The Rhetoric and Reality of Regulatory Reform

Cary Coglianese[†]

Executive Order 13,422[1] leaves in place most of the existing review process established earlier under Presidents Reagan through Clinton.[2] But it makes several controversial changes to Clinton's Executive Order, such as requiring that agencies specify in writing the regulatory problems they seek to solve, giving presidential appointees certain gatekeeping functions as regulatory policy officers, and imposing new review requirements on certain guidance documents.[3] Although these amendments add to or modify only a very small amount of the text in the pre-existing Executive Order on regulatory review, the changes have provoked a firestorm. Critics charge that the new Order solidifies presidential control over rulemaking and will hamper agencies' ability to issue timely regulations in the service of social welfare.

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† Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Law School; Director, Penn Program on Regulation. The author is grateful for research support provided by Jocelyn D'Ambrosio and Tim Von Dulm and comments on an earlier draft from Matthew Adler, Jocelyn D'Ambrosio, Stuart Shapiro, Natalya Shnitser, and Christopher Yoo. A version of this paper is forthcoming in the *Yale Journal on Regulation*.

1 Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (hereinafter referred to in the text as "the Order" or "13,422").

2 Exec. Order No. 12,291, 3 C.F.R. 127 (1982), 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), 58 Fed. Reg. 51,735 (Sept. 30, 1993), *reprinted in* 5 U.S.C. § 601 (2000).

3 In addition to these changes, 13,422 also includes provisions about reporting cumulative regulatory benefits and costs as well as about the use of formal rulemaking procedures.

In this essay, I focus specifically on the concern that the Order will burden and delay the regulatory process. I compare the criticisms of 13,422 with criticisms of past procedural changes to the regulatory process, and I juxtapose the perennial concern about administrative burdens and delay with the growth in federal regulation over the past half-century. If procedural controls, such as those in 13,422, really do impose on regulatory agencies a "paralysis by analysis," then why is the federal government still producing so many high-impact regulations? This essay raises possible explanations for the disjunction between the rhetoric and reality surrounding regulatory reform, including the possibility that the ultimate impact of the Bush amendments will be largely symbolic.

I. Rhetoric Reacting to Executive Order 13,422

For a short presidential decree on administrative rulemaking, Executive Order 13,422 has received a remarkable degree of public attention, including a front-page story in *The New York Times*,[4] a broadcast on MSNBC,[5] and two congressional hearings[6]—not to

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4 Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1 (reporting that "[c]onsumer, labor, and environmental groups denounced the executive order" and feared that it "would hinder agencies' efforts to protect the public").

5 *Countdown with Keith Olbermann: Executive Order 13,422* (MSNBC television broadcast Jan. 30, 2007), *available at* http://olbermannnation.com/index.php/2007/01/30/executive_order_13,422

and http://www.youtube.com/watch?v=Sz6NEoKZRMY (conversation between host Keith Olbermann and guest John Dean highlighting potentially "outrageous" consequences of 13,422, including its "hurdles" for new regulatory actions).

6 There have been at least two congressional hearings *so far*. The House Science and Technology Committee's Subcommittee on Investigations and Oversight held hearings on February 13, 2007 and April 26, 2007. *See Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Parts I and*

mention the passage of a House appropriations bill blocking its implementation.[7] In the course of the highly visible debate over 13,422, critics have advanced two rhetorical arguments. The first emphasizes the balance of power between Congress and the President, tapping into broader critiques of the Bush Administration's positions on executive authority in domestic and foreign affairs.[8] The second, and the one on which I focus here, is a variation on what economist Albert Hirschman calls the "rhetoric of jeopardy."[9]

Executive Order 13,422, the argument goes, "deals a body blow to the ability of our agencies to do their jobs."[10] Its requirement that agencies state the problem they seek to solve imposes "another hurdle for agencies to clear" before they can adopt good public

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II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology, 110th Cong. (2007), *available at* http://democrats.science.house.gov/publications/hearings_markups_details.aspx?NewsID=1269 *and* *http://democrats.science.house.gov/publications/hearings_markups_details.aspx?NewsID=1777*.

