

## THE FORUM

# That Regulatory Review Order: Who Benefits, and at What Cost?

**P**resident Bush's new executive order on the rulemaking process and an accompanying bulletin issued by the Office of Management and Budget broaden and deepen the White House's role in implementing environmental, health, and safety laws. OMB, part of the office of the president, has examined economically significant new regulations before they are finalized since the Carter administration, a policy followed ever since. President Reagan's Executive Order 12291 established regulatory review formally in OMB's Office of Information and Regulatory Affairs.

Executive Order 13422 mandates that the regulatory review office in each agency be headed by a presidential appointee charged with ensuring that the president's priorities are addressed. The order also requires that an agency identify in writing a specific "market failure" or other problem that justifies government intervention before it hands down any rule. And it requires agencies to tote up the costs and benefits of their entire suite of regulations on an annual basis.

The bulletin subjects to White House review for the first time the thousands of guidance documents agencies generate each year. According to OMB, "The executive order does not expressly require a cost-benefit analysis for guidance documents, although — as should be the case with everything that people do in life — the agency should issue a guidance document only if the agency believes that the 'pros' for issuing the guidance (i.e., its benefits) will outweigh its 'cons' (i.e., its costs)." The executive order requires agencies to post guidance documents expected to have an annual economic effect of \$100 million on the Internet for public comment.

Whether by presidential decree or congressional enactment, does it make sense to place a non-career official into each agency to serve as a regulatory gatekeeper? Who will benefit from guidance review, and are there costs to democratic decisionmaking? Finally, is the mandate to identify a market failure or other problem before a rule may be promulgated to address it sensible, or can the new policy lead to a situation in which Congress legislates and executive agencies decline to implement the law?



*“This will worsen an already untenable situation, where government doesn’t act until there is national news about people being hurt or dying.”*

**Gary D. Bass**

*Executive Director*  
OMB WATCH



*“Individuals should know what government requirements or suggestions apply to them and have an opportunity to object.”*

**John G. Knepper**

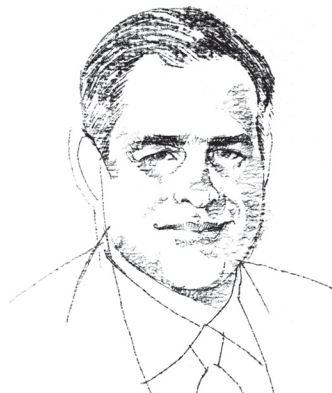
*Deputy General Counsel*  
OFFICE OF MANAGEMENT AND BUDGET



*“Our Constitution provides for an elected president to execute the laws of the United States, including the appointment of inferior officers.”*

**Bill Kovacs**

*Vice President, Environment, Technology & Regulatory Affairs*  
U.S. CHAMBER OF COMMERCE



*“Prohibiting regulators from employing good cost-benefit analysis is as problematic as mandating it.”*

**Jerry Taylor**

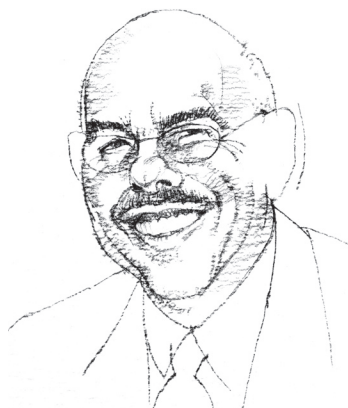
*Senior Fellow*  
CATO INSTITUTE



*“The new executive order should have checked political interference in policymaking but instead makes it more likely.”*

**Wesley P. Warren**

*Director of Programs*  
NATURAL RESOURCES DEFENSE COUNCIL



*“Bush is erecting new barriers to prevent common-sense safeguards from advancing in the next administration.”*

**Rep. Henry Waxman**

*Chair*  
HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

## Paralysis: Real Consequences, for Real People

GARY D. BASS

**M**ore than just a power grab, the changes President Bush implemented with his newest amendments to Executive Order 12866 and his bulletin requiring the Office of Management and Budget to review agency guidance documents have larger consequences. The requirement to conduct market failure assessments adds more layers of analysis for agencies — a paralysis by analysis. The requirement to have political appointees oversee all steps in the regulatory process allows politics to trump science and shape-shift the regulatory process in ways that can benefit regulated interests. The requirement for OMB review of thousands of agency guidance documents means massive delay in providing advice to regulated industries and further shifts agency discretion to the White House. Each of these actions upsets the constitutional balance between Congress and the presidency, in pursuit of the administration's goal of a "unitary executive."

Congressional delegation of regulatory powers to agencies puts Congress in the role of overseeing the implementation of legislation. OMB's review process is already so cumbersome that the only real effect of requiring guidance documents to go through the same process is to delay implementation and usurp congressional mandates by allowing OMB to decide which actions go forward.

