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Report Questions Executive Order on Reg Reform

The Congressional Research Service of the Library of Congress issued a report June 15 that questioned the constitutionality of the president's Feb. 13 Executive Order 12291 on regulatory reform (*see Legal Times, Feb. 23, 1981, p. 15*).

In the report, American public law specialist Morton Rosenberg concluded that the executive order may conflict with the Administrative Procedure Act, impinge on congressional delegations of authority, and inadequately protect its contemplated decision-maker (the Office of Management and Budget) from ex parte contacts.

The full text of the report's concluding sections follows. Several footnotes have been deleted; others have been supplemented with full citations.

The Presidential Order is directed solely at informal rulemaking by covered Executive Branch agencies. In terms of scope of coverage, then, it would encompass virtually all substantive agency rulemaking since few rulemakings are required by statute to be conducted in the context of formal record hearings.[334]

The Order differs in several major respects from any previous legislative or Executive effort to regulate the rulemaking process. For the first time central coordination of the rulemaking process has been placed in an agency (OMB) subject to and controlled by the President and invested with authority to define, direct and enforce the manner in which the process is conducted. Moreover, for the first time, the rule development process of all agencies is subjected to formal procedures. Finally, in another innovation, the development of all rules is subject to a single common standard of assessment—cost effectiveness—which is to be defined by OMB.

Under the Order, the new rulemaking process may be sketched as follows. All proposed rules must be submitted to OMB before publication in the Federal Register. If an agency deems a rule minor, it must be submitted at least ten days prior to publication. However, if within that period the Director determines it to be major, the agency must prepare a preliminary Regulatory Impact Analysis (RIA) and submit it for review. The criteria for determining whether a rule is major are to be established by the Director. If an agency itself determines the rule in question is major it must be submitted, together with its RIA, at least 60 days before publication. If on review the Director finds that a preliminary RIA is deficient he may order a delay in publication of the proposed rule and RIA and require consultation with him or with other agencies.

Similarly, final RIA's must be prepared and submitted to the Director at least 30 days prior to publication of the rule as final. The Director may order the agency to refrain from publishing a final rule and RIA until he has submitted his comments and the agency has responded. The Order does not impose any time limit on the Director to complete his review and submit comments to either preliminary or final RIA's. OMB's negative comments and the agency response to them must be placed on the public record of the proceeding. However, the Order does not require any other comments or communications between the Director and the agency, or contacts with any interested person, to be placed on the public record of a particular rulemaking proceeding.

However, the Director recently issued notice that OMB and the Task Force would advise members of the public who have submitted factual material to them to send such factual material to the proposing agency. Where warranted, OMB and the Task Force will send materials received to the relevant agency on their own, as well as internally developed factual material, which will be placed on the record. Oral communications, and particularly those with the President and White House staff will not be revealed.[335]

For the first time central coordination of rulemaking has been placed in an agency controlled by the President and given authority to define, direct and enforce the manner in which the process is conducted.

The Director's authority also extends to existing rules. He may designate any rule or related set of rules as major and require that it be subjected to cost-benefit review and analysis on a schedule set by him.

The methodology to be utilized in the preparation of the RIA is to be defined by the Director. In addition, he can require an agency to obtain and evaluate in connection with any rule any additional relevant data from any appropriate source.

Finally, the Director may, in his discretion, waive any or all the requirements of the Order. The Director's decisions are subject to review by the Presidential Task Force on Regulatory Relief headed by the Vice President, a body of which he is a member. Final appeal lies with the President.

The Legal Justification for the Order

Despite the Order's disavowal of any applicability where it is contrary to law, and its insistence that it "is intended only to improve the internal management of the Federal Government," it may be contended that the Order exceeds the President's independent authority under Article II to "guide and supervise" executive officers in the exercise of their administrative discretion because it in fact displaces such discretion; conflicts with the purpose and design of the Administrative Procedure Act; and fails to provide adequate procedural safeguards to protect the integrity of the rulemaking process. A fair statement of the Executive's case to meet these objections may be summarized as follows.

The President's authority to coordinate the administration and execution of the laws is founded in the Constitution, historical practice, and the common sense practicalities of modern government. Thus, Article II vests in the President the powers of appointment and removal, the power to demand written opinions from subordinate executive officers, and the right to invoke executive privilege to protect consultative privacy, for the purpose of ensuring the President's effective supervision over the Executive Branch.

