

# Presidential Management of Agency Rulemaking

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This Article examines legal and policy issues surrounding presidential management of agency rulemaking. Its premise is that there has been sufficient experience with this activity to justify a general appraisal. Therefore, I examine the record of the Reagan administration's program, which is easily the most ambitious to date. Prominent controversies under that program are summarized here. The effort is not to provide a definitive administrative history, but to identify issues likely to arise in the future. My general conclusion is that a presidential oversight program has its place in the administrative state, but that certain controls on its exercise need to be adopted to keep it within appropriate bounds of law and policy.

Part I begins by outlining the constitutional framework within which oversight operates. Part II examines the comparative abilities of the President and Congress to manage regulation, and concludes that there is a need for a limited executive role. Part III describes the evolution of presidential management programs from the early 1970s to date. Part IV assesses the comparative competence of the Office of Management and Budget and the agencies with regard to regulatory issues as well as the relative power of these institutions. In Part V, I examine a number of controversies over the current program's fidelity to statutory authority. Part VI addresses the

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An earlier version of this Article was a Report to the Administrative Conference of the United States. I thank the Conference and its staff for their support, but they bear no responsibility for the views expressed here.

openness of executive oversight, and makes recommendations on an appropriate degree of disclosure. Finally, in Part VII I seek criteria for identifying rulemaking functions that should be excepted from oversight.

### I. *The Constitutionality of Executive Oversight*

The Constitution does not foreshadow the rise of the modern “administrative state” that regulates so many aspects of our lives. Instead, the federal bureaucracy is almost wholly statutory in origin and organization, and therefore occupies an uneasy constitutional status.<sup>1</sup> The provisions of the original Constitution that delineate the interrelations of the three great branches of government are skeletal—even cryptic—in nature.<sup>2</sup> Perhaps because of the flexibility engendered by this characteristic, they have survived almost unchanged despite the vast changes that two centuries have wrought in the nation.<sup>3</sup> Obviously, an accommodation of present practice to ancient text has been requisite. It exists in the form of a considerable body of constitutional doctrine and administrative law that provides legitimacy for modern institutions and guidance about their operations.<sup>4</sup>

Questions about the President’s power to supervise administration in competition with Congress have always invited arguments of Hamiltonian sweep or Jeffersonian caution.<sup>5</sup> A brief review of the

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1. See generally *A Symposium on Administrative Law: The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987).

2. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597-601 (1984).

3. Five amendments have affected presidential elections, succession, and disability. U.S. CONST. amend. XII (affecting the procedures governing presidential elections); U.S. CONST. amend. XX (providing succession procedures for the President); U.S. CONST. amend. XXII (establishing the maximum period one can hold the presidential office); U.S. CONST. amend. XXV (establishing the procedures for presidential disability). See also U.S. CONST. amend. XVII (providing for the direct election of senators).

4. See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 166-70; Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 451-55 (1979).

5. Classic arguments of this kind arose in 1793 concerning Washington’s proposed Neutrality Proclamation. See J. ROCHE & L. LEVY, *THE PRESIDENCY* 10-12 (1964). Hamilton argued that the Proclamation was authorized by a grant of power in Article II:

The second article of the constitution of the United States, section first, establishes this general proposition, “the EXECUTIVE POWER shall be vested in a president of the United States of America.

The same article, in a succeeding section, proceeds to delineate particular cases of executive power. . . . It would not consist with the rules of sound construction, to consider this enumeration of particular authorities, as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations. . . . The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable, that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. . . . The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power. . . .

*Id.* at 10-11.

James Madison responded with the Jeffersonian position:

pertinent text and the major interpretive positions will outline this unresolved debate. Article II vests the "executive Power" in the President.<sup>6</sup> At the least, this provision signifies that the Framers rejected proposals for a plural, divided executive.<sup>7</sup> Perhaps it means no more than that, but presidential partisans have always read it as a substantive grant of "executive" power, whatever that is.<sup>8</sup> Similarly, the President's duty to "take Care that the Laws be faithfully executed"<sup>9</sup> may mean only that he must enforce particular statutory powers that Congress gives him,<sup>10</sup> or that he derives a broader power to reconcile the body of legislation as a whole.<sup>11</sup> Finally, the President has explicit power to require the "Opinion, in writing" of department heads regarding their duties.<sup>12</sup> This clause, obscure of intent, grants the President at least some power to consult with his bureaucratic chiefs.<sup>13</sup> Its presence in the Constitution, however, suggests that the Framers held a view of the presidency that is difficult to reconcile with expansive views of the office.<sup>14</sup>

Congress can respond to claims of broad presidential power by citing its Article I powers to legislate and its related authorization in

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The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must pre-suppose the existence of the laws to be executed. A treaty is not an execution of the laws; it does not pre-suppose the existence of laws. . . . To say then that the power of making treaties which are confessedly laws, belongs naturally to the department which is to execute laws, is to say, that the executive department naturally includes a legislative power. In theory this is an absurdity . . . in practice a tyranny. . . .

Another important inference to be noted is, that the powers of making war and treaty being substantially of a legislative, not an executive nature, the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on those subjects. . . .

*Id.* at 11-12.

6. U.S. CONST. art. II, § 1.

7. See Strauss, *supra* note 2, at 599-601.

8. For a more modern statement of the Hamiltonian position, see *Myers v. United States*, 272 U.S. 52, 118 (1926).

9. U.S. CONST. art. II, § 3.

10. *Myers*, 272 U.S. at 177 (Holmes, J., dissenting) (stating that "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power").

11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting). Chief Justice Vinson noted that "[u]nlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed." *Id.*

12. U.S. CONST. art. II, § 2, cl. 1.

13. See Strauss, *supra* note 2, at 646-48.

14. Justice McReynolds stated:

It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable power here claimed.

*Myers*, 272 U.S. at 207 (McReynolds, J., dissenting).

the "necessary and proper" clause to pass laws effectuating powers vested in the other branches.<sup>15</sup> Today, it is generally accepted that the President is not free to contravene congressional policies embodied in statutes, at least in domestic contexts such as regulation.<sup>16</sup> This principle of congressional supremacy does not, however, tell us how to resolve disputes over power in the interstices between clear statutory commands.

In these situations presidents use executive orders to implement their directives to the bureaucracy, relying on any combination of constitutional and statutory authority that is thought to be available.<sup>17</sup> Thus, these orders often dwell in a zone of twilight, where authority is neither clearly present nor absent.<sup>18</sup> Although interstitial, the programs involved may prove surprisingly durable. Two prominent examples are orders promoting civil rights in government-related activities and orders seeking economic stabilization.<sup>19</sup>

The principle of congressional supremacy also does not tell us how to approach statutes that directly address the power of the constitutional branches. For these separation of powers controversies, the courts employ varying analytic approaches. There are two main competitors, with contrasting implications for the outcome. The Court has often used a formalistic approach that reasons logically from the constitutional text and the Framers' acknowledged purpose to create three independent branches with distinct functions. These cases tend to draw bright lines between the responsibilities of the branches. In recent years, three landmark formalist decisions have produced victories for the executive. In *Buckley v. Valeo*,<sup>20</sup> the Court refused to allow Congress to appoint executive officers. In

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15. See generally Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788 (1975).

16. The Supreme Court held early on that executive officers must obey statutory directives. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612-14 (1838). That proposition is no longer in doubt, absent a challenge by the executive to the constitutionality of the statute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (holding that the President's seizure of steel mills was illegal because it was forbidden by statute).

17. See generally Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L L. 695, 710-12 (1976) (reviewing the President's power to issue rule-like statements); Kennan, *Executive Orders: A Brief History of Their Use and the President's Power to Issue Them*, reprinted in SENATE SPECIAL COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., 2D SESS., EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 20 (Comm. Print 1974); Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105 (1964) (examining the executive order and its use by the President). For a compilation of many important executive orders, see OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES AND RECORDS ADMIN., CODIFICATION OF PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS: JANUARY 20, 1961—JANUARY 20, 1985 (1985).

18. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-40 (1952) (Jackson, J., concurring) (explaining the various situations in which a President may act).

19. See Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1 (1976); *AFL-CIO v. Kahn*, 618 F.2d 784, 789-96 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979).

20. 424 U.S. 1 (1976).

*INS v. Chadha*,<sup>21</sup> the Court invalidated the legislative veto, by which Congress had sought to override executive action by means less formal than legislation. And in *Bowsher v. Synar*,<sup>22</sup> the Court forbade an officer removable by Congress to perform executive functions.

The competing approach is a functional one that assesses the needs of each branch for protection of its "core" constitutional functions. These cases stress the Framers' inclusion of checks and balances, shared powers that aid the overall strategy of controlling each branch and ultimately the government as a whole. Examples include *United States v. Nixon*,<sup>23</sup> recognizing a limited executive privilege, and *Nixon v. Administrator of General Services*,<sup>24</sup> upholding congressional authority to regulate presidential papers. Functional analysis favors complex arrangements blending the powers of the branches; formalism tends to condemn them.

The Supreme Court has explained that formalism is appropriate for cases presenting a threat that one branch will aggrandize itself at the expense of another.<sup>25</sup> There, "good fences make good neighbors." When the Court perceives no sign of aggrandizement, it employs the looser, functional approach.<sup>26</sup> Thus, in *Morrison v. Olson*,<sup>27</sup> the Court upheld provisions of the Ethics in Government Act<sup>28</sup> that provide for court-appointed independent counsel to investigate and prosecute high-level executive branch officials who are accused of serious federal crimes.

The *Morrison* Court upheld a statutory provision allowing removal of independent counsel for "good cause," rejecting arguments that everyone performing executive functions, or at least all prosecutors, must be removable at the will of the President to protect his responsibilities under Article II.<sup>29</sup> The Court then worked an explicit change in the law that will spark widespread argument and speculation about *Morrison's* significance. *Buckley*, *Chadha*, and *Bowsher* had left many observers questioning the continued vitality of *Humphrey's*

21. 462 U.S. 919 (1983).

22. 478 U.S. 714 (1986); see Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779. See generally Symposium, *Bowsher v. Synar*, 72 CORNELL L. REV. 421 (1987).

23. 418 U.S. 683 (1974).

24. 433 U.S. 425 (1977).

25. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986). The Court stated that "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch." *Id.*

26. See *Mistretta v. United States*, 109 S. Ct. 647, 659-60 (1989) (upholding functions of the U.S. Sentencing Commission against a separation of powers challenge).

27. 108 S. Ct. 2597 (1988).

28. 28 U.S.C.A. §§ 49, 591-99 (West 1973 & Supp. 1988).

29. *Morrison*, 108 S. Ct. at 2603-11, 2622.

*Executor v. United States*.<sup>30</sup> That case upheld a “good cause” provision restricting the removal of Federal Trade Commissioners and, in dicta, gave independent agencies such as the FTC broad immunity from presidential supervision. *Humphrey’s Executor* said, however, that the President could remove “purely executive” officers (whoever they are) at will.<sup>31</sup>

This portion of the opinion squelched recent Justice Department arguments that independent agencies cannot constitutionally operate free of plenary presidential removal power.<sup>32</sup> Still, the Court called for an ad hoc inquiry into the relationship between a particular function and presidential supervisory needs. Moreover, the Court stressed that the independent counsel is not a policymaker in the broad sense, in contrast to agencies like the FTC and the Federal Reserve Board.<sup>33</sup> Some independent functions may fall prey to the new balancing test.

It would be a mistake, however, to read *Morrison* as a case that settles much beyond its context. The Court’s formalist opinions, drawing bright lines between the branches, promote political accountability by clarifying the responsibility of executive officers for the choices they make in administering statutes.<sup>34</sup> When accountability cannot be expected to produce sound decisions, as in the situations covered by the Ethics in Government Act, it should be permissible to qualify executive authority.<sup>35</sup> Thus, *Morrison* appropriately endorsed congressional power to remedy special problems

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30. 295 U.S. 602 (1935).

31. *Id.* at 610. In *Myers v. United States*, 272 U.S. 52 (1926), the Court held that Congress could not condition presidential removal of an officer on the Senate’s advice and consent. The Court would not allow Congress to expand the Senate’s role beyond its explicit authorization to review appointments. The Court’s formalist rationale was that no branch should have implied powers to participate in functions constitutionally assigned to another; because removal was an executive function, the Senate could not share it. The Court concluded that Article II granted the President an illimitable power to remove those executive officials whom he had appointed. *Humphrey’s Executor* limited the application of *Myers* to “purely executive” officers.

32. See, e.g., *Bowsher*, 478 U.S. at 760-61 (White J., dissenting).

33. *Morrison*, 108 S. Ct. at 2619.

34. See *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981); Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 503-06 (1987). In *Sierra Club*, the D.C. Circuit stated that it recognized

the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared—it rests exclusively with the President. The idea of a “plural executive,” or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President’s control and supervision over the Executive Branch, the Constitution—and its judicial gloss—vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy.

657 F.2d at 405 (footnotes omitted).

35. See Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 548-49 (1988).

in prosecuting senior executives. It is not a broad warrant for shearing the President of control over other executive functions.

Although uncertainty still surrounds the constitutional status of the agencies and their amenability to presidential supervision, some generalizations can be ventured. Under the "Opinions" Clause,<sup>36</sup> a President may require executive officers to report their views on any policy issues that the President deems important. In return, the President may communicate his own policy views, or those of his chosen subordinates, to agencies and may expect these views to be honored within the limits of discretion conferred by statute. In case of disagreement, however, the President may not simply render a decision himself when Congress has vested such authority in another officer.<sup>37</sup> Instead, the President's remedy is to remove the officer, within statutory limits on that power, in hopes of finding a more compatible replacement.<sup>38</sup>

These principles reveal an enduring tension between presidential supervision of execution and congressional supremacy over legislation.<sup>39</sup> They provide only a framework for addressing, and not a formula for answering, the hard questions that attend the actual administration of government. For example, what if presidential oversight is faithful to the letter of statutes, but appears to violate their

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36. U.S. CONST. art. II, § 2, cl. 1.

37. *The President and Accounting Officers*, 1 Op. Att'y Gen. 624, 625 (1823).

38. *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 489 (1831).

39. In *Myers v. United States*, 272 U.S. 52 (1926), Chief Justice Taft captured these tensions in a single pregnant passage:

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

*Id.* at 135.

spirit? On the other hand, should restrictions on removal of officers be read to forbid kinds of oversight that otherwise would be permissible? I address these and other issues below. In doing so, I begin with the premise that each of the two branches has a serious claim to the oversight of administration, and that accommodation should be sought wherever possible.<sup>40</sup>

## II. *The Need for Executive Management of Rulemaking*

Any appraisal of regulatory oversight must address two broad questions at the outset. First, what goals should oversight try to achieve? Second, which branches of government are suited to pursue each goal? Answering these questions separately helps to clarify issues of technique. For example, we should not belabor a branch for failing to achieve something that is beyond the present capacities of government generally.

The broadest possible role for oversight is “macromanagement,” coordinating national policy on the grand scale. That is a highly complex task, and a central responsibility of government. Nevertheless, there are limits to the amount of coordination that any government can perform. The information necessary to make coherent centralized decisions about society as a whole simply does not exist, as the Soviets so consistently demonstrate.<sup>41</sup> Instead, we must seek “second best” levels of coordination that are geared to actually available knowledge.

A more limited goal is “micromanagement,” which addresses regulation on a case-by-case basis. This kind of oversight can strive to conform individual rules to a set of general principles, such as economic efficiency or distributional equity. More modestly, it can remain within the compass set by the regulator, and ask only such questions as whether the rationale for the rule is sensible and whether factual support is present.

A vigorous call for macromanagement of rulemaking was made by the American Bar Association’s Commission on Law and the Economy, to improve policy coordination and to avoid unnecessary cost, duplication, and conflict:

Our government has adopted a wide variety of national goals. Many of these goals—checking inflation, spurring economic growth, reducing unemployment, protecting our national security, assuring equal opportunity, increasing social security, cleaning up the environment, improving energy sufficiency—conflict with one another, and all of them compete for the same resources. One of the central tasks of modern democratic government is to

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40. There is much wisdom in Professor Freund’s observation that “[i]n the eighteenth-century Newtonian universe that is the Constitution, an excessive force in one direction is apt to produce a corresponding counterforce.” Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 20 (1974).

41. See, e.g., T. SOWELL, KNOWLEDGE AND DECISIONS 41-42 (1980) (emphasizing the advantages of decentralized markets in allocating resources efficiently due to the difficulty of assembling the same information centrally).

make wise balancing choices among courses of action that pursue one or more of these conflicting and competing objectives.

While Congress establishes the goals, it cannot legislate the details of every action taken in pursuit of each goal, or make the balancing choices that each such decision requires. It has therefore delegated this task to the regulatory agencies. But it has given each of the regulatory agencies one set of primary goals, with only limited responsibility for balancing a proposed action in pursuit of the agency's own goals against adverse impacts on the pursuit of other goals. For most of these agencies, no effective mechanisms exist for coordinating the decisions of one agency with those of other agencies, or conforming them to the balancing judgments of elected generalists, such as the President and Congress. Appointed rather than elected, specialist rather than generalist, regulatory agency officials enjoy an independence from the political process—and from one another—that weakens the national ability to make balancing choices, or to hold anyone politically accountable when choices are made badly or not at all.<sup>42</sup>

To illustrate the problem, the Commission noted that, as of 1979, at least sixteen federal agencies bore regulatory responsibilities that directly affected the price and supply of energy.<sup>43</sup> This diffusion of policymaking authority had persisted despite the earlier consolidation of several energy-oriented agencies into a Department of Energy. Similar multiplicity problems presented themselves with respect to antitrust, equal employment, industrial safety, and natural resources policymaking. From this, the Commission concluded:

Congress cannot perform these [balancing] tasks by legislating the details of one regulation after another; that is why Congress delegated rulemaking power to the agencies in the first place, and gave them a wide degree of discretion as to the content of the rules to be issued. The President is the elected official most capable of making the needed balancing decisions as critical issues arise, while the most appropriate and effective role for Congress is to review and, where necessary, to curb unwise presidential intervention.<sup>44</sup>

The Commission did not clearly separate the question of the extent of feasible policy coordination by our government from the question of comparative institutional capacities to perform it. Perhaps for that reason, there is a considerable gap between the broad scope of the macromanagement problem the Commission perceived and its recommendations, which tended toward micromanagement.<sup>45</sup>

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42. COMMISSION ON LAW AND THE ECONOMY, ABA, FEDERAL REGULATION: ROADS TO REFORM 68 (1979) [hereinafter *ROADS TO REFORM*].

43. *Id.* at 70.

44. *Id.* at 73 (footnote omitted).

45. The Commission recommended interagency review of regulatory analyses

Most questions of macromanagement of regulatory policy can be settled only by Congress, through legislation, and even then quite imperfectly.<sup>46</sup> For example, such tasks as the consolidation of scattered functions into the Department of Energy require legislation, but do not eliminate problems of coordinating policy.<sup>47</sup> The executive can play a role, however, analogous to its role in the budget process—one of gathering and organizing proposals for congressional consideration. In contrast, most questions of micromanagement are better suited to the executive branch, which has the more direct power to order or influence particular regulatory actions. Still, congressional oversight can play a role in probing regulatory decisions and seeking information for statutory overhaul.

