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## Executive Order 12866: Regulatory Principles Survive and Thrive for 25 Years

By: Mark Febrizio, Daniel R. Pérez, & Zhoudan Xie | September 26, 2018

This week marks the 25<sup>th</sup> anniversary of [Executive Order 12866](#), *Regulatory Planning and Review*. This document, signed by President Clinton in 1993, built on orders from previous administrations to cement the regulatory principles and centralized review that continue to guide the rulemaking process today. Office of Information and Regulatory Affairs (OIRA) Administrators who led this review under presidents Clinton, Bush 43, Obama, and Trump [gathered](#) Monday at the George Washington University along with government experts and scholars to discuss why these principles and processes have withstood the test of time across changes in administrations and political parties.

### Looking Back on 25 Years

GW Regulatory Studies Research Professor and former senior OIRA analyst, [Bridget Dooling](#), moderated the first panel that reflected on the past 25 years. [Sally Katzen](#), OIRA Administrator during the Clinton administration and now professor at NYU School of Law, noted the value of reaffirming the analytical framework outlined in President Reagan's [E.O. 12291](#) observing "...if centralized, economic analysis [of regulations] had not been in place, we would have had to invent it." Katzen proposed two primary explanations for the longevity of E.O. 12866. First, the regulatory principles themselves largely continued the generally accepted analytical requirements [established by previous presidents](#). Second, engaging various stakeholders to comment on early drafts of E.O. 12866 garnered support and legitimacy for the final version—especially among agency appointees.

[Clark Nardinelli](#), Chief Economist of the Food and Drug Administration and Vice President of the Society for Benefit-Cost Analysis, elaborated on the positive effects that the words themselves—the document's 12 principles of regulation—have had on improving the quality of regulatory analysis conducted in the U.S. These best practices include: clearly identifying the problem the agency intends to address; assessing whether regulation is the appropriate policy instrument for doing so; weighing risk tradeoffs; writing regulations in a cost-effective manner to reduce the burdens imposed on society; and analyzing the effects of alternative ways of regulating. Nardinelli noted that agency efforts to follow these practices have led to marked improvement in the quality of analysis used throughout each stage of the regulatory process.

Similarly, [Neil Eisner](#), former Assistant General Counsel at the Department of Transportation, observed that one of the legacies of E.O. 12866 was its role in increasing the overall sophistication of agency rulemaking. Eisner credited OIRA’s role in coordinating interagency dialogue as key to producing better outcomes via cooperation rather than conflict.

[John Graham](#), OIRA Administrator during the Bush 43 administration, stated that the regulatory philosophy of E.O. 12866 and the best practices detailed in the document were worth consideration by Congress in its efforts to legislate in the area of regulatory improvement. He also noted that the document’s regulatory principles have become adopted internationally by institutions and governments including the [OECD](#) and the [EU](#). According to Graham, one of the legacies of E.O. 12866 is the expanded role of economists in the rulemaking process allowing agencies to improve their efforts to write cost-effective regulations; economists’ training makes them suited to identifying opportunities to substantially decrease costs while retaining benefits.

[Howard Shelanski](#), OIRA Administrator during the Obama administration, expanded on E.O. 12866’s role in advancing the use of economic analysis—including benefit-cost analysis (BCA)—as a key component of the U.S. regulatory process. He contrasted BCA with reliance on a precautionary principle which might unnecessarily harm economic competition and stifle innovation. Shelanski also observed that, during his time as Administrator, OIRA successfully coordinated interagency disputes with only three issues requiring direct intervention by President Obama (a testament to the effectiveness of the process outlined in E.O. 12866).

## Q & A with Congressional Staff

The second panel, moderated by [Shawne McGibbon](#), General Counsel of the Administrative Conference of the United States, explored the order from a legislative perspective. Daniel Flores—Chief Counsel, House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law (Majority Staff)—opened the conversation by highlighting the importance of E.O. 12866 and how it interacts with legislative actions. He noted how E.O. 12866 “gave a further texture and principle” to the notice-and-comment provisions in the [Administrative Procedure Act](#) (APA) of 1946. Simply put, when agencies closely follow E.O. 12866 and the APA, they produce better regulation. He also explained how E.O. 12866 helps Congress by incentivizing agencies to produce a higher quality product to evaluate—often obviating action under the Congressional Review Act (CRA).

Anthony Papiian—Professional Staff, Senate Homeland Security and Government Affairs Committee, Subcommittee on Regulatory Affairs and Federal Management (Minority Staff)—added that the E.O. has led to “agencies producing a product close to congressional intent,” even as more authority is delegated to agencies.

When asked how agencies could improve their compliance with the order’s principles and procedures, Papian mentioned the reality of resource and time limitations but emphasized how, ultimately, agency staff are working well with what they have. Flores emphasized the importance of weighing alternatives in regulatory analysis, but mentioned how the “velocity of change” often makes analyses outdated. Enhancing agencies’ real-time response when analyzing alternatives would produce better rules.

