THE ROLE OF THE COUNCIL ON COMPETITIVENESS
IN REGULATORY REVIEW

HEARING
BEFORE THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SECOND CONGRESS
FIRST SESSION
ON
S. 1942

TO PROVIDE FOR PROCEDURES FOR THE REVIEW OF FEDERAL
DEPARTMENT AND AGENCY REGULATIONS, AND FOR OTHER PURPOSES

OCTOBER 24, 1991
THE ROLE OF THE COUNCIL ON COMPETITIVENESS IN REGULATORY
REVIEW

NOVEMBER 15, 1991
SECRECY OR SUNSHINE? PRESIDENTIAL REGULATORY REVIEW

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-041632-9
you received and that you acted on was improper, and that it was against your better judgment that you did these things?" If those people can't stand tall and say that, then I submit, sir, that nobody else should have to sit there and have to be questioned. The first place we've got to question is where was the improper influence brought to bear. The agency head signs those rules.

Chairman GLENN. OK. Let's say I agree with you 100 percent. Then I would follow up by asking what is wrong, then, with adopting the Executive Order and the agreement we had last fall, if what you just said was true.

Mr. MacRAE. I would say first of all I think you need to explore what evidence is there. What real evidence is there. If allegations are made, there are ways to find out. Let's find out what the real evidence is.

Chairman GLENN. Well, we've had a couple hearings on this testimony where people testified as to improper influence by the Council, a lot of evidence, and we may hear more later this morning; I don't know.

Mr. MacRAE. Yes, but you didn't bring the agency heads up here, the ones who write rules.

Chairman GLENN. OK. Thank you very much. We appreciate it. We'll keep in touch on this, and the message I'd send back is hope we can still resurrect that agreement of last fall. That would solve a lot of problems and give a lot more confidence to the people of the country than we're going to have otherwise, I think.

Thank you.

Chairman GLENN. Our next panel includes Robert V. Percival, Assistant Professor of Law and Director, Environmental Law Program, University of Maryland School of Law; Richard Wegman, Partner, Garvey, Schubert & Barer; and Joan Claybrook, President, Public Citizen.

We welcome you all to the table this morning. Mr. Percival, if you'll lead off, we'd appreciate it.

TESTIMONY OF ROBERT V. PERCIVAL, ASSISTANT PROFESSOR OF LAW AND DIRECTOR, ENVIRONMENTAL LAW PROGRAM, UNIVERSITY OF MARYLAND SCHOOL OF LAW

Mr. PERCIVAL. Thank you, Mr. Chairman.

I'll be brief, and I'd like to confine most of my remarks largely to responding to what Mr. MacRAE said in his testimony.

Chairman GLENN. Good, fine.

Mr. PERCIVAL. The creation of the Council of Competitiveness represents a new and potentially dangerous development for Presidential intervention in rulemaking. As I indicate in my testimony, the historical record indicates that now we have added a new layer of regulatory review on top of what was already the most onerous regulatory review system in history, and second, what is so disturbing about it is that it is being conducted entirely in secret. As you pointed out, we had made some progress in getting OMB to institute disclosure policies in the agreement that you reached with the administration last year; now, however, we have an entirely new

1 The prepared statement of Mr. Percival appears on page 157.
entity that operates entirely in secret, and basically all we know about their activities from them are the press releases that they issue.

In these circumstances, I think it is entirely appropriate for Congress to pass legislation requiring disclosure. The real issue here is how do you promote fidelity to law. It is clear that while the President has authority to supervise Executive agencies that that authority cannot dictate that the agencies fail to carry out the law or violate the law. The question is what is the best mechanism for ensuring that, and I submit that the historical record shows that disclosure is the best means for doing that.

In his testimony, Mr. MacRae begins on page 2 by suggesting that the legislation that you have proposed would be incredible onerous and incredibly broad because it would apply to the Council of Economic Advisers, CEQ, NSC, and the National Drug Control Policy Agency. From my own analysis of the legislation, it seems clearly targeted on entities that conduct regulatory review. I was not aware that the President had asked all these other agencies in the Executive Office to conduct regulatory review, so it would be my conclusion that it would really target primarily the Competitiveness Council unless they choose to expand regulatory review even more dramatically then they have already.

Secondly, the administration’s main response seems to be again very exaggerated claims of executive privilege. We know in the past they have had a history of making exaggerated claims of privilege which have not held up under scrutiny. In fact the claims that they make for the deliberative process privilege are so broad that they would suggest that their logical extension would be that Congress could not even require the basic procedures that agencies are following today to implement the Administrative Procedures Act and that the Executive could deny Congress access to virtually all information about what goes on in agencies.

Secondly, their primary response seems to be this analogy to the legislative process, saying that because we don’t require Congress to disclose everyone they have contact with, it is inappropriate to have similar disclosure requirements for the Executive Branch. I submit that that analogy is entirely inappropriate in the context of regulatory review.

What is going on here is that Congress has already enacted law, in public, with your votes being recorded. The administration is free to deliberate all its wants about what administration policy should be, what new legislation to recommend, without any interference whatsoever from Congress. However, when it comes to the task of executing the law that Congress has passed, there are very important reasons for disclosing what factual information agencies are considering and how they are making their decisions. So I think the legislative analogy is entirely inappropriate.

Mr. MacRae suggests that OMB’s existing disclosure policy is working, but I think he demonstrated fairly clearly how the Competitiveness Council now, which is having daily contact that is so numerous that he can’t even list all of the circumstances, effectively can make a mockery out of that disclosure policy since none of those activities have to be disclosed at all.
He also suggests that the decision in *Sierra Club v. Costle* indicates that the administration's policy is entirely legal. That case, which is cited every time this issue comes up, only establishes that in a circumstance where the President had a conversation with the head of EPA that the Clean Air Act had not required that that conversation be disclosed on the public record. It doesn't stand for the broad proposition that disclosure requirements such as are included in this legislation would in any way be unconstitutional. Moreover, in light of the District Court's decision in *EDF v. Thomas*, that made it quite clear that regulatory reviewing entities have no authority despite the fact that the President may have created them to make agencies take actions that are not in accordance with law, it becomes very important to create a mechanism to ensure fidelity to law.

Finally, I think the most fantastic claim of all that he makes is on page 8 of his testimony, in Footnote 3, where he seems to suggest that somehow this legislation would conflict with protection of whistleblowers. The notion that the Competitiveness Council in meeting with the regulated industries are primarily listening to whistleblowers disclose what really goes on is fairly fantastic to me. It seems to me that the context of protecting whistleblowers does not arise in the course of a normal rulemaking proceeding but rather with respect to whether or not those rules are being enforced, and that just illustrates how extreme the administration's are of privilege.

I think the real question here is openness in Government, fidelity to law; how do we assure the public that the promises that are made in the regulatory statutes and the Administrative Procedures Act are carried out. The activities of the Competitiveness Council threaten to further increase the gap between the ambitious promise of our laws and the reality of how they are carried out, and I think legislation to respond to this potentially extreme escalation of Presidential intervention in rulemaking is entirely appropriate.

Thank you.

Chairman Glenn. Thank you very much.

Mr. Wegman?

**TESTIMONY OF RICHARD A. WEGMAN,¹ PARTNER, GARVEY, SCHUBERT & BARER**

Mr. Wegman. Thank you, Senator Glenn. It is a pleasure to be back here again.

I will summarize my testimony and ask that it be placed in the record.

Chairman Glenn. All of your entire statements will be included in the record.

Mr. Wegman. Essentially, I think there are three problems with the type of mechanism that the administration is employing today for regulatory review.

First, I think there is a serious risk of undermining the integrity of the administrative process. I think the kind of process that has been established here does do basic violence to the notice and com-

¹ The prepared statement of Mr. Wegman appears on page 210.
Testimony

of

ROBERT V. PERCIVAL

Mr. Chairman, Senators, my name is Robert V. Percival. I am an assistant professor of law and director of the Environmental Law Program at the University of Maryland School of Law. Thank you for inviting me to testify today.

I have had experience with regulatory review both as a practitioner and as an academic. Prior to joining the Maryland faculty in 1987, I served as a senior attorney for the Environmental Defense Fund ("EDF"). In that capacity I represented EDF in litigation against OMB that produced the clearest judicial recognition of legal limits on OMB's regulatory review authority. Environmental Defense Fund v. Thomas, 627 F.Supp. 566 (D.D.C. 1986). Since joining the Maryland faculty in 1987 I have continued to study the evolution of the regulatory review program.1

I. INTRODUCTION: REGULATORY REVIEW AND PUBLIC CONFIDENCE IN GOVERNMENT

As the recent election results indicate, a large portion of the electorate feels a growing sense of frustration with the products of the political process. Distrust of government stems in part from a widespread perception that government institutions and officials are not performing as promised. This perception is

reinforced when laws promising comprehensive protection of public health and the environment are quietly undermined at the behest of regulated interests when translated into regulations. Given the high stakes involved in regulatory decisions and the complexity of recent regulatory legislation, some scholars have argued that the regulatory process has become an arena of legal gameplaying best understood by models of deception and strategic betrayal.²

The need to restore public confidence in government makes it all the more important to fulfill the promises of the Administrative Procedure Act (APA). The APA promises the public that agency decisions will be the products of reasoned decisionmaking arrived at through a public process, open to all, and that they will be consistent with law and based only on evidence in the rulemaking record. This "legal" model of the regulatory process contrasts with a "political" model reflected in the White House's persistent temptation to intervene in agency rulemaking to reward political supporters.