For several reasons, oversight by both branches tends to favor micromanagement. First, there is the intimidating prospect of assembling the information necessary to any serious effort at large-scale coordination. Second, legislative change is time-consuming and difficult—as the Framers intended it to be. Third, the imperatives of electoral politics tend to force both branches to focus on short-run solutions to problems. Thus, it seems both easier and more profitable to leave cosmic issues and statutory revision for another day, and to concentrate on pending regulations.

Congress is not well suited to coordinate policy, whether the goal be macromanagement or the application of consistent principles to particular contexts. The reasons for this lie in its decentralization, which stems partly from Congress's institutional nature and partly from its current organization. Congress is a collectivity of 535 separately elected individuals. The self-interest created by its fragmented political bases sets distinct limits on the amount of centralization the institution will tolerate.<sup>48</sup> Congress is naturally

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prepared by rulemakers, and, more controversially, legislation granting the President the ability to direct agencies to decide a limited number of "critical" regulatory issues and to order changes in their decisions. *See id.* at 68-91; *see also* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975) (urging an enhanced presidential role in coordinating regulation).

46. For a defense of congressional prerogative and performance, in sharp contrast to the ABA Commission's views, see SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION, pt. 5, at 6-7, 67-81 (Comm. Print 1977) [hereinafter FEDERAL REGULATION].

47. Congress has often authorized the President to prepare government reorganization plans which, within certain limits, may transfer, consolidate, or abolish agency functions. 5 U.S.C. §§ 901-912 (1982 & Supp. IV 1986). The current statute forbids abolishing or transferring all the functions of an executive department or independent regulatory agency. *Id.* § 905 (Supp. IV 1986). Congress's desire to keep close control over reorganization authority is based on its recognition that the placement of a function in one agency rather than another can have important effects on substantive policy. *See generally* Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1 (noting that Congress has increasingly placed emphasis on its role as overseer of the executive branch, and has only grudgingly and reluctantly granted the power of reorganization). For many years, Congress subjected presidential reorganization plans to legislative veto. In 1984, Congress amended the statute to require the plans to be approved by joint resolution. 5 U.S.C. §§ 908-912 (Supp. IV 1986).

48. *See* Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED 332-46 (L. Dodd & B. Oppenheimer 2d ed. 1981).

nonhierarchical; its characteristic process is one of bargaining.<sup>49</sup> Although little will be accomplished without some delegations of authority to make the decisions on which the fate of legislation rests, concentrated power threatens the members' capacity to serve their own constituents and tends to be resisted.

The centrifugal and centripetal forces within Congress are in constant tension and evolution.<sup>50</sup> In recent years, both Houses of Congress have markedly decentralized.<sup>51</sup> A central goal—the opening of policymaking to more diverse influences—has been achieved, but at substantial cost to both the capacity to legislate and the consistency of oversight. The story is one of overreaction to perceived abuses. By the early 1970s, power in Congress was widely perceived to be overly centralized.<sup>52</sup> A series of reforms produced today's congressional structure.<sup>53</sup> In the House of Representatives, under the aptly named "subcommittee bill of rights," a majority of a committee (instead of the chairman) now determines the number and jurisdiction of subcommittees.<sup>54</sup> In the Senate, informal assurances to each Senator of at least one good committee assignment have resulted in a subcommittee chair for most majority Senators.<sup>55</sup>

Because a subcommittee chair provides a platform for political advancement, committee members have an incentive to create many subcommittees.<sup>56</sup> Not surprisingly, subcommittees have proliferated; the number in the House rose by a third between 1971 and

49. Davidson, *The Congressional Budget: How Much Change? How Much Reform?*, in CONGRESSIONAL BUDGETING 153, 158 (W. Wander, F. Herbert & G. Copeland ed. 1984).

50. See generally HOUSE COMM. ON RULES, 97TH CONG., 2D SESS., A HISTORY OF THE COMMITTEE ON RULES (Comm. Print 1983) (providing a history of varying degrees of centralization within the House).

51. See generally A. MAASS, CONGRESS AND THE COMMON GOOD 54-63 (1983).

52. A few powerful committees—and especially their chairmen, selected on the basis of seniority—controlled the congressional agenda in ways that caused other members to feel disenfranchised. The chairmen dominated the committees through their power to control the agenda, the staff, and the existence and composition of subcommittees. Davidson, *Subcommittee Government: New Channels for Policy Making*, in THE NEW CONGRESS 104 (T. Mann & N. Ornstein ed. 1981).

53. Two related developments led to reform. First, the chairmen seemed increasingly out of touch with majority views in Congress and the nation. For example, the bottling up of civil rights legislation throughout much of the 1950s and 1960s exacerbated frustration with the seniority system. Second, the composition of Congress was changing. Increased turnover made the membership of both houses markedly more junior. Mann, *Elections and Change in Congress*, in THE NEW CONGRESS, *supra* note 52, at 37. New members not planning to spend a lifetime in Congress were unwilling to serve an extended apprenticeship before assuming power. *Id.*

54. Davidson, *supra* note 52, at 108. Also, there are limits to the number of chairmanships anyone can hold; previously, one person could chair multiple subcommittees. *Id.*

55. Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in THE NEW CONGRESS, *supra* note 52, at 140.

56. M. FIORINA, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT 62-67 (1977).

1981.<sup>57</sup> The shift of power to the subcommittees has been real: the committees often ratify their action, and have not coordinated subcommittee action firmly.<sup>58</sup> Increasing the number of semiautonomous subunits necessarily makes it more difficult for the chamber to control its procedures.<sup>59</sup> Policy coordination, which is difficult enough for a body with a very crowded agenda, suffers.<sup>60</sup>

Recent congressional studies of the committee system have recommended reducing their number and broadening their jurisdiction.<sup>61</sup> These reforms have languished due to the reluctance of those controlling the present committees and subcommittees to give up their power. In the meantime, the fragmentation of oversight is sometimes extreme. For example, the Environmental Protection Agency reports to thirty-four Senate and fifty-six House committees and subcommittees.<sup>62</sup> So conducted, congressional oversight cannot hope to send an agency consistent signals about policy.<sup>63</sup>

Even if Congress does succeed in improving its own capacities for coordinating policy, much latitude—and need—will remain for the executive to act interstitially under the mass of statutes as they exist at any given time. One primary impetus for such activity is the likelihood of a disparity between theories of regulation held by the administration and the existing body of statutes and regulations. The ebb and flow of federal regulation has been considerable in recent decades. The 1970s witnessed a surge of new “social” regulatory statutes promoting health and safety in broad sectors of the economy.<sup>64</sup> These programs encountered complexities unknown to the older “economic” regulation that controlled entry and pricing in certain industries.<sup>65</sup> We entered an “age of rulemaking” and began developing administrative law to control the new programs.<sup>66</sup> By the end of the 1970s, however, a movement toward deregulation was evident. Long-simmering dissatisfaction with the inefficiencies

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57. A. MAASS, *supra* note 51, at 62; Davidson, *supra* note 52, at 109. A concomitant increase in congressional staff has occurred, mostly in the subcommittees. Malbin, *supra* note 55, at 140-42.

58. A. MAASS, *supra* note 51, at 62-63.

59. The difficulty of legislating has risen: even if the committees usually ratify subcommittee action, legislation is still at peril at both stages of consideration.

60. Ornstein, *The House and the Senate in a New Congress*, in *THE NEW CONGRESS*, *supra* note 52, at 379.

61. See, e.g., HOUSE SELECT COMM. ON COMMITTEES, 96TH CONG., 2D SESS., *LIMITATIONS ON THE NUMBER OF SUBCOMMITTEES AND SUBCOMMITTEE ASSIGNMENTS* (Comm. Print 1980).

62. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PANEL ON CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, DRAFT REPORT 39 (1988). The Panel is considering a number of recommendations to Congress to make oversight more systematic, such as the adoption of an overall agenda for the review of statutory authorities. *Id.* at 85-86.

63. See Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 229-33 (1984).

64. See generally Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278-95 (1986) (discussing the development of federal regulation of health and safety).

65. C. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 9-12 (1977).

66. For the quoted phrase and the temper of the times, see Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

of traditional economic regulation provided an early impetus.<sup>67</sup> But there was also substantial reaction against the stringent new programs of social regulation because they created large redistributions and had inefficiencies of their own.<sup>68</sup> By the early 1980s a period of experimentation with deregulation had borne fruit in such industries as airlines and banking. Then, to bring the story full circle, calls for "reregulation" followed as the costs of deregulation became evident. Today, there remain widely perceived needs to reconsider statutory policies.<sup>69</sup> Meanwhile, there is pressure to update policy to the extent that statutes permit.

Although some substantive statutory overhaul has resulted, most of the important developments have been more informal or indirect.<sup>70</sup> All three branches of the government have recently tried to improve their capacity to control administration within the parameters of existing statutes. Congress has experimented with various techniques to improve its oversight of the mushrooming bureaucracy.<sup>71</sup> The courts have developed new doctrines to provide closer review of both the substance and procedure of agency action.<sup>72</sup> And soon after enactment of the first major group of health and safety statutes, the Nixon administration initiated the first attempts at executive management of regulation.<sup>73</sup>

Executive oversight should not be designed to transfer statutory discretion from the agencies into the White House. The President's bureaucracy lacks the institutional capacity to take on such responsibilities; indeed, we require the full existing resources of the agencies to discharge them. Nor would Congress be likely to ratify such a transfer. Instead, there is a place for micromanagement: probing the agency's fact and policy judgments and ensuring that the agency

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67. See, e.g., FEDERAL REGULATION, *supra* note 46, pt. 6 app. (1978) (providing case studies considering federal regulatory activities in ten major areas of the national economy).

68. See B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 79-94 (1981) (describing the effects of social regulation concerning air quality); Lilley & Miller, *The New "Social Regulation,"* PUB. INTEREST, Spring 1977, at 49 (discussing economic and social problems presented by the "new social regulation" of the 1970s).

69. Calls for reform have come from authors representing a wide political spectrum. See, e.g., S. BREYER, REGULATION AND ITS REFORM (1982); G. EADS & M. FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA (1984); M. WEIDENBAUM & R. PENOVER, THE NEXT STEP IN REGULATORY REFORM: UPDATING THE STATUTES (1983); Lilley & Miller, *supra* note 68.

70. See generally Strauss, *Regulatory Reform in a Time of Transition*, 15 SUFFOLK U.L. REV. 903 (1981) (explaining the types of federal regulatory reform and exploring the potential changes in the 1980s).

71. See generally the valuable six-volume overview by the Senate Committee on Governmental Affairs, FEDERAL REGULATION, *supra* note 46 (1977-78).

72. Rabin, *supra* note 64, at 1295-1315; Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 359.

73. See *infra* text accompanying notes 80-81.

considers factors of general importance to the President's policies, to the extent permitted by law.

Congress has recognized both the need for coordination of government policy and the President's unique capacity to provide it. A number of statutes confer managerial authority on the President. Their existence feeds the current debate over the President's power to control executive policymaking in statutory interstices. They also serve to show how Congress can go about creating and confining executive coordinating powers.

Since enactment of the Budget and Accounting Act of 1921,<sup>74</sup> the President has been responsible for compiling the yearly budget for the federal government and submitting it to Congress for consideration. In general, the Office of Management and Budget (OMB) controls both the budgetary and the legislative requests of federal agencies, including the independent agencies.<sup>75</sup> As a practical matter, OMB derives considerable leverage from this power of review. Congress has occasionally granted federal agencies an exception from one or both requirements, however.<sup>76</sup>

OMB also has power to control the agencies' demands for information from the public, under the Paperwork Reduction Act of 1980.<sup>77</sup> The independent agencies may overrule OMB directives under this statute by majority vote.<sup>78</sup> The component of OMB that administers the Paperwork Reduction Act, the Office of Information and Regulatory Affairs, also administers the President's program for coordinating policymaking.<sup>79</sup>

### III. *The Evolution of Presidential Management Programs*

The first executive oversight program for rulemaking was the Nixon administration's "Quality of Life" review.<sup>80</sup> This program was announced as an interagency review of proposed regulations dealing with environmental quality, consumer protection, and other aspects of public health and safety. In practice the Quality of Life

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74. Ch. 18, 42 Stat. 20 (codified in scattered sections of title 35 U.S.C.).

75. For the origin and evolution of OMB's functions, see S. WAYNE, *THE LEGISLATIVE PRESIDENCY* (1978), and L. BERMAN, *THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921-1979* (1979).

76. *E.g.*, 15 U.S.C. § 2076(k)(2) (1982) (Consumer Product Safety Commission). The procedures for submittal and clearance of agency requests are set forth in OMB Circular A-19 (rev. 1979).

77. Pub. L. No. 96-511, 94 Stat. 2812 (codified in scattered sections of titles 5, 20, 30, 42, and 44 U.S.C.).

78. 44 U.S.C. § 3507(c) (1982).

79. Stormy relations between OIRA and Congress due to the executive orders have led Congress to subject the head of the office to advice and consent. Continuing Appropriations, FY 1987, Pub. L. No. 99-591, 100 Stat. 3341 (1986). For OIRA's early history, see O'Reilly, *Who's On First? The Role of the Office of Management and Budget in Federal Information Policy*, 10 J. LEGIS. 95, 111-15 (1983).

80. The Quality of Life program began in June, 1971. It is discussed in J. QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* 117-42 (1976); see also *Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 60, 61 (1979) [hereinafter *Environmental Hearings*] (statement of John Quarles, former Deputy Administrator, EPA).

review program focused almost exclusively on regulations of the Environmental Protection Agency (EPA). EPA's summary of a new rule and its possible alternatives were sent to reviewing agencies (such as the Council on Wage & Price Stability), which had four weeks to comment, unless OMB extended the time.<sup>81</sup> The OMB staff integrated the comments and criticisms and transmitted them to EPA. The process sometimes prolonged rulemaking for many months. Quality of Life review brought outside views of regulatory costs and alternatives to EPA, with some effects on its policymaking.<sup>82</sup>

President Ford's Inflation Impact Statement program focused on the fiscal impact of regulations. By Executive Order No. 11,821, he authorized OMB to promulgate criteria for agencies to use in determining which proposals were "major" in their effects upon the overall economy.<sup>83</sup> Agencies' rulemaking staffs then prepared Inflation Impact Statements outlining the costs of the rules and furnished them to OMB.<sup>84</sup> It soon became clear, however, that a decentralized process that left the primary responsibility for impact assessment to the agencies would not affect policy choices as much as would external review. Charges were made that the Inflation Impact Statements were post-hoc justifications for decisions already reached rather than actual restraints on the excessive inflationary cost of rules.<sup>85</sup>

In 1978, President Carter issued Executive Order No. 12,044 requiring detailed regulatory analyses of proposed agency rules and

81. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL REGULATION AND FEDERAL REGULATORY REFORM, H.R. Doc. No. 134, 95th Cong., 1st Sess. 506 (1976).

82. For an example of a major EPA regulation that was affected by the review program, see *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.) (en banc) (upholding a regulation reducing gasoline lead content that was affected by interagency review), *cert. denied*, 426 U.S. 941 (1976). In early 1977, the incoming Carter administration terminated the program. See *Environmental Hearings*, *supra* note 80, at 63-66.

83. Exec. Order No. 11,821, 3A C.F.R. 926 (1974), *modified by* Exec. Order No. 11,949, 3 C.F.R. 161 (1976).

84. OMB instructed agencies to include in the evaluation submitted "an analysis of the principal cost or other inflationary effects of the action[,] . . . a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts, and . . . a review of alternatives to the proposed action that were considered." Evaluation of the Inflationary Impact of Major Proposals for Legislation and for the Promulgation of Regulations or Rules, OMB Circular No. A-107 (Jan. 28, 1975) (rescinded by Memorandum to the Heads of Executive Departments and Agencies, Subject: Rescinding OMB Circulars A-85 and A-107 (Oct. 20, 1978)).

85. O'Reilly & Brown, *In Search of Excellence: A Prescription for the Future of OMB Oversight of Rules*, 39 ADMIN. L. REV. 421, 427 (1987).

review by the Executive Office of the President.<sup>86</sup> OMB subsequently issued guidance to the agencies on how to perform a regulatory analysis.<sup>87</sup> President Carter then created the Regulatory Analysis Review Group (RARG), composed of representatives from the principal economic and regulatory agencies.<sup>88</sup> RARG's purpose was to review a limited number of regulatory analyses having substantial economic impact. Its four-member executive committee included representatives from OMB and the Council of Economic Advisors (CEA) as permanent members; the other two memberships rotated every six months among the cabinet departments (excluding State and Defense) and EPA. RARG received staff support from the CEA and the Council on Wage and Price Stability (COWPS), and analyzed only the most important half-dozen proposed regulations each year. In the RARG review process, reports were drafted by the CEA and COWPS staff, commented on and agreed to by the permanent RARG members, and issued in final form for agency consideration.<sup>89</sup>

President Carter also created the Regulatory Council, a group consisting of the heads of regulatory agencies.<sup>90</sup> The Council's principal function was to develop and publish semi-annually the *Calendar of Federal Regulations*, which provided analytical synopses of 120

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86. Exec. Order No. 12,044, 3 C.F.R. 152 (1978) (revoked by Exec. Order No. 12,291). For "major" regulations, regulatory analysis was to contain "a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others." *Id.* at 154.

President Carter explained:

Regulation has a large and increasing impact on the economy. Uncertainty about upcoming rules can reduce investment and productivity. Compliance with regulations absorbs large amounts of the capital investments of some industries, further restricting productivity. Inflexible rules and massive paperwork generate extra costs that are especially burdensome for small businesses, state and local governments, and non-profit groups. Regulations that impose needless costs add to inflation.

Our society's resources are vast, but they are not infinite. Americans are willing to spend a fair share of those resources to achieve social goals through regulation. Their support falls away, however, when they see needless rules, excessive costs, and duplicative paperwork. If we are to continue our progress, we must ensure that regulation gives Americans their money's worth.

President Carter's Regulatory Reform Message to the Congress, 1 PUB. PAPERS 492 (Mar. 26, 1979). He also ordered that regulations be as simple and clear as possible, and that they not impose unnecessary burdens. *Id.*

87. Memorandum from Wayne G. Granquist, Associate OMB Director for Management and Regulatory Policy to the Heads of Departments and Agencies, Regulatory Analysis (Nov. 21, 1978).

88. For an overview of the Carter administration's regulatory management efforts, including RARG operations, see G. EADS & M. FIX, *supra* note 69, at 54-57.

89. From 1977 to 1980, in support of RARG's efforts, COWPS filed 18 reports with 8 departments and agencies. Also, during the same period, COWPS issued 180 other reports (filings, letters, and testimony) commenting on programs and individual regulations. T. HOPKINS, T. LENARD, J. MORRALL & E. PINKSTON, A REVIEW OF THE REGULATORY INTERVENTIONS OF THE COUNCIL ON WAGE AND PRICE STABILITY: 1974-1980, at 2 (1981).