7 Financial Services and General Government Appropriations Act 2008, H.R. 2829, 110th Cong. § 901 (2007). The Senate did not pass similar legislation.

8 *See, e.g.*, Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 732-38 (2007).

9 ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 84 (1991). Although Hirschman focuses most of his attention on the rhetoric of conservatives, he readily acknowledges that progressives make parallel rhetorical moves. *Id*. at 149-54 (labeling the progressives' parallel to the jeopardy argument the "imminent danger thesis"). Conservatives' rhetoric of jeopardy emphasizes the dangers of *action*, while progressives' parallel rhetoric of imminent danger focuses on the dangers of *inaction*. *Id*. at 153.

10 *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation?: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007) (Statement of David C. Vladeck, Associate Professor, Georgetown University Law Center), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/13feb/vladeck_testimony.pdf.

policies "protecting public health and safety."[11] Its provisions on guidance documents give the Office of Management and Budget (OMB) the ability "to keep the agencies in an endless loop of analysis and [will] lead to endless regulatory delays."[12] The Order's relatively obscure, if somewhat puzzling, provision on formal rulemaking procedures causes at least one prominent administrative law scholar to wonder if its purpose is "[j]ust to help one's friends slow things down—throw a good dose of sand into the gears of rulemaking."[13]

According to critics, 13,422 generates "gridlock"[14] or "a new bureaucratic bottleneck."[15] It "codifies regulatory delay"[16]—and hence "lead[s] to the further

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11 Pear, *supra* note 4, at A19 (quoting Gary D. Bass, Executive Director of OMB Watch).

12 OMB WATCH, A FAILURE TO GOVERN: BUSH'S ATTACK ON THE REGULATORY PROCESS 22 (2007), *available at* http://www.ombwatch.org/regs/PDFs/FailuretoGovern.pdf. Even an otherwise supportive treatment of 13,422 expresses concern that the revised "process could slow or stop the issuance of some guidance that serves a useful social purpose." *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 4 (2007) (statement of Robert W. Hahn, President, AEI-Brookings Joint Center for Regulatory Studies), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/hahn testimony.pdf.

13 *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 12 (2007) (Statement of Peter L. Strauss, Professor, Columbia University School of Law) *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss_testimony.pdf.

14 Union of Concerned Scientists, Presidential Mandate Centralizes Regulatory Power, Endangers Citizens, http://www.ucsusa.org/scientific_integrity/interference/executive-order.html (last visited Nov. 18, 2007).

15 Public Citizen, Latest White House Power Grab Puts Public at Risk: Problems of the Jan. 2007 Executive Order and Bulletin on Guidance (Jan. 2007), http://www.citizen.org/documents/new-eo-and-guidance-overview.pdf.

ossification of an already overburdened administrative process."[17] One member of Congress claims 13,422 provides "another avenue for special interests to slow down and prevent agencies from protecting the public."[18] Still another declares that it "make[s] it harder for agencies to take virtually any action."[19] A former OMB regulatory policy administrator predicts that due to 13,422, along with recent OMB bulletins and standards, "fewer regulations can be issued."[20]

II. Rhetoric and Reaction in Administrative Law

The kinds of criticisms that have been leveled against 13,422 are hardly new. Burdens and delays have figured prominently in the rhetoric against a variety of administrative law reforms. When President Reagan first established formal White House review of

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16 OMB WATCH, UNDERMINING PUBLIC PROTECTIONS: PRELIMINARY ANALYSIS OF THE AMENDMENTS TO EXECUTIVE ORDER 12,866 ON REGULATORY PLANNING AND REVIEW 3 (2007), *available at* http://www.ombwatch.org/regs/EO12866_amendments_analysis.pdf.

