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BEYOND THE LIMITS OF EXECUTIVE POWER: PRESIDENTIAL CONTROL OF AGENCY RULEMAKING UNDER EXECUTIVE ORDER 12,291

*Morton Rosenberg**

Carrying out a campaign promise to eliminate burdensome and unnecessary government regulations, President Reagan recently signed Executive Order 12,291 into law.¹ The Order aims to improve the efficiency and accountability of the informal rulemaking processes of executive agencies. The heart of the Order is its requirement that "major"² rules survive cost-benefit analysis. Section 2, which applies to the extent permitted by law, stipulates that regulatory action may not be undertaken unless, "taking into account affected industries [and] the condition of the national economy," the potential benefits to society outweigh potential costs, and net benefits are at a maximum.³

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The views presented in this Article are solely those of the author and do not reflect the thinking of the Congressional Research Service.

1. 46 Fed. Reg. 13,193 (1981). The Order applies only to executive agencies, and does not affect independent agencies such as the Securities and Exchange Commission. The Justice Department originally argued that the President could subject independent regulatory commissions to the Order, but they were exempted on "policy grounds." See C. LUDLAM, UNDERMINING PUBLIC PROTECTIONS: THE REAGAN ADMINISTRATION REGULATORY PROGRAM 7 (1981) (copy on file with the *Michigan Law Review*); LEGAL TIMES OF WASH., July 20, 1981, at 1. A more recent memorandum prepared for the Office of Management and Budget, however, has recommended "that the White House pressure the independent commissions in a variety of ways to bring them under the President's control." C. LUDLAM, *supra*, at 7. See LEGAL TIMES OF WASH., June 1, 1981, at 1. To date, the Administration has only sought voluntary compliance with the Order from the independent agencies. LEGAL TIMES OF WASH., Oct. 5, 1981, at 5.

2. The Order defines a major rule as a regulation likely to result in an annual effect on the economy exceeding \$100 million, a major increase in costs or prices, or a significant effect on unemployment or other economic indicators. Exec. Order No. 12,291 § 1(b), 46 Fed. Reg. 13,193 (1981).

3. Sec. 2. *General Requirements.* In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

- (a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
- (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
- (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
- (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

To implement its cost-benefit standard, the Order imposes certain mandatory procedural requirements on agencies and creates a centralized oversight body composed of the President's top advisers. The Order provides, among other things, that executive agencies must prepare "Regulatory Impact Analyses" (RIAs) detailing the potential costs and benefits of all proposed and final "major" rules.⁴ The Director of the Office of Management and Budget (OMB), who, subject to the Presidential Task Force on Regulatory Relief, has authority over the definition, implementation, and enforcement of the Order's provisions, reviews all RIAs and can force the agency to delay publication of proposed or final rules.⁵

Although Executive Order 12,291 is the latest in a series of recent presidential efforts to control informal rulemaking,⁶ the nature of the Order's oversight mechanism, the extent of its required procedures, and the substantive import of its cost-benefit requirement are unprecedented. In the past, less formalized presidential intervention into agency decision-making has stirred both court action and congressional hearings.⁷ If, as published reports indicate, the Order's stated purposes⁸ are pursued vigorously,⁹ it will undoubtedly attract

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by the regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Exec. Order No. 12,291 § 2, 46 Fed. Reg. 13,193 (1981).

4. Exec. Order No. 12,291 § 3, 46 Fed. Reg. 13,193, 13,494-95 (1981).

5. (f)(1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a)(2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's view, and incorporated those views and the agency's response in the rulemaking file.

Exec. Order No. 12,291 § 3(f), 46 Fed. Reg. 13,193, 13,195 (1981).

6. See notes 101-04 *infra* and accompanying text.

7. For private challenges to presidential intervention, see, e.g., *American Petroleum Inst. v. Costle*, Nos. 79-1104, 79-1201, *et al.*, slip op. (D.C. Cir. Sept. 3, 1981); *Sierra Club v. Costle*, 657 F.2d 298, 386-410 (D.C. Cir. 1981); *In re Permanent Surface Mining Regulation Litigation*, 13 E.R.C. 1586 (D.D.C. 1979); *Natural Resources Defense Council v. Schultze*, 12 E.R.C. 1737 (D.D.C. 1979); *Nader v. Volpe*, 340 F. Supp. 1178 (D.D.C.), *affd.*, 446 F.2d 261 (D.C. Cir. 1972). For congressional hearings provoked by presidential intervention, see *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. (1979); *Regulatory Reform Legislation, Pt. 2: Hearings on S. 262 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

8. The preamble states the Order's purposes as: "reduc[ing] the burdens of existing and future regulations, increas[ing] agency accountability for regulatory actions, provid[ing] for presidential oversight of the regulatory process, minimiz[ing] duplication and conflict of regu-

congressional attention and challenges in court by adversely affected individuals. Already, critics of the Order have expressed fears that OMB oversight will serve as a "conduit" for the views of private industry,¹⁰ and have attacked the Order's cost-benefit requirement as a thinly disguised "justification for deregulating business and industry."¹¹

This Article addresses the substantial legal problems posed by Executive Order 12,291. Part I argues that the Order, taken as a whole or separated into its procedural and substantive components, violates the constitutional separation of powers. Drawing on the analytic framework outlined by Justice Jackson in the *Steel Seizure* case,¹² Part I maintains that courts should demand clear congressional support for the Order's requirements. The available evidence, however, conclusively demonstrates Congress's intent to deny the President formalized, substantive control over administrative policy-making. As interpreted by the Supreme Court, moreover, the informal rulemaking provisions of the Administrative Procedure Act (APA) repose authority to require additional procedures solely with the agency, not with the President or his advisers.

Part II addresses the legitimacy of ex parte communications between White House and agency officials, a problem that is exacerbated by the Order's oversight provisions. Because agencies typically attribute great weight to the views of the President and his closest advisers, such unrecorded and unreviewable communications threaten to deprive individuals of due process and to distort the APA's provisions for judicial review and public participation. Accordingly, Part II argues that significant oral or written communications between the White House and an agency should be disclosed in the rulemaking docket and that courts should invalidate agency action where this disclosure requirement has not been fulfilled.

I. PRESIDENTIAL CONTROL AND SEPARATION OF POWERS

A. *The President's Constitutional Authority*

The prestige and aura of the presidential office accompany Exec-

lations and insur[ing] well-reasoned regulations." Exec. Order No. 12,291 Preamble, 46 Fed. Reg. 13,193 (1981).

9. *Deregulation HQ: An Interview with Murray L. Weidenbaum and James C. Miller III*, REGULATION, Mar./Apr. 1981, at 14-23.

10. See LEGAL TIMES OF WASH., Oct. 5, 1981, at 5; LEGAL TIMES OF WASH., June 22, 1981, at 1.

11. N.Y. Times, Nov. 7, 1981, at 7, col. 1.

12. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

utive Order 12,291, but it is undisputed that its legitimacy depends on the scope of the President's constitutional and statutory authority.¹³ Notwithstanding this fundamental proposition, Executive Order 12,291 does not appear to draw its authority from any specific constitutional provision or congressional enactment; the Order itself refers only to "the authority vested in . . . [the] President by the Constitution and laws of the United States of America."¹⁴ If the legal basis for presidential oversight and management of the rulemaking process lies within the Constitution, it will be found in the provisions of article II, which have not been extensively tested in the courts.

Article II of the Constitution reposes all executive power in a single Chief Executive,¹⁵ and charges him to "take Care that the Laws be faithfully executed."¹⁶ Whether article II authorizes the President to manage administrative rulemaking through executive orders, however, is open to question. On its face, article II sets out a potentially formidable scheme for executive control of administration. By vesting the entire "executive Power" in the one federal officer with a national constituency, the framers accommodated the twin notions of accountability and efficiency. The sparse but important provisions that follow develop lines of authority reflecting the competing claims of administrative necessity and the separation of powers. The President can appoint executive officers¹⁷ and require them to report to him so that he can determine whether the laws are being "faithfully executed."¹⁸ This ability to require reports necessarily implies the right to confer with those officers. The President in turn must periodically report to Congress concerning the progress of the administrative operation and may suggest further legislative action. For some, this scheme implies operational oversight and management of the administrative process, if not some degree of substantive control, and suggests a line of authority that runs from Congress to the President rather than from Congress to subordinate executive officers.

For others, however, these inferences are not so clear. It is well understood that, notwithstanding their experience under the Articles of Confederation, the framers did not intend the presidency to be an

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

14. Exec. Order No. 12,291 Preamble, 46 Fed. Reg. 13,193 (1981).

15. U.S. CONST. art. II, § 1.

16. U.S. CONST. art. II, § 3.

17. U.S. CONST. art. II, § 2, cl. 2.

18. U.S. CONST. art. II, § 2.

institutional competitor to the Congress. Arguably, they did not conceive of the President as an administrative manager with a general power to control the acts of executive officers.¹⁹ This view also draws support from the language of article II. The vesting of "executive power" in the President may locate the situs of power but not define its content; the "take Care" clause does not say that the President will execute the laws; and the ability to require written reports from department heads on their activities does not naturally lead to an inference of power to direct the activities of those who report. The wording may thus suggest oversight of execution by others rather than direct execution by the President. The idea that power over administrative decision-making derives from the President's role as head of the executive branch or inheres in the concept of "executive power," moreover, is inconsistent with a written Constitution establishing divided, limited government.

Like the language of the Constitution, the case law provides few solid conclusions concerning the President's authority to act by executive order in domestic affairs. Although in rare instances the Supreme Court has relied on one of the President's constitutionally specified powers to sustain an executive order,²⁰ orders have most often been upheld by virtue of a specific congressional authorization.²¹ The Court has not held, however, that the President can validly act by executive order only where a legislative enactment specifically delegates him the requisite authority. It has instead

19. [I]t was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose function should, in the main, consist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the Government, with general power of directing and controlling the acts of subordinate Federal administrative agents.

3 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1479-80 (2d ed. 1929). See F. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* 51-54 (1893); Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Jaffee, *Investive and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1203, 1238 (1939); Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1, 10-11 ("Nor did [the framers] conceive of the presidency as an institutionalized representation of popular will distinct from, let alone capable of opposition to, the will expressed by the legislature."); Zamir, *Administrative Control of Administrative Action*, 57 CALIF. L. REV. 866, 869-70 (1969).

20. See, e.g., *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1872).

21. See *Old Dominion No. 496*, *AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974); *Jones v. United States*, 137 U.S. 202, 217 (1890); *AFL-CIO v. Kahn*, 618 F.2d 784, 796 (D.C. Cir.) (*en banc*), *cert. denied*, 444 U.S. 888 (1979). On occasion, subsequent legislation has been found to ratify an earlier order, see *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943); *The Prize Cases*, 67 U.S. (2 Black) 635, 671 (1862), and some cases have even held that continued congressional funding of a program created by executive order constitutes sufficient ratification, see *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 118-19 (1942); *Brooks v. Dewar*, 313 U.S. 354, 360-61 (1941); *United States v. Midwest Oil Co.*, 236 U.S. 459, 482-83 (1915).

skirted the more difficult separation of powers issues, and has said little regarding the President's unilateral authority to act in domestic affairs and the strength of the statutory support needed to justify his action.

Youngstown Sheet & Tube Co. v. Sawyer,²² better known as the *Steel Seizure* case, stands as the exception. To prevent a strike in the steel industry, President Truman issued an executive order, based solely on his constitutional powers,²³ directing the Secretary of Commerce to seize and operate most of the country's steel mills. The Supreme Court invalidated the order, holding that the President had violated the constitutional separation of powers. Writing for the majority, Justice Black articulated a separation of powers theory that would also doom Executive Order 12,291. Justice Black's theory rests on a rigid distinction between legislative and executive power.²⁴ According to Justice Black, other than the constitutionally specified authority to recommend and veto legislation, the President has no power to make law: The Constitution explicitly vests lawmaking power in the Congress. Applying Justice Black's compartmentalized approach, one could argue that executive control of administrative rulemaking usurps Congress's constitutional lawmaking role. The Court has recognized the essentially legislative nature of rulemaking, and has sharply curtailed the President's control over rulemaking agencies.²⁵ Because rulemaking in effect involves the power to make law, Justice Black's theory implies that the President may not unilaterally act to control the rulemaking process.

Justice Black's separation of powers analysis, however, has been

22. 343 U.S. 579 (1952).

23. During the debate on the Taft-Hartley Act, Congress had rejected an amendment that would have authorized executive seizure, in an emergency situation, of means of production threatened by labor-management strife. The President twice advised Congress of his action, but it took no countermeasures.

24. Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. . . . The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . .

. . . .
The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes of freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

343 U.S. at 587-89.

25. See text at notes 62-75 *infra*. Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 n.1, 542 n.16 (1978) (due process ordinarily does not require procedures more rigorous than those prescribed by Congress in rulemaking proceedings); *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915) (action of State Board of Equalization analogized to action of legislature).

widely criticized as “unduly simplistic” and unworkable.²⁶ In place of Black’s view of mutually exclusive spheres of legislative and executive power, a more “complex understanding of governmental authority . . . [as] shared by reciprocally limiting branches”²⁷ has been urged. Justice Jackson’s famous concurring opinion in the *Steel Seizure* case outlines one such understanding. “Presidential powers,” he declared, “are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”²⁸ Justice Jackson delineated three types of presidential power.²⁹ He acknowledged that the executive and legislative branches each possess a realm of autonomous authority. The President, in other words, possesses certain exclusive powers that Congress cannot abrogate or delimit. Congress cannot, one supposes, deprive the President of his constitutionally specified power to appoint executive officials. Congress likewise possesses certain exclusive powers. In this sphere of exclusive congressional authority, the President may not legitimately act unless Congress has validly delegated power to him. Unlike Justice Black, however, Justice Jackson also envisaged a third category — a “zone of twilight”³⁰ in which the President and Congress have concurrent authority. In this twilight zone, the President does not need a congressional delegation of power to justify his actions; he may legitimately act as long as Congress has not expressly or im-

26. Bruff, *Presidential Power and Administrative Rulemaking*, 88 *YALE L.J.* 451, 472 (1979).

27. *Id.* at 487.

28. 343 U.S. at 635 (Jackson, J., concurring).

29. 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential jurisdiction in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 635-38 (Jackson, J., concurring).

30. 343 U.S. at 637 (Jackson, J., concurring).

pliedly denied him the power. Congress, however, retains ultimate control since the President must abide by its expressed will.³¹

Justice Jackson's tripartite framework furnishes a provocative starting point for analysis. To assess the validity of Executive Order 12,291, one must first ask whether the Order falls within the exclusive domain of one branch or whether the President and Congress possess concurrent authority in the area. It seems obvious that the President cannot have exclusive authority to control informal rulemaking. The Supreme Court has recognized that an agency acts as a legislative body when it promulgates rules and thus has limited presidential control over the rulemaking process.³² Even if the Order is viewed as purely procedural, it would be anomalous to hold that Congress may mandate the general substantive standards to which rules must conform but may not establish the procedures that an agency must use to formulate those rules. At the very least, therefore, Congress possesses concurrent authority to act in the area covered by Executive Order 12,291.

The more troubling question is whether the Order intrudes on an exclusive province of Congress. If it operates within an area where Congress's powers are exclusive, an executive order can be sustained only if an express or implied delegation can be discerned. If the President has concurrent authority, however, an order may be upheld as long as it does not contradict the intent of Congress. Although Justice Jackson did not discuss how to determine whether a given action by the President falls within the twilight zone of concurrent authority or encroaches upon Congress's exclusive authority, three factors suggest themselves as especially relevant:³³ (1) the institutional competence of each branch,³⁴ (2) the historic and proper role of each branch, and (3) the degree to which the executive action in question intrudes on a function appropriately entrusted to the leg-

31. See note 29 *supra*; *The Yale Paper, Indochina: The Constitutional Crisis, Part II*, 116 CONG. REC. 16,478, 16,479 (1970) ("Furthermore, the lesson of the steel seizure case itself is that the legislative will must prevail when there is conflict within the twilight zone.") [hereinafter cited as *The Yale Paper*].