The Supreme Court has confirmed that these powers, together with his constitutional duty to "take Care" that the laws are faithfully executed, make it clear that the President was meant to have the exclusive responsibility to execute the law through agents who are in turn responsible to him. Otherwise the constitutional goals of accountability and efficiency implicit in the creation of a single Executive would be thwarted.

Congressional practice also makes evident the recognition of the President's central management role. The Chief Executive has been given effective control over agency budgets, legislative proposals, and information gathering from the public, and is not specifically precluded by the Administrative Procedure Act or other law from participating in the informal rulemaking process. Moreover, recent legislative efforts to perfect procedural safeguards in rulemaking by prohibiting *ex parte* contacts and requiring rulemaking on the record have not been extended to informal rulemaking, an indication of acquiescence in the possibility, if not the fact, of presidential intervention in the process.

Further, the practical realities of administrative rulemaking, and modern government generally, demand Executive coordination and supervision. Rulemaking today tangibly touches and effects all aspects of society. Our form of government simply cannot function effectively, efficiently, or rationally if key administrative policymakers are isolated from each other and the President. Only the President with his overall view can provide the unified, coordinated direction necessary to integrate policy administration. Therefore, only the clearest direction of Congress to insulate an officer's discretion will suffice to preclude executive guidance and supervision.

Executive Order 12291 does no more than rationalize management direction over the Executive Branch rulemaking process. The Order does not interfere with the decisional role assigned by Congress to subordinate executive officers since ultimate authority always remains with those officials. Also, formalization of the supervisory structure opens it to public scrutiny more than ever before and focuses responsibility on the President and his principal management agent. With the availability of judicial review, procedural due process rights of participants and the integrity of the rulemaking process are fully preserved and protected.

Conclusion

A critical review of the historical and legal development of the Office of the President leads to the conclusion that the modern expansion of presidential power in domestic matters has not been constitutionally impelled. Neither the removal power nor the authorities and duties of Article II are sufficient to support or explain that development. Rather, the explanation lies in the mammoth growth of modern government, a phenomenon solely attributable to the will of the Congress and the need to use the arms of administration to carry out that Congressional will.

Such explanation is not meant to denigrate either the Executive office or ignore the scope of authority that has been legislatively reposed in it. It does, however, speak to the source and nature of executive power. What authority Congress gives the Executive must be scrutinized carefully to determine the exact measure that it is given; for what is withheld is not the President's to wield.

A close examination of Executive Order 12291 raises a serious question whether the purpose and effect of its scheme, taken as a whole, is to establish substantive control over the process of informal rulemaking. That object seems evident in its central focus on cost-benefit analysis. Thus agency action that involves the promulgation of new rules, review of old rules, or the development of legislative proposals concerning regulation may be undertaken only if societal benefits will outweigh the costs of the action.[338] Operational oversight authority is placed in the Director of OMB who has a formidable array of powers to accomplish that goal. All rules must be reviewed by the Director and he decides which are major based on the definition supplied by the Order and supplemental criteria he is authorized to devise.

The proposing agency is then required to prepare a preliminary cost-benefit analysis (RIA) based upon a methodology designed by the Director. The Director may require the agency to obtain and evaluate any additional relevant data from any appropriate source designated by the Director. He may require consultation with other agencies or with himself. He can also direct the agency to refrain from publishing the proposed rule and RIA for an indefinite period. Once the proposal and RIA are allowed to be published and the period for public comment is concluded, a similar review process for a final RIA begins. Publication of the rule in final form again may be delayed indefinitely.

All rules are subject to a single common standard.

Existing rules are also subject to OMB review. Here the Director may designate a rule or set of rules as ma-

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jor and require that they be subjected to cost-benefit analysis, again according to the Director's prescribed methodology. The review must be accomplished within a schedule set by the Director. Although the existing rule review process does not specifically require that cost-ineffective rules be modified or repealed, there would appear no other purpose for the exercise.

Finally, the Director has authority to waive all the requirements of the Order. There is no standard to guide either the exercise of the waiver or deferral authority, nor is there any time limit on the length of any deferral by the Director.

The OMB director has authority to waive the requirements of the order.

