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 man-

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

**Much Ado About Nothing?**

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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 sup-
porters and detractors — over changes in regulatory procedure like EO 13422 really much ado about nothing?

Rhetoric...

In testimony before the House Subcommittee on Investiga-
tions 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 ossi-
fication 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 sub-
committee 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, say-
ing EO 13422 will “make it harder for agencies to take virtu-
ally any action.”

The rhetoric over EO 13422 could easily have been bor-
rrowed from the early part of the last century. At that time,
observers worried that New Deal changes to administrative
procedures would create “a partial paralysis ... by reason of
excessive formality and litigation,” as the author of a 1938
Harvard Law Review article put it. The Administrative Procedure
Act (APA) of 1946, although praised today as the source of sim-
pal and efficient rulemaking techniques, was actually chastised
around the time of its adoption. In 1946, the prestigious
Public Administration Review featured an article asserting that
the APA amounted to a “sabotage of the administrative
process.” The author of an article in the University of Pennsyl-
vana Law Review’s 1948 volume claimed that the APA would
“severely cramp the style of government regulation.” The
American Political Science Review in 1947 published an article
arguing that the right to file a rulemaking petition under the
APA’s section 553(e) was of “doubtful value” and would lead
to regulatory agencies being “swamped by frivolous requests
having delay as their sole objective.”

Over the years, other changes to administrative procedures
— from freedom of information laws to environmental impact
statement requirements — have prompted similar predictions.
Following President Reagan’s issuance of EO 12291, a 1986
Harvard Law Review paper by Alan B. Morrison claimed that the
OMB’s power to review regulations under the order “imposes
costly delays that are paid for through the decreased health and
safety of the American public.” 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.’”

...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-
eral 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. Accord-
ing 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 con-
sider 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 sys-
tematic evidence that OMB review imposes “paralysis,” let
alone causes any significant delay in the regulatory process.
For instance, political scientists Cornelius Kerwin and Scott
Fudenberg analyzed determinants of the duration of 150 non-routi-
time 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 mod-
els, two of which failed to find that OMB review made any dif-
cference 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 sig-
nificant, 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 actu-
ally shorter when only narrow sets of businesses were in con-
tact with OMB. The authors found that staff contacts with out-
side parties occurred for only about 7 percent of the reviewed
rules and, though those rules tended to have longer reviewing
times, other variables appeared to explain the longer review
process. The authors concluded, “[C]ontrary to widely held
expectations . . . outside communications do not operate in a
process. The authors concluded, “[C]ontrary to widely held
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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 pol-
cy 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 ephemonal, or at least highly
malleable. That is, rulemaking procedures may appear to
impose burdens on agencies, but the real burdens depend
entirely on whether or how the procedures are implemented.
As a result, regardless of what procedures are on the books, a
presidential administration that wants to issue a lot of regu-
lations will succeed at doing so, and an administration that
wants to ease the nation’s regulatory burden will also succeed.

Another possibility is that there may be real effects from
procedural changes, but those effects are trivial. For instance,
agencies may be able to satisfy a new administrative procedure
simply by publishing boilerplate language in their Federal Reg-
istration notices. If agencies come to satisfy EO 13422’s new require-
ments by offering boilerplate language, checklists, 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 adminis-
trators 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 stringency
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 admin-
istration that is tasked with adhering to the procedures.

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 bureaucrati-
cic behavior. That failure, combined with the lack of strong evi-
dence showing that past procedures have lived up to expecta-
tions, 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
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