17 Vladeck, *supra* note 10, at 19.

18 Press Release, Subcomm. on Investigation and Oversight, H. Comm. on Science and Technology, Miller Leads Subcommittee Hearing into White House Exec. Order that Gives More Political Control Over Public Health, Safety Regulations (Feb. 13, 2007), *available at* http://democrats.science.house.gov/press/PRArticle.aspx? NewsID=1328 (quoting Hon. Brad Miller).

19 153 CONG. REC. E 1438 (June 28, 2007) (statement of Rep. Waxman).

20 *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation?: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 9 (2007) (Statement of Sally Katzen, Adjunct Professor, University of Michigan Law School), *available at* http://democrats.science.house.gov/Media//File/Commdocs/hearings/2007/oversight/13feb/katzen_testimony.pdf.

rulemaking under Executive Order 12,291,[21] critics raised separation of powers questions[22]—but they also complained that OMB review would impede agencies' ability to make new regulations.[23] A widely cited article published in the *Harvard Law Review* during the Reagan years declared that "OMB control imposes costly delays that are paid for through the decreased health and safety of the American public."[24] Even after President Clinton changed the Reagan Order to reserve OMB review for a more limited set of

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21 Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

22 *See, e.g.*, Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

23 Felicity Barringer, *If Rules Are Made To Be Broken, So Are Rulemakers*, WASH. POST, June 25, 1981, at A21 (describing the Reagan Order as "requiring further delays and studies of all pending rules"); Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES, Nov. 7, 1981, at 28 (noting that the Reagan Administration had issued only about thirty new major regulations compared with "100 to 200 such major regulations" in previous years, and quoting observers who suggested that OMB review was "stemming regulation" and serving as a means to "obstruct regulations"). *See also* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1087-88 (1986) ("[M]ost criticism has focused . . . on the delay that OMB review entails."); OMB Watch, OMB Control of Rulemaking: The End of Public Access 13 (Aug. 1985) (on file with author) ("The required cost/benefit analyses impose[ ] often heavy burdens on the regulatory agencies"). Even earlier efforts of presidential oversight were said to obstruct rulemaking. *See* OMB Watch, *supra* at 3 (stating that Nixon's "[h]ighly controversial" review process stood "accused of delaying the already lengthy environmental regulatory process").

24 Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986). Publishing in the same issue of the *Harvard Law Review*, Christopher DeMuth and Douglas Ginsburg lauded OMB review because it "encourages policy coordination, greater political accountability, and more balanced regulatory decisions." DeMuth & Ginsburg, *supra* note 23, at 1081. DeMuth and Ginsburg both served as Administrators of the Office of Information and Regulatory Affairs within OMB. DeMuth & Ginsburg, *supra* at 1075. Their claims, and those of other supporters of OMB review, can and should be scrutinized along with the claims of critics—especially since empirical studies generally "have failed to show that economic analysis and OMB review have significant effects on the cost-effectiveness of government regulations." Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1123 (2002). *See also id*. at 1123 nn.54-57 (citing studies of the impact of economic analysis on regulatory decisions).

significant rules and to place time limits on the review process,[25] scholars continue to claim that OMB review slows down the regulatory process, and even grinds it to a halt in certain instances.[26]

OMB review is not the only procedure to stand accused of obstruction. What critics say about OMB generally, and 13,422 specifically, mirrors the charges leveled against many other administrative procedures. For example, environmental impact statements required by the National Environmental Policy Act purportedly postpone many federal actions.[27] The Freedom of Information Act allegedly imposes high costs on federal agencies.[28] Critics of recent proposals for peer review and other checks on information

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25 The Reagan Executive Order required agencies to submit *all* rules to OMB for review. Exec. Order No. 12,291, §§ 3(c)(3), 3(e)(2)(C), 3(f)(2). In contrast, the Clinton Executive Order only required agencies to submit *significant* rules to OMB. Exec. Order No. 12,866 §§ 6(a)(3)(A), 6(a)(3)(B), 6(b)(1). Furthermore, unlike the Reagan Order, the Clinton Order stated that when reviewing proposed and final rules "OIRA shall . . . notify the agency in writing of the results of its review . . . within 90 calendar days." Exec. Order No. 12,866 § 6(b)(2), 3 C.F.R. 638, 642 (1993), *reprinted in* 5 U.S.C. § 601.

