

DOGE REDUX

Can Information Technology Save the Republic?

The modern world's complexity and pace of change is challenging governments and their institutions. Management and decision-making processes in the U.S. and other democracies and constitutional republics may be simply too slow to allow the effective leadership necessary to survive in the competition among nations. Some believe that a transition towards dictatorships and autocracies is inevitable—that democracy is doomed and autocracies are the wave of the future.

It would be unfortunate if this were the case. Democracy's superior ability to harness the benefits inherent in individual liberties and the wisdom of creative individuals, crowds and constituencies is critical to the maintenance of leadership in innovation, development, and advancement of the public good. Slowness and inefficiency should not be allowed to dissipate the inherent advantages that our special form of government provides.

The U.S. seems to be engaged in an important new initiative--to better use existing regulatory tools to enable executive leadership and allow rapid change in our regulatory system, without compromising either the rights of citizens or the essential dynamics of constitutional processes.

Efficient use of existing tools can help preserve democracy by overcoming the "speed" advantage that autocratic systems sometimes appear to have--reforming our regulatory system, within the limits of existing law but combined with modern technology, to inform, track and expedite decisions and actions.¹

Better Use of Executive Orders – Executive Orders are instruments through which a President can instruct the agencies that operate the Government. The current Administration has recognized that function, has increased the use of these orders, and has used them to lay out policies and more efficient approaches to critical issues, such as expediting and improving NEPA review, streamlining the permitting process for critical infrastructure like power plants and energy export facilities, increasing private investment in public infrastructure, and advancing the U.S. shipbuilding, seabed mining and nuclear power industries. Effective implementation of these Executive Orders can put the President more fully in charge of the operations of the government enterprise --and enable the enterprise to more efficiently advance the Government and its policies.

E.O.s, however, are only instructions to agencies. They are not law and do not have legal effect without agency implementing actions. There are essentially two ways in which the Executive Branch can implement and advance new Administration policies.

Rulemaking – the primary official means of implementing laws and policies-- is a cumbersome process that involves public review and comment, potential appeals and judicial review. Proposed

¹ Congressional legislation and oversight are, of course, primary instruments for change. That approach, however, has its own slowness issues.

rules regarding controversial subjects can generate tens of thousands of public comments –which need to be responded to--and are subject to judicial review, which can add years to the process before a new regulation has the force of law.

Where new rules are necessary, the slow pace of rulemaking delays change. Where change to existing rules is needed, rulemaking delays tend to lock in federal policies of the past. There needs to be ways to allow both expedited adoption of necessary new rules, as well as review and revision of existing rules to ensure consistency with law and current policy.

Interpretations and "Guidance" – Inevitably, laws and regulations require interpretations and findings of fact - areas in which Agencies have exercised considerable discretion. The Agencies have used this discretion to add a tier of regulation which very much reflects their own internally developed policies, as well as those of the Administrations in charge and those of the Congress that enacted the laws. The result has been an evolving body of something approaching law that has a direct impact on the regulated community, often as controlling as that of either Congressionally enacted law or formally adopted regulations.

The "guidance" process started with the issuance of interpretive letters and advisory opinions issued by agencies in response to requests from regulated companies or persons. Though, in theory, not legally binding, these interpretations were circulated within the agencies and had practical effect close to that of actual law or regulations. At some point agencies began designating some of these interpretations as "guidance", publishing them and giving them precedential effect. Almost as often, they have remained unpublished but still applied as precedents. So "guidance" though relatively simple and expeditious to issue, has often been uncharted territory in terms of public access, and has also tended to give the agencies unfettered discretion in determining their authorities. There are tens of thousands of these guidance documents, many of which are decades old, and most of which have never been reviewed by the public or even at high levels within the issuing agencies. Though these interpretations continue to have at least quasi legal *effect*, there is little assurance that the interpretations they contain are either clearly grounded in applicable law or consistent with current Administration policy. There has also been little assured public access and limited public ability to address issues of policy or compliance with law.

During the first Trump Administration, concerns about "Regulatory Dark Matter" led to both Congressional concern with the guidance process, and an Executive Order requiring agencies to publish all “active guidance” and provide affected persons with an opportunity to contest prior to enforcement. The present Administration has reinstated and strengthened these requirements and has also established an OMB-directed process requiring agencies to install processes to review all “active guidance” for consistency with applicable law and current Administration policies.

