating that "[t]he President, agencies, and Congress need to take a series of steps to *improve the process* to accomplish regulatory goals in a cost-effective manner") (emphasis added).

10. See *id.* at 11, 77-78.

Budget (OMB). It also included representatives of other key advisors in the executive office of the President.

Our team concentrated on the regulatory process within the agencies, while the Quinn-Katzen task force focused on presidential (OMB) review. As we embarked on interviews with regulators and regulated interests, we quickly found that the first item on their agenda invariably was "OMB review of rules." Fortunately, this one limitation on our scope of review precluded discussions of this politically charged issue, enabling us to develop consensus recommendations more easily. At the same time, however, it became clear that our team and the Quinn-Katzen task force each needed to know what the other was doing, so I was invited to participate in the task force meetings. As a result, the executive order issued on September 30 included some of our team's ideas,<sup>11</sup> and the September 7 NPR Report published the outline of the order with approval.<sup>12</sup>

The scheduling demands necessitated by the September deadline made it difficult to conduct new empirical research. We therefore embarked on a review of past studies (including, of course, those done by the Administrative Conference<sup>13</sup>) and a series of interviews with business groups, public interest lawyers, and agency and congressional staffs about the perceived problems with agency regulatory activities. We also began making (and discussing) lists of problems and potential solutions.

In June, our team's effort received a major boost with the release of a major, three-year study by a panel of the Carnegie Commission on Science, Technology, and Government headed by former Environmental Protection Agency (EPA) Administrator Douglas Costle. The panel was an exceptionally distinguished group that included Judges Stephen Breyer and Patricia Wald, Professors Donald Elliott and Richard Merrill, and former Dupont Company Chairman Irving Shapiro. The study, *Risk and the Envi-*

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11. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

12. See IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 77-78.

13. The Administrative Conference of the United States (ACUS) was established in 1964 by the Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C.A. §§ 591-596 (West Supp. 1994)). It is an independent agency in the executive branch and serves as the government's permanent, in-house adviser on the fairness, efficiency, and effectiveness of administrative procedure. Its recommendations are listed at 1 C.F.R. § 305 (1993) (providing a cumulative list of the Conference's recommendations).

ronment: *Improving Regulatory Decision Making*,<sup>14</sup> was quite thoughtful and consistent with our findings, and we drew heavily from it.

Our team concluded that many complaints about the substance of regulations are exacerbated by perceived problems with the regulatory process.<sup>15</sup> Regardless of their general views about regulation or deregulation, most interviewees agreed with our conclusions.

- 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 rule-making 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.<sup>16</sup>

The consensus that began to crystallize around these points led us to believe that we could recommend procedural reforms that were neither pro-regulation nor anti-regulation but would produce *better* regulation. Moreover, it reinforced our belief that the existing regulatory foundation, as prescribed by the Administrative Procedure Act, is basically sound and that major statutory or structural reform is not necessary.<sup>17</sup>

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14. See CARNEGIE COMM'N ON SCIENCE, TECH., AND GOV'T, *RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING* (1993) [hereinafter CARNEGIE COMM'N].

15. See *IMPROVING REGULATORY SYSTEMS*, *supra* note 8, at 11.

16. *Id.* at 17-73 (proposing individual responses to each of these conclusions).

17. The report stresses the point that the APA's rulemaking process is "simple and straightforward." *Id.* at 8, 41.

Our review resulted in ten recommendations that were approved by the Vice President for inclusion in the NPR Report.<sup>18</sup> The next Part discusses the recommendations, noting any actions that have been taken to implement them.

## II. THE RECOMMENDATIONS<sup>19</sup>

### *REG01: Create an Interagency Regulatory Coordinating Group*

This recommendation, in a sense, sets the table for the others. In urging the creation of a forum for the agencies to discuss overlapping policy and procedural issues, we hearkened back to President Carter's U.S. Regulatory Council, headed by Douglas Costle, which improved coordination in several areas and showed much promise in its two-year lifespan before it was disbanded after the 1980 election.