32. See notes 62-75 *infra* and accompanying text.

33. Cf. Bruff, *supra* note 26, at 488:

At least six questions should be considered in an evaluation of the legitimacy of a given presidential initiative aimed at influencing agency regulatory policy:

(1) is there express or implied statutory authority for the initiative; (2) does the President have the capacity to execute the initiative; (3) is the initiative best characterized as procedural or substantive; (4) is the regulatory program suited to presidential intervention of the kind attempted; (5) what protections are accorded to ensure that the rulemaking process remains an open one that is fair to those concerned; and (6) are effective checks by the other branches of government available.

34. *The Yale Paper, supra* note 31, at 16,479.

islature. By applying these factors, one can intelligently evaluate the congressional support that should be required to sustain Executive Order 12,291.

The first factor, institutional competence, refers to the comparative advantages inherent in the operation of each branch. Because the President possesses final authority over his actions, he can make decisions and take action more quickly than can Congress.³⁵ Congress, by design, acts more slowly as issues are debated, compromises made, consensus built, and differences between the two houses reconciled.³⁶ Another crucial difference concerns the relative openness of the two branches to public scrutiny. While legislation is subject to an on-the-record public debate, only the final outcome of executive decision-making need be publicly disclosed. Indeed, the Supreme Court has held that the President has a constitutionally protected interest in the confidentiality of communications with his chief advisers.³⁷ These differences suggest that the President is best suited to act in emergency situations, where speed is at a premium, and in

35. The President can act more quickly than the Congress. The President with the armed services at his disposal can move with force as well as speed. All executive power — from the reign of ancient kings to the rule of modern dictators — has the outward appearance of efficiency.

Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives. Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient.

343 U.S. at 629 (Douglas, J., concurring). In a similar vein, it has been noted that [t]he special competence of the office of the Presidency is its capacity for fast, efficient, and decisive action. Power in the executive branch is hierarchical; in Congress it is diffuse. Decisions in the legislative branch are made according to complex procedural rules in two separate institutions; in the White House they can be made by one man. The essence of the legislative process is deliberation and compromise; in the executive process, at least in theory, it is command.

The Yale Paper, *supra* note 31, at 16,479.

36. The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 55, 293 (1926) (Brandeis, J., dissenting), *quoted in* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 629 (Douglas, J., concurring).

Speed and efficiency, however, are not the proper ends of government. If they were, the framers would have created a dictatorship. The main theme underlying the Constitution is, of course, the desire to temper the decisiveness of a President with the prudence inherent in a large body which acts through deliberation, compromise, and consensus. And it is that prudence, coupled with the fact that Congress is closer to the People and reflects the diversity of their views, that gives rise to *its* special competence, a unique legitimacy to commit the resources and will of the nation.

The Yale Paper, *supra* note 31, at 16,479 (footnote omitted) (emphasis in original). See Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, *LAW & CONTEMP. PROB.*, Summer 1976, at 46, 47.

37. *United States v. Nixon*, 418 U.S. 683 (1974).

foreign affairs, where an open decision-making process might damage the national interest or hinder a thorough consideration of the relevant issues. This understanding of the President's competence might explain why most Justices, unlike Justice Black, found the *Steel Seizure* case difficult. Most of the Justices, perhaps because the case arguably involved an emergency touching on national security concerns, were willing to interpret the President's authority expansively. A close reading of the concurring and dissenting opinions reveals that a majority³⁸ of the Justices thought that President Truman's action was, in Justice Jackson's terms, within the twilight zone of concurrent authority. Disagreement arose only over whether Congress had impliedly denied the President authority to act.

Executive Order 12,291 stands in sharp contrast to President Truman's decision to seize the steel mills. Few would seriously contend that agency rulemaking has created a crisis situation necessitating a swift response or has somehow jeopardized the nation's security. The special competence of the office of the presidency is thus not needed to correct deficiencies in the rulemaking process. Public debate and legislative compromise are possible and, because the Order alters the way that fundamental domestic policies are formulated, desirable.

The desirability of legislative rather than presidential action points to the second factor affecting the categorization of the Order: the historic and proper role of each branch of government. The Constitution, of course, does not speak directly to the control of the federal bureaucracy. The proper role of the President must, therefore, be implied from his constitutional authority to appoint executive officers and to require reports from his subordinates, and from his duty to "take Care that the Laws be faithfully executed."³⁹ Consideration of the express and implied powers accorded the President by article II, however, should not end the inquiry. The Constitution's general grant of legislative power to Congress⁴⁰ further delimits the President's authority to regulate domestic affairs. According to the prevailing view, the framers intended the constitutional role of the Chief Executive, at least in domestic affairs, to be ancillary to that of the legislature.⁴¹ They believed that the President would be a

38. See 343 U.S. at 634 (Jackson, J., concurring); 343 U.S. at 655 (Burton, J., concurring); 343 U.S. at 660 (Clark, J., concurring); 343 U.S. at 667 (Vinson, C.J., Minton, J. & Reed, J., dissenting).

39. U.S. CONST. art. II.

40. U.S. CONST. art. I, § 1.

41. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 161, 181 (1978).

managerial agent for the legislature rather than an independent source of domestic policy.⁴² This view is evinced by a number of contemporaneous sources. Statutes enacted by the earliest Congresses, for example, reveal an assumption that Congress, not the President, should direct the operation of domestic agencies, and that presidential control over the execution of domestic laws was purely a matter of legislative authorization. In establishing the Departments of Foreign Affairs,⁴³ War,⁴⁴ and the Navy,⁴⁵ Congress recognized that the President should have full control over those officers who would perform the highly sensitive and political functions that the Constitution explicitly vests in the Chief Executive — such as the conduct of foreign affairs and the command of the military. The statutes creating those departments explicitly empowered the President to direct and control their activities. Provision for presidential direction, however, was conspicuously absent in the statutes creating domestic departments such as the Treasury,⁴⁶ the Post Office,⁴⁷ and the Interior Department.⁴⁸ The Treasury Department statute, for example, did not even mention the President; it required the Secretary to report to Congress “and generally perform all such services relative to the finances, as he shall be directed to perform.”⁴⁹ Such direction, the context makes clear, was to come from Congress, not the President. Indeed, for a significant period in our early history, the President did not see departmental budget estimates before the Treasury Department transferred them to Congress, and the Secretary recommended tax policy directly to Congress.⁵⁰ Similarly, the Postmaster General was given detailed discretionary duties with no suggestion that he was to be under other than congressional direction in performing these tasks.⁵¹

42. See note 19 *supra* and accompanying text.

43. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28.

44. Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49.

45. Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553.

46. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

47. Act of May 8, 1794, ch. 23, § 3, 1 Stat. 357.

48. Act of Mar. 3, 1849, ch. 108, § 1, 9 Stat. 395.

49. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

50. L. WHITE, *THE JACKSONIANS* 78 (1954); L. WHITE, *THE FEDERALISTS* 326 (1948).

51. W. WILLOUGHBY, *supra* note 19, at 1480. Professor Goodnow remarked about this unusual administrative organization as follows:

In the United States, the original conception of the head of department was that of an officer stationed at the center of the government who might have, it is true, in many cases the power of appointment and removal, but who was not supposed to direct the actions of the subordinates of his department. . . . The conception of a hierarchy of subordinate and superior officers was very dim if it existed at all.

F. GOODNOW, *supra* note 19, at 136-37.

The opinions of Attorneys General throughout the nineteenth century echo the view that the "take Care" clause does not authorize the President to control subordinate officials in the exercise of their statutory discretion. For example, when pensioners tried to appeal the Comptroller's decision regarding the level of veterans' pensions directly to the President, Attorney General Wirt advised that the Comptroller's statutory authority was exclusive:

If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it; but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be taking care that the laws were faithfully executed, but he would be violating them himself.⁵²

In the same vein, Attorney General Mason concluded in 1846 that the President's power to ensure that his subordinates "faithfully" execute their statutory duties does not confer on him "the power of correcting, by his own official action, the errors of judgment of incompetent or unfaithful subordinates."⁵³ Other Attorneys General applied this rule to a wide variety of situations where a subordinate was directly vested with authority by Congress,⁵⁴ so that, by 1884, Attorney General Brewster could inform the President of a "well settled" general rule: "It has repeatedly been held that the observance of your constitutional duty of taking care that the laws be faithfully executed does not of itself warrant your taking part in the discharge of duties devolved by law upon an executive officer."⁵⁵

52. 1 Op. Atty. Gen. 624, 625-26 (1823).

The Constitution of the United States requires that the laws be faithfully executed; that is, it places the officers engaged in the execution of the laws under his general superintendence; . . . But it never could have been the intention of the Constitution, in assigning this general power to the President . . . that he should in person execute the laws himself. . . . The Constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully. . . . He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully* — that is, *honestly*: not with perfect correctness of judgment, but *honestly*.

Id. at 625-26 (emphasis in original).

53. 4 Op. Atty. Gen. 515, 516 (1846).

54. For example, the President was told that he could not interfere with a patent decision, 13 Op. Atty. Gen. 28 (1869), and that he had no authority to review a department head's decision concerning the lowest bidder on a contract, 6 Op. Atty. Gen. 226 (1853).

55. 18 Op. Atty. Gen. 31, 33 (1884). *See* 1 Op. Atty. Gen. 624 (1823); 1 Op. Atty. Gen. 705 (1825); 2 Op. Atty. Gen. 480, 481 (1831); 2 Op. Atty. Gen. 507, 508 (1832) (Comptroller's decision "is conclusive upon the executive branch of government"); 2 Op. Atty. Gen. 544 (1832); 5 Op. Atty. Gen. 630, 635 (1852) (presidential interference "would be a usurpation on the part of the President, which the accounting officers would not be bound to respect" unless Congress expressly ordered them to do so); 11 Op. Atty. Gen. 14 (1864); 13 Op. Atty. Gen. 28 (1869); 15 Op. Atty. Gen. 94, 101-02 (1876). The opinions are not unanimous, however. *See* 7 Op. Atty. Gen. 453, 469-70 (1855). In Attorney General Cushing's view, a denial of the power of presidential direction would allow Congress to "so divide and transfer the executive power as utterly to subvert Government." The opinion was called "extreme" by a prominent early

The original view of the limited nature of presidential control over the discretionary actions of subordinate officers is confirmed by contemporaneous judicial precedent as well. In *Kendall v. United States*,⁵⁶ for example, a statute directed the Postmaster General to pay a group of individuals who had delivered the mail for a number of years an amount determined by the Solicitor. The Postmaster General, apparently at the express direction of the President, refused to pay the full amount that the Solicitor had found owing. The Supreme Court, viewing the Postmaster General's duty to pay the full amount as ministerial rather than discretionary, held that the President had no authority to direct the Postmaster General's performance of his statutory duty. Despite the *Kendall* Court's narrow holding, key passages in the opinion reflect the nineteenth-century notion that the President may not direct the manner in which executive officers carry out their discretionary functions. Where Congress has imposed upon an executive officer a valid duty, the *Kendall* Court declared, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."⁵⁷ Underlying the Court's rejection of the contention that the "take Care" clause carries with it the power to control executive officials was a strong desire to avoid "clothing the President with the power entirely to control the legislation of Congress."⁵⁸ Other early cases, like *Kendall*, also reflect the primacy of Congress in domestic affairs.⁵⁹ Congressional enactments, legal opinions of the various Attorneys General, and early judicial precedent thus establish that the President's role in the scheme of government established by the Constitution for more than a century of our nation's existence was that of a managerial agent for the legislature.⁶⁰ This prevailing view was premised on the assumption that presidential power was not essen-

commentator. F. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 81 (1905).

56. 37 U.S. (12 Pet.) 524 (1838).

57. 37 U.S. (12 Pet.) at 610.

58. 37 U.S. (12 Pet.) at 613.

59. See *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (holding Secretary of Agriculture to be an agent of Congress in promulgating "administrative" rules); *United States v. Perkins*, 116 U.S. 483 (1886) (holding that where Congress vests the power of appointment in some official other than the President, it can regulate and restrict the manner of removing that appointee); *Ex Parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) ("The only power . . . which the President possesses, where the 'life, liberty or property' of a private citizen are concerned, is the power and duty . . . 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution."). The continuing validity of *Perkins* was affirmed in *Myers v. United States*, 272 U.S. 52, 127 (1926).

60. As late as 1885, Woodrow Wilson could suggest in his *Congressional Government* that

tially constitutionally based, but emanated from the legislative will, an assumption that traced its roots to the reasons for founding the Republic.⁶¹ This view, moreover, carries with it the concomitant notion that presidential efforts to control the administrative actions of subordinate officers must find their bases in explicit constitutional provisions, express statutory enactments, or the clearest of implications from a congressional mandate or course of practice. The lack of congressional prohibition is, under this view, insufficient in itself to support executive power to control administrative discretion, even indirectly.

While the President's authority directly to control his subordinates' performance of specific statutory duties occupied the attention of legal scholars and the courts in the nineteenth century, twentieth-century judicial precedents address a more indirect means of influence: the President's power to remove subordinate officials. *Myers v. United States*,⁶² the leading case, held unconstitutional a statute providing that postmasters appointed by the President with the Senate's consent shall hold office for four years unless "removed by the President by and with the advice and consent of the Senate."⁶³ The President's responsibility to "take Care that the Laws be faithfully executed," the Court reasoned, demands that he have unqualified authority to remove as well as to appoint subordinate officials.⁶⁴ Chief Justice Taft's majority opinion has been read as discerning broad supervisory power vested in the President by article II: The President, he concluded, must have the authority to "supervise and guide" at least some decisions of subordinate officers "to secure that unitary and uniform execution of the laws which Article II . . . evidently contemplated in vesting general executive power in the President alone."⁶⁵

Although the Justice Department's legal memorandum accompanying Executive Order 12,291 relies heavily on the interpretation given the "take Care" clause by Chief Justice Taft in *Myers*,⁶⁶ such

the presidency was at best a ceremonial and symbolic office in need of executive and administrative support from a reorganized Congress. See Zamir, *supra* note 19, at 871-73.

61. See Karl, *supra* note 19, at 11.

62. 272 U.S. 52 (1926).

63. 272 U.S. at 107 (quoting Act of July 12, 1876, ch. 179, § 6, 19 Stat. 80, 81).

64. 272 U.S. at 117.

65. 272 U.S. at 135.

66. Memorandum of Acting Assistant Attorney General Larry L. Simms, Proposed Executive Order Entitled "Federal Regulation," February 13, 1981 [hereinafter cited as Simms Memo] (copy on file with the *Michigan Law Review*).

More specifically, the Justice Department memorandum reasons as follows. It first sets forth the general constitutional principles perceived as underlying presidential authority. The

reliance is misplaced. The indirect power of removal differs significantly from the Order's conception-to-enactment influence over administrative rulemaking, and the Court's opinion nowhere goes so far as to hold that the President may direct the outcome of all decisions specifically committed by statute to a subordinate. The Court carefully distinguished the "ordinary duties of officers prescribed by statute" from those 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."⁶⁷ Because the former duties "come under the general administrative control of the President," he may properly "supervise and guide" their performance.⁶⁸ But Taft's opinion makes clear that the Chief Executive's power to "supervise and guide" his subordinates in the conduct of "ordinary duties"⁶⁹ prescribed by statute does not extend to the rulemaking and adjudicatory functions committed by law to his subordinates' discretion. The President may remove a subordinate for negligent or inefficient use of that discretion; he may not, however, exercise his removal power before the subordinate has exercised the personally committed discretion.⁷⁰

"take Care" clause, as construed in *Myers*, is asserted to authorize the President, as head of the Executive Branch, to "supervise and guide" executive officers in carrying out the statutes under which they act so that there can be some measure of uniformity in the interpretation and execution of diverse laws enacted by Congress. A denial of such guidance from the sole officer vested with the executive power under the Constitution could result in confusion and inconsistency among government agencies. On the other hand, it is conceded that Congress may so delimit a delegation of authority to a subordinate official as to preclude presidential supervision of decision-making. Such cases are rare, it is argued, and it must be presumed that when Congress delegates rulemaking authority to the heads of nonindependent agencies, it is aware that they are removable at the will of the President. It would thus be anomalous to believe that Congress would make such delegations with a lack of understanding of the existence of that control relationship. From these premises it is concluded that the standard to be applied for determining the permissible extent of presidential guidance and supervision is to be based on the degree of displacement of subordinate officer discretion. "[S]upervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official." *Id.* at 4.

67. 272 U.S. at 135.

68. 272 U.S. at 135.

