ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance

Draft Recommendation for Committee Review

Joint Rulemaking and Other Means of Agency Policy Coordination

Many areas of regulation are characterized by fragmented and overlapping delegations of power to administrative agencies.[1] Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies, giving each responsibility for part of a larger whole. Instances of overlap and fragmentation are not rare or isolated. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation.[2] The following recommendation suggests some reforms aimed at improving coordination of agency policymaking, including joint rulemaking.

Such delegations may produce redundancy, inefficiency, and gaps, but they also create underappreciated coordination challenges. A key advantage to such delegations may be the potential to harness the expertise and competencies of specialized agencies. But that potential can be wasted if the agencies work at cross-purposes or fail to capitalize on one another's unique strengths and perspectives.

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[1] Fragmented delegations create situations in which different agencies possess the authority necessary to tackle different aspects of a larger problem. *See, e.g.*, Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 806–13 (2005) (describing the complex distribution of federal and state authority over environmental regulation and resource management); *see also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 84-1, PUBLIC REGULATION OF SITING OF INDUSTRIAL DEVELOPMENT PROJECTS, 1 C.F.R. 305.84-1 (July 25, 1984) (recognizing the challenge posed by agency overlap for environmental review of industrial development projects).

[2] As the Comptroller General of the United States has noted, "[v]irtually all of the results that the federal government strives to achieve require the concerted and coordinated efforts of two or more agencies." U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-00-95, MANAGING FOR RESULTS: USING GPRA TO HELP CONGRESSIONAL DECISIONMAKING AND STRENGTHEN OVERSIGHT 19 (2000), *available at* http://www.gao.gov/assets/110/108330.pdf (statement of David M. Walker, Comptroller General of the United States, before the Subcomm. on Rules & Org. of the H. Comm. on Rules).

The study underlying this recommendation provides a comprehensive picture of overlapping and fragmented delegations, and makes some practical suggestions for addressing the coordination problems they create. Because characterizing such delegations as redundant might suggest literal duplication, this recommendation uses instead the more nuanced concept of "shared regulatory space."

Presidential leadership can be helpful in addressing the challenges posed by fragmented and overlapping delegations. Promotion of coordination could be accomplished through a comprehensive management strategy, which might most effectively be done via a new executive order tasking one or more White House offices with an oversight role. Alternatively, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) could intensify its coordination efforts under Executive Orders 12,866 and 13,563, or OMB could adopt a coordination agenda as part of its implementation of the Government Performance and Results Act. However, centralized supervision is not the only means of improving agency coordination. Certain targeted reforms could be adopted voluntarily by the agencies. These reforms include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, and tracking of outcomes and costs. Alternatively, Congress could prescribe such reforms via statute.

Centralized Supervision of Coordination by the President

Coordination often is superior to consolidating agency functions, which runs a greater risk of resulting in a net loss of expertise and accountability or simply relocating interagency conflicts without meaningfully addressing them. Systematic efforts to institutionalize coordination (as opposed to relying on ad hoc coordination that occurs as a matter of course among agencies) also will tend to be more stable, visible, and durable than relying only on informal networks for promoting interagency interactions. Yet the prospect of achieving these benefits is subject to the important caveat that the agencies themselves must be motivated to pursue coordination, by either internal or external incentives. In cases of high conflict, recalcitrance, or incapacity, a central coordinator will be necessary.

The White House can play a crucial role in fostering coordination by establishing priorities, convening the relevant agencies, and managing a process that is conducive to producing agreement. For example, the White House Office of Energy and Climate Change Policy has been credited with spearheading the joint rulemaking effort of EPA and the Department of Transportation, which produced new fuel efficiency and greenhouse gas standards,[3] and the White House played a central role in convening and coordinating the nine-agency Memorandum of Understanding (MOU) on siting of transmission lines on federal lands.[4] There are many other examples from prior administrations, involving policy initiatives large and small.

Also, as a legal matter, this role is consistent with OIRA's mission and within the scope of its legal authority. Promoting consistency in agency rulemaking is explicitly within the agency's mandate under Executive Order 12,866 and was reiterated by President Obama in Executive Order 13,563. Where agency programs outside of rulemaking (including permitting, management, and other non-"regulatory" functions) seem clearly beyond OIRA's existing authority, the President could easily expand it. In addition, while it might be controversial, the President could seek to extend such an enhanced regulatory review function to independent agencies as well.

