ROLE OF OMB IN REGULATION

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OVERSIGHT AND INVESTIGATIONS
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ROLE OF OMB IN REGULATION

THURSDAY, JUNE 18, 1981

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. John D. Dingell (chairman) presiding.

Mr. DINGELL. The subcommittee will come to order.

Today, the subcommittee will examine the regulatory reform program of the administration.

On February 17, 1981, the President signed Executive Order 12291. The preamble states ambitious and meritorious desires: "Reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions . . . and insure well-reasoned regulations." These are goals with which no one, especially the Chair, would quarrel. Like the President, the Chair believes these goals can be realized.

Unlike the President, the Chair believes we can reduce regulatory burdens without totally displacing the discretionary authority of agency decisionmakers in violation of congressional delegations of rulemaking authority.

Unlike the President, the Chair believes we can increase agency accountability without destroying the safeguards against secret, undisclosed, and unreviewable contacts by governmental and nongovernmental interests seeking to influence the substance of agency action, as would be done if OMB is made the central and unrestrained clearinghouse, often, the Chair believes, in defiance of clear statutory directions by the Congress.

Unlike the President, the Chair believes we can insure more reasoned regulations without the creation of substantively oriented procedures designed to direct and control the rulemaking process.

These are also the well-reasoned conclusions of a 3-month study by the American Law Division of the Library of Congress, contained in an impressive and compelling legal memorandum prepared for the subcommittee and received yesterday.

These consequences led to the conclusion that the President exceeded his authority in issuing the order and that the order deprives interested persons of their constitutional right to due process of law.

The sentiments were echoed by this country's preeminent administrative law scholar, Prof. Kenneth Culp Davis. In the draft pre-
pared for his new treatise which Professor Davis shared with the subcommittee, he comments on the Executive order:

. . . the reality may be that the Director and his staff may in many ways secretly influence the rulemaking. Indeed, the most crucial elements of the rulemaking may be immune to any kind of response by the persons who are vitally affected by the rulemaking. The basic question that is raised is whether or not all the progress that has been made in the development of procedural protections in rulemaking is now subverted with respect to Executive agencies by Executive Order 12291.

If these arguments were not persuasive enough, yesterday's Supreme Court decision in American Textile Manufacturers Institute v. Donovan, the cotton dust case, removed all doubt.

The Court spoke with clarity when it held:

When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute. . . . Congress uses specific language when intending that an agency engage in cost-benefit analysis.

We are not here today to pass final judgment on the President's successes or failures in regulatory reform. Such is a difficult task, and this is too early a time.

The Chair will note the Chair's concern for the administration’s efforts to declare success. The headlines this weekend read: "Regulators said to save $18 billion." The Chair believes such a claim to be misleading to the point of being fraudulent.

We will inquire today and in succeeding proceedings into whether, in fact, the alleged savings are real, have been made, can be made, and upon what basis the claim is made.

We will discuss today the likely success or failure of this effort: First, with a panel who have been deeply involved in regulatory reform from different perspectives—the agency, the White House, and the public interest—and, second, with Dr. James C. Miller III, the Administrator for Information and Regulatory Affairs at OMB.

Regulatory reform is a subject that should command all of our attention. It is needed. The Chair and this subcommittee have been and will continue to work hard toward that end.

The Chair and this subcommittee, however, will not participate in a process that circumvents existing law and tramples on procedural protections in the name of reform. We are, after all, a nation of laws and not of men.

The Chair does add a footnote to the comments just made, and that is that years ago, under the leadership of then Speaker Sam Rayburn, the Subcommittee on Oversight was created.

One of the reasons that this subcommittee was created, the record should show, was because of ex parte communications and because of the attempts of the then administration to influence and to dictate the policies of independent agencies created by the Congress and attempts by that administration to subvert the independence of those independent agencies.

It is the hope of the Chair that this administration will not cause the purposes of this subcommittee to revert to the original purposes of the subcommittee at that time.

It is, however, the intention of the Chair of this subcommittee, if that kind of interest be necessary, to pursue with great vigor the original purposes of the subcommittee.
The Chair observes that some of my colleagues may have statements, and if so the Chair will be delighted to recognize its colleagues at this time.

Does the gentleman from Pennsylvania seek recognition for that purpose?

Mr. Marks. I do, Mr. Chairman.

Mr. Dingell. The Chair is happy to recognize the gentleman at this time.

Mr. Marks. Thank you, Mr. Chairman.

I would like to welcome all of our witnesses this morning, especially Dr. Miller who was before this subcommittee just last year, although under somewhat different circumstances.

Speaking for my minority colleagues as well, I want you all to know that we appreciate your testimony and are looking forward to hearing it this morning.

Initially, I am convinced that it would be very helpful today to maintain an historical perspective. Let us be mindful that administrations of both parties have tried to impose discipline and reason on executive branch agencies because of their well-known tendencies to spew forth unneeded and certainly unwise regulations.

In fact, both Presidents Ford and Carter used Executive orders in their attempts to get a handle on this problem. Unfortunately, both were unsuccessful because they were just not aggressive enough in their approaches to tame the regulatory monster.

This administration is trying to build upon and to improve upon the foundations laid by the previous administration's Executive order.

Quite frankly, I do not consider it helpful to our non-partisan mutual desire to control regulation to make this into some kind of a political football.

Of course, each of us may disagree with the individual various methods, but the fact remains that those methods, tried until now, have been unsuccessful.

On the other hand, I have reason to believe that the testimony today will show that the current plan is functioning adequately and promises to be quite effective.

We, of course, will be interested in hearing the reaction of our witnesses today to the Supreme Court decision handed down yesterday in the Cotton Dust suit and, of course, its immediate effect specifically on Executive Order 12291 and generally on the process of regulatory relief.

Thank you, Mr. Chairman.

Mr. Dingell. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Tennessee. Before the Chair does so, the Chair thanks the gentleman for handling the hearing yesterday in the absence of the Chair. The Chair has been advised that the gentleman from Tennessee handled matters very well, and the Chair expresses the thanks of the Chair and also of the subcommittee to the gentleman from Tennessee.

Mr. Gore. Thank you very much, Mr. Chairman.

Mr. Dingell. The gentleman is recognized.

Mr. Gore. Thank you, and I thank my colleagues for their indulgence for this opening statement.
I take this time because I feel that this hearing should be taken very seriously. I think it is the most significant hearing we have had this year.

I had the opportunity to chair hearings before this subcommittee on almost exactly the same subject 2 years ago, and at least one of our witnesses today was present on that occasion. It does involve the separation of powers and may be the beginning of an extremely long and difficult fight over these issues.

I want to commend you, Mr. Chairman, for initiating this investigation into the role of the Office of Management and Budget in regulation.

The OMB has been, and under our former colleague, Mr. Stockman's direction, obviously continues to be an extraordinarily useful institution to any President.

Ever since the establishment of the old Bureau of the Budget under the Budget and Accounting Act of 1921, the President has had a central place to bring together the competing priorities of Federal agencies under his direction and to fashion a financial program for submission to the Congress for ultimate review and approval.

Through long established processes, recently supplemented by the Budget and Impoundment Act of 1975, the Congress has developed a rational and open process for determining the priorities of the Nation, and OMB has contributed to that process.

It is perhaps not surprising, therefore, that the administration should turn to OMB as a place from which to direct its regulatory reform efforts.

In doing so, however, I believe that it has disregarded 50 years of procedural progress in making the regulatory process one that is equally as open as the budget process, that it has significantly overestimated this society's ability to fairly do the kind of analysis required under Executive Order 12291, that it is damaging the OMB's credibility in a cynical attempt to cripple important activities of the Government, and, perhaps most importantly, that it is coming dangerously close to violating the separation of powers doctrine that is at the heart of our constitutional system.

With the adoption of the Administrative Procedures Act, Congress explicitly established a neutral process for insuring that regulatory decisions would be carried out in the full light of day.

In the ensuing years, the Congress, and particularly this committee, has taken further steps to insure the propriety of the regulatory process by emphasizing the need for regulators to observe strict standards of conduct that scrupulously avoid ex parte communication as well as conflicts of interest or even the appearance of conflicts of interest.

I am concerned that the new arrogation of authority to OMB in the regulatory process is not accompanied by any thought about the safeguards that are needed to ensure an open regulatory process.

The imposition of an inflexible cost-benefit test on all regulations is troubling in two respects: First, we all know that our ability to do the kind of analysis commanded in the Executive order is chancey at best. For example, what dollar figure can be assigned to the avoidance of birth deformities?
I am continually astonished at statements by members of the administration, including one of our witnesses today, that blithely discount the benefits of regulation while trumpeting grossly inflated estimates of cost.

And I remain to be convinced that any kind of ethereal academic analysis can adequately value the benefits of lives saved by regulations that prevent the introduction of unsafe drugs, adulterated foods, and that attempt to mitigate insufferable conditions in workplaces.

Even if the analysis can be done, this administration is not providing the agencies with resources to do the job. Indeed, in a cynical fashion, the analytical resources of agency after agency are being cut, just as the demands placed upon them by OMB are increased.

The juxtaposition of increasingly rigid demands for analysis and decreased analytical resources cannot but lead to the conclusion that this administration’s real goal is to simply stop regulation. If this is indeed the goal, it would be best to say it outright.

Instead, the Director of the OMB’s Office of Information and Regulatory Affairs cynically tells the public that agency heads will still be making the final decisions on regulations, when he really knows that people who defy his office will be fired.

Such a policy of “cooperation” between OMB and the agencies is not likely to do much for the morale of agency heads and their staffs who are tasked with the requirements for analysis.

Finally, I am concerned that Executive Order 12251 comes dangerously close to removing the substantive power entrusted to executive agencies by the Congress.

I fully understand that presidential actions regarding the organization and operation of the Government need to be accorded great deference, but I am concerned that executive Order 12251 in fact, if not directly, totally displaces the discretionary authority of agency decisionmakers in violation of congressional delegations of rule-making authority.

The process of reforming regulation in this Nation is a necessary one, but it can only be accomplished in a way that ensures its legitimacy by formulating neutral, open processes that ensure that the elected representatives of the people in the Congress have an explicit opportunity to review the activities of the executive in a routine and continuous fashion.

If OMB is to be the President’s whip in this area, it must take care not to impose analysis that guarantees no regulation or to impose processes that unfairly prejudice regulatory outcomes.

Thank you, Mr. Chairman.

Mr. Dingell. The Chair thanks the gentleman.

The Chair recognizes now the gentleman from Kansas, Mr. Whittaker.

Mr. Whittaker. Thank you, Mr. Chairman.

I welcome the opportunity to have these hearings today, and I would personally like to congratulate the President and his task force on regulatory reform for taking action that is, in my opinion, long overdue.