We concluded that, if anything, the need for coordination had increased in the intervening years.<sup>20</sup> We were pleased that President Clinton agreed with us, ordering the establishment of an interagency Regulatory Working Group (RWG) to be chaired by the OIRA Administrator.<sup>21</sup> The RWG has already had several meetings, and it has created task forces on risk assessment, use of cost-benefit analysis, streamlining agency rulemaking, and using information technology in rulemaking. I am optimistic that the creation of the RWG will help effect the implementation of the following nine recommendations.

### *REG02: Encourage More Innovative Approaches to Regulation*

As the report emphasizes, one of the biggest challenges regulators face is choosing the best tool to solve a problem. In many instances, a *nonregulatory* solution may be the best one. Examples include efforts to spur technological innovation (such as EPA's "Golden Carrot" program to encourage development of an environmentally friendly refrigerator<sup>22</sup>), information disclosure, and

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18. See NATIONAL PERFORMANCE REVIEW, *supra* note 2, app. C at 167-68.

19. The following discussion uses the NPR numbering system for recommendations, e.g. REG01, used both in the appendix to the main report, *see supra* note 2, and in *Improving Regulatory Systems*.

20. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 18-19.

21. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,739 (1993).

22. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 23.

consumer education. When a regulatory approach is necessary, alternative, market-oriented approaches are sometimes preferable. We urged that representatives at high levels of government encourage agencies to consider such approaches.<sup>23</sup> President Clinton has responded by directing agencies to do so.<sup>24</sup>

To promote alternative regulatory approaches, we also urged the development of a *Deskbook on Regulatory Design* for regulators and legislators. The *Deskbook* 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*.

### *REG03: Encourage Consensus-Based Rulemaking*

As the readership of this *Journal* is well aware,<sup>25</sup> the traditional notice-and-comment rulemaking process has tended too often to encourage adversarial, uncooperative behavior by people who might be adversely affected by a proposed rule. This posture more often than not leads to protracted litigation, especially in controversial areas of regulation such as environmental or workplace safety rules.<sup>26</sup>

To counter this trend, my home agency, the Administrative Conference of the United States (ACUS), developed a consensus-based approach called negotiated rulemaking (sometimes called regulatory negotiation, or reg neg).<sup>27</sup> This technique relies on a convener who holds open negotiating sessions with representatives of affected interests and of the relevant agency to produce a consensus-based proposal. Such a proposal still undergoes the usual comment process, but by then, the areas of controversy should be limited, the comments few, and lawsuits rare.<sup>28</sup> Since 1982, there have been about thirty-five reg negs undertaken by about a dozen agencies,<sup>29</sup> and most of them have produced consensus or near-

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23. *Id.* at 26.

24. Exec. Order No. 12,866, 58 Fed. Reg. 51,735-36 (1993).

25. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 42 DUKE L.J. 1385 (1992).

26. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 29.

27. Recommendations of the Administrative Conference of the United States, Procedures for Negotiating Proposed Regulations, Recommendations No. 82-4, 85-5, 1 C.F.R. §§ 305.82-4, .82-5 (1993).

28. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 29.

29. *Id.* at 29-30.



consensus proposals while dramatically reducing the rate of litigation over those rules.<sup>30</sup>

The report details the benefits and limitations of this approach and urges the President to direct agencies to consider advocating reg neg. Again, President Clinton has responded quickly, generally advocating reg neg<sup>31</sup> and specifically requiring agencies either to select at least one pending or proposed rulemaking as a candidate for reg neg or to explain why it is not feasible to do so.<sup>32</sup> Already, OIRA and ACUS have held a well-attended symposium on reg neg to help agencies follow the presidential directive.

#### *REG04: 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>33</sup> Negotiated rulemaking is one way to do so, but agencies have used less formal mechanisms as well, such as policy discussion groups, public meetings, and focus groups, to obtain input before issuing notices of proposed rulemakings or to help determine how existing rules are working. Agencies also should consider whether an ombudsman, as used by the Food and Drug Administration (FDA), the Internal Revenue Service (IRS), and Comptroller of the Currency, or a toll-free hotline might increase public participation during the implementation of rules.<sup>34</sup>

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, and even e-mail reg negs are ideas that may soon be realized.<sup>35</sup>

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30. See *id.* at 32 n.7.

31. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,740 (1993).

