Much Ado about Nothing?

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Secrecy and the Changing Nature of the Regulatory Process

By Cary Coglianese

Executive Order 13422 followed previous orders signed by presidents Ronald Reagan and Bill Clinton that established White House policy for scrutinizing federal rulemaking and incorporated aspects of cost–benefit analysis into regulatory review. The Bush order gives presidential appointees in regulatory agencies increased “gatekeeper” functions, requires agencies to specify in writing the market failures they hope new rules will solve, and calls for agencies to provide the Office of Management and Budget with information on certain guidance documents.

Much Ado About Nothing?

Declaring that it is too soon to judge the impact of Executive Order 13422, President Bush last November signed into law the Regulatory Relief Act of 2002, which placed a one-year moratorium on many of the changes in procedure mandated by the order. The act included provisions that give the OMB, not the agencies, the first opportunity to alter new rules before they become final. It also required agencies to convene an interagency task force to study and make recommendations about making the regulatory system more efficient and cost-effective.

Despite the claims of opponents and supporters, changes in procedure seem to have little effect on the regulatory process.
Such lamentations have been heard before. For at least 70 years, significant changes in rulemaking procedures have elicited criticisms that federal regulation will be obstructed. Yet the federal government continues to issue many new, high-impact regulations. Is the rhetoric — from both supporters and detractors — over changes in regulatory procedure like EO 13422 really much ado about nothing?

**Rhetoric...**

In testimony before the House Subcommittee on Investigations and Oversight, Georgetown law professor David Vladeck claimed that EO 13422 “deals a body blow to the ability of our agencies to do their jobs” and could “lead to the further ossification of an already overburdened administrative process.” At a later hearing of the same subcommittee, Columbia law professor Peter Strauss suggested that the order might “throw a good dose of sand into the gears or rulemaking.” The subcommittee chair, Rep. Brad Miller (D-N.C.), agreed with those assessments, claiming the order is “another avenue for special interests to slow down and prevent agencies from protecting the public.” Rep. Henry Waxman (D-Calif.) also agreed, saying EO 13422 will “make it harder for agencies to take virtu-

**...And Reality**

Despite the rhetoric, it does not appear that administrative procedures have hindered the federal government’s ability to regulate. The sheer volume of rules, as measured by pages in the Code of Federal Regulations, has increased about five times since the APA was enacted in 1946, and it has continued to grow since the advent of OMB review. Over the past two decades, the federal government has issued an average of sev-

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tles, two of which failed to find systematic evidence that OMB review imposes “paralysis,” let alone causes any significant delay in the regulatory process.

The Reagan order was relaxed somewhat by President Clinton’s EO 12866, which limited the set of rules subject to OMB review and placed a time limit on the review process. But the new order still met with similar criticisms. As Richard B. Stewart explained in a 2003 article in the New York University Law Review, many observers believe that “OMB regulatory analysis and other forms of regulatory impact review have contributed to ‘paralysis by analysis.’”

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WHY THE DIVERGENCE?

The ongoing production of significant new regulations combined with the lack of systematic evidence of substantial delays from OMB review raises the question whether the effects of EO 13422 will be as significant, or as dire, as critics claim. If previous major changes in administrative procedure failed to reduce the issuance of high-impact federal regulations, will Bush’s order likewise prove insignificant?

That question cannot be definitively answered without empirical data that will not be available for some time. In the meantime, there is another question worth considering: Why have policy observers invoked such heated rhetoric about the Bush procedural changes? Perhaps the observers believe that previous procedures have indeed been pernicious, but that policy research has simply failed to discern the harmful effects. Or perhaps EO 13422 is different from previous changes, and this time there really will be “paralysis by analysis.” Or perhaps the rhetoric surrounding current procedural changes is just that — rhetoric.

Why has procedural reform rhetoric diverged so much from the reality of regulatory policymaking? Three possible explanations spring to mind. The first is that administrative procedures like EO 13422 are epiphenomenal, or at least high-impact, but those effects are trivial. For instance, agencies may be able to satisfy EO 13422’s new requirements using boilerplate language, check-boxes, or other “short-cuts,” the order’s effect will be inconsequential in terms of the pace and cost of rulemaking.

A third possibility is that EO 13422 and other regulatory procedure changes do have real and consequential effects, but those effects are eclipsed by behavioral factors that push in the same direction. For instance, if Reagan’s EO 12291 did place a significant burden on regulatory agencies, that burden may not have had much effect on appointed agency administrators who were already disinclined to regulate. Likewise in the case of EO 13422, if other legal rules, professional norms, or political exigencies are pushing agencies to take benefit-cost analysis seriously, then any additional, incremental strangulation of a regulatory review order may have only indiscernible effects.

In each of those possibilities, it is not the procedure that drives the pace and nature of regulation, but other factors such as the political and policy objectives of the presidential administration that is tasked with adhering to the procedures. Administrative procedures, in other words, do not take the politics out of the rulemaking process.

CONCLUSION

Given the history of changes in regulatory procedure, policy scholars and decisionmakers should be careful before concluding that EO 13422 will result in “paralysis by analysis.” That lament has been heard for at least seven decades, yet steady increases in the cost and volume of federal regulations during this same period clearly indicate that paralysis has yet to set in.

Both scholars and decisionmakers should bear in mind that administrative procedures are embedded within a complex web of politics, institutions, and organizational behavior. Within that web, procedures are but one factor influencing government agencies. Other factors include a variety of institutional, professional, social, budgetary, and political forces that interact with each other and that can adapt and change over time.

Social scientists who have devoted their careers to the empirical study of bureaucracy have yet to create a robust theory that makes sense of all the influences on bureaucratic behavior. That failure, combined with the lack of strong evidence showing that past procedures have lived up to expectations, should make both institutional designers and their critics more circumspect about their predictions — and their rhetoric — concerning the impact of any procedural reform related to government regulation.

Readings