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Commentary [FNa]

**1059** OMB INTERFERENCE WITH AGENCY RULEMAKING: THE WRONG WAY TO WRITE A REGULATION

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If you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly.
— James C. Miller III, the first head of the Reagan Administration's Office of Information and Regulatory Affairs. [FN1]

Over the last decade, the Office of Management and Budget ("OMB") has played a greater and greater role in the issuance of agency regulations. Both litigants and commentators have raised substantial questions as to the legality and desirability of OMB's role, especially with respect to its attempts to alter the outcome of particular rulemaking proceedings. Although both OMB and the agencies steadfastly insist that the final decisions are those of the agency alone, there is little doubt that Mr. Miller's analysis of the situation is correct—even though the signature may be that of the executive branch official designated by statute, the power to decide whether and in what form a regulation will be issued resides at OMB. [FN2]

This Commentary focuses not on the legality of this practice, but on its wisdom. After briefly reviewing the history of the centralization of control of agency rulemaking and describing how OMB now runs the rulemaking process from start to finish, I will argue that whatever theoretical legitimacy there may be for OMB involvement in the rulemaking process, its dominance under the present system is unwarranted. Congress should eliminate OMB's involvement in the *1060* rulemaking process; and until that occurs, the President, in the interest of fairness and sensible management, should impose restrictions on OMB that eliminate the worst abuses.

I. A LITTLE HISTORY

To understand how a President, who campaigned in part on his abhorrence of centralized power, came to place the entire federal regulatory process under the control of a single office, it is necessary to review briefly the origins of the urge to centralize and control agency action. Throughout the late 1960s and early 1970s, Congress enacted comprehensive statutes creating new agencies, granting new powers, and expanding existing agency authority to provide greater protection for the environment, workers, consumers, and the general public. These statutes, for the most part, required agencies to enforce their broad mandates by issuing prospective rules, instead of giving them the choice to proceed by adjudication. [FN3] By insisting on rulemaking, Congress sought to ensure greater public participation, examination of problems as a whole, added flexibility for the phasing in of new requirements, and the efficient concentration of the resources of both the agency and the pub-
lic in a single proceeding.

Translating Congress's broad mandates into a comprehensive and workable regulatory scheme that was satisfactory to the many interests affected proved difficult. In the first place, the regulated industries quickly realized what some of them had known all along: there were serious problems that Congress sought to correct, and fixing them properly was sometimes quite expensive. In some cases, there were gaps in Congress's knowledge of the extent of the problems, and in other instances, the costs of regulation were not adequately considered. Added to these difficulties was the fact that the economy failed to grow as rapidly as some had expected, which made the costs of regulation more difficult for industry to absorb.

In addition, at least at the beginning, there was little coordination among agencies. Agencies with information and potentially differing views failed to participate in the rulemaking process, either because they were not informed of the proceedings or because they did not consider commenting on rulemaking by other agencies to be part of their mission. Furthermore, real problems arose because of conflicting statutes, overlapping jurisdictions, and Congress's inability to predict new problems or to arm agencies with the tools needed to handle *1061 them. Not surprisingly, there arose a feeling, often fostered by those who opposed the regulatory legislation in the first place, that the agencies had run amuck and were not doing the jobs that Congress thought it had assigned them. The charge was that many agencies were administering their laws with no consideration of other interests or the economic effect of their decisions. [FN4]

Inevitably, some agencies made mistakes, most of which were cured, either by judicial review or congressional oversight. Most observers agreed that the rulemaking process needed better coordination. But for some critics, improved coordination was not enough. They sought, and eventually obtained, increased supervision and centralization of executive agency rulemaking, culminating with OMB's complete dominance of the rulemaking process under the Reagan Administration. [FN5]

The process began under President Nixon with his so-called 'Quality of Life Review,' [FN6] and was followed by President Ford's requirement that agencies consider the inflationary impact of major rulemaking proposals. [FN7] Under President Carter the process of centralization continued, with the establishment of a Regulatory Analysis Review Group within the White House and the requirement of a detailed regulatory analysis of every 'major' rule before it was issued. [FN8] In addition the Administration also supported the Paperwork Reduction Act of 1980, under which the OMB gained greater control over the *1062 ability of all agencies, including the independents, to gather information through surveys and to impose recordkeeping and reporting requirements. [FN9] Each of these changes was a step toward greater centralization and particularly toward insuring a greater decisional role for persons outside the agency, including various economic advisers in the White House. Yet with very few exceptions—the cotton dust rule at the Department of Labor being one [FN10]—the ultimate policy decisions remained both legally and practically in the hands of the individual agencies.