69. The structure of this critical paragraph supports an argument that by "ordinary duties" Taft meant ministerial tasks or purely administrative duties not involving substantive decision-making since that passage is immediately followed by passages that clearly set apart rulemaking and adjudicatory functions. If so, the power to "supervise and guide" is of minimal substance.

70. 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 cannot in a particular case properly influence or control.

This requirement is not an empty procedural nicety. Although the President may remove an officer for a particularly offensive decision, he obviously cannot use the removal power to exert control over all administrative rulemaking. The threat of removal, of course, gives the President great influence, but the decision that prompted the removal remains unaltered, and perhaps unalterable,⁷¹ until a new appointee reverses the offensive action.⁷² After-the-fact removal, moreover, gives Congress notice of the dispute and an opportunity to clarify its intent on the matter or to refuse to confirm a new nominee to an advice and consent position. Limiting the President to after-the-fact removal thus partially prevents secret or undue Executive influence in an area committed to a particular subordinate's discretion.

Reliance on *Myers* is misplaced for a second reason as well: More recent cases have greatly limited the removal power that the Court once recognized. Distinguishing between purely executive officials such as the postmaster in *Myers* and officials who, while titularly within the executive branch, perform quasi-judicial or quasi-legislative functions, the Court has held that the President may not remove the latter type of official without cause. In *Humphrey's Executor v. United States*,⁷³ the President had removed a member of the Federal Trade Commission without cause despite a statutory provision that precluded removal except for "inefficiency, neglect of duty, or malfeasance in office." In rejecting the idea of an illimitable presidential removal power, the Court emphasized the distinction between officials who performed purely executive tasks and those who carried out rulemaking and adjudication. "[A]n administrative body created by Congress to carry into effect legislative policies," the Court declared, "cannot in any proper sense be characterized as an arm or eye of the executive."⁷⁴

The most recent removal case, *Wiener v. United States*,⁷⁵ reiter-

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.
272 U.S. at 135.

71. Due process, for example, may prevent the withdrawal of a property right granted.

72. The difficulties that may be encountered, and the occasional inefficacy of the use of the removal power to alter the course of discretionary decision-making, was dramatized in the aftermath of the Saturday Night Massacre. See *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (holding that Acting Attorney General Bork had illegally dismissed the Watergate prosecutor).

73. 295 U.S. 602 (1935).

74. 295 U.S. at 628.

75. 357 U.S. 349 (1958).

ated the *Humphrey's* Court's distinction between purely executive and other types of administrative officials. The *Wiener* Court held that the President lacked the authority to remove a member of the War Claims Commission even though the Commission's founding statute had no removal provision. Because the official performed adjudicative tasks more closely allied to the judicial than the executive power, the Court reasoned that Congress intended to deny the President the power of removal. *Humphrey's* and *Wiener* thus teach that the scope of presidential authority depends on the agency function that the President seeks to control.⁷⁶ Where that function is legislative or judicial in nature, authority for presidential control cannot be implied from the Constitution.

Although one must resist simplistic distinctions between executive, judicial, and legislative functions, there is a strong connection between legislative power and informal rulemaking. Rulemaking power is, of course, a preeminent feature of the modern administrative agency, and the promulgation of rules has been a normal feature of American government since its inception. It is only during the present century, however, that rulemaking authority has brought about a shift in the center of gravity of lawmaking. Due to the increasing complexity of modern society, Congress now lacks the capacity to enact all of the legislation that it regards as desirable. The number and size of the problems requiring regulatory attention, together with the constraints on congressional decision-making, increasingly demand that legislative tasks be delegated to administrative agencies. It was originally thought that the agencies would merely work out the technical details of broad policies established by Congress. Yet today, administrative legislation dwarfs the primary legislation of Congress, and the vastness of the delegations now required have blurred the line between principle and detail.⁷⁷ The legislative mandate of the agencies is often a skeleton; consequently, they must author the broad regulatory policies characteristic of statutory law. Not surprisingly, therefore, the Supreme Court has

76. At least one commentator has raised the question whether the Supreme Court's holding in *United States v. Nixon*, 418 U.S. 683 (1974), "that Congress may authorize the Attorney General to establish limitations on the President's power, . . . implicitly . . . overrule[s] *Wiener*]." Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 82-83 (1974). Mishkin doubts, however, that this part of the *Nixon* opinion is reliable. *Id.*

77. The courts have upheld delegations that contain no or exceedingly general standards to guide the agency. *See, e.g., Arizona v. California*, 373 U.S. 546 (1963) (upholding a delegation without a substantive standard); *NBC v. United States*, 319 U.S. 190, 225-26 (1943) (delegation authorized FCC to license radio communications "as the public convenience, interest or necessity requires."). *See generally* W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 52-80 (7th ed. 1979). For a criticism of the delegation doctrine, see note 84 *infra*.

treated rulemaking as a legislative process for purposes of both the President's removal power and due process.⁷⁸ In view of the essentially legislative character of administrative rules,⁷⁹ strong reasons exist for minimizing presidential control over agency rulemaking. To the extent that the President can control rulemaking, he has the unilateral ability to enact fundamental domestic policy,⁸⁰ a power that the Constitution entrusts to the legislature. Presidential direction of rulemaking thus undermines the values that the framers sought to protect by resting lawmaking power in Congress. First, placing lawmaking authority in the President's hands deprives lawmaking of much of its participatory character. Congress can act only after legislation has been publicly proposed and debated. During the often lengthy period of consideration, interested groups can and do voice their views. In contrast, the presidential decision-making process, by institutional design, is often hidden from the public's view, and the sense of participation is correspondingly diminished.⁸¹

Second, presidential control, in effect, makes it considerably easier to enact or repeal legislation. Due to the slowness and political fragmentation of the legislature, the framers expected that regulatory policies could be implemented only with great difficulty. Conferring legislative powers on the President frustrates the framers' expectation. Unrestrained by the procedural complications and political vicissitudes of the legislature, the President can rather easily implement regulatory policy through executive order. The difficulties accompanying congressional action facilitate this type of legislative action: Congress can prevent the implementation of the

78. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 n.1, 542 n.16 (1978); *Bowles v. Willingham*, 321 U.S. 503, 519 (1944); *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915).

79. Properly promulgated rules and regulations have the same legal effect as statutes. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Their provisions have the force of law and they are backed by the same sanctions as statutes, including, in many instances, the criminal sanctions designed to coerce obedience to the law.

80. Undeniably, the President's executive responsibilities also involve lawmaking of sorts. In interpreting the particular terms of a statute which he must enforce, the President must exercise judgment that "shades" into lawmaking. Cf. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) ("the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts"); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770 (2d ed. 1973) ("Statutory interpretation shades into judicial lawmaking on a spectrum."). The interpretative skills that the President must exercise in enforcing the law, however, fundamentally differ from the broad policy judgments that the FCC, for example, must make when formulating broadcasting regulations "in the public interest."

81. *Fleishman & Aufses, Law and Orders: The Problem of Presidential Legislation*, 40 *LAW & CONTEMP. PROB.* 1, 38 (1976) ("when a President acts through an order, he avoids having to subject his policy to public scrutiny and debate").

President's domestic policies only by enacting a statute to block the action. And the President can render his action even more secure by using his veto power. Ironically, a two-thirds majority vote is needed to overturn rather than undertake such legislative action.⁸² As a result, the continuity of domestic policy that the framers must have desired is disturbed. Using his power to control rulemaking, each successive President could discard disagreeable policies or implement new ones. Perhaps more importantly, the ease of legislative action through presidential control of rulemaking would thwart the framers' desire to limit governmental power.

Third, there is no assurance that policies enacted via executive order will be accompanied by a sufficiently broad popular consensus. It is a matter of political reality that an elected candidate does not represent the views of his constituency on every issue. Voters often elect a candidate because they support his position on issues that they consider fundamental, and they may disagree with many of his other stances. If permitted to legislate by executive order, the President can enact his less popular policies with a simple stroke of his pen. In contrast, a congressman encounters greater difficulty because, unlike the President, he must persuade a majority of Congress to accept his views. There is thus a much greater guarantee that legislation passed by Congress has the wide popular support that the framers desired. Ironically, presidential control of the substantive products of the administrative process, a measure sometimes urged to improve the accountability of the administrative process,⁸³ actu-

82. One commentator has observed that congressional control of presidential policy-making is likely to be ineffectual for two reasons:

First, Congress cannot simply "overrule the executive" when it objects to the executive's interpretation of a statute. Overrule can generally be accomplished only by means of repeal or amendment of the statute in question, and this is subject to a (likely) presidential veto; thus a super-majority of two-thirds of each house would be needed to rein in expansive executive policy-making. In fact, shortly after President Ford imposed the oil import fees, Congress did pass a bill suspending the fees, but the President vetoed it.

Second, when Congress is faced with an executive policy that is in place and functioning, Congress often acquiesces in the executive's action for reasons which have nothing to do with the majority's preferences on the policy issues involved. In such a situation, Congress may not want to embarrass the President; or Congress may want to score political points by attacking the executive's action rather than accepting political responsibility for some action itself; or Congresspersons may be busy running for reelection or tending to constituents' individual problems; or Congress may be lazy and prefer another recess; or there may just be inertia because some policy is functioning. For these reasons and others, congressional review of executive policy-making is sporadic, and the executive frequently makes policy without Congress either taking responsibility for it or repudiating it. The result is a system sharply skewed towards executive policy-making.

Gewirtz, *supra* note 36, at 78-79.

83. See Bruff, *supra* note 26, at 453-63; Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

ally reduces the voters' control over domestic policy.⁸⁴ History, precedent, and policy all favor viewing rulemaking as an exclusive legislative function properly controlled by Congress.

The third factor influencing whether a given presidential action falls within the twilight zone of concurrent authority or encroaches upon Congress's exclusive authority is the extent to which the President's action intrudes on a function properly reserved for the legislature. Although rulemaking, as we have seen, is essentially a legislative function, presidential action in this sphere is not necessarily objectionable. Presidential directives improving intra-agency communication or access to relevant scientific information, for example, do not seriously interfere with the legislative character of rulemaking. Such measures, best described as "facilitative,"⁸⁵ do not command an agency to take certain action and do not affect an agency's substantive orientation; they simply allow an agency to execute better whatever it perceives to be its mandate. Procedural requirements pose more difficult questions because they may or may not affect the substance of agency rules. Where particular procedu-

84. "[Presidential legislation] provides policy quickly and decisively. [But by] evading Congress, . . . it sacrifices accountability and consent. In short, it replaces government by law with rule by orders." Fleishman & Aufses, *supra* note 81, at 40. See Scher, *Conditions for Legislative Control*, 25 J. POL. 526 (1963) ("Democratic ideology requires control of administrative action by elected representatives of the people."). One cannot deny the validity of the concerns expressed by advocates of increased presidential supervision of agency policy-making. Administrative policy-making is now largely unaccountable to either Congress or the President. Due to the broad delegations of lawmaking power upheld by the courts and the sporadic quality of congressional oversight, see G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 847-48 (2d ed. 1980), Congress has failed to perform its constitutionally assigned task of legislating basic policy. Presidential control over agency rulemaking, however, is an improper response to a very real problem. Presidential policy-making control distorts rather than ensures adherence to constitutional values. A better response to the accountability problem is to revive the delegation doctrine so that delegations of lawmaking power will be accompanied by meaningful standards. By requiring Congress to make basic policy decisions, a stricter delegation doctrine achieves accountability but not at the expense of transferring enormous amounts of legislative power to the President. This approach draws support from *Industrial Union Dept. v. American Petroleum*, 448 U.S. 607 (1980). In that case, a majority of the Court intimated that it would be willing to employ the delegation doctrine to invalidate "'sweeping delegation[s] of legislative power' . . ." 448 U.S. at 646 (plurality opinion) (citations omitted); 448 U.S. at 674-76, 685-86 (Rehnquist, J., concurring). Commentators have also called for a revivification of the delegation doctrine. See, e.g., Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972). Under a revived delegation doctrine, one wonders whether the Order's cost-benefit injunction, if ratified by Congress, could withstand scrutiny. The ambiguity of cost-benefit analysis raises serious questions concerning the intelligibility of the delegated standard.

85. Directives of this sort should be distinguished from procedural or substantive directives. In contrast to substantive measures, facilitative measures are not intended to affect the agencies' policy orientation. Unlike procedural directives, facilitative directives do not *require* the agency to change its decision-making process. Facilitative measures create opportunities rather than impose mandatory procedures.

ral requirements have a substantive effect, however, they clearly intrude on the legislative character of rulemaking.

Executive Order 12,291 sets up a framework for management of the administrative rulemaking process that is unprecedented in scope and substance. The Order establishes conception-to-grave oversight of the rulemaking of all covered agencies, and concentrates effective operational authority in one agency, the OMB. This coordinating agency is vested with the power to define and implement a uniform methodology and system of standards by which all important regulatory action is to be judged. The substantive impact of this single standard of assessment is apparent. The Order declares that "[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society,"⁸⁶ and that "[r]egulatory objectives shall be chosen to maximize the net benefits to society."⁸⁷ It thus fails to recognize that Congress, in creating administrative agencies, has itself weighed certain costs and benefits and established general policy goals. Implicit in the notion of an agency's statutory mandate or mission is a congressional instruction to attribute special weight to particular concerns.⁸⁸ Executive Order 12,291, however, in effect commands agencies to undertake a *de novo* balancing of factors that Congress has already considered.

The so-called cotton-dust case, *American Textile Manufacturers Institute, Inc. v. Donovan*,⁸⁹ nicely demonstrates this point. In that case, the Occupational Safety and Health Administration (OSHA) had promulgated a standard limiting occupational exposure to cotton dust. The textile industry challenged the regulation, essentially claiming that OSHA was required to find that the benefits of the standard outweighed its costs. In rejecting the industry's argument, the Supreme Court held that Congress had instructed OSHA to use a feasibility, not a cost-benefit, standard when drafting its rules.⁹⁰ The cotton-dust case vividly illustrates that the cost-benefit principle, like a principle requiring special concern for worker safety, affects the substance of agency rulemaking. Executive Order 12,291 gives the President power to shape substantive domestic policies and thus con-

86. Exec. Order No. 12,291 § 2(b), 46 Fed. Reg. 13,193 (1981).

87. Exec. Order No. 12,291 § 2(c), 46 Fed. Reg. 13,193 (1981).

88. See Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1396-97, 1419 n.111 (1981).

89. 101 S. Ct. 2478 (1981).

90. 101 S. Ct. at 2490.

stitutes a significant intrusion on an area properly entrusted to Congress.

The Justice Department memorandum supporting the Order concedes that it imposes both procedural and substantive requirements, but contends that these requirements do not unlawfully displace congressional or agency authority. The memorandum identifies the Regulatory Impact Analysis requirement as a procedural requirement, "which . . . is at most an indirect constraint on the exercise of statutory discretion."⁹¹ The Justice Department categorizes the requirement that agencies exercise their discretion in accordance with "the principles of cost-benefit analysis" as substantive in nature,⁹² but argues that the Order does not conflict with statutes that explicitly preclude decisions based on cost-benefit assessments since it recognizes an exception where adherence to its requirements is precluded by law.⁹³ Finally, the memorandum finds that the functions of the OMB and the Task Force are supervisory only; the tasks delegated to those bodies do not suggest authority to reject an agency's ultimate judgment.