The same impact results from placing presidential appointees in agency positions with the power to quash regulations. This also raises an interesting separation of powers ques-

tion: should these people be subject to Senate confirmation if they no longer report to the agency heads but to OMB and thus the White House?

Strikingly, the president is requiring a market failure analysis when agencies contemplate whether to regulate, even though Congress has not required such criteria. In fact, Congress often imposes other criteria, such as best available technology. While we must wait to see what guidance OMB provides to agencies on how to implement this requirement, it is clear that this will be one more barrier to issuing sensible safeguards.

We, the people, are the ones hurt most by this regulatory chokehold. In the end, less regulation means less protection. Instead of having a regulatory cop on the beat, we will have none. Instead of addressing regulatory gaps, we will operate based on whether these gaps have political consequences. This will worsen an already untenable situation, where government doesn't act until there is national news about people being hurt or, even worse, dying.

There is real danger to our constitutional system from this arrogation of power. Equally significant, however, is the danger to the American public from the delay or refusal to regulate dangerous activities. Every year, foodborne illnesses kill an estimated 5,000 people and sicken 76 million. Nearly 6,000 workers die from injuries on the job, with an additional 50,000 to 60,000 killed by occupational disease. And asthma — linked to air pollution — is rising dramatically, afflicting 17 million, including six million children.

There are real consequences from regulatory action and inaction. Our government should be doing more, not less, to protect the public. The executive order amendments and good guidance directive move us in the wrong direction.

**Gary D. Bass** is the Executive Director of *OMB Watch*, a nonpartisan, nonprofit government watchdog organization in Washington, DC.

## These Reforms, Put Simply, Are Good Government

JOHN G. KNEPPER

**I**n January, the Office of Management and Budget issued a bulletin that lays out good guidance practices for federal agencies. The same day, the president issued Executive Order 13422, which makes several amendments to President Clinton's earlier order on regulatory planning and review. Together, they create a framework for the development, issuance, and use of guidance documents that ensures quality, public participation, and agency coordination.

The bulletin provides best practices for agencies to use when telling the American people what they "should do." It directs agencies to provide a list of significant guidance documents to the public; provide an opportunity for feedback; ensure that appropriately senior officials have approved important guidance before issue; and for guidance reasonably anticipated to have an annual economic effect of \$100 million, provide for public comment.

These reforms are, simply put, good government. Individuals should know what government requirements or suggestions apply to them, they should have an opportunity to object if they disagree, and they should have the assurance that an agency's decision represents a considered judgment. Of course, there can be circumstances when an agency must act immediately, without pausing for public consultation, and the bulletin includes an exemption for such emergencies.

The executive order reinforces the bulletin with an informal process whereby some — but by no means all — significant guidance is submitted to OMB for interagency review. In practice, this happens already for some agencies. For example, OMB coordinated interagency review when Health and Human Services issued a state

Medicaid director letter on implementation of a new legal requirement that Medicaid applicants prove they are U.S. citizens or have another approved immigration status. Consultation with the departments of State and Homeland Security took less than two weeks.

The recent executive order also requires that an agency's regulatory policy officer (a position created by President Clinton in 1993) be a presidential appointee accountable to the public, the president, and Congress, rather than a lower level official. The order requires that these regulatory policy officers review proposals for new rules and regulations before the agency invests time and effort in the process. Agencies are encouraged to consider whether to use a formal rulemaking to address difficult issues, and they are directed to provide the public with a total, every fall, of their best estimates of the benefits and costs of agency rulemaking.

Finally, the order states, "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." The concept of market failure was included in the order when it was issued by Clinton. The order includes a requirement that the agency shall identify the problem in writing, but rulemaking agencies should already do so. This concise statement will assist with analysis of whether regulatory action is needed and, if so, whether the proposed regulation is the best way to accomplish the intended result.

The good guidance bulletin and the president's executive order will improve the way that the government does business by making the issuance of guidance and regulations more open, transparent, and accountable.

**John G. Knepper** is Deputy General Counsel of the Office of Management and Budget.

## Down With the Divine Right of Bureaucrats!

BILL KOVACS

**P**resident Bush's executive order on guidance review draws hysterical cries from the so called "public interest groups" who claim the nation's chief executive is somehow abusing his authority by interfering with the decisions of EPA to protect health and safety. Moreover, by exercising greater control over agency rules they reason somehow that democratic decisionmaking is being harmed. Such reasoning ignores the fact that we elected the president to be our chief executive officer and neither our Constitution nor laws provide veto power to bureaucrats.

