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# PRESIDENT X AND THE NEW (APPROVED) DECISIONMAKING

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*We are the president, that's what we are.*  
—An OMB official, 1986<sup>1</sup>

## INTRODUCTION

When I left Washington, D.C. in 1981, the question of the moment was whether, in this modern day, a President could ever be reelected to a second term. Five years later there is no doubt that, were it lawful, a President could win a third term by a landslide. This shift in power has altered the constitutional question surrounding the extent of that power. The inquiry is no longer whether a President can control the government, but whether that control can be curtailed.

The question is not hypothetical. The President, through budget proposals, appointments, vacancies, enforcement priorities, and review of individual agency decisions, agenda, and priorities, has extended the influence of the White House to an extent unimaginable only a few years ago. Congressional attempts to curb this influence have foundered.<sup>2</sup> The presidency, as an institution, is scoring at will. This turn of events does not call for a constitutional convention. It does, however, call for a new look at the rules under which the game is being played. That look is at the heart of this

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1. M. Benson, *Budget Office Power Grows Under Reagan*, Times-Picayune/States-Item, Mar. 9, 1986, at A-8, col. 1. In a subsequent telephone interview, Mr. Benson declined to name the official on the grounds of confidentiality, but stated that the official remained "highly placed" within the agency. Telephone conversation with Miles Benson (June 16, 1986).

2. See, e.g., *Bowsher v. Synar*, 106 S. Ct. 3181, 3199-202 (ruling that Congress improperly assigned executive power to Comptroller General under Gramm-Rudman), *aff'g* 626 F. Supp. 1374 (D.D.C. 1986); *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (finding congressional veto over executive agency's acts unconstitutional); *Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976) (holding Congress' appointment of members of executive agency unconstitutional); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, §§ 200-275, 99 Stat. 1037, 1038-1101 (1985) (establishing greater congressional control over budgetary process and impoundment).

symposium.<sup>3</sup>

This Comment begins with a statement of the problem. It then offers a critique of two scholarly responses and concludes with alternative proposals for resolving the constitutional interests at stake.

## I. THE NEW DECISIONMAKING

Bedell [Deputy Administrator, OMB Office of Information and Regulatory Affairs] in an interview with BNA said Congress should not be as concerned over whether OMB told [EPA Administrator] Thomas to change a proposal as over whether the proposed change makes sense. "Who the hell cares how it occurred?" he asked.<sup>4</sup>

All Presidents have struggled to control the decisions of federal agencies.<sup>5</sup> The 1970s saw attempts to manage these decisions

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3. The question of presidential authority over agency decisionmaking is the subject of current litigation, legislative proposals, congressional investigations, administrative conference studies and proposals, and some of the most extensive scholarship in the field of administrative/constitutional law. See, e.g., *supra* note 2 (discussing Congress' and Supreme Court's activity in area). This writer's understanding of the subject, aside from participation in early litigation raising the issue, is largely indebted to Bernstein, *The Presidential Role in Administrative Rulemaking: Improving Policy Directives: One Vote for Not Tying the President's Hands*, 56 TUL. L. REV. 818, 819-21 (1982) (arguing that presidential participation in rulemaking is necessary to coordinate activities of executive agencies); Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830, 843-48 (1982) (criticizing procedural rules that inhibit President's ability to balance competing policy goals); Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 851-57 (1982) (describing and recommending improvements for President Reagan's system of controlling executive agencies' issuance of rules and regulations); Gray, *Presidential Involvement in Informal Rulemaking*, 56 TUL. L. REV. 863, 865-76 (1982) (arguing that presidential involvement in rulemaking brings highly desirable perspective to major issues); Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879, 884-901 (1982) (examining approaches to defining President's proper role in informal rulemaking); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 640-67 (1984) (claiming that President should coordinate executive agency decisionmaking to balance Congress' power to structure agencies); Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 978-82 (1980) (warning against extending ex parte communication restrictions to White House).

4. *Bedell Says OMB Uses Pressure to Shape Environmental Rulemaking; Thomas Sees Budget Office Role as Legitimate But Says He Has Final Say*, [Current Developments] 16 Env't Rep. (BNA) No. 45, at 2050-51 (Mar. 7, 1986).

5. One unsuccessful attempt was President Truman's efforts to control the Corps of Army Engineers: "President Truman was strong enough to fire General Douglas MacArthur but, so far, the Army Engineers have successfully defied him . . . . No more lawless or irresponsible Federal group than the Corps of Army Engineers has ever attempted to operate in the United States, either outside of or within the law." Houck, *New Roles for the Old Dam Builder?*, NAT'L WILDLIFE, Aug.-Sept. 1975, at 13 (quoting Secretary of the Interior Harold Ickes' 1951 statement). Indeed, the mechanism developed by Congress for authorizing and funding Corps of Engineers projects successfully resisted all White House influence until President Carter, at enormous political cost, launched a water project review process. See *Carter Will Ask Hill to Halt Aid for 18 Major Water Projects*, Wash. Post, Feb. 20, 1977, at A6, col. 1 (discussing President Carter's cutback on Army Corps of Engineers' projects in face of vigorous congressional opposition).

through various agency councils<sup>6</sup> and several incursions by the White House into specific agency decisions.<sup>7</sup> These efforts remained, on a government scale, rather modest and unintrusive. The coordinating councils reviewed a small number of regulations and had no authority, beyond an appeal to the White House, to enforce their views.<sup>8</sup> Interventions on specific problems were more effective, but limited to a few major controversies. Those days have passed.

The Reagan administration's control of federal agencies began with transition teams that well before inauguration day had completed an agenda for the reorientation of the agencies and, in most instances, their reduction.<sup>9</sup> The President proposed no monies for unfavored programs,<sup>10</sup> halved the budgets of others,<sup>11</sup> refused to

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6. See SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 99TH CONG., 2D SESS., OFFICE OF MANAGEMENT AND BUDGET: EVOLVING ROLES AND FUTURE ISSUES 198 (Comm. Print 1986) (describing President Nixon's "quality of life" review under which OMB passed on environmental regulations); Exec. Order No. 11,821, 3 C.F.R. 926 (1971-1975), *reprinted in* 12 U.S.C. § 1904 (1976) (requiring agencies under Ford Administration to submit inflation impact statement for major regulations); Verkuil, *supra* note 3, at 948-49 (discussing President Carter's use of Regulatory Council to screen proposed rules). See generally Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES 1 (1984) (analyzing growth of OMB authority over executive agency rulemaking); Verkuil, *supra* note 3, at 947-48 (overviewing historical background of presidential control of agencies).

7. See *Sierra Club v. Costle*, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (holding that undocketed intra-executive branch meeting on upcoming rule during post-comment period did not violate Clean Air Act or due process); Verkuil, *supra* note 3, at 944-47 (describing Carter administration's involvement in regulation of cotton dust in workplace, ozone levels, and surface mining).

8. The Quality of Life Review, a visionary term for OMB supervision, did have the elements of a more coercive process and, in fact, operated with particular energy against EPA regulation for a short period of time. See Olson, *supra* note 6, at 9 (describing how quality of life program was vehicle of review of EPA rules).

9. See, e.g., *Seven-Member Team Appointed to Manage Change to Reagan Administration at EPA*, [Current Developments] 11 Env't Rep. (BNA) No. 33, at 1226 (Dec. 12, 1980) (discussing budget, personnel, and policy issues to be raised in Team's upcoming reports).

10. The administration has proposed zero funding for, among other programs, coastal zone management grants to coastal states. See *Program Will Not Be Phased Out, House Panel Tells Administration*, [Current Developments] 14 Env't Rep. (BNA) No. 24, at 989 (Oct. 14, 1983); see also *Marching Backwards: The Department of the Interior Under James G. Watt*, NAT'L WILDLIFE FED'N, Apr. 29, 1982, at 365 (state grants for land acquisition under the Land and Water Conservation Fund); *id.* at 35 (national park acquisition under the Land and Water Conservation Fund); *id.* at 32 (wetlands acquisition under the Wetland Loan Act); *id.* at 33 (cooperative Research Unit Program for training wildlife professionals); *id.* at 51 (Water Resources Council, interdepartmental planning agency).

