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On amending Executive Order 12866: Good governance or regulatory usurpation?

by Sally Katzen

The following essay is based on testimony delivered February 13 before the House Judiciary Subcommittee on Commercial and Administrative Law and the House Science and Technology Subcommittee on Investigation and Oversight.



During the last six years, there has been a slow but steady change in the process by which regulations are developed and issued—specifically, in the balance of authority between the federal regulatory agencies and the Office of Management and Budget. Recently, the Bush Administration has again restricted agency discretion and made it more difficult for the federal agencies to do the job that Congress has delegated to them. The implications of these changes for administrative law and regulatory practice are very significant.

On January 18, 2007, the Bush Administration released two documents. One was expected; the other was not. While I disagree with several of the choices made in the “Final Bulletin for Good Guidance Practices,” I recognize that a case can be made that there is a need for such a bulletin. On the other hand, there is no apparent need for Executive Order 13422, further amending Executive Order 12866. Regrettably, none of the plausible explanations for its issuance is at all convincing. As I discuss below, there are at least three aspects of the new executive order that warrant attention:

- the way it was done—without any consultation or explanation;
- the context in which it was done—coming on the heels of OMB’s imposing [of] multiple mandates/requirements on the agencies when they are developing regulations; and
- the effect it will have and the message it sends to the agencies—it will be even more difficult for agencies to do their jobs because regulations are disfavored in this administration.

To put the most recent executive order in perspective, a little history may be helpful. The first steps towards centralized review of rulemaking were taken in the 1970s by Presidents Nixon, Ford, and Carter, each of whom had an ad hoc process for selectively reviewing agency rulemakings: President Nixon’s was called the Quality of Life Review; President Ford’s was focused on the agency’s Inflationary Impact Analysis that

accompanied the proposed regulation; and President Carter’s was through the Regulatory Analysis Review Group. Those rulemakings that were considered significant were reviewed by an inter-agency group, which then contributed their critiques (often strongly influenced by economists) to the rulemaking record.

In 1981, President Reagan took a significant additional step in issuing Executive Order 12291. That order formalized a process that called for the review of all executive branch agency rulemakings—at the initial and the final stages—under specified standards for approval. The office that President Reagan chose to conduct the review was the Office of Information and Regulatory Affairs (OIRA), established by the Congress for other purposes under the Paperwork Reduction Act of 1980. Unless OIRA approved the draft notice of proposed rulemaking and the draft final rule, the agency could not issue its regulation.

Executive Order 12291 was highly controversial, provoking three principal complaints. One was that the executive order was unabashedly intended to bring about regulatory *relief*—not reform—relief for the business community from the burdens of regulation. Second, the order placed enormous reliance on (and reflected unequivocal faith in) cost/benefit analysis, with an emphasis on the cost side of the equation. Third, the process was, by design, not transparent; indeed, the mantra was “leave no fingerprints,” with the result that disfavored regulations were sent to OMB and disappeared into a big black hole. The critics of Executive Order 12291, including the then Democratic majority members of Congress, expressed serious and deep concerns about the executive order, raising separation of powers arguments, the perceived bias against regulations, and the lack of openness and accountability of the process.

When President Clinton took office and I was confirmed by the Senate as the Administrator of OIRA, my first assignment

was to evaluate Executive Order 12291 in light of the 12 years of experience under Presidents Reagan and Bush, and help draft a new executive order that would preserve the strengths of the previous executive order but correct the flaws that had made the process so controversial. President Clinton would retain centralized review of executive branch agency rulemakings, but the *development* and the *tone* of the executive order he would sign (Executive Order 12866) was to be very different.

I was told that Executive Order 12291 was drafted in the White House (Boyden Gray and Jim Miller take credit for the document) and presented, after President Reagan had signed it, as a *fait accompli* to the agencies. The protests from the agencies were declared moot. We took a different route, consulting and sharing drafts with the agencies, public interest groups, industry groups, Congressional staffers, and state and local government representatives. When all their comments were considered and changes made to the working draft, we again consulted and shared our new drafts with all the groups, and again took comments. More changes were made, and where comments were not accepted, we explained the basis for our decisions.

The tenor of Executive Order 12866 was also quite different from Executive Order 12291. As noted above, Executive Order 12866 retained centralized review of rulemakings, but also reaffirmed the primacy of the agencies to which Congress had delegated the authority to regulate (Preamble). Executive Order 12866 also limited OIRA review to “significant regulations”—those with a likely substantial effect on the economy, on the environment, on public health or safety, etc. or those raising novel policy issues (Section 6(b)(1))—leaving to the agencies the responsibility for carrying out the principles of the executive order on the vast majority (roughly 85 percent) of their regulations.

