

April 19, 2016

No. 215

Why Congress Must End Regulation by Guidance Document

Federal Agencies Escape Accountability through Use of Regulatory “Dark Matter”

By Clyde Wayne Crews Jr.*

[I]f the government confined itself to enacting a code of laws simply intended to prevent mutual aggression and to maintain peace and order, it is hard to see how such a code would run into any great number of laws.¹ —Henry Hazlitt, “The Torrent of Laws”

Several pre-election congressional task forces are now busy at work, trying to set a policy agenda for the next administration and Congress. These include task forces on homeland security and health care, while three others seek to address the overlapping challenges of reining in executive branch overreach,² restoring congressional authority under the Constitution, and expanding congressional oversight and control of the federal regulatory enterprise.³ To have any chance of accomplishing these goals, they need to focus on “regulatory dark matter”—guidance documents, memoranda, and even blog posts—used by federal agencies to enact rules while skirting the formal regulatory process under the Administrative Procedure Act (APA).

President Obama has been deservedly criticized for unilateral executive actions that are dreadnoughts of rule-without-Congress.⁴ But federal agency guidance documents, memoranda and other regulatory dark matter swell ominously, often out of sight.⁵ If executive orders and legislation sometimes strain doctrines of limited government, sub-rosa decrees of bureaus most assuredly do. Collectively, the 2016 congressional task forces need to address executive branch overreach and agency rulemaking undertaken without congressional authority.

Getting a Grip on “Regulatory Dark Matter.” The flow of agency memoranda, guidance documents, notices, bulletins and the like has become almost intractable. While these are purportedly not legally binding, they still manage to cajole and intimidate private parties into compliance with agency pronouncements. Guidance binds “as a practical matter,” noted the late George Mason University law professor Robert A. Anthony, given that “failure to conform will bring adverse consequences, such as an enforcement action or denial of an application.”⁶ As a July 2012 U.S. House of Representatives Committee on Oversight and Government Reform report voiced the concrete effect of guidance documents:

Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However... they are increasingly used to effect policy changes, and they often are as effective as

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regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.⁷

Yet while costs remain largely unmeasured, we can tally agency proposed and final rules, and even executive orders and memoranda.⁸ “Regulatory dark matter” is more elusive.

Prominent recent examples of executive agency guidance include:

- Housing and Urban Development guidance decreeing landlord and home seller denial of those with criminal records a violation of the Fair Housing Act;⁹
- Department of Labor blog post and “Administrative Interpretation” informing the public that most independent contractors are henceforth employees;¹⁰
- Treasury Department delay—first by July 2013 blog post, then by IRS guidance—delaying the Patient Protection and Affordable Care Act’s (ACA) employer mandate and accompanying tax penalty for non-compliance, without public feedback or mandatory economic analysis;¹¹
- November 2013 declaration—in a presidential Obama press conference, and subsequently in a Department of Health and Human Services guidance—that non-ACA compliant health policies could continue to be sold;¹²
- Environmental Protection Agency Clean Water Act interpretive guidance on “Waters of the United States.”¹³ While this directive solicited notice and comment, the agency illegally lobbied for supportive comments, manufacturing endorsement;¹⁴
- Federal Aviation Administration “Notice of Policy” interpretation on drones¹⁵ that temporarily outlawed commercial activity in violation of the APA, before reversal by the National Transportation Safety Board;¹⁶
- Education Department guidance affecting colleges and schools with new mandates at the rate of one issuance per business day;¹⁷
- Increased National Labor Relations Board of memoranda affecting nonunion employers.¹⁸

Congress’ over-delegation to agencies and neglect of the Administrative Procedure Act’s formal rulemaking process has led to agency abuse of both rulemaking and guidance. Over a third of agency rules are issued without a Notice of Proposed Rulemaking,¹⁹ often exploiting the APA’s “good cause” exemption whereby agencies claim notice is “impracticable, unnecessary or contrary to the public interest.”²⁰

Further, most final rules face no cost-benefit analysis from the Office of Management and Budget (OMB). In 2014, only 14 rules out of thousands faced OMB review.²¹