When the Reagan Administration took office, it recognized that White House control over administrative agencies was not yet complete. Therefore, one of its first acts was to issue Executive Order 12,291, which dramatically changed the relation between the agencies and OMB. [FN11] First, the Order requires that agencies promulgate only those regulations that are the product of cost-benefit, least-cost analysis, [FN12] which all persons involved understand as meaning, 'you can still regulate, but only as a last resort.' [FN13] Second, the Order authorizes OMB to review virtually all proposed rules for consistency with the substantive aims of the Executive Order before an agency can even ask for public comment on the proposal. [FN14] Finally, at the conclusion of the rulemaking process, the matter is sent once again to OMB, which may delay issuance of the final rule until
the agency has considered and responded to OMB's views. [FN15]

In one sense, Executive Order 12,291 is merely an extension of the prior system of control over agency rulemaking. In another sense, however, the Order creates a very different system, because the professed aim of this Administration is to cut back significantly, if not *1063 actually to destroy, the regulatory system established by Congress. The Administration believes that it has a mandate to do so, despite public opinion polls showing the contrary, and it has proceeded under that assumption. The difficulty with its position is that the basic laws have not been amended, and to the extent that the Administration has tried the legislative route to bring about change in the basic federal regulatory framework, it has not succeeded. [FN16] It is one thing for the President to use OMB supervision of executive agencies to coordinate the issuance of agency regulations so that they are consistent with congressional statutes; but it is quite another to use the system of OMB control to frustrate or dismantle the very regulatory scheme enacted by Congress and reaffirmed over the Administration's legislative efforts. [FN17]

In January 1985, just before the start of the President's second term, the President issued Executive Order 12,498, which created a new type of OMB control. [FN18] Its principal feature is the implementation of what its supporters might characterize as an “early warning system,” which requires agencies to notify OMB virtually as soon as an idea for a regulation is conceived, and to obtain OMB approval before undertaking any significant steps. [FN19] The means chosen to give teeth to the Order are found in an OMB Bulletin, issued six days after the Order, which requires detailed submissions to justify all significant information gathering and research regarding a problem, even when the agency may only suspect that a problem exists and simply wants to determine whether any federal action is needed. [FN20] The stated purpose of the Order is to provide for better planning and better allocation of resources in accordance with the President's program. [FN21] However, there are others who think its purpose is to stop agencies from creating a record from which no reasonable person could refuse to issue some ameliorative rule.

*1064 II. THE GOOD AND THE BAD

I do not dispute that OMB can perform some useful functions in the rulemaking process. Its role in coordinating related proceedings between agencies and in assuring that relevant scientific information, cost data, and alternative approaches are shared between agencies, are entirely proper. And to the extent that OMB review can help ensure that agencies give careful consideration to the principal comments submitted in a rulemaking, that is also an appropriate goal. Similarly, it is proper for OMB to insist that agencies take a hard look at the necessity for a rule, provided OMB does so in an evenhanded manner. [FN22]

Some of the functions performed by OMB under Executive Order 12,498 can also be valuable. No sensible person can be opposed to planning or to allocating resources meaningfully in order to insure that the most serious problems receive attention first. Similarly, if the Order were merely intended to prevent agencies from going too far down the road and committing themselves to solve problems for which they lack the requisite money, personnel, or legal authority, it would be unobjectionable.

In practice, however, neither Executive Order is being used to further any of these theoretically beneficial ends. Rather, as described below, they operate in a manner inconsistent with the basic principles underlying informal rulemaking. Contrary to the ostensible aim of the original Executive Order, the system of OMB control imposes costly delays that are paid for through the decreased health and safety of the American public. This system also places the ultimate rulemaking decisions in the hands of OMB personnel who are neither competent in
the substantive areas of regulation, nor accountable to Congress or the electorate in any meaningful sense. In addition, the entire process operates in an atmosphere of secrecy and insulation from public debate that makes a mockery of the system of open participation embodied in the Administrative Procedure Act (APA). *1065 Finally, the new Executive Order allows OMB to cut off investigations before they even begin, making it nearly impossible to attack OMB's decision that a potential rule is 'unnecessary.'