For decades the president through executive order and Congress through numerous statutes have tried (and largely failed) to gain some control over the federal agency regulation mill, which has spewed out over 110,000 regulations and 4,000 new regulations annually — and hundreds of thousands of guidance documents. The people who elected the president and Congress have to deal with this massive amount of detail. Imagine being a small business and having every day to deal with hundreds of new pages of the *Federal Register* and worrying about incomprehensible regulations covering health care, pensions, environmental and labor standards, the transportation of product, privacy, immigration, and taxes to name only a few areas of federal regulation. The bureaucrats have seized this mass of detail, claim it as their domain, and along with their interest group supporters cry foul if an elected official attempts to override their decision.

If anything is a threat to de-

mocracy it is a legal system that is incomprehensible, for it puts Kafka type powers in the hands of unelected persons and grossly distorts the nation's ability to prioritize the use of our resources to provide the greatest amount of health and safety. When all risk is equal and regulations so numerous and complex, we squander our resources on trivial pursuits.

The president's executive order merely requires employees of the federal government, before issuing a new regulation, to identify the specific problem they intend to address and the cost of the regulation and all other regulations issued by that agency, so as to enable the president to assess if the new regulation is warranted. And yes, the president is appointing a regulatory policy officer for each agency to ensure that his executive order and guidance requirements are carried out as he has set forth.

Last checked, our Constitution provides for an elected president to execute the laws of the United States, including the appointment of inferior officers to help him execute the laws. The election of the president is a political process, and once elected the chief executive uses the bureaucracy to execute the laws, which is a discretionary process, since it involves human events. For public interest groups to somehow claim that executive orders pervert the political system implies that bureaucrats have some policymaking power that the president cannot control.

This nation fought a revolution to eliminate the Divine Right of Kings and now is not the time to establish the Divine Right of Bureaucrats.

**Bill Kovacs** is Vice President, Environment, Technology & Regulatory Affairs, at the U.S. Chamber of Commerce in Washington, D.C.

## Why Regulating the Regulators Won't Work

JERRY TAYLOR

**A**lthough the president's executive order has triggered a great deal of *sturm und drang*, it's unlikely that it will change regulatory business as usual in Washington.

After all, this is not the first time that politicians have tried to force regulators to jump through economic hoops. President Reagan first ordered the use of cost-benefit analysis for major regulations in 1981 in the form of Executive Order 12291, an order that was left untouched by the Clinton administration. In 1995, the Republican Congress likewise required all executive branch agencies to assess the costs and benefits of economically significant rules.

So what has our 26-year-old experiment with cost-benefit mandates delivered? According to Stuart Shapiro, a professor of Political Science at Rutgers, "neither the promoters nor the critics of cost-benefit analysis have seen their predictions realized." The regulatory process, in short, has not been shut down. Nor have the net benefits of regulation increased over time.

This shouldn't surprise. When analysis supports political goals, it is used as a rationale to do what politicians want to do anyway. But when analysis undercuts political goals, analysis rarely if ever trumps political imperatives. It pays to remember that the Office of Management and Budget is an instrument of the president's preferences rather than a neutral generator of economic analysis. The fact that no rule regarding Homeland Security has ever been returned for having costs that exceed benefits speaks volumes.

Environmental policy is an

extreme example of the conflict between analysis and politics. The governing statutes for many environmental laws mandate that EPA consider only public health effects (i.e., benefits) and not costs in its rulemaking. As a consequence, many statutes promise outcomes that are very costly relative to benefits.

But even though EPA is technically not allowed to consider costs in its decisions, it does consider them indirectly through delay and inaction. In short, prohibiting regulators from employing good cost-benefit analysis is as problematic as mandating that regulators employ good cost-benefit analysis.

Consider, for example, the 1970 Clean Air Act. The law stipulated that states were to eliminate air pollution as a public health risk by 1982. Yet 25 years since that deadline has passed, over 100 localities still violate federal air quality standards for various pollutants. The law also required a 90-percent cut in automobile tailpipe emissions of hydrocarbons, carbon monoxide, and nitrogen oxide by 1975 (1976 for nitrogen oxides). Those deadlines, however, were repeatedly extended and only partially met by cars rolling off the assembly lines in 1995.

Despite mandates to the contrary, agencies are not generally prepared to impose politically unpopular costs on private actors because the politicians responsible for those agencies aren't willing to take the heat for such regulations.

There is much to be said for a requirement that regulatory benefits exceed regulatory costs — or for a requirement that market failures be identified in a concrete manner prior to regulatory action — but the belief that we can force agencies to do things that politicians won't do of their own accord represents the triumph of hope over experience.

**Jerry Taylor** is a Senior Fellow at the Cato Institute in Washington, D.C.

## Politics Gets Its Nose Into the Rulemaking Tent

WESLEY P. WARREN

**T**he Bush presidency has been a long march into night during which agency experts relying on science have been replaced by political appointees using ideology as a guide. The president's recent executive order steps further in this direction by making it more difficult to protect the public from toxics and other pollutants being put into our food, air, and water. Specifically, key parts of it raise hurdles to creating new protections and extend the reach of the White House into what kind of agency decisions it could overrule.