32. Negotiated Rulemaking, Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52,391 (1993) (alteration in original).

33. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 37-39.

34. *Id.* at 36-38.

35. Soon after this program, the Department of Labor announced plans to try an electronic reg neg. See Cindy Skrzycki, *Modem Times: OSHA to Try Writing Rules in Cyberspace*, WASH. POST, Feb. 8, 1994, at D1.

*REG05: Streamline Agency Rulemaking Procedures*

Our team found that many agencies had great difficulty describing their own internal clearance processes. One agency hired a contractor to produce an eighteen-foot flow chart with 373 boxes to describe its rulemaking process.<sup>36</sup> Long delays in some rulemakings suggest the old bureaucratic joke: “What’s the difference between ‘under consideration’ and ‘under active consideration?’” “‘Under consideration’ means ‘we’ve lost the file,’ and ‘under active consideration’ means ‘we’re trying to find it.’”

We encouraged the RWG to help agencies develop ways to tier their internal review processes so that less controversial rules face fewer procedural hurdles. This selective approach mirrors that taken by the executive order for OIRA’s review of agency rules.<sup>37</sup>

We also discovered a new idea—new, at least, outside the EPA: “direct final” rulemaking.<sup>38</sup> Under this procedure, used by the EPA to issue rules that it expects to be uncontroversial, the Agency publishes a notice in the *Federal Register* saying that the rule will become effective in sixty days unless someone submits notice within thirty days of an intent to file a negative comment.<sup>39</sup> For about 90% of these “direct final” rules, EPA officials have correctly predicted that there would be no negative comments, thereby cutting the internal review time by more than half for such rules.<sup>40</sup> Recently, a large agency in the Department of Agriculture announced plans to use this procedure.<sup>41</sup> President Clinton has issued a directive requiring agencies to examine their internal rulemaking clearance processes and report in six months on the steps taken to improve them.<sup>42</sup>

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36. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 41.

37. Only rules deemed to be “significant regulatory actions” are subject to OIRA review. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,740–41 (1993).

38. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 42–43.

39. *Id.*

40. *Id.* at 43 & n.11.

41. See Animal and Plant Health Inspection Service, USDA, Policy Statement on Use of Direct Final Rulemaking, 58 Fed. Reg. 47,206 (1993).

42. See Memorandum on Agency Rulemaking, 29 WEEKLY COMP. PRES. DOC. 1933 (Sept. 30, 1993).

*REG06: Encourage Alternative Dispute Resolution When Enforcing Regulations*

It is our hope that the term “*alternative* dispute resolution” will soon be a misnomer as various techniques, such as mediation, arbitration, minitrial, and early neutral evaluation, become part of agencies’ everyday menu for resolving disputes. The acronym ADR may be preserved by substituting “appropriate” for “alternative.”

The movement toward the use of ADR by federal agencies has accelerated with the passage of the 1990 Administrative Dispute Resolution Act,<sup>43</sup> which removed some hurdles from agency use of ADR. Unfortunately, despite some clear success stories in agencies such as the EPA, the Federal Deposit Insurance Corporation, Farmers Home Administration, Health and Human Services, and the Department of Labor (DOL), some agencies have given ADR limited emphasis.<sup>44</sup> Our recommendation was to ask the President to encourage ADR strongly, especially in the area of budgetary and personnel incentives, and to make it easier for the government to hire mediators, arbitrators, and other “neutrals.”<sup>45</sup>

We were especially pleased that the NPR Report specifically pledges support for the expanded use of both ADR and reg neg.<sup>46</sup> The Administrative Conference is continuing its active role in promoting these recommendations. NPR selected ACUS to develop an exciting pilot project that would use e-mail to connect agency ADR programs and would place an extensive library of resources concerning ADR on-line. Electronic ADR cannot be far behind.

*REG07: Rank Risks and Engage in Anticipatory Regulatory Planning*

Improved long-range strategic planning was one of the themes of NPR, leading in part to the Government Performance and Results Act of 1993, which authorizes agencies to create pilot projects based on performance-based strategic planning initiatives.<sup>47</sup> Our specific recommendation that regulatory agencies en-

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43. 5 U.S.C. §§ 571-583 (Supp. IV 1992).

44. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 48-49.