This attempt to justify the Order is unpersuasive. The Justice Department treats two specific requirements of the Order and the general supervisory functions devolved on the OMB and the Task Force as isolated aspects of the displacement of discretion issue. The Order, however, is a complex, interrelated series of prescriptions and functions that, taken as a whole, establishes an integrated system of management for a substantial portion of the Executive Branch's rulemaking activities. Thus, the requirement that an agency prepare a Regulatory Impact Analysis assessing the costs and benefits of major rules, standing alone, may be properly characterized as procedural. That requirement is relatively innocuous legally until it is seen as part of a mandatory assessment process that evaluates rules for their consistency with "the principles of cost-benefit analysis." Even then, the conclusion that sufficient discretion is left with executive officials is plausible since it may be conceded that there is no single set of cost-benefit principles applicable to all situations.⁹⁴ But these

91. Simms Memo, *supra* note 66, at 5.

92. *Id.*

93. *Id.* at 6. Where a statute is silent, however, an agency decision-maker is free to consider such factors and the President is within his supervisory authority to see that the decision-maker considers it. As it is the agency head, and not the President, who makes the calculation under the Order, that officer retains considerable latitude in determining whether regulatory action should be taken. *Id.*

94. *Cf.* STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 2D SESS., COST-BENEFIT ANALYSIS: WONDER TOOL OR MIRAGE? (Comm. Print 1980) (describing shortcomings of cost-benefit analysis

two requirements do not stand alone. In the context of the unfettered authority that the OMB may wield under the Order,⁹⁵ the inevitable effect of the application of these substantive principles could be the displacement of ultimate agency discretion in contravention of any statute vesting discretionary rulemaking authority in an agency official. Executive Order 12,291 prescribes exactly how agency decisions are to be made: Legitimate agency action can occur only where the potential benefits exceed the potential costs. The Order's declaration that it applies only to the extent permitted by law does not alter its substantive character. This exception permits an agency to forgo cost-benefit analysis only if its underlying statute explicitly forbids such balancing. Yet where, due to the ambiguity of the congressional delegation or some other reason, the applicable statute does not direct an agency to use a particular methodology, adherence to the Order will undoubtedly shape the substance of agency regulations. In such cases, the Order's cost-benefit principle directs an agency to consider a broad range of factors and, more important, determines how the agency should value each factor. The Order thus limits the permissible range of agency action and, by enjoining agencies to maximize net benefits, implies that there is one "right" response in each rulemaking situation. Agencies, of course,

in certain situations). Cost-benefit analysis has also been criticized as biased against regulation because it systematically understates the value of benefits that are not amenable to numerical quantification. Douglas Costle, the EPA Administrator during the Carter administration, explained:

A third difficulty in benefit measurement is the most difficult of all: translating certain kinds of physical benefits, such as reduced sickness or the prevention of premature death, into dollar terms. In other words, what is the economic value of a longer and healthier life?

Because of these analytical problems, health effects and their economic valuation remain speculative. We cannot pin them down . . . and in the meantime, business and government officials can point to the dollar-costs of controls that federal regulation requires. The upshot is that, while our critics consistently appear no-nonsense fellows with their feet on the ground, environmental regulators come across as a bunch of bureaucratic flower-children intent on recreating the Garden of Eden.

Costle, *Stop Demagoguery on Cost-Benefit Analysis*, LEGAL TIMES OF WASH., Apr. 9, 1979, at 32.

95. The rulemaking authority vested in the Director of the OMB allows him to "[p]repare and promulgate uniform standards for . . . the development of Regulatory Impact Analyses." Exec. Order 12,291 § 6(a)(2), 46 Fed. Reg. 13,193, 13,196 (1981). Thus, whether such standards are government-wide or individually tailored to an agency, agency-head discretion is diminished in a degree not accounted for in the memorandum's conclusion that "[t]he agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take," Simms Memo, *supra* note 66, at 6, since "the principles of cost-benefit analysis" may be selected for the agency requiring little more than simply ministerial application. Finally, § 2(b) of the Order appears to enjoin all subject agencies to take no "[r]egulatory action . . . unless the potential benefits to society for the regulation outweigh the potential costs to society." Initial implementation of this directive, of course, falls to the Director. In the face of this directive, will the Director, after developing cost-benefit principles, fail to attempt to ensure their proper application to the fullest extent of his authority?

retain some discretion in the application of the notoriously ambiguous cost-benefit methodology.⁹⁶ But even this residual discretion is limited since the Order authorizes the Director of the OMB to promulgate a uniform methodology for cost-benefit analyses.⁹⁷ Moreover, the Order also creates a formal "review" mechanism through which the White House can market its views concerning the agencies' applications of the cost-benefit principles.⁹⁸ By requiring most agencies to use a uniform cost-benefit methodology and subjecting their application of that methodology to correction, albeit formally unenforced, by the White House, the Order substantially interferes with agencies' discretion and directly affects the substance of administrative policy-making. One might hope that Congress will more explicitly specify the factors that agencies must consider and the weight that they must attribute to those factors. The proper response to this concern, however, is to require that Congress delegate power according to definite standards, not to shift policy-making authority to the President wherever those standards are indefinite.⁹⁹

Comparing Executive Order 12,291 to recent presidential initiatives in the area highlights the degree of the Order's intrusion on agency discretion and Congress's domestic policy-making function. Like President Reagan, recent presidents have sought to direct agencies' attention to factors beyond their narrow statutory purview.¹⁰⁰

96. See note 94 *supra*.

97. Exec. Order 12,291 § 6(a)(2), 46 Fed. Reg. 13,193, 13,196 (1981).

98. The Justice Department's suggestion that agency discretion is somehow preserved because the Order contains no sanctions for either disregarding the views of the White House or failing to comply with the order's requirements, Simms Memo, *supra* note 66, at 6-7, must be rejected. The presumption must be made that the agency will heed the Order's requirements — it has the force of law — and be influenced by the views of the White House. Otherwise, the Order is pointless. This adherence to the views of the White House will prove particularly troublesome if, as Representative Waxman suspects, the Administration uses "cost-benefit analysis to reach decisions that will favor business and industry in this country rather than the public." N.Y. Times, Nov. 7, 1981, at 7, col. 3. In that event, cost-benefit analysis "will be a political tool rather than a regulatory tool." *Id.*

99. See note 85 *supra*.

100. During the Nixon Administration, for example, the OMB instituted a system of Quality of Life Review. Although it was theoretically applicable to all agencies with jurisdiction over environmental quality, consumer protection, and occupational and public health and safety, review focused almost exclusively on Environmental Protection Agency (EPA) regulations. See generally J. QUARLES, CLEANING UP AMERICA 117-42 (1976).

Quality of Life procedures required all EPA regulations to be processed through an inter-agency review both before such regulations were issued as proposals for public comment and again before the regulations were promulgated in final form. The OMB coordinated the review which involved the circulation of draft regulations to all interested departments and agencies and an allowance of time, often four weeks or more, for the preparation of comments, followed by meetings at the staff level to resolve any questions raised. The OMB controlled the decision whether or not to require additional time for completion of agency review or to hold additional meetings to resolve disputes. The Department of Commerce was apparently a frequent and hostile participant, often reflecting indirectly the opposition to proposed EPA

President Ford's Executive Order 11,821,¹⁰¹ for example, required all executive agencies to assess the inflationary impact of proposed regulations.¹⁰² President Carter issued an order of even broader scope. His Executive Order 12,044¹⁰³ required that agencies address the anticipated economic impact of certain rules and detail available alternatives.¹⁰⁴ Neither of these earlier orders, it should be noted,

rules. See Bruff, *supra* note 26, at 464. If there was dissatisfaction with the EPA's resolution of disputed issues, further meetings, presided over by OMB officials and often attended by White House staff, were called to resolve the conflicts. *Id.* at 464-65. It is estimated that it took at least two years for significant environmental regulations to be finalized. See *Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Environmental Regulation of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 60-76 (1979) (statement of John Quarles) [hereinafter cited as Quarles testimony].

Quality of Life Review was highly controversial throughout its existence. Proponents contended that any delay in the rulemaking process was justified by the improved quality of both the regulations and the supporting analyses produced by the agency to justify its proposals. These improvements were directly attributed to the searching comments and critiques of sister agencies. Bruff, *supra* note 26, at 465. Critics contended that the review unnecessarily extended the rulemaking process and allowed many important comments and discussions to occur off the public record, thereby depriving the system of the full benefits of public debate. Furthermore, it was contended that the system in actuality often resulted in behind the scenes resolutions to accommodate objections of other agencies. This, assertedly, was contrary to the statutory assignment of ultimate decision-making authority to the Administrator of the EPA and distorted the public perception of the locus of that final authority. See Quarles Testimony, *supra*, at 63-66; *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 ENVIR. REP. (BNA), Sept. 3, 1976, at 693, 694-97. Quality of Life Review was ended on January 25, 1977, by the Acting Administrator of the EPA. There was no reported court challenge to the validity of the review system.

101. 3 C.F.R. 926 (1971-1975 Comp.), *reprinted in* 12 U.S.C. § 1904 app., at 592 (1976), extended to December 31, 1977, by Exec. Order No. 11,949, 3 C.F.R. 161 (1977), *reprinted in* 12 U.S.C. § 1904 app., at 592 (1976).

102. The impact statements prepared under this directive were reviewed by the President's Council on Wage and Price Stability, but that body had no power to mandate changes in the rules. There is some indication that the Order stimulated improvement in the economic analysis of some affected agencies and may have influenced some agency decisions. See AMERICAN BAR ASSOCIATION, COMMISSION ON LAW AND ECONOMY, FEDERAL REGULATION 85 (1979) [hereinafter cited as ABA STUDY]; Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 AM. U. L. REV. 1138, 1160-62 (1977).

103. 3 C.F.R. 152 (1979), *reprinted in* 5 U.S.C. § 553 app., at 107 (Supp. III 1979).

104. The Order attempted to ensure more meaningful public participation in informal rulemaking by setting a minimum 60-day comment period in certain cases. It also provided for review of "significant" proposed rules by the promulgating agency. Under certain circumstances, agencies were required to analyze the anticipated impact of a proposed rule and to detail their consideration of the available alternative approaches. The agencies themselves determined whether a rule was significant and developed the procedures for preparing regulatory analyses. They were also required to prepare semi-annual agendas of forthcoming rulemaking proceedings. Oversight of the performance of the agencies was lodged in three institutional entities: the Regulatory Council, the Council on Wage and Price Stability (COWPS), and the Regulatory Analysis Review Group (RARG). The Regulatory Council, which consisted of the heads of all executive departments and agencies and those independent regulatory agency heads who desired to participate, played two roles. It collected information from agencies about major pending and proposed rules and published it semiannually in the Regulatory Calendar. It also served as a prescreening body for proposed rules, allowing agencies to coordinate rulemaking to avoid duplication of effort or contradictions of policy. RARG, composed of representatives from all economic and regulatory agencies, chaired by the Chairman of the Council of Economic Advisors, and staffed by individuals from COWPS,

interfered with the agencies' discretion to decide how to balance the additional information that they were required to generate. President Reagan's order stands alone in commanding that cost-benefit principles, rather than an agency's perception of its statutory mission, should guide administrative policy-making.

Executive Order 12,291 is also more intrusive than the presidential intervention in informal rulemaking recently sanctioned by the District of Columbia Circuit Court of Appeals. In *Sierra Club v. Costle*,¹⁰⁵ the D.C. Circuit upheld the legitimacy of discussions between the President and the Environmental Protection Agency (EPA) during the postcomment period of informal rulemaking. The Court rejected statutory and due process challenges to the oral contacts, stating:

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.¹⁰⁶

Although the Court did not expressly address the separation of powers issue, the oral contacts present in *Sierra Club* can, for separation of powers purposes, be distinguished from the presidential intervention contemplated by Executive Order 12,291. In *Sierra Club*, the EPA apparently retained discretion to decide what weight, if any, to accord President Carter's policy suggestions. Executive Order 12,291, in contrast, is a presidential *command* regarding the method of decision that agencies must use. In addition to creating a formalized mechanism through which the President's policies can be communicated and, to some extent, enforced, the Order permits the President, through the Director of the OMB, to comment on *how* the agency makes its decision. While the *Sierra Club* communications

had the task of selecting from 10 to 20 of the agencies' regulatory analyses for independent review and comment. The comments were to be filed during the public comment period of the rulemaking and made part of the record. But, as with the Ford Order, Executive Order 12,044 vested no formal enforcement authority in any governmental body outside of the subject agencies. It also provided no central standard setting and performance evaluation mechanism by which to judge the efficacy of the regulatory analyses that the agencies were required to perform. The Order depended entirely on hortatory means for achieving compliance, a task made most difficult by the presence of the subject agency on the interagency groups.

For a critique of the Carter Order program, see DeMuth, *Constraining Regulatory Costs: Part I, The White House Programs*, REGULATION, Jan./Feb. 1980, at 13-26; *Deregulation HQ: An Interview with Murray L. Weidenbaum and James C. Miller III*, *supra* note 9, at 14-16.

105. 657 F.2d 298 (D.C. Cir. 1981).

106. 657 F.2d at 406.

substantially preserved the agency's policy-making discretion, Executive Order 12,291 largely displaces that discretion.

Recent legislation proposed in Congress provides a final illustration of the Order's interference with the prerogatives of the legislature. A number of proposed amendments to the APA have recently been circulated in Congress. Several of these proposals deserve special mention. One bill, championed by Senator Lloyd Bentsen and Representative Clarence Brown, parallels President Reagan's order and requires that federal agencies proposing regulation select the most cost-effective method of meeting regulatory objectives.¹⁰⁷ A second bill, unanimously reported out of Senate Committee in 1980, explicitly rejects a cost-benefit requirement as "both unworkable and undesirable."¹⁰⁸ The Senate Report states:

This Committee recognizes the inadequacy of any strict cost/benefit analysis. The goal of regulatory reform is not the elimination of regulation, nor is it intended to slow regulation to a halt by requiring agencies to justify their regulations through unrealistic and cumbersome cost/benefit requirements. Rather, it is an effort to develop a mechanism for developing economically feasible methods of regulation consistent with important societal goals.¹⁰⁹

The Senate Report and the two competing bills highlight the danger that the President, by acting in an area of congressional controversy, will reach a different result than the one that Congress would otherwise adopt.¹¹⁰ In fact, even the Bentsen-Brown bill differs from President Reagan's order. The bill does not direct agencies to calcu-

107. H.R. 75, 96th Cong., 1st Sess. (1979).

108. Reform of Federal Regulation Act, S.262, 96th Cong., 1st Sess. (1979).

109. S. REP. No. 96-4018, 96th Cong., 2d Sess., Pt. 2 at 20 (1980). The value of cost-benefit analysis has been hotly debated. See N.Y. Times, Nov. 7, 1981, at 7, col. 1. A House subcommittee has extensively considered the merits of cost-benefit analysis. While not condemning all uses of this tool, the subcommittee's conclusion summarizes the state of the art:

Proponents of the use of cost-benefit analysis suggest that by adding up all the projected costs and the projected benefits of a given regulation, we can determine whether a proposed regulation is worth implementing. However, this report has documented numerous theoretical and practical shortcomings in trying to do a cost-benefit analysis. Even if all analysts were brilliant and public-spirited, it would be impossible to do a cost-benefit analysis that would accurately predict the effects of a given proposal. Moreover, such analyses do not deal with the equity factor, that the costs and benefits of a given regulation often accrue to different people. In short, the Subcommittee believes that all available evidence suggests that formal cost-benefit analysis is simply too primitive a tool to make a decisive factor in rulemaking.

SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, COST-BENEFIT ANALYSIS: WONDER TOOL OR MIRAGE? 32 (Comm. Print 1980).

110. The Regulatory Reform Act, the bill now pending in the Senate, contains cost-benefit provisions similar to those in Executive Order 12,291 — a fact undoubtedly due in part to the issuance of the Order. The bill requires that rulemaking agencies determine "that the benefits of the rule justify the costs of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making." S. 1080, § 621(d)(2), 97th Cong., 1st Sess. (1981). An amendment to S. 1080 intro-

late benefits because, in the words of Representative Brown, "Congress generally presumes or sets a level of benefits to be achieved";¹¹¹ the bill merely enjoins agencies to use the lowest cost method of attaining presumed benefits.¹¹² In any case, it is highly inappropriate for the President, by executive fiat, to attempt to resolve this important legislative debate. That President Reagan has done so demonstrates the significance of his intrusion on the legislative domain.

All three factors reviewed above — the institutional competence of the President, the proper roles of the legislature and the Chief Executive, and the degree of the Order's intrusion on the role of the legislature — argue against according the President unilateral authority to enact Executive Order 12,291. Casting the argument in Justice Jackson's language, strong reasons exist for viewing the Order as within Congress's exclusive domain; the Order may thus be sustained only if an express or implied congressional delegation of authority may be discerned.

duced by Senator Laxalt includes identical language. Amendment No. 640 to S. 1080, § 622(d)(2)(B), 127 CONG. REC. S14,132 (daily ed. Nov. 30, 1981).

This cost-benefit provision is less constricting than § 2 of Executive Order 12,291. Unlike the Order, the Senate bill requires neither that benefits *exceed* costs nor that net benefits be maximal.