Executive Order 12866 continued to require agencies to assess the consequences of their proposals and to quantify and monetize both the costs and the benefits to the extent feasible. (Section 1(a)) But it explicitly recognized that some costs and some benefits cannot be quantified or monetized but are “nevertheless essential to consider” (Section 1(a)). I believe it was Einstein who had a sign in his office at Princeton to the effect that “not everything that can be counted counts, and not everything that counts can be counted.”

While Executive Order 12291 required agencies to set their regulatory priorities “taking into account the conditions of the particular industries affected by the regulations [and] the condition of the national economy” (Section 2 (e)), Executive

Order 12866 instructed agencies to consider “the degree and nature of the risks posed by various substances and activities within its jurisdiction” (Section 1(b)(4)), and it added to the list of relevant considerations for determining if a proposed regulation qualified as “significant” not only an adverse effect on the economy or a sector of the economy, but also “productivity, competition, jobs, the environment, public health or safety or State, local, or tribal governments or communities” (Section 3(f)).

There were other significant differences between Executive Order 12291 and Executive Order 12866, including those relating to the timeliness of review and the transparency of the process, but for present purposes, the key to the difference was that President Clinton was focused on a process for better decision-making and hence better decisions and not a codification of a regulatory philosophy or ideology. Centralized review was seen as a valid exercise of presidential authority, facilitating political accountability (the president takes the credit and gets the blame for what his agencies decide) and to enhance regulatory efficacy (that is, decisions that take into account the multitude of disciplines and the multitude of perspectives that can and should be brought to bear in solving problems in our complex and interdependent society). But whatever one’s view of centralized review of agency rulemakings, Executive Order 12866 was—on its face and by intent—a charter for good government, without any predetermination of outcomes. The neutrality of the process was essential. President Clinton

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viewed regulations as perhaps the “single most critical . . . vehicle to achieve his domestic policy goals” (Kagan, 114 *Harvard Law Review* 2245, 2281-82 [2001]), and he spoke often of the salutary effects of regulations on the nation’s quality of life and how regulations were part of the solution to perceived problems. But the executive order was not skewed to achieve a pro-regulatory result. The regulations would be debated on their merits, not preordained by the process through which they were developed and issued.

When George W. Bush became President in January 2001,

his philosophy was decidedly anti-regulatory. I know that his advisors considered whether to change Executive Order 12866 and they concluded that it was not necessary to accomplish their agenda. Indeed, President Bush's OMB director instructed the agencies to scrupulously adhere to the principles and procedures of Executive Order 12866 and its implementing guidelines (OMB M-01-23, June 19, 2001). The only changes to the executive order came two years into President Bush's first term, and the changes were limited to transferring the roles assigned to the Vice President to the chief of staff or the OMB director (Executive Order 13258).

Almost five years later, President Bush signed Executive Order 13422, further amending Executive Order 12866. So far as I am aware, there was no consultation and no explanation of the problems under the existing executive order that prompted these amendments, or whether the amendments would have a salutary effect on whatever problems existed, or whether the amendments would have unintended consequences that should be considered. Press statements issued after the fact do not make for good government.

Second, the new executive order comes in the course of a steady and unwavering effort to consolidate authority in OMB and further restrict agency autonomy and discretion. On

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February 22, 2002, OMB issued its Information Quality Act (IQA) Guidelines (67 *Federal Register* 8452). The IQA itself was three paragraphs attached to a more than 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001, with no hearings, no floor debate, and no committee reports. Its objective was "to ensure the quality, objectivity, utility, and integrity of information disseminated to the public." OMB took up the assignment with a vigor and determination that was remarkable. OMB's government-wide guidelines created a new construct: Now, there would be "information" and "influential information" and different (more stringent standards) would apply to the higher tiers. OMB also required the agencies to issue their own guidelines (subject to OMB approval); establish administrative mechanisms allowing people or entities to seek the correction of information they believe does not comply

with these guidelines; and report periodically to OMB on the number and nature of these complaints. The U.S. Chamber of Commerce thought this "would have a revolutionary impact on the regulatory process"—keeping the agencies from relying on data that industry thought was questionable.

Then came OMB's Proposed Draft Peer Review Standards for Regulatory Science (August 29, 2003), in which OMB attempted to establish uniform government-wide standards for peer review of scientific information used in the regulatory process. Peer review is generally considered the gold standard for scientists. Yet leading scientific organizations were highly critical of what OMB was trying to do and how it was doing it, and they were joined by citizen advocacy groups and former government officials. They argued that the proposed standards were unduly prescriptive, unbalanced (in favor of industry), and introduced a new layer of OMB review of scientific or technical studies used in developing regulations. The reaction was so strong and so adverse that OMB substantially revised its draft Bulletin to make it appreciably less prescriptive and restrictive, and in fact OMB resubmitted it in draft form for further comments before finalizing the revised Bulletin.

