

Symposium: Reflections on Executive Order 13,422

Introductory Comment

Connor Raso[†]

This Symposium evaluates President Bush's January 2007 amendments to the Executive Order governing the White House regulatory review process.¹ A brief review of the current process will provide context to evaluate the recent changes. All federal agencies except independent commissions submit their rules to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). Agencies are required to submit a benefit-cost analysis on the most important rules. OIRA then reviews this analysis and may return the rule to the agency for further work.² While seemingly obscure, this review process has generated tremendous political controversy and academic inquiry since President Reagan mandated the practice on a wide-scale basis in 1981.³ The Bush amendments have been no exception, sparking media coverage and political controversy leading to an appropriations bill with a rider prohibiting implementation of the order.⁴

These changes to the regulatory review process have sparked such attention for two major reasons. First, the regulatory process is clearly an important means of setting public policy. Agencies issue roughly 4,000 rules per year, while the President typically signs into law fewer than one-tenth as many bills.⁵ Many of these rules have a relatively minor impact, but others set

[†] J.D., Yale Law School, expected 2010; Ph.D., Stanford University Department of Political Science, expected 2010. The author wishes to thank all Symposium contributors for their comments.

1 Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-65 (Jan. 23, 2007).

2 Exec. Order No. 12,866, 3 C.F.R. 638, 638 (1993), *reprinted in* 5 U.S.C. § 601 (2000).

3 Though the controversies over regulatory review began in earnest during the Reagan administration, the technique began even earlier in different forms. The Ford administration issued the first executive order requiring benefit-cost analysis of regulations. The order instructed the OMB director to analyze the inflationary effect of rules. The Carter administration retained this order, helping to institutionalize the regulatory review. *See* Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974).

4 H.R. 2829, 110th Cong. (2007).

5 CLYDE WAYNE CREWS JR., *COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2* (2007), *available at* <http://www.cei.org/pdf/6018.pdf> (noting that in 2006, agencies issued 3718 rules and the President signed only 321 bills into law).

policy on high-stakes issues including fuel economy standards, power plant emission limits, and cigarette marketing. For a variety of reasons beyond the scope of this Symposium, Congress is increasingly unable to pass detailed legislation to deal with certain contentious and complicated issues, leaving most policy movement to the regulatory process. The environmental arena, in which Congress has passed little major legislation since the early 1990s, is a well known but hardly unique example.

Secondly, regulatory review raises some of the most fundamental issues of separation of powers and democratic accountability. Who controls the bureaucracy—Congress, the President, the courts, or agency leadership? How do we value political accountability against allowing regulatory agencies to act independently and use their expertise to implement policy free from congressional and presidential influence? To what degree do special interests influence our policy process?

I. Major Provisions of the Order

Executive Order 13,422 (“the Order”) and a corresponding OMB Bulletin on Good Guidance Practices (“the Bulletin”)⁶ make three major changes to the Clinton administration’s regulatory review system. First, the Order requires agencies to provide a written justification for each guidance document. This justification must identify the source of market failure or other issue that necessitates regulation.

Second, the Order explicitly grants OIRA the authority to review “significant” agency guidance documents.⁷ This provision raises several important definitional issues. No common definition of “guidance document” exists, but the OMB Bulletin states that the term encompasses: “interpretive memoranda, policy statements, guidances, manuals, circulars, memoranda, bulletins, advisories, and the like.”⁸ Notably, guidance may include non-written forms of communication such as videos and verbal advice. The OIRA Administrator has broad discretion to designate guidance documents as “significant” under the Order’s criteria.⁹ The Bulletin defines economically significant documents as the subset of significant documents whose annual effect on the economy exceeds \$100 million.¹⁰ This designation is important as agencies must submit a list of all significant guidance documents to OIRA with

6 Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

7 Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-64 (Jan. 23, 2007).

8 Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3434.

9 These criteria follow the standards for significant rules and include all guidance documents that have a projected annual impact greater than \$100 million, create an inconsistency with other agencies, raise important new legal issues, conflict with the President’s program, or impose new fees or costs on a private party. See Exec. Order No. 13,422, 72 Fed. Reg. at 2764.

10 Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3434.

an accompanying justification at least ten days before planned publication.¹¹ OIRA then determines whether to conduct a full review of the document. If so, the agency strives to complete the review within thirty days but faces no binding deadline.¹²

The Bulletin also requires that agencies create internal procedures to manage the approval of guidance documents.¹³ All documents are required to include standard information such as the issuing office, the party to which the document applies, and a document identification number.¹⁴ Most importantly, agency leaders must ensure that guidance does not bind external parties.¹⁵ Finally, agencies are required to accept public comments on all issued guidance documents. For economically significant guidance, agencies must go a step further and accept public comments before issuance.¹⁶ Agencies must also list all significant guidance documents currently in effect on their websites.¹⁷ These requirements have a net effect of recreating some of the notice and comment procedures used in the Administrative Procedure Act (APA) to seek public comment on informal rules.¹⁸

Finally, the Order requires agencies to designate only presidential appointees as Regulatory Policy Officers (RPOs).¹⁹ Agency RPOs are responsible for coordinating the regulatory process and must approve before an agency may “commence” a rulemaking or add an item to the agency’s regulatory agenda.²⁰ To date, agencies have primarily designated general counsels, deputy administrators, or policy office heads as their RPOs.²¹

The Order has provoked a spirited and varied set of responses in the political, academic, and policy worlds. This level of attention is a product of the broader underlying political and procedural issues that the Order raises. This Symposium seeks to add to the dialogue by bringing together contributors with different methodological perspectives. The following discussion elaborates upon four major themes that emerge from the contributions: differing notions of accountability, the tradeoff between accountability and other values, the efficacy of procedural constraints on the rulemaking process, and procedural fairness.

