Much Ado about Nothing?

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Much Ado About Nothing?

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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 man-

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 would “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-}

cations seeking to derail prospective agency regulations.”
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procedural changes, but the effects are trivial. For instance,
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ly malleable. That is, rulemaking procedures may appear to
procedures like EO 13422 are epiphenomenal, or at least high-
explanations spring to mind. The first is that administrative
the rhetoric surrounding current procedural changes is just
this time there really will be “paralysis by analysis.” Or perhaps
EO 13422 is different from previous changes, and
empirical research has simply failed to discern the harmful effects.
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-
icy 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 diversified 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 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 regula-
tions 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 the effects are trivial. For instance, agencies may be able to satisfy a new administrative procedure simply by publishing boilerplate language in their Federal Reg-
ter notices. If agencies come to satisfy EO 13422’s new require-
ments 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 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 adminis-
tration that is tasked with adhering to the procedures. Administrative procedures, in other words, do not take the polit-
icos out of the rulemaking process.
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 bureaucratic
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
• “Administrative Law in the Twenty-First Century,” by Richard
• “OMB Interference with Agency Rulemaking: The Wrong Way to
Write a Regulation,” by Alan B. Morrison. Harvard Law Review,
• “Outside Communication and OMB Review of Agency
Regulations,” by Steven J. Balla et al. Annual Midwest Political
• “Presidents and Process: A Comparison of the Regulatory
Process under the Clinton and Bush (43) Administrations,” by
Stuart Shapiro. AEI-Brookings Joint Center for Regulatory
Studies, October, 2006.
• “Time and Rulemaking: An Empirical Test of Theory,” by
Cornelius M. Kerwin and Scott Furlong. Journal of Public