The tension between the "legal" and "political" models of agency decisionmaking has been displayed consistently during the last two decades of regulatory review by the Executive Office of the President. This experience has shown that measures that open

the process to public view are the most effective means for promoting fidelity to law. Prior to creation of the Council on Competitiveness, some progress had been made in this regard. As a result of vigorous oversight by this committee, new disclosure policies governing regulatory review had been promulgated and agreement had been reached with the Bush administration on legislation to codify docketing and disclosure requirements. This legislation would have represented an important step toward defusing the tension between Congress and the executive that has been a hallmark of regulatory review programs during the last two decades.

This progress is now severely threatened by the actions of the Council on Competitiveness. As the reincarnation of the Reagan administration's Task Force on Regulatory Relief, the Competitiveness Council gives every indication that it may repeat some of the most egregious abuses that have marked executive office oversight since 1971. In light of this development, S. 1942, the Regulatory Review Sunshine Act of 1991, should be supported not only by those concerned with fulfilling the APA's promise but also by those who seek to preserve the benefits of regulatory review.

II. REGULATORY REVIEW IN HISTORICAL PERSPECTIVE

Each of the five presidents who have served during the last two decades of rapid growth in federal regulatory legislation has established some mechanism for oversight of agency decisionmaking.
A. Regulatory Review in the Nixon Administration

In 1971 President Nixon established the first modern regulatory review program, called Quality of Life ("QOL") review. The QOL program required that selected regulatory proposals be submitted to interagency review to ensure that adequate consideration was given to the economic impact of regulation. OMB was made responsible for coordinating interagency review, but it was not given ultimate decision-making power. A proposal that would have shifted to OMB explicit decision-making authority had been rejected because of concern over legal and political obstacles.

Under the QOL process, agencies were to submit "significant" proposed rules to OMB thirty days in advance of publication, along with an analysis of the rule's objectives, alternatives, and expected costs and benefits. OMB then solicited comments from other agencies which were forwarded to the agency proposing the rule. A similar process, though focusing on public comments and any new issues that had been raised in the rulemaking, was to be followed twenty days in advance of the publication of final rules.

Although the QOL review process was supposed to apply to environmental, consumer protection, and health and safety regulations, EPA was the only agency whose regulations actually were subjected to QOL review. At the behest of the National Industrial Pollution Control Council (NIPCC), composed entirely of corporate executives appointed by the Secretary of Commerce,
the Commerce Department used the QOL process to raise vigorous challenges to EPA regulatory proposals. The QOL review process has been described as featuring "heated arguments between EPA and the Department of Commerce, its principal antagonist," with the "main 'analysis'" on which the reviews focused being "industry-prepared information presented by the Commerce Department."3

Accounts by former agency officials offer some of the most candid insights into relations between the Executive Office and the agencies. In his account of his tenure at EPA, John Quarles reports that the White House sought to intervene in one of EPA's first enforcement actions to protect a politically important ally who had complained that jobs would be lost. Quarles was summoned to the White House and asked by a presidential aide to seek a stay of a court order EPA had won.4 The White House backed off, however, after a newspaper report of the incident triggered an immediate congressional hearing and a public threat by Administrator Ruckelshaus that he would resign "if environmental decisions are overruled because of political considerations."5

Environmentalists charged that QOL review was used to weaken regulations crucial to EPA's early implementation of the Clean

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4 This incident is described in John Quarles, Cleaning Up America: An Insider's View of the Environmental Protection Agency 58-76 (1978).
5 Id., at 68-70.
Air Act. In a statement that now has become a familiar refrain, an attorney for a national environmental group told the Senate Environment and Public Works Committee in February 1973:

"The White House Office of Management and Budget is reviewing in secrecy every major action of the Environmental Protection Agency. The public is completely excluded from this review, but the most anti-environmental Federal agencies, such as the Commerce Department and the Federal Power Commission, appear to have full access to it. These agencies, acting as spokesmen for industrial interests, have effective power to veto EPA's actions. Now becoming routine, OMB review is gelding the clean air amendments."  

Responding to this charge, EPA Administrator William Ruckelshaus admitted that EPA had relaxed its guidelines for implementing the Clean Air Act after OMB review, but he branded as "categorically false" the notion that OMB had dictated the changes. Sounding a theme often to be repeated in defense of regulatory review, Ruckelshaus asserted that he had made the final decision about changes in the guidelines and not OMB. Ruckelshaus emphasized that Executive Office officials were not making decisions for EPA and "[i]f they were, I would be breaking

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8 William Ruckelshaus in Implementation of the Clean Air Act Amendments of 1970, id. at 243 ("OMB did not get any final crack at the regulation. OMB is nothing more than a conduit to insure that other Federal agencies who want to comment on any regulation that we might issue are given that right to comment. The final determination as to what ought to be in the guidelines is mine.").
the law, and I would not function as Administrator of this Agency if I let them do so."

The notion that EPA retained final authority for regulatory decisions subject to QOL review was confirmed by OMB Director George Shultz. While he did not appear at the hearing, Shultz sent a note advising the committee that "EPA has final authority on plans for implementation of air quality standards under the Clean Air Act Amendments of 1970."9

Quarles reports that as a condition for remaining as EPA Administrator after the 1972 election, Ruckelshaus requested written assurances from the President that the EPA Administrator retained the ultimate authority for EPA policy decisions.10 Despite President Nixon's verbal assent, Quarles reports that EPA "bargained in vain with OMB to spell out the change in writing."11

Russell Train also insisted upon written assurances that the EPA Administrator retained ultimate policy authority when he was appointed to succeed Ruckelshaus in the summer of 1973.12 In his confirmation hearing, Train emphasized that it was "of crucial importance that EPA establish and maintain at all times a strongly independent role." Train asserted that while he would welcome comments from within the government, he alone would make

9 Id., at 333.
10 John Quarles, supra note 24, at 117-19.
11 Quarles, id. at 119 (1976).
12 Id., at 119.
all final EPA regulatory decisions. Train voiced his support for QOL review, which he called "a perfectly appropriate part of the decisionmaking process," to the extent that it elicits the view of other agencies, but only when it is conducted, controlled and directed by the EPA Administrator. He announced that he had "already discussed this matter with responsible officials in OMB" and that he had "full concurrence that all processes of interagency comment, review, and suggestion with respect to proposed regulatory decisions by the Administrator of EPA will be directed by the Administrator of EPA and be conducted by him and on his behalf, not controlled by the Office of Management and Budget."

Train's pledge that he would control the regulatory review process did not insulate him of vigorous White House pressure to influence major regulatory decisions. John Quarles has provided a detailed account of unrelenting pressure from the White House to weaken EPA's initial regulations limiting the lead content of gasoline. Faced with a court-ordered deadline to promulgate the regulations, Train had submitted a draft of them to OMB for QOL review three weeks before the deadline. At an interagency

13 Nomination of Russell E. Train, Hearing before the Senate Comm. on Public Works, 93rd Cong., 1st Sess. 3 (1973) ("I assure you that I, as Administrator, will make the final decisions. I will seek and welcome comments and suggestions both from within Government and from the public, but the final decisions will be mine.").

14 Id., at 8.

15 See Quarles, SUDRA note 24, at 117-118.
meeting held to discuss the regulations five days before the deadline, EPA stated that it would proceed with the regulations despite opposition from other agencies such as the Department of the Interior. Throughout the two days preceding the deadline—a flurry of phone calls and White House meetings transpired as presidential aides, OMB and Interior officials sought to block Train from promulgating any meaningful limits on the lead content of gasoline. EPA ultimately promulgated the regulations it wanted only after agreeing, at OMB’s behest, two hours before the press conference announcing the regulations, to delay the final target date for the lead phasedown program by one year.\(^\text{16}\)

**B. Regulatory Review in the Ford Administration**

While President Ford continued the QSL review program, his staff was less directly involved in efforts to influence regulatory decisions. A transition team that advised President Ford had expressed concern over OMB’s growing influence over agency policies. It concluded that “OMB was becoming too involved in departmental policy processes, and limiting the departments’ ability to come up with innovative ideas. It was moving into departments at too low a level, and preventing the free flow of ideas.”\(^\text{17}\) Perhaps motivated by such concerns, the Ford Administration shifted the focus of regulatory review away

\(^{16}\) Id. at 138.