The Order therefore appears to establish a formal, comprehensive, centralized, and substantively oriented system of control of informal rulemaking that is without precedent. While it might be argued that a requirement to utilize cost-benefit principles, standing alone, is procedural, the extra-agency definition of such principles and the requirement that they be applied, supported by an effective enforcement mechanism, appears to belie a simple procedural purpose. The prescription of such principles is concededly substantive[339] and in the context of the unfettered authority that may be wielded under the Order, the inevitable effect could be the displacement of ultimate agency discretion in contravention of any statute vesting discretionary rulemaking authority in an agency official.

The scheme of the Order arguably would also bring it in direct conflict with the Administrative Procedure Act. The legislative history of that Act establishes that its dominant purpose was to create a novel form of rulemaking that in its flexibility and informality could be tailored to meet the individualized situations that are encountered by agencies with markedly different missions. The framers of the Act specifically rejected proposals that would have imposed government-wide rulemaking procedures that were uniform and highly judicialized. Thus, in section 553 the focus is on the individual agency.

There is neither a role for, nor even a mention of, the President in the Act, or its legislative history. The clear intent is to emphasize maximum flexibility and informality free of any extra-agency control in order to bring to bear agency expertise on situations in a fair and expeditious manner. The procedures required are spare and value neutral.

Executive Order 12291 could be said to defeat the intent of the APA by superimposing on section 553 a scheme that establishes a central super-coordinator of unilaterally created uniform, substantively oriented procedures. The Order removes from the hands of the individual agencies not only the method and means of informal rulemaking but, effectively, the statutorily reserved prerogative of an agency to decide whether or not to make a rule. As a consequence, the character of informal rulemaking is irresistably altered. The practice of independent in-house agency rule development prior to public notification is substantially displaced and agency freedom to experiment with procedures and methods of self-education before issuance of a final rule may be superfluous. At the very least, both appear subservient to the dominant focus on cost effectiveness analysis.

It may be contended in opposition that since each agency could have adopted cost-benefit assessment itself as part of its decisionmaking process, absent a statutory prohibition on the particular agency, and even voluntarily subjected itself to OMB "guidance and supervision," the fact that it has been established as a result of a presidential initiative should make no difference. In response it may be said that it does, and that it is a difference of constitutional dimensions. In the one case, the agency is exercising its choice pursuant to a statutory authorization. In the other, the Executive is exercising presidential means to effect a presidential purpose in an area in which Congress has spoken. That is the essence of Executive lawmaking and if a court should conclude this is in fact what has occurred, it will be held a violation of the doctrine of separation of powers.

Another concern that may be raised by the design of the Order is the possibility that in funneling all agency rules through one coordinating entity, OMB, a new access or entry point to the decisionmaking process is now available for persons interested in influencing the outcome of a particular rulemaking. Since this Order provides no explicit safeguards to protect the integrity of the process or the interests of the public against secret, undisclosed, and unreviewable contacts, it may be argued that the Order, on its face, deprives participants of essential elements of fair treatment required by due process.[342]

In particular, in view of the fact that the President's closest managerial agent is the operational head of this sensitive access point, there may be said to be an invitation to the President and White House aides to make their views known in an effective manner. Similarly, non-governmental interests may attempt to utilize the White House or OMB as a conduit for their views and thereby covertly influence the agency. In such instances there is usually neither knowledge of the contact or what was communicated[343] and thus no opportunity to rebut, nor an appropriate record for court review. In the past the courts have recognized and extended due process protections normally associated with adjudicatory proceedings to rulemaking and other informal executive actions to guard against improper governmental and non-governmental influences in agency policymaking.

In response, OMB relies upon the recent appeals court decision in *Sierra Club v. Costle*[344] which gave blanket approval to "intra-executive contacts" between the President and White House staff both during and after the public comment period.[345] The court did, however, reserve judgment on the effect on rulemaking of conduit contacts which were not present in the case.[346]

It may be doubted whether the court's remarks would be dispositive of a dissimilar situation likely to occur under the Order. *Costle* dealt with a typical situation of a direct but undisclosed contact with a decisionmaker. Under the Order, the likely scenario is a White House contact with the Director who exercises his authority without disclosing the communication or its nature. Indeed, this is present OMB policy.[347]

Further, the failure of the court to make a distinction between White House staff contacts and presidential contacts would appear to be explained by the fact that only one meeting was involved which included both the President and staff. Commentators have generally noted the importance of this distinction.[348]

Finally, the fact the contacts are likely to be made at the rule formulation or drafting stage may be significant. A proposed rule that never sees the light of day because of unknown persuasive efforts at this early stage arguably has at least as much effect on the potentially interested but ignorant segment of the public as a secret contact after the public comment period.

