

Essay

The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration

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Introduction

On January 18, 2007, President Bush issued Executive Order 13,422.¹ This Order was issued on the same day that the White House Office of Management and Budget (“OMB”) issued the *Final Bulletin for Agency Good Guidance Practices*.² According to recent commentary, these two documents introduce the potential for a marked expansion of presidential oversight of agency administration.³

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

² Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007) [hereinafter Final Bulletin]. Although the *Final Bulletin* did not appear in the Federal Register on January 18, it was announced on that day, when Executive Order 13,422 was released. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, ISSUANCE OF OMB’S “FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES” (2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>.

³ See generally CURTIS W. COPELAND, CONG. RESEARCH SERV., CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13422 (2007) (discussing changes made by Executive Order 13,422 and how the order represents an expansion of presidential authority over rulemaking agencies); OMB WATCH, A FAILURE TO GOVERN: BUSH’S ATTACK ON THE REGULATORY PROCESS (2007), <http://www.ombwatch.org/regs/PDFs/FailuretoGovern.pdf> (describing the changes resulting from Executive Order 13,422 and the *Final Bulletin* and analyzing potential impacts on the regulatory system).

This Essay attempts to analyze the legal and policy issues arising out of the changes put in place by Executive Order 13,422 and the *Final Bulletin*. In the final analysis, this Essay argues that much of the criticism lodged against these reforms is misplaced. On the contrary, these reforms are part of a gradual accretion of centralized review of agency regulatory action in the White House. In addition, much of Executive Order 13,422 continues the policies and practices that governed agency review in prior administrations. Although significant changes have been made, those changes are not on their own indicative of a revolution in presidential oversight of agency administration.

Part I first briefly discusses the development in the last four decades of centralized presidential oversight of the administrative state, how that oversight has varied in different administrations, and concerns often raised with respect to that oversight function. Next, Part I offers a summary of the changes made by Executive Order 13,422 and the *Final Bulletin* in this area. Part II offers a subjective analysis of the new changes, considering their impact on the balance between agency heads and the President, on agency independence and flexibility, and on the regulatory agenda as a whole.

I. Presidential Oversight of Agency Administration

There has been a constant effort on the part of presidential administrations over the last four decades to exert greater control over the administrative state.⁴ This Part offers a brief history of presidential maneuvers to control regulatory activity and then examines the changes to that process implemented by Executive Order 13,422.

A. Background of Presidential Efforts to Control Administrative Agencies

Executive Order 13,422 is part of a larger trend whereby the executive branch has constantly attempted to exercise greater control over administrative agencies.⁵

The idea of agencies submitting drafts of “significant” rules pertaining to certain issues to the OMB for review before publication in the *Federal Register* was born as part of the Nixon Administration’s

⁴ 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 498 (4th ed. 2002).

⁵ See, e.g., Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 *FORDHAM URB. L.J.* 1257, 1263–64 (2006) (noting that “centralized review of agencies’ regulations . . . has been part of the rulemaking process since the early 1970s”).

“Quality of Life Review” program.⁶ Another advent of the Nixon Administration was OMB Circular A-19, which required agencies to submit proposed testimony, reports, and legislation to the OMB before providing such materials to Congress.⁷ In 1978, the Carter Administration subsequently introduced the idea of submitting proposed regulatory activity with a high level of anticipated economic impact to heightened review in Executive Order 12,044.⁸ This Order required agencies to prepare a regulatory analysis for rules having more than a \$100 million impact on the economy.⁹

Ultimately, the modern development of centralized presidential review of agency regulation came about through President Reagan’s issuance of Executive Order 12,291 in 1981¹⁰ and Executive Order 12,498 in 1985.¹¹ Together, these two orders mandated a whole host of procedures to be implemented when agencies proposed issuing “major” rules.¹² Most importantly, these two orders centralized the role of the Office of Information and Regulatory Affairs (“OIRA”) in reviewing agency regulatory activity.¹³ OIRA had the power to overrule agency determinations as to whether a rule was “major,” to require an agency to obtain and consider additional information, and to delay agency rulemaking at either the proposed or final rulemaking stage until it believed the agency had properly resolved its concerns.¹⁴ OIRA review was tremendously controversial.¹⁵ Its constitutional sta-

⁶ See *id.* at 1264. In fact, President Nixon’s assignment of additional functions to the OMB was part of a general transformation of that office from the “Bureau of the Budget” to something more capable of “bring[ing] recalcitrant cabinet departments and agencies into line.” Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 657–58 (2005).