From the very first days of his administration, President Reagan has taken a very aggressive posture in attempting to reduce the
regulatory burden placed on the American people, and I welcome
the chance to discuss these improvements in a public forum such
as this.
For too long, the American people have been at the mercy of the
bureaucratic regulators in Washington who devise rules and regu-
lations without taking into account the effect that they will have
on the American people.
Just last week, this subcommittee spent many hours examining
what happened when a couple of bureaucrats from the Food and
Drug Administration decided to turn the contact lens industry
upside-down by removing salt tablets from the market and mandat-
ing a premixed saline solution in its place.
No one bothered to examine the impact that this decision would
have on the American consumer, and, as a result, we have all been
stuck with a bill of over $500 million.
There is no doubt about it—there is too much regulation in this
Nation and it is not only costing the American people millions of
dollars, but it is adding to the inflation that we suffer.
By forcing Federal agencies to submit a cost-benefit study before
a regulation is implemented, President Reagan has finally taken
control over the executive branch of Government and is deter-
mined to let the businesses of this Nation get on with business by
reducing the burdens of excessive regulation.
I do not see how anyone can object to knowing what the effects
of a regulation will be before it takes effect. Why should we have to
wait until after the damage has been done before we realize that a
mistake has been made? It only makes good sense to know what
the impact of a regulation will be ahead of time.
The President has taken command and is legally and properly
exercising his authority as Chief executive. Rather than protect the
rights of the regulators in Washington, he has chosen to protect
the rights of American business and the American consumer. I be-
lieve that he should be congratulated for this action, and I look for-
tward to monitoring the work of the task force as it begins its work.
Thank you again, Mr. Chairman.
Mr. DINGELL. The Chair thanks the gentleman.
The Chair recognizes now our colleague and friend, Mr. Synar.
Mr. SYNAR. Thank you, Mr. Chairman.
I thank the chairman for providing us with this opportunity to
examine this administration's use of executive orders and cost-
benefit analyses to accomplish the reform of the regulatory process.
As a member of the Judiciary Subcommittee on Administrative
Law, I have been actively involved in drafting legislation which
opens the rulemaking process up to greater public participation.
Our goal has been to create a bill which will enable all interested
parties to have input as rules are being drafted and which provides
for greater oversight of the process by the Congress, the executive,
and the Federal courts.
This legislation is the direct result of a general consensus in Con-
gress that real reform is necessary and must be enacted quickly
and fairly. I am greatly alarmed, however, by the approach this ad-
ministration has taken to achieve our common goal.
Real regulatory reform assures all interested parties—business
and labor, environmentalists and developers, manufacturers and
consumers—that they are getting a fair hearing before the agencies. It is not done behind closed doors at the White House or in a private office at OMB.

Real regulatory reform will come only after open hearings and full debate in Congress, where all sides have the opportunity to share their views and follow the legislative process. It is not achieved by unilateral executive order.

And real regulatory reform will benefit all the people, permanently. It is not a 4-year public relations campaign that disappears after the next election, and it is not measured by the number of pages in the Federal Register or by comparing the costs of rules never written against the benefits of rules never achieved.

Mr. Chairman, it is the Congress, as the elected representatives of the people, who have created the executive agencies, it is the Congress who have written the laws these agencies implement, and it must be the Congress who revises and reforms the laws under which these agencies operate.

When a President of the United States acts on his own to manipulate the work of the Congress, he is circumventing the democratic process.

I am reminded of one of Mr. Reagan’s predecessors, Richard Nixon—when he did not like the purposes for which Congress had appropriated money, he impounded the funds.

Now we have another President who, when he does not like the purposes for which Congress has created executive and independent agencies, seeks to impound the intent of Congress.

I submit today, Mr. Chairman, that the impoundment of open access to the rulemaking process is no less dangerous than the impoundment of funding which occurred under Mr. Nixon. I, for one, had thought we had seen the last of the imperial Presidency. I fear this morning that we have not.

Thank you, Mr. Chairman.

Mr. Dingell. The Chair thanks the gentleman.

The Chair announces that a very lengthy document has been prepared for this subcommittee in response to the subcommittee’s request. The document referred to is the Congressional Research Service’s study entitled: "Presidential Control on Agency Rulemaking: An Analysis of the Constitutional Issues That May Be Raised by executive Order 12291."

The Chair announces that that will be published as a staff document by the subcommittee, and the Chair will observe that it will probably also be inserted in the hearing record at the end of the transcript because we will be referring to it during the discussion of this matter.

The Chair announces that our first panel of witnesses consists of Mr. George Eads, who is senior economist at The Rand Corp.; Joan Z. Bernstein, Esq., of Wald, Harkrader & Ross; and Douglas Parker, Esq., deputy director, Institute of Public Representation, Georgetown University Law Center.

Ladies and gentlemen, if you would each come forward to appear before the subcommittee as witnesses, we will hear your testimony.

The Chair is not sure this is in order, but in keeping with the practices of the subcommittee over the years, even though you are
here to advise us on matters of law, I think we will ask that you be sworn. Do you have any objection?

Mr. EADS. No, sir.
Ms. BERNSTEIN. No, sir.
Mr. PARKER. No, sir.
Mr. DINGELL. Then, will you raise your right hands? Do you solemnly swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. EADS. I do.
Ms. BERNSTEIN. I do.
Mr. PARKER. I do.
Mr. DINGELL. If you would each be seated, you may regard yourselves as sworn.
The Chair will advise that copies of the rules of the committee, rules of the House, and rules of the subcommittee relevant to your appearances are there at the witness table.
The Chair advises that we will hear first Mr. Eads’ statement, then Ms. Bernstein’s, and finally Mr. Parker’s.
We do thank you very much—each and all—for your kindness and courtesy to the subcommittee and for your assistance to us. We know that you have put considerable work and effort into your statements, and we are very grateful to you for your assistance.

Mr. Eads, we recognize you first, and we do thank you.

TESTIMONY OF GEORGE C. EADS, SENIOR ECONOMIST, THE RAND CORP.; JOAN Z. BERNSTEIN, ATTORNEY, WALD, HARK-RADER & ROSS; AND DOUGLAS PARKER, DIRECTOR, INSTITUTE FOR PUBLIC REPRESENTATION, GEORGETOWN UNIVERSITY LAW CENTER

Mr. EADS. Mr. Chairman and members of the subcommittee, I am pleased to have been invited to appear here today to comment on certain aspects of the Reagan administration’s regulatory reform efforts.

At the outset, I need to state for the record that the views I will express are my own and do not necessarily reflect the opinions of the Rand Corp., or of any of the agencies or organizations that support its research.

I want to concentrate on the efforts by the Reagan administration to increase White House control over the activities of the executive branch regulatory agencies—agencies such as EPA, OSHA, and NHTSA.

Thus, I will not refer, at least in this prepared statement, to the question of the relationship between the White House and statutorily independent regulatory commissions such as the ICC, CAB, FCC, CPSC, FTC, and FERC.

My concerns with the Reagan regulatory oversight process are spelled out in the attached article that will be published within a few days in the May/June issue of the American Enterprise Institute’s journal, Regulation.

I would like to thank AEI for permitting the article to be released early to enable me to refer to it at this hearing. Since you have it before you, I will merely summarize.
Mr. Dingell. Without objection, it will be included in the record following your statement.

Mr. Eads. The article has two purposes: First, to describe in some detail the differences between the regulatory oversight procedures and institutions employed during the Carter administration and those established by President Reagan; and, second, to suggest what these differences may imply for regulatory reform.

I conclude that while the Reagan program bears some resemblance to Carter's, and indeed those of Presidents Nixon and Ford as well, there can be no doubt that it is intended to move considerably beyond any of these earlier programs.

Unfortunately, I am unable to conclude that the Reagan program will advance the cause of regulatory reform. Indeed, I fear just the opposite.

Let me begin by discussing the set of general requirements for rulemaking outlined in the Reagan Executive order.

The Carter administration always took pains to stress that its requirements for regulatory analysis should not be interpreted as subjecting rules to a cost-benefit test. Agencies were to identify costs and benefits, to quantify them insofar as possible, and—within the constraints of statutes—either to choose cost-effectiveness solutions or to explain why they had not.

The burden of proving that proposed rules were not cost-effective, and of pursuing the matter with the President if need be, lay with senior White House aides.

In contrast, except where expressly prohibited by law, President Reagan's Executive order requires that a cost-benefit test be applied—and met—and places the burden of proof for showing this on the agencies.

Regulatory actions are not even to be proposed unless agencies can demonstrate that the potential benefits to society outweigh the potential costs. How they are to make such a demonstration, especially when many regulatory benefits and costs are nonquantifiable, is left unspecified.

If the agency determines to regulate, it must choose, first, the objectives that maximize net benefits to society; and, second, the specific regulatory approaches that minimize net costs to society.

Finally, each agency is to set its regulatory priorities so as to maximize aggregate net social benefits, taking into account the condition of the national economy, the condition of the industries affected by its regulations, and the impact on those industries of regulatory actions contemplated by other agencies.

These requirements might not be all that objectionable if viewed as broad principles toward which agencies might strive in order to improve the efficiency of their regulatory programs. But as hard and fast demonstrations that must be made before new regulations can be issued, or existing regulations reformed, they are straitjackets which could paralyze the agencies.

To some, this result would be fine. As far as such people are concerned, the best thing that could be done with the regulatory process is to shut it down. These people consider anything which looks like a move in that direction to constitute progress. This view is naive on at least two counts.
First, it ignores the role that regulation must play in a society as complex as ours. Regulation has been misused at times in the past, and even useful regulation has sometimes been inappropriately administered.

But regulation is and will continue to be a legitimate activity of Government. It cannot be shut down any more than can the Government's other essential activities.

Second, this view ignores the need to reform the body of regulations now in place. Paralyzing the process by which new rules are issued paralyzes the reform of existing regulations.

Agencies cannot merely wave a wand and eliminate regulations. Facts must be gathered supporting the proposed changes, analyses on these changes must be performed, and public comments gathered.

As Nino Scalia has argued so eloquently, even those who believe that the best regulation is no regulation should be aware of these due process requirements and should be concerned about erecting impossible barriers to the issuance of regulations.

New general rulemaking requirements are not the only thing that President Reagan announced. He also has drastically centralized the power to administer regulatory oversight.

Under Carter, the various oversight functions were parcelled out among several offices. In part, this was a deliberate decision reflecting the specialized capabilities of certain organizations. In part, it reflected the ongoing experimentation that occurred during the Carter administration.

The Reagan Executive order consolidates White House oversight functions in OMB's Office of Information and Regulatory Affairs, which I will refer to as OIRA.

