Written by **William F. Jasper** on January 8, 2013

Danger: Federal "Regulatory Cliff" Ahead

The "fiscal cliff" has been the subject of daily headlines and fierce debates. But what about the "regulatory cliff"? Is the Obama administration unleashing a pre-planned tsunami of post-election regulations that would — if allowed to take effect — sweep us over that precipice?

Everything seems to be pointing in that direction. Many of the administration's critics, this publication included, warned this was coming. Shortly before the November 2012 presidential elections, Senator James Inhofe (R-Okla.) charged that "President Obama has big plans to continue pushing his far left green agenda in a second term" with a "slew of job-killing EPA regulations that the Obama-EPA has put on hold until after the election but will be on the 'to-do' list for 2013."

In a 13-page minority report issued in October entitled "A Look Ahead to EPA Regulations for 2013," Sen. Inhofe, the ranking member of the U.S. Senate Committee on Environment and Public Works, warned that "numerous Obama-EPA rules placed on hold until after the election spell doom for jobs and economic growth."

"American families," said the Inhofe report, "will be subjected to a regulatory onslaught that will drive up energy prices, destroy millions of jobs, and further weaken the economy. Those in poor communities and on fixed incomes, who are already spending around 24% of their income on higher energy prices, will be hurt the most."

Sen. Inhofe has highlighted, for instance, these horrendously costly and disruptive EPA regulations:

• *Ozone rule:* The EPA has proposed tightening the national ambient air quality standards (NAAQS) for ground-level ozone. The compliance cost could range from $19 to $90 billion, making them the most expensive EPA regulations ever proposed. If these rules go into effect, many towns and cities across the nation not currently in violation of EPA ozone standards will suddenly find themselves on the agency's "dirty air list" and will be subject to costly fines and mitigation mandates.

• *Utility MACT:* EPA's Utility Maximum Achievable Control Technology rules will force the retirement of 30 to 100 gigawatts of coal-fired electricity. That's the potential elimination of 20 percent of America's coal plants, along with hundreds of thousands of jobs. The impact will be felt hardest in these states: West Virginia, 90 percent coal-fired; Ohio, 80 percent coal-fired; Michigan, 60 percent coal-fired; Minnesota, 60 percent coal-fired; and Wisconsin, 66 percent coal-fired.

• *Boiler MACT:* Boiler Maximum Achievable Control Technology would impose stringent emission limits and monitoring requirements for industrial boilers used in manufacturing, processing, mining, and

refining, as well as commercial boilers used in malls, laundries, apartments, restaurants, and hotels. IHS-Global Insight concluded that the proposal could put up to 798,250 jobs at risk. Moreover, they said every $1 billion spent on upgrade and compliance costs will put 16,000 jobs at risk and reduce U.S. GDP by as much as $1.2 billion.

• *Farm Dust Rule:* The EPA, which has been regulating farm dust for decades, indicates it may tighten the standards as part of its review of the National Ambient Air Quality Standards (NAAQS). This could very likely put the standard below the amount of dust created during normal farming operations, making it impossible to meet. The effect will be to drive many already-struggling family farms into insolvency — and to drive up food prices even higher.

• *Greenhouse Gas Regulations:* These rules, says the minority report, "will cost more than $300 to $400 billion a year, and significantly raise the price of gas at the pump and energy in the home. It's not just coal plants that will be affected: under the Clean Air Act (CAA), churches, schools, restaurants, hospitals and farms will eventually be regulated." Many farms, for example, would be slaughtered by the EPA's cost-per-animal outcome known as the "cow tax." According to the report, "EPA itself estimates that in its best case scenario, there will be over 37,000 farms and ranches subject to greenhouse gas permits at an average cost of $23,000 per permit annually, affecting over 90% of the livestock production in the United States."

"Soviet-style Planning of the Economy"

The EPA proposals cited above, sweeping as they may be, are but a few of the many draconian regulatory measures the agency is unleashing. And keep in mind that Senator Inhofe's minority report referenced here concerns only the EPA, which is merely one of dozens of federal agencies and departments that are engaged in the unconstitutional process of "legislation through regulation." The EPA, however, by claiming protective authority over "the environment" — which means virtually everything — has established itself as the 800-pound gorilla in the regulatory zoo. Even many of the EPA's former champions recognize that it is an agency dangerously out of control. According to former Environmental Defense Fund chairman Richard Stewart, now a New York University law professor, the EPA's regulation "has grown to the point where it amounts to nothing less than a massive effort at Soviet-style planning of the economy to achieve environmental goals." As harsh — and apropos, we would say — as that critique may seem to some, Professor Stewart may have it backwards. Even a casual survey of the EPA's ever-expanding claims to power and jurisdiction indicates that the White House and the EPA are using the pretext of environmental goals to achieve Soviet-style planning of the economy.