90. Memorandum for the Heads of Executive Departments and Agencies, Subject: Strengthening Regulatory Management, PUB. PAPERS 1905 (Oct. 31, 1978).

to 180 major regulations under development that were likely to have substantial economic or public impact. The Council also assisted regulators in developing cost-effective and consistent regulations. The Council then used the *Calendar* to help identify relationships among upcoming rules, and to develop coordinated plans for dealing with any significant interjurisdictional regulatory issues.<sup>91</sup> The Council also undertook numerous studies and projects designed to improve the regulatory process.

The Ford and Carter precedents influenced the Regulatory Reform bills drafted, but never enacted, between 1978 and 1981.<sup>92</sup> These bills foreshadowed OMB's subsequent role in the Reagan administration. The Office of Information and Regulatory Affairs (OIRA) within OMB was created by the Paperwork Reduction Act, a spinoff from the regulatory reform bills.<sup>93</sup> The Act's more stringent requirements for agency justification of record-keeping requirements that are imposed on the public provide a statutory basis for OIRA to involve itself in the detail of new agency rules because the rules frequently require submissions, reports, and surveys. This legislation was the formal beginning of an institutional OMB structure for rulemaking oversight. Also, all of the major bills gave key roles in oversight to OMB. The Reagan administration borrowed from the bills in the drafting of its first executive order in the first month after the change of administrations in 1981.

The Reagan administration's program for oversight of regulation is the most ambitious to date.<sup>94</sup> Executive Order No. 12,291, "Federal Regulation,"<sup>95</sup> requires executive agencies, to the extent permitted by statute, to observe cost-benefit principles in implementing

91. See *Regulation Reform Act of 1979: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 96th Cong., 1st Sess. 3-270 (1979) (testimony of OMB Director James T. McIntyre, Jr., CEA Chairman Charles L. Schultze, and EPA Administrator Douglas Costle).

92. See, e.g., SENATE COMM. ON THE JUDICIARY, THE REGULATORY REFORM ACT, S. REP. NO. 284, 97th Cong., 1st Sess. 70 (1981); SENATE COMM. ON GOVERNMENTAL AFFAIRS & SENATE COMM. ON THE JUDICIARY, REFORM OF FEDERAL REGULATION, S. REP. NO. 1018, 96th Cong., 2d Sess., pt. 1, at 17 (1980); HOUSE COMM. ON THE JUDICIARY, REGULATION REFORM ACT OF 1980, H. REP. NO. 1393, 96th Cong., 2d Sess. 1 (1980). The bill passed in the Senate, 128 CONG. REC. 5297 (1982), but died in the House. See 128 CONG. REC. 25,662-63 (1982) (statement of Representative Dingell).

93. The Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1982 & Supp. IV 1986), was passed as the only part of the package of Senate Government Affairs bills to have been relatively noncontroversial, while the regulatory reform bills stalled in that committee. See, e.g., SENATE COMM. ON GOVERNMENTAL AFFAIRS, PAPERWORK REDUCTION ACT OF 1980, S. REP. NO. 930, 96th Cong., 2d Sess. 15 (1980) [hereinafter S. REP. NO. 930]. The office was established under 44 U.S.C. § 3503 (1982).

94. See generally Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1235-42 (1981); Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1268 (1981).

95. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 note at 431-34 (1982).

regulations. The order requires executive agencies to evaluate proposed “major rules” (those with a significant effect on the economy) according to a prescribed “regulatory impact analysis.”<sup>96</sup> The central innovations of Executive Order No. 12,291 are the mandatory character of its substantive requirements and its system for their enforcement by OMB.

Section 2 of the order requires agencies, to the extent permitted by law, to “adhere” to five general principles “[i]n promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation.” These principles require agencies to base administrative decisions on “adequate information concerning the need for and consequences of proposed government action,” and to set regulatory objectives, order regulatory priorities, and undertake regulatory action in a way that will maximize the net benefits to society when costs and benefits are compared.<sup>97</sup>

Section 3 of the order requires agencies to issue preliminary and final Regulatory Impact Analyses (RIAs) in connection with major rules. An RIA must include statements of the anticipated costs and benefits of the proposed rule, the anticipated incidence of those costs and benefits, the net anticipated benefits of the regulation, and other potentially more cost-effective regulatory possibilities, with an explanation, if appropriate, of the legal reasons why the most cost-effective means of achieving the anticipated benefits cannot be adopted. The cost-benefit analysis mandated by the order expressly requires the inclusion of beneficial or adverse regulatory effects that cannot be quantified in monetary terms.<sup>98</sup>

On their face, these provisions do not dictate particular regulatory decisions. The terms “cost” and “benefit” are not defined by the order, and the inclusion of unquantifiable costs and benefits in the required calculus can afford agencies significant discretion. The section 2 principles are, however, expressly intended to require agencies to weigh competing values in a particular way, and to be prepared to justify regulatory decisions according to a generally prescribed form of analysis. In this sense, section 2 is not neutrally “procedural.” The order is obviously meant to affect the substance of regulation.

An agency must transmit each proposed major rule, together with a preliminary RIA, to the Director of OMB sixty days prior to the publication of any notice of proposed rulemaking. OMB then has sixty days to review the submission, and may require the agency to consult concerning the preliminary RIA and notice of proposed rulemaking, and to refrain, subject to judicial or statutory deadlines, from publishing its proposal until review is concluded. The order provides, however, that these review powers shall not “be construed as displacing the agencies’ responsibilities delegated by law.”<sup>99</sup>

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96. *Id.* § 3, 3 C.F.R. 128-30.

97. *Id.* § 2, 3 C.F.R. 128.

98. *Id.* § 3, 3 C.F.R. 128-29.

99. *Id.* at 130.

Subsequently, Executive Order No. 12,498 was promulgated to establish a "regulatory planning process."<sup>100</sup> This order requires the head of each executive agency to send OMB a "draft regulatory program" that describes "all significant regulatory actions" to be undertaken within one year. OMB reviews the plan for consistency with administration policy, and a final plan is published. Executive Order No. 12,498 supplements the prior order by giving agency heads and OMB more power over the early stages of the regulatory process. This new authority reduces the capacity of agency staff components to develop a regulatory initiative to the point that it develops a constituency—and a life—of its own. Professors Strauss and Sunstein elaborate this point:

[The orders respond to the] perception that agency heads are, to an undesirable degree, the captives of their own staffs rather than politically powerful managers of agency business. Courts have created a number of techniques to attempt to respond to the problem, including review to ensure that the benefits of regulation are roughly commensurate with the costs. The value of such techniques is, however, severely diminished by institutional limits of the courts, which are not well-equipped to calculate the costs and benefits of regulatory initiatives and are incapable of imposing a hierarchical or coordinative structure. The orders represent an effort to deal with the general problem of uncoordinated and insufficiently accountable administrative decisions.

While the orders on their surface mark a major enhancement of presidential authority, a significant element of their attractiveness lies in their potential to expand the effective authority, accountability, and oversight capacity of the agency head. This potential is particularly strong for Executive Order 12,498. Requiring the development of an agency regulatory plan should have the same effect on the regulatory side as requiring agency presentation of a budget does for fiscal planning. It will provide an annual opportunity for the agency head to focus on the work of her agency in a planning rather than a reactive mode, stressing broad vision and priority setting, and involving her early enough that one may expect her to have a significant impact on options considered. Fewer staff deals will have been cut. The requirement of early disclosure of plans—through ventilation of alternatives (in the case of Executive Order 12,291) and annual statement of the regulatory plan (in the case of Executive Order 12,498)—is thus a means of ensuring that regulatory policy is set by agency heads rather than staffs. In this respect, the two orders may be understood, not only as efforts to enhance presidential or OMB power as against agencies, but also as a means of enhancing the agency

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100. 3 C.F.R. 323 (1985). See generally Note, *Presidential Policy Management of Agency Rules Under Reagan Order 12,498*, 38 ADMIN. L. REV. 63 (1986) (outlining the changes in presidential oversight of regulatory policies through Executive Order No. 12,498).

head's effective control over her staff.<sup>101</sup>

Like the Reagan orders, any permanent regulatory management program must address inherent tensions between political appointees and the career bureaucracy. That topic follows.

#### *IV. OMB and the Agencies: Comparative Competence and Power*

##### *A. Vantage Points: The Place of OMB and the Agencies in the Executive*

OMB is the President's principal institutional means for supervising the federal bureaucracy. Recast from the old Bureau of the Budget, OMB consists of a few hundred civil servants (most of them budget officers) and a growing cadre of political appointees at the top. Since the 1970s, OMB staffing has become increasingly political, with a sharp upsurge from nine to twenty-five Schedule C political appointees in the first Reagan term alone.<sup>102</sup> The Reagan administration also kept close central control over political appointments within the agencies.<sup>103</sup> Both developments respond to the growth of the regulatory bureaucracy since 1970. They reflect presidential efforts to control policy both by designing new functions for OMB and by using traditional executive powers more effectively.

Budget functions have long dominated OMB, to the dismay of some political scientists who yearn for more attention to management.<sup>104</sup> In budgeting, OMB's classic stance has been the skeptical reviewer of requests from agencies that are always wanting "too much." Indeed, a famous theory of bureaucratic behavior holds that the principal endeavor of agencies is to expand their budgets, in search of the power and perquisites that more money can buy.<sup>105</sup> Whether or not this theory fits reality, to the extent that it is accepted within OMB, it affects OMB's behavior.

Attitudes born of the budget process probably carry over to supervision of rulemaking by OIRA.<sup>106</sup> True, the functions are somewhat different—no formal "regulatory budget" yet exists, "appropriations" for which must be coaxed from Congress. Although the direct tradeoffs between scarce federal dollars that

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101. Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 187-88 (1986) (footnotes omitted).

102. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS, S. REP. NO. 156, 99th Cong., 2d Sess. 20 (1986) [hereinafter S. REP. NO. 156].

103. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN. REV. 57, 59 (1987). Pendleton James, Director of the White House Personnel Office, stated: "We handled all the appointments: boards, commissions, Schedule C's . . . [I]f you are going to run the government, you've got to control the people that come into it." *Id.* at 59.

104. *E.g.*, Benda & Levine, *OMB and the Central Management Problem: Is Another Reorganization the Answer?*, 46 PUB. ADMIN. REV. 379, 379 (1986).

105. W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971).

106. See *supra* text accompanying note 93. There is also some functional overlap. OMB reviews rules to ensure that fiscal year and administration budgetary goals are achieved. This review centers on entitlements programs, such as student loans and health care financing.

characterize the budget process do not occur in the oversight of regulation, the perspective of anyone working in OMB is determined by its placement at the apex of the executive branch. An office that sees the full scope of federal regulation must be impressed by its net burdens, and is likely to doubt that any particular rule is indispensable to national welfare. Analogies to budgeting, however, can ignore the principal differences between these functions: unlike regulatory review, budget requests are not confined by preexisting statutory standards, and they lead to automatic legislative resolution of policy issues.<sup>107</sup>

For similar reasons of perspective, agency personnel are likely to view OMB as institutionally overcautious about regulation. Focusing on the statutory missions committed to them, bureaucrats lack any incentive to view their own regulations in competition with other claims for scarce national resources.<sup>108</sup> Therefore, any system for central oversight of regulation will produce conflict between the regulators and their overseers, regardless of the politics of the administration in power.

Former OMB Director James C. Miller III has argued that decentralized regulation advantages control by well-organized interests.<sup>109</sup> This conclusion requires some qualification. The pressures on agencies from all three branches of government and private interest groups foster a quite complex and not readily predictable set of bureaucratic motivations. Traditional theories that agencies are subject to capture by their regulated interests do not account for the complex constituencies and expanded rights of participation that characterize modern regulation.<sup>110</sup> For example, EPA encounters

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107. Strauss & Sunstein, *supra* note 101, at 195.

108. As economist Robert Crandall has observed:

The Administrators of the Occupational Safety and Health Administration, the Environmental Protection Agency, or the National Highway Traffic Safety Administration, for example, are not expending their own budgetary allotments when they mandate outlays by private firms on pollution or safety devices. Their principal goal is to achieve an improvement in environmental quality or human health and safety at a minimum political cost, not necessarily at the lowest social cost. Since few citizens can possibly know how much alternative policies will cost them—in terms of reduced resources for purchasing food, shelter, medical care, or general amusement—it is exceedingly unlikely that the decision which minimizes the social cost of government regulation is the one which appears politically the most prudent to the agency Administrator.

*Administrative Procedure Act Amendments of 1978, Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 389-90 (1978).*

109. Miller, Shughart & Tollison, *A Note on Centralized Regulatory Review*, 43 PUB. CHOICE 83, 86 (1984); see also R. NOLL, REFORMING REGULATION 40-42 (1971) (stressing that only well-organized interests such as regulated groups have the resources to politically or legally affect regulatory agency change).

110. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 190-91 (1978).

effective pressure from both industry and environmental groups. There does seem to be a tendency to compromise among effectively organized interest groups, which often results in service to a fairly broad range of interests.<sup>111</sup> Director Miller has argued that centralized review of regulation limits special interest influence in two ways. First, it adds lobbying costs while potential gain remains the same. Second, because reviewers deal with everyone, there is no reason to expect capture by anyone.<sup>112</sup> Again, qualification is necessary. Political appointees at OMB are naturally more responsive to an administration's friends than to its enemies. Because the issue is marginal gain from the presence of additional process, any group that expects a friendlier reception from OMB than from an agency will favor central review, and will be willing to expend resources in hopes of influencing its outcome. This suggests that the way in which OMB review is actually performed will determine its tendency to reinforce or dampen special interest influence.

Executive oversight also serves separation of powers goals. Congressional oversight of regulation is constant. The President needs to assert his own claims over the executive branch to forestall the formation of "iron triangles" by which agencies, interest groups, and congressional committees might otherwise gain control of regulatory policy. A President needs to be especially concerned with the formation of alliances between agency staff who oppose his policies and committees in a House of Congress that is organized by the party out of power. Because congressional oversight is decentralized, it does not usually send consistent signals to agencies. Only the executive branch, with its hierarchical organization, has the capacity to formulate a consistent set of instructions to the bureaucracy. This provides an opportunity to promote values held by the administration, thereby maximizing the political accountability of regulation.<sup>113</sup>

### *B. Analysis of the Costs and Benefits of Regulation*

The requirement of Executive Order No. 12,291, that agencies perform regulatory analyses to support their rules, had two sources. One was the similar analyses required by executive orders in previous administrations. The other was an existing need to explain the basis for rules to survive judicial review.<sup>114</sup> These developments revealed the major weakness of controlling discretion by means of formal analysis: Either the initial analyst or the reviewing entity may

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111. See generally Bruff, *supra* note 63.

112. Miller, Shughart & Tollison, *supra* note 109, at 85.

113. See generally Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORGANIZATION 81 (1985).

114. See generally Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985) (analyzing the development of judicial review of administrative action and its impact on administrative law); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (examining the use of hard-look review in administrative actions and its effect on administrative law).

disguise a predetermined substantive preference in the garb of considered discourse.<sup>115</sup> Counteracting this weakness should be a major purpose of those who guide the activities of both analysts and reviewers.

Executive review of regulatory analysis can promote its consistent performance in ways that judicial review cannot, for two reasons. First, although courts are decentralized, the executive can review all analyses according to a single set of criteria.<sup>116</sup> Second, although courts do not attempt to require the "best" analyses, just acceptable ones, the executive can pursue both quality and consistency in the agencies' analytic techniques.

Executive Order No. 12,291 requires cost-benefit analysis, which has always been controversial for several reasons.<sup>117</sup> First, the uncertainty and difficulty of the process may render it especially vulnerable to manipulation in service of predetermined outcomes. Second, it tends to be biased against regulation because the direct costs of a rule are likely to be more visible and quantifiable than are its benefits.<sup>118</sup> Third, cost-benefit analysis is usually the province of economists, whose professional orientation favors private ordering and clashes with that of health scientists, who are more risk-averse to possible threats to public health.<sup>119</sup>

What matters most about cost-benefit analysis is the spirit in which it is performed. One skeptic concedes that it is valuable if used by someone "committed to the underlying goals and spirit of a regulatory program," but not if used to mask anti-regulatory bias.<sup>120</sup> Its defenders point out that its stated purpose is to ask questions about rules that any rational observer would address.<sup>121</sup>

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115. See Bruff, *supra* note 63, at 238-40. This weakness of judicial review was identified very early. See *SEC v. Chenery Corp.*, 318 U.S. 80, 99 (1943) (Black, J., dissenting). For its presence in an earlier executive order program, see *supra* text accompanying notes 83-85.

116. For the difficulties the courts face in imparting consistent administrative law commands to agencies, see Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

117. Compare Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) with Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984) (refuting Kennedy's critique of cost-benefit analysis).

118. See McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1279-83 (1987).

119. *Id.* at 1266.

120. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES* 44 (1987) [hereinafter NAPA REPORT] (providing separate views of Richard Wegman). This Report, by an able panel of the National Academy, resulted from an empirical and normative inquiry into presidential management of agency rulemaking in the Reagan administration.

121. See, e.g., Scalia, *Regulatory Review and Management*, REG., Jan./Feb. 1982, at 19, 19-20.

Cost-benefit analysis can reveal and counteract biases that favor excessively stringent regulation. Disputes between OMB and the agencies have persisted concerning two analytic techniques with strong implications for the desirable stringency of regulation. First, agencies have pressed for the use of multiple conservative assumptions in environmental decisions, which favors strict regulation. OMB has urged the use of discount rates for future illnesses,<sup>122</sup> which implies relaxed regulation. Similarly, OMB has pursued efficiency by pressing agencies to replace traditional "command and control" regulations, such as engineering controls, with innovative market-based strategies, such as auctions of rights to pollute.<sup>123</sup>

A second, less controversial, technique is cost-effectiveness analysis. It avoids direct weighing of such imponderables as the value of life by simply asking whether a given strategy is the cheapest means to a posited goal. Present regulations vary greatly by this criterion.<sup>124</sup> This technique's use can help to equalize burdens of regulation, minimizing differences in costs to the economy per unit of gain, by such measures as statistical lives saved. Much of the existing disparity in approach, however, is built into the statutes due to their episodic enactment or because other values intrude, such as equalizing risks to groups of workers regardless of cost differences.<sup>125</sup>

The role of regulatory analysis in undergirding an agency's regulations—and in informing judicial review—is shown by several examples from rulemaking by the National Highway Traffic Safety Administration (NHTSA). In *Center for Auto Safety v. Peck*,<sup>126</sup> the court upheld NHTSA's relaxation of its standard for automobile bumper crashworthiness, although the regulation altered previous agency policy. The court relied heavily on the agency's regulatory analysis, which comprehensively analyzed the costs and benefits of nine alternative standards.<sup>127</sup> NHTSA had estimated that requiring bumpers to survive collisions at 2.5 mph would yield average net benefits per car of \$42 more than the preexisting 5 mph standard.<sup>128</sup>

On the other hand, in the celebrated *State Farm* case,<sup>129</sup> the

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122. OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1988—MARCH 31, 1989, at 35-37 (1988) [hereinafter 1988-89 REGULATORY PROGRAM].