26 *See, e.g.*, Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 447 (2003) ("OMB regulatory analysis and other forms of regulatory impact review have also contributed to 'paralysis by analysis.' Agencies increasingly turn to less formal, less accountable, and more opaque methods of making regulatory policy."). It has even been said that "OMB's review of agency rulemaking has proved far more intrusive during the 1980s and early 1990s than either judicial or congressional review." Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1429 (1992).

27 *See, e.g.*, Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 52 (2003) ("Some critics blame the NEPA process for delay and inefficiency."); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 906-7 (2002) (NEPA "demands the impossible" and "places extreme demands on agency resources"); James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 75 (2003) ("[C]ommentators and the agencies bound by [NEPA's] requirements have often decried the Act as a time- and resource-consuming annoyance.").

28 *See, e.g.*, Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 15, 16 (FOIA requests "have greatly burdened investigative agencies"). Scalia's argument

quality claim that they will unduly delay regulatory policy-making.[29] It has become widely accepted that judicial review under the arbitrary and capricious standard has "burdened, dislocated, and ultimately paralyzed" certain agencies' rulemaking.[30]

"Paralysis by analysis" has become a cliché in regulatory circles today.[31] This appealing rhyme, though, is itself far from new, dating at least to the first half of the twentieth century when it appeared in religious sermons and writings.[32] The underlying

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against FOIA, along with criticisms of delays caused by NEPA, suggest how arguments about the burden of administrative procedures can cut across ideological lines.

29 *See, e.g.*, Thomas O. McGarity, *Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 KAN. L. REV. 897, 935 (2004) (arguing that "the result [of the Information Quality Act] can only be added expense and delay in the decisionmaking process"); J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1, 6 (2006) (quoting a critic of peer review who predicted that regulatory peer review will "introduce potentially massive costs and delay, thus injecting paralysis by analysis into the regulatory process").

30 Jerry L. Mashaw & David Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 443 (1990). *See also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 932 (2003) ("[Judicial] review has contributed to the 'ossification' of notice-and-comment rulemaking, which now takes years, in part as a result of the effort to fend off judicial challenges. In light of the risk of invalidation, many agencies have turned away from notice-and-comment rulemaking altogether.").

31 *See, e.g.*, Daniel A. Farber, *Rethinking Regulatory Reform After* American Trucking, 23 PACE L. REV. 43, 51 (2002) ("Environmentalists respond that cost-benefit analysis is a recipe for 'paralysis by analysis.'"); Thomas O. McGarity, *The APA at Fifty: The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1523 (1996) (noting the "fear that many of the cognitive regulatory reforms . . . will lead to 'paralysis by analysis'"); Chris Mooney, *Paralysis by Analysis*, WASH. MONTHLY, May 2004, at 23, *available at* http://www.washingtonmonthly.com/features/2004/0405.mooney.html.

32 *See, e.g.*, ELI STANLEY JONES, THE CHRIST OF EVERY ROAD: A STUDY IN PENTECOST 40 (1930). Although the phrase appears to have been employed most commonly by Christian writers and preachers during the early part of the twentieth century, it came into more general usage after Martin Luther King, Jr. made it part of his call for racial justice. *See* MARTIN LUTHER KING, JR., STRENGTH TO LOVE 17 (1963). The rhyme appeared within the pages of the *Federal Register* as early as in 1952, used by a Republican appointee to the Federal Communications Commission. *See* Dissenting Opinion of Comm'r Robert F. Jones, 17 Fed. Reg. 4093, 4094 (1952) ("The Commission has had the paralysis of analysis for 1 year, not consumed in

concern the rhyme conveys about administrative process also dates back to the early part of the last century. In an article published in the *Harvard Law Review* in 1938, an administrative law scholar asked whether New Deal changes in rulemaking procedures would lead at least to "a partial paralysis . . . by reason of excessive formality and litigation."[33]

