Testimony of

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before

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law,

on February 13, 2007

concerning

Executive Order 13422, 72 Fed. Reg. 2763 (January 23, 2007), President Bush's recent amendments to Executive Order 12866

Thank you very much for inviting me to testify before you today. I am a scholar of administrative law, who has had the privilege of teaching that subject at Columbia Law School for the past 36 years and who for two years in the 1970's had the honor of serving as the first General Counsel of the Nuclear Regulatory Commission. I was later Chair of the ABA's Section of Administrative Law and Regulatory Practice, a consultant to the ABA's Coordinating Committee on Regulatory Reform, and long-time chair of the Section's Rulemaking Committee. My 1984 analysis of agency relations with the President won its annual prize for scholarship. I have continued since then to write about separation of powers and, in particular, the President's constitutional relationship to the agencies on which Congress has conferred regulatory authority. Attached to this testimony is the current draft of my most recent writing on this subject, an essay to be published this summer by the George Washington Law Review entitled "Overseer or 'The Decider' – The President in Administrative Law." This draft will have to be revised in light of the executive order you are hearing about today, but its bottom line will not. Our Constitution is very clear, in my judgment, in making the President an overseer of all the varied duties the Congress creates for government agencies to perform. Yet our Constitution is equally clear in permitting Congress to assign these duties to them and *not* to the President. He is not "the decider," but the overseer of decisions by others. When the President fails to honor that admittedly subtle distinction, he fails in his constitutional responsibility to "take Care that the Laws be faithfully executed." The assignment of decisional responsibility to others is a part of those laws to whose faithful execution he must see.

Our subject is Executive Order 13422, 72 Fed. Reg. 2763 (January 23, 2007), that amends the long standing Executive Order 12866, concerning regulatory planning and review. Others here today may speak to those elements of the order that reach guidance documents, another of its

important elements, and that heighten the specificity of the analysis the order requires agencies to perform. I will leave those elements largely to them. Let me say only, as a long-time advocate of the proper use of guidance to help the public deal with agency regulatory standards, that I find the extension of the order to guidance documents possibly troubling only in its details. As a long-time supporter, as well, of the President's constitutional authority and wisdom in commanding regulatory analyses in connection with important rulemakings, I find that heightened specificity troubling only insofar as it may be administered to require agencies to decide matters on the basis of factors Congress has not authorized them to consider.

In these remarks I want to address two other aspects of the order, that I find particularly troubling – first, enhancements to the existing provisions respecting the regulatory planning office and officer that amended §4(c)(1) of E.O. 12866 by adding

> *Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Officer,*

and §6(a)(2) of EO 12866 by adding

> *Within 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation.*

and second, an entirely new idea added to §6(a)(1) of EO, requiring that

> *In consultation with OIRA, each agency may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex*

determinations.

Both additions threaten to disturb the difficult but necessary balance between politicians and experts, between politics and law, that characterizes agency rulemaking. The first threatens a dramatic increase in presidential control over regulatory outcomes, to an extent Congress has not authorized and in my judgment must authorize. The second threatens redeployment of a discredited, remarkably expensive rulemaking procedure that delivers substantial controls over the timing and cost of rulemaking into the hands of private parties – notably, I fear, those whose dangerous activities proposed regulations are intended to limit.

I. Presidential Control of Rulemaking Agendas

When President Reagan elaborated the idea of a regulatory agenda in Executive Order 12498,[1] Christopher DeMuth, who had responsibilities for these issues in his administration, characterized it as essentially an aid to the political heads of administrative agencies – requiring career staff to reveal their priorities and plans for rulemaking to agency leadership, just as the annual dollar budget process does, and consequently injecting the agency's political leadership into the picture before matters got set in bureaucratic concrete. Seen in this way, the measure supported Congress's assignments of responsibility – it is, after all, on the agency's political leadership alone that Congress's statutes confer the power to adopt rules. To judge by its own actions in measures like the Regulatory Flexibility Act, Congress like the private community was also attracted by the transparency and added opportunities for broad public participation early notice of rulemaking efforts would provide. President Clinton's Executive Order 12866 continued and in some ways