At least one regulatory reform bill now before the House contains a cost-benefit provision that is even more flexible than the Senate version. The House bill, sponsored by Representative Danielson, requires that an agency explain "how the benefits of the rule bear a reasonable relationship to the costs and other effects of the rule," and "why the rule attains its objectives, in a manner consistent with applicable statutes, with less adverse economic effects than other alternatives considered. . . ." Amendment in the Nature of a Substitute to H.R. 746, § 622(c)(5)(6A), 97th Cong., 1st Sess. (1981).

Although both bills would give oversight authority to the President, they place greater limits on that authority than does Executive Order 12,291. First, in contrast to the Order, neither bill permits the President or his staff to delay indefinitely promulgation of proposed or final rules. The Senate bill stipulates that if Presidential review of agency regulatory analysis is established, "such reviews must be concluded within one hundred and twenty days following the receipt of the relevant draft rules and analyses." S. 1080, § 624(a)(1), 97th Cong., 1st Sess. (1981). The House proposal states that all compliance procedures established by the director of the OMB "shall be consistent with the prompt completion of rulemaking proceedings. . . ." Amendment in the Nature of Substitute to H.R. 746, § 624(a), 97th Cong., 1st Sess. (1981). Second, both bills provide for public comment before executive oversight procedures are adopted. Third, the Senate bill declares that "Any exercise of authority by the President concerning proposed or final major rules or associated regulatory analyses of an independent regulatory agency pursuant to subsection (1) shall be limited to nonbinding advisory recommendations." S. 1080, § 624(a)(2), 97th Cong., 1st Sess. (1981) (emphasis added).

The final form of the regulatory reform legislation or even whether Congress will enact any new legislation cannot be predicted. Nevertheless, it appears that, in addition to differing substantially from the APA (the most recent comprehensive legislation regarding informal rulemaking), *see* notes 140-64 *infra* and accompanying text, Executive Order 12,291 also differs from any new legislation that Congress is likely to approve.

111. Brown, *A More Demanding Standard: The Brown-Bentsen Bills*, REGULATION, May/June 1979, at 20, 22.

112. *See id.*

B. *Has Congress Delegated Authority?*

In the absence of express or implied constitutional authority, support for Executive Order 12,291 must be found in a congressional grant of authority. Since Congress has made no directly applicable statutory grant, that authority must be implied from relevant legislation or congressional practice. In view of Executive Order 12,291's substantive ramifications, the need to maintain the constitutional separation of powers demands that the implication be clear, convincing, and unmistakable. Congress has nowhere stated the role that the President should play in the control of informal rulemaking, but its intent can be inferred from several sources, the most prominent of which include the President's budgetary and reorganizational powers, use of the legislative veto over certain agency rules, and the Administrative Procedure Act. Rather than establishing the requisite authorization for the Order, these sources convincingly demonstrate Congress's intention to exclude the President from a policy-making role in the administrative process.

1. *Presidential Budgetary and Reorganizational Powers*

Since early in this century, the President, with Congress's blessing, has wielded a great deal of authority over the agency budget process. Through his budget office, the President has been authorized to present a unified annual budget on behalf of federal agencies, clear agency information requests, and even decide which legislative proposals urged by the agencies should receive congressional attention. The scope of the control over administrative policy-making that these powers confer has fluctuated over the years.

Presidential authority in the agency budget process began with the enactment of the Budget and Accounting Act of 1921,¹¹³ which allowed the President to formulate a national budget with the assistance of a newly created Bureau of the Budget (BOB). Previously, each agency had submitted its annual budget request directly to Congress. Finding this process inefficient and unwieldy, Congress created the BOB to review the morass of agency budgetary information and to approve agency budget requests.¹¹⁴ By 1970, the BOB possessed an impressive array of legal authorities for supervision of

113. Ch. 18, 42 Stat. 20 (1921) (codified throughout 31 U.S.C.). The Office of Management and Budget was created by Reorganization Plan No. 2 of 1970, 3 C.F.R. 1070 (1966-1970 Compilation), reprinted in 31 U.S.C. § 16 app., at 1197 (1976) and in 84 Stat. 2085 (1970).

114. See generally L. FISHER, *PRESIDENTIAL SPENDING POWER*, ch. 1 (1975).

nearly all departments and agencies.¹¹⁵ In addition to reviewing and approving agency budget requests, the Bureau was authorized to study agency organization, to clear agency proposals for legislation or agency comments on proposed legislation,¹¹⁶ and to control agencies' requests for information.¹¹⁷

In granting these powers to the President, Congress intended — at least in part — that he would play a policy-neutral role; the President was to coordinate the vast tangle of administrative agencies. Through his authority to study agency organization and review budget requests, the President could identify overlapping efforts, eliminate needless duplication, and resolve interagency conflicts. One must recognize, however, that the powers that enabled the President to carry out his managerial responsibilities also gave him the capacity to influence administrative policy. In the threat of budget reductions, the President possesses a powerful tool that he can use to enforce his own policy designs. The President could, moreover, use his clearance powers to focus congressional attention on agency proposals or comments agreeable to him. Yet the BOB, notwithstanding its significant policy-influencing potential, maintained an image of bipartisan neutrality, and its Director was seen as a personal technical adviser on fiscal and organizational matters.¹¹⁸ Although, in principle, the President has long been able to influence substantively the policies formulated by administrative agencies, until recently the power was relatively dormant.

In 1970, however, President Nixon reconstituted the BOB as the OMB¹¹⁹ and sought to expand its role.¹²⁰ Departing from the history

115. Reorganization Act of 1939, ch. 36, tit. II, 53 Stat. 565 (codified at 31 U.S.C. § 2 (1976)).

116. See President's Message to Congress Transmitting Reorganization Plan 2 of 1970, 6 WEEKLY COMP. OF PRES. DOC. 353 (Mar. 16, 1970), reprinted in 31 U.S.C. § 16 app., at 1198 (1976). The requirement of legislative clearance does not appear to be legislatively based but has been an accepted practice since 1937. See Bureau of Budget Circular No. 344 (Nov. 15, 1937). The present version of this policy appears in OMB Circular No. A-19 (Sept. 20, 1979).

117. Federal Reports Act of 1942, ch. 811, 56 Stat. 1078 (codified at 44 U.S.C. §§ 3501-3511 (1976)).

118. Indeed, the Director was not even subject to Senate confirmation. SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95th Cong., 2d Sess., 5 STUDY ON FEDERAL REGULATION, REGULATORY ORGANIZATION 43 (Comm. Print 1977) [hereinafter cited as FEDERAL REGULATION STUDY].

119. Reorganization Plan No. 2 of 1970, 3 C.F.R. 1070 (1966-1970 compilation), reprinted in 31 U.S.C. § 16 app., at 1197 (1976), and in 84 Stat. 2085.

120. The OMB's ostensible purpose was to take a more active role in the evaluation of program performance and to judge the overall effectiveness of the programs from a central perspective. President's Message to Congress Transmitting Reorganization Plan 2 of 1970, 6 WEEKLY COMP. OF PRES. DOC. 353 (Mar. 16, 1970), reprinted in 31 U.S.C. § 16 app., at 1198 (1976).

of policy-neutrality, President Nixon began to use the OMB, together with his self-proclaimed impoundment powers, to alter or end established programs.¹²¹ As the OMB began to be viewed as a political instrument of the President,¹²² Congress's response to President Nixon's unprecedented efforts was far-reaching; the legislature severely limited the OMB's autonomy and forcefully asserted its own desire to control administrative policy-making. For the first time, Congress required Senate confirmation of the OMB's Director and Deputy Director.¹²³ The OMB's monopoly on the processing of agency budget requests was ended as Congress created its own central budget evaluator, the Congressional Budget Office (CBO).¹²⁴ Congress has, on a selective basis, either eliminated the requirement that the OMB clear agency budget requests or mandated that the requests be concurrently submitted to the CBO.¹²⁵ Equally signifi-

121. See L. FISHER, *supra* note 114, at 147-74.

122. FEDERAL REGULATION STUDY, *supra* note 118, at 43-44.

123. Act of Mar. 2, 1974, Pub. L. No. 93-250, 88 Stat. 11 (codified at 31 U.S.C. § 16 (1976)).

124. 2 U.S.C. §§ 601-604 (1976).

125. Since 1973, Congress has mandated that the budget requests of the U.S. Postal Service, see Act of June 30, 1974, Pub. L. No. 93-328, § 23, 88 Stat. 287 (codified at 39 U.S.C. § 2009 (1976)), and the U.S. International Trade Commission, see Trade Act of 1974, Pub. L. No. 93-618, § 175(a)(1), 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2232 (1976)), be submitted to Congress without revision, and that the budget requests and legislative proposals of other agencies be submitted concurrently to OMB. See, e.g., Privacy Act of 1974, Pub. L. No. 93-579, § 5(a)(5), 88 Stat. 1896 (reprinted in 5 U.S.C. § 522a app., at 318 (1976)) (Privacy Protection Study Commission); Commodity Future Trading Commission Act of 1974, Pub. L. No. 93-463, § 101(a)(3), 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 4a(h)(1)-(2) (1976)) (Commodity Future Trading Commission); Consumer Product Safety Act, Pub. L. No. 92-573, § 27(k), 86 Stat. 1207 (1972) (codified at 15 U.S.C. § 2076 (k) (1976)) (Consumer Product Safety Commission); Hazardous Materials Transportation Act, Pub. L. No. 93-633, § 304(b)(7), 88 Stat. 2156 (1975) (codified at 49 U.S.C. § 1903(b)(7)(1976)) (National Transportation Safety Board); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122 (codified at 5 U.S.C. § 1205(j) (Supp. III 1979)) (Merit Systems Protections Board); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 311, 90 Stat. 60 (codified at 31 U.S.C. § 11(j) (1976)) (Interstate Commerce Commission); Department of Energy Act, Pub. L. No. 95-91, § 401, 91 Stat. 582 (codified at 42 U.S.C. § 7172(j) (Supp. III 1979)) (Federal Energy Regulatory Commission); AMTRAK Improvement Act of 1973, Pub. L. No. 93-146, § 12, 87 Stat. 553 (codified at 45 U.S.C. § 601(d) (1976)) (National Railroad Passenger Corporation); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 2021, 87 Stat. 990 (codified at 45 U.S.C. § 712(g) (1976)) (U.S. Railway Association) Section 111 of the Act of Oct. 28, 1974, exempts the following agencies from clearance of legislative proposals and comments: Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and the National Credit Union Administration. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500 (codified at 12 U.S.C. § 250 (1976)).

Until 1973, the requirement of clearance of information-gathering requests extended to independent regulatory agencies. Act of Nov. 16, 1973, Pub. L. No. 93-153, tit. IV, § 409, 87 Stat. 593 (codified at 44 U.S.C. § 3512 (1976)). Congress has since returned partial control over the independents to the OMB. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2819 (codified at 44 U.S.C.A. §§ 3501-3520 (West Supp. 1981)). OMB may now veto collection requests by independent regulatory commissions but the veto may be overridden by a majority vote of the subject commission. See 44 U.S.C.A. § 3507(c) (West Supp. 1981).

cant was the enactment of the Budget and Impoundment Control Act of 1974,¹²⁶ which greatly limited the President's putative authority to impound agency funds and his concomitant power to shape policy.¹²⁷ Finally, Congress countered the institutional development of the OMB by enhancing the authority of its watchdog audit agency, the General Accounting Office, with program evaluation functions and a special oversight role in preventing presidential impoundments.¹²⁸ The spate of legislation following the politicization of the OMB conclusively demonstrates that Congress, rather than acquiescing to presidential policy-making, desired to maintain control over administrative agencies. Congress has empowered the President to act in the interests of coordination and organizational efficiency, but has carefully restrained such action, lest it assume substantive policy dimensions.

Congressional limitations on the President's reorganizational powers reiterate the theme that the President's managerial role does not encompass control of administrative policy-making. Congress has several times delegated to the President extensive powers of governmental reorganization.¹²⁹ The policy-making potential stemming from these powers was great: The President typically could transfer, consolidate, or abolish agency functions, including rulemaking.¹³⁰ In principle, the President could have transferred rulemaking programs from one agency to another possessing a fundamentally different mission. Hesitant to confer power with such potential substantive impact, Congress has imposed several conditions on the President's reorganizational authority. First, all of the reorganization acts have been of limited duration, none being effective for more

126. Pub. L. No. 93-344, 88 Stat. 297 (codified in part at 31 U.S.C. §§ 1400-1407 (1976)). The Act was passed in response to President Nixon's assertion that he had inherent authority to impound appropriated funds. See *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973), holding that the President had no inherent authority to impound. All other reported cases dealt with whether the statute in question specifically permitted impoundment. These opinions generally held that impoundment was not allowed. See, e.g., *Train v. City of New York*, 420 U.S. 136 (1975); *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974); *State Highway Commn. v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

127. The statute severely restricts the Executive's power to impound. Although it allows for the possibility of deferral or rescission and short (45 days) periods when agency spending can be suspended, all impoundment actions are subject to a one-House veto and agency spending is under constant surveillance by the Comptroller General, who has authority to seek court assistance in the face of violation of the provisions of the Act. 31 U.S.C. § 1406 (1976).

128. See, e.g., 31 U.S.C. §§ 1405-1406 (1976) (provision for oversight and court action by Comptroller General on impoundments); 31 U.S.C. §§ 1151-1157 (1976) (program evaluation authority).

129. Reorganization plans submitted by the President take effect if not vetoed by either House of Congress within a specified period. Reorganization Act of 1977, Pub. L. No. 95-17, § 2, 91 Stat. 32 (codified at 5 U.S.C. § 906 (Supp. II 1978)).

130. 5 U.S.C. § 903(a)(2) (Supp. II 1978).

than four years.¹³¹ Second, some of the acts specifically restricted reorganizational power. Illustratively, the most recent reorganization act, which lapsed on April 7, 1981, expressly prohibited the President from abolishing "any enforcement or statutory program,"¹³² creating any new executive departments, or consolidating two or more departments.¹³³ Third, with two short-lived exceptions, all of the reorganization acts adopted since 1932 have included provisions authorizing a legislative veto.¹³⁴ Each of these restrictions, and particularly the provisions for a legislative veto, reflect Congress's intent to cabin even the potential for presidential control of administratively formulated policy.

2. Congress's Use of the Legislative Veto

Perhaps the clearest and most eagerly pursued congressional indication of its desire to maintain control over administrative decision-making in general and agency rulemaking in particular is its acceptance and utilization of the legislative veto.¹³⁵ Congress has used the legislative veto not only to prevent the President from indirectly controlling the substance of agency policy, but also to increase its own control over the administrative process. Since 1932, 193 acts of Congress have contained 272 separate provisions giving the legislature direct review powers of some description. Of that number, substantially more than half have been enacted since 1970. In 1980 alone, Congress passed seventeen acts containing thirty-eight veto provisions.¹³⁶ Moreover, the nature and scope of the review has

131. The authority was allowed to lapse in April 1973 and was not revived until April 1977. See CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. ON THE RULES OF THE HOUSE OF THE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO (Comm. Print 1980) [hereinafter cited as LEGISLATIVE VETO].

132. 5 U.S.C. § 903(a)(2) (Supp. II 1978).

133. 5 U.S.C. § 903(a)(1) (Supp. II 1978).

134. One exception is found in the Economy Act of 1933, ch. 212, § 403(c), 47 Stat. 1489, which gave President Roosevelt unfettered reorganization authority. See generally LEGISLATIVE VETO, *supra* note 131, at 164. The other appears in the First War Powers Act of Dec. 1941, ch. 593, tit. I, 55 Stat. 838.

135. Briefly, a legislative veto is a statutorily authorized means by which the Congress, or a part of it, such as one House, a committee, or a committee chairman, may subject proposals for Executive action pursuant to statute to further legislative consideration and control. In its most controversial form, a proposal must be either reformulated or abandoned. But common to all varieties of the veto mechanism is the inability of the President to counter-veto a congressional rejection.