In effect, OIRA becomes the gate through which all important regulations must pass—not just once, but twice—on their way to becoming law.

OIRA's powers are very broad. It can unilaterally determine which rules are major and thus subject to the full procedural requirements of the Executive order. It can exempt regulations from those requirements. For those rules determined to be major, OIRA can hold up the issuance of a Notice of Proposed Rulemaking until it is satisfied with its contents, subject only to being overruled by the President's Task Force on Regulatory Relief, which it helps staff.

It can also delay the issuance of a final rule for a period of time, subject to the same check. It can designate existing rules for analysis and establish schedules for such reviews.

It will publish the regulatory calendar. It will oversee the implementation of the Regulatory Flexibility Act, which requires regulations to be structured to take account of their impact on small business, and the Paperwork Reduction Act.

Finally, it is specifically charged with developing procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and an industrial sector basis—for purposes of compiling a regulatory budget.

OIRA's responsibilities are thus considerably broader than the sum of the responsibilities of the agencies and organizations it re-
placed. What procedures will it employ in carrying out these responsibilities? Again, there have been significant changes.

One important difference between the Carter and Reagan oversight processes is in the use made of the formal public comment period.

Under Carter, it was during this period that the regulatory analysis review group—RARG, for short—or the Office of Government Programs and Regulations in the Council on Wage and Price Stability—the successor to the office that I founded—prepared and filed on the record comments for important agency proposals.

These filings served a useful public education purpose as well as helping to assure that White House concerns were made a part of the rulemaking record.

The Reagan plan dispenses with public filings by Executive Office agencies such as COWPS and by interagency groups such as RARG.

Any views that OMB or any other agency may have on a proposed rule presumably will be reflected in the proposal when it is published. The public will have no opportunity to learn how these views may have differed from the views of the agency proposing the regulation. Some might consider that a good idea. I do not.

Mr. Chairman, I want to depart from my prepared statement at this point to call your attention to certain materials that were issued last Friday by the Office of Management and Budget describing the progress they believe that they have made in regulatory reform since the administration took office.

Included in that package is a memorandum dated June 11—which was, in effect, embargoed until June 13—to the heads of executive departments and agencies from David Stockman. The subject is: “Certain Communications Pursuant to Executive Order 12291: Federal Regulation.”

It is a two-page memorandum, and it is intended to either modify or clarify—I cannot tell which—the procedures I have been discussing.

In particular, the last two paragraphs of the memorandum seem to imply that OMB may, in fact, revive the process of on-the-record filings with agencies. That is the next-to-the-last paragraph of the memorandum—

Mr. DINGELL. You said it may use the process—

Mr. EADS. May develop formal filings as RARG did, or as COWPS did.

Mr. DINGELL. Mr. Eads, your statement is very helpful, but the acoustics are bad. Could you pull that mike a little closer to you?

Mr. EADS. Yes. I am discussing the memorandum that Budget Director Stockman sent out on June 11, which was actually released for public consumption on Friday at 6 p.m.

Mr. DINGELL. Without objection, it will be inserted in the record following your statement.

Mr. EADS. I am saying that the last two paragraphs of the memorandum suggest either a major clarification or a change in policy concerning the use of public filings.

Let me quote the paragraph, since you might want to ask Jim Miller about this. The second-to-the-last paragraph of the memo states: “On occasion, the task force staff and OMB will receive or
develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking:"

I do not know how they plan to interpret it. It was my understanding—which I confirmed with a number of people—that at least prior to the issuance of this memo they did not plan to have public filings either for OMB or anyone else.

But if this, in fact, contemplates routine public filings on all occasions when OMB and an agency differ, then my testimony should be corrected. Again, you will have to ask Jim Miller for comments on what this means.

Mr. Gore. Will the chairman yield?

Mr. Dingell. The Chair does not have the floor. The Chair would like to see the witness proceed. We will recognize our colleague for questions at the appropriate time.

Mr. Gore. I will wait. The timing of the memo—I think our witness should not be concerned that his statement is sort of outdated by this memo. I do not think it is outdated at all. In fact, this memo was prepared after the notice of the hearing and after OMB started preparing for the hearing.

Mr. Dingell. Nor does the Chair, and the Chair will advise that the Chair will instruct the staff at this time that they will see to it that appropriate memos and so forth from the Office of Management and Budget be inserted in the record as might be appropriate.

Mr. Marks. Mr. Chairman?

Mr. Dingell. Does the gentleman from Pennsylvania seek recognition?

Mr. Marks. Yes, sir.

Mr. Dingell. For what purpose?

Mr. Marks. For the purpose of asking the chairman to perhaps ask the witness at this point whether or not, having read that memo—which we all have—whether that would change his testimony significantly at this particular point.

Mr. Dingell. The Chair does not want to open up for questions of the panel at this particular time. The Chair will recognize the gentleman for that question at the earliest possible moment.

The Chair again recognizes Mr. Eads.

Mr. Eads. Returning to my prepared statement, the Reagan and Carter procedures also differ substantially in the way they operate during the period after the formal public comment period has closed—the "postcomment" period.

The Carter procedures provided for monitoring of important regulations by top Presidential advisers—the CEA Chairman, the OMB Director, the President's Assistant for Domestic Policy, his inflation adviser, and his science adviser.

These individuals—or, more usually, their aides—met regularly to track important rulemakings, assign responsibility for White House/agency liaison, and decide whether or not to involve the President. The substance of any White House/agency interaction was recorded by the agency and included in the rulemaking file.
Under Reagan, OIRA is the primary instrument of postcomment involvement. Thirty days before a rule is to be issued, the agency proposing it must transmit the rule, together with the final regulatory impact analysis, to OIRA.

If OIRA objects, it can hold up the rule until its objections are resolved or until it is overruled by the President’s Task Force on Regulatory Relief or by the President himself.

Only in the event of disagreement on the final rule, and then possibly only in the event of unresolved disagreement, will the substance of these discussions be recorded and put into the rulemaking file, where they will be available to courts that may review the regulation.

Mr. Chairman, again it is necessary for me to depart from my statement for a moment because the final paragraph of Mr. Stockman’s memo contains an even more cryptic comment.

The second sentence of the final paragraph says:

Our procedures will be consistent with the holding of and policies discussed in Sierra Club v. Costle, No. 79-1565, Slip Opinion, at 212 to 220, D.C. Circuit, April 29, 1981.

Not having been able to get hold of that opinion at this point, I am not sure whether that is a clarification about how they will log postcomment discussions or whether it indicates that they intend to adopt the procedures that the Carter administration used.

It was my impression that they contemplated very different procedures, and again this is a matter that I would be happy to get into in the questions and that maybe should be addressed to Mr. Miller.

Another aspect of the Reagan postcomment process that differs significantly from that employed by the Carter administration is the attention paid to controlling ex parte contacts.

The problem of policing such contacts is always difficult, but under Carter great pains were taken to minimize the possibility that they could “taint” a rulemaking.

Officials who either were or who might become involved in postcomment discussions were extremely careful to avoid contacts with outside parties such as industry representatives. The task of keeping in touch with an agency was informally assigned to a single person.

Individuals from White House offices having most frequent contacts with industry were excluded from postcomment activities to avoid their becoming a conduit for information not on the public record.

In those rare cases where information relating to the rulemaking was inadvertently received by those in the White House following the rule, a copy was immediately passed on to the agency with a request that it be placed in the rulemaking file.

The Reagan administration’s decision to broaden the circle of individuals potentially involved in postcomment activities to include a number of Cabinet officers—the members of the President’s Task Force on Regulatory Relief—will make the policy of policing outside contacts substantially more difficult.

It will be impractical to insure that these individuals, or their aides, any of whom have only sporadic involvement in rulemaking
and who, in the natural course of their duties, have numerous contacts with industry, will confine themselves to the rulemaking record in reaching decisions.

Given the central role it will play in White House regulatory oversight, OIRA's ability to handle the duties assigned it becomes an extremely important question.

If it wants to conduct effective regulatory oversight, OIRA must show everybody involved—the agencies, the Congress, the courts, the regulatees, and the general public—that it can use its power responsibly. The assertion of authority must be matched by competence in exercising the authority.

Considering the enormous scope of its powers and its apparent intent to move aggressively, OIRA would find itself in trouble on these grounds even if its resources were ample, but they are not. Furthermore, to a large extent, the resources that OIRA does have are ill suited to the task of regulatory analysis.

This last point is particularly important for, considering the stress that the Reagan program lays on formal cost-benefit analysis, the meagerness of OIRA’s analytical resources cannot help but undermine its credibility.

Of course, OMB will have help with regulatory oversight just as it does with budgetary oversight. Indeed, the overwhelming bulk of the responsibility for preparing supporting regulatory analyses—including the formal cost-benefit analyses now required under Executive Order 12291—must necessarily fall on the agencies themselves.

A major paradox of the Reagan program is that, while giving OIRA an extremely broad mandate and high political visibility, it lays a much greater analytical burden on the agencies that did the Carter procedures.

Unfortunately, the way the Reagan process is being operated, it is likely to weaken, not strengthen, the agencies' incentives to perform this role in a manner consistent with both Presidential objectives and legal requirements.

How are the agencies to be motivated? The quick answer is that President Reagan is appointing agency heads who share his basic regulatory philosophy. But that answer is certainly too quick. A general desire to check regulation does not easily translate into an effective program of regulatory management.

The agencies must possess both sufficient analytical capabilities and the incentive to use them wisely. Unfortunately, President Reagan's budget priorities show signs of reducing, not increasing, agency resources directed to analysis—resources that even prior to recent budget cuts would likely have been inadequate to meet all the demands that the Reagan program places on them.

Even more serious is the threat that OIRA will give the signal that, despite the words of the Executive order, analysis is really unimportant in determining whether regulations will be allowed to proceed—that the true litmus test is political acceptability.

There are already signs that this may occur. I cite one such instance in my article, and I am aware of others—specifically, in deciding which regulations should be held up in the so-called midnight regulations. As best as I can tell, OIRA did not give any attention to whether or not the regulations proposed by the agency were or were not well supported.
For example, the OSHA noise regulation which, in my opinion, was very well supported by the agency, not only on feasibility grounds but on grounds of cost-effectiveness and cost-benefit, were held up just the same as any others. The Food and Drug Administration’s patient package insert regulations were also held up despite good economic support. But I think the greatest example of this problem is in the putting together of the auto relief package—actions to help the U.S. auto industry, issued April 6, 1981—where, regardless of what you think of the individual numbers that are claimed, the agencies are being given the signal that the results should come out a certain way before the necessary analysis has even begun.

If you look carefully at the contents of the auto package, you will see that most of the claimed savings are anticipating the outcomes of regulatory proposals that have not even been issued and that will not be issued for some time.