On March 2, 2004, OMB replaced a 1996 "best practices" memorandum with Circular A-4, setting forth instructions for the federal agencies to follow in developing the regulatory analyses that accompany significant draft notices of proposed rulemaking and draft final rules. The Circular, almost 50-pages single spaced, includes a detailed discussion of the dos and don'ts of virtually every aspect of the documentation that is needed to justify a regulatory proposal. While the term "guidance" is used, agencies that depart from the terms of the Circular do so at their peril (or more precisely, at the peril of their regulatory proposal).

Then came the OMB Proposed Risk Assessment Bulletin (January 9, 2006), providing technical guidance for risk assessments produced by the federal government. There were six standards specified for all risk assessments and a seventh standard, consisting of five parts, for risk assessments related to regulatory analysis. In addition, using the terminology from the IQA Guidance, OMB laid out special standards for "Influential Risk Assessments" relating to reproducibility, comparisons with other results, presentation of numerical estimates, characterizing uncertainty, characterizing results, characterizing variability, characterizing human health effects, discussing scientific

literature, and addressing significant comments. Agency comments raised a number of very specific problems and such general concerns as that OMB was inappropriately intervening into the scientific underpinnings of regulatory proposals. OMB asked the National Academies of Scientists (NAS) to comment on the draft Bulletin. The NAS panel (on which I served) found the Bulletin “fundamentally flawed” and recommended that it be withdrawn.

Then, on January 18, 2007, OMB issued its final bulletin on “Agency Good Guidance Practices.” Agencies are increasingly using guidance documents to inform the public and to provide direction to their staff regarding agency policy on the interpretation or enforcement of their regulations. While guidance documents—by definition—do *not* have the force and effect of law, this trend has sparked concern by commentators, including scholars and the courts. In response, the bulletin sets forth the policies and procedures agencies must follow for the “development, issuance, and use” of such documents. It calls for internal agency review and increased public participation—all to the good. In addition, however, the bulletin also imposes specified “standard elements” for significant guidance documents; provides instructions as to the organization of agency websites containing significant guidance documents; requires agencies to develop procedures (and designate an agency official/office) so that the public can complain about significant guidance documents and seek their modification or rescission; and extends OIRA review to include significant guidance documents. I do not believe it is an overstatement to say that the effect of the bulletin is to convert significant guidance documents into legislative rules, subject to all the requirements of Section 553 of the Administrative Procedure Act, even though the terms of that section explicitly exempt guidance documents from its scope. To the extent that the bulletin makes the issuance of guidance documents much more burdensome and time consuming for the agencies, it will undoubtedly result in a decrease of their use. That may well have unintended unfortunate consequences, because regulated entities often ask for, and appreciate receiving, clarification of their responsibilities under the law, as well as protection from haphazard enforcement of the law, by agency staff. This is quite a record. While each step can be justified as helping to produce better regulatory decisions, the cumulative effect is overwhelming. Requirements are piled on requirements, which are

piled on requirements that the agencies must satisfy before they can issue regulations (and now, significant guidance documents) that Congress authorized (indeed, often instructed) them to issue. And OMB has not requested, nor has the Congress in recent years appropriated, additional resources for the agencies to carry out OMB’s ever increasing demands. As agencies must do more with less, the result is that fewer regulations can be issued—which is exactly what the business community has been calling on this administration to do.

It is in this context that Executive Order 13422, further amending Executive Order 12866, is released. Until the bulletin on guidance documents, OIRA extended its influence

. . . may well have unintended unfortunate consequences, because regulated entities often ask for, and appreciate receiving, clarification of their responsibilities under the law, as well as protection from haphazard enforcement of the law, . . .

throughout the Executive Branch without any amendments to Executive Order 12866. As detailed above, OMB issued circulars and bulletins covering a wide variety of subjects, virtually all of which were quite prescriptive (and often quite burdensome) in nature. OMB circulars and bulletins do not have the same status as an executive order, but they are treated as if they did by the federal agencies. Why then did OMB draft and the President sign Executive Order 13422?

One indication of a possible answer is that while Executive Order 13422 in effect codifies the bulletin on guidance documents, it does not pick up and codify the earlier pronouncements on data quality, peer review, regulatory impact analyses, or even risk assessment principles. It may be that it was thought necessary to amend Executive Order 12866 for guidance documents because Executive Order 12866 was written to apply *only* where the agencies undertook regulatory actions that had the force and effect of law. But it is unlikely that the agencies would balk at submitting significant guidance documents to OIRA if there were an OMB bulletin instructing them to do so, and since neither executive orders nor circulars or bulletins are judicially reviewable, it is also unlikely that anyone could successfully challenge in court an agency’s decision to submit a significant guidance document to OIRA.

Perhaps more revealing of the reason(s) for Executive Order 13422 is that the changes are not limited to guidance documents but go beyond what has been done in the past. First, Executive Order 12866 had established as the first principle of regulation that:

“Each agency shall identify the problem that it intends to address (including, where applicable, the failure of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.”