136. Norton, Statistical Summary of Congressional Approval and Disapproval Legislation, 1932-1982 (CRS, Sept. 13, 1981) (copy on file with the *Michigan Law Review*). For a comprehensive compilation of legislative veto provisions see Norton, Congressional Review, Deferral, and Disapproval of Executive Actions: A Summary and Inventory of Statutory Authority (CRS, April 30, 1976) (copy on file with the *Michigan Law Review*); Norton, 1976-1977 Congressional Acts Authorizing Prior Review, Approval, and Disapproval of Proposed Executive

changed markedly. In the past, legislative veto provisions have usually been selective, directed to some or all actions encompassed by a particular statute or program. More recently, Congress has considered proposals with a vastly broader sweep. In May 1980, for example, Congress subjected all trade regulation rules of the Federal Trade Commission to legislative scrutiny.¹³⁷ And bills that would apply the legislative veto to the proposed rules of all agencies have received serious consideration.¹³⁸ Besides indicating that Congress desires to exercise ultimate control over administrative policy-making, the dramatically increased reliance on the legislative veto signals an intention to exclude presidential action from this sphere. Because the veto is accomplished without presidential assent or involvement, its inherent nature is antithetical to executive control of agency rulemaking. Indeed, some commentators have raised constitutional objections against the legislative veto, claiming that it deprives the President of his constitutional power to veto legislation.¹³⁹

Congress's use of the legislative veto, like its treatment of the

Actions (CRS, May 25, 1978) (copy on file with the *Michigan Law Review*); Norton, 1979 Acts Authorizing, Approval or Disapproval, or Requiring Advance Notice, of Proposed Executive Actions, Rules and Regulations (CRS, April 17, 1980) (copy on file with the *Michigan Law Review*). Not all legislative veto provisions are still effective. Brief for the U.S. Senate, Appellee-Petitioner at Addendum I (identifying 56 statutes currently in effect that contain legislative veto provisions—the list, however, appears incomplete), *Immigration and Naturalization Service v. Chadha*, cert. granted, 102 S. Ct. 87 (1981) (Nos. 80-1832, 80-2170, 80-2171).

137. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 374, 393 (codified at 15 U.S.C. § 57a-1 (Supp. IV 1980)). In the Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207, 95 Stat. 718 (to be codified at 15 U.S.C. § 2083), similar review was imposed on all rules to be promulgated by the Consumer Product Safety Commission.

138. See, e.g., H.R. 512, H.R. 601, and H.R. 1776 (96th Cong., 1st Sess. 1979). In the 97th Congress, see S. 382, S. 890, H.R. 1776, and H.R. 3740 (97th Cong., 1st Sess. 1981).

139. Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 423 (1978); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953). These objections are based primarily upon the separation of powers principle and the specific constitutional requirements that both Houses of Congress participate in the lawmaking process and that the President have an opportunity to veto the product of that process. There has as yet been no definitive judicial resolution of the issue. Two cases have been decided on the merits. In *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978), a divided Court of Claims upheld the one-House veto provision of the Salary Act. In *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980), appeal filed, 49 U.S.L.W. 3865 (U.S. May 19, 1981) (No. 80-1832) the court struck down a one-House veto provision of the Immigration and Nationality Act on separation of powers grounds.

The continuing uncertainty as to the veto's validity, combined with persistent Executive opposition to its application and doubts as to its practicality as a mechanism to manage and control administrative action on a broad scale, have raised serious questions as to its long range utility. See, e.g., HOUSE COMM. ON RULES, 96th Cong., 2d Sess. RECOMMENDATIONS FOR ESTABLISHMENT OF PROCEDURES FOR CONGRESSIONAL REVIEW OF AGENCY RULES 28-34 (Comm. Print 1980); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977).

OMB and governmental reorganization, reveals a coherent conception of the President's role in the administrative process. Congress has delegated to the President tasks that it cannot effectively perform — coordinating the welter of administrative agencies, organizing the haphazardly created bureaucracy more efficiently, avoiding duplicative efforts, and eliminating needless conflict. The President's authorized concern for "efficiency," however, justifies ensuring that agencies successfully execute their tasks, not measuring agency-formulated policy according to cost-benefit ratios. As the counterweights that Congress has developed to the OMB and the President's reorganization powers demonstrate, Congress has denied the President leeway to shape administrative policy-making in any direct and significant way. The legislative veto, a device that excludes presidential participation entirely, signifies Congress's judgment that it alone should shape the course of domestic policy.

3. *The Administrative Procedure Act*

In addition to the sources discussed above, the Administrative Procedure Act¹⁴⁰ (APA) supports an argument that Executive Order 12,291 contradicts the will of Congress. The first part of this two-part argument builds on the theme already developed, concluding that, like the other available indicators of legislative intent, the Act denies the President authority to control the substance of administrative policy-making. Although the Act is silent on the permissibility of presidential intervention, the evidence suggests that Congress objected to a formalized presidential presence in rulemaking, especially where the possibility of substantive policy influence exists. Both before and after passage of the Act, Congress considered proposals that, like Executive Order 12,291, concentrated authority to evaluate agency performance in a central oversight body. The 1941 Report of the Attorney General's Committee on Administrative Procedure,¹⁴¹ the source of many of the Act's provisions, recommended the creation of an Office of Federal Administrative Procedure. Sitting atop the bureaucratic maze, this superagency was "to study and coordinate administrative procedures, and in general through continuing studies and periodical recommendations, to achieve and stimulate practical improvements in a manner not possible through omnibus legislation."¹⁴² Although the Office apparently would have had no

140. 5 U.S.C. §§ 551-559, 701-706 (1976).

141. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT (1941) [hereinafter cited as FINAL REPORT].

142. *Id.* at 6.

power to promulgate and enforce a uniform methodology by which agencies would review proposed rules, the Committee's Report contemplated that the Office would be authorized to oversee the entire agency decision-making process and to require additional procedures, some of the powers now claimed by President Reagan. The proposal for an Office with centralized oversight power was rejected in the Senate, apparently because of fear that "such an office . . . will be political, will interfere with the independent operation of boards and commissions, [and] will constitute a superadministrative agency."¹⁴³ The fear that the Office would unduly politicize the agency decision-making process applies *a fortiori* to an oversight mechanism that, in addition to imposing new procedures, seeks to enforce an outcome-influencing methodology.

Two other proposals also deserve mention. First, the Brownlow Report,¹⁴⁴ a 1936 study that served as a springboard for congressional discussion of the Act,¹⁴⁵ recommended that the executive branch be reorganized to create an integrated, hierarchical structure over which the President would preside as an active manager.¹⁴⁶ In particular, the Report urged that the President's role be expanded by placing some 100 independent agencies, administrations, boards, and commissions within the executive department. These independent agencies, the Report argued, constituted a "headless 'fourth branch'" acting "under conditions of virtual irresponsibility,"¹⁴⁷ thereby frustrating the President's role as "the general manager of the United States." As conceived by the Report, the President's role was more confined than that claimed by President Reagan in Executive Order 12,291. The Report spoke only of the President as an

143. STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), reprinted in SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY (1946) [hereinafter cited as APA LEGISLATIVE HISTORY].

144. U.S. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937) [hereinafter cited as BROWNLOW REPORT]. The Report was commissioned by President Roosevelt in 1936 to make a study of administrative management in the federal government. The study was conducted against a backdrop of opposition to the rapidly proliferating substantive programs of the New Deal, opposition which took the form of complaints, sometimes well founded, as to the fairness and regularity of the new agencies' procedures. See G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 34-35 (2d ed. 1980); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 269-70, 273-74 (1978).

145. Both the Senate and House reports on the APA acknowledge the Brownlow Report as the starting point for understanding the origins of the Act. See S. REP. NO. 752, 79th Cong., 1st Sess. 3 (1945), reprinted in APA LEGISLATIVE HISTORY, *supra* note 143, at 189; H.R. REP. NO. 1980, 79th Cong., 2d Sess. 7-8 (1946), reprinted in APA LEGISLATIVE HISTORY, *supra* note 143, at 241-42.

146. BROWNLOW REPORT, *supra* note 144, at 41-42.

147. *Id.* at 39-40.

efficient organizer and coordinator rather than as a source of administrative policy. Nonetheless, contemporary scholars raised constitutional objections to even this more limited notion of the President as general manager,¹⁴⁸ and, significantly, Congress did not enact the Report's proposals.

A second proposal to establish the principle of superior administrative control in the President for the entire executive branch was introduced in the Senate in 1949, shortly after the enactment of the APA. This bill gave the President sweeping powers to control the administrative process. Functions vested by law in an agency, the bill declared, were also "vested in the President," and were exercised "pursuant to authority . . . derived from delegations by the President." Thus, executive agencies were "at all times subject . . . to the direction and control of the President."¹⁴⁹ This bill was referred to the Senate Committee on Expenditures in Executive Departments, where it quietly died. Congress's failure to endorse the proposals of the Brownlow Report or the Senate bill, admittedly, are not ideal indicators of its intent. Traditionally, courts have been reluctant to infer intent from Congress's failure to act. Unlike the Report of the Attorney General's Committee on Administrative Procedure, moreover, the legislative materials offer no glimpse of Congress's reasons for rejecting the conception of the President's role advanced in the Brownlow Report or the Senate Bill. Nevertheless, an explanation that focuses on a desire to minimize the President's policy input is both plausible and consistent with the other, more explicit evidence of Congress's intent.

There is admittedly some evidence for the view that "key executive policymakers" were not intended to be "isolated from each other and from the Chief Executive."¹⁵⁰ Since Congress permits the President to appoint the sole director of an executive agency, in contrast to independent agencies whose several commissioners serve staggered terms, it arguably does not intend that executive agencies be entirely immune from the President's policy suggestions. Congress's decision not to forbid *ex parte* contacts in informal rulemaking, moreover, can be read to signify an intent to countenance presidential communications with the agencies about proposed rules. The evidence suggesting congressional approval of informal presidential

148. *See, e.g.*, Jaffee, *supra* note 19, at 1238.

149. General Executive Management Act, S. 942, 81st Cong., 1st Sess. (1949). It is interesting to note that this bill would have given the President authority to control the "time, manner, and extent" of agencies' performance of their delegated functions.

150. *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981).

suation, however, falls far short of justifying Executive Order 12,291's formalized control over administrative policy-making. As we have seen, a variety of sources — Congress's recent treatment of the OMB, the limitations that it has imposed on the President's reorganizational powers, its use of the legislative veto, and the legislative history of the APA — evince Congress's desire to minimize more formalized control over agency rulemaking. Certainly no evidence exists to support the conclusion that Congress has implicitly delegated the President authority to command adoption of a uniform, substantive methodology that is itself hotly debated within Congress.

The argument presented above suggests that Congress meant to preclude a formalized presidential policy presence in the administrative process and, by implication, to repose ultimate discretion on policy matters with the agencies. The scheme established by the APA also supports a second, slightly different argument. The APA, this argument asserts, gives the agencies considerable managerial discretion, and impliedly prevents the President from imposing procedural requirements or delaying the timing of agency regulations.¹⁵¹

The procedural requirements established by the APA for informal rulemaking¹⁵² are few and simple. The agency must publish notice of a proposed rule; allow, at its option, written or oral comments; and accompany final rules with "a concise general statement of their basis and purpose."¹⁵³ The flexibility of informal rulemaking was a considered response to an earlier version of the APA,¹⁵⁴ which ap-

151. See note 149 *supra*.

152. The Act declares informal rulemaking to be the preferred method of agency rulemaking. Formal rulemaking is limited to those situations where a statute specifically requires it. See 5 U.S.C. § 553(c) (1976): "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title shall apply instead of this subsection." The Supreme Court has strictly adhered to this statutory preference. See, e.g., *United States v. Florida East Coast Ry.*, 410 U.S. 224, 234-38 (1973).

153. 5 U.S.C. § 553(b), (c) (1976).

154. Critics of the Brownlow Report pushed for a highly judicialized procedural system, which received its embodiment in the Walter-Logan bill in 1939. S. 915, 76th Cong., 1st Sess., 84 CONG. REC. 668 (1939); H.R. 6324, 76th Cong., 1st Sess., 84 CONG. REC. 5561 (1939). With regard to adjudication, it created a dichotomy between single and multi-headed agencies and provided for trial-type hearings to be conducted by a three-member hearing board in single-headed agencies and by a single examiner in multiheaded agencies. Any person "aggrieved" by a decision of any officer or employer of any agency could demand such a hearing. The rulemaking section provided that all rules "affecting the rights of persons or property" should be issued "only after publication of notice and public hearings." Rules under future statutes were to be issued within one year of the statute's enactment, and rules in existence for less than three years were to be reconsidered within one year after the bill became law "if any person substantially interested in the effects" of the rule so requested. Judicial review could be obtained by any person "substantially interested in the effects of any administrative rule" in the Court of Appeals for the District of Columbia to determine whether such rule was in conflict with the Constitution or the statute under which it was promulgated.

plied "a procrustean procedural system"¹⁵⁵ to the entire administrative process. President Roosevelt, who vetoed the earlier bill, and others criticized the bill because it ignored the "underlying diversities" of agencies "different in structure and function."¹⁵⁶ Recognizing the validity of these objections, Congress designed the APA to leave "wide latitude for each agency to frame its own procedures."¹⁵⁷ The Act rejects the notion that a central source such as Congress or the proposed Federal Office of Administrative Procedure should devise extensive and uniform procedures for agency rulemaking. Beyond the statute's minimum requirements, each individual agency has maximum discretion to fashion procedures that accord with its perception of "considerations of practicality, necessity, and public interest."¹⁵⁸

This view of the Act's legislative history has been confirmed by

155. Verkuil, *supra* note 144, at 277.

156. Veto Message of the President, 86 CONG. REC. 13,942-43. The Association of the Bar of the City of New York said: "[W]e think the present bill, under the guise of reform, would force administrative and departmental agencies having a wide variety of functions into a single mold which is so rigid, so needlessly interfering, as to bring about a widespread crippling of the administrative process." Report of the Assn. of the Bar of the City of New York, *quoted in id.* at 13,943.

157. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 22 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 143, at 256. *See also* S. REP. NO. 752, 97th Cong., 1st Sess. 12 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 143, at 198.

The influence of the Report of the Attorney General's Committee on Administrative Procedure is again apparent. With particular regard to the rulemaking process, the scheme should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses. They should also be adapted to eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action.

FINAL REPORT, *supra* note 141, at 98. The choice of the manner and means necessary to accumulate the information required to promulgate a fair rule is to be left to the sound discretion of the agencies themselves: "Here, as elsewhere in the administrative process, ultimate reliance must be on administrative good faith." *Id.* at 104.

158. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 25 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 143, at 259. *See also* S. REP. NO. 752, 79th Cong., 1st Sess. 14-15 (1945), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 143, at 200-01.

This general objective of maintaining individual agency integrity and flexibility in the informal rulemaking process reflected in the legislative history of the Act, and also in the general provisions of § 553, is most clearly established by the specific requirement of § 553(e) that agencies allow the public to request the initiation of a rulemaking proceeding: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e) (1976). The legislative history of the section and the case law interpreting it make it abundantly clear that the decision to act on such a petition is committed solely to the agency being petitioned and its decision is final, though subject to limited judicial review in certain circumstances. *See* APA LEGISLATIVE HISTORY, *supra* note 143, at 258 (Senate Report), 260 (House Report); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38-39 (1947). The Attorney General's Manual is normally accorded considerable deference because of the role the Attorney General played in drafting the legislation. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978).

the courts. The case law has consistently affirmed agencies' discretion to decide exactly how they will conduct their rulemaking activities. The Supreme Court, for example, has upheld an agency's decision to promulgate rules through adjudication rather than informal rulemaking,¹⁵⁹ and the choice of informal rulemaking over a formal hearing on the record when the agency's statute did not clearly require the formal process.¹⁶⁰ And, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,¹⁶¹ the Court strongly endorsed an agency's unqualified discretion in informal rulemaking to adopt only the minimal procedures prescribed by the APA.¹⁶² *Vermont Yankee* is especially relevant here because the District of Columbia Circuit Court of Appeals, like President Reagan, had claimed that its competing constitutional duties authorized the imposition of procedures beyond the statutory minimum. In particular, the D.C. Circuit relied on its constitutional obligation of judicial review to justify its action. In an opinion remarkable for its reproving tone, the Court upheld the agency's discretion against the countervailing interests of the judiciary. After reviewing the legislative history and the relevant judicial precedent, the Court declared: "In short, all of this leaves little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."¹⁶³ Under this reading of the Act, the President, notwithstanding his constitutional obligations, should likewise be denied authority to require additional procedures of an agency. His action, no less than that of the D.C. Circuit in *Vermont Yankee*, constitutes a "serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."¹⁶⁴

Executive Order 12,291's interference with an agency's freedom to fashion its own procedures is remarkable. A partial list of the additional procedures required by the Order includes:

- (1) preparation of a Regulatory Impact Analysis prior to publica-

159. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974).