The way I have always understood that regulation operates, the decision is to be based on the record accumulated during the rulemaking proceeding.

However, the White House is already claiming cost savings from diesel particulate regulations, emissions averaging, and a number of things where, when we in the Carter administration looked at them, a record was nonexistent. Not that the merits were arguable—there was just no evidence on the record on, for example, the feasibility of averaging. The White House seems to have already decided what the conclusion in the rulemaking should be.

If the agencies are not adequately supplied with analytical resources or if, either intentionally or inadvertently, they are signaled that the analyses they do produce do not matter, the cause of regulatory reform will be set back seriously. Regulatory analysis will be returned to the State it was once in—a tool used to justify predetermined outcomes.

Although I have already mentioned it in passing, I want to return briefly to an issue of great concern to me—that of public visibility and accountability.

Under Carter, there were complaints that the regulatory oversight activities of the White House were not sufficiently visible to the public.

Just how visible one can feasibly make any governmental process and still make it work is always a difficult question. But I do not see how anyone can charge that the Carter administration did not go quite far—perhaps as far as feasible—toward making sure that its involvement with the agencies concerning rulemaking was visible and on the record. And, I might add, that our processes have, in fact, been upheld by the courts—most recently in Sierra Club v. Castle.

In contrast, unless it has indeed been modified substantially by last Friday’s Stockman memo, the Reagan process is intended to impose a virtual information blackout on intragovernmental discussions.

From the time that OIRA and the agencies begin talking prior to the issuance of the notice of proposed rulemaking until the OMB Director issues a notice of intent to submit views on the final record, absolutely no public record will be kept. It is even question-
able whether a record of IORA-agency contacts during this critical final period will be kept if agreement is eventually reached.

The Executive order can be read as requiring that a record be kept only in the event that OIRA finally gets overruled. In any case, nothing assures that whatever record is kept will be anything but perfunctory.

It might be argued that this merely creates a regulatory process analogous to that employed in putting together the financial budget and that its purpose is to encourage maximum give and take between OIRA and the agencies.

I find the budget analogy faulty because once the financial budget is put together it is submitted to the Congress and defended in open hearings. I know of no proposal to subject important regulations to such a routine congressional review and would oppose such a thing, just as I oppose a congressional regulatory veto.

The second point cannot be so easily dismissed, but I think the procedures we used during the Carter administration struck an appropriate balance between encouraging candid discussions—within the boundaries of the record—and keeping all interested parties reasonably well informed about what was going on.

Furthermore, the system of "on the record" filings by RARG and COWPS performed a useful public education role and also encouraged the agencies to improve the quality of their analyses. I bemoan their loss as I do the other steps that have been taken to render the Reagan oversight process invisible.

In a real sense, the Executive order of February 17 marks the final emergence of regulation as a governmental function deserving the same level of attention as the raising and spending of money.

We do not yet have—and, indeed, may never have—a formal regulatory budget. But enough basic budget-like controls are now in place, at least on paper, to permit the President to shape regulatory programs, singly and overall. But this by itself does not assure meaningful regulatory reform.

Whether the White House will use these controls to view regulation in the context of other Federal activities and coordinate the whole—for this is surely what regulatory budgeting means—or whether it ends up acting merely as a sharpshooter, taking aim at this or that politically sensitive regulation, depends critically on the Office of Management and Budget and, more particularly, on its new Office of Information and Regulatory Affairs.

Unfortunately, even at this early stage, there are signs that OIRA will choose, or will be forced by events to settle for, the sharpshooter's role.

If these signs are correct, then the result will be the hamstringing of regulatory reform. This will be a tragedy, for regulatory reform is indeed urgently needed.

That completes my prepared statement.

[Testimony resumes on p. 26.]

[Attachments to Mr. Ead's prepared statement follow:]
MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  DAVID A. STOCKMAN
DIRECTOR

SUBJECT:  Certain Communications Pursuant to Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in Sierra Club v. Costle, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)
HARNESSING REGULATION
The Evolving Role of White House Oversight
George Eads

President Reagan’s creation of a cabinet-level regulatory appeals group and his issuance of Executive Order 12291 represent the most thoroughgoing attempt thus far to bring the regulatory activities of executive branch agencies firmly under White House control. Not that the President or his aides will dictate each and every decision of those agencies. But the clear intent is that their regulatory programs bear a much heavier presidential imprint than ever before.

In a real sense, the executive order of February 17 marks the final emergence of regulation as a governmental function deserving the same level of attention as the raising and spending of money. We do not yet have a formal regulatory budget, but enough basic budget-like controls are now in place, at least on paper, to permit the President to shape regulatory programs, singly and overall. Whether the White House will use these controls to view regulation in the context of other federal activities and coordinate the whole—for this is surely what regulatory budgeting means—or whether it ends up acting merely as sharpshooter, taking aim at this or that politically sensitive regulation, depends critically on the Office of Management and Budget (OMB) and, more particularly, its new Office of Information and Regulatory Affairs (OIRA). Unfortunately, even at this early stage there are signs that OIRA will choose, or be forced by events to settle for, the sharpshooter’s role.

To some, the new regulatory oversight mechanism should be judged by one measure: If it causes the regulation-issuing process to shut down, it has succeeded. If it does not, it has failed. This view is naive on at least two counts. First, it ignores the fact that, in becoming as important an instrument of government as taxing or spending, regulation has become just as indispensable. Clearly it is here to stay. Second, the view is naive because it also ignores the need to deal with the vast body of existing regulations. Doing this sensibly requires a well-functioning oversight process that can identify the rules needing review, develop information to support its case, and ensure that the agencies adopt the needed reform.

Thus, assessing the performance of the Office of Information and Regulatory Affairs will not be simple. Certainly OIRA will slow the pace of new regulations—probably a good idea. But how will it decide which regulations should be issued? How can it ensure that new regulations intrude on private decisions only to the degree necessary? And perhaps most important, can it establish a rational process for reviewing and reforming existing regulations?

The New Framework

In theory, Executive Order 12291 provides all the tools needed to accomplish these tasks. The order certainly is impressive both in its scope—
and in the extent to which it rearranges the power relationships that prevailed under previous administrations.

Substantive Requirements. Certain sections of the order resemble or only modestly extend executive orders issued by Presidents Gerald Ford and Jimmy Carter. The prime example is the requirement that agencies subject proposed "major" rules to formal economic analysis and make these analyses (now to be called "regulatory impact analyses") available for public comment at the time rules are formally proposed.

In many important respects, however, the order moves far beyond the Carter and Ford systems. The Carter administration always took pains to stress that its requirements should not be interpreted as subjecting rules to a "cost-benefit test." Instead, agencies were to identify costs and benefits, to quantify them insofar as possible, and either to choose cost-effective solutions or to explain why they had not. Moreover, the burden of proving that proposed rules were not cost-effective lay not with the agencies but with senior White House aides. In addition, it was made clear that the administration was not trying to impose new substantive standards on those responsible for issuing rules.

Reagan's program goes much further. Except where expressly prohibited by law, the new executive order requires that a cost-benefit test be applied and met. An agency may not even propose regulatory action unless it can demonstrate that the potential benefits to society outweigh the potential costs. (How it is to make this demonstration, especially when many regulatory benefits and costs are nonquantifiable, is not explained.) If the agency proceeds to regulate, it must choose (1) the objectives that maximize net benefits to society and (2) the specific regulatory approaches that minimize net costs to society. Finally, each agency is to set its regulatory priorities so as to maximize aggregate net social benefits, taking into account three factors—the condition of the national economy, the condition of the industries affected by its regulations, and the impact on those industries of regulatory actions contemplated by other agencies. This last requirement is a puzzle. When asked recently how agencies could meet it, OIRA Administration

tor Miller replied: "Relatively easily... by consulting the regulatory calendars that each agency is required to publish twice a year" (see "Deregulation HQ," interview with Murray L. Weidenbaum and James C. Miller III, Regulation, March/April 1981). But that does not explain how, in practice, an agency is to calculate the cumulative impact of such regulations and how it is to coordinate its actions with those of other agencies.

Oversight Procedures. The oversight mechanism is also being drastically changed. Under Carter, the various oversight functions were deliberately parcelled out among many offices. OMB monitored compliance with the regulatory analysis requirement and, beginning in late 1979, became increasingly important in monitoring regulatory paperwork as well. The Council on Wage and Price Stability (CWPS) and, in the case of particularly important regulations, the interagency Regulatory Analysis Review Group (RARG) maintained quality control of agency analysis by filings for the public record. The Regulatory Council compiled calendars of future proposed regulations, spotted and resolved regulatory conflicts, and encouraged the adoption of innovative regulatory techniques. Finally, several of the President's closest advisers followed important regulations from the close of the public comment period until the issuance of the final rule.

The Reagan executive order consolidates most White House oversight functions in OMB's Office of Information and Regulatory Affairs. In effect, OIRA has become the gate through which all important regulations must pass—not just once, but twice—on their way to becoming law. The order gives OIRA extremely broad powers. It can overrule agency determinations on whether a proposed rule is to be considered "major." In the case of a major rule, it must receive the draft regulatory impact analysis at least sixty days before the agency publishes the Notice of Proposed Rulemaking. If it finds the analysis weak or believes that important alternatives have been neglected, it can delay publication of the Notice of Proposed Rulemaking until the agency has adequately responded to its concerns. There is no requirement that a record be kept of these initiatives or of the agency's response. The agency may appeal only to the President's Task
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Force on Regulatory Relief or to the President himself.

It is important to note that all this is to take place before a regulation has been formally proposed. In that respect, the new process is like the behind-the-scenes preparation for the President's financial budget.

The Carter and Reagan systems also differ in the use made of the formal public comment period. Under Carter, it was during this period that RARG (for ten or so key regulations a year) or CWPS prepared and filed comments on agency proposals. In the case of RARG filings, a draft was written by analysts at the Council of Economic Advisers (CEA) and CWPS and circulated to all RARG members—including the agency whose proposal was under review—when they met formally to discuss the issues involved. Comments and dissents were incorporated into the draft, and the final report was placed on the public record at the close of the comment period. The Reagan plan dispenses with public filings by executive office agencies such as CWPS and interagency groups such as RARG. Any views that OIRA or any other agency may have on a proposed rule presumably will already be reflected in the proposal when it is published. Moreover, as noted earlier, the executive order does not provide the public with an opportunity to learn what these views were and how they differed from the views of the agency proposing the regulation.