Executive Order 13422 amends Executive Order 12866 to state instead:

“Each agency shall identify *in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.*”

By giving special emphasis to market failures as the source of a problem warranting a new regulation, the administration is saying that not all problems are equally deserving of attention; those caused by market failures are in a favored class and possibly the only class warranting new regulations. This could be read as a throwback to the “market-can-cure-almost-everything” approach, which is the litany of opponents of regulation; in fact, history has proven them wrong—there are many

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areas of our society where there are serious social or economic problems—e.g., civil rights—that are not caused by market failures and that can be ameliorated by regulation. Second, the new executive order amends Section 4 of Executive Order 12866, which relates to the regulatory planning process and specifically references the Unified Regulatory Agenda prepared annually to inform the public about the various proposals under consideration at the agencies. The original executive order instructed each agency to also prepare a regulatory plan that identifies the most important regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year. Section 4, unlike the rest of the executive

order, applies not only to executive branch agencies, but also to independent regulatory commissions, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, and the Federal Reserve Board. It is not without significance that the new executive order uses Section 4 to impose an additional restraint on the agencies:

“Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the plan without the approval of the agency’s regulatory policy officer . . .”

This language should be read in conjunction with an amendment to Section 6(a)(2) that specifies that the agency’s regulatory policy officer must be “one of the agency’s presidential appointees.” Executive Order 12866 had provided that the agency head was to designate the agency’s regulatory policy officer, with the only condition that the designee was to report to the agency head. The original executive order further provided that the regulatory policy officer was to “be involved at every stage of the regulatory process . . .”—in other words, a hands-on job. Now, there is an explicit politicalization of the process; a “sign-off,” not a hands-on, assignment; and, most significantly, no accountability. The newly appointed officer is not required to be subject to Senate confirmation, nor is the person required to report to a Senate-confirmed appointee.

The other changes to Section 4 are also troubling. As amended, the agencies must now include with the regulatory plan the:

“agency’s best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year . . .”

Very few would dispute that the regulatory plan has been notoriously unreliable as an indicator of what an agency is likely to accomplish in any given time frame; it is not unusual for regulations that are not included in the plan to be issued should circumstances warrant, nor is it unusual for regulations included in the plan with specific dates for various milestones to languish year after year without getting any closer to final form. In any event, the requirement to aggregate the costs and benefits of all the regulations included in the plan for that year is very curious. We know that costs and benefits can be estimated (at least within a range) at the notice stage because the agency will have settled on one or more options for its proposal. But to try to estimate either costs or benefits before there is any notice, that is, before the agency has made even tentative

decisions, is like trying to price a new house before there is even an option on the land and before there are any architect's plans. The numbers may be interesting, but hardly realistic, and to aggregate such numbers would likely do little to inform the public but could do much to inflame the opponents of regulation. This would not be the first time that large numbers that have virtually no relation to reality have driven the debate on regulation—e.g., the \$1.1 trillion estimate of the annual costs of regulations that is frequently cited by opponents of regulation, even though every objective critique of the study that produced that number concludes that it not only overstates, but in fact grossly distorts, the truth about the costs of regulation. The only other plausible explanation for this amendment to the executive order is that it is the first step toward implementing a regulatory budget. In my view, the concept of a regulatory budget is deeply flawed, but it should be debated on the merits and not come in through the back door of an executive order justified on other grounds.

There is also a gratuitous poke at the agencies in the amendment to Section 4(C). The original executive order instructed the agencies to provide a “summary of the legal basis” for each action in the regulatory plan, “including whether any aspect of the action is required by statute or court order.” The new amendment adds to the previous language the clause, “and specific citation to such statute, order, or other legal authority.” It may appear to be trivial to add this requirement, but by the same token, why is it necessary to impose such a requirement?

As noted above, I am not aware of any consultation about either the merits of any of the amendments or the perception that may attach to the cumulative effect of those amendments. Therefore, I do not know whether the agencies have, for example, been proposing regulations based on problems caused by something other than market failure which OMB does not consider an appropriate basis for a regulation; whether senior civil servants at the agencies have been sending proposed regulations to OMB that run contrary to the wishes of the political appointees at those agencies; or whether agencies have been misrepresenting what applicable statutes or court orders require.

If not, then there is little, if any, need for these amendments, other than to send a signal that the bar is being raised; that OMB is deciding the rules of the road; and that those rules are cast so as to increase the I's that must be dotted and the T's that must be crossed. In other words, the message is that agencies should not be doing the job that Congress has delegated to them. This is not a neutral process. If the Bush Administration does not like some or all agency proposed regulations, they can debate them on the merits. But the executive order should not become a codification of an anti-regulatory manifesto. This is not good government. ■