45. *Id.* at 49-50.

46. NATIONAL PERFORMANCE REVIEW, *supra* note 2, at 118-19.

47. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat.

gage in systematic risk prioritization grew out of the EPA's success with this approach. In 1987, the Agency asked seventy-five senior career managers to compare and rank the relative risks posed by thirty-one environmental problems the Agency regulates.<sup>48</sup> This effort pointed out not only disparities between the rankings and the legislatively mandated resource allocation at EPA, but also the variance between the public's and the "experts'" perceptions of risks.<sup>49</sup> In 1990, EPA's Science Advisory Board made further recommendations to the Administrator on how to undertake risk prioritization.<sup>50</sup>

We joined the Carnegie Commission in applauding this effort as a "groundbreaking enterprise"<sup>51</sup> and urged the other twenty or so agencies that regulate health, safety, or environmental risks to follow.<sup>52</sup>

The need to anticipate future regulatory problems is related to risk prioritization. EPA is a leader in this area as well. It has established a special "futures staff"<sup>53</sup> to anticipate problems such as one it failed to anticipate—the problem of mercury disposal caused by the increased use of cool fluorescent lamps.<sup>54</sup> Had the problem been anticipated earlier, the lamps could have been made without mercury. The futures staff has already identified a similar problem with lithium in the batteries of electric cars.<sup>55</sup> We suggested that regulatory agencies be encouraged to develop processes and devote specific resources to ranking risks and anticipating future regulatory problems.<sup>56</sup> The purpose behind this recommendation was well stated by one of the "Peter Principles:" "If you

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290 (1993) (to be codified in scattered sections of 5, 11, 31 U.S.C.).

48. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 53–54 (citing ENVIRONMENTAL PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987)).

49. *Id.* at 54.

50. *Id.* (citing ENVIRONMENTAL PROTECTION AGENCY, REDUCING RISKS: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990)).

51. CARNEGIE COMM'N, *supra* note 14, at 81.

52. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 55–56.

53. *Id.* at 54.

54. Interview with David Rejeski, Futures Staff Chief, Office of Strategic Planning and Environmental Data, Office of Policy, Planning and Evaluation, EPA, in Washington, D.C., (June 24, 1993).

55. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 55.

56. *Id.* at 55–56.

don't know where you are going, you will probably end up somewhere else."<sup>57</sup>

*REG08: Improve Regulatory Science*

Carl Sagan has identified a growing problem in society:

We've arranged a civilization in which most crucial elements—transportation, communications, and all other industries; agriculture, medicine, education, entertainment and protecting the environment; and even the key democratic institution of voting—profoundly depend on science and technology. We have also arranged things so that almost no one understands science and technology. We might get away with it for a while, but eventually this combustible mixture of ignorance and power is going to blow up in our faces.<sup>58</sup>

This warning applies to most regulatory agencies as well because most regulatory decisions are made by an agency head who is not a scientist and who must rely on the advice of program officials, administrative law judges, and agency general counsels—who are all much more likely to be lawyers than scientists. “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 who follow the regulatory process.”<sup>59</sup>

Scientific advisory boards are a partial solution to this problem. EPA has a large-scale, well-funded board that advises the Administrator on scientific and technical aspects of environmental problems.<sup>60</sup> FDA has recently followed suit with a twelve-member board.<sup>61</sup>

We joined the Carnegie Commission in urging agencies to improve their scientific capabilities.<sup>62</sup> We advocated that regulatory agencies that depend heavily on scientific information create an advisory board or explain why one is not needed.<sup>63</sup> President Clinton has taken this advice, creating (within the White House)

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57. LAURENCE F. PETER & RAYMOND HULL, *THE PETER PRINCIPLE* 159 (1969).

58. Carl Sagan, *With Science on Our Side*, WASH. POST, Jan. 9, 1994, at X1.

59. *IMPROVING REGULATORY SYSTEMS*, *supra* note 8, at 59; *see id.* at 59 n.8.

60. *See id.* at 60.

61. *Id.* at 60–61.

62. *Id.* at 61.

