STATEMENT

of

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and

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PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF

before the

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

of the

COMMITTEE ON ENERGY AND COMMERCE

of the

UNITED STATES HOUSE OF REPRESENTATIVES

(June 18, 1981)

Mr. Chairman and Members of the Subcommittee: I am privileged to appear here today, because I regard these hearings as reflecting, at least in part, the importance of the President's program of regulatory relief.

As you know, President Reagan has made regulatory relief one of the cornerstones of his program for economic recovery. This recovery program is designed to reduce inflation, create employment opportunities, encourage economic growth, and increase productivity. It has four complementary components:

- o A stringent budget policy, to reduce the rate of growth of federal spending;

- o An incentive tax policy, to increase after-tax returns and thus promote savings, work, and investment;
- o A regulatory relief policy, to eliminate unnecessary regulations and improve the performance of the regulatory agencies; and
- o A stable monetary policy, to reduce uncertainty and bring inflation under control.

Let me now address in more detail the third item in the President's program - regulatory relief.

Presidential Task Force on Regulatory Relief

On January 22nd, President Reagan established a Cabinet-level Task Force on Regulatory Relief. It is chaired by Vice President Bush and includes as members: Treasury Secretary Regan, Attorney General Smith, Commerce Secretary Baldrige, Labor Secretary Donovan, Office of Management and Budget (OMB) Director Stockman, Assistant to the President for Policy Development Anderson, and Council of Economic Advisers Chairman Weidenbaum. I serve as Executive Director of the Task Force; Rich Williamson, Assistant to the President for Intergovernmental Affairs, serves as Associate Director; and C. Boyden Gray, Counsel to the Vice President, also serves as Counsel to the Task Force.

The Task Force's basic charter is to:

- o Review major proposals by executive-branch regulatory agencies, especially those proposals that would appear to have a major policy significance or where there is overlapping jurisdiction among agencies;

- Assess executive-branch regulations already on the books, especially those that are particularly burdensome to the national economy or to key industrial sectors; and
- Oversee the development of legislative proposals in response to Congressional timetables, and, more importantly, to codify the President's views on the appropriate role and objectives of regulatory agencies.

The President's action in creating the Task Force clearly established regulatory oversight at the highest levels.

Executive Order 12291

To help carry out his program of regulatory relief, on February 17th, President Reagan signed Executive Order 12291, "Federal Regulation." That Order accomplishes three major tasks. First, it establishes the pre-eminence of the Task Force in matters involving regulatory relief.

Second, it sets forth the President's regulatory principles. These are:

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

- 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 regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

According to the terms of the Executive Order, agencies are expected to adhere to these principles to the extent permitted by law.

Third, the Order establishes a review mechanism for assuring that agency actions comport with the President's regulatory principles. This review process is carried out under the overall direction of the Presidential Task Force on Regulatory Relief, with major responsibility for implementation residing with the Director of OMB.

Under the terms of the Executive Order, executive-branch agencies must to submit all proposed and final regulations pursuant to informal rulemakings to OMB prior to publication in the Federal Register. (Although independent regulatory agencies are not formally covered by the Executive Order, on March 25, the Vice President requested them to comply voluntarily with certain of its basic components.) OMB then reviews these rules and reports to the agencies whether they comport with the President's regulatory principles. To aid in the review and consultation process, and to assure that agencies have a proper factual basis on which to make their most important regulatory decisions,

agencies are required to prepare Regulatory Impact Analyses (RIA's) for each rule that the agency or OMB has determined to be "major" according to criteria established in the Order. Any disagreement with OMB's views about the conformance of a proposed or final rule with the President's regulatory principles, will be taken up by the Task Force, or, if necessary, the President. The agencies, however, retain authority over the final decision, pursuant to their governing statutes.

Implementation of E.O. 12291

Let me now describe briefly our implementation of the Executive Order.