\(^{17}\) Quoted in question submitted by Senator Ribicoff to OMB Director designate Thomas B. Lance in *Nominations of Thomas B. Lance and James T. McIntyre, Jr.*, Hearings before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 30 (1977).
from prepublication review toward review of proposed regulations during the public comment period.\textsuperscript{18}

Concerned about the growing inflation problem, President Ford broadened the type of analyses agencies were required to undertake. In November, 1974, the President issued Executive Order 11821 which required executive agencies to prepare "inflation impact statements" prior to the issuance of major rules.\textsuperscript{19} OMB instructed agencies to include in the inflation impact statements "an analysis of the principal cost or other inflationary effects of the action," a comparison of these with "the benefits to be derived from the proposed action," and a review of alternatives that were considered.\textsuperscript{20}

A new agency in the Executive Office of the President, the Council on Wage and Price Stability (CWPS), was given the role of coordinating agency compliance with the executive order. Unlike QOL review, CWPS's review occurred during the public comment period and it produced written statements by CWPS that were submitted to the rulemaking record. CWPS was not authorized to

\textsuperscript{18} George C. Eads, "White House Oversight of Executive Branch Regulation," in Social Regulation: Strategies for Reform 192-93 (Bardach & Kagan, eds. 1982).

\textsuperscript{19} Executive Order 11821, 3A C.F.R. 203 (1974). This program was later incorporated into a revised Executive Order 11949, issued by the lame duck Ford Administration on December 31, 1976. This executive order renamed the basic regulatory analysis document an "Economic Impact Statement." 42 Fed. Reg. 1017 (Jan. 5, 1977).

block agency rulemaking action, but rather to seek to influence the agency through CWPS’s testimony during the rulemaking proceeding. CWPS representatives often testified in person at agency hearings. While CWPS’s activities generated considerable controversy, Congress expressly endorsed CWPS’s participation in rulemaking proceedings when it amended CWPS’s enabling act in 1975.21

The Ford Administration’s continuation of QOL review was more controversial than its new inflation impact analysis requirement. Reviewing OMB’s management of the QOL review program, the Environment Reporter concluded in 1976 that: “The Office of Management and Budget plays an influential part in shaping federal environmental policies, frequently with little public awareness or understanding of its role.”22 Repeating some of the same criticisms made during the Nixon Administration, the report noted that EPA officials believed that their Agency had been unfairly “singled out” for QOL reviews and that most other federal agencies generally used the review process to try to weaken EPA regulations.

21 Congress confirmed CWPS’s authority “to intervene and otherwise participate on its own behalf in rule-making, rate-making, licensing, and other proceedings before any of the departments and agencies of the United States in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings.” Pub. L. 91-307 § 3(a)(B). See National Academy of Public Administration, Presidential Management of Rulemaking in Executive Agencies 9 (1987).

While President Ford did not become personally involved in regulatory decisions, friction continued between EPA and the Executive Office during the QOL review process. This is reflected in statements made by Administrator Train in the waning days of the Ford Administration. Train provided a congressional oversight committee with his own candid assessment of the impact of QOL review on EPA:

"It has certainly made our job more difficult. Whether it has actually resulted in [our making] a decision which we would not otherwise have made or not making a decision which we otherwise would have made, I don't know. I think it simply prolonged the struggle very often." 23

Train opined that "there has to be interagency review" and that EPA benefits from it. However, he concluded that EPA "has been singled out for special attention" by OMB and he urged that EPA, rather than OMB, should control the regulatory review process in the future. 24

C. The Carter Administration's Regulatory Review Program

To the dismay of many environmentalists, President Carter played a surprisingly active role in efforts to temper EPA


24 I believe that OMB can properly participate in such review sessions, but I don't see OMB as controlling them, controlling the timetable, holding up, sitting on regulations or proposals," id.; Train also noted that EPA clearly had not been given sufficient resources to fulfill its broad statutory responsibilities, id., at 8, 82-83, and he stated that the Agency needs more flexibility in its regulatory authority. Id., at 9.
regulations. When the economic consequences of the second OPEC oil price shock subsequently led him to question whether the economy could afford tighter environmental controls, the Carter White House became more directly involved in regulatory review than any previous administration.

On March 23, 1978, President Carter issued an executive order entitled "Improving Government Regulations," which created the most comprehensive regulatory review program that ever had been established. Declaring that regulations should "not impose unnecessary burdens on the economy" and should be issued only after consideration of meaningful alternatives, Executive Order 12044 required all executive agencies to prepare a "Regulatory Analysis" for major regulations. Major regulations were defined as those that may have major economic consequences, such as an annual economic impact of $100 million or more or major increases in costs or prices for individual sectors of the country.\(^{25}\)

OMB was responsible for coordinating regulatory oversight under the Carter Administration program. OMB joined the President's Council of Economic Advisers (CEA) in playing a major role in conducting regulatory reviews through an interagency group called the Regulatory Analysis Review Group (RARG). Chaired by the Chairman of the CEA, RARG was composed of representatives of seventeen major executive agencies.\(^{26}\)

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\(^{26}\) RARG's membership included representatives from five "economic agencies" (the Council of Economic Advisers, OMB, Commerce, Labor and Treasury), seven "regulatory agencies" (EPA,
was made responsible for assisting agencies in analyzing the economic consequences of major rules. A four-member executive committee, including representatives of the CEA, OMB and two rotating members (one from an "economic agency" and one from a "regulatory agency"), were directed to select 10-20 major regulations each year for intensive review by RARG. Economists from CNPS served as staff reviewers for RARG, and assisted in the preparation of RARG's formal comments on these rules which were submitted to agencies as part of the public rulemaking record.

Unlike the QOL program, the RARG review process was structured to respect the public rulemaking procedures required by the Administrative Procedure Act and the underlying regulatory statutes. RARG reviews were conducted on the public record during the normal course of agency rulemaking proceedings. Unlike QOL reviewers, RARG reviewers could not attempt to prevent agencies from issuing rulemaking proposals because RARG review occurred only after an agency had published a proposed regulation in the Federal Register. RARG's reviews were designed to take place entirely during the public comment period. Unlike QOL reviews, which were conducted in secrecy, RARG reviews produced public documents summarizing the reviewers' concerns, which were submitted to the rulemaking record. The RARG program was designed to force agencies to take a harder look at regulatory

Transportation, Agriculture, Energy, HEW, Interior and Justice) and the Office of Science and Technology Policy and CNPS. CEQ and the President's Domestic Policy Staff were to serve as advisers to RARG.
alternatives, while leaving ultimate regulatory decisions to the agency responsible for issuing the regulation.

RARG reviews of EPA regulations were highly controversial. The RARG staff was composed of mission-oriented economists strongly committed to the use of cost-benefit analysis in setting environmental standards. EPA officials reportedly had little respect for the RARG review process. Former EPA Administrator Douglas Costle has been quoted as saying that "probably three out of every four CWSG comments on our rule making were cribbed right from industry briefs...partly because it suited their economic biases about these issues, and their own perception that they were custodians and keepers of the regulatory reform flame."\(^{28}\)

Some of the most celebrated incidents of presidential intervention in regulatory decisionmaking occurred during the Carter Administration. In May, 1978, Charles Schultz, RARG's chairman, sought to direct OSHA to relax a standard it was about to adopt limiting worker exposure to cotton dust. Joined by labor groups and congressmen, Labor Secretary Marshall then successfully appealed to President Carter, who allowed OSHA to promulgate the standard after the agency agreed to postpone its effective date to give the industry more time to come into

\(^{27}\) Susan J. Tolchin, "Presidential Power and the Politics of RARG," Regulation, July/Aug. 1979, at 44.

\(^{28}\) Quoted in Marc K. Landy, et al., The Environmental Protection Agency: Asking the Wrong Questions 68 (1990).
compliance. Although the regulation was issued with only slight modifications, the President's intervention attracted considerable publicity and criticism particularly because RARG review prevented OSHA from issuing the standard by a court-ordered deadline.

Despite its failure to weaken the cotton dust standard, RARG aggressively challenged several other regulations including EPA's national ambient air quality standard (NAAQS) for ozone and its new source performance standard (NSPS) for coal-fired power plants. RARG argued that the NAAQS for ozone would cost $14-19 billion per year, nearly twice EPA's estimates. After a series of meetings with White House staff over a two-week period in January 1979, EPA Administrator Costle agreed to relax the ozone standard but not by as much as the White House staff had requested. President Carter decided not to intervene personally, and Costle prevailed.