63. *Id.*

the National Science and Technology Council<sup>64</sup> as well as the President's Committee of Advisors on Science and Technology, which is made up of fifteen outside scientists.<sup>65</sup>

*REG09: Improve Agency-Congress 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>66</sup> Wherever the blame may lie, there is little doubt that communication between agencies and their congressional counterparts has broken down. The problem has perhaps been exacerbated by divided political control of the branches in recent years. Congress has not trusted the agencies, and the agencies have not been completely forthcoming in the legislative drafting process. More frequent interbranch forums was one solution our team favored.

More specifically, we discovered that agencies generally do not provide drafting assistance to legislative staffs.<sup>67</sup> 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.<sup>68</sup>

*REG10: Provide Better Training and Incentives for Regulators*

We began the discussion of our final recommendation with the truism that "[a] regulatory system is only as good as the people implementing it."<sup>69</sup> Recommendations for improved training are hardly original, but we were genuinely struck by the lack of training for presidential appointees, especially given the intensive orientation members of Congress and the federal judiciary receive. A recent study by the National Academy of Public Administration reported that 79% of presidential appointees received no orientation whatsoever.<sup>70</sup> We are encouraged that the RWG has acknowl-

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64. Exec. Order No. 12,881, 58 Fed. Reg. 62,491 (1993).

65. Exec. Order No. 12,882, 58 Fed. Reg. 62,493 (1993).

66. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 65.

67. *Id.* at 66-67.

68. *Id.* at 67-68.

69. *Id.* at 69.

70. *Id.* at 70 (citing Robert S. Adler et al., *Shaping Up Federal Agencies: A Basic*

edged this problem and is exploring ways to address it with the Administrative Conference.

At lower levels, there is currently a good, ongoing training program for federal lawyers, the Legal Education Institute in the Department of Justice.<sup>71</sup> Unfortunately, legislation passed several years ago required the program to move from Washington to Columbia, South Carolina, where it is unlikely to attract as many students and pro bono faculty.<sup>72</sup>

Finally, we were inspired by an idea of Judge Stephen Breyer, who suggested that regulatory professionals be cultivated within the government and encouraged to rotate among the branches as in the French Conseil d'Etat.<sup>73</sup> Our slightly less grand plan would be to establish at least an "honors" rotation for select, mid-level career staffers among agencies with key regulatory mandates, like OIRA.<sup>74</sup> OIRA Administrator Sally Katzen has announced plans to begin such a program.<sup>75</sup>

### III. CONCLUSION

In a nutshell, these ideas were our team's recommendations and we are pleased that some of them are already coming to fruition. Other NPR teams also proposed changes in regulatory processes. Some proposals, like the increased use of ADR and reg neg at the DOL, were consistent with our recommendations;<sup>76</sup> others, such as allowing judicial review of agency actions under the Regulatory Flexibility Act,<sup>77</sup> expanding the use of waivers from federal regulations,<sup>78</sup> and requiring a shift to self-inspection of

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*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).

71. IMPROVING REGULATORY SYSTEMS, *supra* note 8, at 70.

72. *See id.* at 70 & nn.11-12 (citation omitted).

73. *See id.* at 71 (citing STEPHEN G. BREYER, THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993)).

74. *Id.* at 72.

75. Letter from Sally Katzen to author (and other members of Regulatory Working Group) describing "OIRA's Regulatory Exchange Program" and soliciting participation (Jan. 11, 1994).

76. *See* NATIONAL PERFORMANCE REVIEW, *supra* note 2, app. A at 146 (Recommendations DOL03 and DOL04).

77. *Id.* app. A at 148 (Recommendation SBA01).

78. *Id.* app. C at 160 (Recommendation SMC08).

worksites under the Occupational Safety and Health Act,<sup>79</sup> were not affirmatively advocated by our team.

I suspect there will be critics who claim that we set our sights too low, ignoring proposals for more radical reforms, such as a regulatory budget, sunset laws, specialized administrative courts, or various new impact statement requirements. Our answer is that we were convinced of the merits and the low costs and risks of our ten recommendations and we did not think that more radical approaches were necessary or feasible. In other words, to quote an aphorism I once heard attributed to Jeremy Bentham, "Don't talk to me of reform; things are bad enough as they are!"

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79. *Id.* app. A at 146 (Recommendation DOL10).