The Administration has principally used the system of OMB review created by the Executive Orders to implement a myopic vision of the regulatory process which places the elimination of cost to in dustry above all other considerations. In doing so, however, the Administration has imposed a significant price on the public resulting from the delay it causes in adoption of needed protections. While OMB pondered the validity of a proposed rule, or the agency's responses to public comments, the failure to issue health and safety rules is certain to mean deaths and injuries that could be avoided.

Because of their fear of negative OMB reaction, agencies have become increasingly defensive about their rules. As a result, they have often added a third stage to the rulemaking process—an advance notice of proposed rulemaking that solicits comments on a general problem but proposes no solution. Although such a step may be sensible for a few particularly complex problems, it is becoming increasingly routine and thus adds a further layer of delay onto every rulemaking effort. [FN23] It is extremely difficult to measure the impact that delays of six months, a year, two years, or even more may have on the health and safety of the American people. What is clear, however, is that such delay represents a significant and potentially dangerous cost to society. [FN24]

*1066 Although insisting on least-cost solutions for industry, the Administration's program produces greatest-cost solutions for government. In deciding whether to undertake the elaborate regulatory analyses required by the first Executive Order, there is no indication that the Administration considered a cost-benefit analysis of the process—even though the costs of the documents required by the Order have been estimated at several hundred thousand dollars each. [FN25] Similarly, the vast amount of additional resources spent in justifying proposed regulations to OMB, as well as in obtaining the necessary OMB clearance to undertake the studies needed to decide whether to begin work on a problem in earnest, are all burdens on the federal treasury, yet there is no indication that these costs have been balanced against the benefits to be derived from this complex labyrinth of OMB overlay.

A third major difficulty with OMB interference is that the people at OMB who give 'thumbs up' or 'thumbs down' lack the substantive backgrounds to make intelligent judgments. Their job is not simply to ask questions and require that agencies answer them; rather, the desk officers who have principal responsibility for reviewing agency rules decide for themselves what is the 'proper answer.' That OMB is not simply asking questions, but demanding specific answer, is particularly troubling because the issues that OMB reviews often involve scientific determinations. For instance, solely as a result of OMB's overruling the Department of Labor, the short-term exposure limitation for the deadly gas ethylene oxide was deleted from a final OSHA standard, despite the overwhelming technical support in the record and the concurrence of everyone at the Department of Labor who reviewed the matter that such a limitation was necessary. [FN26] Similarly, for many years the Food and Drug Administration has been trying to determine whether the ingredients in currently marketed over-the-counter drugs are generally recognized as safe and effective, as required by the governing statute. [FN27] Yet OMB is now reviewing each such determination, even though virtually all of its reviewing staff are economists, lawyers, or public policy analysts, not scientists, pharmacologists, or doctors.

*1067 It is one thing for OMB to play the role of institutional skeptic, questioning an agency in order to be
sure that it has considered matters thoroughly. It is quite another for it to second-guess technical decisions made by career personnel, let alone those of Cabinet officers or other agency heads confirmed by the Senate. In addition to their lack of expertise to decide the many scientific and technical issues which arise, the group at OMB working on rules is extremely small and does not have the time or budget to review most agency decisions on any rational basis.

Supporters of OMB control of the rulemaking process argue that the concentration of decision-making power in the hands of OMB personnel is necessary to insure accountability to the electorate. Most of what OMB is doing, however, has little or nothing to do with large policy issues, except in the crudest sense that the policy of this Administration is to say no to all regulations. However, it is not the President or any other elected official, nor even anyone appointed with the advice and consent of the Senate, who is making these decisions. Therefore, if it is accountability that is the basis for increased control, a system that allows desk officers to overrule Cabinet officials cannot meet that test.

The fourth fundamental difficulty with the review process is that it operates in secrecy, directly contrary to the principles of the APA. OMB provides information and misinformation to agencies and applies criteria for deciding whether to approve a rule that never appear in the public record and to which no reply is possible. [FN28] While in some cases no reply is necessary, since OMB is principally recycling industry arguments that proved unsuccessful at the agency level, there are times when new reasons for opposing a proposed rule persuade OMB. In these cases the rule's supporters are handicapped by the lack of an opportunity to respond. Indeed, under the present system, OMB can simply refuse to approve a regulation without giving any reason, and an agency head is left the job of devising an acceptable explanation for refusing to proceed or for deleting a particularly offensive*1068 requirement. And, because this process operates in secret, there is no way for the public, the Congress, or the courts to know precisely what OMB has done and what the real basis is for decisions issued under the nominal signature of the agency head.