⁷ See Yoo, *supra* note 6, at 659.

⁸ Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

⁹ See Copeland, *supra* note 5, at 1264.

¹⁰ Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2000).

¹¹ Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2000); 1 PIERCE, *supra* note 4, at 498.

¹² See 1 PIERCE, *supra* note 4, at 498. A rule was defined as “major” if it would impose a cost on the economy of \$100 million or more, result in a major increase in costs or prices, or threaten U.S. economic competitiveness. Exec. Order 12,291 § 1(b), 3 C.F.R. at 127–28.

¹³ See Copeland, *supra* note 5, at 1265–66.

¹⁴ *Id.* at 1265; see also 1 PIERCE, *supra* note 4, at 499. As Copeland has noted, OIRA’s influence on rulemaking was bolstered by its “organizational position within OMB, the agency that reviews and approves the rulemaking agencies’ budget requests.” Copeland, *supra* note 5, at 1265.

¹⁵ See Copeland, *supra* note 5, at 1266 (“Although some believed that OIRA’s authority did not go far enough . . . most of the concerns were that the expansion had gone too far.”).

tus was challenged, its lack of technical expertise and transparency attacked,¹⁶ and, in 1983, a dissatisfied Congress allowed OIRA's appropriation authority to expire.¹⁷

When President Clinton was elected, he issued Executive Order 12,866, which revoked Executive Orders 12,291 and 12,498, yet continued the "general framework of presidential review of rulemaking."¹⁸ This Order continued to require cabinet departments and agencies to submit proposed and final rules to the OMB before publication in the *Federal Register*, but limited OIRA review to "significant regulatory actions."¹⁹ Regulatory action was defined as "significant" if it was likely to: (1) have a large economic impact ("an annual effect on the economy of \$100 million or more"); (2) lead to a "serious inconsistency or otherwise interfere" with other agency action; (3) "[m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs"; or (4) "[r]aise novel legal or policy issues."²⁰ The impact of Executive Order 12,866 limiting OIRA review to "significant" regulatory actions was substantial. Whereas OIRA had once reviewed between 2,000 and 3,000 rules per year, it suddenly reviewed only 500 to 700 rules per year.²¹

Significantly, Executive Order 12,866 recognized that occasionally the impetus for regulatory action will be difficult to state in simply "quantifiable measures."²² Thus, the Order directed agencies to also consider "qualitative measures" of costs and benefits when deciding whether to regulate.²³ In addition, the Order directed agencies to adopt a regulatory approach that maximized net benefits, including "economic, environmental, public health and safety, and other advantages," unless Congress specified by statute "another regulatory approach."²⁴

¹⁶ See *id.* at 1266–67. As Professor Pierce has noted, subsequent developments removed any doubt "concerning the President's power to influence Executive Branch policymaking through the kinds of controls on the informal rulemaking process implemented in Executive Orders 12,291 and 12,498." 1 PIERCE, *supra* note 4, at 500; see *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

¹⁷ See Copeland, *supra* note 5, at 1267 ("[However] the office's statutory authority under the [Paperwork Reduction Act] was not affected and it continued to receive an appropriation via [the] OMB.").

¹⁸ *Id.* at 1270.

¹⁹ Exec. Order No. 12,866 § 6(b)(1), 3 C.F.R. at 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

²⁰ *Id.* at § 3(f), 3 C.F.R. at 641–42.

²¹ COPELAND, *supra* note 3, at 2.

²² Exec. Order No. 12,866 § 1, 3 C.F.R. at 639.

²³ *Id.*

²⁴ *Id.*

In addition, Executive Order 12,866 included a number of other important features.²⁵ It required OIRA generally to complete reviews of proposed and final rules within ninety days.²⁶ The Order also required transparency in OIRA review.²⁷ Finally, the Order required the heads of agencies, as well as independent regulatory agencies, to submit an annual “Regulatory Plan” to OIRA setting forth the agency’s regulatory objectives and priorities, planned significant regulatory action, legal basis for the action, and a statement of the “need for such action.”²⁸

For the first half of the George W. Bush Administration, Executive Order 12,866 was mostly left in place.²⁹ In January 2007, however, the Bush Administration changed this framework.

