Do Agencies Use Guidance Documents to Avoid Presidential Control?

A recent debate has emerged over whether federal agencies use issue “guidance documents”\(^1\) to avoid presidential influence over the rulemaking process. Guidance documents have long been exempt from review by the Office of Information and Regulatory Affairs (OIRA), which reviews most rules on behalf of the White House. The scope of this exemption is potentially vast, as guidance documents greatly outnumber rules.\(^2\)

Policymakers, courts, and academics have all expressed concern that agencies have abused this loophole. For example, a report from the House Committee on Government Reform notes that guidance documents may allow agencies to circumvent procedures that: “protect citizens from arbitrary decisions and enable citizens to participate effectively in the process.”\(^3\) Similarly, D.C. Circuit opinions have sharply criticized agency use of guidance.\(^4\) Finally, academics have expressed strong concern that agencies abuse guidance documents.\(^5\)

\(^{1}\) The term “guidance document” lacks a clear legal definition. Guidance is commonly associated with a varied set of regulatory materials such as agency interpretations of existing rules, statements outlining how an agency will regulate an evolving area, and internal training manuals. See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-65 (Jan. 23, 2007) (describing guidance as: “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”).

\(^{2}\) No systematic analysis of the total volume of guidance documents has been compiled, but case studies strongly suggest that agencies issue significantly more guidance documents. See, e.g., Peter L. Strauss, The Rulemaking Continuum, 1992 DUKE L.J. 1463, 1469 (showing that Federal Aviation Administration rules are two inches thick while corresponding guidance totals forty feet. Similarly, IRS rules consume a foot of space while supporting guidance documents total over twenty feet).


\(^{4}\) See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (criticizing agency misuse of guidance: “Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”).

In response to such concerns, President Bush issued an executive order\(^6\) in 2007 requiring agencies to receive OMB approval for a subset of “significant” guidance documents. President Obama quickly repealed this executive order, however.\(^7\) This decision signals that the Obama administration does not share the Bush administration’s concern that agencies use guidance documents to undermine presidential control. This paper uses newly available data to analyze the central question underlying this policy difference: do agencies actually use guidance documents in place of rules to avoid presidential control?

**Presidential Control of Guidance**

The Bush administration’s executive order required non-independent agencies to classify all existing guidance documents as “significant” or “non-significant.” Agencies were also required to submit all newly created significant documents to OIRA for approval. The Order defined “significant” guidance as the subset of all documents satisfying the following conditions:

(i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
(iv) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866, as further amended.\(^8\)

This definition of significant guidance closely mirrored the definition of significant rules, suggesting that the Bush administration sought to impose a similar level of control on guidance

documents and rules. The Obama administration’s repeal of the executive order left guidance documents fully exempt from OMB review.

Is Guidance Actually Used to Avoid Presidential Control?

Will agencies exploit the Obama administration’s repeal of the Bush executive order and use guidance documents to skirt presidential control of rulemaking? This paper analyzes data generated by the Bush executive order, which provides the first uniform measure of guidance document significance.

Use of Guidance for Significant Policymaking:

Do agencies use guidance documents to formulate important policy decisions? To analyze this question, a count of significant guidance documents by agency is compiled.11 Restricting the analysis to significant guidance documents has several important advantages relative to studying the entire population of guidance. First, the fact that all significant documents satisfy the significance criteria removes much of the heterogeneity that complicates empirical analysis. As a result, the analysis is not contaminated by the fact that some guidance documents are substantially more important than others. In addition, significant guidance documents are directly comparable to significant rules because the definition of both categories is almost identical.12

The data show that agencies rarely issue significant guidance documents (insert Table 1). A total of 723 significant guidance documents were in effect in September 2008. This sum may appear substantial at first glance, but it is small in comparison to the number of significant rules

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11 Data were unavailable for the Department of Commerce, the Food and Drug Administration, and the Federal Motor Carrier Safety Administration. In addition, independent agencies are exempted from submitting data to OMB, see Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601.
12 OFFICE OF MGMT. & BUDGET 2007, supra note 8.
issued each year. From 1993 to 2008, OMB reviewed over 10,800 significant rules.\textsuperscript{13} Again, the definitions of significant guidance and significant rules are nearly identical, making these categories directly comparable. In short, the proportion of outstanding significant guidance documents is small relative to the body of rules. This suggests that agencies do not frequently use guidance documents to avoid issuing rules that are subject to OMB review.