It is axiomatic that presidential actions are to be accorded the greatest deference; there can be no presumption of invalidity. But a President's authority can be tested,[349] and the question in such cases may turn, as Justice Jackson suggested in the *Steel Seizure Case*, "on the imperatives of events and contemporary imponderables."[350] That may be taken to mean that presidential initiatives close to the borderline of his authority may be gauged, in part, by the imperatives of contemporary circumstances, the urgency for executive response.

This is not to say that an emergency situation can make lawful action that would otherwise be unlawful. It is, simply, an acknowledgement that actions must be judged within a context. In the present situation, for example, there do not appear to be any "imperatives" or "imponderables" which would weigh judgment conclusively for Executive action, certainly no war or major strike as was present in *Youngstown*. The linkage has been made between the current inflation and excessive and costly government regulation but no credible claim is made that it has reached the proportions of a national emergency. Nor, as has been indicated, has Congress been quiescent in its attitude toward Executive control of administrative decisionmaking generally or rulemaking in particular.

On the basis of the foregoing review of applicable historical, legal and legislative authorities, it is concluded, first, that Executive Order 12291, in establishing a central coordinating agency for the process of informal rulemaking, and by vesting it with authority to create and enforce substantively oriented procedures designed to direct and control that process, arguably conflicts with the intent of Congress in enacting the Administrative Procedure Act and the scheme of informal rulemaking provided for in section 553 of that Act. There is, therefore, a substantial risk that a court challenge to a rule promulgated pursuant to that Order, or to the Order itself, may succeed on the ground that the President exceeded his authority in issuing the Order.

Second, taking the provisions of Executive Order 12291 as an integral whole, in the context of the stated goals of the Order, and viewing them in the light of the reasonably foreseeable consequences of the Director's exercise of the enforcement mechanisms of the Order, a serious question is raised whether the discretionary authority of agency decisionmakers may be totally displaced in violation of Congressional delegations of rulemaking authority.

Third, it may be argued that the Order, by centralizing authority over informal rulemaking in OMB and requiring it to be the sole clearinghouse for all covered rules, has created a critical access point to the agency decisionmaking process without providing safeguards against secret, undisclosed, and unreviewable contacts by governmental and non-governmental interests seeking to influence the substance of agency action. If so, a court might rule, based upon a body of recent judicial precedent, that the Order's failure to protect the integrity of the policymaking process in the interest of the public from such influences on its face deprives interested persons of their due process rights to a meaningful participation in the decisionmaking process, to a reasoned agency decision based on some kind of record, and the possibility of effective judicial review.

A serious question is raised whether the purpose and effect of the executive order is to establish substantive control over the process of informal rulemaking.

[324] 1 Davis, Administrative Law Treatise, sec. 6:1 (2 ed. 1978).

[333] See Memorandum of June 11, 1981 from David A. Stockman to Heads of Departments and Agencies, entitled "Certain Communications Pursuant to Executive Order 12291, 'Federal Regulation'." The memo cryptically states that "our procedures will be consistent with the holdings of and policies discussed in Sierra Club v. Costle," an apparent reference to the court's approval in that case of oral contacts between the President and White House staff and agency officials both during and after the public comment period.

[338] Executive Order 12291, sec. 2(b).

[339] (See Memorandum of Acting Assistant Attorney General Larry L. Simms on Proposed Executive Order, Feb. 13, 1981—Ed.)

[342] But see Stockman Memorandum, *supra* note 335.

[343] The Freedom of Information Act is of no aid in such situations since the communications are usually oral and thus not discoverable. See 5 U.S.C. 552(a) (1976).

[344] (No. 79-1565, D.C. Cir., April 29, 1981—Ed.

[345] *Id.*, slip opinion at 217.

[346] *Id.*, slip opinion at 213, note 520.

[347] See Stockman memo, *supra* note 335.

[348] (See Verkuil, Jawboning Administrative Agencies, 80 Colum. L. Rev. 943 (1980); Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451 (1979)—Ed.)

[349] See, *e.g.*, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 637 (1952). United States v. Nixon, 418 U.S. 683 (1974).

[350] *Id.*, 343 U.S. at 637.