At the time of the New Deal, proposals for government-wide procedural reform triggered the "fear of unduly hampering" agencies."[34] Of course, today the informal rulemaking provisions of the Administrative Procedure Act (APA) of 1946 are held up as a model of administrative simplicity and efficiency,[35] only to have been spoiled by developments in judicial and regulatory oversight in the last several decades.[36] It is little known that the APA was itself once viewed as a major source of ossification. Scholars in the 1940s feared that its uniform procedures would "severely cramp the style of

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drafting the general rules and standards [for television service], but consumed in a search for a city-to-city allocation plan which it can freeze on the country by rule-making proceedings.").

33 Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 280 (1938).

34 *Administrative Law—Developments 1940-45*, 44 MICH. L. REV. 797, 803 (1946).

35 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 283 (1970) (describing informal rulemaking under the APA as being among the "greatest inventions of modern government"). This phrase of Davis's continues to be quoted today.

36 McGarity, *supra* note 26, at 1385 ("Professor Kenneth Culp Davis captured the prevailing sentiment . . . when he called informal rulemaking 'one of the greatest inventions of modern government.' Twenty years later, the bloom is off the rose. . . .[The] rulemaking process has become increasingly rigid and burdensome [due to an] assortment of analytical requirements . . . and evolving judicial doctrines . . . .") (citation omitted).

government regulation."[37] The right to file a rulemaking petition under § 553(e) was of "doubtful value," especially since agencies could be "swamped by frivolous requests having delay as their sole objective."[38] It is hard to imagine now, but at the time of the APA's adoption some academic observers forecasted "disastrous" effects from the law, characterizing the Act as nothing short of a "sabotage of the administrative process."[39]

III. The Reality of Regulatory Growth

So we have heard complaints about procedural burdens many times before. What, then, should we make of the rhetorical similarities between criticisms of 13,422 and of administrative procedures more generally? The perennial nature of the refrain about delay and obstruction might well make anyone suspicious that the criticisms of 13,422 are nothing more than the rhetorical ploy trotted out by the opponents of any reform. But as Hirschman reminds us, the mere fact that a rhetorical argument is repeated or even overused does not necessarily make it wrong.[40] The impact of OMB review, with or

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37 Fritz Morstein Marx, *Some Aspects of Legal Work in Administrative Agencies*, 96 U. PA. L. REV. 354, 354 n.2 (1948).

38 Foster H. Sherwood, *The Federal Administrative Procedure Act*, 41 AM. POL. SCI. REV. 271, 279 (1947).

39 Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213, 213 (1946).

40 HIRSCHMAN, *supra* note 9, at 166.

without 13,422, is ultimately an empirical question that requires looking at what agencies have actually done in terms of rulemaking.[41]

Yet here is where suspicions about the rhetoric of paralysis grow strongest, because the regulatory state has increased considerably in size and impact since the establishment of the APA and subsequent reforms, including OMB review. The sheer volume of rules, as measured by pages in the Code of Federal Regulations (CFR), has increased about five times since 1946 and has continued to grow since the advent of OMB review. For the past couple of decades, the federal government has issued an average of about 4,000 new rules each year in the *Federal Register*. The 2006 CFR contains about 33% more pages than did the 1980 volume of the CFR.[42]

Pages of rules are only one way to measure regulatory activity. When estimated monetarily, the impact of federal regulation has also increased. Not only do new rules deliver substantial benefits to society, they also impose substantial costs. According to the estimates collected by OMB during its review process, government regulations issued since 1981 have imposed $127 billion in annual costs on the economy.[43] According to a

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41 *See generally* Coglianese, *supra* note 24.

42 The values reported in this paragraph draw on data on file with the author that were collected by and obtained from the Office of the Federal Register. A recent study by Anne Joseph O'Connell similarly "calls into question much of the existing debate on regulatory 'ossification'" and reports data on rulemaking frequency that "strongly suggest that the administrative state is not ossified." Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. (forthcoming June 2008).

