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Who Will Regulate the Regulators? The Battle Over Susan Dudley and OIRA

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She is fundamentally opposed to regulation...regularly referencing the free market as her guiding light.

—Public Citizen President Joan Claybrook
on OIRA nominee Susan Dudley¹

Unmentioned on the front pages of the nation's newspapers, a nomination battle is brewing that could affect every American's pocketbook and daily life. The position is administrator of the Office of Information and Regulatory Affairs (OIRA), and President Bush's nominee is Susan Dudley, currently an economist at the Mercatus Center at George Mason University. The nomination has been met with criticism from a number of (mostly left-wing) advocacy groups, charging that Dudley is "anti-regulatory" and would endanger vital health and safety protections. These charges ring hollow. Dudley will bring to the job a wariness of new rules and an expertise in analyzing rules' likely effects, both of which are appropriate, even essential, for the regulator of the government's regulators.

Regulating the Regulators

Sometimes known as the president's regulatory "czar," the OIRA administrator regulates the federal government's regulators by ensuring that the rules they promulgate have benefits that justify their costs and are consistent with the president's policies. The stakes are high: According to a recent study by the Small Business Administration, regulation costs some \$1.1 trillion per year, or about \$10,000 per household.²

OIRA was founded in 1980 and charged with reviewing regulations to be proposed by executive branch regulatory agencies. The idea of centralized regulatory review, however, goes back much farther; presidents from Richard Nixon to Jimmy Carter established review mechanisms in an attempt to ensure that agencies did not impose excessive regulatory burdens. Regulatory review by OIRA is now an established and accepted part of the rulemaking process. As Sally Katzen, OIRA's chief for most of President Clinton's term recently stated, "[W]e resolved for the most part the legitimacy of centralized review. It was fiercely debated. It is now generally off the table."³

During the present Bush Administration, the review process has been further formalized and strengthened. John Graham, OIRA administrator from 2001 until earlier this year, established clear analytical frameworks for the evaluation of proposed rules and guidelines for cost-benefit analyses, peer reviews of those analyses, and transparency and disclosure in OIRA's decisionmaking.

So far under the Bush Administration, the annual average cost of new regulations has been less (as measured by agency cost-benefit analyses)

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than in any of the previous three administrations.⁴ But critics who charge that the administration has slashed regulation are badly mistaken. Rhetoric on both sides to the contrary, regulatory burdens have actually increased, not decreased, under Bush.⁵ Although the flow of new rules has decreased somewhat, very few existing regulations have been repealed or reformed.

Dudley No “Extremist”

The challenge for the new OIRA chief is to build on the progress made during John Graham’s tenure, while increasing efforts to reform older, outdated rules. Susan Dudley, the President’s nominee, is well-prepared to tackle this difficult assignment. With a degree in resource economics, she has previously served as an OIRA staff economist and an economist in the Environmental Protection Agency. From 2003 until her nomination, she directed the regulatory studies program at the Mercatus Center, a research group affiliated with George Mason University. In that capacity, she wrote frequently on issues facing OIRA, analyzing proposed regulations and recommending areas for reform.

Despite Dudley’s extensive academic and policy experience—or perhaps because of it—opponents

of strong regulatory review are attempting to demonize her. Public Citizen has called her “unfit” to head OIRA, an “anti-regulatory zealot” who would be “in a position to cripple critical safeguards that protect the public.”⁶ “Behold Susan Dudley,” declaimed an *American Prospect* article, “and be afraid.”⁷

There is little substance to the name calling or support for its claims. Many of the accusations are flatly untrue. For example, many of the critics ridiculed Dudley for her opposition to flame-retardant children’s pajamas. Economist Brad DeLong called it “disturbing.”⁸ The only thing disturbing about the claim though is that it is completely untrue: Dudley had simply listed the rule once as an example of the sorts of things the federal government regulates. Similarly, the Center for American Progress cited a Mercatus paper as “proof” that Dudley opposed measures to stop global warming. Whatever the merits of that view, the paper was actually authored by somebody else.⁹

Even where opponents cite Dudley’s positions accurately, their criticisms fall short. For example, the advocacy group Public Citizen cited with alarm Dudley’s opposition to mandated ergonomics standards for office workers.¹⁰ But Dudley is not alone in that “extremist” view: A majority of