Two weeks after winning the November 6 election, President Obama used another agency, the U.S. Fish and Wildlife Service (USFWS), to impose "Soviet-style planning of the economy," in the name of protecting the environment. Taking advantage of the Thanksgiving weekend, the Obama administration gave an early Christmas present to its "green" constituency: 9.6 million acres across the states of Washington, Oregon, and California. The ostensible recipient of this Black Friday gift is the northern spotted owl. This raptor has enraptured environmental activists — and enraged loggers, ranchers, landowners, and rural towns economically devastated by the "threatened" designation affixed to the feathered icon. The Obama administration's action nearly doubled the already enormous 5.3 million acres designated as protected habitat for the bird by the Bush administration in 2008.

The USFWS has a boundless supply of additional "threatened" and "endangered" species candidates that can be used to close millions more acres of public and private lands to human use and destroy

businesses, jobs, homes, and energy development.

Regulators-R-Us

We remind the reader once more, the regulatory avalanche we have touched on thus far has dealt merely with environmental matters, and only a couple of agencies at that. What about the dozens of other agencies of what is known as "the administrative state"?

Take a look at www.regulations.gov, the federal government's regulatory website. The home page informs us (on December 21, 2012) that in the last 90 days, the administration has posted 5,934 new regulations.

Yes, our federal bureaucrats have been very diligent. The website informs us of their daily productivity of regulations over the past 90 days:

Today (121)

Last 3 Days (274)

Last 7 Days (371)

Last 15 Days (826)

Last 30 Days (1,915)

Last 90 Days (5,934)

How will these regulations affect you, your family, and your job, business, ranch, or farm? You may not have federal SWAT teams descend upon you, as has happened to dairy farmers and natural food store operators who dared to sell raw milk products not approved by the federal Food & Drug Administration or the hundreds of other Americans subjected to Gestapo-style treatment for running afoul of the volumes of murky and convoluted regulations that fill the 169,301 pages of the Code of Federal Regulations published in the *Federal Register*. And, as if such a regulatory load is not sufficiently mind numbing, please be informed that these edicts are amplified, explained, and interpreted by *millions more pages* of "guidance." Consider merely one federal agency, the EPA. Professors David Schoenbrod, Richard B. Stewart, and Katrina M. Wyman report:

> The federal environmental statutes that Congress has addressed to EPA run to more than 2,700 pages in the two large, maroon United States code volumes. The legally binding regulations issued by EPA to implement these statutes fill the 31 ochre volumes of the Code of Federal Regulations. The guidance and other documents issued by EPA to explain or interpret its regulations fill around one million pages and are represented by the 1,250 grey loose-leaf volumes.

A million pages for just one agency! And woe betide the property owner or business owner who misses the latest guidance memo from a faceless bureaucrat changing the standards, protocols, or record-keeping and reporting procedures.

Even if your home, farm, or business is not personally "visited" by agents of the FDA, EPA, OSHA, SEC, or any of the myriad other federal agencies, you will pay a huge price nonetheless, both in economic costs and in loss of freedoms. A cost analysis by the Small Business Administration in 2008 found that the cost to our national economy of compliance with federal regulations was an astronomical $1.75 *trillion — annually*!

That was in 2008. The cost, of course, has escalated dramatically in the past four years. We should note

that the 169,301 pages of federal regulations referenced above covers only those promulgated through 2011; it does not include thousands of pages added in 2012. Nor does it include the thousands of pages that are expected to soon be dumped into the pipeline by bureaucrats who had been instructed to hold off until after the election.

According to the U.S. Chamber of Commerce, between January 1, 2009 and December 31, 2011 the Code of Federal Regulations increased by 11,327 pages — a 7.4 percent increase. The regulatory burden is now a crushing weight on the entire economy that constitutes a hidden tax which is equivalent to roughly half the current federal spending and equal to the entire federal budget of the late 1990s.

A U.S. Chamber of Commerce study entitled *Project No Project* found that a broad range of energy projects "are being stalled, stopped, or outright killed nationwide due to a broken permitting process and a system that allows nearly limitless opportunities for opponents of development to raise challenge after challenge."