Such rulemaking abuses are problematic enough, but guidance dispenses entirely with the APA’s requirement for formal advance public notice followed by a comment period. Conveniently for eager regulators, the APA’s notice-and-comment requirements do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”²²

Guidance is Growing and Duplicitous. Executive branch agencies sometimes, though rarely, highlight “significant guidance,” a nod toward compliance with a 2007 OMB memo on “Good Guidance Principles.”²³ Guidance, memos, bulletins, circulars, and more can take up considerable space in the *Federal Register* and on agency websites. Mercatus Center analyst Hester Peirce described how “agencies opt for short-cuts”:

Rather than bothering with the burdensome rule-making process, they use faster and more flexible means of imposing mandates. To avoid running afoul of the letter of the Administrative Procedure Act, these mandates are often couched in tentative, temporary or voluntary terms. Regardless of the language and the format, the effect is the same for regulated entities. The agency suggests that you do something—even if it says that it might suggest something different later—and you do it.²⁴

Agencies issue their guidance with caveats to deflect punishment for abuse of the process. The “contains nonbinding recommendations” disclaimer permeating the Food and Drug Administration (FDA) guidance document on “Distributing Scientific and Medical Publications on Unapproved New Uses—Recommended Practices” (governing procedures drug and medical device manufacturers and representatives follow when distributing scientific or medical information regarding unapproved new uses for approved drugs or medical devices) is a typical example of this practice.²⁵

No complete survey exists,²⁶ but the proposition that regulation through guidance is a growing phenomenon is beyond doubt. As Mary Whisner, reference librarian with the University of Washington Law Library, notes:

You might have been taught that agencies do their legal work through regulation and adjudication, but the body of guidance documents (or nonlegislative rules) is growing, both in volume and in importance.²⁷

The volume of guidance may even dwarf that of formal rules.²⁸ Acknowledged “significant” guidance documents number in the hundreds, and agency public notices in the thousands annually.²⁹

An important but little-known fact is that the Congressional Review Act’s (CRA) resolution of disapproval process, whereby Congress can reject agency rules, also applies to guidance documents.³⁰ Most material submitted to the Comptroller General per the CRA’s requirement for reporting rules to Congress and the Government Accountability Office has been formal notice-and-comment regulation. However, as Morton Rosenberg of the Congressional Research Service described even back in 1999:

It is likely that virtually all the 15,000-plus non-major rules thus far reported to the [Comptroller General] have been either notice-and-comment rules or agency documents required to be published in the Federal Register. This would mean that perhaps thousands of covered rules have not been submitted for review. Pinning down a concrete number is difficult since such covered documents are rarely, if ever,

published in the Federal Register, and thus will come to the attention of committees or members only serendipitously.³¹

In May 2015, Sens. Lamar Alexander (R-Tenn.) and James Lankford (R-Okla.) launched an investigation “into whether agencies are skirting notice and comment laws to create new requirements for American businesses, colleges and universities, and individuals.”³² A hearing later conducted by these and other lawmakers established that how agencies decide whether some new initiative will be a rule or guidance is often a “black box.”³³

Congress’s To-Do List. Congress has a duty to affirm that every agency decree matters, not just those subject to formal notice-and-comment or deemed economically significant. Past attempts at serious government downsizing in the 1970s, ‘80s, and ‘90s brought partial liberalization of some industries, but fell short when it came to shutting down agencies and increasing agency accountability. Today, circumstances have deteriorated to the point where Congress has no idea of what today’s thousands of agency proclamations consist. We do not even know how many agencies exist.³⁴

Regulation and guidance cannot be controlled without downsizing the federal government and strengthening democratic accountability. That requires reining in the colossal bureaucracies that enable rule by unelected experts.