11. Indeed, the Reagan administration has accomplished much of its intended deregulatory agenda through the budget process. As then Secretary of Interior James Watt frankly explained: "We will use the budget system to be the excuse to make major policy decisions." *Beware the New Park Ranger*, N.Y. Times, Apr. 5, 1985, at E20, col. 1. And so he did. See generally THE WILDERNESS SOC'Y, *The Watt Record* 26-34 (1983) (analyzing budgets of National Park Service, Bureau of Land Management, and Alaska Lands and Wilderness Management), and *Marching Backwards: The Department of Interior Under James G. Watt*, NAT'L WILDLIFE FED'N, Apr. 29, 1982, at 365 (during James G. Watt's first 15 months as Secretary of Interior budget priorities have changed, whole sub-agencies eliminated or reorganized, and new pro-

spend monies actually budgeted,<sup>12</sup> made no nominations for unfavored positions,<sup>13</sup> made no effort to enforce unfavored laws,<sup>14</sup> and appointed agency heads whose primary qualification, indeed whose only qualification in common, was a field-tested hostility to the statutory missions that Congress had entrusted to them.<sup>15</sup> Each of

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gram objectives adopted). See also NATIONAL WILDLIFE FEDERATION, SHREDDING THE ENVIRONMENTAL SAFETY NET: THE FULL STORY BEHIND THE EPA BUDGET CUTS 9 (1982) (analyzing one year's budget cuts amounting to almost 50% of EPA).

12. Presidential deferral of spending funds allocated by Congress to a program the President does not like was itself deferred for discussion at a later date by a congressional panel. *Spending Bill Approved by Congressional Panel*, Times-Picayune/States-Item, June 19, 1986, at A-2, col. 2.

13. For example, the position of EPA Assistant Administrator for Enforcement remained unfilled for more than a year. 39 CONG. Q. ALMANAC A29 (1983).

14. The Reagan administration has deregulated federal programs simply by refusing to enforce them. According to the Chairman of the House Energy and Commerce Subcommittee on Oversight and Investigations, in the Administration's first fourteen months enforcement activity at EPA "had come to a virtual halt." *Panel Finds Past Mismanagement by EPA, New Jersey in Hazardous Waste Enforcement*, [Current Developments] 13 Env't Rep. (BNA) No. 38, at 1612 (Jan. 21, 1983). Between 1980 and 1981, he cited a 79% decline in cases referred to EPA headquarters from its regional offices, and a 69% decrease in referrals from headquarters to the Department of Justice. *Id.* In 1980, EPA filed 43 lawsuits to clean up hazardous waste sites. In the first nine months of 1982 it filed only three. *Id.* See generally Baldwin, *Playing Politics with Pollution*, COMMON CAUSE, May-June 1983, at 15 (arguing that EPA under President Reagan has seriously neglected pollution problems); Goldberg, *Muzzling the Watchdog*, WASH. MONTHLY, Dec. 1981, at 30 (criticizing Reagan administration's suspension of certain EPA regulations and cutback in agency's funding). While the same pattern is found in other unfavored agency programs, perhaps the most notorious has been the Administration's refusal to enforce the Surface Mine Restoration Program. See H.R. REP. NO. 1146, 98th Cong., 2d Sess. 5 (1984) (concluding that Department of Interior has failed to effectively implement Surface Mining Control and Reclamation Act); Address by Thomas J. McGlady, The Governor's First Annual Conference on the Environment, Oklahoma City, Okla. (June 7, 1985) (asserting that federal agencies have inadequately enforced Surface Mining Control and Reclamation Act of 1977). Thousands of strip mines remain unimproved; approximately \$200 million in fines and nearly \$32 million set aside for reclamation are uncollected. *The Horror Continues: Strip Mining Takes Its Toll*, Conservation '85, NAT'L WILDLIFE FED'N, Oct. 11, 1985, at 1. See generally *Failed Oversight, a Report on the Failure of the Office of Surface Mining to Enforce the Federal Surface Mining Control and Reclamation Act*, NAT'L WILDLIFE FED'N, Sept. 1985 (outlining problems facing Office of Surface Mining and suggesting approaches for solving them).

15. See *The Unforcerer: Strip Mining Agency Falls Victim to Reagan's Reforms*, Wash. Post, June 6, 1982, at A8, col. 1 (stating that Director of Office of Surface Mining Richard Harris, as member of Ohio legislature, had challenged OSM program as unconstitutional); *Environmentalists Say Watt Deceives with "Doublespeak,"* Wash. Post, June 4, 1981, at A17, col. 1 (noting that Secretary of Interior James Watt had directed anti-environmentalist Mountain States Legal Fund before joining Reagan administration); *OSHA to Review Work-Exposure Rules*, Wash. Post, Mar. 28, 1981, at A2, col. 4 (discussing OSHA Administrator Thorne Auchter's recall of agency publication because of its portrayal of brown lung disease victim on cover); *Sagebrush Rebels Bound to Lose*, Wash. Post, Feb. 22, 1981, at C2, col. 3 (analyzing Director of Bureau of Land Management Robert Buford's support for private use of federally protected lands); *Denver Lawyer Reagan's Choice to Head EPA*, Wash. Post, Feb. 21, 1981, at A4, col. 1 (reporting EPA Administrator Ann Gorsuch's opposition to environmental programs while member of Colorado legislature); *Possible USDA Forest Overseer Nominee Creates an Uproar*, Wash. Post, Feb. 11, 1981, at A3, col. 1 (noting Chief of United States Forest Service John Crowell's opposition to wilderness protection programs while serving as general counsel for Louisiana-Pacific Corp., one of leading cutters and purchasers of federally owned timber). See generally J. LASH, K. GILLMAN & D. SHERIDAN, *A SEASON OF SPOILS* (1984) (analyzing and criticizing Reagan administration's record on environmental matters).

these actions, as troublesome as they may have been and remain for Congress to respond to, was based on a clear source of authority in article II.<sup>16</sup>

The President went on to subordinate the agencies to a smaller number of trusted officials. One mechanism was the creation of "cabinet councils" that grouped several agencies under one department head.<sup>17</sup> The Environmental Protection Agency, for example, was grouped with others under the jurisdiction of the Secretary of the Interior.<sup>18</sup> Another tool was a directive requiring the Justice Department to review and approve all agencies' litigation policies.<sup>19</sup> The strongest measures taken, however, have been two executive orders that, at bottom, created a new institution for federal decisionmaking.

Under Executive Orders 12,191<sup>20</sup> and 12,498,<sup>21</sup> all major new decisions, existing regulations, plans, and research that may "influence" or "lead to" agency action in the future are to be reviewed and cleared by the Office of Management and Budget (OMB).<sup>22</sup> OMB has the authority to require, among other things, that a decision be withheld until its review is concluded. The criteria for approving agency decisions include that they present the "least net cost" to society.<sup>23</sup> No agency proposal leading to a future decision

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16. U.S. CONST. art. II, § 3 ("[President] shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.").

17. See *Reagan Creates New Cabinet Council on Natural Resources, Environment*, [Current Developments] 11 Env't Rep. (BNA) No. 45, at 2060 (Mar. 6, 1981) (describing how councils would serve policy review function).

18. *Id.* For a discussion of the effectiveness of these councils in obstructing agency decisions, see *Governors Compromise on Acid Rain Plan, Vote for "Significant" Reductions in Phases*, [Current Developments] 14 Env't Rep. (BNA) No. 23, at 947 (Oct. 7, 1983) (describing cabinet council opposition to EPA Administrator Ruckelshaus' acid rain control program).

19. See Memorandum from Attorney General Meese to Assistant Attorneys General and United States Attorneys, *Department Policy Regarding Consent Decrees and Settlement Agreements 3-4* (Mar. 13, 1986) (restricting agencies' authority to enter into consent decrees and settlements).

20. Exec. Order No. 12,191, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1982) [hereinafter E.O. 12,191] (requiring OMB review of agency decisions).

21. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), reprinted in 5 U.S.C. § 601 (Supp. III 1985) [hereinafter E.O. 12,498] (requiring yearly approval of agencies' regulatory policies). Both E.O. 12,498 and E.O. 12,191 should be made required reading for students of American Government. See *supra* note 20 (citing E.O. 12,191).