The greatest perversion of the principle of open government occurs under the newest Executive Order, 12,498. In the practice of administrative law as it has developed over the years, there have been virtually no restrictions on communications with agency officials at the early stages of their consideration of a particular problem. Written information is routinely supplied, meetings are held at which the presentations are made by the regulated industry one day, and those on the other side the next, and the agency has felt free to discuss its tentative views about where a proposal is going and what the agency is considering with any interested person. However, as a proposal has progressed further, agencies have felt increasingly constrained to proceed through public comments on the record, beginning after a proposal has been published in the Federal Register, and in particular after the record has been closed and the agency is reviewing the comments and deciding upon a final rule. [FN29]

The new Executive Order turns this practice on its head. Whereas openness used to be the guiding light when an agency considered a problem in a general way, the new Executive Order precludes agencies from telling anyone that they are even thinking about taking action on a problem until after they have permission from OMB to do so. Not only can agencies not begin rulemaking, but they cannot request data or undertake substantial research until OMB gives the go-ahead. All this serves to deny agencies the benefit of public input on a potential problem at precisely the time when it may be most helpful. What makes matters worse is the fact that OMB itself is under no similar injunction of secrecy. Given the predilections of OMB desk officers, industry will know perfectly well what is being proposed and will surely have its input into OMB's decision whether to permit an agency to begin to consider a problem in earnest.
Finally, because Executive Order 12,498 gives OMB unbridled discretion to cut off an investigation before it even begins, the public may not learn of the dangers posed by the next ‘asbestos’ tragedy before even more lives are lost than happened this time. Once again, the issue is not whether planning and allocation of resources are sensible ideas; everyone agrees they are, although they can probably be accomplished without the heavy hand of OMB. The real concern is that OMB is cutting off investigations at the earliest possible stage, *1069 before an agency can even hope to meet the burden that OMB has placed on it in order to commence a study of the problem. It is clearly more difficult for critics of the Administration to prove that it is neglecting health and safety when there is no accumulated data. Aside from the judiciary’s lack of willingness to intervene at the prepropositional stage, there simply will be no data to prove that OMB has acted unreasonably in cutting off an investigation. And of course, when the government does not collect the information, it is more difficult for private parties to take the initiative, either by petitioning for a rule, suing the offending companies, or, in the case of workers, insisting upon protections through collective bargaining. For OMB, without any public input, to prevent an agency from conducting a preliminary investigation is the height of irrationality—unless one defines rationality as abhorrence of all regulation.

One could conceivably justify this system if agencies were issuing superior regulations as a result of OMB review, but that is clearly not the case. Rather, to paraphrase an old saying, ‘the proof of the pudding is in the judicial reviewing,’ and based upon that, the record is a pretty sorry one.

As a result of the Supreme Court’s decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., [FN30] which prohibited courts from imposing on federal agencies procedural requirements other than those provided for by the Administrative Procedure Act, courts are now reviewing agency determinations principally to determine whether they are consistent with the underlying statute and to determine whether they are arbitrary and capricious, the standard established in the APA. [FN31] I do not purport to have done a detailed study of the ‘batting average’ of this Administration as compared with that of its predecessors. I have, however, regularly read the opinions of the D.C. Circuit, where many of the challenges to agency rules are brought. Despite the deference normally accorded to agencies, it is my clear impression that courts in recent years have with greater frequency directly overturned agency interpretations of their statutory mandates or found agency action to be arbitrary and capricious—not merely wrong, but very wrong. [FN32]

The highlight of, from the Administration’s perspective, the low point of court review was the Administration’s attempt to repeal the passive restraint rule for automobiles as not cost-effective. The Supreme Court unanimously found that the agency had acted arbitrarily in not considering the obvious option of mandatory air bags, and by a vote of 5-4, decided that it had also acted arbitrarily in dismissing *1070 a detachable automatic seatbelt requirement. [FN33] The supposedly careful review of this action by OMB could not pass even the minimal arbitrary and capricious test, raising real doubts about the system of OMB control, especially in other less important matters.