123. OMB has urged EPA to adopt such an approach for the protection of stratospheric ozone. See 53 Fed. Reg. 30,566 (1988) (to be codified at 40 C.F.R. pt. 82).

124. NAPA REPORT, *supra* note 120, at 2, 30; see also Lilley & Miller, *The New "Social Regulation,"* 47 PUB. INTEREST 49, 52-58 (1977) (concluding that the regulatory decision-making process is inefficient and leads to higher costs than are necessary to achieve stated objectives).

125. See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 687 (3d ed. 1986).

126. 751 F.2d 1336 (D.C. Cir. 1985) (Scalia, J.).

127. *Id.* at 1342, 1362-66; see also *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 880-84 (4th Cir. 1983) (relying on regulatory analyses to uphold a rule), *cert. denied*, 465 U.S. 1080 (1984).

128. OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1987—MARCH 31, 1988, at xviii (1987) [hereinafter 1987-88 REGULATORY PROGRAM].

129. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

Supreme Court held that NHTSA's rescission of its automobile passive restraint regulation was arbitrary and capricious.<sup>130</sup> An otherwise comprehensive regulatory analysis had failed to consider a major alternative to rescinding the existing standard: requiring airbags.<sup>131</sup> Thus, requirements for persuasive analysis restrict an agency's discretion to alter a previous policy that was itself carefully justified.

Cost-benefit analysis has also led NHTSA to impose new regulations. In 1983, NHTSA required new automobiles to have center high-mounted stop-lamps.<sup>132</sup> The regulation followed field experiments with various types of stop-lamps, and reflected NHTSA's estimate that the ones required would prevent 40,000 injuries and over \$400 million in property damage annually, at a cost of \$70 million per year.<sup>133</sup>

### C. *The Nature of OIRA Oversight*

Review of rules within OIRA is generalist in nature. It is performed by "desk officers," who are typically young economists, lawyers, or policy analysts with little prior experience in government or with the programs they oversee. Because most review is performed by the individual desk officers, OIRA is rather decentralized. The consistency of desk officer review is reduced by the lack of formal training programs or detailed written instructions on their tasks; on-the-job training is to suffice. Because OIRA reviews all rules of covered agencies, volume precludes detailed analysis of rules. Desk officers sort new rules to identify the most important, and dispose of most rules quickly.<sup>134</sup>

The goals of review in OIRA are based upon a recognition that, like any other outside review, executive oversight can make regulation more reasoned by forcing articulation of the basis of proposals. OIRA review is closely similar to the generalist "hard look" review of the courts, which asks whether regulations are persuasively reasoned and consistent with the agency's other policies and its statute.<sup>135</sup> Thus, the executive can both pursue optimal policy and

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130. *Id.* at 40-57.

131. See McGarity, *supra* note 118, at 1327.

132. 48 Fed. Reg. 48,235; 48,235 (1983).

133. 1988-89 REGULATORY PROGRAM, *supra* note 122, at 16, 31.

134. OMB has preferred to review all rules rather than to allow agencies to apply criteria defining rules meriting review. As a result, OMB's latest figures show that in 1987, 70.5% of the rules were approved "without change," 23.7% were approved "with change," 2.5% were "withdrawn by agency," and 0.4% were "returned for reconsideration." *Id.* app. IV at 553.

135. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983). The NAPA REPORT, *supra* note 120, quotes an OIRA staff member as stating that the goal is to obtain a "common sense," outside review of the agency's product. *Id.* at 39; see also J. LASH, K. GILLMAN & D. SHERIDAN, A SEASON OF SPOILS 24 (1984) (noting

search out analytic errors that would otherwise cause problems in court.

Of course, it is also possible for OIRA to introduce rather than to remove regulatory defects. A certain amount of tinkering with rules probably results from the efforts of desk officers to justify their own existence.<sup>136</sup> That effect, however, probably attends any scheme for centralized review.

OIRA's principal officers do not expect expertise or research from the desk officers. It would not be sensible to do so, in view of the vastly greater expertise and resources of the agencies. For example, EPA, with a staff of about 10,000, submits all its rules to four desk officers in OIRA, who receive some assistance from other OIRA and budget personnel.<sup>137</sup> These officers have neither the time nor the expertise to evaluate conflicting interpretations of technical data in a rulemaking.

In this system, tension with agency heads is automatic. Because the agency heads typically are not technical experts in their regulatory fields, they have already provided generalized review of a regulation that they send to OMB. Moreover, they regard themselves as cooperative in achieving the goals of the administration that appointed them. The premise of centralized review, then, is that the judgment of the political appointees requires an outside check—that their judgment is affected by exposure to daily pressure from career staff, the interest groups, and congressional committees, or at least by a natural overcommitment to the statutory mission of the agency.<sup>138</sup>

Agency officials have often called for OIRA to be more selective in its review.<sup>139</sup> Thus, OMB is perceived to suffer priority problems. Essentially, the complaint is the one so often lodged against agencies, that there is too much burdensome process and delay with too little result. This reflects on the judgment of desk officers in selecting issues to discuss with agencies; rules that receive only cursory

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that former OIRA Deputy Administrator Tozzi claimed he could “tell in about four minutes if a rule made sense”).

136. S. REP. No. 156, *supra* note 102, at 19. The Committee Print quotes a former EPA desk officer at OMB as stating that “[a] good desk officer does change a rule. To make your mark, you get changes made. I felt kind of funny handing [my supervisor] back a rule saying it was consistent [with Executive Order No. 12291].” *Id.*

137. *Id.* at 18-19.

138. *See Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981). The D.C. Circuit noted:

Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

*Id.* The D.C. Circuit's analysis is reminiscent of political scientist James Q. Wilson's observation that if agencies are captured by anyone, it is by their staffs. *See The Dead Hand of Regulation*, 25 PUB. INTEREST 39, 48 (1971).

139. NAPA REPORT, *supra* note 120, at 39.

attention are not much delayed. Although OIRA has recently instituted a tracking process for regulations under review,<sup>140</sup> controversy between a desk officer and agency personnel is the typical mechanism for bringing issues to the attention of senior officers in OIRA and OMB. Thus, although OIRA lacks formal appeals processes, issues percolate up through the bureaucratic chains in the agencies and in OMB until they are resolved.

The presence of OMB's review program has led to the formation of "mini-OMBs" in the agencies to mimic OIRA review, in hopes of forestalling embarrassment from negative comments by OIRA.<sup>141</sup> Some of the conflict inherent in the program then shifts into the agencies, where the mini-OMBs (which are usually in the agency head's office) struggle for power with the program offices. This development adds a new level of clearance and delay to the rulemaking process, unless offset by speedier OMB review.<sup>142</sup> If the mini-OMBs become a permanent feature of the government scene, OMB might be able to shift its emphasis toward macromanagement issues such as rationalizing statutory authorities.

At present, due to lack of resources OMB cannot provide much coordination on issues concerning more than one agency. Some critics consider the Carter administration's RARG<sup>143</sup> to have been better adapted for in-depth review, on grounds that it provided a mechanism for rethinking statutory schemes, for balancing major regulations with other goals, and for aggregating experience with regulatory analysis.<sup>144</sup> A recent study prepared by the National Academy of Public Administration (NAPA Report) recommends creating a regulatory analysis office for these purposes.<sup>145</sup> At present, however, OIRA does have a group of "superanalysts" review agencies' analyses, seeking improvements in the technique. And whatever advantages the Carter administration's process may have had in depth of inquiry were won at the cost of sharply reduced coverage, because only a handful of regulations were reviewed each year.

#### D. *Bargaining in the Shadow of Presidential Power*

Executive Order No. 12,291 states that it is not to be construed as

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140. Under this tracking process, a briefing book for the senior officers gives the status of significant regulations and provides an opportunity to monitor the desk officers.

141. NAPA REPORT, *supra* note 120, at 39.

142. See GENERAL ACCOUNTING OFFICE, IMPROVED QUALITY, ADEQUATE RESOURCES, AND CONSISTENT OVERSIGHT NEEDED IF REGULATORY ANALYSIS IS TO HELP CONTROL COSTS OF REGULATIONS 51 (1982).

143. See *supra* text accompanying notes 88-89.

144. NAPA REPORT, *supra* note 120, at 40.

145. *Id.* at 41. The Report also suggests creating a parallel office within the General Accounting Office or the Office of Technology Assessment. See *id.*

"displacing the agencies' responsibilities delegated by law."<sup>146</sup> OMB's formal power, then, is limited to "jawboning" the agencies: arguing over proposals; delaying the issuance of regulations while persuasion is sought; and, ultimately, placing critical comments in the public file to which the agency must respond. How does this work in practice? The NAPA Report concluded that "OMB arguments are more than advisory but still less than mandatory. The review process is more one of negotiation and accommodation than of agency initiatives being overruled by OMB demands. Agencies are not monolithic, and political appointees frequently differ with career employees."<sup>147</sup>

This assessment seems generally correct, with some qualifications. The system is built for both conflict and compromise. Consider the advantages held by each of the two parties. An agency has an initial advantage because it sets the parameters of the debate. Still, agencies draft their rules to survive the anticipated nature of OMB review.<sup>148</sup> Thus, OMB has more pervasive influence than raw statistics on rules altered during its review would reveal.<sup>149</sup> Summary rejection of an agency submission is rare. Negotiations usually produce tradeoffs at the margins of the agency proposal (as, indeed, they do in the budget process).<sup>150</sup> An agency also has massive advantages in the size and expertise of its staff, and can respond in depth to any position taken by OIRA. An agency displeased by an OMB position, while appealing within the executive branch, can seek allies among the interest groups or in Congress.<sup>151</sup> Finally, agencies retain the formal authority to promulgate rules, and can do so if they are willing to persist in opposing OIRA's point of view. When statutory or judicial deadlines for rulemaking loom, this authority gives agencies considerable leverage with OIRA.

OMB, however, has advantages of its own. First, there is the power of persuasion, which varies with the cogency of its positions and the power of the individuals asserting them. Second, OMB can use the threat of further delay to press acceptance of its views. Experience has shown this to be a powerful tool. Third, OMB can play on the allegiance to the administration of senior political appointees in the agency in an effort to sway them from positions generated by

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146. Exec. Order No. 12,291, § 3(f)(3), 3 C.F.R. 127, 130 (1982), *reprinted in* 5 U.S.C. § 601 note at 431-34 (1982).

147. NAPA REPORT, *supra* note 120, at 26.

148. Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 41, 45-50 (1984).

149. *See supra* note 134.

150. *See* NAPA REPORT, *supra* note 120, at 27-28.

151. G. EADS & M. FIX, *supra* note 69, at 135 conclude:

[Case studies involving] OSHA and EPA . . . illustrate . . . the limited powers, even under the broad Reagan executive order, that the White House actually has to force regulatory changes on unwilling agencies if such agencies are prepared to protest the changes all the way to the president and to leak word of their protest to the press.

career staff.<sup>152</sup> Here too, OMB has repeatedly demonstrated its practical power. Fourth, OMB's leverage depends on its other powers over the agencies: its budget and legislative clearance functions; its statutory power to control requests for information from the public; and, ultimately, its ability to request the President to remove an uncooperative official. Given the likelihood that an agency's budget and legislative program eclipse any particular regulation in its priorities, this may be the most important element of OMB's bargaining power.

Much depends on the bureaucratic level that a particular controversy reaches, and on the agency's power within the administration. No OIRA desk officer can realistically threaten to slash an agency's budget, but the OMB Director can. A Deputy Assistant Secretary in an agency cannot realistically threaten to appeal to the President, but the Secretary can. As with other issues in the bureaucracy, continuing controversy over a rule tends to rise up the chain of command in both the agency and OMB until resolution is reached. Final compromise on a relatively controversial rule will be reached among the senior political appointees in the administration. This does not mean, however, that OMB and the agency will be evenly matched in the bargaining. Several of the agencies whose rules have produced frequent controversy with OMB (EPA, FDA, and OSHA) are headed by subcabinet administrators who lack the "clout" of the old-line cabinet departments such as State and Treasury. With regard to the health and safety agencies, OMB may truly be the "toughest kid on the block,"<sup>153</sup> able to impose its will if its senior officers are persistent.<sup>154</sup>

Because agency heads and senior OMB officials deal with each other on a multitude of issues, each has a strong incentive to reach compromise on controverted issues arising under the executive orders, rather than spend limited institutional capital on squabbling over a particular regulation.<sup>155</sup> Perhaps for that reason, the ultimate

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152. See G. BRYNER, *BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES* 67 (1987). Professor Bryner has noted that:

There have been few disagreements between agency heads and officials of the regulatory review bureau in the Office of Management and Budget; the few times that the head of OSHA or EPA have tangled with OMB reviewers are rare, attention to ideology in appointments having assured general agreement in executive agencies over policy concerns and priorities.

*Id.* (citation omitted).

153. *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, REG., MAR./APR. 1981, at 14, 22 (quoting James C. Miller, former head of both OIRA and OMB).

154. Of course, contests for power between agency and White House staff long predated the Reagan administration. See SUBCOMM. ON EMPLOYEE ETHICS AND UTILIZATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, *PRESIDENTIAL STAFFING—A BRIEF OVERVIEW*, H.R. REP. No. 17, 95th Cong., 2d Sess., 59-61 (1978).

155. See Olson, *supra* note 148, at 45-50.

steps of appealing to the presidential level<sup>156</sup> or issuing a rule over OMB's objections are rare.

In the early years of the program, EPA did issue one regulation without OMB clearance, and received an immediate threat of retaliation.<sup>157</sup> More recently, the Department of Agriculture sent OIRA a draft of a proposed rule deleting requirements that meat food labels disclose the use of mechanically separated meat (MSM).<sup>158</sup> Sausage makers had petitioned for the change on grounds that consumers would not buy products containing MSM. OIRA returned the rule to USDA, objecting that the costs of the rescission in reducing informed market decisions would outweigh its benefits.<sup>159</sup> USDA published the proposed rule anyway.<sup>160</sup> In this case, OIRA could claim the role of protector of the general public's interest against special interest pressures, but could not claim victory.

During the eight years of the Reagan administration, the executive order program had time to evolve and mature. The next two sections of this Article portray such a process, with early controversies leading to procedural compromise and improved regularity. A program that had a distinctly experimental flavor in 1981 has achieved tentative acceptance in the executive branch.<sup>161</sup>

## V. Fidelity to Statutory Authority

### A. Reconciling Statutory Commands with Administration Preferences: "Regulatory Relief" in the Reagan Administration

Although the Reagan administration's regulatory management program is constitutional on its face, its implementation has the potential to transgress substantive or procedural statutory limits.<sup>162</sup> Of course, all executive activity carries the potential for straying beyond legal limits. The question concerning this particular program is whether one of its announced purposes has placed an undue strain on fidelity to statutory requirements. That purpose is deregulation, which, if pursued for its own sake rather than as a result of a

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156. During the existence of the Presidential Task Force on Regulatory Relief, it received only one appeal of a proposed rule. *Id.* at 44.

157. *EPA: Investigation of Superfund and Agency Abuses: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess.* pt. 3, at 7-8 (1984) [hereinafter *Superfund Hearings*] (testimony of former EPA Chief of Staff Daniel).

158. Burros, *Eating Well*, N.Y. Times, Sept. 21, 1988, at C8, col. 3.

159. Letter from Jay Plager, Administrator, OIRA, to Christopher Hicks, General Counsel, USDA (Aug. 18, 1988).

160. 53 Fed. Reg. 35,089 (1988) (to be codified at 9 C.F.R. pt. 317) (proposed Apr. 26, 1988).

161. M. GOODMAN & M. WRIGHTMAN, *MANAGING REGULATORY REFORM: THE REAGAN STRATEGY AND ITS IMPACT* 73 (1987) (stating that "[t]he goals have filtered down through the bureaucracy and, to a remarkable extent, they have been accepted across regulatory agencies").

162. See generally Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59 (1981); Symposium, *Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195 (1981).

careful review of regulations, can undermine compliance with statutes that mandate regulation.<sup>163</sup>

Both of the executive orders that create the present regulatory management system include among their purposes "to reduce the burdens of existing and future regulations."<sup>164</sup> Indeed, the Reagan administration's first day saw creation of the high-visibility Task Force on Regulatory Relief, with the Vice President as chair and cabinet officers as members. Its final report in 1983 claimed to have "rationalized the rulemaking process and slowed the growth of new rules."<sup>165</sup>

This theme has persisted. President Reagan's introduction to his *Regulatory Program* for 1988-89 stated his belief "that American life is burdened by too much regulation and that true regulatory reform must involve regulatory reduction."<sup>166</sup> The President's message went on, however, to endorse "the development of useful regulations that will increase benefits to society as a whole," and to express confidence that his successor "will want to continue this endeavor to serve the public interest by insisting that regulatory activity be productive."<sup>167</sup>

If a regulatory management program is to succeed, it must not cause rules to be invalidated by reviewing courts. Recent Supreme Court decisions have set the parameters for judicial review of rulemaking. The Court has tried to achieve two somewhat inconsistent purposes: to allow political oversight to operate freely, yet to bind final agency decisions to law. The two most important cases illustrate the tensions.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>168</sup> the Court considered the amount of latitude that courts should give to agencies' interpretations of their governing statutes. It allowed the EPA to reverse preexisting policy in favor of an approach to air pollution that met the administration's efficiency criteria.<sup>169</sup> In a departure from earlier cases, the Court called for a determination "whether Congress has directly spoken to the precise question at

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163. A sign of deregulation for its own sake in the Reagan program is the use of categorical waivers of OMB review for deregulatory actions, for example, relaxations of pesticide tolerances and the deletion of listed toxic water pollutants. See OMB, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT: APRIL 1, 1985—MARCH 31, 1986, at 581 (1985).

164. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note at 431-34 (1982); Exec. Order No. 12,248, 3 C.F.R. 323 (1986), reprinted in 5 U.S.C.A. § 601 app. at 296-97 (West Supp. 1988).

165. OMB, PRESIDENT'S TASK FORCE ON REGULATORY RELIEF FINAL REPORT (1983).

166. 1988-89 REGULATORY PROGRAM *supra* note 122, at vii.

167. *Id.* at viii.

168. 467 U.S. 837 (1984).

169. *Id.* at 845-66. See generally Landau, *Chevron, U.S.A. v. NRDC: The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. 285 (1985).

issue” in the text or legislative history of a statute.<sup>170</sup> If Congress has spoken clearly, its will governs, but if the statute is “silent or ambiguous,” the agency’s interpretation prevails if “reasonable.”<sup>171</sup> The Court’s rationale for endorsing the interpretive authority of agencies emphasized political accountability; an agency may “properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>172</sup>

Although controversy surrounds *Chevron*, it has had considerable impact on the lower courts.<sup>173</sup> *Chevron* altered prior law by denying courts the power to decide issues of statutory interpretation that depend on the overall structure and purposes of the statute. *Chevron*’s critics regard that role as a traditional preserve of the judiciary.<sup>174</sup> Perhaps because of that tradition, the Court’s later cases have evinced some doubts about *Chevron*’s sweep.<sup>175</sup>

The Court’s earlier decision in *State Farm*<sup>176</sup> invalidated NHTSA’s attempt to conform its policy to administration goals by rescinding its passive restraints regulation. One can reconcile these two cases on the ground that in *State Farm* the agency insufficiently explained the fact and policy bases of its action, whereas in *Chevron* the agency passed that test. Nevertheless, by endorsing active judicial review of an agency’s support in the administrative record for any change in the regulatory status quo, the Court slowed administrative efforts to alter existing regulations.<sup>177</sup>

From the outset, the Reagan administration’s regulatory relief emphasis has been difficult to reconcile with the legislative history of some of the most stringent health and safety statutes. These statutes were passed in the early 1970s, in an era when congressional sensitivity to the cost of regulation was low.<sup>178</sup> In the absence of comprehensive reform of these statutes, which has not occurred, the administration has struggled to accommodate its philosophy of government with statutory commands premised on a need for aggressive regulation. As *Chevron* and *State Farm* illustrate, the results in court have been mixed.