The Chamber of Commerce study reported:

> In total, the 351 projects identified in the Project No Project inventory could have produced a $1.1 trillion boost to the economy and created 1.9 million jobs annually during the projected seven years of construction. Moreover, these facilities, once constructed, would have continued to generate jobs, because they would have operated for years or even decades.

That's nearly two million jobs annually, just in the energy sector, that are being killed by the federal regulatory straitjacket.

The Unconstitutional Fourth Branch of Government

In 2011, Congress passed 81 bills into law. During the same period, federal agencies promulgated 3,807 regulations — rules that are treated as if they are binding law.

These agencies are under the executive branch, which means they are under the president. However, under the U.S. Constitution, the president has no authority whatsoever to make laws. Neither do any of his subordinates. The president's role is to faithfully execute (i.e., administer) the laws passed by Congress, provided, of course, that said laws comport with the Constitution.

The very first sentence of Article I, Section 1 of the U.S. Constitution states: "All legislative powers herein granted shall be vested in a Congress of the United States."

It is difficult to get more plain and definitive than that: "*All* legislative powers." Congress is the *legislative* branch, and it possesses "all legislative powers." The executive and judicial branches have their own peculiar jurisdictions and purviews, but their powers do not include lawmaking. Nor does the Constitution allow the Congress to sublet or delegate its lawmaking authority to the president, bureaucrats, or judges. Moreover, Congress has only those legislative powers "herein granted," which means, of course, that Congress may not legislate on whatever its members may wish, but only regarding those particular matters granted by the states in the Constitution.

Nevertheless, Congress (and the American people, whose duty it is to vigilantly monitor Congress) has allowed the executive branch to stealthily, steadily build an enormous fourth branch of government — the federal regulatory leviathan — that has usurped legislative, executive, and judicial powers. According to our Founders, this is "the very definition of tyranny." James Madison, frequently referred to as the "Father of the Constitution," addressed this issue in essay No. 47 of *The Federalist*, noting:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

So, it should not be surprising to find federal bureaucrats acting tyrannically, since they have been allowed to accumulate "all powers, legislative, executive, and judiciary, in the same hands." Consider: An agency (FDA, EPA, OSHA, etc.) issues regulations (legislative); then sends out agents to monitor and enforce the regulations, demand compliance, levy fines, and make arrests (executive); and if a citizen wishes to contest the regulatory action, he must appeal to an agency tribunal (judiciary).

Congress has completely abdicated its responsibility. It has allowed executive branch agencies to get away with usurping powers for so long that it has become an accepted practice. Now the chairmen of committees of Congress are reduced to the pathetic practice of beseeching third-level bureaucrats of myriad agencies simply to be allowed to examine the mushrooming multitude of regulations that are being fastened upon the citizens of this land.

The regulations are as unconstitutional as the agencies that issue them. Not only should virtually the entire Code of Federal Regulations be abolished, but all of the unconstitutional regulatory agencies as well.

As James Madison famously explained in *The Federalist*, No. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined" and "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce."

"The powers reserved to the several States," Madison continued, "will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." That is, if the people decide some sort of government regulation is necessary to deal with a particular concern, then, under our constitutional system, it is to the state or local governments they should look for solutions.

The federal government's powers, besides being *delegated* to it by the states, are also *enumerated*. Hence, the federal government's jurisdiction, Madison explained in *The Federalist*, No. 14, "is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any." All other powers are retained by the states or the people.

This is a principle that was well understood in the Founders' time and was reaffirmed in the 10th Amendment of our Bill of Rights, which states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Since federal powers are "delegated" and limited to those "few and defined" found in the Constitution, Congress may not pass laws that trespass on the innumerable powers reserved to the states and the people. "No legislative act … contrary to the Constitution can be valid," Alexander Hamilton noted in *The Federalist*, No. 78. "To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."

If this constitutional principle applies to legislative acts of Congress, it most certainly applies to the massive regulatory maze erected by unelected, unaccountable, and unconstitutional agencies of the

executive branch. However, “administrative law” promulgated and enforced by steadily multiplying rogue agencies has become so routine ever since the New Deal that it is rarely questioned anymore. It is time that concerned Americans begin questioning and challenging not only the offensive regulations that are obviously tyrannical, but the very process that is perverting our constitutional system and making tyranny by bureaucrats possible.

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