160. *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973).

161. 435 U.S. 519 (1978).

162. The Court brought a halt to a trend of lower court decisions that sought to influence the process of regulatory policy-making by judicially imposing procedural requirements on informal rulemaking beyond those required by the APA. *See, e.g.*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

163. 435 U.S. at 546 (emphasis in original).

164. 435 U.S. at 544.

tion of proposed and final rules;¹⁶⁵

(2) consultation with the Director of the OMB, at his request, concerning proposed rules;¹⁶⁶

(3) preparation of a legal memorandum determining that a final rule is "clearly" within the agency's statutory authority;¹⁶⁷

(4) determining that an adopted final rule have substantial support in the rulemaking record;¹⁶⁸

(5) initiation, at the request of the Director of the OMB, of cost-benefit review of an agency's existing regulations;¹⁶⁹ and

(6) delaying the effective date of an adopted rule until the Director of the OMB has responded to the Regulatory Impact Analysis accompanying the final rule *and* the agency has responded to the Director's comments.¹⁷⁰

These additional procedural steps, one might reasonably conclude, are well-advised. Indeed, recent legislative proposals considered by Congress have incorporated many of the Order's procedural features.¹⁷¹ However desirable, these procedures are inconsistent with the APA, and as Congress has recognized, the Act must be amended before such procedural requirements can become law.

Executive Order 12,291 stands in direct opposition to the informal rulemaking provisions of the APA and to the Act's legislative history.¹⁷² The Order effectively allows the Director of OMB to determine when an agency must undertake rulemaking, contrary to section 553(e); prescribes the procedures that an agency must follow in its rulemaking; requires the use of the substantive principles of cost-benefit analysis; and superimposes a central coordinating au-

165. Exec. Order No. 12,291 § 3, 46 Fed. Reg. 13,193, 13,194-95 (1981).

166. Exec. Order No. 12,291 § 3(f)(1), 46 Fed. Reg. 13,193, 13,195 (1981).

167. Exec. Order No. 12,291 § 4(a), 46 Fed. Reg. 13,193, 13,195 (1981).

168. Exec. Order No. 12,291 § 4(b), 46 Fed. Reg. 13,193, 13,195 (1981).

169. Exec. Order No. 12,291 § 3(i), 46 Fed. Reg. 13,193, 13,195 (1981).

170. Exec. Order No. 12,291 § 3(f), 46 Fed. Reg. 13,193, 13,195 (1981).

171. See note 110 *supra* and accompanying text.

172. Nothing has occurred legislatively to the APA since 1946 that would support such presidential action. Its basic structure is the same today as it was in 1946. The amendments to the Act have, if anything, reinforced the original scheme. Thus the Act of Sept. 6, 1966, Pub. L. No. 89-554, § 552, 80 Stat. 378 (codified at 5 U.S.C. § 552 (1976)) (amended 1967), imposed an obligation on the agencies to grant public access to agency records unless specifically exempted from disclosure. In 1974, continuing criticism of the agencies for undue secrecy led to further amendments of § 552 designed to tighten the exemptions and to penalize agency non-compliance with the Act. Freedom of Information Act of 1974, Pub. L. No. 93-502, 88 Stat. 1561-64 (codified at 5 U.S.C. § 552 (1976 & Supp. II 1978)). The coverage of the Act was expanded to embrace the Executive Office of the President. Freedom of Information Act, § 3 (codified at 5 U.S.C. § 552(e) (1976)). Finally, the Government in the Sunshine Act of 1976 added an open meetings requirement as well as a prohibition against *ex parte* contacts in formal *ex parte* rulemaking. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §§ 552(b), 557(d) (1976)). These changes are consonant with the public participation and public disclosure themes evident in the original Act. They in no way support the substantial overhaul effected by Executive Order 12,291.

thority over all agency rulemaking, despite Congress's rejection of the general manager approach of the Brownlow Report, its rejection of the Federal Office of Administrative Procedure, and its general rejection of uniform procedures that reduce the flexibility that is the hallmark of informal rulemaking. As the previous section demonstrated, Executive Order 12,291 must receive strong legislative support to survive Justice Jackson's separation of powers test. Because the Order falls within Congress's exclusive domain, it can be upheld only if Congress has implicitly delegated the President authority to promulgate it.

Yet Congress has not delegated the President authority to promulgate the unprecedented regulatory oversight scheme established by Executive Order 12,291. Instead of a delegation, one can, in fact, discern an affirmative intent to *deny* the President authority to promulgate both the substantive and the procedural features of the Order. Thus, whether viewed as within Congress's exclusive domain or within the nebulous zone of concurrent authority, Executive Order 12,291 violates the constitutional separation of powers.

II. PRESIDENTIAL CONTROL AND EX PARTE CONTACTS

Executive Order 12,291 commands the early intervention of the President's closest aides and advisers in the agency rulemaking process. In so doing, the Order greatly increases the opportunities for off-the-record, ex parte contacts between executive agencies engaged in rulemaking and the White House. Presidential advisers are likely to use their oversight positions not only to comment on the agencies' cost-benefit analyses, but also to convey informally their views about the agencies' rulemaking activities.¹⁷³ Although such contacts arguably disrupt the kind of rulemaking proceedings contemplated by the APA and undoubtedly raise serious questions of fairness, Executive Order 12,291 provides no safeguards whatsoever to protect the integrity of the rulemaking process. Over the past few years, courts and commentators have debated the extent to which ex parte contacts should be prohibited or controlled in informal rulemaking proceedings.¹⁷⁴ A host of competing considerations have informed this

173. This aspect of the Order's oversight mechanism has already aroused concern. See note 10 *supra*. To minimize the potential dangers associated with secret White House contacts, Senator Carl Levin (D-Mich.) has proposed that copies of all written and "significant" oral comments from the OMB to an agency regarding a proposed rule be included in the rulemaking file. See LEGAL TIMES OF WASH., Oct. 5, 1981, at 5.

174. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 400 n.500 (D.C. Cir. 1981) (citing cases); Carberry, *Ex Parte Communications in Off-The-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 DUKE L.J. 65; Verkuil, *Jawboning Administrative Agen-*

interesting debate. In 1976, Congress amended the APA to prohibit *ex parte* contacts in formal, on-the-record rulemaking, but chose not to extend the blanket prohibition to informal rulemaking.¹⁷⁵ Nevertheless, concerns for reasoned administrative decision-making,¹⁷⁶ efficacious judicial review,¹⁷⁷ fairness,¹⁷⁸ and meaningful public participation¹⁷⁹ argue in favor of restricting *ex parte* contacts in informal rulemaking in certain circumstances. *Vermont Yankee*, however, seemingly calls for judicial restraint in the area. The issue

cies: Ex Parte Contacts by the White House, 80 COLUM. L. REV. 943 (1980); Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 194 (1979).

175. 5 U.S.C. § 557(d)(1) (1976). *Ex parte* contacts are defined by the APA as "oral or written communication[s] not on the public record with respect to which reasonable public notice to all parties is not given. . . ." 5 U.S.C. § 551(14) (1976). The prohibition applies to any "interested person outside the agency."

176. The courts have insisted that there be reasoned agency decision-making based on some kind of record. *Ex parte* comments negate the opportunity for outside parties to comment on their substance. The lack of such adversarial discussion of the merits of the comments is seen as weakening the agency's decision: "From a functional standpoint, we see no difference between assertions of facts and expert opinion tendered by the public, as here, and that generated internally in an agency: each may be biased, inaccurate, or incomplete — failings which adversary comment may eliminate." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

177. . . . As a practical matter, *Overton Park's* mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 415, 419-20; see K. Davis, *Administrative Law of the Seventies* § 11.00 at 317 (1976), but must treat the agency's justifications as a fictional account of the actual decision-making process and must perform find its actions arbitrary. See *Ruppert v. Washington*, 366 F. Supp. 686, 690 (D.D.C. 1973), *affirmed by order*, D.C. Cir. No. 73-1985 (Oct. 26, 1976). 567 F.2d at 54. See also *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973).

178. The *Home Box Office* court also recognized that secret communications with agency decision-makers are inconsistent "with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits. . . ." 567 F.2d at 56. See *United States Lines, Inc. v. Federal Maritime Commn.*, 584 F.2d 519, 539 (D.C. Cir. 1978).

179. Agency decisions are to be made after a full public airing of all relevant issues and factual disputes. *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). Public participation is a crucial aspect of this principle. But *ex parte* communications may nullify that participation. Due process, therefore, requires that such contacts be restricted to the greatest extent possible. *Home Box Office v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

A similar conclusion was reached in *United States Lines, Inc. v. Federal Maritime Commn.*, 584 F.2d 519 (D.C. Cir. 1978). Although the case involved an informal adjudication, the court noted that the "quasi-adjudicatory" procedure in question had to be protected against *ex parte* communications because the impact of agency action would extend "well beyond the immediate parties involved." 584 F.2d at 539. The court added that "however we label the proceedings involved here and in our earlier cases, the common theme remains: that *ex parte* communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully in the decisionmaking process." 584 F.2d at 539.

becomes even more complicated where, as here, the contacts occur between executive agencies and the White House. While the President's article II duties and the concept of executive privilege sanctioned in *United States v. Nixon*¹⁸⁰ arguably should give the President greater leeway to contact those agencies, his enormous influence over them increases the need for restraints.

Balancing these conflicting concerns, this Part proposes that certain judicially enforced limitations on ex parte contacts between presidential advisers and executive agencies accompany Executive Order 12,291. Where the rulemaking is of an adjudicatory nature, due process dictates that the substance of the ex parte communications be publicly disclosed in the rulemaking docket. Even where the rulemaking does not adjudicate individual rights, certain guidelines must be observed. White House contacts should be publicly disclosed, for example, where the President or his advisers are acting as a conduit for information received from interested private parties. In cases where the President or his advisers simply convey the Administration's policy, however, a strong case can still be made for disclosure of the existence, if not the substance, of such ex parte communications in the rulemaking docket. On a case-by-case basis, courts should invalidate agency action where the White House fails to conform to the guidelines outlined above.

A. *Ex Parte Contacts in Informal Adjudications*

The APA makes no provision for informal adjudications — adjudications unaccompanied by the protections of a formal, judicial trial. To conserve their resources, many agencies therefore hold adjudicatory proceedings under the APA's informal rulemaking provisions. Since these informal adjudications involve individual rights rather than issues of general policy, they implicate constitutional due process values.¹⁸¹ Although due process does not generally require a full-scale judicial trial, informal adjudications must nevertheless conform to the "fundamental notions of fairness implicit in due process."¹⁸²

Ex parte contacts may undermine the due process rights of parties to informal adjudications in several important respects. By depriving the parties to the adjudication of notice and an opportunity

180. 418 U.S. 683 (1974).

181. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 (1978); *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981); Carberry, *supra* note 174, at 98-99; Verkuil, *supra* note 174, at 982.

182. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (1977), *cert. denied*, 434 U.S. 829 (1978).

to respond to relevant information, ex parte contacts violate fundamental canons of fairness.¹⁸³ Moreover, the impartiality and objectivity of the decision-maker, qualities traditionally regarded as essential to due process, are compromised by ex parte contacts.¹⁸⁴ Such contacts, as one commentator has stated, create "a fertile bed for arbitrary administrative action."¹⁸⁵

While the "poisonous" effects of ex parte contacts are pronounced in an adjudicatory setting, the reasons for judicial restraint are attenuated. First, *Vermont Yankee's* message that courts should be wary of imposing additional procedural requirements on informal administrative rulemaking does not apply to adjudications implicating due process values. The *Vermont Yankee* Court explicitly qualified its holding, stating: "[W]hen an agency is making a 'quasi-judicial' determination . . . in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process."¹⁸⁶ Second, the President's article II duties are not impaired by restrictions on ex parte contacts between the White House and executive agencies in informal adjudications. The President's authority is necessarily circumscribed in an area more closely related to the judicial than to the executive sphere. In the words of one scholar: "There is no inherent executive power to control the rights of individuals in an adjudicative setting."¹⁸⁷ Third, because the President's article II powers are of dubious applicability in such a setting, claims of executive privilege, a doctrine that analytically should encompass only activities properly within the executive power, are also of questionable validity. The due process interests present in adjudicatory proceedings, moreover, should override the limited concept of executive privilege established in *United States v.*

183. Cf. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding that execution of a prejudgment writ of replevin without hearing or notice to the affected party violates due process).

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."
407 U.S. at 80 (citations omitted).

184. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'") (citations omitted). See note 176 *supra*.

185. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 228 (1978).

186. 435 U.S. at 542 (citations omitted). "Where agency action resembles judicial action, where it involves . . . quasi-adjudication among 'conflicting claims to a valuable private privilege,' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved." *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981).

187. Verkuil, *supra* note 174, at 982.

Nixon.¹⁸⁸ In sum, because the President's authority is at a low ebb and sensitive due process concerns are involved, informal adjudications present an especially strong case for restricting ex parte contacts.

The line between an adjudication, where due process applies, and a policy-type rulemaking, where due process does not apply, will often be difficult to draw. The Supreme Court has, on several occasions, attempted to shed some light on the distinction. In *United States v. Florida East Coast Railway*,¹⁸⁹ for example, the Court distinguished between "proceeding[s] for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases, on the other."¹⁹⁰ More recently, the *Vermont Yankee* Court declared that an agency conducts an adjudication when it makes "a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected in each case upon individual grounds.'"¹⁹¹ Yet the distinction between policy-type and adjudicatory determinations is often blurred; administrative proceedings often combine both adjudicatory and policy-making features. *United States Lines, Inc. v. Federal Maritime Commission*,¹⁹² one of the more recent ex parte contacts cases, illustrates this point. In *United States Lines*, the Federal Maritime Commission was required to decide whether certain named parties were entitled to an exemption from the antitrust laws. So described, the Commission's proceedings satisfied the *Vermont Yankee* definition of an adjudication, but the proceedings also required policy-making since the Commission was "charged with enforcing and guarding the public interest, with the impact of its decision extending well beyond the immediate parties involved."¹⁹³

The frequent admixture of policy-making and adjudicatory elements in informal agency proceedings suggests the need for a flexible solution to the problem of White House contacts. Rather than prohibiting White House contacts, the most sensible solution would require public disclosure of the substance of all such contacts in the rulemaking docket whenever the proceeding has an adjudicatory component. Because disclosure allows affected parties to respond to relevant information and enables courts to determine whether

188. 418 U.S. 683 (1974).

189. 410 U.S. 224 (1973).

190. 410 U.S. at 245.

191. 435 U.S. at 542 (citations omitted).

192. 584 F.2d 519 (D.C. Cir. 1978).

193. 584 F.2d at 540.

agency decisions are based on legitimate factors, this requirement adequately protects the due process interests threatened by ex parte contacts. By allowing ex parte contacts between the White House and executive agencies to occur, the proposed requirement also defers to the President's legitimate desire to suggest general policies.

If the proceeding under review was adjudicatory, even in part, therefore, courts should invalidate agency action where agency communications with White House officials charged with oversight responsibilities under Executive Order 12,291 have not been publicly revealed.

B. *Ex Parte* Contacts in Informal Policy-Making Proceedings

A more vexing problem concerns the legitimacy of unrecorded and unreviewable White House communications in policy-type informal rulemakings. When the proceedings involve no adjudicatory component, the argument for disclosure of these communications cannot be bolstered by reference to the need to preserve due process. One must recognize, moreover, that article II of the Constitution authorizes the President to supervise and coordinate policy-making proceedings, at least by using facilitative measures and making policy suggestions. And *Vermont Yankee's* instruction that courts should not fashion additional procedures to further "some vague, undefined public good"¹⁹⁴ suggests that a disclosure requirement must find a solid statutory basis.