Considering the reality of limited agency resources, McGibbon asked whether focusing on *ex-ante* or *ex-post* analysis was more important. Both panelists agreed that rather than being an either/or decision, both prospective and retrospective analysis need to occur. Flores recommended contemplating methods to “crowdsource from stakeholders” to enhance information available to agency staff, and Papian proposed that robust retrospective review could inform BCA. He emphasized the importance of planning for retrospective review when developing regulations, and using *ex-post* evaluations to update analytical assumptions and improve future *ex-ante* analyses.

Finally, the panelists discussed the prospects for, and difficulties facing, congressional bills that would codify regulatory processes in the spirit of E.O. 12866 (specifically, [H.R.5](#) and [S.951](#)). Papian acknowledged remaining sticking points, such as concerns about “the appropriate role of judicial review.” Nevertheless, both panelists highlighted the significant progress that has been made, and Flores optimistically concluded that “there’s still time left in this Congress” for reaching consensus.

Overall, these senior staff representing different parties and different chambers of Congress reinforced that broad bipartisan agreement exists on the core principles embodied in the executive order, and McGibbon concluded the discussion by highlighting the staying power of centralized review.

## The Future of OIRA Review

In the final panel, attorney [John Cooney](#), immediate past Chair of the American Bar Association’s Section of Administrative Law and Regulatory Practice, and former OMB Deputy General Counsel, led panelists in an exploration of the future of E.O. 12866. Current OIRA Administrator [Neomi Rao](#) joked that she had learned to stop worrying and love E.O. 12866, which she described as “an important framework” for regulatory review. She observed that the future of E.O. 12866 is promising, as it has gained a great level of bipartisan consensus and can be applied irrespective of administrations’ policy goals. She highlighted the importance of regulatory humility reflected in the order; it emphasizes the baseline of free markets and individual choice, and encourages agencies to consider what can really be accomplished by government when promulgating a regulation. In addition, the centralized review mechanism ensures that each agency’s regulatory actions are consistent with presidential priorities and legislative authority.

Consumer Product Safety Commission (CPSC) Acting Chair, [Ann Marie Buerkle](#), supported the principles embodied in E.O. 12866, even though, as an independent regulatory agency, the CPSC is not subject to it. She pointed out, however, that some enabling legislation constrained the extent to which the CPSC could consider costs and benefits for certain categories of regulations, and that her agency's use of voluntary consensus standards also complicated the role for economic analysis.

Rao acknowledged that the Administration was contemplating extending E.O. 12866 to independent regulatory agencies, an action supported by [Richard Revesz](#), Lawrence King Professor of Law & Dean Emeritus at NYU Law School and Director of the Institute for Policy Integrity. He stated that some independent financial agencies face court challenges on their rules due to their lack of expertise in regulatory analysis. In such cases, OIRA could provide the expertise and help independent agencies address related issues.

Revesz was less enthusiastic about legislation to codify the principles of E.O. 12866, and he questioned the extent to which generic legislation could be expected to override the specific instructions found in agencies' authorizing legislation. Revesz also expressed concern that the current deregulatory efforts focused primarily on cost savings while ignoring benefits foregone, and agencies are not always consistent in counting co-benefits in regulatory impact analyses. He pointed to examples where courts are overturning deregulatory actions for inadequate analytical justification. Rao responded that all deregulatory actions are based on a net-benefit test and that President Trump's [E.O. 13771](#) is consistent with E.O. 12866. She also suggested it can improve retrospective reviews by providing incentives to agencies to review the existing regulations that are not working well.

Other panelists reinforced the benefits of retrospective review. [Susan Dudley](#), Director of the GW Regulatory Studies Center and former OIRA Administrator, observed that, retrospectively reviewing the actual impacts of regulations could help agencies verify their *ex-ante* assumptions and analyses. To implement retrospective reviews, agencies should plan for data collection from the beginning (i.e., at the time of promulgating a rule). Revesz recommended building certain protocols in rules to ease the later implementation of retrospective reviews.

In looking to the future, Dudley observed that the philosophy and principles of E.O. 12866 are not only firmly established in executive branch practices, but increasingly influencing legislative and judicial decisions, noting that courts are overturning rules with inadequate regulatory impact analysis. She also emphasized the order's requirement that agencies identify a compelling public need before regulating and expressed hope that this principle would be a greater focus going forward. Agreeing with Rao that this requirement calls for regulatory humility, she encouraged regulators to appreciate that competition and accelerating technological innovation can increase social welfare, and to guard against precautionary approaches to regulating new business models or technologies that could reduce or hinder competition.

## Conclusion

Much has changed in regulatory policy and administrative law in the past 25 years, but the importance of E.O. 12866 has remained consistent. By incorporating the perspectives of experts from different presidential administrations, regulatory agencies, and branches of government, the anniversary event succeeded at both conveying a broad array of views and emphasizing broad fundamental agreement on key regulatory principles. In fact, a common theme was that the document's underlying principles were critical to its longevity. Looking toward the future of regulatory policy, continued adherence and examination of E.O. 12866 is needed so that ongoing attempts to improve regulation will be both durable and beneficial.

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### QUESTIONS?

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