43 OFFICE OF MGMT. & BUDGET, DRAFT 2007 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 34 (2007), *available at* http://www.whitehouse.gov/omb/inforeg/2007_cb/

retrospective study conducted by the National Highway Traffic Safety Administration, the annual costs attributable to mandatory federal auto safety standards have increased from $255 per car during the 1968-78 period to $760 per car in the 1991-2001 period, even controlling for inflation.[44] An independent study has reported that the annual costs associated with environmental regulations more than quadrupled between 1972 and 1992, roughly a decade before and a decade after the establishment of OMB review.[45]

Given the overall increase in pages of regulation and their costs, government regulators have clearly not been paralyzed. Have they nevertheless been hobbled? Is it possible that regulatory growth would have been greater still in the absence of OMB review? Several empirical studies have tried to determine whether OMB review slows down the rulemaking process, thus making it harder for agencies to issue as many rules as they otherwise would. Although it might seem intuitive that OMB review would increase the time and expense of issuing new rules, researchers have not found systematic evidence that OMB review imposes any significant delay on the regulatory process, notwithstanding careful analysis of both large-sample datasets and matched case studies. For example,

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2007_draft_cb_report.pdf. The same report indicates that annual average regulatory costs have tended to be lower during the second Bush Administration than during previous administrations, although of course these data precede the issuance of Executive Order 13,422. *Id*.

44 Marcia J. Tarbet, Cost and Weight Added by the Federal Motor Vehicle Safety Standards for Model Years 1968-2001 in Passenger Cars and Light Trucks, NHTSA Report No. DOT HS 809 834 at 145, Table 5A, *available at* http://www.nhtsa.dot.gov/cars/rules/regrev/Evaluate/809834.html (reporting all data on unit costs in 2002 dollars).

45 Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. ECON. LIT. 132, 140 (1995).

political scientists Cornelius Kerwin and Scott Furlong published a regression analysis of the determinants of EPA rulemaking duration in which they found little by way of any statistically significant effect from OMB review.[46] Stuart Shapiro, another social scientist, analyzed a series of matched *state* agencies and found that even seemingly cumbersome rulemaking procedures, like economic analysis review, did not affect the rate of regulatory change, although the partisan control of the political branches did.[47] More recently, political scientist Steven Balla and his colleagues studied the determinants of the duration of OMB review and found that, contrary to claims that special interests try to capture OMB review to delay rules, reviews were actually shorter when only narrow sets of businesses

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46 Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992). The Kerwin and Furlong study analyzed determinants of the duration of 150 non-routine U.S. Environmental Protection Agency (EPA) rules issued during the period October 1, 1986 through September 30, 1989, drawing on data collected from the EPA's internal regulatory management system. *Id*. at 122. The authors reported results from three separate regression models. In two of these models, the OMB review variable was not significant at all. *Id*. at 130. In the model of duration between proposed and final rules, OMB review was statistically significant, but only had an effect that for every day a rule was under OMB review, the duration of the process was lengthened by two days. *Id*. Even with this one apparent statistical relationship, the variable for OMB review could be serving as at least a partial proxy for the overall complexity or political salience of rules. *Id*. at 132. In other words, at least part of any statistically observed delay may stem from the fact that rules that go to OMB for review are simply more complex and controversial to begin with than the ordinary rule.

47 Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change*, 12 J. PUB. RES. & THEORY 29 (2002). Shapiro studied day care regulation in eight states, selecting states in pairs that otherwise were geographically and economically similar. He chose to study day care regulation because it is a domain that has largely escaped federal preemption, thus helping to maximize the possibility of variation across states. Contrary to prior expectations, Shapiro found that regulators in states with purportedly cumbersome regulatory procedures were not deterred from issuing new regulations. Instead, he found that the key determinant of the level of regulatory activity was the political environment within the states. When the political alignment in the legislature and executive branch favored regulatory change, change generally occurred, even in states with higher procedural hurdles. *Id*.