One way to pursue this role, at least for rulemaking, is for OIRA to involve itself in the early stages of rule development, which sometimes begins years before a rule is noticed under the Administrative Procedure Act. The pre-notice stage is when much of the important foundational work is done to lay the analytic basis for a rule and when an agency is likely to

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3 Jim Tankersley, *Emissions Deal Nearly Stalled at the Finish*, L.A. TIMES, May 20, 2009, at A1, A20. (maybe cite Jody's article on EPA/DOT instead?

4 *See* Press Release, Advisory Council on Historic Pres., Nine Federal Agencies Enter into a Memorandum of Understanding Regarding Transmission Siting on Federal Lands (Oct. 28, 2009), http://www.achp.gov/docs/pressrelease10282009.pdf.

become invested in its chosen course of action.[5] Early involvement of OIRA can also help to minimize conflict among agencies regarding the application of statutory or other analytic requirements to joint policymaking efforts, and might help to reduce duplication when more than one agency engages in the same or similar analyses.[6]

Beyond early engagement in rule development, OIRA has successfully conducted other policy harmonization efforts, although most of its efforts are related to its primary focus of establishing the requirements for cost-benefit analyses and reviewing agencies' analyses.[7] Its efforts to actively coordinate agency policymaking to overcome problems created by fragmentation and overlap seem less numerous or at least less visible. Any serious effort to promote coordination as distinct from minimizing regulatory burdens likely would require a significant reorientation of OIRA's traditional focus on economic efficiency and an expansion of its current role. For this and other reasons, including historical tensions between the agencies and OIRA over regulatory review, other White House offices and councils with relevant policy expertise might be better positioned to promote coordination in their respective domains. Still, OIRA might play an important role in this effort. Its resource management offices, which possess programmatic and budgetary expertise, could provide essential support. And on the budgetary side, OMB might propose cross-cutting budget allocations to help incentivize the agencies to work together.

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5 *See* Curtis W. Copeland, Cong. Research Serv., The Unified Agenda: Implications for Rulemaking Transparency and Participation 5 (2009), *available at* http://www.fas.org/sgp/crs/secrecy/R40713.pdf (observing that "comments and suggestions from the public may arguably be most effective while proposed rules are still under development at the agencies"); *see also id.* (quoting Sally Katzen, OIRA Administrator during most of the Clinton Administration, as stating that by the time a notice of proposed rulemaking is published, "the agency is invested. By that time, the agency has its own strongly held view of how it wants this thing to look. And OMB changes at that point are, I think, really at the margin rather than going to the heart of the matter." (internal quotation marks omitted)).

6 Analytic requirements imposed by executive order or statute can result in wasteful duplicative efforts if multiple agencies must engage in similar or identical reporting. In addition, agencies engaged in joint policymaking may disagree about the application of such requirements.

7 Under Executive Order 12,866, agencies must produce a detailed cost-benefit analysis justifying significant regulatory actions. *See* Exec. Order No. 12,866, § 6(a)(3)(C), 3 C.F.R. at 645–46. OMB has elaborated the requirements for regulatory review in detail. *See* OMB Circular A-4, stipulating the requirements for cost-benefit and alternatives analyses and specifying appropriate methodologies.

Of course, regardless of how it is framed, any effort to centralize White House control over agency policymaking will be recognized as such and likely would be met by the agencies, and by Congress, with a certain amount of suspicion. The President clearly has more than an "objective" interest in coordination and can be expected to use coordination tools to put his imprimatur on policy. And, notably, a certain amount of this activity will be out of public view and hard for Congress to track. To have any chance of success, a concerted effort to promote coordination across the government will require the White House to develop strong allegiances, and maintain close working relationships, with the agencies.