22. E.O. 12,191, *supra* note 20, § 3. OMB has the authority to require that a decision be withheld until it has concluded its review. *Id.* § 7. OMB's responsibilities under the new executive orders have helped stimulate the Office's expansion to 600 professionals. See *Budget Office Power Grows Under Reagan*, *supra* note 1 (discussing how OMB's size, influence, and responsibilities have grown during Reagan administration). The review itself is conducted by OMB's Office of Information and Regulatory Affairs. Only the OMB Director, not the Director of the Office of Information and Regulatory Affairs or any of its staff, is subject to Senate confirmation. See C. LUDLAM, UNDERMINING PUBLIC PROTECTIONS: THE REAGAN ADMINISTRATION REGULATORY PROGRAM: A REPORT BY THE ALLIANCE FOR JUSTICE 17-18 (1981) (arguing that OMB's control of regulatory process reduces accountability of agency officials).

23. E.O. 12,191, *supra* note 20, § 2.

is allowed unless it is part of an agenda previously approved by OMB;<sup>24</sup> the primary criterion for approval is the proposal's "consistency with the Administration's policies and priorities."<sup>25</sup> None of these criteria is found in any statute conferring authority on OMB, the White House, or the President.<sup>26</sup>

What we have here is more than a recipe for review; it is a recipe for control. Few agencies are in a position to gainsay OMB, through which they must clear their budgets, manpower levels, and legislative proposals.<sup>27</sup> Few agencies are able to demonstrate factually, in the face of OMB opposition, that their proposals meet such subjective standards as "least cost to society" or "consistency" with Administration policies. Few outside the agencies, whether the courts, the press, or the Congress, are able to identify or explain the rationale for what OMB has done.<sup>28</sup> As one OMB reviewer has explained: "I don't like to leave fingerprints."<sup>29</sup> The *carte* is *blanche*, and on it can be read Administration objectives that have more to do with deregulation than with the faithful execution of laws.<sup>30</sup>

In practice, the executive orders appear to be working in exactly this fashion.<sup>31</sup> OMB is reported to have objected to about one-third

24. E.O. 12,498, *supra* note 20, § 1.

25. *Id.* § 3.

26. See Rosenberg, *Regulatory Management at OMB*, printed in SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 99TH CONG., 2D SESS., OFFICE OF MANAGEMENT AND BUDGET: EVOLVING ROLES AND FUTURE ISSUES 185, 187-202 (Comm. Print 1986) (discussing origins and limits of OMB's statutory authority). Congress has rejected proposals to require cost-benefit studies for all federal regulations. See *Part of Regulatory Reform Bill Opposed by Cannon, NRDC at House Panel Hearing*, [Current Developments] 14 *Env't Rep.* (BNA) No. 10, at 382-83 (July 8, 1983) (discussing congressional opposition to amending Administrative Procedure Act).

27. OMB's power of budget control cannot be overemphasized. The agencies themselves do not mistake it. As OMB Administrator James Miller has stated: "Sometimes when an agency sends a communication to me, it also sends a copy to the associate director of OMB who is in charge of its budget." *Deregulation HQ*, 5 *REG.*, Mar.-Apr. 1981, at 22.

28. The unknown rationale may be political. According to one student of the agency, OMB has undertaken to advise the President as to the political ramifications of legislative proposals. See *Budget Office Power Grows Under Reagan*, *supra* note 1 (quoting George Washington University Professor Stephen Wayne's comments about OMB's critical role in budget review, legislative clearance, and management oversight). There is no reason to believe that, to the extent OMB even communicates with the President regarding an agency's proposals, these communications do not include consideration of politics as well.

29. *If There's a New Rule, Jim Tozzi Has Read It*, Wash. Post, July 10, 1981, at A21, col. 2 (profiling OMB Deputy Administrator Jim Tozzi). Tozzi explains further: "If there's something on the record indicating that OMB raised certain concerns, the people who liked the regulation [as proposed] could use it to go to court." C. LUDLAM, *LITIGATION REGARDING WHITE HOUSE REGULATORY POWERS* 5 (Oct. 1981) (unpublished; on file with the American University Law Review).

30. See generally M. GREEN & N. WAITZMAN, *BUSINESS WAR ON THE LAW: AN ANALYSIS OF THE BENEFITS OF FEDERAL HEALTH/SAFETY ENFORCEMENT* (1981) (criticizing Reagan administration and big business for opposing federal regulations that protect consumers and workers).

31. The word "appear" is used advisedly here, for there is no complete record of what is taking place under these executive orders and no prospect of obtaining one. OMB has de-

of all federal regulatory proposals.<sup>32</sup> It has used its authority simply to delay these proposals to great advantage. Over a three-year period, OMB held beyond their statutory deadlines eighty-six out of more than 169 EPA regulations submitted to it for review.<sup>33</sup> For example, Food and Drug Administration regulations on infant formula were held for eighteen months. According to a House subcommittee, the rules finally approved "adopted, virtually in every respect, the suggestions of the infant formula industry to relax the proposed rules and add 'flexibility.'" <sup>34</sup> It is inevitable that agencies accede to such compromises in order to get *some* regulation in place. Indeed, it is the very mechanism of the Orders.

Further, OMB has used its "least cost" mandate to reinterpret statutory policies whenever a statute allows for agency discretion.<sup>35</sup>

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fended the absence of internal records on even those rules it has returned to an agency for further review. *See Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce, 97th Cong., 1st Sess. 111-13 (1981)* (OMB Administrator James Miller's responses to Chairman John Dingell that OMB did not have originals or copies of regulations that were returned to agencies for further review); C. LUDLAM, *supra* note 22, at 12-66 (criticizing President Reagan's regulatory program for subverting agency officials' authority, and for violating procedural standards and statutory mandates). Olson, *supra* note 6, at 40-73 (discussing how OMB conducts its review of executive agency rules behind veil); Strauss, *supra* note 3, at 595 & n.83 (arguing that lack of public exposure of OMB's review activities encourages candor, flexibility, and compromise within rulemaking process); *see also Oversight of the OMB Regulatory Review and Planning Process Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Affairs, 99th Cong., 2d Sess. 71, 75-76 (1986)* (statement of Sr. Atty. Percival of Environmental Defense Fund's Toxic Chemical Program) (arguing that although there exist important legal limits on OMB's authority to review executive orders, they have not been honored by OMB in practice); Brief in Support of Petitioners at 2, *Public Citizen Health Research Group v. Rowland, 796 F.2d 1479 (D.C. Cir. 1986)* (Nos. 84-1252, 84-1392, & 85-1014) (Reps. Dingell, Rodino, Brooks, Hawkins, and Ford as amici curiae) (seeking to prevent OMB's interference in rulemaking by administrative agencies). All four of these sources have the OMB process in action on specific regulations and from its underside. *See also* the comprehensive survey of an agency/OMB interaction in T. MCGARITY, *THE ROLE OF REGULATORY ANALYSIS IN REGULATORY DECISIONMAKING 1-375* (Mar. 1985) (unpublished; on file with the American University Law Review). When it comes to conclusions of fact on government programs, this author tends to give great weight to those who have worked directly with these programs but who are not beholden to them, and less to those of us who are at some remove.

32. Benson, *supra* note 1, at col. 3. The word "objected" can lead to considerable confusion, as there are many ways for OMB to express its displeasure. *See* Olson, *supra* note 6, at 41-42 (reporting that in first year of Executive Order 12,291, OMB returned 101 regulations to agencies and agencies withdrew 81 rules in face of OMB opposition). *See also* C. LUDLAM, *supra* note 22, at 25 (demonstrating extent of OMB control by citing discrepancies between lists of regulations supplied to House Oversight Subcommittee of Commerce Committee that were returned to agencies under authority of Executive Order 12,291). OMB explained discrepancies as caused by confusion between regulations that had been rewritten and those that had been withdrawn. *Id.*

33. *See* Percival, *supra* note 31, at 85-86 (indicating increase in OMB attention to EPA and reporting increase of OMB review of 196 EPA regulations in 1984-85, up from 73 proposed rules and 85 final rules in first two years under Executive Order 12,291).

34. Tolchin & Tolchin, *The Rush to Deregulate: Would Child Labor Laws Pass the Reagan Administration's Cost-Benefit Test?*, L.A. Daily J., Aug. 30, 1983, at 4, col. 3 (quoting staff report of Oversight Subcommittee of House Energy and Commerce Committee).

35. *See* Percival, *supra* note 31, at 89-90.