1. “Susan Dudley is Unfit to be Nation’s Next Regulatory Czar,” Statement of Public Citizen President Joan Claybrook, September 12, 2006, at <http://www.citizen.org/pressroom/release.cfm?ID=2270>.
2. W. Mark Crain, “The Impact of Regulatory Costs on Small Firms,” Small Business Administration Office of Advocacy, September 2005.
3. Comments at Sally Katzen “OIRA at 25: A Review of the Record,” American Enterprise Institute, November 7, 2005, at http://www.aei.org/events/filter.all,eventID.1174/event_detail.asp. Katzen did take issue, however, with aspects of cost-benefit analysis as applied by the Bush Administration.
4. OIRA, Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations (April 2006), p. 27, at http://www.whitehouse.gov/omb/inforeg/reports/2006_draft_cost_benefit_report.pdf.
5. See James L. Gattuso, “Reining in the Regulators: How Does President Bush Measure Up?” Heritage Foundation *Backgrounder* No. 1801, September 28, 2004, at www.heritage.org/research/regulation/bg1801.cfm.
6. Public Citizen and OMB Watch, “The Cost is Too High: How Susan Dudley Threatens Public Protections,” September 2006, at <http://www.citizen.org/publications/release.cfm?ID=7448>.
7. Genevieve Smith, “The Anti-Regulator,” *The American Prospect Online Edition*, August, 4, 2006, at <http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=11810>.
8. Brad DeLong, “OIRA,” Brad DeLong’s Semi-Daily Journal, August 5, 2006, at <http://delong.typepad.com/sdj/2006/08/oira.html>.
9. See Jonathan H. Adler, “Desperately Smearing Susan,” National Review Online, August 14, 2006, at <http://article.nationalreview.com/?q=OTIjNzg5Y2E4YTE3NTVhMjc4MWE5MzBjOGYyNDIyY2Y=>.
10. Public Citizen and OMB Watch, p. 17.

Congress apparently agreed with Dudley, voting to rescind the rule.

More generally, critics of Dudley argue that she is prejudiced against regulation and holds an “anti-regulatory ideology.” According to Public Citizen and OMB Watch, Dudley “would bog the agencies down in endless analysis, stalling regulations and leaving the public at risk.”¹¹

Yet, in an unusual step, six former OIRA administrators—including the Clinton Administration’s Katzen—disagreed, writing in a joint letter to congressional leaders that Dudley “is committed to ensuring that regulations are evaluated objectively and that the review process is transparent.”¹²

Dudley’s work shows that she is not so much prejudiced against regulation as wary of it. Such wariness is not evidence of closed-mindedness but of a reasonable judgment that regulation should not be policymakers’ first choice. She argues that regulatory burdens should be imposed only when the market and other voluntary alternatives have failed—and even then, rules should be the least burdensome possible. Thus Dudley has supported strict and detailed OIRA oversight of agency rule-

makings and comprehensive analyses of the likely benefits and costs of proposed actions.

Dudley’s critics are dismissive of such institutional safeguards against overregulation. Public Citizen and OMB Watch, for instance, write disdainfully of OIRA’s “so-called ‘review’ process”¹³ and deride comprehensive cost-benefit analyses as impeding the flow of regulations from federal agencies. In this, they give the benefit of the doubt to regulators rather than the market.

Conclusion

Behind all the hot rhetoric, this is the real issue in the Dudley debate: Should regulators be subject to strong controls to ensure that the costs they impose on Americans are necessary and no more burdensome than necessary? Or, to put it simply, should regulators be regulated? Coolheaded observers agree that government regulators need firm oversight. And Susan Dudley is well qualified to do that job.

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11. Public Citizen and OMB Watch, p. 6.

12. Letter to Senators Susan M. Collins and Joseph I. Lieberman from James C. Miller III, Christopher DeMuth, Wendy Lee Gramm, Sally Katzen, John Spotilla, and John D. Graham, September 20, 2006, at http://www.mercatus.org/repository/docLib/20060927_Former_OIRA_Administrator.pdf.

13. Public Citizen and OMB Watch, p. 1.