Not surprisingly, most of the controversy that has surrounded the

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170. 467 U.S. at 842.

171. *Id.* at 843-44.

172. *Id.* at 865.

173. See generally Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (noting that lower courts have adopted a “strong” *Chevron* approach, deferring to the agency to resolve policy questions); Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986) (discussing the effect of *Chevron*’s two-part standard of judicial review on lower courts).

174. E.g., Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 381 (1986).

175. See *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 426 (1987) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224-25 (1987) (Scalia, J., concurring). See generally Starr, *Of Forest and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1988).

176. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); see *supra* text accompanying notes 129-131.

177. See generally Garland, *supra* note 114; Sunstein, *supra* note 114.

178. See, e.g., *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (OSH Act); *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) (Clean Air Act).

regulatory management program has centered on its relation to these statutes. Although the real disagreement usually concerns the substance of regulatory policy, much of the debate has occupied the more neutral ground of procedure.<sup>179</sup> In other contexts, administrative lawyers are familiar with this tendency for procedural debate to mask substantive conflict. For purposes of this Article, it creates two difficulties. First, one needs to penetrate the substantive static to identify real issues of procedure. Second, one needs to craft procedures that respond to the potential for tension between statutory requisites and executive preferences.

### B. Delay, Deadlines, and Bargaining Power

The NAPA Report found that the "clearest impact" of the oversight process has been to delay rulemaking; agency personnel complained about it constantly.<sup>180</sup> Of course, delay is a cost of any analytic process. Whether the cost is justified in a particular case by improvements in the final rule is a matter of opinion. Leaving that question aside, I will discuss three issues. First, in the Reagan oversight program, long delays have been common enough to suggest a need to revise applicable administrative deadline and extension provisions. Second, courts have found delay illegal when it contributes to missing statutory deadlines. And third, delay provides both OMB and the agencies a tool to obtain the other's assent to their views.

Executive Order No. 12,291 sets short presumptive deadlines for OMB review: 60 days for proposed major rules, 30 days for final ones, and 10 days for all others.<sup>181</sup> Most rules are reviewed within these general parameters—the overall figures for 1981-87 show an average of 32 days for major rules, 18 days for others, and 19 days for all rules.<sup>182</sup> In view of OIRA's small staff and large workload, this record is impressive. Still, gross statistics can be misleading for complex or controversial rules. For example, in 1985 the average review time for major EPA rules was 78 days, and for the Department of Labor (where OSHA resides) it was 173 days.<sup>183</sup>

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179. For an example of mixed legal and policy concerns in the continuing debate, compare Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986) (arguing that OMB's unwarranted dominance over agency rulemaking should be either eliminated by Congress or restricted by the President) with DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (defending President Reagan's regulatory review programs).

180. NAPA REPORT, *supra* note 120, at 7, 37.

181. Exec. Order No. 12,291, § 3(e)(2)(A)-(C), 3 C.F.R. 129 (1982), *reprinted in* 5 U.S.C. § 601 note at 431-34 (1982).

182. 1988-89 REGULATORY PROGRAM, *supra* note 122, at 555.

183. *Id.* Figures compiled at EPA differ somewhat. They showed that in 1985, OMB held major rules for over four months. OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS, S. REP. NO. 156, 99th Cong., 2d Sess. 9 (1986) [hereinafter S. REP. NO. 156].

These statistics do not reflect delay stemming from OMB-agency negotiations that precede formulation of a proposed rule.<sup>184</sup> Nor do they reflect the time costs of internal agency review processes that have arisen in response to the Executive Order.<sup>185</sup> Of course, pre-proposal delay may be offset by speedier review later due to agreement on some issues. Indeed, the Executive Order's short presumptive periods for review provide some incentive to shift review to earlier stages of rule formation to avoid extensions. Moreover, as the very existence of Executive Order No. 12,498 reveals, the earlier OMB review occurs, the more likely it is to be effective in molding agency policy.

Executive Order No. 12,291 allows OMB to extend its review indefinitely, absent judicial or statutory deadlines.<sup>186</sup> Controversial rules have been held for periods exceeding one year. For example, EPA submitted eleven New Source Performance Standards (NSPS) for air pollutants to OIRA for review, between three and thirteen months before the applicable statutory deadline for their issuance.<sup>187</sup> Negotiations then extended past the deadline for all eleven rules, in one case by a year. This technical violation of both statutory and executive order requisites may not have seemed serious to either EPA or OIRA because the health and safety statutes contain many rulemaking deadlines that agencies do not meet. Nevertheless, these violations tend to produce hostile reactions in Congress. A congressional oversight report concluded that the NSPS delay was "caused by the need to respond to OMB's questions on cost-effectiveness and to clarify apparent misunderstandings and misinterpretations, by delayed meetings, and by simple inaction and unresponsiveness on the part of OMB."<sup>188</sup>

Review-based delays have also encountered judicial disapproval when they have contributed to an agency's failure to meet statutory deadlines. In *Environmental Defense Fund v. Thomas*,<sup>189</sup> a district court considered a suit to compel EPA to comply with a statutory directive that it promulgate rules dealing with hazardous wastes in underground storage tanks by March 1, 1985. EPA had already failed to meet this deadline when it sent a proposed rule to OMB on March 4, 1985. The agency might have anticipated that the missed deadline would compel speedy OIRA clearance, but that was not to be. In an April meeting, OIRA pressed EPA to alter its strategy from containing all leaks to one of preventing leaks of wastes that risk

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184. See Olson, *supra* note 148, at 46 (noting that "OMB was involved for over a year" before any EPA proposal emerged on air quality standards for particulates).

185. See G. BRYNER, *supra* note 152, at 125 (noting that due to the organizational complexity that has arisen within EPA, progress in the rulemaking process has been stifled).

186. Executive Order No. 12,291 exempts rules from its process when review would "conflict with deadlines imposed by statute or by judicial order." Exec. Order No. 12,291, § 8(a)(2), 3 C.F.R. 133 (1982), *reprinted in* 5 U.S.C. § 601 note at 431, 434 (1982).

187. Olson, *supra* note 148, at 68.

188. S. REP. NO. 156, *supra* note 183, at 31.

189. 627 F. Supp. 566 (D.D.C. 1986).

analysis identified as health threats. After more negotiations, OMB cleared the rule in mid-June.<sup>190</sup>

Finding a statutory violation, the court set a new deadline for promulgation of a final rule, compliance with which was not to be prevented by OMB review.<sup>191</sup> Judge Thomas Flannery noted that the delay problem was not limited to this rule—interrogatories revealed that OMB often extended its review even when statutory or judicial deadlines were present.<sup>192</sup> Complaining that the executive order's exemption for rules under deadline is "[a]pparently . . . simply ignored," he declared that OMB review must terminate in time to allow deadlines to be met.<sup>193</sup>

Especially in the presence of statutory deadlines, either OIRA or an agency can use delay to gain leverage. A typical agency complaint occurred in an internal EPA study of the NSPS delays:

The problem is that OMB has no incentive whatsoever to keep the process moving and no one to which they are accountable for failures of responsiveness. . . . Once a dialogue has begun, OMB tends to repeatedly find new issues each time the last issue is settled, often with long intervening delays. Often, . . . these issues involve questioning the technical judgment of EPA rather than the implications of costs, benefits, and impacts to society.<sup>194</sup>

EPA is correct that the responsibility for issuing a rule (and, probably, the desire to have one at all) lies principally with the agencies rather than OIRA. Knowledge that the agencies need new rules more than OMB does gives OIRA leverage in any rulemaking. Still, OIRA is accountable within OMB and the administration for its lapses. Any tendency to bring up new issues during review can result from inefficiency in OIRA, and if so can be cured by improved management. Also, it is not easy to identify the borderline between technical judgment and oversight of a rule's costs and benefits.

True, even when delays are long, it is rare for agencies to seek formal appeal of an OIRA position, or to publish a rule in the face of its opposition.<sup>195</sup> An agency contemplating either action would fear worsened relations with OMB and, possibly, retribution. Therefore, delay caused by OIRA preference can put effective pressure on an agency to accede. Moreover, this pressure arises even when delay in

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190. *Id.* at 567-69.

191. *Id.* at 570-71.

192. *Id.* at 571.

193. *Id.*

194. S. REP. NO. 156, *supra* note 183, at xvi (emphasis omitted) (quoting Emission Standards and Eng'g Div., Off. of Air Quality Planning and Standards, Off. of Air, Noise, and Radiation, U.S. EPA, New Source Performance Standards: Beverage Can Industry—A Case Study (Aug. 23, 1983)).

195. See *supra* text accompanying notes 155-160; see also S. REP. NO. 156, *supra* note 183, at 6.

OIRA is not a negotiating tactic but a result of the volume of rules and the small size of its staff.

In addition, OIRA has an incentive to prolong negotiations with an agency rather than to appeal for help from higher levels in OMB and the administration. In the absence of a formal review process within the executive, it is unclear who may appropriately intervene in a dispute. OIRA might reasonably fear that its own relatively technocratic style of review will be displaced by more politically oriented operatives on the White House staff.<sup>196</sup>

In the presence of a statutory or judicial deadline, the possibility arises for either OIRA or an agency to pressure the other in a game of "chicken." Agencies have the formal responsibility to meet deadlines, and are therefore vulnerable to threats of delay. At the same time, agencies can withhold their own submission to OIRA until a deadline nears, and press for immediate review. Indeed, if an agency is tardy enough, it may escape review entirely.<sup>197</sup>

More definite limits should be placed on the duration of OIRA review to constrain the relatively infrequent but extended delays that have sometimes interfered with the administration of federal programs. Such limits would presuppose that the marginal utility of OIRA review diminishes as time passes and as the costs of delay increase. Reasonable minds could disagree on the optimal duration of OMB review. One strategy would begin with the presumptive limits in Executive Order No. 12,291, which have sufficed for most rules.<sup>198</sup> OIRA would be entitled to a set number of extensions each year, again for a fixed and final period.

Firmer administrative deadlines would inform both sides to the dialogue of the time it will end. Of course, agencies would gain opportunities to stall, hoping to prevail through inaction. The existence of OMB's other powers over agencies, especially in budgeting, should confine this tendency somewhat. For a more sensitive enforcement device, OIRA should be granted power to counter agency delay by imposing deadlines for agency responses to its communications. If an agency misses the deadline, the time for OIRA review would increase accordingly. As well, OMB could threaten to comment publicly on the rulemaking record in order to induce an agency to respond to its views.

### C. *Allocating Agency Jurisdiction: Asbestos*

The regulation of asbestos has produced a major controversy over the role and limits of OMB oversight. The dispute concerned OMB pressure on EPA to invoke its authority under section 9 of the

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196. John Cooney, former Deputy General Counsel, OMB, Remarks at the meeting of the ABA Section of Administrative Law and Regulatory Practice, Denver, Colo. (Feb. 5, 1989).

197. See *Natural Resources Defense Council, Inc. v. Ruckelshaus*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,817; 20,819 (D.D.C. 1984) (ordering EPA to issue a rule without OMB review because of a violation of statutory deadlines).

198. See *supra* text accompanying note 181.

Toxic Substances Control Act (TSCA)<sup>199</sup> to defer to the Occupational Safety and Health Administration (OSHA) and the Consumer Product Safety Commission (CPSC) for asbestos regulation. Unlike most instances of OMB oversight, this one involved a question of coordinating action among several agencies having potential jurisdiction.<sup>200</sup>

In 1984, after five years of preparation, EPA sent OIRA two proposed regulations for the control of asbestos.<sup>201</sup> EPA's approach was strict—the rules would have banned four product categories and phased down production of others. For about the next six months, EPA and OIRA sparred over the rules. One prominent dispute concerned valuation of benefits. In accordance with its policy of promoting consistent approaches to cost-benefit analysis, OIRA argued that the health benefits of cancer cases avoided should be discounted for the thirty- to forty-year latency period for asbestos-caused cancer.<sup>202</sup> EPA resisted the discounting approach, noting its consequence of reducing the apparent cost-effectiveness of the rules.<sup>203</sup>

As impasse loomed, OMB began pressing EPA to invoke its section 9 authority, which authorizes it to defer to another agency with jurisdiction over a toxic substance upon a finding that the other agency has power to reduce the risk "to a sufficient extent."<sup>204</sup> EPA had repeatedly rejected the adequacy of such a referral; OIRA now argued that referral was mandatory.

In February, 1985, EPA suddenly announced that it was withdrawing its proposed rules for referral to OSHA and CPSC. The only support for the decision was an OMB legal memorandum urging that referral was mandatory.<sup>205</sup> Enraged EPA staff wrote an open letter to Administrator Thomas, denouncing the deferral as "an insult to our intelligence and the public's."<sup>206</sup> Amid this internal turmoil and after a heated public controversy and hostile congressional hearings, EPA reconsidered its decision. It issued proposed rules in

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199. 15 U.S.C. § 2608 (1982).

200. Another jurisdictional dispute concerned the regulation of radioactive wastes. See Olson, *supra* note 148, at 64-67. Like the asbestos controversy, it involved a sharp clash between EPA (especially its staff) and OMB. *Id.*

201. The chronology for this account is drawn from *EPA's Asbestos Regulations: Hearing Before the Subcomm. on Oversight and Investigations of the House Energy and Commerce Comm.*, 99th Cong., 1st Sess. 21-28 (1985), and the SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., EPA'S ASBESTOS REGULATIONS: REPORT ON A CASE STUDY ON OMB INTERFERENCE IN AGENCY RULEMAKING 1-5 (Comm. Print 1985) [hereinafter OMB INTERFERENCE REPORT].

202. OMB INTERFERENCE REPORT, *supra* note 201, at 25, 78-82; see *supra* text accompanying note 122.

203. *Id.* at 78.

204. See 15 U.S.C. § 2608(a)(1) (1982).

205. OMB INTERFERENCE REPORT, *supra* note 201, at 3.

206. *Id.* at 28.

January, 1986.<sup>207</sup> Some months later, OSHA issued regulations drastically reducing permissible amounts of asbestos in the workplace.<sup>208</sup>

In the asbestos controversy, an agency reversed a considered position under pressure from OIRA without any supporting analysis of its own. OIRA swayed EPA's political appointees from a position for which the staff had prepared extensive support that appeared in the administrative record. The inflamed reaction of the staff to the deferral decision reveals the intellectual and emotional investment that agency personnel develop after years of work on a regulation. The principal officers of an agency are responsible for its decisions, however, and a main purpose of executive review is to ensure that these officers fully consider administration policy. Indeed, the tenor of the staff's reaction in this episode lends support to the perception in OMB that its review can serve to correct a tendency for agency staff, who are devoted to a regulation, to mislead agency heads about the facts or the law.<sup>209</sup> Still, sudden reversals of policy encounter substantial jeopardy from courts exercising today's "hard look" review for arbitrariness.<sup>210</sup>

The notably hostile tone of congressional oversight of this episode might stem partly from a perception that OIRA engaged in some regulatory "forum-shopping," urging EPA to defer only after its intent to pursue stringent regulation became clear. Certainly, OIRA may have acted upon a broader view of the appropriate allocation of jurisdiction to regulate toxic substances. If so, however, the fact that the review process occurs after one agency's rulemaking initiative is well underway can lead to a waste of time and effort. Instituting earlier review of an agency's program pursuant to Executive Order No. 12,498 may ameliorate this problem.

#### D. Constraints of the Administrative Record: Ethylene Oxide

Ethylene oxide is a suspected carcinogen used in the sterilization of hospital instruments. After OSHA had considered its regulation for years, a federal court mandated issuance of a rule by June 15, 1984.<sup>211</sup> As the deadline loomed, OSHA completed work on a final rule, in two parts.<sup>212</sup> There was a permanent exposure limit (PEL) of one part per million (ppm) and a short term exposure limit (STEL) of ten ppm. OSHA's draft preamble to the final rule explained that studies had shown that the PEL alone would not reduce cancer risks to acceptable levels; instead, it reflected the limits of

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207. 51 Fed. Reg. 3738 (1986).

208. NAPA REPORT, *supra* note 120, at 5.

209. See Olson, *supra* note 148, at 62.

210. This is illustrated by the ethylene oxide case, discussed *infra* Part D.

211. Public Citizen Health Research Group v. Aucther, 702 F.2d 1150, 1154 & n.12 (D.C. Cir. 1983) (per curiam).

212. See H. SEIDMAN & R. GILMOUR, POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE 142-43 (4th ed. 1986); Brief for the Public Citizen Health Research Group, at 1-27, Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) (No. 84-1252) (providing a chronology of the work on the final rule).

economic feasibility.<sup>213</sup> OSHA also concluded that its STEL would be economically feasible.

On June 13, 1984, OSHA sent the rule to OMB for review. The next day, OIRA Administrator DeMuth responded with a detailed letter objecting that the STEL was insufficiently supported by the health effects data and would not be cost effective.<sup>214</sup> The speed and cogency of this response suggest strongly that OIRA had already negotiated with OSHA concerning the shape of the final rule, before its formal submission for review. The approach of the court's deadline would have compelled such a process if OIRA's review was to be meaningful. The next day, OSHA forwarded its final rule to the Federal Register.<sup>215</sup> In its haste, OSHA simply deleted the STEL and all reference to it from the final standard, and blacked out the portions of the draft preamble referring to support for the STEL. Conceding that this decision was based "largely in response to reservations expressed by the Office of Management and Budget," OSHA then announced further rulemaking proceedings on the issue of a STEL.<sup>216</sup> These proceedings also terminated without promulgation of a STEL.

In *Public Citizen Health Research Group v. Tyson*,<sup>217</sup> the D.C. Circuit upheld the permanent exposure limit, but remanded the STEL portion of the rule to the agency. Without "any evidence" in the record, OSHA now argued that the permanent limit would reduce short-term exposure.<sup>218</sup> Pointing to studies in the administrative record that suggested the contrary conclusion, the court ordered OSHA to promulgate a STEL or explain more persuasively why it would not.<sup>219</sup> A year later, the court declined to hold OSHA in contempt for further delays, but issued an acerbic opinion characterizing the history of ethylene oxide regulation as "one of hesitation

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213. This preamble language reflected the Supreme Court's holding that "cost-benefit analysis by OSHA is not required by the [OSH Act] because feasibility analysis is." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981).