After formal public comment, while the agency was drafting its final rule, the Carter procedures provided for monitoring by top presidential advisers—the CEA chairman, the OMB director, the President's assistant for domestic policy, as well as his inflation adviser and science adviser. They (or their aides) met regularly to track important rulemakings, assign responsibility for White House-agency liaison, and decide whether to involve the President. (The President was kept informed but, for a variety of reasons, rarely asked to mediate disputes with the agencies.) Under the Reagan system, OIRA fulfills this monitoring function, getting one more shot at the agency's proposal. Thirty days before the rule is to be issued, the agency must transmit the final regulatory impact analysis to OIRA. If OIRA objects, it can hold up the rule until its objections are resolved or until it is overruled by the President's task force or the President himself. Only in the event of disagreement on the final rule is the substance of these discussions to go into the rulemaking file, where it will be available to courts that may review the matter.

Another important difference between the two systems should be noted. During the so-called post-comment period, the Carter White House carefully limited its contacts with the agency so as to minimize the possibility of ex parte contacts that might "taint" the rulemaking. Thus the task of keeping in touch with the agency was informally assigned to a single person—usually the one who had been following the rulemaking most closely. And the White House offices having the most frequent contact with industry were excluded from agency-White House deliberations to avoid their becoming a conduit for information not on the public record. The Reagan administration's decision to broaden the circle of individuals potentially involved during this period to include a number of cabinet officers (as members of the President's Task Force on Regulatory Relief) will make the policing of outside contacts substantially more difficult. It will be impractical to ensure that these individuals, who have only sporadic involvement in rulemaking and who, in the course of their normal duties, have numerous contacts with industry, will confine themselves to the rulemaking record in reaching decisions.

Additional Responsibilities. The process described above applies to new rules. But the vast body of regulation already in place also needs attention. The Carter system required that agencies periodically review existing rules and eliminate or revise those that were outdated. But it never created a formal "sunset" procedure to give this requirement force. Reagan's executive order does. It allows OIRA to designate existing rules for analysis and to establish schedules for such review. Revising a rule requires, of course, that a new rule be proposed, at which point the procedural and analytical standards of Reagan's executive order apply.

OIRA has still more powers. President Reagan has abolished the Regulatory Council, transferring to OIRA the job of publishing the Regulatory Calendar and of identifying and eliminating duplicative, overlapping, and conflicting rules. OIRA will also implement the Federal Regulatory Flexibility Act of 1980, which
addresses the regulatory problems of small business, and the Paperwork Reduction Act of 1980, which seeks to limit the paperwork that agencies impose along with their regulations. Finally, OIRA is specifically charged with developing procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and an industrial sector basis—"for purposes of compiling a regulatory budget."

Can OIRA Handle the Task?

If it wants to conduct effective regulatory oversight, OIRA must show everybody involved—the agencies, the Congress, the courts, the regulators, and the public—that it can use its powers responsibly. Its assertion of authority must be matched by competence in exercising that authority. Considering the enormous scope of its powers and its apparent intent to move aggressively, OIRA would find itself in trouble on these grounds even if its resources were ample. But they are not. Furthermore, to a large extent they are ill-suited to the task of regulatory analysis.

Staff Resources. According to the Miller/Weidenbaum interview in Regulation, OIRA will have about ninety slots and will, in addition, be aided by OMB’s regular staff. But the numbers give a misleading picture. Few if any of the ninety slots are new, because OIRA is a combination of three existing units: the Office of Regulatory and Information Policy (RIP) within OMB, the Office of Government Programs and Regulations from the now-abolished Council on Wage and Price Stability, and the Office of Statistical Policy (OSP) from the Department of Commerce. Moreover, of these, only the twenty-person CWPS staff is experienced in the techniques of regulatory analysis. The forty-five RIP analysts are primarily trained to monitor paperwork burdens and oversee the agencies’ technical compliance with the executive order. The Statistical Policy Office’s twenty-five analysts may be helpful to OIRA in standardizing techniques for cost-and-benefit accounting, but they are not regulatory specialists and are not likely to become so. As for drawing support from elsewhere in OMB, while some of OMB’s 250 budget examiners may be available from time to time, their training and professional inclination equips them to monitor direct federal expenditures, not the indirect costs of regulation.

In short, because the influence of regulation pervades the entire economy, OIRA’s duties are considerably broader than those of the conventional financial budgeters, while its resources are far smaller. But its analytical horsepower is significantly less than that of the offices whose functions it has assumed.

Considering the stress the Reagan program lays on formal cost-benefit analysis of regulations, the meagerness of OIRA’s analytical resources cannot help but undermine its credibility.

Analytical Capabilities. Considering the stress the Reagan program lays on formal cost-benefit analysis of regulations, taken both individually and in groups, the meagerness of OIRA’s analytical resources cannot help but undermine its credibility. Even more serious is the likelihood that OIRA will miss opportunities for reform. Important issues may fall between the cracks because no one knows enough about their significance to challenge them, or because none of the parties involved has the incentive to raise them or the capability of analyzing them properly.

For example, during a 1980 proceeding of the Environmental Protection Agency (EPA), an opportunity arose to broaden the definition of “source” for purposes of new source reviews in areas of the country not meeting national ambient air quality standards. The importance of broadening the definition was brought to the attention of White House staff very late in the rulemaking process—and not, incidentally, by industry. The contemplated change would have been helpful to industry, especially steel, because it would have allowed a plant to make replacement investments free of EPA’s new source reviews so long as its emissions were not significantly increased. The change also would have reduced total emissions. But EPA’s more restrictive definition was a valuable weapon for forcing steel firms onto compliance schedules, because it permitted the agency to
hold any modernization investment "hostage." Thus EPA was opposed.

The White House analysts worked up estimates showing the favorable impact of the change on steel industry investment. However, after heated discussions between senior White House officials and EPA's leadership, EPA prevailed. (Subsequently, with the advent of the Reagan administration, EPA announced that it would repropose the regulation to permit the issue to be reexamined.)

In this instance, having a highly competent analytical staff strategically located within the White House with sufficient resources to prepare a well-documented analysis helped ensure that an important issue that otherwise might have slipped by at least got considered. It might be argued that, under Reagan, no agency will ever try to slip a regulatory change past the White House. My experience in several administrations suggests otherwise.

Agency parochialism is not the only thing that a strong White House analytical capability can help prevent. Sometimes there are important issues lurking in a rulemaking that only the White House has the incentive to raise. An example occurred during EPA's rulemaking on premanufacturing notification procedures for new chemicals and new chemical uses (which is still pending). White House analysts became concerned that the proposed procedures would adversely affect innovation in the chemicals industry and suggested a RARG review. EPA voted no, contending that this was not the proceeding in which to address the innovation issue and that the information needed to make a finding was not available. The chemical industry, for its part, seemed indifferent, possibly because the procedures in question would have an ambiguous effect on industry profits. By slowing the rate of innovation of new chemicals and increasing the cost of developing new uses for chemicals, the procedures could substantially enhance profits on the sale of existing products and differentially affect innovation in large and small firms.

Nevertheless, RARG launched a review, and the resulting report, filed by CWPS in March 1981, shed important light on an issue of national importance. It might be argued that in the Reagan administration the agencies themselves will see to it that all significant issues are raised and properly analyzed, or that OIRA, though thinly staffed and overworked, will be able to single out the issues of importance that the agencies let drop. I have my doubts. Or it might be argued that the agencies will forget about such "trivialities" as premanufacturing notification once the Reagan oversight process really gets rolling. Again I am doubtful. Congress may be in an antiregulatory mood right now, but it will be interesting to see how long the mood lasts if a new chemical harms someone and if the harm might have been prevented by tight regulation.

The matter of adequate resources is thus critical in determining how successful OIRA will be in shaping the regulatory process. Effective and credible oversight requires a staff that is familiar with both agency programs and the affected industries, and that also has the ability to set priorities and ask cross-cutting questions (including whether proposed "reforms" of one agency may increase costs elsewhere). Merely requesting industries, trade associations, and other interests to submit "hit lists" of regulations they would like to see eliminated (as Vice President Bush did on March 25) may be good politics. But it is no substitute for developing independent judgments as to which regulations make sense and which do not. Either OIRA's analytical resources will have to be greatly increased, or its objectives greatly trimmed—and maybe both.

Can the Agencies Do Their Part?

Of course, OMB will have help with regulatory oversight, just as it does with financial budget oversight. Indeed, the overwhelming bulk of the responsibility for preparing cost-benefit analyses must necessarily fall on the agencies themselves. A central White House staff can never know enough about the detailed workings of regulatory programs to prepare a large number of regulatory analyses from scratch; it generally will have to rely on raw material generated by the agency, and the quality of this material is crucial. A major paradox of the Reagan program is that while giving OIRA an extremely broad mandate and high political visibility, it lays a much greater analytical burden on the agencies than did the Carter procedures. Unfortunately, however, it is likely to weaken the agencies' incentive to perform
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this role in a way consistent with both presidential objectives and legal requirements.

How are the agencies to be motivated? The quick answer is that President Reagan is appointing agency heads who share his basic regulatory philosophy. But that answer is certainly too quick. A general desire to check regulation does not easily translate into an effective program of regulatory management.

Improving Analytical Capabilities. Initially, the regulators typically responded to both President Ford’s and President Carter’s executive orders by preparing analyses designed solely to support regulatory options they had already chosen and to “prove” that their proposals actually generated few if any costs. Only gradually did they start to use these analyses for the intended purpose: to help decision makers identify the likely impacts of a range of possible regulatory actions. In general, it was not until an agency had been through a number of RARG or CWPS reviews that it began to appreciate the breadth of information that could be generated during a rulemaking. Indeed, one of the most important (and perhaps least appreciated) objectives of the RARG and CWPS efforts was to improve agency analytical skills. Through the collegial RARG process, the distinction between “good” and “bad” analysis was slowly being transmitted throughout the bureaucracy.

Even so, by the end of the Carter administration, very few agencies were good at regulatory analysis and some did not yet understand what it meant. There is little reason to think this situation has improved since then, and some reason to think it has worsened: because of budget cuts and hiring freeze, a number of the best analysts have returned to the private sector.

The prospects would be bleak enough if the agencies had only to analyze the impact of individual proposed or existing regulations. But each of them must also develop priorities for its entire regulatory program and understand how its proposed rules and those of other agencies accumulate to influence an industry or sector. I am not aware of any agency qualified to do this competently at the present time.

Paradoxically, the obligatory cost-benefit test may well be a hindrance to obtaining good analysis. Considering the state of the art... the requirement amounts to an invitation to fraud.

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that agencies identify (and quantify, to the extent possible) whatever costs and benefits they consider likely to flow from the proposed regulations. This, coupled with the lifting of all statutory bars to considering and balancing costs and benefits (such as the bars contained in the Delaney Amendment and the Clean Air Act), would be a powerful spur to sensible regulation. Unfortunately, not even the regulatory reformers in the Republican-controlled Senate seem willing to face this issue squarely. Instead, their major proposal would merely codify the procedural requirements of the executive order, tightening the procedural straight-jacket that the courts have been increasingly imposing upon “informal” rulemaking.

