

Dear Jessica --

Thanks for asking. I saw, and warmly applaud, the President's several actions on this front. The one thing that had given me a little pause was that I saw references only to consulting with agencies, and I am delighted to know you are casting a wider net and pleased to be a fish invited into it.

As you may know I testified before Rep. Sanchez' subcommittee of House Judiciary twice in 2007 on the EO 13422 issues, strongly opposing what President Bush had done, as a threat to the integrity of regulatory decisionmaking and to democratic values. I have been a member of the OMBWatch Task Force, whose views you know and I generally share. I have been writing for over a quarter century about the relationship between the President and the regulatory agencies, including a work co-authored with the wonderful scholar whom I hope will shortly be confirmed to head OIRA, Cass Sunstein. Most recently, in Volume 75 of the George Washington Law Review I wrote an extended account of those views with a giveaway title: "Overseer or 'The Decider'?" The President in Administrative Law."

In a nutshell, my settled view is that the President as our one elected executive official with a constitutionally defined active role is entitled to - must - actively oversee the work of all elements of government charged with execution of the laws. That reaches the SEC as well as the Department of the Treasury. His active engagement in the processes for developing rules and regulations in either place is entirely appropriate. This is executive branch activity and he is at the head of the executive branch.

BUT, and here is where I part company with President Bush and perhaps also his three immediate predecessors, his role under the laws, in a government of laws, requires him to respect Congress's placement of duties where Congress has placed them. When the EPA is authorized to adopt rules, it is the head of the EPA who has the responsibility to decide those matters. The President's place is one of oversight, not decision, making sure that she does that well. Which of course includes acting only on the basis of those factors Congress has made relevant to her decision and not injecting others, not legally available to her but that the President might wish to have considered. Article II in explicit terms acknowledges the "duties" of the executive departments, and describes the President's role in terms of consultation ("require ... written opinion," not "command.")

Turning specifically to EO 12866, in my judgment

- 1) some such regime should be continued. Rulemaking is too important to national well-being for there not to be a strong central voice and regime for coordination and settlement of interagency dispute.
- 2) I join with those who observe that as administered EO 12866 has not been a neutral device, but rather a deregulatory device - a source of delay and diversion, a pressure point for reduction of burdens and not actions to protect the public. The narrow focus on monetized "costs" and "benefits" is largely responsible for that, and I take heart from the President's reference to a broader field of vision. I know that has been a major element of Professor Sunstein's scholarship, and this is one of the many things that contributes to my pleasure he has been tapped for this job.
- 3) The legitimacy and acceptability of this role requires a high degree of transparency in its exercise - not just lists of meetings, attendees and submissions, but copies of documents. If agencies

should change their course as a result of coordination activities, they should indicate how and why they were persuaded to do so.

- 4) OIRA will doubtless remain a small office, and one lacking the expertise to be found in the operating agencies. It is important that effort be focused on the most important rulemakings, and that it be prompt. No more than a few hundred rules annually, as such, should be in strong review.
- 5) Much more important in my judgment - because much more central to effective oversight - is attending to the regulatory structures in each agency. Priority planning has been a part of the executive order at least since the second Reagan administration, but it has never been seriously used, so far as I have been able to tell. Conversations with agencies about their priorities - where the President believes it is important for them to put their effort - is in my judgment far more likely to be effective in improving government performance and administration than retrospectively checking sums on a series of particular rules. So also, engagement with agencies in how they structure their internal processes to promote sound and efficient analysis and decision. Sally Katzen often talked about the last of these as central to her vision of the order and her role, and said she sought to downplay retrospective analysis of what was already well under way. That seemed and seems just right to me. Chris DeMuth, the progenitor of the regulatory plan element, rationalized it as a way to give the political heads within agencies a mechanism for engaging with their staff at the outset of rulemakings, and not themselves find themselves caught in retrospective exercises with effective fait accompli perpetuated by staff. This has seemed right to me also. Thus, I urge much more attention to the front end of EO 12866 (Art. 4) and less to the back (Art. 6).

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