Ending regulation by guidance is especially urgent for frontier sectors such as telecommunications and infrastructure expansion, and policy surrounding drones and automated vehicles. Decades-old agencies are already seeking to regulate new technologies, business models, and contractual arrangements with obsolete rules and without congressional authorization. If government regulation is warranted, Congress should legislate directly rather than tolerate open-ended agency regulation or “informal” guidance. Confronting possible obsolescence of decades old statutes is a necessary, fundamental task.³⁵

To accomplish these goals, here are actions Congress should take:

- Abolish, downsize, cut the budgets of, and deny appropriations to aggressive agencies, sub-agencies, and programs that routinely pursue regulatory actions not authorized by Congress.
- Repeal or amend enabling statutes that sustain the regulatory enterprise’s excesses in the first place.³⁶
- Withhold appropriations for specific agency actions not authorized by Congress.
- Require congressional affirmation for guidance and other agency proclamations likely to have significant economic impact.³⁷
- Subject regulatory dark matter to more intense OMB review. By exposing the costs of guidance, this can provide a public record for future reform efforts. President Reagan’s Executive Order 12291 provides a good model to follow in this regard, in that it put the burden of proof on agencies to demonstrate the need for a new rule. Guidance should be held to the same standard.³⁸
- Require agencies to present data regarding regulation and guidance to Congress in a form comparable to the federal budget’s Historical Tables.³⁹ The Reagan and first Bush

administrations had something along these lines, a document accompanying the budget titled the *Regulatory Program of the United States Government*, which included a lengthy appendix, “Annual Report on Executive Order 12291.”⁴⁰ This could provide a template for disclosure, along with requiring that guidance documents appear in the *Federal Register* in an accessible way. Other disclosures needed are as follows.

- **Economically significant guidance.** Require streamlined, one-location online disclosure of economically significant guidance, augmenting what a few executive agencies voluntarily already publish based on the 2007 OMB memorandum to agencies.⁴¹
- **Secondary guidance and notices.** Require centralized disclosure of these proclamations, which currently are scattered under numerous monikers and across various websites, if publicized at all.
- Apply the Administrative Procedure Act’s notice-and-comment requirement to guidance.
- Apply the Congressional Review Act’s 60-day resolution of disapproval process to guidance. If guidance grows, the public can know in which instances Congress could have acted to stop or call attention to it, but did not.

Law against laws. It has been a generation since Congress last proposed major downsizing of the federal bureaucracy. This year’s congressional task forces, along with a distinctive statement of principles in the 2017 House budget proposal, are good first steps in voicing the principles of congressional authority over lawmaking and of restricting the federal government to *some* boundaries.⁴²

Guidance documents are not new, but the recent blatant executive branch assertions of power—including boasts regarding unilateral action without Congress—makes addressing their power to impose rules more salient than ever. The solution for executive overreach is for Congress to say no to it. Likewise, the overweening Washington bureaucracy endures only because Congress has yet to say no to it. The public should understand that and hold their elected representatives accountable for this surrender of their authority and shirking of their duties.

Usually, despite the common refrain, there ought *not* to be a law.

Notes

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⁴ Remarks by the President and the Vice President at U.S. Conference of Mayors Reception, The White House, January 23, 2014, <https://www.whitehouse.gov/the-press-office/2014/01/23/remarks-president-and-vice-president-us-conference-mayors-reception>.

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- ⁵ Clyde Wayne Crews Jr., “Mapping Washington’s Lawlessness: A Preliminary Inventory of Regulatory Dark Matter,” *Issue Analysis* 2015 No. 6, December 2015, <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf>.
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- ¹³ Clean Water Act Definition of “Waters of the United States,” Environmental Protection Agency, accessed April 14, 2016, <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>. See also Daren Bakst, “What You Need to Know about the EPA/Corps Water Rule: It’s a Power Grab and an Attack on Property Rights,” *Backgrounder* #3012, Heritage Foundation, April 29, 2015, <http://www.heritage.org/research/reports/2015/04/what-you-need-to-know-about-the-epacorps-water-rule-its-a-power-grab-and-an-attack-on-property-rights>.
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²⁶ A preliminary inventory is Crews, “Mapping Washington’s Lawlessness.”

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³⁸ Ronald Reagan, “Executive Order 12291—Federal regulation,” February 17, 1981, National Archives, <http://www.archives.gov/federal-register/codification/executive-order/12291.html>.

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