The prospects for successful presidential coordination likely will vary depending on the reason why Congress structured delegations of authority as it did, and whether the President's efforts frustrate Congress' purposes. For example, in cases where the delegation scheme is meant to help lawmakers deliver benefits to constituent groups, and presidential coordination would frustrate that goal, we can expect congressional resistance. Likewise, if Congress has separated certain functions specifically to enhance agency independence, presidential efforts to undermine that independence may face congressional opposition. Yet where Congress has delegated authority to more than one agency as a compromise, coordination efforts that achieve a compromise between the agencies should be consistent, or at least not inconsistent, with congressional intent. And where delegations are largely accidental, or have resulted in unintended consequences that frustrate statutory goals, presidential coordination efforts to restore coherence may be met with little opposition, or even with assent.

In sum, it seems that the President is uniquely positioned and motivated to tackle coordination problems and may be best positioned to institutionalize coordination efforts as a way of tackling the problems presented by overlapping agency authority. To the extent that there are risks of presidential overreach, existing legal and political constraints provide a check. Some of the reforms suggested below seek to improve the transparency of the interagency process, making it easier for both Congress and the public to track. This additional transparency will be not only valuable to the public but also useful to agencies wishing to learn from each other and to Executive Branch officials who currently lack a central mechanism for overseeing MOU implementation. And to the extent that the existing legal and political checks are insufficient, judicial review provides some protection against presidential overreach.[8]

Targeted Approaches to Improving Coordination

By improving efficiency, effectiveness, and accountability, coordination can help to overcome the dysfunctions created by shared regulatory space. Greater coordination is also likely to improve the overall quality of decisionmaking by introducing multiple perspectives and specialized knowledge and structuring opportunities for agencies to test their information and ideas. Coordination instruments can incentivize and equip agencies to monitor each other, which should help to control shirking and drift and, at least when used in the manner suggested, ease the monitoring burden for Congress. In addition, coordination can produce policy compromises that are consistent, or at least not inconsistent, with at least one of Congress' rationales for dispersing authority in the first place. Documented policies can help to formalize ad hoc approaches and provide a helpful road map for agency staff. Compatible policies can help to simplify and sustain interagency coordination over time. It is plausible, too, that greater coordination will make it harder for interest groups to capture the administrative process or to play agencies against each other. Finally, coordination often will be superior to consolidation and will be an improvement on the informal coordination that occurs as a matter of course in the administrative state.

As mentioned above, both Congress and the President have toolboxes of versatile procedural devices at their disposal with which they can address coordination challenges. Yet

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8 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (reversing, at step one of *Chevron*, FDA's effort to regulate tobacco). Note, however, that the relative informality that makes MOUs so appealing and easy to deploy also makes them generally unenforceable and, in most cases, entirely insulated from judicial review.

even absent direction from the President or Congress, agencies could adopt reforms aimed at improving coordination.

The recommendations below suggest some initial and relatively modest measures to help government agencies better track and evaluate existing coordination initiatives, which they could adopt independently, subject, of course, to budget constraints. These include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, tracking of outcomes and costs, and making coordination tools more transparent.

RECOMMENDATION

1. *Developing Agency Coordination Policies.*

(a) As an initial matter, all federal agencies should develop and adopt policies and procedures for facilitating coordination with other agencies. Agencies should identify any areas of jurisdiction or operation that might implicate or benefit from interagency coordination generally, or with respect to specific sister agencies.[9]

(b) The President or the Executive Office of the President should develop a coordination policy addressing matters of both process and substance, including how to resolve disagreements over jurisdiction, how to develop standards jointly, how to solicit and address conflicting views, and how to share or divide information-production responsibilities. Such policies should also address how to reduce duplication of effort in

[9] A recent GAO report on the implementation of the Dodd-Frank Act faulted the financial regulatory agencies for not pursuing coordination more systematically and noted that the majority of agencies reviewed had not developed internal policies on coordination. *See* GAO REPORT ON DODD-FRANK, [citation needed], at 25 (noting that seven of nine regulators reviewed "did not have written policies and procedures to facilitate coordination on rulemaking").

complying with the numerous analysis requirements imposed by statute and executive order, and how to resolve conflicts with other agencies over their application.