In a subsequent dispute over implementation of the Clean Water Act, the New York Times quoted anonymous EPA officials to the effect that "continuing White House intervention in the regulatory process is compromising their efforts to establish and

enforce antipollution laws.\textsuperscript{30} Faced with criticism from a congressional oversight committee, President Carter endorsed the notion that he had a right to intervene in EPA decisionmaking, but he pledged that this power would be exercised very sparingly.\textsuperscript{31}

D. The Reagan Administration Regulatory Review Program

While the previous regulatory review programs had been motivated by concern for improving the quality of regulations, the Reagan Administration's principal objective was quite different: to eliminate as much regulation as possible. Thus, the presidential task force that was formed to supervise the program was called the Task Force on Regulatory Relief.

Many elements of the Reagan Administration's program were derived from the previous administrations' regulatory review programs, but the Reagan program is a significant departure from its predecessors in several important respects. First, it centralizes unprecedentedly power in ONR. Unlike previous programs that authorized review only of selected regulations, the

\textsuperscript{30} Philip Shabecoff, "Some in EPA Assail White House Moves," \textit{New York Times}, February 22, 1979, p. 1. The article noted that EPA officials complained that RAGS's economists invariably represented industry viewpoints. "This often amounts to giving industry one more shot at weakening the regulations after the record is closed," an anonymous EPA official said. The article reported that White House interference "has led several senior officials at the environmental agency to talk of resigning."

\textsuperscript{31} The President stated that "I have not interfered in that process. I have a statutory responsibility and a right to do so, but I think it would be a very rare occasion when I would want to do so." Philip Shabecoff, "Environment Vow Made by President," \textit{New York Times}, February 28, 1979, p. A15.
Reagan program requires that all proposed and final regulations be submitted to OMB for prepublication review. Even more significantly, the Reagan program purports to give OMB the authority to block publication of regulations for an indefinite period of time while review is pending. Unlike RARG reviews which were conducted during the course of public rulemaking proceedings, the Reagan executive order directs agencies to "refrain from publishing" any rule until OMB has completed its review.

Perhaps the most significant feature of the Reagan regulatory review program is that it seeks to dictate the substantive criteria that agencies are to use in setting regulatory standards. The executive order directs agencies not simply to analyze the costs of regulation, but to base regulatory decisions on the results of cost-benefit analysis. The executive order dictates not only that least-cost regulatory alternatives be selected, but also that agencies should not regulate unless cost-benefit analysis demonstrates that the benefits of regulation outweigh its costs. While the Carter Administration regulatory review program had encouraged agencies to develop cost-effective regulations, it had repeatedly emphasized that no cost-benefit tests were to be required. Finally, the Reagan

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32 Section 8(b) of the executive order authorizes OMB to exempt certain types of regulations from review. See note _infra_. Section 8(a) purports to exempt from the prepublication review requirement regulations that respond to emergency situations and regulations for which review would conflict with statutory or judicial deadlines.
program was the first to attempt to effect a comprehensive relaxation of existing regulations.

While the executive order purports to leave ultimate decisionmaking responsibility with the agencies, as a practical matter it gives OMB enormous power to influence the substance of regulatory decisions. As a former OIRA official has boasted: "The Government works using three things: money, people, and regulations; the agency must get all three through OMB." While the executive order does not expressly authorize OMB to "veto" regulations, it can be used to achieve effective if the same objective. The source of OMB's power under EO 12291 is OMB's ability to invoke the "extended review" provision contained in § 3(f). If OMB notifies an agency that it is extending its review beyond the normal ten- or sixty-day review period, EO 12291 directs the agency to "refrain from publishing" the rule until OMB's review is concluded. This provision enables OMB to block for an indefinite period of time regulations objectionable to OMB.

Like the QOL review process, the Reagan program sought to shield regulatory reviews from public view. By directing OMB to conduct its review prior to publication of proposed regulations, the executive order deprived the public of an opportunity to learn the views of the agency unfiltered by the Executive Office.

Unlike the RARG program, which produced reviews filed on the public docket, under the Reagan program documents reflecting OMB’s reviews were not incorporated into the public record, even in rulemakings under the Clean Air Act where Congress had explicitly required it.  

In the early days of the Reagan program, congressional oversight hearings lent credence to charges that OMB had served as a conduit for secret back door lobbying by industry. Former EPA Chief of Staff John Daniel testified that he discovered that OMB had leaked draft EPA rulemaking proposals to industry when an industry representative mistakenly called EPA, rather than OMB, to provide his comments. In response to such charges, OMB initially established policies requiring OMB staff to advise the public to submit factual materials to the relevant agency rulemaking docket and prohibiting low-level staff from meeting with industry representatives. A comprehensive study of the early years of the Reagan program found that these policies often

34 Section 307(d)(4)(B)(ii) of the Clean Air Act, 42 U.S.C. § 7607(d)(4)(B)(ii), requires that drafts of EPA’s proposed and final rules submitted to OMB for review, all written comments by OMB or other agencies, and all written responses to comments be placed in the public docket of rulemakings under the Act. Erik Olson’s study found that compliance with this requirement is rare. Olson, supra note 133, at 71 & nn. 367-370.

35 EPA: Investigation of Superfund, supra note 138, at 80.

have been honored in the breach.\textsuperscript{37} The Reagan Administration's regulatory review program has been highly controversial, to say the least. Anne Gorsuch Burford, originally an enthusiastic promoter of the Reagan Administration's regulatory relief program, later testified that while presidential oversight of rulemaking is appropriate, "there were some serious abuses" by OMB.\textsuperscript{38} The Reagan Administration's single-minded emphasis on regulatory relief is now widely viewed as a critical mistake that forfeited a rare opportunity for achieving truly beneficial regulatory reform.\textsuperscript{39} As Eads & Fix explain:

"The Reagan administration failed to realize that a crucial element in generating and sustaining the perception of a good-faith administration of social regulation is an open and relatively transparent process of regulatory decision making, including regulatory oversight as exercised by the White House. . . . Indeed, a regulatory decision-making process that is (or merely appears to be) biased to favor any one interest group (especially the entities supposedly being regulated) invites Congress and the courts to further constrain existing administrative discretion and to engage increasingly in second-guessing individual administrative actions. Given the nature of the issues involved, the potential for arbitrary decisions and abuse of discretion is so inherently great in social regulation that faith in the fairness of the decision-making process is an absolute

\textsuperscript{37} Olson, \textit{supra} note 133, at 62-64.

\textsuperscript{38} EPA: Investigation of Superfund and Agency Abuses, \textit{supra} note 138, at 214 (testimony of Anne Gorsuch Burford).

prerequisite to increased regulatory flexibility.\footnote{\textsuperscript{40}}

At the start of President Reagan's second term in office, Executive Order 12498 was issued to expand OMB's regulatory review responsibilities. Executive Order 12498 establishes a regulatory planning process that authorizes OMB review up to a year in advance of the initiation of agency action.\footnote{\textsuperscript{41}} The order requires executive agencies to submit annually to OMB for review a "draft regulatory program" that describes all "significant regulatory actions" the agency intends to undertake during the next year. If OMB determines that an agency's regulatory program is consistent "with the Administration's policies and priorities," it is incorporated into an annual document entitled "The Regulatory Program of the United States Government."

When combined with OMB's opportunities for review of agency information collection requests under the Paperwork Reduction Act and for review of proposed and final rules under EO 12291, EO 12498 adds a potential fifth layer of clearance for agencies undertaking rulemaking that requires information gathering.

III. THE COUNCIL ON COMPETITIVENESS AND THE BUSH ADMINISTRATION'S REGULATORY REVIEW PROGRAM

A. The Council on Competitiveness

The most significant change made by the Bush Administration in President Reagan's regulatory review program has been the quiet creation in 1989 of an interagency task force known as the

\footnote{\textsuperscript{40}} George C. Eads & Michael Fix, \textit{Relief of Reform?: Reagan's Regulatory Dilemma} 258-59 (1984).

\footnote{\textsuperscript{41}} Executive Order 12498, 3 C.F.R. 323 (1985).
Council on Competitiveness. Chaired by Vice President Quayle, the Council is designed to serve as the successor to the Reagan Administration's Task Force on Regulatory Relief, which had been disbanded in 1983. In this capacity it apparently is responsible not only for coordinating administration regulatory policy but also for intervening in disputes between OIRA and agencies that arise in the course of regulatory reviews.

In its first major regulatory intervention, the Competitiveness Council effectively disapproved a new source performance standard for municipal incinerators that required recycling of 25 percent of the waste streams. By rejecting a major regulatory initiative that EPA had spent years developing and that previously had been cleared by OMB, the Council's action may presage a resurgence of the kind of anti-regulatory fervor that prevailed in the early days of the Reagan Administration.