[1] A predecessor provision may be found in President Carter's E.O. 12044.

strengthened this measure, requiring agencies to designate a regulatory policy officer who would coordinate general issues under the Executive Order – in effect be the agency's designated contact person for the OMB Office of Information and Regulatory Affairs (OIRA). While there were hints that it might be used to effect presidential control over agency policy choices, after years of paying fairly close attention to this question in my scholarship and professional associations, I have never heard that that had happened. On specific issues of importance to him, as Dean Elena Kagan of Harvard has detailed, President Clinton through his domestic policy office – not OIRA – would issue directives to particular agencies on particular issues of importance to his program. President Bush's first head of OIRA, John Graham, initiated a practice of occasional "prompt letters" publicly directing agency attention to matters that he concluded might warrant regulation. But a general centralization of actual control over regulatory agendas, so far as I could tell, was never effected. Until this order.

President Bush's order purports to confer authority on a junior officer in each agency, whose identity must be coordinated with OIRA, to control the initiation of agency rulemaking and, it seems to be intended, its continued processing within the agency. I would have thought conferring this kind of authority Congress's business, not something the President is authorized to accomplish on his own say-so. And if Congress were to ask my judgment about such a step I would call it unwise – as a diffusion of political authority within the agency, that Congress generally entrusts to the agency head. While legislation may permit the head to subdelegate some of her authority to persons she trusts and will take responsibility for, it wisely has rarely if ever permitted subdelegation of ultimate control over rulemaking, and it certainly would be unwise to permit that to persons who are controlled by others outside the agency. Congress as well as the President has political relationships with the agency head. While the President has a formal capacity to discipline agency heads whose

work displeases him, that capacity is sharply limited by the political costs of doing so – including the necessity of securing senatorial confirmation of a successor. As a well-connected friend of mine recently remarked,

> I personally have watched two agency heads tell the President to pound sand — they wouldn't do what they were told and the President knew they had the political capital to win.

Junior officers, given their responsibilities in a process under close White House supervision, knowing as "presidential appointees" that they can be dismissed at any moment, and lacking both this political capital and much prospect that their dismissal would have, in itself, political costs for the White House, are not ever going to be telling the President *or* OIRA to pound sand.

A number of gaps in the order make this problem, in my judgment, a lot worse.

- First, the Clinton executive order reinforced ordinary agency hierarchy by providing in §6(a)(2) that the regulatory policy officer "shall report to the agency head." That language has been omitted. Now it is at least ambiguous to whom the RPO reports. Anyone aware of the change – the agency head, for example – will know that this mandatory relationship has been eliminated.

- Second, the amended order now requires that the "policy officer" be a "presidential appointee," but it doesn't tell us what kind of presidential appointee – one who must also be confirmed by the Senate? One the President can name without need for confirmation? Perhaps a non-career officer in SES, whose appointment occurs only after White House clearance and with a presidentially-signed commission? If it is either of the latter, then the

President has found his way around the constraints the Constitution insists upon, that people who exercise major authority in government can do so only with the Senate's blessing as well as his. Then it becomes obvious that the President has created a divided administration within each agency, with real power vested in a shadow officer who essentially answers only to him. As my friend also remarked, this would be "disastrous."

> First as a practical matter it takes regulatory power away from the head of the agency where Congress has vested it. Second, it continues the political accretion of power in the bureaucracy of the White House, away from public scrutiny. But, the worst part from my vantage point is that it treats the agency as a conquered province — the career staff is explicitly told it is distrusted and is not to make recommendations to the agency head but to the White House's political officers. That in turn destroys communication between the staff and the political level of the agency. And, the agency is quite ineffective when that happens.