B. Executive Order 13,422

In the November 2006 general election, the Republicans lost control over both the United States Senate and the House of Representatives.³⁰ On January 18, 2007, shortly after the new Democratically controlled 110th Congress was sworn in to office, the White House and the OMB announced Executive Order 13,422 and released the *Final Bulletin*.³¹ According to critics of these new measures, the timing was directly attributable to the Democrats’ success in the November election.³² And according to an outside observer, the Order was issued without any sort of consultation with agencies or without a detailed description of the problems prompting the revision of Executive Order 12,866.³³ In fact, there was no indication from the White House

²⁵ See COPELAND, *supra* note 3, at 3.

²⁶ Exec. Order No. 12,866 § 5(a), 3 C.F.R. at 647; see COPELAND, *supra* note 3, at 3.

²⁷ Exec. Order No. 12,866 § 4(d), 3 C.F.R. at 645; see COPELAND, *supra* note 3, at 3.

²⁸ Exec. Order No. 12,866 § 4(c), 3 C.F.R. at 642.

²⁹ President Bush did issue Executive Order 13,258, which removed certain duties from the Vice President’s Office and placed them with his Chief of Staff. Exec. Order No. 13,258, 3 C.F.R. 204 (2003). This Order, however, made no substantive change to the OIRA review process. See COPELAND, *supra* note 3, at 1 n.3.

³⁰ See John M. Broder, *Jubilant Democrats Assume Control on Capitol Hill*, N.Y. TIMES, Jan. 5, 2007, at A1; Adam Nagourney, *Democrats Take House*, N.Y. TIMES, Nov. 8, 2006, at A1.

³¹ See *supra* notes 1–2 and accompanying text.

³² See, e.g., Genevieve Smith, *With a Hostile Congress Pushing Back Against White House Initiatives, What’s a President to Do? Govern by Executive Fiat and (Anti-)regulatory Edicts*, AM. PROSPECT, Feb. 26, 2007, <http://www.prospect.org/cs/articles?articleId=12515>. But see John M. Broder, *A Legacy Bush Can Control*, N.Y. TIMES, Sept. 9, 2007, 4 (Week in Review), at 1 (suggesting increased regulatory activity is simply a natural phenomenon as a President’s time in office draws to a close).

³³ *Amending Executive Order 12866: Good Governance or Regulatory Usurpation?: Hearing Before the H. Comm. on Science and Technology*, 110th Cong. 6 (2007) [hereinafter *Hearing*]

that the process for centralized review of agency action was being revised.³⁴ Given that Executive Order 13,422 was released the same month as the Bush Administration faced a new Democratic majority on Capitol Hill, it was unsurprising that the new measure would be criticized as a partisan maneuver to preemptively push back against a new regulatory environment being directed by Congress.

Executive Order 13,422 makes four significant changes to centralized regulatory review.

First, the new Order changes the calculus that agencies are required to undertake in deciding whether or not to pursue regulatory action. Agencies now are required to address in a much more specific way the problem that they intend to address.³⁵ Executive Order 13,422 directs agencies to:

[I]dentify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.³⁶

This amendment's impact is primarily twofold: it requires that this determination be made by the agency "in writing," and it highlights "specific market failure" as a main criterion for regulatory action.³⁷

Still, the Order leaves in place the language from Executive Order 12,866 discussing the importance of considering "qualitative" benefits from regulation and adopting a regulatory approach that maximizes a variety of noneconomic benefits.³⁸ Thus, for the most part, Executive Order 13,422 seems to be a rephrasing of the Clinton Administration Order. Although the importance of "specific market

(statement of Sally Katzen, Adjunct Professor, University of Michigan Law School), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/13feb/katzen_testimony.pdf.

³⁴ *Id.* at 2, 6.

³⁵ Exec. Order No. 13,422 § 1(a)(1), 72 Fed. Reg. 2763, 2763 (Jan. 23, 2007).

³⁶ *Id.*

³⁷ See COPELAND, *supra* note 3, at 4. Of course, the Clinton Administration Executive Order also included a reference to "where applicable, the failures of private markets." See Exec. Order No. 12,866 § 1(b)(1), 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000). The language in the Bush Order requiring an assessment of whether "any new regulation is warranted," however, is entirely new. See Exec. Order No. 13,422 § 1(a)(1), 72 Fed. Reg. at 2763.

