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Much Ado About Nothing?

BY CARY COGLIANESE
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EARLY LAST YEAR, President Bush signed Executive Order 13422, implementing modifications to the review requirements for new federal regulations. EO 13422 follows 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.

EO 13422 met with strong opposition from Congress and received considerable attention from the media. A subcommittee of the House Committee on Science and Technology held hearings on the order and the full House voted to block its implementation. Critics of the measure charge that it gives the White House too much control over the regulatory process and that it will create “paralysis by analysis”—that is, it will hamper agencies’ ability to issue regulations in a timely manner.

Despite the claims of opponents and supporters, changes in procedure seem to have little effect on the regulatory process.
MORGAN BALLARD

Act (various Law Review article put it. The Administrative Procedure procedures would create “a partial paralysis … by reason of any action.” Rep. Henry Waxman (D-Calif.) also agreed, saying 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 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 might “throw a good dose of sand into the gears or rulemaking.” The subcommittee chair, Rep. 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...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 several thousand new rules each year in the Federal Register. The Code’s 2006 volume contains over 30 percent more pages of binding regulatory text than does the 1980 volume. According to estimates collected by the OMB, government regulations issued since 1981 have imposed $127 billion in annual costs on the economy. But these are only prima facie measures; they do not consider what the pace of regulation would have been without the various changes to rulemaking procedures. Several empirical studies have attempted more rigorous examinations of the effects of regulatory review, but researchers have yet to find systematic evidence that OMB review imposes “paralysis,” let alone causes any significant delay in the regulatory process. For instance, political scientists Cornelius Kerwin and Scott Furlong analyzed determinants of the duration of 150 non-routiniie U.S. Environmental Protection Agency rules issued in the period from October 1, 1986 to September 30, 1989. The authors reported results from three separate regression models, two of which failed to find that OMB review made any difference at all in the time it took the agency to develop its rules. The third model, examining the duration between proposed

and final rules, found the OMB variable was statistically signif-
icant, but it only had an effect of increasing the process’s duration two days for every one day of OMB review.

More recently, in a paper presented at the 2006 Midwest Political Science Association meeting, a research team led by Steven Balla studied the determinants of the duration of OMB review and found that, contrary to claims that special interests try to capture and prolong the review process in order to delay the adoption of rules they do not like, OMB reviews were actually shorter when only narrow sets of businesses were in con-
tact with OMB. The authors found that staff contacts with outside parties occurred for only about 7% of the reviewed rules and, though those rules tended to have longer reviewing times, other variables appear to explain the longer review-

The authors concluded, “[C]ontrary to widely held expectations . . . outside communications do not operate in a way that particularly advantages business firms and trade asso-
ciations seeking to derail prospective agency regulations.”

WHY THE DIVERGENCE?

The ongoing production of significant new regulations com-
bined 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-

CONCLUSION

Given the history of changes in regulatory procedure, policy scholars and decisionmakers should be careful before con-
cluding 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, pro-
fessional, 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 bureau-

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 adminis-

Readings