214. Letter from Administrator Christopher DeMuth, OIRA to Solicitor Francis Lilly, Department of Labor (June 14, 1984) (copy on file at the *George Washington Law Review*). OIRA also raised questions about OSHA's compliance with Paperwork Reduction Act requirements for clearance of its information collection provisions and about the rule's restrictions on compliance by means other than engineering controls. *Id.*; see also 1987-88 REGULATORY PROGRAM *supra* note 128, at xxi (providing additional OMB criticisms of OSHA's approach).

215. 49 Fed. Reg. 25,734 (1984).

216. *Id.* at 25,775.

217. 796 F.2d 1479 (D.C. Cir. 1986).

218. *Id.* at 1506.

219. *Id.* at 1507.

and lack of resolve,"<sup>220</sup> and set yet another deadline for final decision.<sup>221</sup> OSHA finally issued a STEL regulation on April 4, 1988.<sup>222</sup>

In the regulation of ethylene oxide, as with asbestos, an agency suddenly changed a considered position in response to OMB pressure. In both cases, the consequent problem was one of bureaucratic regularity—the agency did not take time to conform its administrative record to the altered outcome of the rulemaking. For asbestos regulation, in which a pure issue of law was involved, the agency's general counsel would ordinarily provide detailed legal advice supporting referral. Although OIRA's legal position in the asbestos controversy may have been correct, OIRA and OMB do not have the staff resources to do more than raise legal questions that the agencies have neglected. In the ethylene oxide rulemaking, OIRA did just that, asking OSHA how its STEL met the Supreme Court's requirement for a "significant risk" finding.<sup>223</sup>

Bureaucratic regularity helps to ensure the legality of agency action. Hasty decisions encounter jeopardy on judicial review. Courts search for signs that issues of fact, policy, and law have been considered carefully. The ethylene oxide case illustrates the potential for sudden policy reversals to fail the dictates of *State Farm*, requiring that agencies show they have taken a "hard look" at policy choices.<sup>224</sup> Thus, even if acceptance of OIRA's position improved the agency's action in each case, the need remained to ensure that the administrative record, including the agency's statement of basis and purpose, fully supported the final outcome. This responsibility lies principally with the agencies, not OIRA. Because government policymaking frequently occurs under time pressure, however, it is important that both parties involved in the review recognize the need to protect the administrative record. Failure to do so risks a judicial remand that is inevitably more burdensome and disruptive than the work needed to ensure legality in the first instance.<sup>225</sup>

#### E. Factors Made Relevant by Statute

In *Center for Science in the Public Interest v. Department of the Treasury*,<sup>226</sup> a consumer health group sued the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (BATF) for rescinding regulations designed to inform consumers, especially those with allergies, of the contents of alcoholic beverages.<sup>227</sup> In 1980, BATF issued a final rule requiring contents labeling, or in the alternative,

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220. *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

221. *Id.* at 629.

222. 53 Fed. Reg. 11,414 (1988).

223. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 642 (1980).

224. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983); see *supra* text accompanying notes 176-77.

225. The risk of remand is increased by judicial hostility to "post-hoc rationalizations" for administrative action through litigation affidavits or arguments of counsel. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

226. 573 F. Supp. 1168 (D.D.C. 1983).

227. The plaintiffs sued under the Federal Alcohol Administration Act, 27 U.S.C.

notification of the availability of a contents list from the manufacturer.<sup>228</sup> BATF had performed a Regulatory Analysis under the Carter administration's Executive Order No. 12,044.<sup>229</sup> The analysis reported wide variations in estimates of both the costs and benefits of the rule. In May, 1981, BATF proposed to rescind the rule, heeding the call of the new Executive Order No. 12,291 to review existing rules under cost-benefit criteria.<sup>230</sup> Finding that the rule's costs were not commensurate with its benefits, BATF then rescinded the rule.<sup>231</sup>

The district court invalidated BATF's action for two reasons. First, it held that Congress had made an implicit cost-benefit judgment by enacting the statute, stating that Congress "did not condition [its] grant of authority with a proviso that the regulations could be withdrawn if the costs to the industry turned out to be too high."<sup>232</sup> Second, the court held that the agency had not explained its sudden shift of policy persuasively enough; the action was arbitrary.<sup>233</sup> As in the ethylene oxide case, the administrative record compiled in support of the initial rule had not been refuted.

In striking down the alcohol labeling regulations, the court did not defer to the agency's interpretation of its statutory duties.<sup>234</sup> The later *Chevron* decision shows that the court's approach, and perhaps its outcome, was wrong. Still, some statutes do preclude a cost-benefit approach. The Alcohol Labeling Act may be one of them.

Even if a statute's text or legislative history shows that Congress expects an agency to promulgate regulations, as with alcohol labeling,<sup>235</sup> an agency may enjoy wide discretion in its choice of regulatory strategy. Therefore, OIRA review is most likely to produce a statutory violation by causing an agency to consider a factor not relevant under the governing statute.<sup>236</sup> The problem is likely to arise

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§§ 201-211 (1982). Under section 205(e), alcoholic beverages are to be "labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, . . . as will provide the consumer with adequate information as to the identity and quality of the products."

228. 27 C.F.R. § 4.32 (1981).

229. See *supra* text accompanying notes 86-89.

230. 46 Fed. Reg. 24,963 (1981).

231. 46 Fed. Reg. 55,093 (1981).

232. *Center for Science in the Pub. Interest v. Department of the Treasury*, 573 F. Supp. 1168, 1174 (D.D.C. 1983).

233. *Id.* at 1175-76.

234. Indeed, the court heightened the intensity of its scrutiny because the case involved "an action which reverses prior policy [rather] than an action setting policy for the first time." *Id.* at 1173. In *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the Supreme Court subsequently held that the standard of review for rescission of a rule is the same as that for rule promulgation. *Id.* at 41-42.

235. See *Center for Science*, 573 F. Supp. at 1170.

236. This relevancy requirement stems from *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (stating that a reviewing court must consider whether

as it did in the alcohol labeling case—a court reads a statute to forbid considerations of cost, although that is the focus of the executive order program. Because OMB requires the performance of cost-benefit analysis even when it may not enter the calculus of statutory decision, the potential for a misstep is especially great.<sup>237</sup>

Controversy of this sort has arisen repeatedly under other health and safety statutes. Administration of the OSH Act, for which the Supreme Court has forbidden a cost-benefit approach,<sup>238</sup> has produced other disagreements as sharp as the one concerning ethylene oxide.<sup>239</sup> The EPA's setting of National Ambient Air Quality Standards has led to contention with OMB over the permissibility of considering cost.<sup>240</sup> And the FDA's regulation of color additives under the "Delaney Clause," which forbids marketing cancer-causing food additives, has sparked debate over the legality of OMB's suggested "de minimis" exception when cancer risks are low.<sup>241</sup>

Many of these controversies will simmer until the courts either authoritatively construe the governing statutes or defer to executive interpretations under *Chevron*. Even then, charges will arise that impermissible factors have actually affected decisions, notwithstanding denials by OMB and perhaps the agencies as well. In Part VI of this Article, I discuss the potential for public disclosures about the process to allay these concerns.

Contentious relations with congressional committees are likely to continue. As long as Congress continues to be organized by the party not holding the White House, the committees are likely to have a different policy orientation from OIRA. In Congress, policy disagreement with an agency is often cast in terms of the agency's violation of its statute. To mute the criticisms that are framed in legal terms—and to forestall their possible adoption by reviewing courts—agencies and OIRA should strive to buttress their legal stances more thoroughly than they did in the asbestos and alcohol labeling cases.

#### F. OMB's Statutory Power Over Rules: *The Paperwork Reduction Act*

Since 1942, the President's budget agency has possessed power to control federal agencies' imposition of paperwork requirements on

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the decision of an agency was based on the relevant factors set forth in the governing statute). The Court extended this requirement to informal rulemaking in *State Farm*, 463 U.S. at 43; *see supra* text accompanying notes 176-77.

237. *Regulatory Reform Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 98th Cong., 1st Sess. 981-82 (1983) (providing OIRA's response to questions from the Subcommittee).

238. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 540 (1981).

239. *See, e.g.*, SUBCOMM. OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, OFFICE OF MANAGEMENT AND BUDGET INTERFERENCE WITH OSHA RULEMAKING, H.R. REP. NO. 583, 98th Cong., 1st Sess. (1983) (discussing disagreements over toxic chemical regulations and commercial diving standards).

240. S. REP. NO. 156, *supra* note 183, at 30.

241. HOUSE COMM. ON GOVERNMENT OPERATIONS, HHS' FAILURE TO ENFORCE THE FOOD, DRUG, AND COSMETIC ACT: THE CASE OF CANCER-CAUSING COLOR ADDITIVES, H.R. REP. NO. 151, 99th Cong., 1st Sess. 11-12 (1985) [hereinafter H.R. REP. NO. 151].

the public.<sup>242</sup> This function owes its present form to the Paperwork Reduction Act of 1980 (the Act),<sup>243</sup> which created OIRA.<sup>244</sup> The Act recognizes the implications of granting OIRA power over reporting and recordkeeping requirements that are contained in regulations. Information collection is so central to many federal programs that its control can confer de facto power over regulation itself.<sup>245</sup>

The Act adopts a procedural approach to this problem. Copies of proposed rules that include an information collection requirement must be sent to OMB, which has sixty days to file public comments on whether the requirement is "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility."<sup>246</sup> The agency must respond to OMB's comments when it promulgates its final rule. OMB then has sixty days to disapprove the requirement upon a finding that the agency's response was unreasonable.<sup>247</sup> For executive agencies, OMB's action is final; independent agencies, however, may override such disapproval by majority vote.<sup>248</sup>

Within OIRA, administration of the Act is combined with administration of Executive Order No. 12,291. Desk officers review rules of particular agencies, whether or not they contain a paperwork request, under similar criteria: whether the agency action is justified by its benefits and whether burdens have been minimized.<sup>249</sup> There are some procedural differences between the two kinds of review, however. OIRA maintains public files on paperwork matters, which contain the public's comments on submissions. At first, OIRA did not include all correspondence between OMB and the agencies.<sup>250</sup> An amendment to the Act now requires it to do so.<sup>251</sup> As in the

242. Federal Reports Act of 1942, Pub. L. No. 77-831, 56 Stat. 1078.

243. Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501-3520 (1982)).

244. See *supra* text accompanying notes 92-93.

245. 44 U.S.C. § 3518(e) says, however, that nothing in the Act "shall be interpreted as increasing or decreasing the authority of the President [or] the Office of Management and Budget . . . with respect to the substantive policies and programs of . . . agencies." See S. REP. NO. 930, *supra* note 93, at 56.

246. 44 U.S.C. §§ 3504(h), 3508. OMB has issued new regulations requiring that agency submissions provide more information to the public, such as estimates of the burden imposed by the reporting requirement. See 53 Fed. Reg. 16,618 (1988) (amending 5 C.F.R. pt. 1320).

247. 44 U.S.C. § 3504(h).

248. *Id.* §§ 3504(h)(7), 3507(c). Under section 3504(h)(9), "[t]here shall be no judicial review of any kind of the Director's decision to approve or not to act upon" a requirement.

249. See Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 HARV. J. ON LEGIS. 1, 88-91 (1987). OIRA has developed a handbook to guide desk officers in implementing the Act. See OIRA, INFORMATION COLLECTION REVIEW HANDBOOK (draft ed. Sept., 1988) (copy on file with author).

250. Funk, *supra* note 249, at 92.

251. 44 U.S.C. § 3507(h) (Supp. IV 1986); see 53 Fed. Reg. 16,618; 16,620-21 (1988)

executive order program, there is much oral communication with the agencies that is not reflected in the public record.<sup>252</sup> OIRA places an explanation for paperwork disapprovals in the public file along with any separate letter to the agency that states the rationale in greater detail.<sup>253</sup>

In *United Steelworkers v. Pendergrass*,<sup>254</sup> the Third Circuit considered the Act's scope. The case concerned OSHA's rule requiring employers to warn workers of potentially hazardous materials in the workplace.<sup>255</sup> OIRA disapproved requirements for exchange of chemical manufacturers' disclosure sheets at multi-employer work-sites, and also disapproved certain exemptions from duplicative labeling requirements. The court held that the Act's reference to "information collection requests" did not include requirements that information be provided by industry to the public, as distinguished from requirements that information be furnished to the government.<sup>256</sup>

In dicta, the court also stressed the Act's disclaimer of intent to increase OMB's authority over substantive policy decisions delegated to agencies.<sup>257</sup> Although the court's holding provides a relatively clear limit to OIRA authority, its concern over indirect effects on policy suggests that OIRA and the courts may struggle over the relationship between paperwork functions and cost-benefit review.

The executive order processes tend to displace the Act's formal ones because of timing.<sup>258</sup> Because OIRA reviews rules before they are formally proposed or issued, its negotiation with agencies can and does concern both substantive and paperwork matters, leaving little for the Act's post-notice process. This procedure suggests that the executive order may give OMB as much leverage as it can usefully employ. Neither the working relationships between the agencies and OMB nor the overall rate of rejection of agency proposals seem to differ sharply under the two programs.<sup>259</sup> This is not really surprising. To the extent that paperwork requirements mirror the rules they enforce, they should evoke the same OMB reactions as do the rules. And the limits of OMB's peremptory behavior may be set more by such bureaucratic imponderables as general relationships with the agency head than by the existence of formal statutory power.

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(to be codified at 5 C.F.R. pt. 1320). There is an exception to this requirement for classified material. 44 U.S.C. § 3507(h).

252. Olson, *supra* note 148, at 55-59.

253. See SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 2D SESS., OMB REVIEW OF CDC RESEARCH: IMPACT OF THE PAPERWORK REDUCTION ACT 24, 32-37 (Comm. Print 1986).

254. 855 F.2d 108 (3d Cir. 1988).

255. *Id.* at 110.

256. *Id.* at 112-13. Thus, the court implicitly determined either that the Act's ban on judicial review of paperwork approvals does not bar review of disapprovals or that a disapproval must be of paperwork within the Act's scope to be shielded from review. See Funk, *supra* note 249, at 79-80.

257. 855 F.2d at 111-13.

258. Funk, *supra* note 249, at 94-95.

259. *Id.* at 99-103.

### G. *Judicial Review of Executive Order Requirements*

Executive Order No. 12,291 attempts to foreclose judicial review of agency compliance with its requirements. It provides that the order "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law."<sup>260</sup> In other executive order programs, courts have declined to allow private parties to force agency compliance with presidential mandates. For example, in *In re Surface Mining Regulation Litigation*,<sup>261</sup> the court considered a challenge to regulations that was based partly on the agency's asserted failure to prepare an inflation impact statement in accordance with Executive Order No. 11,821.<sup>262</sup> The court agreed with an earlier decision that the executive order "was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action."<sup>263</sup> Accordingly, it would not review agency compliance with the order.

The court's approach in *Surface Mining* was quite conclusory, perhaps because it is very unlikely that the President can confer or remove federal court jurisdiction by executive order. Yet it seems appropriate for courts to recognize a President's wishes about the consequences of his own programs, at least as a matter of comity. Here a careful distinction must be made. Of course, courts must inquire whether a regulation is justified on the administrative record. They may consider materials placed in the record pursuant to executive oversight, such as regulatory analyses, as part of the overall question of the validity of the rule. To date, that is what they have done.<sup>264</sup> But it is quite another thing to consider separately whether the agency has complied with an executive order's requirements, and to reverse its action if it has not.

The burdens of separate litigation over agency compliance with an order would exceed their benefits. Under executive order programs lacking central enforcement provisions (such as Executive Order No. 11,821), agency noncompliance was frequent enough to tempt private parties and courts to perform a task that the executive could do for itself. As experience under Executive Order No.

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260. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note at 431, 434 (1982).

261. 627 F.2d 1346 (D.C. Cir. 1980).

262. Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975), *as amended by* Exec. Order No. 11,949, 3 C.F.R. 161 (1977), *reprinted in* 12 U.S.C. § 1904 note at 592-93 (1976).

263. 627 F.2d at 1357 (quoting *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976)).

264. McGarity, *supra* note 118, at 1318-30.

12,291 has amply demonstrated, however, OIRA can deal with recalcitrant agencies.<sup>265</sup> The histories of asbestos and ethylene oxide regulation do not portray an executive in need of outside aid.

## VI. *The Openness of OMB Oversight*

The extent to which OMB oversight of federal rulemaking is openly reflected in an agency's administrative record raises two legal issues. Both are clouded by uncertainty and debate. First, to what extent are unrecorded "ex parte" contacts permissible in rulemaking? Second, does the President's constitutional executive privilege extend to OIRA's discussions with agencies about their rules? Obviously, these issues are related. They have produced a wealth of analysis, if not agreement.<sup>266</sup> Much of the commentary mixes law and policy, often without clearly distinguishing between them. I will try to identify the law/policy border in the following discussion.

Neither the Administrative Procedure Act (APA)<sup>267</sup> nor the Due Process Clause provides a general bar to ex parte contacts in rulemaking,<sup>268</sup> although some statutes limit them for particular programs.<sup>269</sup> Courts reviewing rules have struggled with two rather inconsistent directives from the Supreme Court, and have consequently produced a confused body of case law.<sup>270</sup> In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>271</sup> the Court held that courts may not compel agencies to follow procedures that are not required by statute or by due process.<sup>272</sup> *State Farm* emphasized, however, that an agency's administrative record must provide full substantive justification for its policy choices.<sup>273</sup>

The application of these competing considerations to ex parte contacts within the executive branch was ably analyzed in *Sierra Club v. Costle*:<sup>274</sup>

The purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact . . . in

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265. For arguments in favor of limited judicial review, see Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 344-51; Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 681-86 (1987).

266. See generally Symposium on Presidential Control of Rulemaking, 56 TUL. L. REV. 811 (1982); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

267. 5 U.S.C. §§ 551-561, 701-706 (1982 & Supp. IV 1986).

268. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 & n.16 (1978); Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201 (1981).

269. E.g., Clean Air Act, 42 U.S.C. § 7607 (1982).

270. See generally G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 367-84 (3d ed. 1986).

271. 435 U.S. 519 (1978).

272. *Id.* at 542; see Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

273. 463 U.S. 29, 56-57 (1983).

274. 657 F.2d 298 (D.C. Cir. 1981).

this informal rulemaking setting. After all, any rule issued here with or without White House assistance must have the requisite *factual support* in the rulemaking record . . . . The courts will monitor all this, but they need not be omniscient to perform their role effectively. Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.<sup>275</sup>

Reflecting a similar analysis, the Administrative Conference<sup>276</sup> has recommended that rulemakers “should be free to receive written or oral policy advice” from elsewhere in the executive branch, “without having a duty to place these intragovernmental communications in the public file of the rulemaking,” unless they contain “material factual information (as distinct from indications of governmental policy).”<sup>277</sup>

#### A. *The Problem of Conduit Communications*

OIRA review can provide a “conduit” by which the views of interested private persons reach an agency, without submission to the publicly available record of a rulemaking. These communications pose two kinds of problems. First, they may include new factual information or policy arguments which escape the testing process to which other material in the agency’s possession is subjected by public comment. Second, due to their endorsement by OMB, they may assume special prominence in the agency’s analysis, risking unfairness to those interested persons who do not enjoy the same access. These concerns for the integrity of the administrative record and for fairness to the public sound partly in law and partly in policy. They have resulted in a recommendation by the Administrative Conference that all conduit communications be revealed in the public record of a rulemaking.<sup>278</sup>

Soon after issuance of Executive Order No. 12,291, the Department of Justice’s Office of Legal Counsel (OLC) advised OMB regarding *ex parte* contacts with agencies:

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275. *Id.* at 407-08.