were in contact with OMB.[48] To be sure, no broad-based empirical study can rule out that OMB review might have the effect of slowing the issuance of an individual rule now and then. The existing work does fail, though, to find clear evidence of any *general* effects consistent with the *general* rhetorical claims made about OMB review.[49]

IV. Explaining the Rhetoric-Reality Divergence

How, then, can the bold rhetoric about 13,422 and OMB review be reconciled with the stark reality of continued and substantial outflows of regulation from the federal government? Perhaps additional research is needed to uncover the real, but more subtle effects that procedures like these have on regulatory behavior. Or perhaps OMB review truly has failed to delay rulemaking so far, but the implementation of 13,422 will take the administrative process past a tipping point to where rulemaking does finally begin to slow

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48 Steven J. Balla et al., Outside Communication and OMB Review of Agency Regulations, presented at the 2006 annual Midwest Political Science Association meeting, Chicago, Illinois. The authors examined nearly 2,000 OMB reviews undertaken from 2002 through 2004 to determine whether contacts between OMB and outside parties over specific rules tended to correspond with the duration of OMB review of those rules. *Id*. at 6. Based on OMB logs of staff contact with outside parties, the authors reported that contacts took place in only about 7% of the rules. *Id*. Although reviews where contacts occurred did take longer on average than reviews without any contacts, once other variables were controlled for, contacts with business groups were not associated with a lengthening of the OMB review process. As Balla et al. state, "contrary 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." *Id*. at 15.

49 *See* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 87 (2006) (noting that "existing evidence and the political economy of rulemaking call into question the claim that [cost-benefit analysis] produces substantial incremental delay"). In one recent paper, two political scientists report results suggesting that OMB review can "actually speed up agency rulemaking—a finding directly contrary to what ossification theory predicts." Jason Webb Yackee & Susan Webb Yackee, Is Federal Agency Rulemaking "Ossified"? The Effects of Procedural Constraints on Agency Policymaking, paper presented at the 2007 meeting of the Midwest Political Science Association, at 24 (on file with the author).

down, if not grind to a standstill. Or perhaps ultimately the rhetoric surrounding 13,422 and OMB review is just that, rhetoric.[50]

These are all certainly possibilities. But I find more interesting three other possible explanations that might offer theoretical insights about the relationship between administrative procedures and regulatory decision-making. The first possibility might be that administrative procedures like 13,422 are epiphenomenal, or at least so highly malleable to make them merely symbolic. That is, rulemaking procedures may look like they impose burdens on agencies, but the real burdens depend entirely on whether or how they are implemented—not on the existence of procedure *qua* procedure. As a result, an administration that wants to regulate a lot will regulate a lot, and an administration that wants to slow down regulation will slow down regulation—regardless of what procedures are on the books.[51]

A second possible account is that the behavioral effect of a law or procedure is real, rather than illusory, but just simply trivial (at least for certain effects of interest). For

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50 *See* CURTIS W. COPELAND, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13,422, at 5 (Congressional Research Service No. RL33862, Feb. 5, 2007) (noting that "concerns about the usurpation of congressional standards for rulemaking and unnecessary delay may be exaggerated"). *See also* Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 697 (2007) (describing the limited, even symbolic, role of various procedural steps in the development of OSHA's ergonomics rule in the 1990s).

51 Stuart Shapiro has suggested as much, concluding that "the new regulatory procedures [put in place during the Bush-II administration] may either be irrelevant to regulatory outcomes or may be used by future pro-regulatory presidents to achieve their own regulatory goals." Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process under the Clinton and Bush (43) Administrations* 22, (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No. 06-30), *available at* http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/RP06-30_topost.pdf.

example, even if state laws requiring consumers to pay a five-cent deposit for soda bottles and cans reduce roadside litter and increase recycling, it is hard to see that these so-called bottle bills place any meaningful barrier in the way of the purchase of soda, and hence it seems unlikely they would lead to any discernible decline in soda sales in states after these laws are adopted.[52] In a similar vein, some administrative procedures probably have only trivial effects on rulemaking because agencies can satisfy them by publishing boilerplate language in their *Federal Register* notices. If agencies come to satisfy 13,422's new written problem statement requirement using boilerplate language or by creating check-boxes on a form, the requirement's impact will surely be inconsequential in terms of the pace and cost of rulemaking.