Three other examples of cases from the docket of the Public Citizen Litigation Group indicate the extraordinary skepticism with which the courts have reviewed these blatant efforts to end-run the law. In Public Citizen v. Steed, the D.C. Circuit described one of the agency’s reasons for eliminating the treadwear portion of the tire quality grading system as ‘silly as it sounds’ [FN34]—hardly a recommendation for the regulatory review process. In New England Coalition on Nuclear Pollution v. NRC, Reagan appointee, and recognized conservative/judicial nonactivist, Circuit Judge Antonin Scalia found that the NRC was saying one thing and doing another and that the reasons that it gave made ‘no sense’ and lacked a ‘rational connection between the facts found and the choice made.” [FN35] Finally, in United Steelworkers of America v. Auchter, involving the rights
of employees to know what chemicals they are handling in the workplace, the Third Circuit voided three separate aspects of the Department of Labor's standard as arbitrary and capricious. [FN36] It is not that courts in the past have not severely criticized rulemaking decisions, or that these criticisms are necessarily so much stronger. The important point is that OMB dominance of the rulemaking process cannot be justified as producing regulatory decisions that are more defensible in court; to the contrary, these cases demonstrate that the OMB review process has yielded arbitrary and unreasonable results in important areas of health and safety regulation.

It is not difficult to fathom why the Reagan rulemaking process is having such difficulty in court: the Administration has made it clear that it doesn't like issuing regulations and doesn't like the statutes that require it to do so, but unfortunately it has been unable to persuade Congress to change the law. Thus, while the Administration talks about political accountability in order to justify OMB's interference with agency rulemaking proceedings, it fails to mention that there are substantial limits on the deregulation process in the form of laws, which were approved by Congress and prior Presidents, and which remain in effect today, notwithstanding the Reagan election margins of 1980 and 1984. It is because the desk officers at OMB are operating at the direction of the political people at the White House, who have their own agendas and little concern for what Congress has mandated, [*1071] that so many of these decisions cannot withstand even the limited scrutiny of judicial review under the APA.

III. WHAT SHOULD BE DONE

To end this process, Congress should step in and prevent OMB intervention in agency rulemaking by precluding OMB from carrying out the functions that it has assumed under both Executive Orders. Thus, either by an amendment to the APA, or through a rider to OMB's appropriations legislation, Congress should prohibit all OMB involvement in the substance of agency rulemakings, except through on-the-record comments that any interested person, either inside or outside government, could submit. Congressional oversight, judicial review, and the President's power to discharge Executive branch appointees already present sufficient checks to ensure that agencies do not act contrary to law or to the wishes of Congress. At best, OMB's second-guessing of the substance of agency decisions is an unnecessary overlay that produces no benefit and imposes enormous costs on the taxpayers by increasing the cost of governing; at worst, it fundamentally undermines the basic principles of fairness and agency expertise on which the rulemaking process is founded. [FN37]

It is highly unlikely, however, that Congress will prohibit all OMB involvement in the rulemaking process. To some extent this is due to an ambivalence on the part of those members of Congress who are very comfortable passing broad, remedial legislation, but are also willing to bend to the desire of powerful regulated industries by ensuring that rules needed to carry out such legislation are never effectively implemented, or at most impose minimal burdens on the industries. [FN38] In addition, some members of Congress view OMB oversight as an opportunity to avoid the difficult issue of amending controversial regulatory statutes—a task that might require them to go on record to vote against, for example, protecting the environment or food safety. Most importantly, the votes are probably lacking to [*1072] pass a broad anti-OMB law, let alone to achieve the two-thirds of each House necessary to override a certain veto by President Reagan. [FN39]

Even though Congress may be unwilling or unable to completely remove OMB intervention from the rulemaking process, the President should amend the Executive Orders to make clear that OMB's function is advisory only and to assure that OMB does not overstep its authority by limiting OMB's role considerably. First, the President should limit OMB review to a few major rules each year. Whatever justification there is for outside in-
volvement in a truly important rulemaking, such as one that dramatically affects an entire industry and concerns more than one agency, most rules have more modest impacts, and the time and effort that it takes to review them is simply not worth it. Thus, the actual number of OMB interventions should be severely reduced either by limiting the total number of rules that OMB can review in a year, or by precluding review except where a major impact is anticipated, for example, something in the order of $500 million. Agency heads should be able to give final approval to all other rules without any interference or advice from OMB, subject to judicial review and the possibility of statutory override.

Second, for those rules that OMB does review, it must have a staff adequate to do the job. This requires not only enough people to handle the work promptly, but also people with a legitimate claim of expertise in the subject matter of the regulations they review. Along the same lines, OMB should be forbidden from second-guessing agencies simply because it would have come out the other way. If that is not a proper role for the courts, it is surely not a proper role for OMB either.