It has required consideration of factors not included, and on occasion not permitted to be considered, in the legislation behind agency decisions.<sup>36</sup> It has applied its criteria selectively, requiring no analysis for proposals that eliminate regulation,<sup>37</sup> and no cost analysis for those that relax existing standards.<sup>38</sup> It has refused to approve entire categories of standards,<sup>39</sup> and indeed entire agency programs.<sup>40</sup> Its resistance to EPA's toxic waste program, for example, has been categorical. As of January, 1986, OMB had objected to and delayed thirty-eight out of fifty proposed hazardous waste regulations.<sup>41</sup> OMB has also acted as a conduit for communications from industry opponents of agency action.<sup>42</sup> It has acted as more

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36. See Olson, *supra* note 6, at 71-73 (discussing OMB insistence on consideration of cost to industry in EPA reconsideration of National Ambient Air Quality Standards (NAAQS)); see also *id.* at 49-50 (detailing internal changes at EPA as consequence of OMB review).

37. See *id.* at 54 n.278 (detailing EPA's revocation of hydrocarbon NAAQS without Regulatory Impact Analysis (RIA)).

38. *Id.* at 54. As OMB's Miller has stated: "[I]f OMB were convinced on the basis of evidence, however sparse, that such a reduction [in compliance costs] would occur, a waiver would be granted immediately." *Id.*

39. OMB returned at least 11 Clean Air Act New Source Performance Standards to EPA between mid-1981 and 1984, including those for: stationary internal combustion engines, volatile organic liquid storage vessels, glass manufacturing plants, flexible vinyl coating and printing operations, metal coil surface coating, graphic arts industry rotogravure printing, surface coating for large appliances, beverage can surface coating, rubber tire manufacturing, and phosphate rock plants. *Id.* at 67-68 & n.350. Each of these standards was held beyond its statutory deadline. *Id.* at 68. In a recent proceeding involving OMB delay of other unfavored regulations beyond their deadline, the Department of Justice categorized EPA's submission of regulations to OMB as voluntary. *Budget Office Review of EPA Regulations Not Required in Every Case, Justice Says*, 16 Env't Rep. (BNA) No. 19, at 807, 808 (Sept. 6, 1985). It is not surprising that a federal district court agreed. See *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (holding that OMB has no authority to use regulatory review powers granted under Executive Order 12,291 to delay promulgation of EPA regulations under 1984 amendments of Resource Conservation and Recovery Act).

40. See Olson, *supra* note 6, at 6 (citing demise of EPA noise pollution control program as example of fate of program unpopular with OMB). An internal OMB memo questioned whether noise pollution was an appropriate area for EPA control, failing to note that Congress had authorized the EPA to control noise pollution in the Noise Control Act of 1972. *Id.* As a result, EPA's 1983 budget passback from OMB completely eliminated the operating budget for the noise program. *Id.*

41. Percival, *supra* note 31, at 87.

42. OMB's use of the regulated industry's information and views are one of the best documented aspects of Executive Order 12,291. See Olson, *supra* note 6, at 60-61 n.307 (documenting OMB's 14 meetings with affected industries during debate over EPA regulations for phase out of lead in gasoline); see also *id.* at 61 n.308 (indicating that OMB's information on EPA's proposed effluent guidelines for iron and steel category under Clean Water Act came exclusively from industry, leading OMB to intervene in EPA rulemaking even before agency's internal review had been completed). OMB's conduit service for affected industries has also been identified. See STAFF OF SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 99TH CONG., 2D SESS., OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS 14-15, 22-34 (Comm. Print 1986) [hereinafter OMB INFLUENCE] (discussing ex parte contacts between OMB and industry and examining selected examples of inappropriate OMB intervention in rulemaking of EPA, OSHA and FDA); C. LUDLAM, *supra* note 22, at 48-50 (discussing meetings of OMB's Stockman and Miller with special interest lobbyists); see also *Federal Efforts to Control Asbestos Hazards: Hearing Before the Subcomm. on Commerce, Transportation and Tourism of the Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 137-38 (1984) (testimony of B.J.

than a conduit for opposing federal agencies by granting them an extra-statutory veto over proposed regulations.<sup>43</sup> It has required quantitative changes in specific standards,<sup>44</sup> and the elimination outright of standards.<sup>45</sup> Its elimination of a workplace standard for the chemical ethylene oxide went to the Federal Register with its deletions in magic marker barely dry on the page.<sup>46</sup> Proposed safety regulations have languished.<sup>47</sup> Existing health regulations have been reviewed and rescinded.<sup>48</sup> OMB has even blocked proposed

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Figg, Executive Director of the Asbestos Information Association (AIA), indicating that AIA, representing 50 asbestos companies, unsuccessfully opposed EPA's plans to ban and phase out asbestos products). *But see Bedell Says, supra* note 4, at 2052 (down-playing impact of outside influence on OMB review of EPA regulations and noting that EPA officials were often invited to meetings with outside parties about proposals). OMB recently proposed fuller disclosure of its ex parte contacts but failed to implement its announced procedures. This failure led to a vote for the elimination of funding for the Office of Information and Regulatory Affairs (OIRA) by the House Appropriations Committee. *See Havemann, House Moves to Wipe Out OMB Unit*, Wash. Post, July 31, 1986, at A23, col. 1 (reporting House Appropriations Committee vote to eliminate funds for presidential review staff at OMB). Neither disclosure of these contacts nor attendance at meetings will cure the problem. Political action committees raise and spend millions for the sole right of special access to legislators. *See generally Drew, A Reporter at Large (Politics and Money - Part II)*, THE NEW YORKER, Dec. 13, 1982, at 57 (investigating effects of political action committees on presidential fund raising). Boyden Gray, Counsel to the Vice President and to the Task Force on Regulatory Relief, has indicated that industry has purchased far more than access. C. LUDLAM, *supra* note 22, at 50-51 (citing as an example an appeal process involving Task Force, only statutory authority for which is President's constitutional authority).

43. For example, OMB circulated the EPA's nineteenth draft proposal for the regulation of high level radioactive waste to the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC), each of which objected to the program on several grounds. OMB informed EPA that it must obtain both DOE and NRC approval before OMB would consider releasing the regulations. Olson, *supra* note 6, at 65.

44. *See, e.g., id.* at 66 (indicating that OMB held up EPA radioactive waste storage rules until EPA agreed to relax institutional controls standards from one hundred years to several hundred years).

45. Examples include OMB's elimination of safety standards for oil and gas drilling, elimination of Superfund sites eligible for federal cleanup funding, and the nondegradation standards of the Clean Water Act. *See OMB INFLUENCE, supra* note 42, at 22-34 (examining OMB pressure on agencies to choose between delaying entire program or sacrificing a part of it to gain OMB approval of major portion). Former EPA Chief of Staff John Daniel admitted that the EPA changed the nondegradation language of its proposal in order to get the regulations past OMB. *Id.* at 28.

46. *See Rosenberg, supra* note 26, at 217-18 (describing effect of OMB review on workplace standard for ethylene oxide); *see also* Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (holding that Occupational Safety and Health Administration (OSHA) limit on long-term exposure to ethylene oxide was warranted, but indicating that there also may be need for short term exposure limit).

47. According to an attorney for the Oversight Subcommittee of the House Energy and Commerce Committee, OMB returned at least seven proposed regulations to the agencies from June to Sept., 1981. Tolchin, *supra* note 34, at col. 4. The agencies never resubmitted six of the regulations, which included one zoning hang gliders away from airports and another regulating the blood-alcohol level of pilots. *Id.*; *see also* C. LUDLAM, *supra* note 22, at 22-23 (discussing fate of minimum insurance standards for haulers of hazardous materials).

48. The Department of Agriculture rescinded regulations requiring hot dog labels to list bone and tissue as ingredients. Tolchin, *supra* note 34. The hot dog industry objected to the regulations as "so frightening to consumers that they wouldn't buy the product." *Id.* (quoting John McClung of the Department's Food Safety and Inspection Service). More recently, OMB blocked testimony by the Surgeon General concerning tobacco advertising. *See Regan*

surveys of health problems.<sup>49</sup>

OMB has done all of this—many more times, one suspects, than will come to light<sup>50</sup>—with an attitude that reflects, in moments of candor, the new realignment of power. When OMB's Deputy Administrator for regulatory review observed several years ago that "Assistant Secretaries have come crying" to OMB reviewers pleading for mercy,<sup>51</sup> he was on the level. The rhetoric has since changed. OMB now speaks in terms of its "socratic dialogues" on agency proposals in which it may take opposing views "solely for the sake of argument."<sup>52</sup> You may believe that if you wish. Instead, you may believe that the first few years of hardball have established the new order. As OMB's Director now explains, "Agencies don't send over really loony things anymore."<sup>53</sup>

Whether the proposals were "really loony" or, in some instances, quite necessary to protect public health, is not the point. The point is that proposals are no longer made. OMB has deterred them. We have a new decision maker on our hands. It is a joint venture of the agency and OMB in which, on all but extraordinary occasions, OMB holds most of the equity.<sup>54</sup>

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*Blocks Anti-Tobacco Testimony*, The Daily Progress (Charlottesville, Va.), July 17, 1986, at A3, col. 1 (indicating that OMB withheld approval of Surgeon General's testimony because proposed legislation had implications beyond health issues).