A third possibility is that procedures do have both real and consequential effects, but these effects are drowned out by other behavioral factors moving in the same direction. For instance, on the assumption that Reagan's regulatory review order was truly more burdensome than Clinton's Order,[53] the additional burden may not have had much of an effect on agency behavior in an administration where appointees were already less inclined to regulate. If it turned out that agencies issued fewer or less costly rules during the Reagan Administration than the Clinton Administration, these results may well have stemmed not

52 In other words, while a price increase can have real effects on purchasing behavior, it would be hard to imagine the demand for soda is so highly elastic that a five-cent deposit has anything but the most trivial effect on overall sales.

so much from procedure than from the ideology of the political appointees heading the agencies.

For much the same reason, if other legal rules, professional norms, or political exigencies already are pushing agencies to take benefit-cost analysis seriously—something Cass Sunstein has suggested[54]—then any additional, incremental stringency of a regulatory review order may yield at best only a small and diminishing behavioral return. In other words, if agencies are already, for other reasons, engaging in exactly the kind of analysis called for by the new Executive Order, the Order will impose no (or negligible) additional costs and delays. To predict the extent of any delay from 13,422's provisions on guidance documents, for example, we need to know more about what analysis of these non-binding documents agencies conduct anyway. It would not be surprising to discover that many agencies already conduct analysis of their most significant guidance documents, precisely the ones covered by the new Executive Order. If this is true, the additional time and effort needed to satisfy OMB review under 13,422 will most certainly turn out to be much smaller than has been widely imagined.[55]

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53 *See supra* note 25. For a further discussion of some of the differences between the Reagan and Clinton Orders, see Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 827-29, 849-50 (2003).

54 CASS R. SUNSTEIN, THE COST-BENEFIT STATE (2002).

55 Moreover, OMB's review of significant guidance documents may turn out to be much more limited than critics apparently assume it will be. *See* OMB Regulatory Policy Chief Anticipates New Draft of Risk Assessment Guidance, BNA Daily Report for Executives, May 10, 2007, at A-24 (quoting OMB regulatory director, Susan Dudley, as anticipating review of guidance documents will be "a quick turnaround thing. . .not the same as [reviewing] a regulation."). If so, it seems still more conceivable that agencies' pre-

Conclusion

For these reasons, scholars and policy decision makers should exercise caution before concluding that Executive Order 13,422 will have anything more than the most minor effects on actual agency operations. The Order's requirement for a written problem statement and its provisions calling for OMB review of guidance documents, for example, may well be easily met or add only superfluously to what agencies already do. Such an outcome would be consistent with the longstanding disjunction between the rhetoric and reality of regulatory reform. Alarms of delay and paralysis have sounded in response to nearly every major regulatory reform since the establishment of the Administrative Procedure Act of 1946—and yet the regulatory state has nevertheless marched rather dramatically onward over the last six decades.

As it applies to the operation of government bureaucracies, administrative law is embedded within a complex web of politics, institutions, and organizational behavior. Within this web, law is but one factor influencing behavior in government agencies among a variety of institutional, professional, social, financial, and political factors that interact with each other, and even adapt and change over time. Social scientists who have devoted their careers to the empirical study of bureaucracy have yet to create a parsimonious theory

existing level of analysis behind guidance documents will often satisfy OMB, thus rendering 13,422's new requirement largely superfluous.

of bureaucratic behavior.[56] Their failure to do so, combined with the obvious expansion of regulation in the face of repeated warnings to the contrary, should make both institutional designers and their critics more circumspect about their predictions—and their rhetoric—concerning the impact of regulatory reform.

56 JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT xi (1989) ("After all these decades of wrestling with the subject, I have come to have grave doubts that anything worth calling 'organization theory' will ever exist.").