Third, all OMB communications on pending rulemakings should be in writing. If they take place orally, they should be reduced to a memorandum that is promptly placed in the public record so that interested persons may reply. [FN40] These requirements are necessary not only to provide fundamental fairness, but also to assure meaningful judicial review, which is not possible under the existing system. [FN41]

*1073 Fourth, the President should amend Executive Order 12,498 to prevent it from being used to shut off an inquiry before the relevant facts concerning potential problems can be developed. As it stands now, the Executive Order operates as a one-way door that closes but never opens. OMB should not be permitted to interfere with an agency's discretion to undertake its own research and development activities, consistent with the budgets that Congress has given it, which, not incidentally, must also pass through OMB. OMB already has more than ample authority under the Paperwork Reduction Act to disapprove information-gathering activities that unnecessarily burden the public. [FN42] At the very least, OMB should be required to give public notice that it is considering denying an agency permission to undertake a study of a problem, so that Congress and the public can submit their views. For meaningful planning of agency research to take place, all segments of the public must be involved; these decisions are too important to be left to OMB alone.

Fifth, if despite all the problems with outside review of the substance of rulemakings, the President is unwilling to end such review, this responsibility should be removed entirely from the budgetary function and placed in a separate office with a separate budget. Only in this way will Congress, not OMB, have the final say over how much is spent on reviewing agency rules. The head of such an office should be appointed by the President with the advice and consent of the Senate, report directly to the President, and be answerable to Congress as well. When David Stockman resigned as director of OMB, many columns were written about his accomplishments, but almost nothing was said about the rule he played in rulemaking for one very obvious reason: his was a very small one, because all the real work was done by largely unknown people, far down the chain of command, none of whom has ever been confirmed by the Senate, let alone allowed to testify in Congress about their activities. If the President insists upon a centralized system for rulemaking, the person in charge must be available to testify about precisely what his staff is doing and whether it is complying with the conditions imposed on it by Congress in order to assure fairness and meaningful judicial review.

Finally, it should be clear that the cabinet officer to whom Congress has delegated the power to administer the law is the lawful decisionmaker. If the head of the President's regulatory review office disagrees with the Cabinet officer, the former, not the latter, should have to ask the President to step in, unlike the present system
under *1074 which cabinet officers must go hat in hand to the President to object to OMB decisions.

Quite apart from whether one agrees with the anti-regulatory bias of this Administration, there are a substantial number of aspects of the present system of OMB intervention that are inconsistent with the way in which rules have been and should be made, that thwart meaningful judicial review, and that produce results which are not based upon reasoned consideration. There is much to be said for getting OMB out of this business entirely, but if it is to remain, there are surely major improvements that must be made if the rulemaking process is to continue to be an effective means of providing solutions to the problems that Congress has directed federal agencies to solve.

[FNa] The authors of these Commentaries have not seen drafts of each other's pieces. The Commentary format is not meant to be a debate, but rather is meant to present different perspectives on current issues of public importance.

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[FN2] An indication of the concern over the role played by OMB in the rulemaking process is the creation of an organization called "OMB Watch" whose purpose is to act as a research and action network concerned about the unchecked and growing power of OMB. In August 1985, OMB Watch issued a special report entitled OMB CONTROL OF RULEMAKING: THE END OF PUBLIC ACCESS, which provides specific examples of the ways in which OMB has been exercising control over rulemaking.


[FN4] Even those who generally agreed with the federal government's rule in solving these kinds of problems spoke of the need for some oversight:

Single mission agencies [that] do not always have the answers to complex regulatory problems [and whose heads are] exposed on a 24-hour basis to a dedicated but zealous staff [therefore] need to know the arguments and ideas of policymakers in other agencies as well as in the White House. Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (Wald, J., formerly an Assistant Attorney General in the Carter Administration and a public interest lawyer).

[FN5] The controls discussed in this Commentary apply only to the executive branch agencies—the Cabinet departments plus the other agencies such as the Environmental Protection Agency, which are headed by one person, whose appointment and retention are subject to the will of the President. The Executive Orders discussed
below explicitly exclude coverage of the so-called 'independent' agencies, such as the Securities and Exchange Commission, the Federal Trade Commission, and the Nuclear Regulatory Commission. Many of the same policy arguments used to support control over executive agencies apply equally to independent agencies; why, for instance, should rules issued by the Consumer Product Safety Commission regarding the safety of all-terrain vehicles not be subject to OMB review, while rules issued by the Department of Transportation regarding automobile safety are? Since this Commentary takes the position that OMB involvement in executive branch decisionmaking should be cut back substantially, there is no need to consider the role OMB should play with regard to the independent agencies, which surely present no greater justification for OMB intervention.