49. See Benson, *Budget Office Power Grows Under Reagan*, Times-Picayune/Stater-Item, Mar. 9, 1986, at A8, col. 1 (stating that OMB rejected EPA proposal to survey Wisconsin adults about high chlorine levels in drinking water).

50. Regulations no longer submitted to or acted upon by OMB compounded the instances cited above. Parick C. McLain, counsel to the Oversight Subcommittee of the House Energy and Commerce Committee, observed: "What we want to know is how many regulations are never submitted at all." Tolchin, *supra* note 34, at col. 4.

51. Olson, *supra* note 6, at 11-12 n.40 (quoting James Tozzi, former Deputy Administrator for OMB Office of Information and Regulatory Affairs).

52. *Senate Democrats Lambast OMB for Control over Environmental, Safety, Health Rules*, 16 Env't Rep. (BNA) No. 40 at 1807 (Jan. 31, 1986) (quoting OMB Director James Miller).

53. Benson, *supra* note 1, at col. 3 (quoting Robert Bedell, administrator of OMB's Office of Information and Regulatory Affairs).

54. An examination of the existing record makes it clear that the claim that OMB does not influence or control many or all agency decisions is simply untenable. Few agencies have acted in defiance of OMB pressure. Only those agencies with strong support in Congress have resisted OMB and they have done so at some cost. See Olson, *supra* note 6, at 46 (quoting former EPA official John Daniel who, having opposed OMB's position, was told that "[t]here was a price to pay for doing what we had done, and that we hadn't begun to pay."). See also OMB INFLUENCE, *supra* note 42, at 26 (outlining congressional efforts to unblock safe drinking water regulations held up by OMB and concluding that: "Congress cannot always invest the time and attention that it did for the drinking water standards for every rule which is subject to lengthy OMB review."). To rely on the fact that OMB finally allowed some regulations to proceed after extraordinary public, judicial, and congressional response is to overlook the effect of OMB on daily EPA regulation, to say nothing of its effect on, for example, the Bureau of Indian Affairs. See Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185 (1986) (explaining OMB review of agency regulations).

This fusion may be a beneficial innovation,<sup>55</sup> or it may be wasteful and dumb.<sup>56</sup> The fact is that it exists and it changes the constitutional analysis. It is one thing to defend presidential influence on a limited number of issues.<sup>57</sup> It is equally easy to rationalize a mechanism for coordinating the decisions of multiple agencies so that they are fully informed and, to the extent possible, not at cross purposes.<sup>58</sup> But these justifications stretch to the breaking point in defense of the degree of influence that is being exercised today. The new decisionmaking has apparently caused some to modify their positions on the limits of executive power.<sup>59</sup> It has also led to a number of remedial proposals, two of which are next reviewed.

## II. THE MCGARITY AND BRUFF PROPOSALS

*Shredding testimony? - we did plenty of that. You know, disgruntled cabinet types headed for the press to tell their story. We didn't require everyone to submit speeches for approval, but one might argue that an administration official who spoke out in a way inconsistent with administration policy would sooner or later hear from OMB about it.*

—A “former high-ranking”  
OMB official, 1986<sup>60</sup>

55. See generally DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1975 (1986) (defending White House/OMB review of agency rulemaking).

56. See generally Morrison, *OMB Interference with Agency Rulemaking: the Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986) (arguing that OMB dominance of rulemaking process is unwarranted).

57. See Verkuil, *supra* note 3, at 987-89 (recommending limited restraints on ex parte contacts between White House and agencies); see also *Sierra Club v. Costle*, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (approving undocketed meeting between White House and EPA staff because it is not expressly forbidden by Congress), *rev'd sub nom. Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), *vacated* 716 F.2d 915 (D.C. Cir. 1983).

58. See DeMuth & Ginsburg, *supra* note 55, at 1081 (stating that centralized review of proposed regulations encourages policy coordination). OMB has extended this rationale to include the American business community. According to proponents such as C. Boyden Gray, the whole point of the current arrangement is to eliminate open conflicts between business and government that had inhibited regulatory progress in years past. Tolchin, *supra* note 34, at col. 4. While the phrase “inhibited regulatory progress” is a marvel of bureaucratic dissimulation in its own right, what Gray is describing and defending is high level access to decisionmaking on behalf of a small, powerful segment of the population.

59. Compare Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 461-62 (1979) (expressing the need for a strong, centralized presidency) with Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 515-16 (1987) [hereinafter Bruff] (advocating some control of executive oversight of agencies). The facts change the analysis, as well they should.

60. Benson, *supra* note 1, at col. 3 (quoting former high ranking OMB official); see also Telephone interview with Miles Benson, *supra* note 1 (declining to identify OMB official other than to say that it was not David Stockman).

The McGarity<sup>61</sup> and Bruff<sup>62</sup> articles have the essentials in common. Both identify serious problems with politicization and accountability in the White House's ever-widening reach over agency decisionmaking. Both authors see the traditional tests for limiting presidential control—tests based on the independent versus the executive nature of an agency or on the formal versus informal nature of the decisionmaking involved—as unhelpful for the range of agency responsibilities that are at stake. Both recommend congressional action to limit the President's influence over agency decisions. Neither recommendation, however, is likely to work.

McGarity's answer is disclosure.<sup>63</sup> Congress should legislate to prohibit *ex parte* intervention by the President, White House staff, and OMB in agency decisionmaking, whether formal or informal, independent or executive. All such contacts would be reduced to writing and placed on the record.<sup>64</sup> McGarity correctly anticipates the outrage of those who would view (and have viewed) these limitations as unconstitutional infringements on presidential authority, and his treatment of their arguments seems as persuasive as any.<sup>65</sup> He is also on target in extending disclosure beyond those palliatives offered by, among others, the Administrative Law Section of the American Bar Association.<sup>66</sup> If disclosure of influence is to be the

61. McGarity, *Presidential Control of Regulatory Agency Rulemaking*, 36 AM. U.L. REV. 443 (1987).

62. Bruff, *supra* note 59.

63. See McGarity, *supra* note 61, at 445 (suggesting publication of presidential communications requirement as appropriate exercise of congressional power).

64. A corollary to this proposal, one would assume, is that the contacts would be limited to the time that the record remained open to the public.

65. Without flyspecking McGarity's discussion, his diminution of checks and balances principles for resolving the question of the constitutional reach of the President's authority seems questionable and unnecessary to his point. See McGarity, *supra* note 61, at 463-64 (noting that although notions of checks and balances will still play role, Congress has power to ensure that President will fulfill his duty regarding faithful execution of laws). Because the language of articles I and II is cryptic, one either resorts to reading additional meanings into it or to a checks and balances approach. See Strauss & Sunstein, *supra* note 54, at 197-200 (examining constitutional basis for executive power); Strauss, *supra* note 3, at 616-21 (discussing checks and balances approach to agency regulation). In addition, McGarity's emphasis on congressional power under the necessary and proper clause seems stronger than case law supports. See McGarity, *supra*, at 476-78 (arguing that Congress has power under necessary and proper clause to ensure that President does not shirk his duty of faithful execution of laws). His emphasis on congressional power to "turn out the lights," like the President's power to remove, seems to confuse the right to decide question with the right to eliminate a decision maker. See *id.* at 463. This said, I learned far more from McGarity's discussion than I could enlighten it.