The APA furnishes two possible bases for a requirement that ex parte contacts be publicly disclosed. First, secret ex parte contacts arguably undermine section 553's provision for "notice and comment" participation by interested parties.¹⁹⁵ Second, section 706's provision for judicial review under an arbitrary and capricious standard can be read to require that significant contacts be included in the record available to a reviewing court.¹⁹⁶ Although these arguments are plausible, courts have declined to adopt a general disclosure requirement in informal rulemakings under the APA.¹⁹⁷ Retreating from broad language in an earlier case, the D.C. Circuit held in *Action For Children's Television v. FCC*¹⁹⁸ that the APA does

194. 435 U.S. at 549.

195. 5 U.S.C. § 553 (1976).

196. 5 U.S.C. § 706 (1976). Section 706, which apparently applies to all of the Act's scope-of-review provisions, provides in part: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

197. *Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981).

198. 564 F.2d 458 (D.C. Cir. 1977).

not warrant a logging requirement that applies generally in informal rulemaking proceedings.

Although the *Children's Television* court's conclusion appears sound, it does not address the more specific situation where ex parte communications are cloaked with the authority of the presidential office. The President's personal and institutional power will undoubtedly lead agencies to attribute more weight to communications emanating from his office than to communications originating with private parties. Isolated off-the-record contacts between agencies and private parties, the sort of contact that Congress probably did not intend generally to preclude, are unlikely to affect the decision-making process significantly. But the regular ex parte communications initiated by the White House under Executive Order 12,291 might undercut the APA's provision for public participation. Surely, Congress did not expect that interested parties would be unaware of information or arguments that will figure so prominently in the agencies' decisions. Yet if influential White House contacts are permitted to occur in secrecy, interested parties will have little incentive to prepare the information and arguments that agencies have found so valuable in the past. Public participation would indeed be reduced to a "sham."¹⁹⁹

In addition to diminishing the value of public participation, secret White House communications impair the quality of judicial review. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,²⁰⁰ the Supreme Court held that the APA's arbitrary and capricious standard of review requires courts to conduct a "searching and careful" inquiry based on "the full administrative record that was before the [agency official] at the time he made his decision."²⁰¹ Secret, unreported communications that nevertheless play a vital role in the agency's decision prevent courts from performing effectively the searching review contemplated by *Overton Park*.²⁰²

Despite the heightened need to control White House communications, the D.C. Circuit recently refused to require the disclosure of ex parte presidential communications. In *Sierra Club v. Costle*,²⁰³ President Carter had met with officials of the EPA to discuss proposed rules after the close of the notice and comment period. The court

199. *United States Lines v. Federal Maritime Commn.*, 584 F.2d 519, 539 (D.C. Cir. 1978).

200. 401 U.S. 402 (1971).

201. 401 U.S. at 416, 420.

202. *See* *United States Lines v. Federal Maritime Commn.*, 584 F.2d 519, 541-42 (D.C. Cir. 1978).

203. 657 F.2d 298 (D.C. Cir. 1981).

held that the agency's failure to docket the meeting in its rulemaking record did not violate the Clean Air Act. Although the Act requires that all documents "which the Administrator determines to be of central relevance to the rulemaking" be placed in the record,²⁰⁴ the *Sierra Club* court stated that nondisclosure was legal "since EPA makes no effort to base the rule on any 'data or information' arising from [the presidential contact]."²⁰⁵ The court's conclusion that judicial review does not demand "that courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting"²⁰⁶ however, may be limited to the facts of the case. Judicial review in *Sierra Club* was made possible by specific provisions of the Clean Air Act, which require that rules find the requisite factual support in the record and prohibit rules based in whole or in part on any "data or information" not in the record.²⁰⁷ Had the particular statute in issue not contained these review-facilitating provisions, the court might well have reached a different conclusion.

When one compares the Clean Air Act and Executive Order 12,291, it becomes apparent that the rationale underlying the legal acceptability of the undisclosed presidential contacts in *Sierra Club* does not legitimize all presidential contacts under the Order. Most executive agencies are not subject to justificatory requirements as stringent as those of the Clean Air Act. Since the APA does not explicitly require that these agencies rely only on docketed information, they must satisfy only the disclosure requirements implicit in *Overton Park*. Although Executive Order 12,291, unlike the APA, demands that agency decisions receive substantial factual support in the record, it does not require that agency decisions be based entirely on recorded information.²⁰⁸ This comparatively weak limitation on presidential influence, combined with the regularity with which White House contacts will probably occur under the Order,²⁰⁹ mean

204. 42 U.S.C. § 7607(d)(4)(B)(i) (Supp. II 1978).

205. 657 F.2d at 407.

206. 657 F.2d at 407.

207. See 42 U.S.C. § 7607(d)(6)(C) (Supp. II 1978).

208. Exec. Order 12,291 § 4(b), 46 Fed. Reg. 13,193, 13,195 (1981).

209. See generally Verkuil, *supra* note 174, at 950-51. Indeed, these contacts may be encouraged by the OMB:

OMB staff possess far less expertise than agency staff on specialized regulatory issues, and in the short time available will not be able to read, let alone understand, the voluminous rulemaking records. Instead, OMB is likely to view the issues from a political or ideological perspective, relying on the arguments of White House political advisors or special interest lobbyists. The tendency will be particularly pronounced when major political supporters of the White House incumbent become interested in a proceeding.

C. LUDLAM, *supra* note 1, at 18.

that the need for disclosure of these contacts is greater than in *Sierra Club*.

The reasoning of the *Sierra Club* court, moreover, is vulnerable to criticism. In holding that the substance of the presidential contact need not be divulged, the court relied heavily on the President's article II authority to monitor and contribute to administrative policy-making. This consideration certainly favors allowing presidential contacts to occur, but its relevance as an argument against disclosure of those contacts rests on an unstated assumption: namely, that disclosure will adversely affect the President's policy-making authority. This assumption is arguably supported by the President's presumptive privilege of confidentiality. In *United States v. Nixon*,²¹⁰ the Supreme Court declared that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."²¹¹

It is doubtful, however, that the President's privilege of confidentiality properly applies in the *Sierra Club* situation. *Nixon* dealt with communications between the President and his closest advisers. In *Sierra Club*, by way of contrast, the President's communications were directed at an executive agency in the exercise of essentially legislative responsibilities — an area where, as Part I argued, the President's authority must be carefully delimited. A disclosure requirement might well hinder presidential efforts to control administrative policy-making. But, so long as the President remains free to thrash out alternatives secretly with his closest advisers, it is doubtful that disclosure would greatly impede his ability to recommend policies to executive agencies. The *Nixon* Court, moreover, held that a demonstrable need for disclosure may overcome the limited privilege of confidentiality.²¹² Here the publicity that the Constitution demands of the legislative process, the public participation in rulemaking contemplated by the APA, and the Act's provision for judicial review all point to the desirability of disclosure. *United States v. Nixon* thus fails to support the *Sierra Club* court's assumption that the President's article II powers impliedly protect the confidentiality of ex parte presidential communications.

Accordingly, courts should require that the substance of ex parte

210. 418 U.S. 683 (1974).

211. 418 U.S. at 708. See *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966).

212. 418 U.S. at 713.

communications between White House and agency officials be disclosed in the rulemaking docket.

Even if courts accept *Sierra Club's* expansive view of presidential authority and refuse to adopt the generalized disclosure requirement stated above, one can still defend a disclosure requirement limited to conduit contacts, through which the President relays the views of private parties to agency officials. Nongovernmental interests, recognizing that Executive Order 12,291 creates a new point of access to the decision-making process, may attempt to utilize the White House or the OMB as a conduit for their views, thereby covertly influencing agency rulemaking. In such instances there is usually no public knowledge of the contact or of what was communicated.²¹³ Commentators have been especially troubled by the prospect of the President, in effect, lobbying on behalf of private parties.²¹⁴ Professor Verkuil, for example, has expressed concern for the integrity of the governmental process

when White House actions reflect the interests of private industry in emphasizing a cost-minimization regulatory policy. Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve equivalent clout. The expressed fear is that government regulation will be co-opted by private groups through the intercession of the White House.²¹⁵

Because private parties can always communicate directly with an agency, the White House serves only to magnify the influence of interested private parties who seek a particular result in rulemaking proceedings.²¹⁶ It is not difficult to conclude that Congress did not

213. The Freedom of Information Act is of no aid in such situations since the communications are usually oral and thus not discoverable. See 5 U.S.C. § 552(a) (1976).

214. See Bruff, *supra* note 26, at 466, 504; John & Litan, *Sierra Club v. Costle — Regulatory Oversight Wins in Court*, REGULATION, July/Aug. 1981, at 17, 23-24; Verkuil, *supra* note 174, at 981.

215. Verkuil, *supra* note 174, at 950-51.

216. Direct *ex-parte* approaches by lobbyists to agency officials are serious enough but OMB dealings with these lobbyists raise other troubling possibilities. If persons interested in a proceeding have *ex-parte* communications with OMB, rather than with the agency, and OMB then communicates those views to the agency without identifying the source of its information, the views will be invested with OMB's authority, rather than seen as merely another partisan argument by a special interest participant. In this example, OMB serves as an influential back-door "conduit" for communicating the views of private parties to the agency.

C. LUDLAM, *supra* note 1, at 40.

Ludlam continues:

The intent of the White House to use the regulatory process to assist political allies seems clear. In an April 10, 1981, speech before the Chamber of Commerce, Boyden Gray, the Vice President's Counsel and Counsel to the Task Force on Regulatory Relief, invited the audience to bring their regulatory problems to the White House. He said,

If you go the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that's what the Task Force is for.

intend the informality of the APA's rulemaking provisions to legitimize behind-the-scenes favoritism.

The *Sierra Club* court recognized, but did not resolve, the conduit contacts problem. Noting that the Carter Justice Department had recommended that all conduit contacts be placed in the rulemaking record,²¹⁷ the court found "no reason to believe that a policy similar to this was not followed here, or that unrecorded conduit communications exist in this case."²¹⁸ Accordingly, the court refused to authorize further discovery on the issue.

There are strong reasons to believe that Executive Order 12,291 will create a conduit contact problem far more serious than that perceived by the *Sierra Club* court. In funneling all agency rules through one coordinating agency, the OMB, the Order makes available to interested private parties a new access point to the decision-making process. In addition, the Order provides only minimal safeguards against improper favoritism. In contrast to guidelines developed under the Carter Administration, the OMB's current position is that not all oral and written communications with private parties need to be summarized and disclosed in the rulemaking record. A recent memorandum simply advises officials involved in the Order's oversight program to advise private parties submitting "factual materials" to refer such matters to the responsible agency.²¹⁹ The oral statements, policy views, and legal arguments of private parties apparently escape the memorandum's relatively weak referral requirement. Thus, the oversight mechanism established by Executive Order 12,291 is rife with the potential for abuse.

A requirement that all White House communications with agencies regarding a proposed rule during the pendency of rulemaking proceedings be accompanied by disclosure of relevant communications from interested private parties received by the President or his advisers while those proceedings were pending would place a needed

Id. at 50.

217. See Office of Legal Counsel, Department of Justice, Memorandum for Hon. Cecil D. Andrus, Secretary of Interior, Re: Consultation With Council of Economic Advisers Concerning Rulemaking Under Surface Mining Control and Reclamation Act (undated), reprinted in LEGAL TIMES OF WASH., Jan. 29, 1979, at 32-33.

218. 657 F.2d at 405 n.520.

219. Certain Communications Pursuant to Executive Order No. 12,291, "Federal Regulation" (memorandum from David A. Stockman, Director, OMB, to heads of executive departments and agencies, June 11, 1981) (copy on file with the *Michigan Law Review*). See LEGAL TIMES OF WASH., June 22, 1981, at 1, 11. The memo, issued by OMB, "does not require OMB to log contacts with outsiders on regulatory issues or notify concerned agencies of such contacts." *Id.* at 1. One observer points out that "factual materials" "does not appear to cover oral communications, which are the primary means of communications at OMB." *Id.* at 11. Submissions of policy or legal analysis may also escape coverage under the OMB memo. *Id.*

check on this potential for abuse. This requirement emphasizes that the relevant agency, not the White House, was meant to be the primary forum for communication of technical data, policy views, and legal arguments. By making agencies aware of the source of information and arguments presented by the President and his advisers in rulemaking proceedings, the requirement should ensure that no undue weight is given to the views of interested parties with allies in the White House.

Although one may consider overly broad a general disclosure requirement applicable to White House policy communications, obvious problems would arise in applying a more limited conduit communication disclosure rule. The difficulty lies in distinguishing between policy positions of private parties and those of the White House: The President and his advisers might adopt as their own the views privately urged by interested parties. Despite this ostensible classificatory dilemma, it is undesirable to limit a conduit contact disclosure rule to material factual information.²²⁰ First, the possibility that the White House will lend its credibility to a private position due to mere favoritism exists with regard to policy and legal arguments as well as to factual information. Second, interested parties must rebut and reviewing courts must scrutinize not only the factual data presented in rulemaking proceedings, but also the policy and legal arguments that an agency has considered. Finally, a rule requiring that White House comments on proposed rules be accompanied by disclosure of private communications received by the President and his advisers during the pendency of the rulemaking proceedings will not unduly constrain expressions of White House policy to agency decision-makers: Presidential aides remain free both to communicate their own views and to endorse the views of private parties.

Ex parte contacts give rise to concerns that vary somewhat according to the nature of the rulemaking — whether adjudicatory or policy-making — and the type of communication — whether direct from the White House or a so-called conduit contact. One can make a virtually unassailable argument for a disclosure requirement in ad-

220. Commentators have argued that ex parte contacts that communicate significant new information should be logged on a public record. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:18 (2d ed. 1978). Apparently realizing the difficulty or arbitrariness in distinguishing between information and argument, the Administrative Law Conference has recommended that agencies “experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or *argument* respecting the merits of proposed rules.” 1 C.F.R. § 205.77-3 (1980) (Admin. Conf. of the United States, Ex Parte Communications in Informal Rulemaking Proceedings, Rec. No. 77-3) (emphasis added).

judicatory rulemaking proceedings. As both *Vermont Yankee* and *Sierra Club* recognize, courts may justifiably intervene to protect the due process rights of affected individuals. But the overwhelming strength of the argument in an adjudicatory setting should not lead one to conclude that a disclosure requirement is not warranted in other settings as well. Although competing considerations based on the President's article II powers and responsibilities come to the fore in policy-type rulemakings, an undeniable need for disclosure remains. That need is perhaps greatest in the conduit contact situation, where the danger of arbitrary decision-making is especially pronounced.

CONCLUSION

Executive Order 12,291 exceeds the proper bounds of presidential authority. By imposing a substantive cost-benefit requirement, the Order displaces the discretion of agency officials to formulate domestic policy. It thus significantly interferes with a function over which the Constitution gives Congress primary, if not exclusive control. Although the President is authorized to coordinate and supervise the executive branch, he has no inherent authority to control executive agencies executing essentially legislative duties delegated to the agencies by Congress. And Congress's evident desire to deny the President formalized control over administrative policy-making effectively refutes the claim that the President has concurrent authority in the area. The President's authority to force executive agencies to use procedures in addition to those mandated by the APA in informal rulemaking is similarly attenuated. The rather extensive array of procedures that the Order requires impinges on the informality and flexibility that the APA contemplates.

A complete discussion of Executive Order 12,291's legitimacy must mention the serious problem of secret *ex parte* contacts raised by the Order. It is reasonable to expect that informal and undisclosed messages will regularly flow in the more formal channel of communication between the OMB and executive agencies that the Order establishes. The OMB oversight mechanism, moreover, creates a new and influential entry point to the rulemaking process that private parties with allies in the White House will seek to exploit. The dilemma posed by unrecorded *ex parte* contacts is especially acute where, as here, the communications occur between White House and agency officials — these communications become weighted with the prestige and authority of the presidential office. To ensure fidelity to due process and the integrity of informal

rulemaking as envisaged by Congress, courts should require that significant White House contacts be disclosed in the rulemaking docket.

During the 1980 presidential campaign, candidate Reagan promised to unshackle the free enterprise system and "to relieve the small business man of the burdens of excessive regulation."²²¹ The bloated pledges characteristic of modern presidential campaigns help perpetuate the image of a President possessing virtually unbounded authority. The reality, of course, is that the President's unilateral authority to implement his domestic policies is subject to powerful constitutional and statutory constraints.

221. N.Y. Times, Feb. 29, 1980, § B, at 4, col. 6.