³⁸ See *supra* text accompanying notes 22–24.

failure” was certainly elevated in the new Order, it was not an entirely new addition.

Second, Executive Order 13,422 alters the role of the regulatory policy officer (“RPO”) at each agency.³⁹ Most importantly, agencies are now required to designate “one of the agency’s Presidential Appointees” as its RPO.⁴⁰ The RPO is intended to “be involved at each stage of the regulatory process,” to assist in developing “effective, innovative, and the least burdensome regulations” possible.⁴¹ One commentator has noted that this amendment has the potential to limit the discretion of the agency head in designating an RPO while at the same time strengthening the RPO’s relationship with the President.⁴² The new Order also changes the role of agency RPOs. No agency rulemaking may commence or be included in the agency’s regulatory plan “without the approval of the agency’s Regulatory Policy Office.”⁴³ Thus, the White House will have a “gatekeeper” in each agency to monitor new rulemaking and ensure that the President’s priorities are carried out.⁴⁴

Two aspects of the RPO provision are left unclear by Executive Order 13,422. First, it is unclear whether RPOs must be subject to Senate confirmation⁴⁵ and whether, if already confirmed in their previous roles, the RPO role is sufficiently different to require Senate confirmation for the new role.⁴⁶

Second, it is unclear whether independent regulatory agencies, which as noted have previously been immune to presidential attempts to control administrative agencies, must also designate RPOs.⁴⁷ Again, Executive Order 12,866 required agencies *and* independent regulatory agencies to adopt an annual regulatory plan.⁴⁸ Executive Order 13,422, in turn, requires the RPO to sign off on all rulemaking

³⁹ OMB WATCH, *supra* note 3, at 6, 11–13.

⁴⁰ Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. at 2764.

⁴¹ Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. at 645.

⁴² See COPELAND, *supra* note 3, at 6. Of course, Copeland also notes that this impact may be unclear if “most of the regulatory policy officers are already presidential appointees.” *Id.*

⁴³ Exec. Order No. 13,422 § 4(b), 72 Fed. Reg. at 2764.

⁴⁴ Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1.

⁴⁵ COPELAND, *supra* note 3, at 7. This first question is somewhat of an academic debate, because according to the personnel directory of regulatory departments and agencies (known as the “Plum Book”), almost all agency presidential appointees (the field from which RPOs can be selected) are already subject to Senate confirmation. *See id.*

⁴⁶ *Id.* at 8.

⁴⁷ *Id.*

⁴⁸ *See supra* note 28 and accompanying text.

included in the regulatory plan unless specifically authorized by the head of the agency.⁴⁹ Thus, the RPO provision could “arguably be read to require that independent regulatory agencies have presidential appointees” designated as RPOs.⁵⁰ If so, the President’s influence over independent regulatory agencies would likely strengthen, “commensurately lessening the agencies’ relationships with Congress, which created them.”⁵¹

The third impact of Executive Order 13,422 on agency action is its requirement that agencies develop annual aggregate estimates of the costs and benefits of regulatory action.⁵² The Order specifies that agencies (including independent regulatory agencies) must now include in their regulatory plans “the agency’s best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities.”⁵³ In short, this provision appears to “elevate the role of cost-benefit analysis” in the regulatory process.⁵⁴

Perhaps the most significant change brought about by Executive Order 13,422 is the expansion of OIRA oversight of agency action to include the issuance of certain guidance documents issued by administrative agencies. The new Order requires prior OIRA review of “significant” guidance documents.⁵⁵ In addition to providing agencies with the content of the draft guidance document, agencies must also provide a “brief explanation of the need for the guidance document and how it will meet that need.”⁵⁶ Moreover, the OIRA Administrator has the power to demand “additional consultation” before issuing a significant guidance document.⁵⁷

Guidance documents are described in the Order as “agency statement[s] of general applicability and future effect, other than a regulatory action, that set[] forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory is-

⁴⁹ Exec. Order No. 13,422 § 4(b), 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007).

⁵⁰ COPELAND, *supra* note 3, at 8.

⁵¹ *Id.*

⁵² *Id.* at 8–9.

⁵³ Exec. Order No. 13,422 § 4(c), 72 Fed. Reg. at 2764.

⁵⁴ COPELAND, *supra* note 3, at 8.