As you may know, under the Paperwork Reduction Act of 1980 (P.L. 96-511), OMB's Office of Information and Regulatory Affairs--which I head--is responsible for reviewing and approving Federal information reporting requirements. Because this task and OMB's task under the Executive Order are highly complementary, OMB has integrated its paperwork and regulation reviews within my office. Thus, my office reviews proposed regulations simultaneously for both their reporting (i.e., "paperwork") requirements and for the degree to which they comport with the President's regulatory principles. And, consistent with the goals of the Paperwork Act and the Executive Order, we have established a computerized tracking service to avoid delay and minimize administrative burdens on the agencies.

Between February 17th (i.e., the date the Order was signed) and June 10th, my office reviewed 881 proposed or final regulations

submitted by the agencies. As shown in Attachment A, 764 of these submissions - 87.6 percent - were judged to be consistent with the President's regulatory principles in the form submitted. An additional 36 submissions were judged to comport with the President's principles after slight changes were made by the agencies reflecting consultations with OMB. Thus, nearly 91 percent of the regulations submitted thus far have gone forward, and in a form consistent with the President's regulatory principles.

On the other hand, 26 submissions were withdrawn by the agencies following consultations with OMB, and 55 were returned to the agencies for their further consideration. In some cases agencies have concluded that the submissions were not needed and thus no further action is contemplated. In most of these cases, however, the agencies will be making new submissions based on our consultations and perhaps those of other interested parties.

Let me add a few other statistics with regard to the review process. As shown in Attachment A, some 846 of the 881 submissions received were reviewed within the initial time frames set forth in the Executive Order; that's 96 percent. In only 35 cases - 4.0 percent - was the review period extended. Moreover, as shown in Attachment B, our average turn-around time for agency submissions is nine days. That, I believe, is a good record, one that reflects the admonitions of the Vice President and the Director that we respond expeditiously to agency submissions and not create "another layer of bureaucracy and red tape."

The Executive Order in Context

Mr. Chairman and Members of the Subcommittee, let me now turn to what I gather are some of your principal concerns, and those are the openness and legality of the process.

I believe that it is important to place this Executive Order in its proper context. Each of the last three Presidents has issued executive orders requiring agencies to analyze carefully the economic consequences of their major regulatory proposals. On November 27, 1974, President Ford issued Executive Order 11821, entitled "Inflation Impact Statements." He subsequently extended that Executive Order by signing Executive Order 11949 and giving the program a new name: "Economic Impact Statements."

President Ford's program envisioned a largely advisory oversight role by OMB and the Council on Wage and Price Stability. Responsibility for carrying out the requirements of the Order was left to the agencies. As a consequence, the impact was uneven--some agencies produced excellent analyses, and others basically ignored the requirements. Often, analyses were strong in certain areas, usually with respect to costs, and weak in others, usually in assessing benefits and identifying alternatives. The analyses often were after-the-fact justifications for actions already contemplated rather than being a component part of the regulatory decisionmaking process.

On March 23, 1978, less than three months after the expiration of President Ford's Executive Order, and while some of the analyses were still being completed under that Order, President Carter issued Executive Order 12044. Like its predecessors, this Order required agencies to evaluate the economic consequences of their

proposed regulations. Executive Order 12044 also expressly provided that "[n]othing in this Order shall be considered to supersede existing statutory obligations governing rulemaking." This provision corresponded to the provision in President Ford's Orders that their requirements were to be followed "to the extent permitted by law." In a similar vein, President Reagan's Executive Order 12291 imposes requirements on agencies only "to the extent permitted by law" and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order."

The limited application of all three Executive Orders is a crucial point, one that ensures their legality and the legality of actions pursuant to them. If a statute expressly or by necessary implication prohibits the consideration of benefits or costs or alternatives by an agency during its rulemaking, then those provisions of Executive Order 12291 imposing them would not apply. If a statute or a court order establishes a date for a rulemaking action, then Executive Order 12291 can't delay that action. In other words, if Congress or the Courts have spoken on a matter, then the Executive Order process will conform to that expression, not contradict it.

I hasten to emphasize, however, that there are substantial differences between President Reagan's Executive Order and those of his predecessors. Specifically note:

- The spelling out of regulatory principles which the agencies must follow to the extent permitted by law;

- The creation of the Presidential Task Force on Regulatory Relief and the role it formally plays in the regulatory oversight process; and
- The requirement that all proposed and final rules be reviewed by the Director of OMB, under the overall guidance of the Presidential Task Force.