276. The Administrative Conference of the United States is a federal agency that formulates recommendations to improve the procedures of the agencies. 5 U.S.C. §§ 571-576 (1982 & Supp. IV 1986).

277. 1 C.F.R. § 305.80-6 (1988).

278. *Id.*

You and your staff may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public.

...

... [R]ulemaking agencies should disclose in the administrative file ... substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of executive or independent agencies.

...

Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process.<sup>279</sup>

Thus, OLC's advice followed the emerging consensus among administrative lawyers regarding *ex parte* contacts. OMB adopted it, but not completely. In a memorandum instructing agencies on procedures under the new executive order, OMB stressed that "[b]oth the public and the agencies should understand that the primary forum for receiving factual communications concerning proposed rules is the agency."<sup>280</sup> Therefore, factual materials sent to OMB were also to be sent to the agencies for inclusion in the record, and OMB promised to identify as "appropriate for the whole record of the agency rulemaking" any factual material that it developed or received and then transmitted to an agency.<sup>281</sup> Omitted from this formulation was policy material received from outside the government. OMB would soon encounter substantial controversy concerning its use.

A number of health and safety rulemakings during the Reagan administration have produced complaints about conduit communications. Congressional committees overseeing the programs proved sympathetic to these complaints, and brought increasing pressure on OIRA to alter its procedures. OIRA has consistently denied that it has served as a conduit.<sup>282</sup> Especially in the early years of the executive order program, however, OMB engaged in many meetings and informal contacts with interested persons, most of whom represented regulated industries.<sup>283</sup> Because of OMB's heavy workload, this practice created risks that new factual material would reach agencies without identification by OMB, that policy positions

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279. Contacts Between the Office of Management and Budget and Executive Branch Agencies Under Executive Order No. 12,291 (Apr. 24, 1981), *reprinted in* 5 Op. Off. Legal Counsel 107, 110-12 (1981).

280. Office of Management and Budget, Memorandum for Heads of Executive Departments and Agencies, Subject: Certain Communications Pursuant to Executive Order 12291, "Federal Regulation" (June 11, 1981), *reprinted in* 1988-89 REGULATORY PROGRAM, *supra* note 122, app. III at 540.

281. *Id.*

282. *See, e.g.,* Olson, *supra* note 148, at 55 n.281.

283. *Id.* at 55-62, 69-71; *Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess.*

of outsiders would be accepted uncritically by OMB, and that the process would display a bias toward industry. Charges arose that all three of these effects were present.<sup>284</sup>

EPA provided one primary field of controversy. In the asbestos rulemaking, it was charged that there were about twenty communications (letters, meetings, and telephone calls) between OIRA and the asbestos industry and other interested persons.<sup>285</sup> A committee thought that legal and policy arguments that OIRA sent to EPA "closely track[ed] arguments made . . . by the Asbestos Information Association in a letter to OMB."<sup>286</sup> OMB denies having had meetings or telephone conversations with industry representatives, and insists that its positions were developed independently and were later adopted by the industry.<sup>287</sup> There were meetings at OMB, but they were with representatives of the Canadian government and the Interior Department.

In OSHA's ethylene oxide rulemaking, a committee concluded that OMB arguments against the short-term exposure limit "apparently repeat[ed] industry arguments which had already been rejected by OSHA."<sup>288</sup> One House report found that OMB met with industry representatives regarding at least two other OSHA rulemakings.<sup>289</sup> A second report found that the FDA's rulemaking on carcinogenic color additives resulted in industry letters to and meetings with OIRA, which then repeated industry arguments to the FDA.<sup>290</sup>

Several features of these cases probably helped to exacerbate relationships with the congressional oversight committees, whose reports developed a notably hostile tone. First, partisan politics

58-61 (1981) (providing an OMB list of 36 meetings in early 1981, 33 of them with industry representatives).

284. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY, REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM, AND OTHER MATTERS 282-94 (Comm. Print 1984).

285. *EPA's Asbestos Regulations: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 231-37 (1985); see also SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 99TH CONG., 1ST SESS., EPA'S ASBESTOS REGULATIONS: REPORT ON A CASE STUDY ON OMB INTERFERENCE IN AGENCY RULEMAKING 103 (Comm. Print 1985) (noting more than 30 ex parte communications by EPA and OMB officials).

286. S. REP. NO. 156, *supra* note 102, at 15, 24-25. In another rulemaking, on water pollutant guidelines, it seemed to EPA's Chief of Staff that comments from OMB "were of such a particularized technical nature . . . in an engineering sense, that they would have had to have come from someone other than the staff of OMB itself." *Superfund Hearings*, *supra* note 157, pt. 3, at 5 (statement of former EPA Chief of Staff John Daniel).

287. OMB posits that the accusations of industry contacts came from the presence in OMB files of papers from the public docket of the agency.

288. S. REP. NO. 156, *supra* note 102, at 32.

289. H.R. REP. NO. 583, 98th Cong., 1st Sess. 11 (1983).

290. H.R. REP. NO. 151, *supra* note 241, at 59-62.

undoubtedly played a role, as the administration and the committees squabbled over the direction regulatory policy should take. Second, in rulemaking it is often difficult to separate fact from policy, so OMB may have appeared to be violating its own rules—or, indeed, it may have done so. Third, the administration's emphasis on regulatory relief and the frequency of its contacts with industry groups opened OMB to portrayal as a special pleader for industry, instead of a critic prepared to see both the costs and benefits of regulation.

### *B. Conflict and Compromise: The Evolution of OMB's Disclosure Policy*

By 1986, OMB was under serious pressure from both Houses of Congress. The Chairmen of three important House committees joined in an effort to deny OIRA any appropriations until limits to its powers were enacted.<sup>291</sup> In the Senate, members of the Committee on Governmental Affairs pressed OMB to open its processes.<sup>292</sup> OMB wanted to obtain reauthorization of the Paperwork Reduction Act and to stop the "defunding" move in the House. In June, 1986, OIRA Administrator Gramm issued a memorandum announcing new disclosure procedures.<sup>293</sup> There were two antecedents for these procedures: a Senate amendment to a paperwork reauthorization bill in 1984,<sup>294</sup> which failed to pass, and a special agreement OMB reached with EPA in 1985 for review of its rules.<sup>295</sup>

Under the 1986 procedures, OIRA makes available copies of draft notices of proposed rulemaking and final rules that are submitted for review, along with copies of all related correspondence between OIRA and agency heads.<sup>296</sup> These documents are available once the notices or final rules have been published in the Federal Register. Similarly, OIRA provides on request copies of agency submissions under Executive Order No. 12,498, following publication of the final Regulatory Program.<sup>297</sup>

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291. They were Chairman Dingell of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, Chairman Brooks of the Government Operations Committee, and Chairman Whitten of the Appropriations Committee.

292. Senators Durenberger and Levin led the effort. See *Oversight of the Office of Management and Budget Regulatory Review and Planning Process: Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 56-58, 97-98 (1986).

293. OMB, Memorandum for the Heads of Departments and Agencies Subject to Executive Order Nos. 12,291 and 12,498, Subject: Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 and 12,498 (June 13, 1986) [hereinafter June 13, 1986 Memo] (rev. Aug. 8, 1986), reprinted in 1988-89 REGULATORY PROGRAMS, *supra* note 122, app. III, at 529-31.

294. SENATE COMM. ON GOVERNMENTAL AFFAIRS, PAPERWORK REDUCTION ACT AMENDMENTS OF 1984, S. REP. NO. 576, 98th Cong., 2d Sess. 21-23, 35 (1984).

295. Letter from Robert P. Bedell, Deputy Administrator, OIRA, to A. James Barnes, Deputy Administrator, EPA (May 30, 1985), reprinted in 1988-89 REGULATORY PROGRAM, *supra* note 122, app. III at 542-43.

296. June 13, 1986 Memo, *supra* note 293. Also now available are drafts of advance notices of proposed rulemaking, and lists, at the end of each month, of all notices and final rules for which OMB has completed review. *Id.*

297. *Id.*

OIRA also agreed to stricter controls on "conduit" communications from persons outside the federal government. For these added controls OIRA referred to its earlier procedures for EPA, along with an offer to extend them to any other agency so requesting.<sup>298</sup> OIRA sends these agencies copies of all written material from outsiders, advises them of all oral communications,<sup>299</sup> and invites agency personnel to attend meetings concerning their rules.<sup>300</sup> It also makes available in its public reading room written materials and lists of meetings and communications involving persons outside the federal government.

These procedures have removed some, but not all, of the controversy over the openness of OMB review.<sup>301</sup> For review under Executive Order No. 12,291,<sup>302</sup> the significant gaps in disclosure are: (1) the absence of draft notices and rules that are withdrawn by the agency and never issued; (2) the absence of correspondence between OIRA desk officers and subordinate agency personnel; and (3) the absence of summaries of oral communications between OIRA and the agencies.

### C. *The Scope of Executive Privilege*

Analysis of the appropriate degree of openness of OMB review of rulemaking must consider the role of executive privilege, which may provide a constitutional bar to some measures. Two Supreme Court cases have shed some light on the problem. In *United States v. Nixon*,<sup>303</sup> the Court recognized a constitutional executive privilege

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298. These agencies now include the Departments of Housing and Urban Development, Labor, Transportation, and the Treasury. *Id.* at 15.

299. The practice regarding oral communications is short of logging, in the sense of a summary of the substance of a conversation. Instead, notice is given of the source and subject matter of each conversation.

300. Since 1981, OIRA has allowed only the Administrator and Deputy Administrator to "meet or discuss a rule under Executive Order 12,291 review," with persons outside the executive branch unless others are specially authorized. 1988-89 REGULATORY PROGRAM, *supra* note 122, at 15 n.21. This limit has been blurred somewhat, however, by the opportunity for OIRA staff to meet with outsiders on paperwork requirement reviews. *See* Olson, *supra* note 148, at 62-64.

301. The 1986 procedures parallel earlier recommendations of the Administrative Law Section of the American Bar Association. *See* Strauss & Sunstein, *supra* note 101, at 193, 207 (urging OMB to make agency drafts prepared under Executive Order Nos. 12,291 and 12,498 available to relevant congressional committees after the rulemaking activity is complete). The Administrative Conference subsequently adopted a recommendation closely resembling the 1986 procedures, modifying its earlier stance discussed *supra*, text accompanying notes 276-77. *See* 54 Fed. Reg. 5207 (1989).

302. For matters concerning Executive Order No. 12,498, see *infra* text accompanying notes 331-37.

303. 418 U.S. 683 (1974). *See generally* Symposium: *United States v. Nixon*, 22 UCLA L. REV. 1 (1974).

based on the President's need for confidential policy deliberations.<sup>304</sup> The privilege was qualified, however,<sup>305</sup> and in *Nixon* itself was overridden by the need of the courts for evidence in a criminal case.<sup>306</sup>

The Court's use of a functional, balancing approach was repeated in *Nixon v. Administrator of General Services*,<sup>307</sup> in which the Court upheld the power of Congress to regulate presidential papers. From a separation of powers standpoint, the Court said,

the proper inquiry focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.<sup>308</sup>

The Court found that the activities of records archivists would cause only a limited intrusion on confidentiality, and were therefore justified by congressional needs to preserve history. It pointed out that confidentiality is a wasting asset subject to erosion by the creation of presidential libraries, the memoirs of participants, and the efforts of historians.<sup>309</sup>

Congress has been of two minds about executive confidentiality. On the one hand, it has entirely exempted the President and his immediate staff from the Freedom of Information Act (FOIA),<sup>310</sup> and has provided an exemption from forced disclosure for deliberative materials generated elsewhere in the executive branch.<sup>311</sup> Accordingly, in *Wolfe v. Department of Health and Human Services*,<sup>312</sup> the D.C. Circuit held that FOIA exempts from disclosure material in a "regulations log" that HHS used to indicate which FDA proposals were being reviewed by HHS or OMB.<sup>313</sup> On the other hand, Congress has repeatedly sought to override claims of executive privilege in order to obtain material in the hands of the executive for its own

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304. 418 U.S. at 703-16.

305. *See id.* at 706 (refusing to sustain an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances").

306. *Id.* at 713.

307. 433 U.S. 425 (1977).

308. *Id.* at 443 (citation omitted).

309. *Id.* at 450-51, 454. The Court observed that most materials in presidential libraries are open, with lessening restrictions over time. *Id.* at 450 n.12. The Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2207 (1982 & Supp. III 1986), restricts access to the President's deliberations with his advisers for not more than 12 years. *Id.* § 2204(a) (1982); *see also Presidential Records Act of 1978: Hearings on H.R. 10998 and Related Bills Before the Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 88 (1978) (providing testimony by the Department of Justice in support of the constitutionality of the Act).

310. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (stating that FOIA's legislative history unambiguously indicates that Congress intended that the President and his immediate staff whose sole function is to "advise and assist" him be exempt from FOIA).

311. 5 U.S.C. § 552(b)(5) (1982); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

312. 839 F.2d 768 (D.C. Cir. 1988) (en banc).

313. *Id.* at 771.

use.<sup>314</sup> Courts have not announced any clear rules for these congressional-executive contests over information,<sup>315</sup> and it is often difficult to litigate them at all.<sup>316</sup> Consequently, informal negotiation and struggle dominate, with congressional committees obtaining most information they desire if they are persistent enough and enjoy the support of their house of Congress.<sup>317</sup>

Thus, it would not reflect actual government practice to argue that the executive branch possesses a nonwaivable executive privilege for all deliberative material it generates. The executive has sometimes made such claims as a tactic in contests over information, yet it often releases such materials to congressional committees or to members of the public. Indeed, the 1986 compromise between OIRA and its oversight committees is one example of the contingent nature of executive confidentiality as it actually operates.

The executive branch has, however, two strong claims for confidentiality. First, deliberations between the President and his immediate advisers (which were involved in *Nixon* itself) implicate the President's ability to perform his constitutional functions, and deserve a strong presumption of confidentiality. Thus, if the President or his immediate advisers wish to discuss regulatory policy with an agency head, their conversations need not reach the administrative record.<sup>318</sup> This privilege does not necessarily mean, however, that communications between OIRA and agencies deserve the same treatment.<sup>319</sup>

Second, throughout the executive branch there is an essentially unvarying interest in protecting policy discussion while a decision is under consideration, as opposed to after the fact. This is not a matter of encouraging candid advice, which needs long-term protection to flourish. Instead, it is a matter of power over the policy decision itself. When deliberation on a pending decision is open, it is very hard to limit the lobbying of every interested person and to control the situation. With these considerations in mind, I now turn to specifics on the openness of OMB oversight.

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314. See generally Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974) (providing a discussion of executive privilege); Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987) (same).

315. *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 128-29 (D.C. Cir. 1977) (concluding that a congressional-executive impasse requires a "judicial balancing of executive and legislative interests").

316. See, e.g., *United States v. House of Representatives*, 556 F. Supp. 150, 152-53 (D.D.C. 1983) (dismissing as nonjusticiable a suit for declaratory judgment brought by the executive branch to compel disclosure of certain documents by EPA Administrator Anne Gorsuch).

317. See P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 187-208 (1988), for case studies that support this proposition.

318. *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981).

319. See *infra* notes 323-30 and accompanying text.

D. *Protecting the Administrative Record: A Paper Trail Or A Logging Requirement?*

Regulatory oversight evolved substantially during the Reagan administration. The NAPA Report concluded that “while it appeared originally to respond to the demands of regulated industries for regulatory relief and to operate with little public and congressional scrutiny, it is now more open and restrained.”<sup>320</sup> NAPA called for even more openness, recommending that agencies “log, summarize, and include in the rulemaking record all communications from outside parties, OMB, or other executive or legislative branch officials concerning the merits of proposed regulations.”<sup>321</sup>

NAPA’s approach is not the only acceptable one.<sup>322</sup> Any particular disclosure feature should be judged by its marginal contribution to the values served by openness, weighed against its marginal burdens and its interference with the values served by confidentiality. I proceed by analyzing increasing levels of disclosure.

The 1986 compromise between OMB and the committees produces a “paper trail” of oversight activity. Those interested can track the written portions of OMB’s activity to check its wisdom and legality. Knowing that this trail is being left, those within OIRA and the agencies can be expected to ensure that their interchange is within legal limits. Presumably, however, candor suffers somewhat. The effects are both good and bad. Pressure to ignore the administrative record or statutory limits might be less likely to occur when information must be delivered orally, and to that extent furtively. On the other hand, written advice may be crafted for the public eye, with more posturing and less incisiveness.

Less than this amount of disclosure does not seem desirable. In the early years of the Reagan administration’s program, charges frequently arose that OMB was pressing an agency beyond the parameters justified by its statute or its administrative record. Under the pressure of congressional investigation, a paper trail of each controversial rulemaking emerged to allow resolution of the dispute. This pattern of inquiry and eventual disclosure, with its heavy transaction costs for all concerned, is likely to recur unless a paper trail is routinely provided. Similarly, the new controls on conduit communications seem necessary to ensure the fairness of executive oversight.

The 1986 compromise does not, however, produce a complete

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320. NAPA REPORT, *supra* note 120, at 7.

321. *Id.* at 35. NAPA explained:

Just as agency decisionmaking can be improved by subjecting it to external scrutiny, so can OMB’s analyses of agency proposals benefit from outside review. The same arguments used to justify OMB review itself—that agencies need to articulate formally what they are doing and why their actions are appropriate—apply equally to OMB.

*Id.* In his separate views, Richard Wegman called for placing any centralized control early in the rulemaking process. If it occurs during the comment period or before, he argued, the public can react to it. He would avoid all post-comment period involvement as too productive of “political mischief.” *Id.* at 44.

322. For a similar approach, see S. 2023, 99th Cong., 2d Sess. (1986) (providing for the establishment of a file concerning the review of rules by the President)

paper trail. One omitted category is notices and rules that are withdrawn by an agency. Adding these items would not pose much added burden for the agencies and OMB. Indeed, the availability of submissions for the Regulatory Program pursuant to Executive Order No. 12,498, whether or not the initiative matures in a notice of proposed rulemaking, shows that such an addition would be feasible.

The 1986 compromise also does not reveal correspondence among subordinate personnel, for example memoranda exchanged by desk officers and agency staff, although congressional inquiries or leaks often reveal them. The routine availability of these items would materially aid understanding of the oversight process, only a portion of which appears in formal written communications between the Administrator of OIRA and agency heads. Also, pressure to ignore an agency's statute or administrative record can occur at any level of the process. On the other hand, revealing staff dialogue might blur political accountability within both OIRA and the agencies by inviting observers to wonder who speaks for the institution, the staff or the political appointee at the top. Knowing their correspondence would be made public, staff could try to bind their superiors by taking strong positions in print. On balance, I think this material should be available, although the issue is close.