This finding may be the result of both legal requirements and political forces. In a number of cases, Congress requires agencies to promulgate a rule.\textsuperscript{14} This is partially offset by the fact that Congress also requires agencies to issue guidance documents, however.\textsuperscript{15} In other cases, administrative law doctrine clearly requires the agency to use a guidance document.\textsuperscript{16} Finally, in many cases the agency leader may simply prefer to issue a rule.

Several agencies issued guidance documents at a significantly higher rate than their peers. A qualitative analysis of these outliers provides some insight as to whether this behavior was intended to avoid presidential control. In most cases, the behavior appears to be motivated by the agency’s need to fulfill a policy mandate within a time constraint. The Department of Homeland Security is perhaps the clearest example. The Department was created in relative haste after September 11, and was required to quickly implement a number of policy changes.

\textsuperscript{13} Data gathered from the General Services Administration. See GENERAL SERVICES ADMINISTRATION, REGINFO, http://www.reginfo.gov/public.

\textsuperscript{14} No existing study has systematically analyzed the proportion of agency rules mandated by Congress. A recent study analyzing agency deadlines imposed by Congress shows that some agencies devote a high proportion of their rulemaking docket to non-discretionary rules, however. See Jacob E. Gersen and Anne Joseph O'Connell, Deadlines in Administrative Law, 156 UNIV. PENN. L. REV. 923 (2008).


This pressure was especially significant in the wake of September 11. The Department used guidance because it often lacked the time and resources to make policy via rules. For instance, the newly created Transportation Safety Administration quickly issued a number of guidance documents related to airline safety. Similarly, the Department of Education used approximately one-third of its total guidance to meet the tremendous policymaking mandate imposed by the No Child Left Behind Act. Again, the pressure to quickly implement the law was substantial and the policymaking burden was significant.

Other agencies appear to use much of their guidance to clarify highly technical details. The Department of Transportation is not known as an ideological agency. Political science ideology measures of federal agencies show that the Department is one of the most moderate government agencies. Anecdotally, both Presidents Obama and Bush appointed Transportation secretaries of the opposite party. Transportation’s use of guidance reflected this reputation; over two-thirds of the Department’s total guidance documents were technical modifications to airline and trucking safety standards. These safety standards sometimes changed rapidly in response to new studies and field experience, making rulemaking impractical. Moreover, the technical nature of these regulations required frequent and rapid clarification, which was not amenable to the much slower rulemaking process.

Use of Guidance for Ideological Policy:

If guidance is used to implement ideologically charged policy decisions, it should be revised when a new president appoints agency leaders with different policy preferences. An

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17 See, e.g., TRANSPORTATION SAFETY ADMINISTRATION, SECURITY GUIDELINES FOR GENERAL AVIATION AIRPORTS (2004).
agency leader who disagrees with a guidance document issued by his predecessor has a strong incentive to modify it because amendments to guidance do not require the notice and comment process or the other procedural requirements associated with rulemaking. Revisions are therefore less likely to incite political controversy or consume time of agency staff. If guidance documents are used to implement ideological policy decisions, a substantial number should be amended after a change in partisan control of the presidency.

This change did not occur on a large-scale basis, however (insert Table 2). President Bush’s appointees revised only 11.8 percent of guidance documents issued by previous administrations. This comparison to all previous administrations is an appropriate because Clinton agencies would have been expected to modify any ideological guidance issued by the Reagan and Bush administrations, forcing the second Bush administration to re-modify the guidance.

Several interesting patterns emerge from these data. Agencies such as the EPA and the Department of Labor that used significant guidance documents more often than average revised their guidance infrequently. For instance, the Bush EPA declined to revise several of its guidance documents detailing proper procedures for conducting risk assessments.21 Such guidelines have significant implications for the projected net benefits of particular regulations, and therefore may influence the stringency of environmental regulation. Although the leaders of a Bush EPA may be expected to hold different views on this subject from their predecessors in the Clinton administration, they declined to revise a number of their guidance documents.

Finally, a number of the revisions to significant guidance were highly technical and did not fundamentally alter policy. For instance, virtually all Federal Aviation Administration

21 See, e.g., ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES FOR ECOLOGICAL RISK ASSESSMENT (1998).
(housed within the Department of Transportation) revisions focused on airplane safety standards. Most of these changes were motivated by findings from FAA inspectors or the airlines. Including such technical revisions therefore overstates the extent to which agency leaders modified guidance documents to move policy toward their ideological preferences.

**OMB’s Guidance Reform Nominations**

In 2002, OMB asked the public to nominate guidance for modification. Interested parties submitted 49 such nominations. This fact alone is striking. Given the low cost of submitting nominations, regulated parties would be expected to submit many more nominations if the benefits of reform were significant. Moreover, if guidance were important then OMB would be expected to approve reform suggestions from its constituent interest groups quickly. However, OMB did not act upon most of the nominations even though many came from allies of the Bush administration. Of the 49 nominations, 37 were from an entity traditionally considered as an ally of the Bush administration. Many of the 11 remaining nominations were from nonpartisan groups not traditionally considered as hostile to the Bush administration. The Bush administration nonetheless reformed only 17 of these 49 nominations. The administration declined to reform 21 of the documents, and reform was pending four years later on the remaining 11 documents. This record suggests that guidance reform was not a high priority.

To take one illustrative example, the U.S. Chamber of Commerce proposed reforming an EPA guidance document issued in the Clinton administration encouraging state environmental agencies to deny or revoke operating permits in jurisdictions with a high proportion of minority

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24 Such entities include corporations, industry trade associations, conservative think tanks, and other Bush administration agencies. The classification is available upon request from the author.
or low-income residents. The document allowed concerned parties to file administrative complaints against anyone applying for an operating permit in such an area. The Chamber of Commerce argued that this guidance document exceeded the EPA’s statutory authority and restricted development of business in impoverished areas. The Bush EPA declined to act on this suggestion despite its apparent ideological appeal. The EPA did not comment on the reason for this inaction, but this outcome indicates that guidance reform was a low priority.

**Conclusions**

The Obama administration has not relinquished control over the rulemaking process by suspending OMB review of guidance documents. Agencies do not commonly use guidance documents to circumvent the rulemaking process and OMB review. Significant guidance is issued infrequently relative to rulemaking. Agency leaders with very different ideological views rarely repeal guidance documents issued by their predecessors despite the modest cost of doing so. Finally, the OMB completes reform on only 35 percent of guidance documents recommended for revision.

Concern over agency misuse of guidance may be partially caused by overgeneralization from a few egregious examples of abuse. Such concern may also be partially fueled by interest groups seeking to reduce regulation by consuming limited agency resources with additional procedural requirements. This is not to suggest that agencies never use guidance to skirt OMB review. Generalizing about an entity as large as the executive branch is obviously hazardous, and critics of guidance correctly point to some egregious examples of abuse. Some agencies

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26 **Office of Mgmt. and Budget, Executive Office of the President, Stimulating Smarter Regulation: Summaries of Public Suggestions for Reform of Regulations and Guidance Documents** 320 (2002).
27 *Id.*
28 See **Office of Mgmt. and Budget 2006, supra** note 23, at 111.
29 For such examples, see Anthony, *supra* note 5.
such the FDA\textsuperscript{30} and the IRS\textsuperscript{31} clearly use guidance much more frequently than others. On balance, however, this paper’s results strongly indicate that the Obama administration’s suspension of OMB review of guidance will not undermine presidential control of the rulemaking process.


\textsuperscript{31} The IRS frequently issues interpretative rules. For an analysis of this practice, \textit{see} Kristin E. Hickman, \textit{Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements}, 82 NOTRE DAME L. REV. 1727.
Table 1: Use of Guidance Documents by Agency

<table>
<thead>
<tr>
<th>Agency</th>
<th>Number of Significant Guidance Documents in Effect in August 2008</th>
<th>Number of Significant Rules Issued, 1993-2008</th>
<th>Ratio of Significant Guidance Documents to Rules</th>
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