⁵⁵ Exec. Order No. 13,422 § 7, 72 Fed. Reg. at 2764. The OMB’s *Final Bulletin* explained the context for this expansion of presidential oversight: “Since early in the Bush Administration, OMB has been concerned about the proper development and use of agency guidance documents.” *Final Bulletin*, *supra* note 2, at 72 Fed. Reg. 3432, 3432 (discussing authorities raising concerns about burdensome guidance practices).

⁵⁶ Exec. Order No. 13,422 § 7, 72 Fed. Reg. at 2765.

⁵⁷ *Id.*

sue.”⁵⁸ The OMB has taken the position that “guidance documents” encompass not only the traditional written documents commonly thought of as falling within that category, but also include unwritten materials in a variety of new formats.⁵⁹ Thus, the Order’s definition includes all “guidance materials,” such as those delivered through video, audio, or “interactive web-based software.”⁶⁰ The definition of “significant” agency guidance documents largely mirrors the definition for “significant” agency regulations.⁶¹ Thus, if any of the four criteria listed above with respect to regulatory action⁶² are present with respect to a guidance document, then the guidance is subject to OIRA review.

This expansion of OIRA review to include agency guidance practices has potentially far-reaching impact. Agencies issue numerous guidance documents to clarify statutory and regulatory requirements each year,⁶³ especially regarding highly technical and scientific subjects.⁶⁴ Moreover, applying the significance definition to guidance documents may be particularly difficult. After all, guidance documents cannot bind the public or regulated entities as a matter of law.⁶⁵ Given this uncertain effect of guidance documents, it is unclear how guidance documents “can be expected to have the effects delineated in the definition” of significance.⁶⁶ On the other hand, the OMB has taken the position that there are situations where guidance documents may reasonably be anticipated to “lead parties to alter their conduct in a manner” having an economically significant impact.⁶⁷ At any rate, because OIRA has final authority to determine whether a guidance document is “significant,” the eventual impact of this provision is difficult to ascertain without empirical proof of how it is being administered by OIRA.⁶⁸

⁵⁸ *Id.* § 3(g), 72 Fed. Reg. at 2763.

⁵⁹ Final Bulletin, *supra* note 2, at 72 Fed. Reg. 3432, 3434.

⁶⁰ *Id.*

⁶¹ *Id.* The only difference between the two definitions is that guidance documents are significant if they “may reasonably be anticipated to” lead to one of the four results, Exec. Order No. 13,422 § 3(h), 72 Fed. Reg. at 2763–64, whereas rulemaking is significant where it is “likely to result in a rule that may” lead to one of the four results, *see* Exec. Order No. 12,866 § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

⁶² *See supra* note 20 and accompanying text.

⁶³ *See* COPELAND, *supra* note 3, at 10.

⁶⁴ *See id.* at 10 n.22 (commenting that the Occupational Safety and Health Administration, for example, issued 3,374 guidance documents between 1996 and 2000).

⁶⁵ *Id.* at 11; *see also* *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

⁶⁶ COPELAND, *supra* note 3, at 11.

⁶⁷ Final Bulletin, *supra* note 2, at 72 Fed. Reg. 3432, 3435.

⁶⁸ COPELAND, *supra* note 3, at 11.

II. Effect of Executive Order 13,422 and the Final Bulletin on Agency Regulatory Power

Criticism of Executive Order 13,422 and the OMB's *Final Bulletin* has been strident.⁶⁹ Although the changes initially went unnoticed for a short period of time, a significant number of complaints were levied against the White House once the public and special interest groups began to understand the depth of the changes.⁷⁰

The fact that Executive Order 13,422 was issued so recently makes assessing its actual impact on presidential oversight of agency administration difficult. As Curtis Copeland, writing for Congress, repeatedly emphasized, the true nature of Executive Order 13,422's impact is hard to discern from the face of the Order itself.⁷¹ Instead, whether the Order will have the far-reaching impact its critics suggest will depend largely on the way in which the reforms are implemented by the Bush Administration.⁷²

A second caveat is also in order. Some of the most criticized provisions in Executive Order 13,422 are introduced with language that may arguably be interpreted to be permissive, or that at least allows an exception for overriding circumstances.⁷³ For example, the "principles for regulation" section, which includes the specific market failure criterion, states that "agencies should adhere to the following principles, to the extent permitted by law and where applicable[.]"⁷⁴ This is hardly the language of an absolute unbending requirement, and that distinction will be relevant in assessing whether Executive Order 13,422 will actually have the impact that its critics suggest.