As a result of the creation of the Competitiveness Council, the Bush administration has expanded its predecessor's regulatory review program in a manner that has reversed efforts to bring more openness to regulatory review. The Council's operations have been shrouded in secrecy. The primary sources of

42 When he announced the creation of the Council on Competitiveness on February 9, 1989, President Bush confirmed that “[i]n reviewing regulatory matters, the Council will be continuing the work of the former President's Task Force on Regulatory Relief...”. Executive Office of the President, Regulatory Program of the United States Government, April 1, 1990 - March 31, 1991 5 (1990).

information concerning the Council's activities have been the
Council's own press releases and a few letters responding to
requests from this committee. The Council has declined to send a
witness to appear at any of the oversight committee hearings that
have inquired into how its activities have affected agency
rulemaking and it has declined requests filed under the Freedom
of Information Act. It apparently does not keep detailed records
and it appears to assert that all interactions between the
Council, OIRA, and regulatory agencies are protected from
disclosure by the deliberative process privilege and that it may
decide to share them with Congress. The Council has "no formal
procedures for how its members receive information from sources
outside the Council," though it asserts that its staff have "a
policy of meeting with any group that requests an appointment to
discuss a regulatory issue." Letter from Allan B. Hubbard to Hon.

There do not appear to be any established procedures by
which the Council selects regulations for review. The Council's
executive director, Allan B. Hubbard, states that:

"The Council determines which items it will review based on
the views of its members and staff; normally the items it
takes up are those that present difficult issues under E.O.
12291 that require Cabinet-level attention, particularly
issues where there is a policy disagreement among agencies."

Letter from Allan B. Hubbard to Hon. John Glenn, October 22,
1991, p. 3. There does not appear to be any consistent pattern
concerning the stage of the regulatory process at which
Competitiveness Council review occurs. The incinerator

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recycling requirement was reviewed by the Council on the eve of final promulgation, while changes to the wetlands delineation manual have been the product of extensive pre-proposal review. The Vice President's March 22, 1991 Memorandum to the Heads of Executive Departments and Agencies asserts EO 12291 jurisdiction over an extraordinarily broad range of agency activities including agency issuance of press releases. Yet this requirement apparently is being ignored by most agencies.

With the creation of the Council on Competitiveness, the Bush Administration apparently has begun pursuit of a deregulatory agenda akin to that of the Reagan Administration's Task Force on Regulatory Relief. The membership of the Council on Competitiveness is heavily tilted toward agencies unlikely to be sympathetic to social regulation. Its six permanent members are the director of OMB, the Secretary of Commerce, the Secretary of Treasury, the chairman of the President's Council of Economic Advisers, the White House chief of staff, and the Attorney General. The Council describes its mission entirely in terms of reducing regulatory burdens, rather than in terms of improving the net benefits of regulation. Given this single issue focus, it appears likely that the Council will repeat the very serious mistakes made by the Task Force on Regulatory Relief by focusing only on measures to reduce cost to industry, regardless of their net benefits to society as a whole. This apparently already has happened with respect to the Council's wetlands delineation proposal which was proposed as the product of desire to reduce
the cost of regulation with no appreciation for its environmental consequences.

In effect, the Council on Competitiveness appears to have created yet another additional layer of regulatory review superimposed upon what already was the most time-consuming and stringent regulatory review program to date. The Council appears to be a potentially powerful mechanism for bolstering OIRA's ability to effect changes in agency regulations, particularly EPA regulations.

B. Legal and Policy Concerns

Based on review of the experience with previous regulatory review programs, the regulatory review activities of the Competitiveness Council raises some serious legal and policy concerns, including the following: (1) that it effectively will usurp decisionmaking authority from agency heads and produce regulations that are not founded on statutorily relevant considerations, (2) that it will reduce the public's ability to monitor the rulemaking process and influence regulatory decisions, and (3) that it will further delay agency rulemaking actions.

1. Speed of the rulemaking process

The most universally acknowledged impact of regulatory review has been to cause significant delays in agency rulemaking. The Nixon Administration's QOL review was often criticized for delaying EPA's issuance of regulations. John Quarles testified that QOL review "added substantial delay to an already lengthy

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process. During the Ford Administration, EPA officials identified "lengthy delays" as the worst problem generated by QOL review. An EPA study estimated that QOL review added nearly two months to the time required to issue a typical regulation.

The Carter Administration's regulatory review program was designed to avoid delaying rulemaking by conducting review during the normal course of the public comment period. While it was not always successful in avoiding delays, it was rarely criticized on this ground because the delays it generated were not as egregious as those caused by QOL review. By contrast, the Reagan Administration's program has been harshly criticized for delaying the rulemaking process. A study of the program by the National Academy of Public Administration (NAPA) found that the "clearest impact of the regulatory management process has apparently been in slowing down rulemaking activities."

An important distinction can be made between programs requiring prepublication clearance (such as the QOL and Reagan

44 Executive Branch Review of Environmental Regulations, Hearings before the Subcomm. on Environmental Pollution of the Senate Environment & Public Works Comm., 96th Cong., 1st Sess. 3 (1979) (testimony of John Quarles).


46 Id., at 694.

47 See note infra and accompanying text.


49 NAPA, supra note __, at 7.
review programs) and the Carter program that did not. By adding another step to the rulemaking process, programs that require prepublication clearance inevitably will lengthen the time it takes for EPA to promulgate regulations. By requiring prepublication clearance for both proposed and final regulations, the Reagan/Bush program compounded this problem. By adding yet another layer of potential review, regulatory review by the Competitiveness Council could contribute to further rulemaking delays. However, in some cases it actually might facilitate a speedier resolution of disputes between agencies and OIRA by providing an avenue of appeal.

The charge that "OMB sometimes uses delay as an intentional strategy" to influence the substance of regulations was frequently heard as a criticism of the OOL process. It also has been frequently applied to the Reagan/Bush program. After a certain point, continued delay by OMB tends to confirm that the problem is not one of needing additional time to perform further analysis, but rather simply a strategy to block regulation until EPA adopts OMB's views. Although they previously had denied that they used delay as a tool to influence the substance of rules, OMB officials announced in 1989 that they would pursue a "new

50 Prior to his appointment to the Supreme Court, Antonin Scalia made this very point when he interviewed James C. Miller III shortly after EO 12291 was issued. "What all that adds up to is that -- making very conservative assumptions with respect to time periods . . . it will ordinarily take an agency at least seven months (210 days) to get a rule into effect -- that's 90 days longer than under the previous system." "Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III," Regulation, March/April, 1981, at 17.
direction" that would not use delay as a way of blocking rules. OMB Director Richard Darman reportedly instructed OMB staff that, rather than delaying rules indefinitely, they are to meet with agency staff and "try to hash it out" in cases where "genuine disagreement exists."51

In Environmental Defense Fund v. Thomas, a federal district court found that OMB frequently had extended its review of regulations required by statutory deadlines despite the theoretical exemption for such regulations in § 8(a)(2) of EO 12291:

"EPA submitted 169 regulations to OMB which were subject to statutory or judicial deadlines, and on 86 occasions OMB extended its review beyond the time periods outlined in EO 12291. OMB's propensity to extend review has become so great that EPA keeps a running record of the number of its rulemaking actions under extended review by OMB and the resulting delays. The average delay per regulation is 91 days; total delays were more than 331 weeks. Apparently Section 8(a)(2) of EO 12291 is simply ignored."52

The court in EDF v. Thomas held that OMB has no authority to delay EPA's promulgation of regulations after a statutory deadline has expired. Thus, Congress clearly can impose some constraints on the length of OMB review, though lawsuits may be necessary to enforce them.

2. Displacement of agency decisionmaking

While Competitiveness Council review might help reduce the


use of delay as a tactic for displacing agency decisionmaking, it may do so simply by substituting more effective pressure to accomplish the same end. The President's appointment and removal powers guarantee that his views will carry considerable weight with his appointees. However, the President does not have the authority to direct agency officials to contravene statutory directives and his ability to dictate the substance of agency decisions may be circumscribed by statutes delegating decisionmaking authority to EPA.

Concern over legal constraints on the exercise of the president's supervisory authority has carefully shaped the structure of each administration's regulatory review program. Each of the programs has sought to preserve, at least in theory, the notion that Executive Office oversight will not displace the decisionmaking authority of agency officials. Thus, as noted above, from the inception of the QOL program, EPA Administrators routinely asserted that they retain ultimate decisionmaking authority despite Executive Office review.