In my view, these differences are key to the success of the President's program. Moreover, I believe that these and other features of the Executive Order and its implementation are consonant with this Subcommittee's concern for openness and fairness--a concern I should emphasize is shared by the Administration.

Let me be more specific. We believe that the Executive Order and the procedures we have established to implement it comport with relevant legal interpretations, and with the need for maintaining openness while at the same time preserving the extraordinarily important role the President must play in giving policy guidance to those who are subordinate to him and whose work is ultimately his responsibility.

The relevant law is quite clear. The Court of Appeals for the District of Columbia recently rejected a challenge to an Environmental Protection Agency rule based in part upon off-the-record contacts with the rulemaker by the public, by representatives of the President, and by Members of Congress. Judge Wald's analysis in Sierra Club v. Costle is worth quoting:

> . . . The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable

> from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. 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. . .

Moreover, it is important to bear in mind that whether the advice given to the agencies is by the President or by his advisers, the ultimate regulatory decision must stand or fall on the merits as reflected in the record. Again, quoting Judge Wald:

> . . . The purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting. After all, any rule issued here with or without White House assistance must have the requisite <u>factual support</u> in the rulemaking record, and under this particular statute the Administrator may not base the rule in whole or in part on any "<u>data or information</u>" which is not in the record, no matter what the source. The courts will monitor all this, but they need not be omniscient to perform their role effectively. Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power. In sum, we find that the existence of intra-Executive Branch meetings during the post-comment period, and the failure to docket one such meeting involving the President, violated neither the procedures mandated by the Clean Air Act nor due process.

Consistent with the opinion of Judge Wald, and arguably going much further than the law requires, we have established a set of guidelines to govern our contacts with the interested public and with the agencies. A copy of these guidelines, promulgated by Director Stockman on June 13th, is found at Attachment C. As you can see, the basic principle is that any factual information given to OMB and the Task Force should also be transmitted to the agencies to be included in their rulemaking files. Furthermore, any time we procure facts or perform analyses based on such facts which impact on our consultations with the agencies, we also transmit such information for inclusion in the record.

Too often in the past, the Executive Office of the President has acted as a conduit for outside groups in back door "consultations" with agencies, sometimes using cost data and other information not in the record to influence decisionmakers. Our new Executive Order, together with new ex parte guidelines, establishes a formal process for assuring that we will not act as a conduit and that such consultations will be based on what is in the public record. Mr. Chairman, I consider that one of the major accomplishments of this program.

Concluding Remarks

Mr. Chairman and Members of the Subcommittee: I want to conclude by emphasizing that we are engaged in an effort that is extraordinarily important and are approaching the task in a manner that is legal, equitable, and consistent with the best professional thinking on the issue.

Regulatory relief just has to be accomplished if the American people are to realize the full potential of the President's program of economic recovery.

The method the President has chosen to address the problem of excessive and inefficient regulation reflects lessons from prior experience, but at the same time constitutes a break from the past and incorporates changes that should mean the difference between failure and success.

The President's approach also reflects current legal and policy opinion. The Executive Order and our implementation of it has been reviewed by the Department of Justice's Office of Legal Counsel, by OMB Counsel, and by White House Counsel. It has been reviewed and analyzed by the private bar. And, in most of its salient characteristics, it tracks closely with the major regulatory reform proposasl now moving through the Congress (i.e., H.R. 746 and S. 1080).

Efforts to reform regulation are nothing new. But a commitment on this scale--by the President, by the agencies, and by the Congress--is unprecedented. In my opinion, a successful effort will require bold, and perhaps even controversial, action. We stand ready to explain our program and defend it where necessary. We will alter our approach when this makes sense. But we will not be deterred from the task at hand.

Thank you very much.

Regulations Reviewed by OMB under E.O. 12291: Recommendation and Review Period, by Agency: February 17-June 10, 1981.