66. See Strauss, *Analysis of OMB Oversight Role Misunderstood*, Legal Times, May 27, 1985, at 13, col. 1 (appendix) (discussing ABA section support for various principles regarding executive oversight of federal agency rulemaking). The ABA Section, while endorsing the placement of substantive decisional responsibility in the agencies and disapproving of the displacement of decisions in particular proceedings, finds presidential oversight, including that currently exercised by OMB under Exec. Order Nos. 12,291 and 12,498, to be most appropriate in matters such as those involving several responsible agencies and those of pub-

cure, then it should be timely and full.<sup>67</sup>

I question whether McGarity's recommendation will either surface the pressure or cure it. Oral communications, for example, are to be subsequently recorded and placed on the record. Because all sensitive communications between the White House and the agency will be oral, one has to wonder whether the record later made will carry the emphasis of the original. It is possible to require that all communications on proposed regulations be made in writing, and I would propose this possibility to McGarity as a friendly amendment. I would propose it with more confidence, however, if I felt it would offset the pressure itself. On a decision concerning particulate levels, for example, the agency might be told: (1) "reconsider the economic impact of level X," (2) "the impact of level X is unacceptable," (3) "if you set level X we lose Ohio in the next election," or (4) "set the level at Y." Where the White House controls an agency official's appointments, personnel levels, and budget, to say nothing of his or her tenure, the differences here are semantic. The messages are the same. The result of disclosure will be paperwork that sanitizes the messages to avoid reversible error.

In sum, if the White House is forthrightly deciding the issue, it tells the agency head what to do and fires the agency head if it does not get done. If the White House is only "jawboning," "overseeing," or "socratic dialoguing" the issue, it tells the agency head what it wants done and fires the agency head if it does not get done. The difference escapes me. Disclosed or undisclosed, the White House as "jawboner" is the giant in the play. Disclosure is not likely to change the new decisionmaking in any significant way.

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lic importance involving expression of the President's policy views. *Id.* Were this an insurance contract against improper White House influence, not a single lawyer would sign. The exceptions swallow the rule. One would be hard pressed to find instances of controversial rulemaking that would not, under these criteria, be found appropriate for intervention. These same lawyers might also find the ABA recommendations for disclosure of jawboning, arm-twisting, and whatever else goes on to be less than reassuring. OMB is only required to reveal factual materials introduced into the proceedings and conduit communications from outside interests. It does not disclose any communications from the President. Agency communications to the President are not disclosed until the rulemaking has been completed.

67. It should be noted, however, that to the extent McGarity's recommendations are constitutionally limited, say by privilege, they will be even less effective than this Comment credits them to be. For the continuing confrontation between the Congress and OMB over access to OMB regulatory review information, see *Dingell Again Asks EPA, Other Agencies to Submit OMB Regulatory Agendas to Panel*, [Current Developments] 15 *Env't Rep. No. 51*, at 2241-42 (Apr. 19, 1985) (noting OMB claimed executive privilege when Congressman John Dingell demanded disclosure of agency communications to OMB). It has been suggested, however, that Congress could require disclosure as a condition of presidential oversight. Bruff, *supra* note 59, at 516 (suggesting constitutional executive privilege need not extend beyond precincts of oval office because disclosure would not hamper performance of constitutional presidential duties) (emphasis added).

Bruff takes a more enigmatic approach. After reviewing recent cases, he follows McGarity to disclosure as the remedy.<sup>68</sup> The constitutional analysis here seems to be that, given the President's recent victories in the Supreme Court, it is time for Congress to win one,<sup>69</sup> to rebalance the scales. Disclosure assumed (and its efficacy assumed as well), Bruff then takes a leap to the independent agencies, finding them fair game for the same sort of OMB treatment we have witnessed with the executive agencies. Bruff bases his leap on the recent Court opinions in *Buckley v. Valeo*,<sup>70</sup> *INS v. Chadha*,<sup>71</sup> and *Bowsher v. Synar*.<sup>72</sup> The conclusion of *Humphrey's Executor v. United States*<sup>73</sup> that independent agencies are, constitutionally, exactly that if Congress so establishes them, succumbs rather easily to the dicta of several justices.<sup>74</sup> At the very least, this proposition deserves fuller treatment. Distinctions between *Humphrey's Executor* and the more recent cases cited in the clarity with which Congress has spoken, the nature of the functions delegated, and the policies that support the independence of these functions are available and will have their day in court. For purposes of this discussion, it suffices to say that Bruff's leap to OMB review over the independents is risky and, in the context of the ever-increasing presidential control that he professes to acknowledge, simply counterintuitive. If the White House's reach is the problem, why add to it?

Uneasily, and this is the enigma of the article, Bruff seems to recognize this contradiction and, at his conclusion, offers support for unspecified, additional congressional controls. Just what these controls, also called congressional "monitoring," should include remains a mystery. The article ends, indeed, just as it was getting good. In an earlier version offered to this symposium, Bruff bit the bullet, offering a Congressional Review Office concept, an analogue to OMB, with rulemaking review functions of its own. Whatever its faults, this proposal had the asset of being tangible. The current

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68. Bruff, *supra* note 59, at 516 (concluding disclosure may be necessary to prevent executive oversight from shifting agency decisions to White House).

69. *See id.* at 517 (explaining that because Court has guaranteed that President may appoint and remove executive officers, it can uphold some legislative controls on executive oversight without being said to have precluded supervisory authority commensurate with President's generalized political accountability).

70. 424 U.S. 1 (1976).

71. 462 U.S. 919 (1983).

72. 106 S. Ct. 3181 (1986).

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

74. Indeed, in *Synar* the Court attempted to make clear that it was *not* "casting doubt on the status of independent agencies," and that, while the *Congress* could not take an active role in the removal (i.e. control) of executive officers, limiting the *President's* removal, as with the independents, was a very different matter. *Bowsher v. Synar*, 106 S. Ct. 3181, 3188 n.4 (1986).

article offers nothing in its place. Were Bruff to deny the White House influence problem he would be in error, but the absence of solutions would be understandable. To acknowledge the problem, establish the basis for a congressional response (as a matter of parity, it is Congress' turn to win), and then fail to offer one gets us into the game, but not to the goal.

### III. ALTERNATIVE REMEDIES

*[I]f you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly.*

—OMB Director, James Miller<sup>75</sup>

The McGarity and Bruff proposals are two points on a spectrum of reactions to the New Decisionmaking that includes a new Executive Office,<sup>76</sup> fuller (if unspecified) congressional review,<sup>77</sup> full disclosure of White House influence,<sup>78</sup> moderate disclosure,<sup>79</sup> even more moderate disclosure,<sup>80</sup> and the status quo.<sup>81</sup> As none of these proposals are likely to be acted upon until we have a less influential President or a dramatic, Congress-shocking abuse, there is time to consider others. In that vein, I offer two: the quasi-independent agency, and the presidential veto.

#### A. The Quasi-Independent Agency

*Under E.O. 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulations, thereby encroaching upon the independence and expertise of the EPA . . . . This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers.*

—EDF v. Thomas<sup>82</sup>

The quasi-independent agency concept begins by recognizing

75. *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, 5 REG., Mar.-Apr. 1981, at 22.

76. Olson, *supra* note 6.

77. Bruff, *supra* note 59.

78. McGarity, *supra* note 65.

79. Verkuil, *supra* note 3.

80. Strauss, *supra* note 3.

81. DeMuth & Ginsburg, *supra* note 55.

82. *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986).



that everything about agencies is "quasi." Agencies are said to act quasi-judicially. Indeed, for anyone who has participated in both judicial and administrative hearings, the modifier is well taken. Their legislative functions are an analogy at best, constrained far more than those of a legislature in their scope, their substance, and the procedural requirements of the Administrative Procedure Act.<sup>83</sup> Having accepted all of this quasi in form and function, we need not utilize absolutes in characterizing their activities as "legislative" or "judicial," or on the relationship of a given agency to the President as "independent" or "executive." The fact is that the independent agencies are subject to significant, if indirect, presidential influences.<sup>84</sup> The question is whether executive agencies may be made free, within limits, of those same influences. The answer suggested is that they may, and that an executive agency subject to presidential appointment and removal (as is an "executive agency") but not subject to presidential influence (as is an "independent agency") is an appropriate response to the new decisionmaking.<sup>85</sup>

From a formalistic standpoint, an executive agency that remains quasi-independent may be said to impinge on the President's article II "removal,"<sup>86</sup> "opinions in writing,"<sup>87</sup> and "taking care"<sup>88</sup> powers. Without reploughing the considerable scholarship that surrounds these provisions, none, on their face, authorizes the President to make or influence agency decisions. The removal authority is subject to congressional limitations<sup>89</sup> that may yet extend to agency officials exercising "quasi-legislative" functions.<sup>90</sup> Even were removal

83. Administrative Procedure Act (APA), 5 U.S.C §§ 551-559, 701-706 (1982).

84. See Pertschuk, *Inside Reagan's Federal Trade Commission*, PUBLIC CITIZEN, July-Aug. 1985, at 16 (describing President's considerable impact on Federal Trade Commission); Hamilton, *Just Because It Melts, That Doesn't Mean It's Cheese*, Wash. Post, Apr. 21, 1986, at 6, col. 1 (nat'l weekly ed.) (asserting that under Reagan's influence, Federal Trade Commission has become substantially less active).