Yet the very purpose of regulatory review is to increase the ability of the Executive Office to influence the actions of agency heads. When disputes between agencies and the Executive

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53 See, e.g., National Federation of Federal Employees v. Brown, 645 F.2d 1017, 1025 (D.C. Cir. 1981) ("Under the structure of government -- the separation of powers -- established by the Constitution, the President has no authority to alter policy and principles declared by Congress even if, at the time the President acts, signals from Congress suggest it would approve the President's action.")
Office arise, the question of who retains ultimate authority over regulatory decisions as a practical matter has often been unclear. In 1976, EPA Administrator Russell Train confirmed that the issue never had been finally resolved because "no regulation has ever been so vigorously opposed by OMB, and so strongly backed by EPA, that the issue has been raised." 54 Were the issue to arise, "Train said EPA would insist on having final say, in part to protect what he sees as the 'regulatory integrity' of the agency in the eyes of the public, the Congress, and other federal agencies." 55 In response to Train, OMB staff told reporters that they agreed that "EPA would have final say on whether to adopt a specific regulation," and they cited an example of a regulation that Train had promulgated despite OMB opposition. 56

Under the Carter Administration program, the Executive Office did not have the authority to block regulations indefinitely when disputes arose during regulatory review. Yet


55 Ibid.

56 "Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review," 7 Envtl. Retzl. 693, 696-97 (1978). After months of delay caused by OMB opposition to selective enforcement audit regulations for the auto industry, EPA Administrator Russell Train told the White House on July 19, 1976 that he was going to sign the regulations without OMB approval. On August 13, 1976, OMB officials sent Train a letter stating that the President wanted EPA to either repeal the regulations or to phaseout its vehicle certification program within one year. EPA responded that it did not share the assumption that the two regulations were redundant. The dispute was never resolved because the Ford Administration left office less than a year later.
considerable political skirmishing occurred nonetheless as the reviewers tried to persuade agencies to modify their regulations. Christopher DeMuth described the process in the following terms:

"What has happened in practice, in any event, is that enforcement of the regulation-review programs has consisted of political skirmishing within the executive branch, with the staff agencies of the Executive Office of the President (CNPFS, CEA, and RARG) conducting economic search-and-destroy missions against the line regulatory agencies, stalking through the Federal Register and the accumulating regulatory analyses after proposals that appear particularly costly, ill-advised, or politically vulnerable." 57

Because review did not take place until after the regulation had been proposed and the reviewers had no authority to delay a final decision, the choice of what regulations to review depended in part on whether the reviewers thought their input could have an impact in a relatively short period of time. 58

Under the Reagan and Bush Administrations' regulatory review programs, agencies are directed to refrain from publishing rules until after OMB has completed its review. As a result, OMB in theory can prevent an agency from taking action until it is modified to satisfy OMB's concerns. OMB has used this authority to gain virtual veto power over agency regulations, as indicated by the dearth of regulations promulgated over OMB's objections. In an effort to maintain its image as "the toughest kid on the

57 DeMuth, supra note 7, at 18.

58 Testimony of Thomas D. Hopkins in Cost of Government Regulations to the Consumer, supra note 70, at 45 (CNPFS selects as its "targets new proposals with (1) large costs (generally over $100 million in any year), and (2) the prospect that we can have a useful policy impact through a 1- to 3-month review.")
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block," OMB officials have admitted that they "yell and scream, jump up and down, do whatever we can to get [the agencies] to listen to us." Even in cases where rules were not modified during the review process, the anticipation of OMB review can have a substantial influence on the substance of rulemaking proposals.

Agencies are not entirely without leverage in bargaining with OMB. An agency's expertise and public support for its regulatory mission confer some bargaining power on an agency during the regulatory review process. However, the addition of the Competitiveness Council to the review process would appear to give OMB a new and potentially powerful trump card in its dealings with agencies. While agencies willing to endure a lengthy battle with OMB could occasionally prevail in the past, OIRA's ability to obtain the support of the Competitiveness Council may substantially increase its leverage over agencies.

Disclosure and congressional oversight have been important allies for agencies in regulatory review disputes. However, when regulatory review is conducted outside public view, it is easier for the Executive Office to influence the outcome of regulatory decisions. The court in Environmental Defense Fund v. Thomas indicated its awareness of the danger that the Executive Office could usurp agency decisionmaking authority. While noting that the President was entitled to a "certain degree of deference" in

exercising his supervisory authority, the court said:

"Yet, the use of EO 12291 to create delays and to impose
substantive changes raises some constitutional concerns.
Congress enacts environmental legislation after years of
study and deliberation, and then delegates to the expert
judgment of the EPA Administrator the authority to issue
regulations carrying out the aims of the law. Under EO
12291, if used improperly, OMB could withhold approval until
the acceptance of certain content in the promulgation of
any new EPA regulation, thereby encroaching upon the
independence and expertise of EPA. Further, unsuccessful
executive lobbying on Capitol Hill can still be pursued
administratively by delaying the enactment of regulations
beyond the date of a statutory deadline."60

Concerns about displacement of EPA decisionmaking have been
given new force by the activities of the Competitiveness Council.
The Council's effective veto of EPA's 25 percent recycling
requirement for incinerators illustrates these concerns. Going
into the meeting of the Council on December 19, 1990, EPA
Administrator William Reilly strongly supported the requirement,
which he had quoted as an indication of EPA's commitment to
stimulating greater recycling efforts. Following the Council
meeting, however, Reilly stated that he would not proceed with
the proposal because of objections from the Council.61 Under
these circumstances it is clear that but for the actions of OMB
and the Council on Competitiveness, EPA would have promulgated
the recycling requirement. Thus, regulatory review clearly
affected the substance of an EPA regulation in a significant
manner. Whether this illustrates illegal displacement of EPA

60 Environmental Defense Fund v. Thomas, 627 F. Supp. 566

61 Michael Weisskopf, "EPA Proposal on Recycling Is
decisionmaking is less clear.

Executive Orders 12291 and 12498 attempt to avoid serious legal and constitutional difficulties by tempering the expansive scope of the review authority granted to OMB. Both orders provide that OMB is authorized to take action only "to the extent permitted by law," and they exempt from OMB review regulations for which such review would conflict with statutory or judicial deadlines. Executive Order 12291 also specifies that nothing in the order "shall be construed as displacing the agencies' responsibilities delegated by law." These provisions repeatedly are cited whenever the legality of OMB's actions is challenged. The Department of Justice has acknowledged the importance of interpreting the executive orders in a manner that avoids a collision with constitutional principles of separation of powers. In its opinion supporting the legality of EO 12291, the Department emphasized that "the President's exercise of supervisory powers must conform to legislation enacted by Congress." Therefore, "In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." To prevent the

62 EO 12291, §§ 2, 3(a), 6(a), 7(a); EO 12498 § 4.
63 EO 12291, § 8(a)(2); EO 12498, § 3(c).
64 EO 12291, § 3(f)(3).
65 Memorandum from U.S. Department of Justice, Office of Legal Counsel, Proposed Executive Order Entitled "Federal Regulation" (Feb. 13, 1981), reprinted in Role of OMB in Regula-
President from usurping authority delegated to EPA, the executive orders are founded on the theory that OMB's role is an "advisory and consultative" one that does not include authority to reject an agency's ultimate judgment on matters delegated to it by law.

OMB officials have recognized the importance of this distinction for preserving the legality of the regulatory review program. OIRA has been sensitive to charges that it has violated the law. Fear that OMB would be subject to legal action or an adverse judgment in court occasionally has resulted in rapid clearance for regulatory packages.

Dictum in Judge Wald's majority opinion in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) provides the clearest judicial support for regulatory review. In *Sierra Club v. Costle*, EPA officials had met with the President to discuss a regulation EPA was about to promulgate. The court held that EPA's failure to mention this meeting in the rulemaking docket did not invalidate the regulations because they were not based on information arising from the meeting. In dictum oft-cited by supporters of the Reagan administration regulatory review program, Judge Wald recognized not only the constitutional authority of the President to supervise executive policymaking, but also the desirability of such Presidential oversight.

Judge Wald's opinion, however, also recognizes limits on the President's supervisory authority. Her discussion of the relationship between the President and the EPA Administrator further elaborates these limitations.
appears to assume that the Administrator retains ultimate responsibility for the regulatory decision. Judge Wald notes that the Administrator "needs to know the arguments" of White House staff, not that he must ultimately adopt them. She recognizes that the President may be successful in "prodding" the Administrator into adopting a different regulation, but she does not imply that the President has the authority to dictate the result.66

As a practical matter, the President's ability to fire the EPA Administrator gives him enormous power to influence EPA decisions. Moreover, Judge Wald's opinion suggests that if the President is successful in persuading the EPA Administrator to change his decision, the regulations would still be upheld unless they lacked adequate support in the rulemaking record.67 But this does not necessarily imply that the President has the authority to make the decision for EPA. In Morrison v. Olson, 108 S.Ct. 2597 (1988) the Supreme Court explicitly rejected the notion that

66 Sierra Club v. Castle, 657 F.2d at 408.

67 "After all, any rule issued here with or without White House assistance must have the requisite factual support in the rulemaking record, and under this particular statute the Administrator may not base the rule in whole or in part on any information or data which is not in the record, no matter what the source." Sierra Club v. Castle, 657 F.2d at 408. But cf. Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (declining to reach issue of OMB's authority because agency action taken at OMB's behest was without support in the record, but noting that OMB's role in the decision "presents difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies").
Congress could not limit or condition the President’s constitutional authority to supervise the actions of executive branch officials.