Having taken these steps to upgrade guidance and make it more accessible and taking into account the Supreme Court’s decision overturning the “Chevron doctrine” which provided for what became nearly absolute deference to often informal agency interpretation of statutes, the Administration is

upgrading the guidance process and has begun using it as an important early step in the implementation of its orders and policies. For example, in carrying out the Administration's orders and directives regarding simplification and streamlining of the NEPA process and implementing the scope reductions and procedural streamlining made available pursuant to the Supreme Court's *Seven Counties* decision, CEQ has revoked its nationally applicable regulations, issued guidance to agencies seeking to streamline their processes and encouraged the agencies to accomplish that streamlining through revision of manuals, handbooks and other guidance-type approaches, rather than by formal regulations. This guidance may be less permanent and reliable than conventional regulations, but it can be a more efficient and expeditious way of giving timely effect to Administration policies and a way of trying revised policies out before they are adopted in regulations.

Although guidance has been criticized as an improper "backdoor" way of making law through agency fiat, a landmark Supreme Court decision² has changed that dynamic and opened the way for more extensive use of guidance as an important element of our regulatory framework. This Administration has apparently concluded that a reformed, accessible and responsive guidance system can be an important way of speeding change and the advancement of its policies, and has taken steps to put such a system in place.

A Coordinated System – To summarize, the Administration has assembled the basic elements of a coordinated system that will:

1. Use Executive Orders to spell out new policies, direct the agencies to expedite issuance of necessary new regulations, and review and revise existing “regulations” (defined to include both formal regulations and guidance) to assure conformity with law and consistency with Administration policy
2. Reform, upgrade and enhance the use of “*Guidance*” as a simple and expeditious way of interpreting laws and implementing executive policies; provide enhanced public access and ability to provide input; increase OMB oversight and agency accountability; and maintain capacity for continuous updates.
3. Expedite both the issuance of necessary new formal rules, and the revision and repeal of old ones that are not consistent with law or Administration policy; and provide an effective OMB oversight process.

Conceptually, these elements should be able to overcome the delays that sometimes seem to be built into our system –and provide a continuously evolving regulatory system that can keep up with the modern world’s pace of change and the demands of developing technologies and global competition. In *actuality*, however, these objectives are unlikely to be achieved without a fourth element.

²The Supreme Court in the mid-2024 case *Loper- Bright v. Raimundo* reversed precedents which required courts to defer to cognizant agencies’ interpretations of complex laws within their jurisdictions and, instead, gave the courts responsibility for interpreting the law.

The Fourth Element - Information Technology – A conceptual framework is far short of an operating system. The system improvements outlined above are highly complex and involve a level of detail beyond the capabilities of the management systems now in place in most, if not all, agencies.

The E.O. that established DOGE (E.O. 14158) recognized that agency software, network infrastructure and IT systems must be digitalized and coordinated across the entire government if we are to overcome inertia and catch up to the speed of global change. It directed all Agency Heads to work through DOGE Teams to implement an initiative to "modernize federal technology and software to maximize governmental efficiency and productivity."

Due to a combination of factors--bad leadership style, misinterpretation of the mission, premature start, agency staff opposition and public pushback, this initiative has, to date, been far from successful. It is, however, still necessary and hopefully not dead.

Evolution - Despite the setbacks, it does appear that evolution is occurring. Agencies are responding to their DOGE experience and to trends in the private sector by employing qualified Chief Information Officers and installing intelligent management systems. As in the private sector, digitalized and data driven systems are increasingly being used to coordinate agency activities and enable more efficient and better-informed decision making.

The Need for New Focus – Until now, however, the focus seems to be on internal agency management. The interoperability, synchronization and “whole of government” approach that the Executive Order called for --which should have been DOGE's primary focus from the outset--may be on the back burner.

Of course, there is hope that somewhere in government-- between the White House, OMB, GSA and other agencies--there is a "skunk works" deeply engaged in dealing with the challenges that must be faced in speeding up our government and making it smart enough to stand up to global competition. If there is not, there should be.

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* The *Blueprint 2025 Initiative* was founded in 2016 by the late Norman Anderson, an infrastructure visionary, as a way of advocating changes in government policy which will put the U.S. back in its rightful place as the Nation with the world's best and most efficient infrastructure. Norman's blueprint, outlined in his book [*VISION: Our Strategic Infrastructure Roadmap Forward*](#) emphasizes IT and digitalization as important parts of the solution.