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Much Ado about Nothing?

Cary Coglianese
University of Pennsylvania Carey Law School

Author ORCID Identifier:

Cary Coglianese 0000-0002-5496-2104

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

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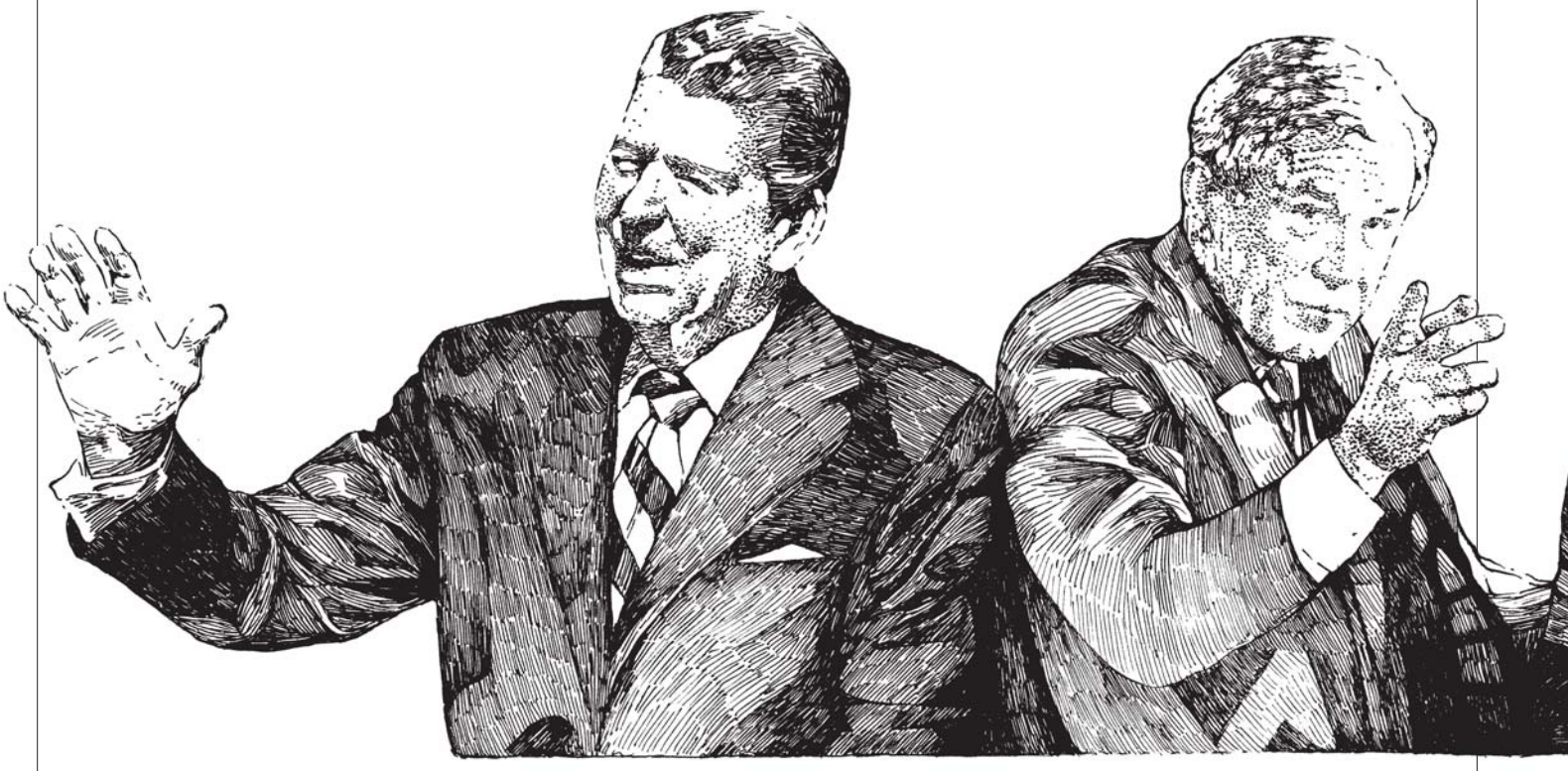
By Cary Coglianese
University of Pennsylvania Law School



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-

Cary Coglianese is the Edward B. Shils Professor of Law and professor of political science at the University of Pennsylvania Law School and director of the Penn Program on Regulation. This article is based on an article that appeared recently in the *Yale Journal on Regulation*.

ner, jeopardizing public welfare.

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 sub-

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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, saying EO 13422 will "make it harder for agencies to take virtually any action."

The rhetoric over EO 13422 could easily have been borrowed 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 simple 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 Pennsylvania 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 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-routine 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 significant, 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 contact with OMB. The authors found that staff contacts with outside parties occurred for only about 7 percent of the reviewed rules and, though those rules tended to have longer reviewing times, other variables appear to explain the longer review process. The authors concluded, "[C]ontrary to widely held expectations . . . outside communications do not operate in a way that particularly advantages business firms and trade associations seeking to derail prospective agency regulations."

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 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 regulations 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 Register* notices. If agencies come to satisfy EO 13422's new requirements using boilerplate language, check-boxes, or other "shortcuts," 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 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 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. R

Readings

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