85. See *Bowsher v. Synar*, 106 S. Ct. 3181, 3206 (1986) (White, J., dissenting) (arguing that Congress may vest executive authority in officers who are not subject to removal by President). Rather than relying on the term "executive," Justice White offers a balancing test bottomed on the potential for disrupting the President's ability to perform his duties. *Id.* at 3214-15. Whether articulated in this fashion or in another fashion, or left unarticulated as in the majority opinion, all line drawing here will be based on such a balance.

86. U.S. CONST. art. II, § 2, cl. 2.

87. *Id.* cl. 1.

88. *Id.* cl. 3.

89. See *Wiener v. United States*, 357 U.S. 349, 356 (1958) (concluding that neither the Constitution directly or statutes indirectly give President power to remove member of adjudicatory body without cause); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (asserting that President's removal power is not unlimited regarding independent agencies in view of congressional authority to require them to discharge their duties free of executive control and to forbid their removal except for cause during the time fixed for their existence).

90. The removal power over agency official exercising quasi-legislative functions is skirted carefully in each of the Supreme Court's opinions.

held to be an indispensable threat for the President to hold against all executive branch officials, the power to remove (the Watergate prosecutor, for example) is functionally different from the power to influence or decide.<sup>91</sup> On a similar reading, the President's authority to obtain opinions in writing guarantees him access to that information he feels is necessary to make presidential decisions; until the day that requesting advice is made equivalent to giving it, the language travels no further. The President's responsibility to take care that the laws are faithfully executed, coupled with his general executive authority, are the most tenable sources of article II authority precisely because they are the most vague. Taken to their limit, they deny the constitutional basis for any agency in any form to be independent of presidential influence or, for that matter because he is responsible for the faithful execution of all laws, his decisionmaking.<sup>92</sup> These phrases reach farther than any court has gone, and attempts to limit them by distinctions between functions and forms rest more on checks and balances considerations than on article II. For years as a public interest lawyer, I have strained to stretch statutory language to authorize agency action, only to be met by those strict constructionists who because they could not find it in the nouns and verbs have held the authority wanting.<sup>93</sup> I am delighted to welcome these same constructionists to this analysis. From a literal perspective, the barriers to a quasi-independent agency are simply not there.

Checks and balances is, by contrast, an equitable concept. When balance is at stake, the effect of one individual reviewing a few decisions and a separate agency reviewing them all is the difference between a visit and an invasion. The President may want, and indeed need, OMB as his eyes and ears in order to run his government most effectively. At the margin, however, the framers put diversity above efficiency; it is that very degree of efficiency that upsets the balance. OMB is not the President.<sup>94</sup> It is, however, even without

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91. Even so vigorous a proponent of presidential authority as Strauss does not rest his authority on the removal power. See Strauss, *supra* note 3, at 607 n.132 (conceding that presidential removal power stems from implicit authority).

92. For this reason, those who rest the President's case on the "taking care" power are required to challenge the status of the independent agencies. See Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 204 (1986) (arguing article II precludes congressional establishment of agencies beyond executive control).

93. See *Sierra Club v. Kleppe*, 427 U.S. 390, 400-02 (1976) (holding that Department of Interior is not required to prepare impact statement on regional coal development under National Environmental Policy Act); *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 965 (3d Cir. 1984) (holding that EPA is not required under Clean Water Act to regulate discharges from hydroelectric dams as point sources).

94. Indeed, the myth that the President and OMB are synonymous is one of Washington's larger fictions, occasionally revealed as such by an insider. See Hoffman, *Did Deaver Break*

Executive Orders 12,291<sup>95</sup> and 12,498,<sup>96</sup> the most powerful agency in government and its influence over the legislative programs of other agencies must be constitutionally limited.

Which leaves the difficult issue: to say that the President may not "jawbone" all executive agencies is a tall order.<sup>97</sup> Consider, however, the following scenarios from the standpoint of a balanced government in which no one branch emerges as tyrannical and beyond the other two branches' control. Congress authorizes EPA to set levels for a given pollutant. The President, through his intervention and influence, secures levels that are set at 100 parts per million. The President may now sustain these levels against all congressional efforts to change them by his veto, and one-third of one house plus one. The circumstances under which a President would not be able to muster even this minimal support are hard to imagine. He wins his levels. Congress may avoid this result, prospectively, by legislating with increasingly greater specificity, a course of action the new decisionmaking has already forced upon it.<sup>98</sup> But the mistakes and costs of legislation that leave no discretion for agency expertise are obvious.<sup>99</sup> Congress may instead seek to regulate through market mechanisms,<sup>100</sup> accepting, in effect, deregulation. Likewise, it could "turn out the lights" on its own program,<sup>101</sup> deregulating more directly. It could create (in another political climate) new independent regulatory commissions with all of their unwieldy trappings, including the coordination difficulties on even a general level. Or it can capitulate.<sup>102</sup> The President still wins. Consider now EPA as a

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*the Rules?*, Wash. Post, Apr. 14, 1980 at 11, col. 1 (nat'l weekly ed.) (discussing defense by former presidential advisor, Michael Deaver, of alleged lobbying contacts with OMB). This chameleon-like quality of OMB to be both in and out of the White House has allowed it to claim considerable maneuvering room around the APA and other laws. See *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 568 (D.D.C. 1986) (rejecting OMB's contention that neither RCRA or APA gave court jurisdiction to enforce limitations on OMB power found in Exec. Order No. 12,291).

95. See *supra* note 20 and accompanying text (discussing Exec. Order No. 12,191).

96. See *supra* note 21 and accompanying text (discussing Exec. Order No. 12,498).

97. I even lose McGarity on this proposition. See McGarity, *supra* note 61 at 446-63 (arguing that Congress can constitutionally control presidential interference in informal rule-making).

98. See OMB "Meddling" in *Environmental Regulation Makes Congress More Specific*, Lautenberg Says, [Current Developments] 16 Env't Rep. (BNA) No. 51, at 2230 (Apr. 18, 1986).

99. See 130 CONG. REC. S13,812 (daily ed. Oct. 5, 1984) (statement of Sen. Symms) (arguing that extraordinarily complex amendments to Resource Conservation and Recovery Act required Congress to make technical decisions more properly left to EPA); OMB "Meddling" in *Environmental Regulation Makes Congress More Specific*, Lautenberg Says, *supra* note 98, at 2230 (lamenting congressional involvement in administrative minutiae).

100. See Stewart, *Economics, Environment and the Limits of Legal Control*, 9 HARV. ENVTL. L. REV. 1, 9-20 (1985) (arguing in favor of economic-based incentives to achieve policy goals).

101. See McGarity, *supra* note 61, at 463 (contending that Congress is dominant institution in setting and carrying out policy).

102. To be sure, Congress can also jawbone but its leverage over the administrator is

quasi-independent agency. EPA sets levels at 50 ppm. The President does not like them, a situation that is not often likely to occur because the administrator and all of his counterparts and their top-level assistants, are cleared, approved, presidential appointees. The President and his appointees share, at the least, a common philosophy. In the unlikely event a conflict between the agency and the President does occur, the President can always fire the administrator. He can also manipulate the administrator through a variety of less drastic means, ranging from the agency's budget and manpower to the White House guest list. Alternatively, the President can initiate 100 ppm legislation that, given the power of the office, will not be ignored and, if it is, may be ignored only for good reason. Congress, meanwhile, remains removed from the action. Should it not like the President's proposed levels, Congress is still facing a veto, sustainable by one-third of one house plus one. The second scenario is not obviously less balanced and is not out of any branch's control. It is simply less dominated by the President.

The quasi-independent scenario is not foreclosed by *Chadha*, *Buckley*, or *Synar*, each of which removed Congress from executive agency action.<sup>103</sup> *Chadha* does provide direct force, however, for one congressional safeguard that has not surfaced in this debate that is at the heart of the quasi-independent agency concept. While the President nominates agency decision makers, the Senate confirms. Without the confirmation, there is no appointee. One obvious reason for this power is for the Congress to ensure that the appointee is not a crook.<sup>104</sup> Another reason for Senate confirmation is to have some confidence that this individual will, in his or her decisions, follow congressional directives. Indeed, this inquiry is the focus of modern confirmation hearings which often feature detailed inquiries into how nominees would react to the decisions they are likely to

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considerably less than that of the President; in a jawboning context, the President will get his way.