Nevertheless, a number of criticisms have been made that merit discussion. Does Executive Order 13,422 upset the proper balance between the President and agency heads? Do the amendments unduly trespass on the independence and flexibility of administrative agencies? Moreover, is the Order part of a broader antiregulatory agenda, and, if so, is that troubling as a matter of law or policy?

The most important issue raised by Executive Order 13,422 seems to be its potential to upset the proper balance between agency heads

⁶⁹ See *id.* at 5.

⁷⁰ See *id.* at 1.

⁷¹ See, e.g., *id.* at 13–14 ("[T]he ultimate impact of these changes to the regulatory review process is unclear, and will likely depend on how the changes are implemented by OIRA and the agencies.").

⁷² *Id.*

⁷³ See *id.* at 5.

⁷⁴ Exec. Order No. 12,866 § 1(b), 3 C.F.R. 638, 639 (1994), reprinted as amended in 5 U.S.C. § 601 (2000).

and the President. Lurking in the background, of course, is the proper relationship between those two entities and Congress.

Certain provisions in the new Order have the potential to alter the previous balance between agencies and the White House. Former Clinton Administration OIRA head Sally Katzen has placed Executive Order 13,422 and the *Final Bulletin* within the “steady and unwavering effort to consolidate authority in OMB and further restrict agency autonomy and discretion.”⁷⁵ As with the other questions raised by the new Executive Order, much of the criticism centers on the prominence given to “specific market failure” as an impetus for regulatory action.⁷⁶ OMB Watch is particularly skeptical of this provision given the purportedly strong views of market failure held by current OIRA Administrator Susan E. Dudley.⁷⁷ Dudley, according to the group, has an uncommon view of market failure that makes her more likely to conclude that the public has chosen an unhealthy or unsafe outcome than to recognize a market failure.⁷⁸

Moreover, some have criticized certain provisions of Executive Order 13,422 as supplanting Congress’s will.⁷⁹ One group has argued that the “specific market failure” requirement, for example, will replace the standards that Congress has required agencies to consider in adopting regulation with “a new market failure standard Congress has never required.”⁸⁰

There are two primary deficiencies with this criticism of Executive Order 13,422. First, market failure has long been a component of presidential oversight of agency administration, and, as noted, the Bush Administration’s Executive Order simply rephrases the Clinton

⁷⁵ *Hearing*, *supra* note 33, at 6 (statement of Katzen).

⁷⁶ *See, e.g.*, COPELAND, *supra* note 3, at 5 (noting that critics view the “specific market failure” as a new standard for regulatory initiation).

⁷⁷ *See* OMB WATCH, *supra* note 3, at 8.

⁷⁸ *Id.* Susan Dudley’s nomination, and eventual recess appointment as OIRA Administrator, has been a significant source of controversy in its own right. *See* Stephen Barr, *Signs Brew of a Heated Debate over OMB Nominee*, WASH. POST, Sept. 13, 2006, at D4; Press Release, OMB Watch, *Bush Recess Appointment Threatens Public Protections* (Apr. 4, 2007), <http://www.ombwatch.org/article/articleview/3799/1/455?TopicID=1>. Groups like OMB Watch stridently opposed Dudley’s confirmation by the Senate, largely examining the record she developed while working at the pro-business Mercatus Center at George Mason University. *See* Barr, *supra*. In making its point about Dudley’s market-failure views, OMB Watch emphasized, for example, Dudley’s position that federal air bag regulations should have been unnecessary if they truly saved lives and customers demanded them. OMB WATCH, *supra* note 3, at 24 n.6.

⁷⁹ *See* COPELAND, *supra* note 3, at 5 (discussing the example of the Clean Air Act, which requires regulations to be based solely on protecting human health).

⁸⁰ OMB WATCH, *supra* note 3, at 7.