But there is also a practical problem. Suddenly imposing a strict cost-benefit test on this gradual learning process means that sensible new regulations, or revisions in existing regulations, may be stalled for lack of acceptable supporting analysis.

Improving Incentives. A great deal depends on how OMB chooses to interpret the requirements of the new executive order. If OIRA acts as an understanding teacher, showing tolerance for agencies as they struggle to learn and providing them with the resources needed to upgrade their analytical skills, then improvement can continue. If OIRA operates as a stern judge, however, virtually all regulations that come to its attention will fail its test—and not necessarily because they are not cost-beneficial.

Finally, progress could stop entirely if a harassed and overextended OIRA yields to the worst temptation: to give each analysis only cursory review and then either permit rulemakings to proceed if the analysis reflects politically desired results or bounce it back if it...
does not. The power of this temptation is suggested in the Regulation interview. When pressed on whether OIRA would apply the full procedural treatment to a rule purporting to reduce regulatory burdens by several hundred million dollars, Miller replied: "If OMB . . . were convinced on the basis of evidence, however sparse, that such a reduction would occur, a waiver would be granted immediately" (italics added). But he would give the full "treatment" to a rule that would raise costs, possibly even by only a small amount—if OMB chose to call the rule "major." This may seem an appealing short-run strategy for getting regulatory proposals changed without a lot of bother. But it runs serious risks of court intervention and, more to the point here, it undermines agency incentives to do serious analysis. Indeed, it returns regulatory analysis to the primitive stage of justifying predetermined outcomes.

Intervening Too Early?

Only occasionally, and usually only at an agency’s request, did officials in the Carter White House concern themselves with actually shaping a regulatory proposal before it was opened to public comment. This approach had its drawbacks. As more than one expert has noted, agencies often tend to structure regulatory proposals in ways that severely limit their scope for final rulemaking. Yet RARG and CWPS, by carefully monitoring developing proposals, were able to ensure that rulemaking discretion was not unduly narrowed. And by zeroing in on agenda-setting actions—first-of-a-kind rulemakings, policy statements, and so on—the White House could further increase the range of options left open.

While the Reagan scheme’s concentration on the pre-proposal stage permits—at least in theory—consideration of the broadest possible range of options, it is questionable how much this will help in practice. A major problem is that agencies use the Notice of Proposed Rulemaking in different ways. Sometimes agencies use it to identify options having a reasonable chance of adoption—in which case considerable effort has been expended before the formal notice is issued and a regulatory impact analysis would make sense. Other times, however, agencies use the NPRM as a tool for gathering data on the industries they intend to regulate and on the possible consequences of various regulatory options. After analyzing the data produced, they repropose the regulation. In this case, there is little point in doing a regulatory analysis before the second NPRM is issued. All that the agency and OIRA would have to work with would be sweeping claims of what the regulation might do if the agency went as far as it conceivably could under its authority. And the numbers submitted by interested parties would represent "worst case" scenarios—useful for attracting headlines but not for understanding what the effect of the actual regulation would be.

(It should be noted that some agencies employ a device called the Advanced Notice of Proposed Rulemaking, or ANPRM, to gather the information required to frame intelligent regulatory options. This should be encouraged. And if OIRA’s formal powers do not now extend to ANPRMs, the temptation to extend them should be resisted. OIRA will have more than enough to do if it concentrates only on genuine NPRMs and ignores the fishing expeditions.)

Less Chance for Public Participation

During the Carter administration, some outside groups complained that they were unable to comment formally on CWPS’s and RARG’s contributions since those contributions were not filed until the end of the comment period. This view is echoed by Murray Weidenbaum in the Regulation interview. He dismisses RARG’s influence by noting that its comments were filed "literally minutes before the comment period closed—which restricted somewhat their capacity for stimulating public dialogue." In practice, however, the filing schedule did not prove to be a serious problem. We found that, with months or often years elapsing between the close of public comment and the time a rule is made final, there was ample time for public discussion of and even formal public comment on a RARG intervention. In one case, an agency reopened a comment period expressly to receive comments on RARG’s analysis. In another case, a "public interest" group prepared a detailed analysis of a RARG filing and CWPS prepared a rebuttal; both documents were placed.
in the record, even though the comment period had closed. In short, under Carter, there was liberal opportunity for public comment on White House interventions up until the very last stage of rulemaking, and comments were liberally offered. And the filings performed a useful educational role for the public and the Congress.

Contrast this with the information black-out under the Reagan process. A record of the critical pre-proposal discussions between the agency and OIRA is not required, and no document reflecting the administration’s views need be placed on public file. A record of agency-OIRA discussions after the comment period will be put into the file, if at all, only when the rule becomes final. And nothing ensures that this record will be in any way complete. No wonder that a Washington attorney (William Warfield Ross) has advised his fellow attorneys that “there may be highly significant conversations going on between agency heads and the White House” before or during rulemaking proceedings about which they know nothing. His conclusion: “Now more than ever, . . . the race will be to the swift, to the enterprising and to those with access to the levers of power, not only in the Congress and the regulatory agencies, but also in the presidential office” (National Law Journal, April 27, 1981).

Whither Regulatory Oversight?

The Reagan initiatives can best be viewed as a logical and significant extension of experimentation begun by President Nixon and carried forward by his successors, the exact form reflecting each President’s character, view of regulation, and attitudes toward bureaucracy. Each successive experiment has borrowed from the previous ones and would not have been possible but for the earlier efforts. Reagan’s version of regulatory oversight borrows much of its procedure from Nixon’s “quality of life review” and many of its analytical requirements from Ford’s inflation impact statements. It draws on the capacity for analysis nurtured by Carter and will rely heavily on what is perhaps his administration’s most important innovation in this area—the Regulatory Calendar. However, it discards the concept of public filings in favor of behind-the-scenes discussions between agencies and OMB—a loss whose importance has yet to be understood. And while the Regulatory Council and RARG brought about greater interagency cooperation, not by commanding it, but by showing agencies that reform could be in their interest, OIRA seems inclined to abandon this approach—another important loss.

So, an experiment it certainly is. It is bound to be tested in the courts and, over the course of the Reagan administration, is likely to undergo major changes. For this reason it would be especially unfortunate if either its current structure or its current procedures were embodied into law. Let it first prove itself by operating under the more flexible arrangement of the executive order. Most important, Congress should avoid writing into law the developing “common law” of hybrid rulemaking in the mistaken notion that slowing the regulatory process to a crawl is somehow the same thing as deregulation.

Congress should avoid writing into law the developing “common law” of hybrid rulemaking in the mistaken notion that slowing the regulatory process to a crawl is somehow the same thing as deregulation. If Congress feels compelled to act, let it take on a task that the Carter administration certainly would have tackled had it won a second term—designing major changes in the substantive standards agencies apply in rulemaking. This does not mean legislating a mandatory cost-benefit test for all regulations. Congress should merely remove the statutory language that prevents agencies from considering costs and from undertaking both intra- and interagency balancing of objectives. This, combined with permitting tolerably flexible administrative procedures, would be sufficient to produce all the regulatory reform that one would reasonably want.

For regulation to be a useful tool in promoting society’s goals, it needs to be harnessed. But the oversight process must be professionally run and adequately staffed. It must not mimic the Queen of Hearts in Alice in Wonderland, constantly running hither and yon shouting, “Off with his head.”
Mr. Dingell. Mr. Eads, the subcommittee thanks you for a very helpful statement.

The Chair recognizes now Ms. Bernstein for such statement she chooses to make.

TESTIMONY OF JOAN Z. BERNSTEIN

Ms. Bernstein. Thank you, Mr. Chairman.

I, too, am delighted and pleased to have been included in this panel discussion of the subject of the Executive order and its impact on the regulatory process.

By way of my own background upon which I base my observations today, I go back to an early time in regulatory reform; namely, when I was a staff attorney in the Federal Trade Commission in the early 1970's. That effort, that seems rather primitive now, focused, at least in part, on examination of regulations as to their pro- or anti-competitive effect. The idea was to see whether the goal of the statute could not be met by a less, rather than a more, anti-competitive approach, and it was very valuable in terms of my professional growth.

Second, I was General Counsel in the Carter administration at the Environmental Protection Agency and at the Department of Health and Human Services.

When I first went to EPA, I was very much involved with the administration in setting up our own mechanism to find a way for the administration to implement its regulatory policy.

We then went about implementing the system, and I was, as General Counsel, of course, responsible for seeing to it that the Agency complied with the Executive order but also tried to help in seeing to it that the process worked effectively, both in terms of the Agency's mandate and in meeting its obligations both to the administration and to the Congress.

So I would like to briefly summarize my observations which are on the practical aspects of regulatory review rather than on the theoretical or the legal implications of centralized review.

I do not have a complete record of our specific reviews which we conducted while at EPA. I do remember four major ones which I have listed in my testimony, and they are PSD—the "Prevention of Significant Deterioration"—"Ozone, NSPS"—"New Source Performance Standards for Electric Utilities"—and one under the RCRA—the Resource Conservation and Recovery Act.

Several others, as I recall, were considered for full-scale regulatory review but were not reviewed.

Based on my experiences, I have concluded—in sort of lay language—that there are pluses and minuses to these reviews. Some call it "good news and bad."

Among the pluses that I see are that it did create a mechanism to insure consistent application of administration policy—always necessary. It also caused agencies, which might not otherwise do so, to consider alternatives and perhaps even to select the least burdensome—equally important.

The final decision, however, might be—and is often—demonstrably improved if the decision documents offer more than one option.
The review process also sharpens the economic analysis and broadens the sometimes narrow focus of the individual agency.

I will not complete the inventory of pluses because I think the administration probably will come forward with a complete inventory.

What about the bad news? I see a number of concerns which ought to be considered. While the new Executive order stops short of actually shifting decisionmaking authority, OMB does have much more authority under this review to review and therefore to delay decision.

The fact that an agency head can neither propose nor promulgate a regulation without having the approval of OMB at least creates the potential that someone other than the agency head will make the regulatory decision. Some call that interference. Whatever it is called, it creates some worrisome aspects about how well the system will work or not work.

While we at EPA began to implement our regulatory review, as I said, I was responsible—at least in part—for getting the Agency reorganized to meet these new requirements. The first thing we had to deal with was how to perform the economic analysis which the Executive order required.

This new Reagan administration order carries, in my judgment, much more explicit cost-benefit requirements, including those newly issued last Friday called: “The Interim Regulatory Impact Guidelines,” which set out a pretty specific formulation.