Agency	Total Regulations	Recommendation: Consistent with E.O. As Submitted	Recommendation: Consistent with E.O. With minor changes after consultation	Recommendation: Inconsistent with E.O. Withdrawn by Agency	Recommendation: Inconsistent with E.O. Returned to Agency	Review Period: within E.O. Time Period	Review Period: Review Extended
TOTAL	881	764	36	26	55	846	35
Percent	*100.0*	*86.7*	*4.1*	*3.0*	*6.2*	*96.0*	*4.0*
DEPARTMENTS							
Agriculture	134	133	1	-	-	126	8
Commerce	53	38	3	10	2	52	1
Defense	1	1	-	-	-	1	-
Education	40	40	-	-	-	40	-
Energy	22	15	6	-	1	21	1
Health & Human Svcs.	20	12	2	-	6	20	-
Housing & Urban Devel.	40	11	-	-	29	40	-
Interior	28	22	4	1	1	27	1
Justice	26	23	-	1	2	25	1
Labor	37	36	1	-	-	37	-
State	5	4	-	1	-	5	-

Regulations Reviewed by OMB under E.O. 12291: Recommendation and Review Period, by Agency
February 17-June 10, 1981, continued

Agency	Total Regulations	Recommendation: Consistent with E.O. As Submitted	Recommendation: Consistent with E.O. With minor changes after consultation	Recommendation: Inconsistent with E.O. Withdrawn by Agency	Recommendation: Inconsistent with E.O. Returned to Agency	Review Period: within E.O. Time Period	Review Period: Review Extended Extended
DEPARTMENTS							
Tranportation	139	129	6	-	4	135	4
Treasury	5	5	-	-	-	5	-
AGENCIES							
Committee for Purchase From the Blind & Other Severely Handicapped	1	1	-	-	-	1	-
Community Services Admin.	1	1	-	-	-	1	-
Environmental Protection Agency	242	222	7	7	6	229	13
Federal Emergency Mgmt. Agency	5	3	-	1	1	4	1

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Agency	Total Regulations	Recommendation				Review Period	
		Consistent with E.O.		Inconsistent with E.O.			
		As Submitted	With minor changes after consultation	Withdrawn by Agency	Returned to Agency	within E.O. Time Period	Review Extended Extended
AGENCIES							
General Services Admin.	13	12	1	-	-	11	2
U. S. Metric Board	3	1	-	2	-	3	-
Nat. Aeronautices & Space Administration	2	1	-	1	-	2	-
Nat. Foundation on the Humanities	5	1	1	-	3	2	3
Office of the Federal Inspector for the Alaska Natural Gas Transp.	4	2	2	-	-	4	-
Office of Personnel Mgmt.	13	12	-	1	-	13	-
Panama Canal Comm.	1	-	-	1	-	1	-
Small Business Admin.	5	3	2	-	-	5	-
Veterans Admin.	36	36	-	-	-	36	-

Regulations Reviewed by OMB under E.O. 12291: Average Review Period, by Class of Rule: February 17-June 10, 1981

Class of Rule	Executive Order Section	Executive Order Days Allowed	Number of Rules	Average Review Period
TOTAL	N/A	N/A	881	9
1. Major rule to be published as notice of proposed rulemaking	3(c)(2)	60	1	8
2. Major rule to be published as final rule for which no notice of proposed rulemaking was published	3(c)(2)	60	6	8
3. Major rule to be published as final and for which a notice of proposed rulemaking was published	3(c)(1)	30	2	6
4. Proposed or final nonmajor rule	3(c)(3)	10	693	8
B. Report on final rule(s) already published for which effective date(s) will not be postponed	7(b)	15	74	8
C. Report on final rule(s) already published that will take effect as interim rule(s) while being reconsidered	7(d)	15	7	3

Regulations Reviewed by OMB under E.O. 12291: Average Review Period, by Class of Rule: February 17-June 10, 1981, continued

Class of Rule	Executive Order Section	Executive Order Days Allowed	Number of Rules	Average Review Period
D. Report on pending proposals which will be promulgated as final rule(s) but have not been considered under the terms of the Order	7(f)	30	62	17
E. Report on emergency regulations(s)	8(a)(1)	N/A	33	6
F. Report on rule(s) for which consideration or reconsideration under the E.O. would conflict with statutory judicial deadlines	8(a)(2)	N/A	3	10