2. Sharing Best Practices.

(a) The government policy on coordination should also establish a mechanism through which the agencies can share best practices and provide for ex post evaluation. For Memoranda of Understanding (MOUs), best practices should include suggestions that agencies include progress metrics and sunset provisions, which might help to ensure that agencies revisit MOUs regularly.[10]

(b) The policy should also include best practices for joint rulemaking and recommend when agencies should consider using it even when not statutorily required to do so. Best practices might include establishing joint technical teams for developing the analytic underpinnings of the rule, requiring early consultation among agency legal staff and lawyers at the Department of Justice who may need to defend the rule, and requiring early consultation with OIRA regarding joint production of cost-benefit analyses and other analyses required by statute or executive order.

3. Supporting and Funding Interagency Consultation.

(a) Because discretionary interagency consultation provisions can be fairly easy for an agency to ignore or to comply with only pro forma, the President, through executive order, or the Congress, by statute, should require agencies to respond publicly and in writing to

10 In several of the examples reviewed in [citation needed to Freeman/Rossi report], the agencies were negotiating new MOUs to replace outdated ones (often negotiated by previous administrations) — a clear sign that ineffective MOUs can be left to languish for too long. And as noted in the food safety and border security examples in Part I, there are many outdated MOUs still on the books.]

comments by other agencies.[11] Where Congress does not explicitly require written responses with reasons, Executive Branch and independent agencies could adopt such a requirement as a matter of good governance.[12]

(b) The President or the Executive Office of the President should encourage agencies to conduct interagency consultations early in a decisionmaking process, before initial positions are locked in, and to conduct such consultations in a continuing and integrated way, rather than periodic and reactive. To this end, when appropriate the coordinating office should establish a cross-cutting interagency team to produce and analyze data together over the course of the decisionmaking process, and the White House should revive the Regulatory Working Group, established by Executive Order 12,866, to assist agencies in identifying opportunities for coordination.[13]

(c) OMB and agencies involved in coordinated interagency activities should take into account, in the budgetary process, the need for sufficient resources to participate effectively in interagency processes, and the need to provide specifically for such cross-cutting activities. Further, an action agency, on whom the duty to consult falls, should

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[11] Under current law, an agency has a duty to respond to comments received from another agency in the public comment process, but only to the extent that comments are relevant to the rulemaking agency's statutory and regulatory framework.

[12] Agency officials may be tempted to treat these obligations as hoops to jump through, rather than as important vehicles for feeding valuable information into their decisionmaking processes. Under NEPA, the onus is on the interested agencies to comment on the action agency's impact statement, and yet the action agencies typically have no obligation to respond directly to those comments. This practice weakens the potential for agency interactions to produce significant benefits. A duty to respond publicly and in writing to comments by other agencies would raise the costs of dismissing other agencies' input without sufficient consideration and would signal the importance of taking that input seriously. Statutes like NEPA that impose analytic requirements on agencies are limited to the extent that they are only "procedural." For example, NEPA requires only that action agencies disclose environmental impacts, not that they alter their plans in light of what they learn. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed — rather than unwise — agency action.").

[13] Exec. Order No. 12,866, § 4(d) (announcing the creation of a Regulatory Working Group as "a forum to assist agencies in identifying and analyzing important regulatory issues").

commit to contribute a share of its resources to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.

4. *Increasing the Visibility of MOUs.*

(a) The President or the Executive Office of the President should develop a plan to make available to the public all extant and future agency agreements that have broad policy implications or that may affect the rights and interests of the general public.

(b) The plan should also establish a government-wide mechanism for periodically revisiting a subset of highly significant MOUs to assess the extent of their implementation.

5. *Tracking Total Resources.*

To better evaluate the costs of coordination, an appropriate office or offices should develop methods for monitoring total resources spent on interagency consultations, MOUs, joint rules, and other similar instruments. At the outset, this effort might be limited to high-priority, high-visibility interagency coordination efforts, such as important joint rulemakings.[14] Such offices might include the Government Accountability Office, Congressional Research Service, or agency inspectors general, perhaps with the assistance of the Administrative Conference of the United States.

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14 For example, given that the volume of joint rulemakings will likely increase as a result of the Dodd-Frank Act, it would be worthwhile to begin tracking and gathering data about these efforts soon. Without creating an enormous burden, it might be possible to compare the average cost of major rules that are jointly produced to that of major rules that are produced by agencies acting independently. *See* COPELAND, CRS DODD-FRANK RULEMAKING REPORT, [citation needed], at 5–7.