

The 50th Anniversary of Centralized Regulatory Review

In this age represented by a near gatling gun approach to the issuance of Executive Orders the academic community is to be complimented for devoting increasingly greater attention to the institutional standing of well-reasoned, peer reviewed Presidential instruments, including both Executive Orders and Proclamations, that stand the test of time. One such Executive Order is Executive Order 12291 which at the time of its publication capitalized on advances made by four prior Administration's and set the stage for it, its predecessors and its progeny to continue for a half a century during which time it established the rules of the game for Presidential involvement in agency rulemaking. This post is aimed at establishing an analytical norm for the issuance of executive orders by the White House.

The administrative state has been subjected to many Executive Orders but only a small number have had a stabilizing impact comparable to that of Executive Order 12291 which addressed the then very vocal and competing demands by members of Congress and a wide array of stakeholders for either more regulation or less regulation and whose time tested decision process would be administered by the newly created OIRA; its current *bipartisan* derivative prevails in part as Executive Order 12866. Executive Order 12291 was in part an outgrowth of the inability of Congress to pass legislation which would control an ever increasing regulatory burden that contributed to rampant inflation. OMB was more interested in the passage of the Paperwork Reduction Act than it was in legislation that would, in its mind, limit its flexibility in overseeing the administrative state.

Consequently notwithstanding our tendency to ignore history centralized regulatory review did not begin with Executive Order 12866 although fortunately it did provide for its timely continuation with bipartisan support even though there was considerable opposition within the Executive Branch. Executive Order 12291's landmark achievement was to require that regulatory agencies perform [benefit/cost analyses](#) of regulations and to submit them to OMB for review. All regulatory actions taken by subsequent Administrations built upon these two building blocks which were previously developed over a twenty year period by four Presidential Administrations. The aforementioned link which describes the landmark contribution of Professor Alan Schmid was published fifty years ago.

The essence of Executive Order 12291 was to give legitimacy to, and increase the jurisdiction of, the best of the various time tested centralized regulatory review processes developed and implemented by four prior Presidential Administrations—another step towards bipartisanship in establishing centralized regulatory review.

Time Magazine has concluded that Executive Order 12291 is one of “9 Executive Orders Which Changed American History”.

Consequently Executive Order 12866 stands on a formidable foundation and this foundation may have to be called into play should the executive order be the subject of a serious challenge since both executive orders are intrinsically linked. Challenges to the administrative powers of the President might occur when the Congress concludes that either an incumbent President, or continuum of Presidents, abuse such authorities. In such an event, instruments which have been around for half a century might be spared the ax if the responsible authorities are advised of their lineage.

Below are the views of leading scholars in the field of administrative law on Executive Order 12291:

“Second, and more innovatively, his [Reagan] Administration issued the now-iconic Executive Order 12291” Jerry Louis Mashaw, David Berke, “Presidential Administration in a Regime of Separated Powers,” Yale Journal of Regulation, Vol 35, 2018.

“In a meeting sponsored by the Federalist Society Professor David Vladek of Georgetown University law school made two observations, one of which was that the Reagan Executive Order 12291, which instituted government-wide centralized regulatory review is, along with the APA, one of the two most influential documents of the regulatory state.” (OIRA Watch) (2017)

“Arguably, the most important legal document of the last 30 years that hardly anyone in America knows about was Executive Order No. 12,291, the Reagan executive order that created the modern system of White House oversight of federal regulatory policy making. The Role of the White House in Regulatory Policy Making; Peter Shane (2011)

‘To date, the cost-benefit revolution has had three defining moments.... The first moment, and by far the most important, came from Ronald Reagan in 1981, when he signed Executive Order 12291, with the most boring imaginable title: Federal Regulation.’ [Sunstein Cost Benefit Revolution](#)

Executive Order 12291 has become an institution because it did not overreach; it never claimed to displace the authority of an agency to make the final call on the substance of a rule. Equally, if not *more* importantly, the administrative processes used to implement the Order were time tested and refined *before* they were implemented on a *government-wide* basis as a result of a decade of experience gained through the [Quality of Life Review](#) initiated in 1971 which focused on EPA. Nonetheless a bridge to be crossed is the application of the executive order to [independent agencies](#).

The policies and processes inherent in Executive Order 12291 were initially implemented by the *first* office in OMB dedicated solely to regulatory review and oversight—the [Office of Regulatory and Information Policy](#). The aforementioned office was a functioning unit that *pre-dated* OIRA which upon morphing into OIRA (Office of Information and Regulatory Affairs) ensured that Executive Order 12291 did not migrate to the Executive Order graveyard. Not only is the sustainability of an Executive Order as dependent upon its implementation as it is on its design but its shelf life is frequently enhanced by the presence of *bipartisan* sponsorship as was the case when the President included the passage of the Paperwork Reduction Act, which created OIRA, into his [State of the Union](#) address.

What is needed is for the academic and stakeholder communities to research those factors which lead to the institutionalization of a select number of executive orders. An emphasis could be placed on those executive actions that have made a permanent change in governmental operations comparable to those resulting from the promulgation of Executive Order 12291. Hopefully the resultant work product would establish a *quality norm* for future executive actions. Adherence to accepted norms could provide a filter to be used prior to the issuance of an executive order which revokes existing executive orders as was the case with [Executive Order 13497](#):

“Executive Order [13258](#) of February 26, 2002, and Executive Order [13422](#) of January 18, 2007, concerning regulatory planning and review, which amended Executive Order 12866 of September 30, 1993, are revoked.”

One might wonder why Executive Order 12291’s progeny did not suffer a similar fate given the fact that the two aforementioned executive orders were minimal expressions of the base program. One answer might be that Executive Order 12291’s progeny were bipartisan.

Those interested in a detailed review of actions that lead to the institutionalization of Executive Order 12291 should read [*Beyond Structure and Process*](#) : *The Early Institutionalization of Regulatory Review* by political science professor Andrew Rudalevige.

Executive Order 12291, its predecessors and its progeny—Executive Order 12866—have dominated the regulatory state for a [half-century](#) and their formulation and implementation should be the basis for judging the continuity of other executive orders.

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