- Third, it is unclear to what extent the new controls extend to the independent regulatory commissions. Section 4's language, including the requirement that "Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Officer," is explicitly applicable to independent regulatory commissions. Section 6, that defines the regulatory policy officer's appointment, is not. As a legal requirement of agencies Congress has chosen to constitute as independent regulatory commissions, this is truly extraordinary.

- The final gap I want to note for you, one of signal importance in my judgment, concerns political access. Among the elements that have made the Executive Order regime acceptable

to Congress, and I might add to much of the academic community, are the commitments it contains to a professionalized, unusually transparent and apolitical administration. Oral contacts with outside interests are limited to OIRA's senate-confirmed Administrator or his particular designee; agencies attend any meetings with outsiders; written communications from outsiders are also logged; and all of this information is publicly disclosed. My understanding is that Congress has properly insisted on these elements of transparency, as a condition of its acceptance of this generally valuable regime. The OIRA website, within a generally closed White House environment, has been a remarkable monument to the worth of this insistence.[2] The professional qualities, too, of OIRA's staff, and the striking qualities of its leadership over time, have offered reassurance. Notice that none of these constraints are made applicable to the Regulatory Policy Officer or his office.

So the President has attempted to do by executive order something that, in my judgment, can only be done by statute. Moreover, in doing so he threatens excessive politicization of agency rulemaking, the subversion of a public process by back-corridor arrangements, and compromising the lines of authority Congress has created. These officers will, in practice, be answerable only to him, as is underscored by the disappearance of "shall report to the agency head" from §6(a)(2). Their conversations with him, his lieutenants, and any political friends he may send their way will

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[2] This is not the setting to explore the accounts I am beginning to hear of increasing, and in my judgment, regrettable, politicization and transparency violations in OIRA functioning – for example, deliberate holding back the clock on formal submission of agency proposals to OIRA, so that negotiations and "adjustments" can be complete before the transparency provisions of EO 12866 kick in. See United States General Accounting Office, Report to Congressional Requesters,"RULEMAKING, OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews" GAO-03-929, September 2003, pp. 47-48. When evidence of OIRA changes *has* been available, it has been available to assist reviewing courts in determining whether agencies have themselves reached the decisions statutes commit to their responsibility, and done so only on consideration of the statutorily relevant factors. See *Riverkeeper, Inc. v. EPA*, No. 04-6692-ag(L), 2007 U.S. App. LEXIS 1642 (2d Cir. Jan, 25, 2007), where the published documents showed 58 "major" changes having been made "at the suggestion or recommendation" of OIRA at the proposal stage, and 95 "major" changes made "at the suggestion or recommendation" of OIRA in the rule as finally promulgated.

be invisible to us.

You will likely hear from the other side that the President is, after all, our chief executive, that our Constitution embodies the judgment that we should have a unitary executive, and so even if the result were to convert agency judgments about rulemaking into presidential judgments, that would only be accomplishing what the Constitution commands. This is the subject of the writing I have attached to this testimony. In my judgment it is not only an erroneous argument, but one dangerous to our democracy. The President is commander in chief of the armed forces, but not of domestic government. In domestic government, the Constitution is explicit that Congress may create duties for Heads of Departments – that is, it is in the heads of departments that duties lie, and the President's prerogatives are only to consult with them about their performance of those duties, and to replace them with senatorial approval when their performance of those duties of theirs persuades him that he must do so. This allocation is terribly important to our preservation of the rule of law in this country. The heads of departments the President appoints and the Senate confirms must understand that their responsibility is to decide – after appropriate consultation to be sure – and not simply to obey. We cannot afford to see all the power of government over the many elements of the national economy concentrated in one office.

Professor Peter Shane, a highly respected scholar of the presidency and a former lawyer in the Office of Legal Counsel, put the matter this way in a recent discussion of President Bush's use of signing statements, which I know is not our subject today.

> The Bush Administration has operated until recently in tandem – can there be a three-part tandem? – with Republican Congresses and a Supreme Court highly deferential to executive power. ... It has not only insisted, in theory, on a robust constitutional entitlement to operate free of legislative or judicial accountability, but it has largely gotten away with this stance. And that success – the Administration's unusual capacity to resist answering to

> Congress and the courts – has fed, in turn, its sense of principled entitlement, its theory that the Constitution envisions a Presidency answerable, in large measure, to no one.
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> Critics of the Administration have not infrequently charged that the Administration's unilateralism is antagonistic to the rule of law. After all, the ideal of a "government of laws, not of men" seems conspicuously at odds with a President's expansive claims of plenary authority. But no sane President claims to be above the law and, indeed, President Bush takes pains repeatedly to defend his controversial actions as legal, including the widespread warrantless electronic surveillance of Americans, the incarceration of U.S. citizens as enemy combatants, and the intense interrogation of detainees in Iraq and Afghanistan. I doubt that President Bush thinks himself antagonistic to the rule of law; he just has a different idea of what the rule of law consists of. But what the Administration seems to believe in is a version of the "rule of law" as formalism. It is the rule of law reduced to "law as rules." Under the Bush Administration's conception of the rule of law, Americans enjoy a "government of laws" so long as executive officials can point to some formal source of legal authority for their acts, even if no institution outside the executive is entitled to test the consistency of those acts with the source of legal authority cited. ...
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> The Bush signing statements, like the doctrines they advocate, are a rebuke to the idea of the rule of law as norms or process. They are a testament to the rule of law as law by rules, preferably rules of the President's own imagination.

This executive order is cut from the same cloth.

What might Congress do about this? This looks like a simple affront to two of Congress's responsibilities – to confer organization and authority on elements of government by enacting statutes, and to approve (in the Senate) all appointments to high office (thus creating one of the Constitution's many checks on unilateral authority in any branch). Change here, though, would likely encounter a presidential veto. Can you find a way to avoid that? There remains the power of the purse. While the use of "do not spend" riders in appropriations measures has often been criticized, perhaps this is a setting in which such a rider would be appropriate, attached to a budget the President will find himself compelled to sign. Why should Congress tolerate the expenditure of government funds to pay the salary of one whose powers it has not authorized, and whose functioning can prove destructive of the public institutions it has worked to create?

II. Outsider Control of Rulemaking

I can be much briefer in addressing the provision of the executive order that invites agencies to "consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations," "in consultation with OIRA." This is permissively worded, but one must wonder how permissive its implementation will be. And the point to note is that the difference between "formal rulemaking procedures under 5 U.S.C. 556 and 557" and the notice-and-comment procedures agencies generally employ, is that the former put rulemaking under the procedural control of an administrative law judge, a person trained in trials not policy-setting, and confer on participants in the rulemaking the kinds of rights parties to trials have – rights to put on witnesses, engage in cross-examination, and in other ways slow rulemaking down and add to its internal costs. It is, simply, the delivery of the henhouse to the foxes.

Experience with on-the-record rulemaking led to its virtual abandonment decades ago, and for good reason. Those familiar with the process have recognized for 40+ years that it is simply too clumsy to work except in very isolated instances. In its 1973 judgment in *U.S. v. Florida East Coast Rwy*, 410 U.S. 224, the Supreme Court essentially ruled that agencies did not need to use it in the absence of the clearest of statutory instructions. Congress hasn't been giving those instructions, and agencies haven't been using that process ever since, and for good reason. Experience has taught us that the use of formal rulemaking is cumbersome and out of all proportion to its benefits because trial-type hearings are poorly suited for determinations that turn on policy judgments, and too subject to unwarranted extension and complication by the participant parties. Why, then, revive it now? Just to help one's friends slow things down – throw a good dose of sand into the gears of rulemaking?

Thank you for the opportunity to address you today. I would be happy to answer any questions you might have.