At EPA in our day, even with a less exacting standard, we quickly found that we had to increase our economic analytical capacity. We had to hire people with new and different skills.

And we probably had at EPA better capacity than other agencies because we administered some laws, such as the Toxic Substances Control Act, which established risk-benefit tests by law. So we were already in the balancing business, and we had already attracted a number of capable people.

Other agencies of Government have historically had little or no reason to have to conduct economic analysis—for example, the Food and Drug Administration, which has historically dealt with scientific determinations of safety and efficacy and not with statutory balancing tests.

With an absolute cost-benefit requirement, the Food and Drug Administration, along with all the others, will quickly have to recruit people skilled in other disciplines. At the same time, these agencies are being asked to cut back on expenditure, time, people, and money.

If you are at an agency, that has got to be a problem in meeting the new requirements, and perhaps even in carrying out existing requirements.

If it is to be meaningful, the new review may require other types of expertise, especially at OMB. Many decisions, which I see in private practice as well as I saw in Government, involve extraordinarily complex technical bases, often highly controversial and highly expensive.

Some critics say that those mini-decisions are buried at the lowest levels of the agency—they never surface in any review process but actually dictate unnecessarily burdensome regulations.
As an example, at the EPA the final decision may well turn on what basic assumptions the Agency permits in the calculation of essential data—what goes into the model, for example.

Time and again, I have heard, from people who are close observers of the process, that the actual dispute between the Agency and the regulated party is really over how conservative those assumptions must be. The Agency will insist on the most conservative, and the regulated argue for the most liberal.

Without highly capable technical assistance to both resurface and reanalyze those assumptions, the review that is conducted, in my judgment, may end up being inconsequential and superficial but will have imposed a blizzard of additional paperwork by all concerned.

Perhaps OMB and the Vice President's staff will have that highly sophisticated capacity. The focus at present seems to be on the economics, and, if so, it will not deal with what many describe as an area which needs "scrutiny and reform."

It may also lead to additional uncertainties. My experience, both in and out of Government, has been that for those affected by Government decisions nothing is worse than uncertainty. The cost of delay and uncertainty is absolutely staggering.

Adding review periods to the beginning of the process and to the deliberative period—which seem to be open ended, I might add—raises the specter of more delay and more uncertainty.

Another aspect of uncertainty may result—the uncertainty of a company or its lawyer in figuring out how far to go.

It has been nonfacetiously suggested that the lawyer who does not argue all the way to Vice President Bush may be subjecting himself to a malpractice charge.

At first blush, it sounds somewhat outlandish. But suppose you are representing a client before a Government agency. Certainly, you must at least advise the client that there is a possibility that the decision he would normally believe is being made at the agency, where he has had notice and opportunity to comment, may be reversed someplace, somehow.

Should not that lawyer say: "Well, we really should make an appointment to see Vice President Bush to make absolutely certain that our views are heard at the right level"? I, for one, have already put Vice President Bush's number in my rolodex.

I also have a gnawing concern about how the permanent bureaucracy will respond. RIFS and cuts to the contrary notwithstanding, most of the Government's work will still be done by the usually skillful professionals who respond, like most of us, to incentives.

Certainly, Government agencies with different histories and different traditions behave in different ways. The EPA is a young agency which began as a rulemaking agency and tends to think of itself in regulatory process terms. It deals easily and well with the public aspects of the regulatory process.

Other, older agencies, some of which predate the adoption of the Administrative Procedures Act, think of the public aspects of the regulatory process as enormously burdensome and difficult and rather routinely tend to look for ways to avoid it. The Administra-
tive Procedures Act itself, after all, was considered a regulatory reform in its time.

At least as to the rulemaking aspects, the reform was that it required Government agencies to conform with what we now consider the simplest, most rudimentary requirements—notice and comment. Before that, many decisions were often made with less than adequate notice and with no opportunity to comment.

I would submit that there are still agencies that make decisions on what I call the back of an envelope. They are sometimes called bulletins or interpretations or policy statements. Others do not call them anything and just tell people what to do—"Do it because I say so, like it or not."

The point is that the more one loads up the regulatory process with additional requirements, the more one drives those who are required by law and their jobs to make Government decisions go back into the dark—to get out the old back of the envelope and avoid publication of any sort.

I believe it would be very difficult for OMB to ferret out those areas because every day millions of decisions are made all over the Government, many relatively minor individually. The total is substantial, however, and the disincentive very real.

In conclusion, again, having been involved in trying to solve the problems that lead to efforts at reform for years, I am becoming more and more convinced that the real problems with Government will not be solved by additional review requirements and/or additional procedures.

If I had my druthers, I would put my confidence in those who are appointed or selected to carry out the reforms, strip down the procedural requirements within an agency so that the agency can quickly make its decisions, and let them be scrutinized more quickly in the courts and in the Congress of the United States sooner rather than later, and see if that does not breathe some fresh air into the process.

I really believe that the most frustrating excesses have less to do with regulation and much to do with the lack of commonsense responsiveness of people.

It's hard to politely say that most of the complaints are those created by a really senseless experience with somebody which was frustrating and infuriating. I've never known quite how to cope with that problem in an agency where there are hundreds or thousands of employees. No individual can possibly know all of the things that are going on and/or being said to people. I believe that the more complex, the more diffuse the review and decisional process, the less the agency controls its own decisionmaking, and the less incentive there is for people in the bureaucracy to behave responsibly and with commonsense. The more one can pass along the decisionmaking, and there is little enough incentive to make decisions in the Government as it is, the more it seems to me one increases the potential for empty headedness at every level of the Government. I can't think of anything that would be more counterproductive than to have those who work hard but are somehow disconnected to the process believe that they are not responsible for programs and decision.
My own personal judgment is that the increased number of procedural requirements, the increased amount of analytical work, the increased need for additional resources with both Carter's and Reagan's review processes, probably exceeds the gains which may come in the quality of the decisionmaking. I did not see major regulatory decisions revised in any major way during the Carter administration even though many were subject to the review process.

I also know that the political pressure to do something about regulation is severe. The political risk is that the review process creates all the problems I have described but does not result in dramatic improvement in at least the perception of a responsive government. If you add that to the equation, it really is not worth it.

Thank you.

Mr. Dingell. Ms. Bernstein, the subcommittee thanks you for your very helpful statement.

We recognize now, Mr. Parker. Mr. Parker, we thank you also for your assistance to us.

TESTIMONY OF DOUGLAS PARKER

Mr. Parker. Thank you, Mr. Chairman.

My name is Douglas Parker. I am the director of the Institute for Public Representation at Georgetown Law Center. We are a public interest law firm that represents groups that are otherwise unrepresented in the Government's process and groups whose access to the administrative process has historically been somewhat restricted.

I approach the questions of regulatory reform from a rather different perspective from the other participants on this panel. We are those outside the Government who are attempting to effect the process and to control the work that Mr. Eads and Ms. Bernstein were doing.

Our interest historically is in general issues of access to Government, including the courts and the administrative process. We have worked on matters of the Freedom of Information Act, public participation funding, control of ex parte communications and, in general, an effort to insure that agencies produce an adequate record for the kinds of regulations that they are adopting.

We have worked in the area of regulatory reform legislation over the last couple of years. I agreed with the opening statements made by members on both sides of the Chair. We recognize a need to reform the process. I do not think there is any question that the regulatory agencies have not, in many cases, been responsive to the public interest.

We are also concerned about access, and about some of the centralization issues that Mr. Gore referred to.

We have become particularly concerned about Executive Order 12291. We are concerned about the extent to which it actually makes the whole process less responsive, to which it obscures responsibility for decisionmaking, to which it opens the process to special interests with particular political access, and in general the way it dilutes the traditional rights of public participation in the administrative process.
There has been some reference made to the legality of the Executive order. I do not think it is all that clear that this Executive order is legal. I am not a constitutional law scholar, but the research that we have done indicates that it is not a clear question. I would bet that there will be legal challenges, not just to particular rulemakings, but to the entire Executive order process.

Many of the questions about legality relate to some of the points that were made here earlier concerning the extent to which OMB displaces agency decisionmaking.

Obviously, there has been considerable discussion on the question of the extent to which the OMB can impose a particular kind of cost-benefit analysis procedure on an agency. I think that is one question. There is obviously substantial interference with the agency's decisionmaking just in that area alone.

Further, the entire schedule of decisionmaking by an agency can be controlled by OMB. As the others have mentioned, the review process which is set up is really open ended. As long as OMB continues to say that it is reviewing a rule, the agency cannot issue the rule.

The OMB also is allowed to control the way the agency itself allocates its resources. They can designate major rules, and they can waive the major rule procedure for other types of rules.

By holding up certain types of rules through the review process, it essentially gives the agency nothing to do and forces it to attempt to operate in other areas.

Finally, OMB directs the agency's processes substantively by requiring it consider certain types of data and certain types of information. We think that adds up to a substantial question of whether the whole process here is one that displaces agency decisionmaking.

Our primary concern, however, is not really with somewhat abstract questions of constitutional power. That is troubling enough. But putting those questions of constitutional doctrine aside, our concern, as practicing lawyers representing people who are trying to get into this process, is, in general, the lack of procedural protections. We are the people on the outside knocking on the door.

There is a real risk, I think, as a result of this process, that, if we are interested in a particular rule, we are going to end up with a legal challenge to that rule in many, many cases. I would anticipate that in the event of a legal challenge, OMB would be a defendant in any such litigation. The question of who is in charge of the rulemaking is obviously a very substantial one here.

The problem, as I have outlined, is that the key decisions are shifted away from the agency to OMB, and the period of decisionmaking is shifted away from what we have traditionally thought is the normal process—the notice and comment period. The decisionmaking is shifted into a sort of pre-notice and comment period. Indeed, before there is any public notice at all of what is going on in the process and whether the agency is regulating or not, given the way the Executive order operates many of the decisions will be made before there is any public notice or any opportunity for public participation.

We have been concerned about this for a long time. We have raised with several agencies the question of whether various proce-
dural protections, particular controls over ex parte contacts, should apply before the notice of proposed rulemaking is even issued.

The Carter administration recognized that that was a problem, and they included in Executive Order 12044 some reference to encouraging agencies to open up the process as much as possible. Executive Order 12291 totally closes that down. Obviously, before any kind of rule is proposed, there will be a substantial amount of negotiation between the agency and OMB. Once that negotiation is complete—once the deal is made—so that the agency can issue its rule at all, it seems obvious that the agency is not going to change its mind.

The problem, as I have said, is that it is OMB which is making the decisions, and that that process really is entirely closed to us. It is OMB which becomes responsible for the final rule and not the agency itself.

The question is: What sort of control do we have over what OMB itself is doing here? The question is really not so much the relation between OMB and the agency—that is itself very troublesome. A real concern we have is how OMB itself reaches its decisions.