11 Memorandum from Rob Portman, Dir., Office of Mgmt. & Budget, to Heads of Executive Dep’ts & Agencies & Indep. Regulatory Agencies 8 (Apr. 25, 2007), *available at* <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf>.

12 *Id.* at 9.

13 Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3436.

14 *Id.*

15 *Id.*

16 *Id.* at 3438.

17 *Id.* at 3437.

18 *See* 5 U.S.C. § 553 (2000).

19 Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764 (Jan. 25, 2007).

20 *Id.* at 2763-65.

21 *See* OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY POLICY OFFICERS (July 19, 2007), *available at* http://www.whitehouse.gov/OMB/info/regpol/agency_reg_policy_officers.pdf.

II. Differing Notions of Political Accountability

Disagreement over the proper standard of political accountability underlies much of the debate over the Order. Jerry L. Mashaw notes the controversy regarding the proper relationship between the President and agency leaders. This has been intensified by recent assertions of presidential authority by the Bush administration, but its roots are much deeper. No consensus has ever emerged regarding the proper accountability relationship between the President and agency leaders. The Order underscores this disagreement by threatening to shift the balance of power between the executive and Congress, raising some of the most fundamental issues of separation of powers and democratic accountability. To what extent do Congress and the President control the bureaucracy? What is the proper scope of the President's authority to direct the agency officials who implement statutes?

These questions have drawn a wide range of responses. In this Symposium, Paul R. Noe and John Graham respond that as the only nationally elected figure, the President should have the authority to set the broad direction of regulatory policy. Enhanced presidential authority increases political accountability relative to delegating authority to unelected career agency staff. A number of scholars have taken a similar position,²² building on a literature arguing that vigorous presidential involvement in the regulatory process may increase democratic accountability.²³ Other scholars have reached the opposite conclusion. For instance, Peter L. Strauss argues that increasing presidential authority upsets the balance of power between the President and Congress, actually undermining accountability.²⁴ Moreover, Strauss claims that the Order's delegation of executive authority without the consent of Congress raises constitutional issues. The Order shifts authority to RPOs at the expense of the agency heads to which Congress originally delegated. Congress, not the President, must affirmatively grant the presidential appointees serving as RPOs such additional authority.²⁵ Supporters of the Order generally respond that the agency head's power to appoint himself as RPO alleviates this concern.

This range of responses has not been confined to the academic realm. Debate within Congress has fallen along similar lines. Supporters of the Order have noted the same advantages of enhanced presidential control, while members fearful of overreaching executive power have responded both rhetorically and substantively. In February 2007, the House Science and Technology Committee's subcommittee on Investigations and Oversight held a

22 E.g., Robert W. Hahn & Robert E. Litan, *The President's New Executive Order on Regulation*, ECONOMISTS' VOICE, Mar. 2007, at 1, 3, available at <http://www.bepress.com/ev/vol4/iss2/art1>.

23 E.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001).

24 Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

25 *Id.* at 735-36.

hearing on the Order.²⁶ Chairman Brad Miller amended the House version of the appropriations bill funding OMB to prohibit OIRA from implementing the Order.²⁷ The amendment was ultimately not included in the final 2008 omnibus appropriations bill, however.²⁸

III. Accountability and Other Values

The balance of power between the President and Congress has received the greatest attention, but the accountability debate has extended to other important values as well. Cary Coglianese notes considerable concern about the Order's impact on the efficiency of the regulatory process. In particular, he discusses predictions that the volume of guidance material will overwhelm OIRA. Substantial staff increases would be necessary to handle such volume without imposing significant delay, but no such growth has been planned.²⁹

The Order also bears on the ability of agencies to use their expertise when formulating and implementing regulatory policy. Since the advent of regulatory review, some scholars have derided OIRA as a small group of ideological economists meddling with technical policy details that agency engineers and scientists have spent entire careers mastering.³⁰ Loss of expertise is therefore often described as a serious cost of increasing agency responsiveness to presidential preferences via procedural constraints. Similar concerns have been raised with the current Order.³¹ However, Roger G. Noll notes that increasing presidential control does not inevitably reduce the ability of agencies to use their expertise in the regulatory policymaking process. For instance, the Order could have included new standards to improve the quality and consistency of agency benefit-cost analyses, which are often plagued by inconsistent assumptions. Changes along these lines have the potential to reshape the traditional debate between political control and expertise, thereby broadening support for regulatory review.

26 *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation & Oversight of the H. Comm. on Sci and Tech.*, 110th Cong. (2007), available at http://democrats.science.house.gov/publications/hearings_markup_details.aspx?NewsID=1777.

27 H R. 2829, 110th Cong. (2007); Matt Maida, OMB Watch, *Update on Bush Changes to the Regulatory Process*, RegWatch Blog, Dec. 20, 2007, <http://www.ombwatch.org/article/blogs/entry/4406/38>.

28 Maida, *supra* note 27.

29 The Fiscal Year 2008 White House budget actually requests a 14% reduction in OIRA's budget. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, available at <http://www.whitehouse.gov/omb/budget/fy2008/pdf/appendix/eop.pdf> (last visited Dec. 16, 2007).

30 See, e.g., Alan B Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986).

31 See OMB WATCH, E.O. 13,422: UNANSWERED AND UNACCOUNTABLE 8 (2007), available at <http://www.ombwatch.org/regs/PDFs/EO13422UnansweredandUnaccountable.pdf>.

IV. Efficacy of Procedural Constraints

As Coglianesi suggests, the Order also renews debate over the ability of procedural constraints to change outputs of the regulatory process. Congress and the President face a tradeoff between the benefits of delegating policymaking authority to agencies, such as increased expertise and the ability to shield certain issues from politics, and the costs of reduced control and democratic accountability. This expertise-control tradeoff raised by delegation is almost surely the most widely discussed issue in the political science literature on bureaucracy.³² Analysts and policymakers alike often view procedural constraints as a method of capturing the benefits of delegation while minimizing the costs.

However, as Coglianesi notes, over sixty years of experience indicates that procedural constraints may have a relatively modest effect on regulatory outcomes. A growing body of academic analysis suggests that procedural constraints may matter significantly less than the preferences of agency officials and interest groups.³³ New procedural constraints are therefore frequently followed by unfulfilled predictions of drastic effects on the regulatory process. As the debate over ossification of the rulemaking process demonstrates, however, this issue is hardly settled. The impact of this Order on the regulatory process will influence political debate over future procedures and serve as another piece of evidence in the academic discourse about the efficacy of procedural constraints.

V. Procedural Fairness

Finally, the contributors note the Order's impact on procedural fairness and consistency in the regulatory process. Noe and Graham argue that agencies may use guidance documents to circumvent accountability mechanisms. Prior to the Order, guidance was often shielded from most intra-agency review, APA requirements, and OMB oversight. As Coglianesi's discussion indicates, such procedures may be less effective than is commonly assumed. Nonetheless, these constraints are not wholly ineffective, and most observers agree that they serve a useful purpose as well. Even some strong opponents of the current Order have expressed concern with allowing agencies to issue guidance as a functional substitute for legislative rules.³⁴ Imposing two additional procedural standards for OIRA review of guidance documents—the same public transparency requirements currently governing review of rules and a firm

32 For a seminal discussion on the issue, see DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

33 For an empirical investigation, see Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663 (1998).

34 See, e.g., Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1476 (1992).

review timeframe³⁵—may improve the process and broaden support even further.

VI. Conclusions

As Mashaw argues, the debates outlined in this discussion will be resolved by observing implementation of the Order. Coglianesi's emphasis on the ability of presidents, agency leaders, congressional committees, and the courts to influence implementation of regulatory procedures in practice underscores the difficulty of predicting the impact of even a well-defined regulatory procedure. Moreover, the Order is often ambiguous, leaving substantial discretion to OIRA staff, RPOs, and agency heads. The Order's ultimate effect on the balance of power between the elected branches, the efficiency of the regulatory process, and the role of agency expertise therefore remains uncertain.

The authority of an RPO over the commencement of rulemaking activity is a particularly important area of ambiguity. The Order clearly empowers RPOs to take a more active role in the regulatory development process. Some RPOs may seek to extend this authority to approve research conducted in the early stages of the regulatory process, while others may follow a recent OIRA clarification that commencement occurs when a rule receives an identification number. This behavior will be influenced by senior OIRA leadership and other White House staff, who may or may not seek to directly influence the selection of RPOs and their subsequent behavior.³⁶

OIRA's routine implementation of the Order will also be critical. The agency has broad latitude to designate guidance documents as significant and subject to review. The lack of a binding deadline on reviews allows OIRA to greatly influence the rate at which guidance documents are issued. OIRA also faces little public scrutiny in the exercise of this discretion because no sunshine requirements govern the review process. Given the lack of transparency requirements, the agency could use the advice of friendly interest groups to do much of the first-level review of guidance documents. The most significant constraints on OIRA's discretion are likely to be its limited staff and political pressure from Congress. Nonetheless, the preferences of future presidents will shape whether the Order is a major change or a mere footnote.

35 See OMB WATCH, *supra* note 31, at 5.

36 CURTIS W. COPELAND, CONG. RESEARCH SERV., REPORT NO. RL33862, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13422, at CRS-13 (2007), available at <http://www.fas.org/sgp/crs/misc/RL33862.pdf>