103. The findings in *Synar* and *Buckley* that the actions in question, none of which were "quasi-legislative," were improper for Congress to influence through appointment or removal did not address the question of whether the functions performed were to be independent of the President. *Bowsher v. Synar*, 106 S. Ct. 3181, 3189-94 (1986); *Buckley v. Valeo*, 424 U.S. 1, 124-42 (1976). Neither did *Chadha*, which invalidated a one-house veto of agency action because it infringed on the President's veto authority and undermined the concept of a quasi-independent agency. *INS v. Chadha*, 462 U.S. 919, 951-59 (1983). Indeed, were balance and symmetry the goal, this opinion would support distancing the President from agency action as well.

104. See THE FEDERALIST No. 76, at 454 (A. Hamilton) (C. Rossiter ed. 1961) (asserting senatorial confirmation will prevent presidential nomination of "unfit characters"). See generally THE FEDERALIST No. 69, at 415 (A. Hamilton) (C. Rossiter ed. 1961) (comparing United States Constitution to British system, in which King was not required to secure parliamentary confirmation for appointments).

face. Although the Senate may not always exercise this right,<sup>105</sup> it always exists<sup>106</sup> as one of those nitpicking checks and balances that are vital to the Constitution's fabric.<sup>107</sup> An agency decision by the President or any other White House official, in lieu of the confirmed decision maker, circumvents the Senate's veto in a fashion similar to the circumvention of the President's veto in *Chadha*. It is no answer to White House intervention, as occasionally offered by OMB, that the statute permitted the results obtained.<sup>108</sup> It is Congress' right to know and approve the person who is making those decisions and carrying out its programs. This right should not be ignored.

The quasi-independent agency represents a compromise. It recognizes a sphere of presidential influence greater than that over the independents, and less than that over the White House staff. There is something for the President in the controls he retains. There is some assurance for the Congress and the public in a decision based on facts and expertise. Congress remains removed, and I would consider a friendly amendment restricting communications from members of Congress on pending rulemakings in the same fashion, for similar if less compelling reasons.<sup>109</sup> At bottom, jawboning is jawbreaking. It decides the issue as directly as the President's recent decision, against the conclusions of the Administrator of EPA to whom Congress had entrusted the decision not to act on acid rain.<sup>110</sup> Congress has the authority to create an organism with the advantages of both executive and independent agencies.<sup>111</sup> The courts would do well to recognize them as well as the integrity of their decisionmaking processes.

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105. See *supra* note 15 (discussing presidential appointees foreseeably inimical to their respective agencies).

106. See *Nomination of William D. Ruckelshaus to be Adm'r of the Environmental Protection Agency: Hearings Before the Senate Comm. on Env't and Public Works*, 98th Cong., 1st Sess. 89 (1983) (statement of William D. Ruckelshaus) (likening first day of confirmation hearings to lynching); *Safety Nominee Is Rejected*, *Times-Picayune/States-Item*, June 19, 1986, at A-7, col. 1 (reporting recent Senate rejection of presidential nominee for Occupational Safety and Health Review Commission).

107. The description is from the District of Columbia Court of Appeals opinion in *Bowsher v. Synar*, 626 F. Supp. 1374, 1394-95 (D.D.C.), *aff'd sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

108. See *Bedell Says OMB Uses Pressure to Shape Environment Rulemaking; Thomas Sees Budget Office Role as Legitimate But He Says He Has Final Say*, *supra* note 4, at 2050 (noting that although no agency head would ignore OMB's advice, OMB properly leaves ultimate decisions to agency determination).

109. Agency officials are, *inter alia*, not beholden to congressmen for their tenure.

110. See *supra* note 18 (reporting that EPA administrators' recommendations to President were strongly opposed and delayed by OMB).

111. The argument can be made that, under the Clean Air Act for example, it has already done so. The Act provides for the referral of certain regulatory impasses to the President. Clean Air Act, 42 U.S.C. §§ 7401-7642, 7475(D)(2)(ii)(1982). This provision clearly implies that other decisionmaking was not to run his way.

### B. *The Presidential Veto*

It may seem surprising, following the above, to suggest a presidential veto of agency rulemaking as another alternative to the new decisionmaking. It is the very opposite of the rationale currently offered, with some disingenuousness, by OMB that it is only "dialoguing" the decision and that the final say rests with the agency.<sup>112</sup> This alternative grants the President the final say, but removes him and his bureaucracy from the jawboning game.<sup>113</sup>

We start by recognizing that frankly what is going on in the agencies is legislation.<sup>114</sup> The "quasi" label is abandoned. Agency rulemakings accomplish what the legislature could have done, sometimes does, and sometimes delegates. The President has a constitutional right to veto legislation. This right cannot be alienated by legislation, by his signature, or by abdication. He remains empowered to exercise it over the legislative actions of executive agencies and, for that matter, the independent agencies. The President's veto power does not empower him to intervene. A veto carries no necessary right of participation. It is, by definition, a check on the powers of another body.<sup>115</sup> It is the final act, and constitutionally his.

I offer this alternative as preferable to the new (approved) decisionmaking. If jawboning by someone who holds your purse and your tenure in his hip pocket is not decisionmaking, then it is the next best thing. It is also an affirmative power to decide, and once the decision has been coerced, it is all but immutable (one-third of one house plus one). It is also a secret power, and when the pres-

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112. Neither can the similar echoes of current agency officials, such as those of the EPA administrators, be entirely relied upon. See *supra* note 18 (discussing Cabinet councils obstruction of agency decisions). An administrator would hardly be expected to say otherwise and still keep his job.

113. Although an explicit presidential veto of agency rulemaking (as opposed to OMB de facto controls) would be a novelty in federal law, several state statutes provide that agency rules do not become effective until they are signed by the governor. See, e.g., HAW. REV. STAT. § 91-3(c) (1976 & Supp. 1981); NEB. REV. STAT. § 84-908 (1976 & Supp. 1980); WYO. STAT. § 28-9-106 (1977). Other states authorize the governor to veto or rescind agency rules. E.g., IND. CODE ANN. § 4-22-2-5 (Burns Supp. 1980); IOWA CODE ANN. § 17A.4(6) (Supp. 1986); LA. REV. STAT. ANN. § 49:970 (West Supp. 1982); MO. ANN. STAT. § 536.022 (Vernon Supp. 1982); NEV. REV. STAT. § 416.060 (1979). See generally Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982) (summarizing state laws authorizing gubernatorial veto or requiring gubernatorial approval).

114. This approach is similar to that in the concurring opinion of Justices Stevens and Marshall in *Synar*, which rests on the "legislative" nature of the functions performed by at least the Comptroller General. The Justices prescribe a drastic remedy: passage by Congress and presentment to the President are required for all such "legislative" acts. *Bowsher v. Synar*, 106 S. Ct. 3181, 3194 (1986). The remedy proposed in this article is more modest: agency passage and, in effect, presentment for the opportunity of a presidential veto.

115. A presidential veto serves to check the power of the legislature. The President's controls over Congress are obviously weaker than his controls over executive agencies.

sure is on there are few disclosure methods that will surface its extra-statutory influences, confine the decision to statutory bounds, or penetrate a post hoc record, particularly under today's judicial review standards.

The veto's advantages are that it does not initiate. It is a lesser, negative power. The agency goes back and tries again. Equally important, it is not scot-free. The person who is finally identifiable is the one elected official who should be.

#### CONCLUSION

The problem exists. The most predictable response to any remedial proposals will be that they exaggerate the problem. We now have in writing and in motion, however, a process that not only controls agency decisions but that will soon make these controls a side-show to the main event: anonymously and politically-sanitized agendas for government thought. Were I defending the *need* for the President to extend such unprecedented influence over the federal establishment, I would advise him: stop acting so strong.<sup>116</sup> In fact, the new decisionmaking is overkill. The balance has shifted and it is time to adjust.

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116. See *supra* notes 9-19 and accompanying text (discussing President's efforts to control executive agencies). While interpretation of the Constitution should not depend upon the power of particular incumbents, the Reagan administration has demonstrated that, as an *institution*, the presidency is not inherently weak or imperiled.