[FN10] See, e.g., Transcript of Proceedings of June 6, 1978, Textile Workers Union of Am. v. Marshall, No. 75-2157 (D.D.C. 1978). In this case, industry pressure resulted in White House intervention just as the Department of Labor was prepared to issue a health standard for cotton dust. As a result, the standard was weakened in certain respects and delayed in its implementation.


[FN12] Section 2 of the Order requires agencies, ‘to the extent permitted by law,’ to promulgate only those regulations for which ‘the potential benefits to society . . . outweigh the potential costs.’ In deciding among alternative approaches to a given regulatory objective, agencies must choose ‘the alternative involving the least net cost to society.’ Id. § 2(d). To implement these directives, the Order requires agencies to prepare a Regulatory Impact Analysis (RIA) for each proposed and final ‘major rule.’ Id. §§ 1(b), 7(g)(2). Each, RIA must contain descriptions of the costs and benefits of the rule and of any alternative approaches that could achieve the regulatory goal at lower cost. Id. § 3(d).

[FN13] Lest there be any doubt about the true purpose of this Order, the group designated to oversee the process was called the Presidential Task Force on Regulatory Relief. Id. § 1(e).

[FN14] Id. § 3(f)(1).

[FN15] Id. § 3(f)(2).

[FN16] See, e.g., Congress Likely to Ignore Reagan’s Request for Clean Air Act Passage, NAT'L J., Nov. 27, 1982, at 2027 (discussing the unlikelihood of success of the Administration’s attempt to amend the Clean Air Act).

[FN17] The result of the OMB review process imposed by Executive Order 12,291 has been a significant decrease in the number of regulations issued and some, although not an extensive, reversal of prior rules. For OMB’s version of the measures of regulatory activities in the Carter and Reagan administrations, see OMB, EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY PROGRAM OF THE U.S. GOVERNMENT:


[FN19] Id. at 1(a).


[FN22] Much of OMB's efforts in the rulemaking area have been justified by the claim that its oversight eliminates "unneeded" regulations. But the question whether a rule is 'needed' cannot be answered in the abstract; instead it must be decided in light of the degree of risk that Congress, in the governing statute, has deemed tolerable for a particular activity. Thus, one of the favorite rhetorical targets of the Reagan Administration is the Delaney Clause, 21 U.S.C. §§ 348(c)(3), 360(b)(d)(1)(H), 376(b)(5)(B) (1982), which prohibits the introduction in foods, drugs, and cosmetics of any substance that causes cancer in animals, on the premise that in those products, there is no acceptable risk of cancer to humans. The result is that no one in the executive branch, including the Director of OMB, is permitted to decide that banning a food additive found to be an animal carcinogen is 'unnecessary.' On the other hand, the Regulatory Flexibility Act, Pub. L. No. 96-354, 5 U.S.C. §§ 601-612 (1982), which requires special consideration of the needs of small business, is an appropriate area for OMB monitoring and insistence upon agency compliance, even though the underlying substantive law may not speak to the question of small business needs at all.

[FN23] Moreover, in one recent case, the Mine Safety and Health Administration added a fourth stage between the advance notice of proposed rulemaking and the proposed rule, in which a pre-draft proposal is publicly circulated, and only after comments are received is it passed on to OMB for initial clearance of a proposed rule. See Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1487 (D.C. Cir. 1985). Assuming that the Labor Department meets its projected schedule in the case, more than seven years will elapse between the filing of the petition to strengthen the rules regarding the carcinogen radon daughters and the issuance of a new rule. Id. at 1482-84, 1487.