Administration standard.⁸¹ While this may “elevate” the importance of market failure in agency analysis, it did not entirely import such analysis into the regulatory process. Second, it is simply inaccurate to contend that Executive Order 13,422 only allows agency action in the face of a specific market failure, because the text of the Order makes clear that agencies may address a “specific market failure . . . or other specific problem.”⁸²

Furthermore, it is not clear that critics of the Order are correct in asserting that the “market failure or other specific problem” language sets aside statutory commands to act for other reasons. After all, if a statute such as the Clean Air Act demands regulatory action to protect the public health, that would be a “specific problem” that the agency could point to as a sufficient basis for regulatory action. Nor is the fact that agencies must identify the market failure in writing reason for alarm on its own. In fact, it is somewhat ironic for critics of the new Order to criticize its lack of guarantees of transparency while also criticizing its requirements that communication between agencies and OIRA be reduced to writing.⁸³

Another claimed source for imbalance between the President and the agencies under the new Executive Order is the RPO provision.⁸⁴ The argument is that by “installing a political appointee where one did not previously exist,” the White House will be able to exert greater control over agency regulatory matters.⁸⁵ The RPOs, critics suggest, will be “the eyes and ears for [the] OMB.”⁸⁶

This criticism, however, seems to be dramatically exaggerated. As an initial matter, it is not entirely accurate to say that the White House installs RPOs in the agencies, given that RPOs are designated as such by the agency head.⁸⁷ In addition, it is far from clear what practical or legal problem is implicated by the OMB having eyes or ears on the ground at the agencies. In fact, it is likely that such a requirement is essential to meaningful OMB and OIRA oversight. Thus, it comes as no surprise that the Clinton Administration’s Order also had a provision in place requiring agencies to designate RPOs,

⁸¹ See Exec. Order No. 12,866 § 1, 3 C.F.R. 638, 639 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

⁸² Exec. Order No. 13,422 § 1(a), 72 Fed. Reg. 2763, 2763 (Jan. 23, 2007) (emphasis added).

⁸³ See, e.g., COPELAND, *supra* note 3, at 4–5.

⁸⁴ See OMB WATCH, *supra* note 3, at 12–13.

⁸⁵ *Id.* at 13.

⁸⁶ *Id.*

⁸⁷ Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. at 2764.

who were required to report to the agency head and be involved in each phase of the regulatory process.⁸⁸ Finally, even critics such as OMB Watch agree that with respect to many agencies, the RPO provision will have little effect, because “the RPO is already a political appointee.”⁸⁹ In those cases, the RPO provision changes the Clinton Order only by expanding the scope of the duties assigned to the RPO, and not by changing his or her identity or relationship with the White House in any meaningful way.

Critics have also suggested that Executive Order 13,422 has the potential to grind to a halt the ability of agencies to deal with pressing problems or with Congress’s commands.⁹⁰ This argument suggests that requiring agencies to comply with Executive Order 13,422 will limit their flexibility and independence to deal with problems they have been assigned by statute to address.⁹¹

This criticism is largely based on the fact that Executive Order 13,422 adds a new layer of oversight to the process of regulatory action.⁹² The “specific market failure” criterion has been a particularly popular target for critics of the new Order.⁹³ Former OIRA head Sally Katzen critiques this part of 13,422 as a “throw back to the ‘market-can-cure-almost-anything’ approach.”⁹⁴ She explains that this approach has been proven terribly wrong by problems in our society, such as civil rights abuses, that do not originate in market failures.⁹⁵ As noted above,⁹⁶ however, the specific market failure criterion is not exclusive, and the caveat language in the beginning of the section setting forth these principles⁹⁷ makes clear that Congress has the power to set forth other important problems that should be the target of regulatory activity.

Further, Executive Order 13,422 has been attacked as being part of a broader antiregulatory agenda.⁹⁸ This critique is based, in part,

⁸⁸ Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. 638, 645 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000).

⁸⁹ OMB WATCH, *supra* note 3, at 12.

⁹⁰ *See id.* at 22.

⁹¹ *See id.*

⁹² *See id.* at 7.

⁹³ *See, e.g., id.; Hearing, supra* note 33, at 10 (statement of Katzen).

⁹⁴ *Hearing, supra* note 33, at 10 (statement of Katzen).

⁹⁵ *Id.*

⁹⁶ *See supra* note 82 and accompanying text.

⁹⁷ *See supra* notes 73–74 and accompanying text.