The Bush administration has a well known history of pandering to corporate polluters. Consider Philip Cooney, former White House environment official now with the oil industry, hand editing agency science on climate change to downplay the factual certainty on the issue. The new executive order should have checked such political interference in policymaking but instead makes it more likely. Two changes to regulatory policy in particular present the greatest opportunities for mischief.

First, the executive order clamps a new restriction onto rulemakings not found in the statutes passed by Congress, namely, that the agency prove a market failure. Because there is no way to objectively measure a "market failure," arbitrary interpretations could be made by ideologues hostile to the public interest.

Take Susan Dudley, the administration's nominee to head the White House regulatory review office at the Office of Management and Budget. During her tenure at the ultra-conservative Mercatus Center the term

market failure was not in her lexicon — any market result was by definition a success. This thinking has led to some extreme positions on her part opposing measures to reduce water pollution, increase energy efficiency, and increase information about toxic lead emissions in communities.

Second, the executive order vastly expands the range of agency actions that OMB can review, and thereby stifle. Not only will future rulemakings go through a complicated and time-consuming review, but even agency explanations of existing rules — guidance documents — will be caught in this process.

For the Environmental Protection Agency, which routinely uses guidance documents to inform industry and the public on what is necessary to achieve pollution reductions, such a review process could mean more uncertainty, increased litigation, and endless delays in implementing the law. The public could also lose the benefit of measures like EPA's 2005 guidance on stormwater instructing cities on how to prevent this pollution by using natural filters like trees and soil. Moreover, the definition of a guidance document is so broad that it could be abused to tie up reports on carcinogens or databases like the Integrated Risk Information System, which helps the public with assessing risk.

Congress gave experts in federal agencies the role of producing rules that protect the public. Supplanting this authority with a political review by the White House undermines sound decisionmaking. A better approach would be to replace this ill-conceived executive order with one that checks insider influence and makes serving the public the foremost responsibility of the administration.

**Wesley P. Warren** is Director of Programs at the Natural Resources Defense Council. He was OMB's Associate Director for Natural Resources, Energy, and Science in the Clinton Administration.

## Mining the Road to Good Government

REP. HENRY A. WAXMAN

**E**xecutive Order 13422 creates new opportunities for politicization and delay in the regulatory process. Like a retreating army that mines the road behind it, the Bush administration is erecting new barriers to prevent common-sense safeguards from advancing in the next administration.

E.O. 13422 creates these new barriers through a simple strategy. It greatly increases the burden on an agency to take any action while simultaneously creating new bottlenecks in the process. The new executive order requires that in deciding whether to issue a regulation, an agency identify in writing “the specific market failure . . . or other specific problem” to be addressed. There are a number of reasons, such as protecting public health and safety, that agencies take regulatory action, often at Congress's direction. Highlighting market failure as the primary justification for regulation sends the wrong message.

E.O. 13422 gives OMB authority over agency “guidance documents.” Agencies issue guidance for a variety of reasons, such as providing safety warnings or helping the public understand the requirements of a particular rule. Agencies will now have to get OMB approval of any guidance document that is considered “significant” — a threshold crossed by simply raising novel policy issues. This means that agencies will be delayed in getting important information to the public and that OMB will have the ability to second-guess the decisions of agency experts.

The executive order defines a guidance document as an “agency statement of general applicability

and future effect . . . that sets forth a policy . . . or an interpretation.” As this article goes to press, the top item on EPA's website features a statement from Administrator Stephen L. Johnson that “at EPA, we believe environmental responsibility is everyone's responsibility.” Is this a guidance document? It arguably is, if it is an “agency statement of general applicability” that “sets forth a policy.” While such an interpretation would seem ridiculous, so far OMB has offered no clarification to rule it out.

The executive order requires agencies to designate a presidential appointee as a “regulatory policy officer” who will wield significant authority. E.O. 13422 provides that unless specifically authorized by the agency head, an agency cannot “commence” a rulemaking without the approval of this official. This means that a political appointee will be in the position of vetoing or indefinitely delaying a rule, even when it is consistent with the agency's congressional mandate. This type of bottleneck will further slow down agency action and invite the politicization of agency decisions.

The administration claims that E.O. 13422 is aimed at “improving the way that the federal government does business.” But we have yet to hear the exact problem the administration seeks to solve. Instead of improving the process, E.O. 13422 is likely to make it even harder for agencies like EPA and OSHA to carry out their missions of protecting health, safety, and the environment.

*Representative Henry A. Waxman is Chairman of the House Committee on Oversight and Government Reform.*