Historical understandings and the text of Article II support the notion that “the President is not authorized either to make particular decisions statutorily vested in at least some subordinate officials, or to direct those officials to make particular decisions — except insofar as the prospect of removal operates as such a direction.”68 Under this view, if the EPA Administrator refuses to make a particular decision that the President wishes him to make, the President’s only recourse is to discharge him and appoint a new Administrator who shares the President’s views.

As a practical matter, few agency heads would defy the President at the risk of losing their job. However, this does not imply that the President has the authority to make the decisions for them. Political constraints on the President’s removal power, as illustrated not only by the history of the Watergate controversy but also by the history of regulatory review of agency decisionmaking,69 dictate that it will be used sparingly.

An even clearer limitation on the President’s supervisory authority is that it may not be used to produce decisions that


69 See text accompanying notes 19, 20 & 31, supra.
are based on statutorily impermissible factors. This is reflected in the executive orders' statements that agencies are to comply with the orders' directives only "to the extent permitted by law."\(^70\) The President does not have the constitutional authority to countermand valid statutory directives for such action would enable the President to exercise legislative powers vested with Congress by the Constitution. As the Supreme Court held in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the President's executive powers under Article II of the Constitution do not permit him to authorize executive officers to act in a manner that is inconsistent with policies established by Congress.

This principle has been recognized by courts reviewing the products of OMB review. In *Environmental Defense Fund v. Thomas* a federal district court held that "OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA regulations . . . beyond the date of a statutory deadline."\(^71\) The court reasoned that although a "certain degree of deference must be given to the authority of the President to control and supervise executive policymaking," action to block promulgation of regulations required by statute "is incompatible with the will of Congress and cannot be sustained as a valid exercise of the

\(^{70}\) EO 12291 §§ 2, 3(a), 6(a), 7(a); EO 12498 § 4.

President's Article II powers.\textsuperscript{72}

This decision illustrates the potentially serious threat that regulatory review poses to separation of powers principles. Aside from OMB's implementation of the Paperwork Reduction Act, the regulatory review program is the exclusive product of the executive orders rather than of legislation. An effort by the President to expand his own powers to dictate the substance of environmental policy poses a particular threat to separation of powers principles if it represents an effort by one branch of government to usurp authority from another. As the Supreme Court recognized in \textit{INS v. Chadha}, "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."\textsuperscript{73} Thus, to the extent that the executive orders expand the President's power to the detriment of Congress' legislative authority, they raise serious separation of powers concerns.

While it seems unlikely that the Competitiveness Council simply persuaded EPA Administrator Reilly that inclusion of the recycling requirement in the incinerator NSPS was not warranted on the basis of the administrative record before EPA, the EPA Administrator has been very careful to state that he now accepts the consensus that the recycling requirement not be promulgated. Thus, he apparently has taken the position that the final

\textsuperscript{72} \textit{Environmental Defense Fund v. Thomas}, 627 F.Supp. at 570.

decision to withdraw the recycling requirement was his. While it is likely that the Administrator's true motivation for withdrawing the regulations is that he did not want to risk being fired by defying representatives of the Executive Office of the President, courts are reluctant to entertain challenges to regulations based on questioning of the decisionmaker's motivations.74 Moreover, courts are eager to avoid what the D.C. Circuit characterized in Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) as "difficult constitutional questions concerning the executive's proper role in administrative proceedings and the appropriate scope of delegated power from Congress to certain executive agencies." Thus, courts may decide simply to accept at face value representations of agency officials that they bore the ultimate responsibility for a regulatory decision. This suggest that OMB and the Council on Competitiveness can effectively displace agency decisionmaking unless the agency head is willing to risk being fired for defying their directives.

Further constraints on the ability of the Executive Office to displace EPA decisionmaking are derived from the requirements that agency decisions must be consistent with the underlying regulatory statutes and supported by evidence in the administrative record. The Executive Office cannot legally

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74 Thus, courts traditionally have not permitted private parties to conduct discovery that "probes the mind of the decisionmaker" to discover the mental thoughts and impressions of government policymakers. See United States v. Moran, 304 U.S. 1 (1937).
dictate a result that is inconsistent with the regulatory statute or the rulemaking record. Thus, if the agency accedes to a change in a regulation dictated by OMB which is not supported in the record, the action may be struck down if challenged in court, as occurred in Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986).

Decisions reached at the behest of Executive Office reviewers are likely to be more vulnerable to such challenges than are other regulations because regulatory review usually emphasizes different factors than do the statutes and the administrative record. For example, the recent decision by the Council on Competitiveness to reject EPA's incinerator recycling proposal was reportedly based on grounds that are not necessarily relevant to the establishment of new source performance standards.75 One unidentified observer at the closed meeting told the press that the chief basis for the decision was philosophical because: "There was the strong sense that they needed to give business something. Business has a lot of concern that we lost our commitment to deregulation."76 Decisions based on such grounds are likely to be vulnerable to judicial review unless they have independent support in the administrative

75 A press release issued by the Council cited three reasons for the decision: (1) the recycling requirement was not a performance standard, (2) the regulation interfered with local government decisionmaking, and (3) it was not cost-beneficial under Executive Order 12291.

record.

1. Secrecy and public participation in the rulemaking process

The activities of the Competitiveness Council raise serious concerns that regulatory review can serve as a "back channel" for private interests to influence rulemaking decisions outside of the public view. These concerns have been a prominent criticism of regulatory review since the inception of the Nixon's Administration's program. Indeed, the Nixon Administration had created an extraordinary mechanism for facilitating secret industry lobbying by establishing the National Industrial Pollution Council. The explicit purpose of this body, which was composed entirely of corporate executives, was to provide industry input on environmental regulation.

The Deputy Assistant Secretary of Commerce who served as executive director of NIPCC told a Senate oversight committee in 1972 that the Council allowed companies to comment on draft environmental regulations before they were released for public comment. As a former OMB official has described the role of NIPCC in QOL reviews:

"[The Council] was made up exclusively of industrial leaders, who met in secret, refused access to both reporters and environmental groups, and was quite clearly an illegal inside track for business leaders to oppose regulations they did not like. It was not just that OMB let the Commerce Department review EPA's regulatory proposals, but that the industrial community itself was getting a direct and illegitimate bite at

them before they were even announced as proposals so that other affected groups could comment.\textsuperscript{78}

As the former OMB official notes, NIPCC's meetings were not publicly announced and were closed to the public. For example, after discovering that NIPCC would be meeting on October 14, 1971, representatives of ten consumer and environmental groups showed up at the Department of Commerce and sought to attend the meeting. The Commerce Department not only refused to allow them to attend the meeting, but it also refused their request to provide a transcript of it.\textsuperscript{79} This required an express waiver of the provisions of an executive order designed to prevent collusion by corporate executives meeting as members of federal advisory committees. Executive Order 11007, an outgrowth of antitrust concerns over advisory committees formed during the Korean War, required that a verbatim transcript be kept of all

\textsuperscript{78} Letter from Richard N.L. Andrews to George C. Eads, January 18, 1984, p. 2, quoted in Eads & Fix, supra, at 269 n.9.

\textsuperscript{79} E.W. Kenworthy, "U.S. Pollution Control Panel Bars Environmental and Consumer Observers," \textit{New York Times}, October 15, 1971, p. 40. Commerce Department officials refused reporters' request for a press conference. Noting that Commerce Secretary Maurice Stans had cited NIPCC as evidence of his department's concern for the environment when meeting with environmentalists, a representative of the Public Interest Research Group asked, "What have they got to hide?" NIPCC subsequently released summary minutes of some of its meetings. \textit{See Implementation of the Clean Air Act Amendments of 1970}, supra note \_\_\_, at 583-594. These summaries, however, amounted to little more than "a skeletal outline of the issues discussed, evidently thoroughly sanitized." William H. Rodgers, Jr., "The National Industrial Pollution Control Council: Advise or Collude?" \textit{13 Boston Coll. Ind. & Comm. Law Rev.} 719, 727 (1972). The members of the NIPCC apparently edited the draft summaries extensively "with the consequence that all damaging, and some useful, information has disappeared from the public record." Id.
meetings of industry advisory committees. The Secretary of Commerce had waived this requirement by finding that it would interfere with the proper functioning of the NIPCC, which William Rodgers describes as a "highly dubious" claim that undermined the Council's credibility. 80

Because of the secrecy that surrounded its operation, it is difficult to assess what impact the NIPCC had on EPA regulations. Rodgers cites two examples where EPA policies were inexplicably altered to conform with positions taken by the NIPCC. 81 He notes that by providing a vehicle for top corporate executives to get together to plot a coordinated strategy for responding to environmental regulations, the NIPCC supplied valuable "inside-track opportunities" for industry to redirect environmental policies. 82

Members of the NIPCC sought to justify the need for secrecy by arguing that disclosure would chill the free exchange of advice. Yet, as Rodgers notes, this rationale is particularly dubious when applied to contacts by private industry with government officials. As reflected in Executive Order 11007, disclosure had been viewed as necessary to prevent private

80 Rodgers, supra note, at 725.

81 Rodgers cites changes sought in air pollution regulations by the Mining and Non-Ferrous Metals Sub-Council of NIPCC and the September, 1971 reversal of the government's policy to discourage use of phosphates in detergents in accordance with the requests of NIPCC's Detergents Sub-Council. Rodgers, supra note —, at 734-743.