⁹⁸ *See Hearing, supra* note 33, at 13 (statement of Katzen) (“[T]he Executive Order should not become a codification of an anti-regulatory manifesto. This is not good government.”); OMB WATCH, *supra* note 3, at 5.

on the new Order's requirement that agencies create a best estimate of aggregate costs and benefits of all regulatory activity planned for the year.⁹⁹ Critics suggest that "cost-benefit analysis is inherently biased against regulation," particularly with regard to environmental and public health problems.¹⁰⁰ Thus, by emphasizing cost-benefit analysis, the Order will inherently reduce regulatory activity.¹⁰¹ This attack on the Order misstates the need for aggregate cost-benefit analysis performed by OIRA. As Curtis Copeland has noted, individual agency regulations on a particular issue may be insignificant, but the cumulative impact of multiple regulations in the same area may reveal a large aggregate impact that would not otherwise be apparent.¹⁰²

In addition, it is extremely unclear how much Executive Order 13,422 represents a deviation from practices in place, especially in the George W. Bush Administration, prior to issuing the Order. In fact, before issuing Executive Order 13,422, the Bush Administration's OIRA had "returned to the role it assumed during the Reagan Administration"¹⁰³ and described itself as the "gatekeeper for new rulemakings."¹⁰⁴ In fact, the Bush Administration embraced a general return to a more aggressive posture for OIRA in light of heavy criticism during the Clinton Administration that OIRA was too permissive.¹⁰⁵ In short, OIRA under the Bush Administration has emphasized economic analysis as a justification for regulatory action, initially increasing the number of rules returned to agencies for further review, and has made other efforts (such as issuing bulletins) aimed at expanding "its influence over agencies."¹⁰⁶ These changes in policy suggest that the reforms implemented in Executive Order 13,422 were part of a trend that has been in place throughout the entire Bush Administration and not simply rash decisions enacted in the face of a newly elected Democratic Congress.¹⁰⁷

⁹⁹ See COPELAND, *supra* note 3, at 8–9.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 9.

¹⁰³ Copeland, *supra* note 5, at 1287.

¹⁰⁴ OFFICE OF MGMT. & BUDGET, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 14 (2002).

¹⁰⁵ See Copeland, *supra* note 5, at 1286–87.

¹⁰⁶ *Id.* at 1287–90, 1297.

¹⁰⁷ Even critics of the Order commonly note that the policies announced therein were emblematic of longstanding Bush Administration efforts toward exerting greater control over

Moreover, all of the above criticisms seem to discount the fact that OIRA is “located within the Executive Office of the President and is the President’s direct representative” in the regulatory process.¹⁰⁸ Thus, whether OIRA serves as a gatekeeper or as a promoter of administrative action will largely depend on the particular President in power at the time.¹⁰⁹ While Presidents Reagan and Bush used the Office in an effort to control regulatory action, the Clinton Administration used the Office to promote proregulatory initiatives.¹¹⁰ Accordingly, one’s position on the desirability of a strong OIRA will often turn on that same individual’s position on the desirability of regulation in general. As such, this criticism more likely reflects a policy preference rather than a valid institutional or legal objection to OIRA review.

In sum, the criticisms that have been levied against the changes put in place by Executive Order 13,422 are misplaced. The new Order neither upsets the proper (or prior) balance between agency heads and the President nor displaces the will of Congress for the will of the executive branch. In addition, concerns regarding the RPO provision and the flexibility and independence left to the agencies after Executive Order 13,422 have been overstated. Finally, although the new Order might represent more of a gatekeeping role for OIRA, it is simply part of a broader regulatory effort put in place over time in Republican presidential administrations and not the sharp revolutionary change that its critics suggest. Of course, presidential review of administrative action could be conducted by the White House in a far more aggressive manner than that envisioned by the simple changes in policy put into effect by the new Order and the *Final Bulletin*. If the balance between administrative agencies and the White House is altered, however, it will likely be the result of other policy changes or informal pressures placed on agencies and not the result of these recent changes to the regulatory oversight process made by the Bush Administration.

Conclusion

Executive Order 13,422 and OMB’s *Final Bulletin* have the potential, depending on their implementation by OIRA, to alter the cur-

agency regulation. See, e.g., *Hearing*, *supra* note 33, at 9 (statement of Katzen); OMB WATCH, *supra* note 3, at 22.

¹⁰⁸ Copeland, *supra* note 5, at 1304–05.

¹⁰⁹ *Id.*

¹¹⁰ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248–49 (2001).

rent practice of presidential review of agency administration. Yet, the terms of the Order and the *Final Bulletin* alone do not represent the usurpation of agency independence and flexibility that their critics have attributed to them. Instead, these changes are part of a gradual trend over the last four decades toward greater presidential oversight of the administrative state.