There is no assurance whatsoever that OMB will disclose anything about how it operates. There is no assurance that it will state, publish, or disclose in any way when it directs an agency to prepare a particular type of regulatory impact analysis. There is no assurance that it will disclose when it directs an agency to obtain and evaluate new information. There is no assurance that the internal appeals process will be accessible to the public at all. And there is no assurance that there will be any control over OMB simply sitting on a regulation and doing nothing about it.

We simply do not know what is going on at OMB. The letter which was referred to—Mr. Stockman's memorandum which was issued last week—does not really spell things out very clearly. There is some talk in that memorandum about providing some sort of a record from OMB to the agencies. That is very unclear, and I think that is something that the subcommittee really should follow up. There is no assurance in the Stockman memorandum that all of the data which comes to OMB and which are the bases of its decisions will be submitted to the agency.

This subcommittee has an important role here. There is a process going on from which many groups, whether they are public interest groups such as ours, public interest groups different from ours, or small businesses, farmers, or whoever, are excluded. What is happening is that the process is getting increasingly centralized in one, very small part of the Federal Government, and the access to that is increasingly restricted.

I do not have Vice President Bush's phone number. I guess if I had it, I would put it in my Rolodex, too. I am not sure he would return my call. But to the extent that that gets to be the kind of process we are dealing with, I am very concerned about it.

Certainly, no group with limited resources and, at this stage, very little political access, is going to be able to do very much about the administrative process here.

On behalf of all of us who are feeling shut out of the process and who are seeing the traditional ways of participating in the administrative process closed to us, I certainly encourage this subcommit-
tee to use its oversight powers to help us find out what is happen-
ing at OMB and to find out what sort of procedural protections
they may offer us. Without that kind of help, I predict that we are
not going to be able to find out anything about what is going on.

Thank you very much.

Mr. Gore [presiding]. Thank you.

A decision to return your telephone call might not meet a cost-
benefit test.

Mr. Parker. I think not.

Mr. Gore. I will recognize first of all counsel, Mr. McLain.

Mr. McLain. Thank you, Mr. Chairman.

Mr. Parker, let me first follow up on a couple of points that you
made, discussing the so-called Stockman memorandum to Depart-
ment heads.

Does that memorandum prohibit any communications with out-
side parties that might have an interest in a rulemaking proceed-
ing?

Mr. Parker. No, it does not. There is nothing that would tend to
restrict any kind of outside contact with OMB by anyone. It deals
only, and in a very indirect way, with contacts between OMB and
the agencies. There is nothing that would apply any sort of even
minimal APA protections to OMB's own deliberations.

Mr. McLain. Does that memorandum apply to any information
that OMB might have gleaned from individuals other than factual
information? By that, I mean that that implies to me a document.
Does that imply the same to you?

Mr. Parker. It does—or a study, or something—yes. It is hard to
know exactly what they mean by factual data.

We have long thought that, in looking at the way decisions are
made, the focus on factual information is somewhat naive. There is
no reference in the Stockman memorandum to policy arguments,
legal arguments, or just blatantly political arguments. There is no
assurance whatsoever of any kind of control over those kinds of
contacts.

Mr. McLain. Do you read the memorandum to include any infor-
mation that OMB or the task force might have received from the
President himself or his assistants?

Mr. Parker. No. I think the OMB memorandum takes the view
that, in effect, Mr. Stockman is the President—that there is just no
distinction between OMB and its staff and the President. There-
fore, there is no need to disclose those kinds of contacts.

Mr. McLain. The memorandum goes on in the last paragraph to
mention the recent court of appeals case of Sierra Club versus
Costle as its basis upon which they rely in the development of that
memorandum.

Generally, what do you believe is the significance of that recent
case—Sierra Club versus Costle—to contacts of OMB employees
with private parties interested in a particular rulemaking proceed-
ing?

Mr. Parker. OMB contacts with private parties? I am not certain
that the case deals directly with that question. I am not certain
that it deals with relations between outside parties and OMB. The
parts that I have read very carefully focus primarily on the ques-
tion of relations between OMB and the President on one side and the Agency itself on the other.

Mr. McLain. Is it not true, Mr. Parker, that in Costle the court specifically said that there were no allegations of conduit-type communications and that that was a matter on which they would reserve judgment?

Mr. Parker. Yes, there is a very specific footnote in which Judge Wald says that. In general, the Costle decision seems to endorse or recognize the validity of substantial contact among CEA, OMB, and agencies. I think the case takes a certain kind of realistic approach taken to that kind of contact.

It does not say that all intra-executive contacts of every kind are not subject to some procedural controls.

Mr. McLain. Many of those contacts were logged contacts, by the way, were they not?

Mr. Parker. Yes, that is correct. In that particular case, I think all but one—

Mr. McLain. As I read the principal point of the case, did it not apply to a Presidential contact?

Ms. Bernstein is nodding her head.

Ms. Bernstein. Yes. I felt as if I were in law school, Mr. McLain—I would have raised my hand.

I believe what was at issue specifically in that case and what was viewed by most as the most controversial was that there was one meeting between the Administrator of EPA and others from that Agency and the President himself with other people. I believe Mr. Eads even attended that meeting.

That was the only consultation that was not logged and was not recorded in that rulemaking.

Mr. McLain. And that was during the postcomment period, was it not?

Ms. Bernstein. That is correct.

Mr. McLain. It was not during the rule promulgation stage?

Ms. Bernstein. No—it was in the so-called deliberative period.

Mr. McLain. And certainly not, as the Executive order allows, prior to a notice of proposed rulemaking.

Ms. Bernstein. Right.

Mr. Parker. Mr. McLain, I really did not answer your question, which really was talking about the notion of OMB acting as a conduit notion. There is a footnote in Costle that says that they are not addressing the question where OMB, CEA, or whoever is acting as a conduit for outside information. There are a lot of fears about the Executive order, and that is certainly one of them—that the process that has been set up is simply for OMB, which apparently has already looked at hundreds of regulations and is going to have its priorities set by outside contacts, to serve as a conduit for information, or certainly political pressures, to the Agencies.

Mr. McLain. Would you find, Mr. Parker, that Costle could be distinguished clearly from those concerns that you have raised in your testimony before the subcommittee in terms of ex parte communications with outside parties?

Mr. Parker. Yes, I think it is talking about a different kind of contact.
One thing that troubles me particularly—and this is something that has not been fully explored—is the extent to which Mr. Stockman is the President, I guess.

What is troublesome, I think, is to have an agency such as OMB, which is clearly not the President but rather is a separate agency in which the President is not directing OMB's own activities closely at all. I am troubled by the extent to which the same kinds of considerations apply in that kind of situation, where one agency is directly intervening in the process of another, as compared with situations such as happened in the Costle case where the President himself was sitting there, essentially jawboning with the head of the Agency.

Mr. McLAIN. Mr. Eads, let me follow up on just one point that you mentioned in your prepared testimony. You stated: "Even more serious is the threat that the Office of Information and Regulator Affairs will give the signal that despite the words of the Executive order analysis is really unimportant in determining whether regulations will be allowed to proceed, and that the true litmus test is political acceptability. There are already signs that this may occur. I cite one such instance in my article. I am aware of others."

My question is: What are the others?

Mr. EADS. After I said that, I mentioned a number of them that concern me. I mentioned the decision to hold up the OSHA noise regulations—the final regulations—for which I felt OSHA had done an extremely thorough job of generating just the kind of economic analysis one would want. Still they were held up.

I mentioned the patient package insert regulations of FDA—where the same thing occurred. And I have also been quite concerned about the process by which commitments seem to have been made to change a lot of the automobile regulations before the supporting record has been generated.

Jim Miller is fond of talking about carrots and sticks, and I understand his stick. To me, it seems that the carrot should be that when an agency is capable and does a good job of showing—again, to the extent it is permitted by law to do so—that its regulations make sense, those regulations should go forward. OMB should, in fact, be a strong advocate of having those regulations go forward even if they do not happen to be politically correct.

But what I am seeing, I am afraid, is first the decision on what the next will be. Then the analysis, if it is done, tends to follow that.

Mr. McLAIN. Ms. Bernstein, your statement indicates the possibility that agencies' decisions might be reversed—I think you say someplace, somehow.

Does not that imply a displacing of the agencies' congressionally delegated discretionary authority?

Ms. Bernstein. To some extent it does, and the reason I said someplace, somehow, is that I believe it is still unclear. I know what the Executive order says, and I know what the statements also said, which was and is: "The Agency still makes the decision."

I believe it is too early to tell, though, if, in that process, decisions which the agency had made are, in fact, reversed, not on the basis of the economic analysis but, rather, on what I would call a value judgment. Then, the decision will be made someplace else.
Mr. McLain. But are you saying that the potential is there for the decision to be made by the Director of OMB?

Ms. Bernstein. Yes.

Mr. McLain. Thank you.

Thank you, Mr. Chairman.

Mr. Gore. Let me try to get this clear in my own mind in as simple a language as possible. It seems to me that there is one major issue involved and then several subsidiary issues that relate to the major issue.

The major issue is: Who makes the decision to allocate resources in this society by regulation? That is really the major decision, is it not?

Ms. Bernstein. Yes.

Mr. Gore. That is a question that has occupied constitutional lawyers since the beginning of this country, since the Constitution was put into effect, and there is a long history of analysis.

To sum it up, the Supreme Court decided in the Youngstown Steel & Tube case when President Truman, during the Korean War, seized the steel mills and cited as justification powers inherent in the Presidency—the Court was called upon to resolve this question of when the executive branch can arrogate unto itself the power to allocate resources within our society.

The Supreme Court decided in that definitive case that the executive branch has such power only when it is given to the executive branch in the Constitution or when it is it is explicitly given to the executive branch by the Congress. Am I OK so far?

Ms. Bernstein. I believe so.

Mr. Gore. Now, there does not seem to be any dispute that the administration does not have a constitutional grant of power to arbitrarily allocate resources in this society by regulation, on its own.

Let me back up. In this matter, the Congress decided to delegate the power to regulate to the executive agencies, and it did so in a fairly explicit way.

Because of concerns about the potential abuse of that power, the Congress adopted procedural safeguards, many of them contained in the Administrative Procedures Act.

Under the Constitution and under the laws passed by Congress, those procedures have to be followed if the power to allocate resources by regulation is used justly and in a lawful manner.

If the Administration comes up with a new tricky device to circumvent all of those procedures, and in the process arrogates unto itself the power to make those decisions without reference to the safeguards attached to the original delegation of power by the Congress, then something has gone wrong.

Is that a fair statement of the concern that you three are expressing?

Mr. Parker. It is my concern.

Mr. Gore. You agree with it?

Mr. