

# Soft Law Reform or Executive Branch Hardball: The Ambiguous Message of Executive Order 13,422

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Imagine that Executive Order (E.O.) 13,422 had been issued by President Al Gore, accompanied by the following press release:

Regulation by executive branch and independent agencies of the federal government has become a defining feature of the American administrative state. Over the past four decades, the decisions of the federal courts interpreting the requirements of the Administrative Procedure Act and the analytic and oversight requirements implemented by my predecessors, Presidents Reagan and Clinton, have made regulatory policy more transparent, participatory and rational—qualities that almost all would agree are the hallmarks of good governance in a democratic society.

These achievements are to some degree jeopardized, however, by the increasing use of agency guidelines as substitutes for formal regulations. These guidelines are technically non-binding, but often operationally controlling for lower level officials and regulated parties. Moreover, this “soft law” is generally not subject to judicial review, the participatory and transparency requirements of the Administrative Procedure Act, or the analytic requirements of existing executive orders and congressional statutes. Under the changed circumstances of extensive substitution of guidance documents for agency rules, E.O. 13,422, along with a Bulletin on Good Guidance Practices issued today by the Office of Management and Budget (OMB), seeks to maintain the gains in good governance that have emerged over the last forty years.

Henceforth, guidance documents, if economically significant, will be subject to procedures similar to the notice and comment requirements for substantive regulations under the Administrative Procedure Act. Moreover, all significant guidance documents will be submitted to OMB, Office of Information and Regulatory Affairs, and posted on agency websites. These postings will include an explanation of why the guidance was needed and how it carries out the agency’s purposes. Guidance documents and their explanations will be subject to the OMB review and consultation requirements that currently apply to agency regulatory actions. Finally, to ensure that agency guidance and other actions are part of a coherent and affordable program of regulatory action, inclusion of regulatory actions in an agency’s annual regulatory agenda and the commencement of proceedings to take any such action will be authorized by a presidential appointee within each agency, either the Regulatory Policy Officer (RPO) established by President Clinton’s E.O. 12,866, or the agency head.

Sounds like responsible government, right? But, of course, E.O. 13,422 was promulgated by George W. Bush without explanation. This is the same

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George W. Bush who has asserted executive prerogative to hold “enemy combatants” picked up anywhere on the planet indefinitely without trial; has authorized government eavesdropping on telephone conversations by American citizens without warrants; has issued hundreds of presidential “signing statements” implicitly declining to enforce the provisions of congressional statutes that conflict with his understanding of the President’s powers as the “unitary executive;” and whose subordinates’ political meddling with the prosecutorial discretion of U.S. attorneys was the final straw in the downfall of his hapless Attorney General, Alberto Gonzalez.

While the Bush Executive Order was supported by long-time proponents of regulatory analysis,<sup>1</sup> pro-regulatory groups, who are suspicious that regulatory analysis is a cover for deregulation, were outraged. Not too surprisingly, OMB Watch concluded that E.O. 13,422 and the OMB Bulletin on Good Guidance Practices represented dangers both to our constitutional system and to the health and safety of all Americans.<sup>2</sup> Public Citizen saw the Order as a scheme to undermine not only the knowledge and expertise of regulatory agencies, but also the ability of the 110th Congress to protect the public from health and safety hazards. It even implied that the White House was giving itself the power to roll back the Democratic gains in the 2006 congressional election, at least where domestic regulatory policy was at issue.<sup>3</sup> The Union of Concerned Scientists urged the Senate to use the confirmation hearings for former U.S. Representative Jim Nussle to head the OMB to try to ensure that “political appointees would not [use E.O. 13,422 to] interfere with the work of agency scientists.”<sup>4</sup>

Serious academics are also concerned. Professor Peter L. Strauss, one of the nation’s most knowledgeable and thoughtful students of administrative law, warned Congress that the new Executive Order threatened to undermine the separation of powers established by the Constitution. In Strauss’s words:

Our Constitution very clearly makes the President the overseer and coordinator of all the varied duties the Congress creates for government agencies to perform. Yet our Constitution’s text, with equal clarity, anticipates that Congress may and

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1 See, e.g., *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. & Tech., 110th Cong.* (2007) (statement of Robert W. Hahn, President, AEI-Brookings Joint Center for Regulatory Studies), available at [http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/hahn testimony.pdf](http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/hahn%20testimony.pdf); Richard Belzer, Executive Order 13422, Part 2: The Kerfuffle over “Market Failure,” <http://neutralsource.org/content/blog/detail/808> (last visited Feb. 1, 2007).

2 OMB WATCH, A FAILURE TO GOVERN: BUSH’S ATTACK ON THE REGULATORY PROCESS 22 (2007), available at <http://www.ombwatch.org/regs/PDFs/FailuretoGovern.pdf>. OMB Watch was formed to monitor political control of federal agencies through OMB and has been consistently skeptical that OMB oversight represents “good government” rather than an attempt to roll back health and safety regulations, particularly by the Environmental Protection Agency.

3 Public Citizen, Executive Order 13,422 and Bulletin on Guidance, <http://www.citizen.org/autosafety/regs/whitehouse/guidance2007/index.cfm> (last visited Nov. 10, 2007).

4 Union of Concerned Scientists, Senate Confirmation of OMB Directorship Should Question OMB Control over Agency Regulations, [http://www.ucsusa.org/news/press\\_release/tomorrows-senate-0048.html](http://www.ucsusa.org/news/press_release/tomorrows-senate-0048.html) (last visited July 24, 2007).

will assign duties to executive officials who are *not* the President. Respecting those duties, he is not “the decider,” but the overseer of decisions by others . . . . [T]he recent Executive Order amendments reflect a different view, in effect making the President not just the overseer, but the decider of these matters.<sup>5</sup>

Strauss’s conclusions seem to be premised primarily on two features of E.O. 13,422 that relate to the position of an agency’s RPO. The first is the provision of the Executive Order that gives the RPO the authority, unless specifically overruled by the head of the agency, to determine which regulatory rulemakings will be included in the agency’s annual plan and whether any rulemaking will begin. This provision replaces the prior language of E.O. 12,866 that the annual plan “shall be approved personally by the agency head.”<sup>6</sup> The second is the provision mandating that each RPO be appointed by the President. This provision also eliminates the prior language in E.O. 12,866 that the RPO would “report to the agency head.”<sup>7</sup> In Strauss’s view these provisions have the potential, if not the design, to take rulemaking authority away from the agency head, to whom it had been delegated by statute, and transfer it to a political operative who might or might not be confirmed by the Senate and who, so far as the Executive Order provides, might report directly to the President.

Professor Strauss is hardly tilting at windmills. Congress normally delegates regulatory authority to departments, agencies, or to the heads of departments and agencies. The implication is that the agency head, always a presidential appointee and always ratified by the Senate, will be in charge of the agency’s agenda. An E.O. divesting the agency head of general control over the agency’s business arguably violates the explicit or implicit terms of hundreds of congressional statutes. And White House control over these policy judgments through a presidential appointee in the agency, not the agency head, centralizes power in the Chief Executive in ways that evade the political checks and balances established by the Constitution. Presidential directives to agency heads may be resisted, and, if so, the President’s only constitutional recourse is to remove the offending officer. This creates, almost inevitably, a high-visibility political contest in which Congress can wield its constitutional authority to decline to approve any presidential replacement. Although I know of no systematic empirical study of administrative or congressional practice in this regard, Professor Strauss is almost certainly correct to conclude that directions to a junior official in an agency are much less likely to be resisted,

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5 *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. & Tech.*, 110th Cong. (2007) (statement of Peter L. Strauss, Professor, Columbia University School of Law), available at [http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apt/strauss\\_testimony.pdf](http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apt/strauss_testimony.pdf). Professor Strauss’s views are elaborated in much greater detail in Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

6 Exec. Order No. 12,866, 3 C.F.R. 638, 642 (1993), reprinted in 5 U.S.C. § 601 (2000).

7 *Id.* at 645.

and if removal were effected, much less likely to generate sustained congressional attention.

But whether these consequences flow from E.O. 13,422 depends upon how the Order is implemented. The Order states that an agency head may still place any item on the agency's regulatory agenda and may order the commencement of a rulemaking proceeding. Moreover, its newly designated section 10 provides that, "[n]othing in this Order shall be construed to impair or otherwise affect the authority vested by law in an agency or the head thereof."<sup>8</sup> In addition, the RPO is designated by the agency head, not the President. And, because virtually all presidential appointees are also subject to Senate ratification of their nominations, it is not obvious that any agency head would be required to designate as the RPO an official who would escape Senate confirmation. As a Congressional Research Service Report to Congress noted, the RPOs appointed pursuant to the prior E.O. 12,866 "were most commonly each agency's general counsel (which are usually presidential appointees with Senate confirmation) or some other presidential appointee within the agencies."<sup>9</sup>

Finally, in a memorandum directed to RPOs, Susan Dudley, the Administrator of the Office of Information and Regulatory Affairs, made clear that she interpreted the Order to maintain the preexisting lines of authority between RPOs and agency heads.<sup>10</sup> In short, there is nothing on the face of E.O. 13,422, or its initial interpretation by the office charged with its implementation, that would suggest a major reorganization of authority over rulemaking within the regulatory agencies, or an attempt to upset the balance of power through which presidents and congresses have routinely waged the 200-plus-year battle for the hearts and minds of administrative officials charged with the implementation of domestic policies.

Should we then believe Rob Portman, the immediate past Administrator of the Office of Management and Budget, that the purpose of E.O. 13,422 was, as my imaginary press release from a pretended President Gore suggested, simply to increase the "quality, transparency, accountability, and coordination" of guidance documents issued by regulatory agencies?<sup>11</sup> It certainly could be so implemented—but by an administration that has been so devoted to the concentration of political and legal power in the Executive Branch and that issued the Executive Order with no explanation? As in so much of

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8 Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2765 (Jan. 23, 2007).

9 CURTIS W. COPELAND, CONG. RESEARCH SERV., REPORT NO. RL33862, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13422, at CRS-5-6 (2007).

10 Memorandum from Susan E. Dudley, Adm'r, Office of Info. and Reg. Affairs, to Reg. Policy Officers (Apr. 25, 2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf>.

11 Memorandum from Rob Portman, Dir., Office of Mgmt. & Budget, to Heads of Executive Dep'ts & Agencies & Indep. Regulatory Agencies 1 (Apr. 25, 2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf>.

administrative law, whether E.O. 13,422 produces sensible (albeit potentially expensive and dilatory) reforms in the promulgation of the “soft law” of guidance documents, or instead provides a good governance cover for executive branch political hardball, will emerge only from the practice of implementing agencies, especially OMB.