82 Id., at 743.

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industry from engaging in collusive practices as members of federal advisory committees. "One wonders why any advice offered to the government, if worthwhile, is not worthy of being placed in the public record." 83 Rodgers concludes with the succinct recommendation that "when members of an industry set out to influence their government, they should be required to do so publicly." 84

Congressional oversight committees and environmental groups made similar criticisms of regulatory review during the Ford and Carter Administrations. In 1976, a staffer for a House oversight committee complained that the secrecy surrounding QOL reviews unfairly tilted the regulatory process in the direction of industrial interests. He stated that regulatory review has "provided industry with an opportunity to review, comment on, delay, and change EPA actions behind closed doors. The public has not been afforded this opportunity and consequently faces industry-influenced and weakened guidelines, regulations, and standards difficult to modify." 85

Although the Carter Administration's RARG review program involved submissions to the public rulemaking dockets, environmental groups charged that White House staff repeatedly met with EPA officials to influence regulatory decisions after

83 Id., at 725-26.
84 Id., at 747.
the close of the public comment period. A lawyer for an environmental group told a congressional committee that as a result of these meetings:

"We have two rulemakings that are going on within EPA on significant issues. We have one which is a public rulemaking, and we have another one which is a private rulemaking, a shadow rulemaking, if you will. A rulemaking which is characterized by little or no record, by secret meetings behind closed doors and by no opportunity for public comment or rebuttal."

Concerned over the secrecy of the regulatory review process, Congress sought to force greater disclosure of the Executive Office's role in regulatory decisions when it amended the Clean Air Act in 1977. Congress amended § 307(d), which governs rulemaking proceedings under the Act, to require that drafts of proposed and final regulations sent to OMB for review be placed in the rulemaking docket so that the public can determine how, if at all, the regulations were changed during the review process. The amendment also requires that all documents accompanying such drafts and all written comments on the drafts from other agencies and responses from EPA be placed in the rulemaking docket. However, a study of regulatory review during the Reagan Administration found that OMB and EPA often ignored these docketing requirements.

88 Erik D. Olson, SUPRA note, at 59-60, 71, 73.
The history of regulatory review demonstrates that the visibility of the review process can have an important impact on its outcome. Presidents have been reluctant to intervene directly into the rulemaking process because the public tends to be suspicious of such intervention. Concerns that the Reagan Administration was trying to conceal the regulatory review process from public scrutiny eventually resulted in the adoption of disclosure policies.

In June 1981, OMB Director David Stockman issued a memorandum directing OMB staff to advise members of the public that “relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record.”\(^8\)

In May 1985, EPA and OMB agreed that OMB would routinely send to EPA copies of documents concerning agency rulemakings that OMB had received from members of the public. OMB pledged to inform EPA’s General Counsel whenever a meeting or phone call with an outside party provided OMB with factual information that OMB officials are not confident was provided to EPA.\(^9\) Moreover, OMB prohibited any employees other than the Administrator and Deputy Administrator of OIRA from meeting with private parties to discuss rulemaking matters without express permission.

Finally, on June 13, 1986, OMB’s Office of Information and

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Regulatory Affairs announced a new disclosure policy. The policy, outlined in a memorandum from then-OIRA Administrator Wendy L. Gramm, pledged to make available for public examination, upon written request made after publication of proposed or final regulations, the drafts of regulations sent to OMB for review. OMB also pledged to release information on the dates it commenced and completed reviews of proposed and final regulations. OMB officials have maintained that these policies are sufficient to prevent the use of regulatory review as an improper "back channel" for promoting private interests. Yet none of these procedures applies to the activities of the Competitiveness Council, while apparently is seeking to cloak all of its activities in broad claims of privilege.


The history of regulatory review illustrates a continued tension between two models of executive oversight: the legal "coordinating, advisory and consultative" model and the political "back channel" that promotes private interests outside of the rulemaking record. Each administration has been involved in episodes that demonstrate the lure of the latter, while plausibly declaring its intentions to be faithful to the former. If regulatory review is to be continued, Congress must consider how to develop mechanisms for ensuring that regulatory review does not undermine agency fidelity to law and the ideals of procedural fairness embodied in the Administrative Procedure Act. The Regulatory Review Sunshine Act of 1991, S. 1942, is an
appropriate mechanism for promoting these ends.

By imposing time limits on regulatory review (that presumably are not intended to supersede existing statutory or judicial deadlines for agency actions), the bill would address a chronic problem engendered by regulatory review -- the use of indefinite holds by OIRA or the Competitiveness Council as a device to displace agency decisionmaking. By requiring any entity engaging in regulatory review to log and disclose certain information about the review process, S. 1942 promotes public access to the rulemaking process by ensuring that efforts to influence agency decisionmaking become a matter of public record.

A large portion of the bill simply would extend to the regulatory review activities of the Competitiveness Council the very disclosure procedures currently employed by OIRA and the procedures required for more than a decade by § 307(d)(4)(B)(ii) of the Clean Air Act. 42 U.S.C. § 7607(d)(4)(B)(ii). These include the requirement that drafts of proposed and final rules submitted for regulatory review be made available to the public. To the extent that the Competitiveness Council chooses to engage in regulatory review, its activities should be subject to the same procedural safeguards as those of other reviewing entities.

The broad claims of privilege apparently asserted by the Council in its effort to avoid public disclosure of its activities are unfounded. First, there is no authority to support the proposition that Congress cannot require the disclosure of information concerning contacts between federal agencies and non-
governmental parties. The Council's claim that such contacts involve "information gathering [that] is necessary to the Executive Branch's deliberative process" would imply that executive agencies cannot be required to disclose any information concerning communications with private parties with respect to any rulemaking activity.

Second, factual information used by the Competitiveness Council in the course of regulatory review is clearly subject to disclosure. Indeed, in light of the recent decision in *Mayer v. Bush*, Civ. No. 88-3112 (D.D.C. Sept. 30, 1991) holding the The Presidential Task Force on Regulatory Relief, the predecessor to the Council on Competitiveness is an agency subject to the Freedom of Information Act, such information already should be disclosable under that Act. The question whether Congress can require logging and disclosure of other communications between reviewing entities and agencies is less clear. It does seem The D.C. Circuit's decision in *Sierra Club v. Costle*, 687 F.2d 298 (D.C. Cir. 1982) holds that such disclosure is not mandatory in circumstances where Congress has not chosen to require it, but the decision does not establish that such information is constitutionally protected from disclosure should Congress wish to require disclosure. With respect to information concerning the status of rulemaking actions, *Wolfe v. Department of Health & Human Services*, 839 F.2d 760 (D.C. Cir. 1988) establishes that Congress intended to exempt such information from disclosure under the Freedom of Information Act; it does not establish that
Congress cannot constitutionally require the disclosure of such information.

While *United States v. Nixon*, 418 U.S. 683 (1974) recognizes an executive privilege implicit in Article II of the Constitution, it is unclear whether this privilege is personal to the president or extends to other members of the executive branch. Because S. 1942 exempts oral communications with the President, Vice President, and the heads of executive departments from its terms, it is more likely that this legislation would be found constitutional than a flat requirement of disclosure for all executive branch officials. Moreover, the fact that the legislation seeks to address chronic abuses of the regulatory process by focusing only on efforts to influence the outcome of rulemaking proceedings, provides a rationale for making certain information available to the public.

Fears that legislation like S. 1942 will have a damaging impact on executive policymaking because of the "chill" of disclosure ignore the alternatives that have been employed heretofore. The primary checks on regulatory review have been aggressive congressional oversight and increasingly prescriptive regulatory legislation. Congressional oversight hearings have repeatedly disclosed a considerable amount of the kind of information addressed by S. 1942.\(^{91}\) Without any demonstrable

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"chilling" effect on executive policymaking. Moreover, the proliferation of statutory deadlines and hammer provisions in regulatory legislation, which is a product of congressional mistrust of regulatory review, surely restricts the policymaking freedom of executive officers far more than the disclosure provisions of this legislation.

V. CONCLUSION

The Regulatory Review Sunshine Act of 1991, S. 1942, would contribute towards conforming executive oversight to a "legal" model that focuses on improving the process by which regulatory decisions are made rather than altering the substance of regulatory outcomes. This model not only would be more consistent with the President's constitutional duty to "take Care that the Laws be faithfully executed," but it also might reduce the need for increasing specific constraints on agency discretion by restoring the public confidence in agency decisionmaking that is so badly needed.


92 U.S. Const., Art. II, § 3.