[FN24] Determining the amount of delay attributable to OMB review is difficult, because the public is afforded no data on how long OMB holds up the process in individual cases and the agencies do not voluntarily produce the documents that show how long a matter has been pending at OMB. See Wolfe v. Department of HHS, No. 85-1033 (D.D.C. Nov. 25, 1985) (release of HHS log ordered under Freedom of Information Act), appeal docketed, No. 86-5017 (D.C. Cir. Jan. 15, 1986). According to one recent report, OMB missed the deadline for reviewing EPA air quality regulations in 11 of 12 cases, with some rules still remaining at OMB after nearly a year. See Washington Post, July 18, 1985, at A21, col. 1. In a recent case, the Environmental Defense Fund claimed that the EPA had failed to promulgate regulations within the time mandated by the 1984 Amendments to the Resource Conservation and Recovery Act (RCRA) because of unlawful interference by OMB. The district court held that OMB may not delay issuance of a regulation beyond the statutory deadline. Environmental Defense Fund v. Thomas, Civ. Action No. 85-1747, men. op. at 13 (D.D.C. Jan. 23, 1986).

It should be noted, however, that delays do not always favor industry; the FDA's proposal to expedite the new drug approval process took more than two years to run OMB's gauntlet of review. See 47 Fed. Reg. 46,622 (1982) (rule proposed); 50 Fed. Reg. 7,452 (Feb. 22, 1985) (rule enacted).

[FN25] See T. McGarity, The Role of Regulatory Analysis in Regulatory Decisionmaking (May 1985); § IV at
120-21 and tables 4-1, 4-2 (unpublished paper authored by Professor Thomas O. McGarity for the Administrative Conference of the United States). These figures are based on studies done by various scholars and are admittedly rough estimates, likely to be somewhat on the low side.


[FN28] An egregious example of this involved a Health and Human Services proposal to require a cautionary label on aspirin bottles. The label was to have warned of a link between the use of aspirin by children with the flu or chicken pox and the contraction of Reye’s syndrome, a rare but often fatal childhood illness. After a last-minute visit to OMB by members of the Aspirin Foundation of America, the regulation was blocked. Wall St. J., June 6, 1983, at 1, col. 6. On December 17, 1985, the FDA finally agreed to publish a rule providing the necessary warning label which, if adopted, will be effective May 30, 1986, ending more than four years’ effort by the Public Citizen Health Research Group to achieve this result. See 50 Fed. Reg. 51,400-04 (1985) (to be codified at 21 C.F.R. § 201). Curiously, the FDA’s notice omits any mention of the lawsuit that Public Citizen brought to challenge the failure to require the label sooner and omits much of the history of the delay. See Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21 (D.C. Cir. 1984).


[FN34] 733 F.2d 93, 102 (D.C. Cir. 1984).


[FN37] Some may believe that Congress cannot constitutionally control the manner in which the executive branch decides what rules to issue, because the Constitution assigns to the President the duty to take care that the laws be faithfully executed. See U.S. CONST. art. II, § 3, cl. 4. At least with respect to the rulemakings discussed in this Commentary, and the means suggested by it to control OMB interference, I believe there is no substantial constitutional issue concerning the power of Congress to add these procedural requirements to the regulatory statutes that it has enacted. If Congress sought to restrict the President himself, the question would be closer, but I remain convinced of the constitutionality of simple requirements in Congressional regulatory statutes, limiting presidential participation to the same public means as other interested persons.
[FN38] Many believe this desire to neutralize remedial legislation was one of the major explanations for the popularity of the legislative veto, which was declared unconstitutional in INS v. Chada, 462 U.S. 919 (1983).

[FN39] The Senate recently demonstrated that if the situation becomes extreme enough, it is willing to take on OMB when it delays the promulgation of rules. In mid-September, the Senate voted to give OMB until October 9, 1985, to release 40 drinking water standards held up for nearly six months. See 131 CONG. REC. S11, 784-86 (daily ed. Sept. 19, 1985); Washington Post, Sept. 23, 1985, at A13, col. 1.

[FN40] After the close of the official comment period, any communication which conveys new information or arguments should be the subject of a Federal Register notice so that responses can be made before the agency concludes its deliberations. A further restriction might forbid OMB from being a conduit for industry information. Ideally, no person interested in a pending rulemaking should discuss it with anyone at OMB, but if such communications take place, they should all be in writing.

[FN41] Noting that Congress must ‘mandate by legislation, what OMB and the President should have had the good sense to do administratively many years ago,’ Senator Levin introduced a bill that would require ‘basic ‘sunshine in government’ provisions for the OMB [regulatory] review process.’ See 132 CONG. REC. S340 (daily ed. Jan. 27, 1986) (statement of Sen. Levin).

[FN42] When OMB attempts to alter these requirements in the context of a rulemaking, it must do so in the open. See 44 U.S.C. § 3504(h) (1982).

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