Another possible modification of the 1986 procedures would be to require agency drafts to be published in the Federal Register simultaneously with their submission to OMB. I think it better to make the drafts available only after the rulemaking notices have been published. Publicity about the pendency of review can only increase pressure on OIRA to engage in communications with interested persons. Instead, rulemaking procedure should be structured to guide persons outside the government to the agency, not to OIRA.

Whether oral communications should be "logged" (summarized and placed in the public record) presents another close question.<sup>323</sup> Longstanding dispute over this procedure has made the arguments familiar. The traditional conception of rulemaking as an informal, "quasi-legislative" activity has made unrecorded *ex parte* contacts seem permissible. Congress has declined to amend the APA to alter that view.<sup>324</sup> Moreover, an agency must defend its rules in court

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323. See Gellhorn & Robinson, *supra* note 270, at 205 (noting the difficulty in articulating guidelines for *ex parte* contacts and impartiality); Verkuil, *supra* note 266, at 989 (concluding that the need for a record should not override other interests such as presidential coordination and policymaking).

324. *Action for Children's Television v. FCC*, 564 F.2d 458, 474-75 & n.28 (D.C. Cir. 1977). The D.C. Circuit noted that

[i]f Congress wanted to forbid or limit *ex parte* contact in every case of informal rulemaking, it certainly had a perfect opportunity of doing so when it

solely on the basis of the public record, and may not rely on facts or policy argument not reflected there.<sup>325</sup>

The NAPA Report finds these considerations outweighed by improvements that disclosure will bring to the oversight dialogue.<sup>326</sup> Certainly, OMB pressure to ignore the administrative record or the statute can be applied as easily by voice as by pen. Yet that pressure can occur anyway, at higher levels of the executive branch, in ways that are difficult or impossible to police. For detailed policy argument, there may be no practical alternative to writing. Moreover, agencies can request that policy advice on a particular matter be transmitted in writing whenever the content of oral advice appears to merit that check. A strict logging requirement in OIRA could simply shift oral discussion up the organization chart, or into the early rulemaking stages to which logging requirements generally do not apply.

Logging all oral communications would add a significant burden to administration. More important, it would alter the relationship between OMB and the agencies in some undesirable ways. The very presence of an executive privilege concept recognizes a positive value in informal discussion. Policy debate tends to feature negotiation and compromise, as the history of OMB oversight illustrates. Negotiation is not a flower that blooms in sunlight. Therefore, there is reason to maintain an informal, oral channel of communication between agencies and OIRA, even if more detailed, formal communication that is written down is available to the public.

The Administrative Conference has recommended that official written policy guidance to agencies from OIRA be placed in the public file of the rulemaking after the notice to which it pertains is issued.<sup>327</sup> I would add other written communications between OIRA and the agencies. Written or oral policy advice from the President or his immediate advisors<sup>328</sup> to agencies need not be disclosed, however, so that the constitutional executive privilege can

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enacted the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 . . . . That it did not extend the *ex parte* contact provisions of amended section 557 [which governs adjudication] to section 553 [which governs rulemaking]—even though such an extension was urged upon it during the hearing—is a sound indication that Congress still does not favor a per se prohibition or even a “logging” requirement in all such proceedings.

*Id.* at 475 n.28.

325. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (stating that the courts may not accept post-hoc rationalizations to support agency action).

326. NAPA REPORT, *supra* note 120, at 35.

327. 54 Fed. Reg. 5207, 5208 (1989); see *supra* note 301.

328. A workable definition of this group is the exemption to FOIA discussed *supra* note 310 and accompanying text.

operate.<sup>329</sup> And at least for the present, a universal logging requirement seems premature.<sup>330</sup>

### E. Executive Order No. 12,498 and the Planning Process

At the start of its second term, the Reagan administration reached earlier into the rulemaking process with Executive Order No. 12,498.<sup>331</sup> The order requires the head of each executive agency to send OMB a "draft regulatory program" that describes "all significant regulatory actions" to be undertaken within the next year.<sup>332</sup> OMB reviews the plan for consistency with administration policy, and a final Regulatory Program is published.<sup>333</sup> As noted above, the order's purpose is to give political appointees in OMB and the agencies more control over the early stages of rulemaking.<sup>334</sup>

OMB's definition of the significant regulatory actions to which the order applies is broad. It includes the creation of an agency task force to evaluate the need for a regulation, the undertaking of studies of economic problems, and an analysis of health and safety risks that might lead to regulation.<sup>335</sup> Consequently, immediate criticism arose that the order would stifle investigative activity that would have shown the need for regulation.<sup>336</sup>

OMB's 1986 disclosure policy included a promise to make available all agency drafts submitted to OMB under the order, after publication of the year's Regulatory Program.<sup>337</sup> Without the availability of the drafts, public and congressional monitoring of OMB's activity would have been extremely difficult. This aspect of the disclosure policy should be continued. Correspondence between OMB and the agencies, or from persons outside the government, should also be made available. But oral communications between OMB and the agencies should remain confidential, as they

329. The Administrative Conference would extend this privilege generally to "other members of the Executive Branch," 54 Fed. Reg. 5207, 5208 (1989), which would subject only OIRA's written advice to disclosure. I would treat written interagency advice that does not emanate from the President's immediate office similarly to OIRA's.

330. My views were once to the contrary. See Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 504-06 (1979).

331. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), reprinted in 5 U.S.C.A. § 601 app. at 296-97 (West Supp. 1988).

332. *Id.*

333. See generally Note, *supra* note 100.

334. See *supra* text accompanying notes 100-101; see also DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (providing views of two former OIRA administrators).

335. OMB, Bulletin 85-9 & Attachment 1 (Jan. 10, 1985).

336. See S. REP. NO. 156, *supra* note 102, at 10-12; Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1063 (1986).

337. 1988-89 REGULATORY PROGRAM, *supra* note 122, at x n.14.

traditionally have been at these early stages of the rulemaking process. The purpose of partial disclosure under this executive order differs, however, from that under Executive Order No. 12,291. Oversight occurring very early in the rulemaking process is not likely to pose an identifiable threat of a statutory violation, unless a statute unequivocally calls for regulation. Nor is it likely to undermine a developed administrative record. Instead, the purpose is more political, to reveal the road not taken. The interested public and congressional committees can then decide whether to press for a different course.

## VII. *Defining Exceptions to OMB Oversight*

### A. *Independent Agencies and Excepted Functions*

To date, Presidents have not attempted to apply their regulatory management executive orders to the independent agencies. Although President Reagan was advised that he had the constitutional power to include these agencies in the coverage of Executive Order No. 12,291, he chose not to do so.<sup>338</sup> The extent of a President's constitutional power over an agency that Congress has chosen to shield from his supervision has been a matter of spirited, if inconclusive, debate for many years.<sup>339</sup>

The Supreme Court has recently given the debate new life. *Morrison v. Olson*<sup>340</sup> announced a new test for the constitutionality of restrictions on the President's power to remove executive officers: whether the statutes "impede the President's ability to perform his constitutional duty."<sup>341</sup> This test is surely better than the old one—whether an office is "purely executive"<sup>342</sup>—with its invitation to bright lines where the reality of government offers none. Nevertheless, it states but does not answer the central question: What is the nature of the President's constitutional duty?<sup>343</sup> A narrow definition might include only the substantive grants of power over foreign affairs and national defense in Article II, and would therefore confer little supervisory power over rulemaking. A broad definition might emphasize the President's duty to take care that the laws be faithfully executed, and would envision broad supervisory power.

Some guidance emerges from the Court's holding in *Morrison*, and from a distinction it made. The Court upheld independence where

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338. Office of Legal Counsel, Department of Justice, Memorandum for Honorable David Stockman, Director, OMB, Re: Proposed Executive Order on Federal Regulation (Feb. 12, 1981), reprinted in P. SHANE & H. BRUFF, *supra* note 317, at 355-58 (abridged version).

339. See generally *A Symposium on Administrative Law: "The Uneasy Constitutional Status of the Administrative Agencies,"* 36 AM. U.L. REV. 277 (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

340. 108 S. Ct. 2597 (1988).

341. *Id.* at 2619.

342. *Humphrey's Exec'r v. United States*, 295 U.S. 602, 629-32 (1935); see *supra* text accompanying notes 30-31.

343. For a summary of the debate over the nature of the President's powers, see *supra* text accompanying notes 5-16.

conflicts of interest undermine normal political accountability, as in the investigation and prosecution of high-level crime in the executive branch.<sup>344</sup> Ordinary regulation does not pose this problem. Thus the Court cautioned that special prosecutors do not enjoy "policymaking or significant administrative authority."<sup>345</sup> This statement implies a broad view of presidential power—that placing policymaking responsibilities in independent agencies infringes the President's powers by undermining political accountability. Of course, the Court left that question for another day.<sup>346</sup>

Any functional, balancing doctrine is uncertain in application. Nevertheless, the President has a substantial argument that his need to supervise most regulation of the traditional independent agencies is no less than for the executive agencies. Much of the policymaking of the independent agencies is not functionally distinct from that of executive branch agencies. For example, the Federal Trade Commission, an independent agency, shares antitrust enforcement responsibility with the Department of Justice. Thus, policies adopted by independent agencies can affect those of executive agencies.<sup>347</sup> Moreover, congressional difficulties with policy coordination pertain to all agencies.

Some independent agencies make policy that is vitally important to our national life; hence presidential interest in its formulation is both inevitable and proper. The Federal Reserve Board's monetary functions and the Securities and Exchange Commission's market regulation come to mind. Nevertheless, congressional perception of a need to insulate particular kinds of regulation from presidential supervision is entitled to some judicial deference. How are we to resolve these imponderables? Fortunately, the Court appears to be moving away from loose conceptions that whole agencies have a special constitutional status outside the executive branch, and toward a more focused inquiry whether the President has been denied a supervisory role that is appropriate to the particular function involved.<sup>348</sup> That appears to be implicit in *Morrison's* willingness to

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344. See Bruff, *supra* note 35, at 541-42.

345. *Morrison*, 108 S. Ct. at 2619.

346. In *Mistretta v. United States*, 109 S. Ct. 647 (1989), the Court rejected a separation of powers challenge to the Sentencing Commission, an independent agency in the judicial branch that sets mandatory sentencing guidelines. The Court thought that this function was appropriately placed in the judicial branch because of historically broad judicial control over sentencing. The Court also remarked that it might be inappropriate to assign this function to the executive branch because that would combine sentencing with prosecution. *Id.* at 664 n.17.

347. See, e.g., *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 774-76 (3d Cir. 1979) (upholding the NRC's decision to suspend nuclear fuel recycling at the request of the President and in deference to his foreign policy efforts to prevent international proliferation of nuclear weapons despite a challenge that such action impermissibly interfered with the agency's independence).

348. See P. SHANE & H. BRUFF, *supra* note 317, at 326.

allow some prosecutorial functions to be made independent, without adopting the position that the entire Department of Justice could be so insulated.

Therefore, we need to identify kinds of rulemaking programs for which presidential supervision is not appropriate. The principal inquiry should be whether the executive's accountability can be trusted. Thus, some federal rulemaking should be excepted from executive oversight because the President's role as head of his party may give him a personal interest in the subject matter. Two prominent examples are administration of the Federal Communications Commission's "equal time" rules<sup>349</sup> and the Federal Election Commission's regulation of political campaigns.<sup>350</sup>

A second inquiry is whether political accountability would interfere with successful performance of the function. Thus, the Court might conclude that sound monetary policymaking requires the insulation from normal accountability to both President and Congress that the Federal Reserve now enjoys because short-run political considerations would hamper this function.<sup>351</sup>

Under this line of inquiry, some kinds of rulemaking functions should receive categorical exemption from presidential supervision. Executive Order No. 12,291 does not apply to "formal" rulemaking, which is performed according to the APA's procedures for adjudication.<sup>352</sup> This exception recognizes that the distinction between rulemaking and adjudication is sometimes blurred. Due process strictures apply when some individuals are "exceptionally affected, in each case upon individual grounds," by administrative action.<sup>353</sup> Adjudication has traditionally been protected from outside interference by anyone.<sup>354</sup> These due process values lurk in the cases upholding agency independence from presidential supervision because adjudicating agencies were involved.<sup>355</sup>

When rulemaking resembles adjudication because it involves deciding "conflicting private claims to a valuable privilege," courts have barred *ex parte* contacts.<sup>356</sup> Similarly, ratemaking should be

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349. 47 U.S.C. § 315 (1982); see G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 125, at 413-21.

350. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (providing an exhaustive examination of the Federal Election Campaign Act of 1971, and upholding the constitutionality of the Federal Election Commission's regulation of political campaigns).

351. For an overview of Federal Reserve monetary functions, see W. MELTON, *INSIDE THE FED* (1983).

352. Section 1(a)(1) of the Order exempts actions "governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code." See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note at 432 (1982).

353. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973) (quoting *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915)).

354. The APA, 5 U.S.C. § 557(d) (1982), bars all *ex parte* contacts in adjudication and formal rulemaking.

355. See, e.g., *Wiener v. United States*, 357 U.S. 349, 349-56 (1958) (holding that the President could not remove a member of the adjudicatory War Claims Commission).

356. *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (involving FCC allocation of a limited number of television channels to particular communities).

excepted from executive oversight.<sup>357</sup> Such an exception would also respect the congressional judgment that ratemaking ordinarily should be insulated from politics.<sup>358</sup>

In a number of modern statutes, Congress has created rulemaking programs that are "hybrids" because they employ some adjudicative procedure.<sup>359</sup> This implies that *ex parte* contacts are inappropriate, although it does not necessarily compel that conclusion. A statute-by-statute judgment is necessary. For example, a statute may have addressed executive branch contacts explicitly, partially controlling them.<sup>360</sup> If not, it is necessary to assess whether oversight is appropriate for the substantive issues involved in the program.

### B. *The Desirability of Statutory Controls on Oversight*

Should a statute be enacted to ratify and control presidential management of regulation? There has been sufficient experience under the executive orders to justify statutory codification. Moreover, enactment is probably feasible because there are advantages for both the President and Congress. The President could benefit by resolving lingering doubts about the program's legitimacy, and perhaps by obtaining its extension to the independent agencies. Congress could benefit by codifying disclosure practices that aid its capacity to oversee the program. Existing doubts about legality foster compromise in the legislative process; if the Court removes them with a broad endorsement of presidential power, the executive may resist statutory control of the program.

Lingering doubts about legality also affect the present nature of the program. The behavior of the participants can be expected to change somewhat under a statutory regime. At present, OMB-agency relationships usually feature negotiation. As experience in separation of powers controversies teaches, that is what we should

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357. See *ROADS TO REFORM*, *supra* note 42, at 82 (exempting ratemaking from a general call for presidential supervision of rulemaking because "although technically rulemaking under the Administrative Procedure Act, [it involves] quasi-judicial functions that should be kept separate from the political process"); *cf.* *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 251-56 (1973) (Douglas, J. dissenting joined by Stewart, J.) (noting that ratemaking has adjudicative elements, and therefore requires full hearings to ensure the integrity of the ratemaking process).

358. See *FEDERAL REGULATION*, *supra* note 46, pt. 5, at 67-81 (explaining that the creation of FERC as an independent agency within a cabinet department was intended to establish an agency somewhat removed from direct executive control because FERC's adjudicatory function should be carried out on the merits and not influenced by partisan considerations and priorities).

359. *E.g.*, 15 U.S.C. § 57a (1982) (providing hybrid rulemaking procedures for the FTC).

360. *E.g.*, 42 U.S.C. § 7607(d)(4)(B)(ii) (1982) (requiring under the Clean Air Act that all written interagency correspondence concerning draft proposed rules be placed in the rulemaking docket).

expect in conditions of uncertainty about ultimate power.<sup>361</sup> If the uncertainty is removed, behavior should change somewhat. Statutory ratification of the program could produce a more peremptory approach by OMB. It is not clear, however, that the change would be very great. For example, OMB's behavior under the Paperwork Reduction Act does not seem sharply different from that under the executive orders. As all students of bureaucracy know, many variables affect OMB-agency relationships—for example, the nature of the personal relationship between an agency head and the President.

The informal agreement that OMB reached with its congressional oversight committees in 1986 did not establish a long-term resolution of the issues that had arisen during the Reagan administration.<sup>362</sup> A management program in the new administration will probably encounter strong pressure to reach a similar *modus vivendi* with the committees. In that case, the primary advantages of a statute would be to give Congress an opportunity to decide which rulemaking programs should be exempt from review, and to enact more permanent controls.

Congress has begun to consider bills that would forbid or limit OMB review of particular programs.<sup>363</sup> In the absence of a generally applicable statute, the executive might simply apply its program to the independent agencies, letting the courts struggle with *Morrison's* criteria to define the limits of executive management. Instead, the better course would be to put OMB review on a statutory basis, with controls reflecting experience to date.

### Conclusion

Experience under the Reagan administration executive order program reflected several enduring tensions in our scheme of government. Indeed, the orders were drafted to affect the allocation of power within the executive, and between the executive and Congress. Hence it should surprise no one that conflict attended the

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361. Executive privilege controversies between the President and Congress provide a prominent example. See P. SHANE & H. BRUFF, *supra* note 317, at 184-208.

362. The denouement of the effort to "defund" OIRA occurred when Senate and House conferees agreed to reauthorize the Paperwork Reduction Act as part of the continuing resolution passed in October 1986. H.R. CONF. REP. 1005, 99th Cong., 2d Sess. 349 (1986). The compromise provided for: (1) a separate line item account for OIRA in OMB's budget with authorized spending of \$5.5 million for the next three years; (2) Senate confirmation of the administrator of OIRA; and (3) a prohibition on the use of the funds authorized for "any function or activity which is not specifically authorized or required by this [Act] . . . [T]he review of a rule or regulation is specifically authorized or required by this [Act] only to the extent that such review is for the sole purpose of reviewing an information collection request contained in, or derived from, such rule or regulation." *Id.* at 355. The sponsors of the reauthorization compromise explained that OIRA could perform other functions if it obtained separate funding for them. *Id.* at 771. The appropriations act also provided \$5.5 million for OIRA with no restrictive language, except to continue the prohibition against OMB review of agricultural marketing orders. *Id.* at 330.

363. *E.g.*, S. 2443, 100th Cong., 2d Sess. (1988) (limiting review of the Nuclear Regulatory Commission).

relations of OMB with both agencies and congressional committees. Another enduring tension in administrative law, between law and politics in regulation, was also present. It was exacerbated (as was the overall level of conflict) by the administration's bias toward industry. From the point of view of the administration, however, the program enjoyed unprecedented success in imprinting regulation with the President's own principles.

An executive oversight program of this sort is constitutional, and is beneficial in its promotion of the political accountability of regulation. Nevertheless, its influence must be kept within the bounds of discretion conferred by existing statutory policies and the administrative records compiled in the agencies. I believe that the "paper trail" procedures that developed through OMB-congressional compromise are well suited to that task, with some modifications. In a new administration, where this experiment in government continues, the time may be ripe to place it on a more permanent statutory basis.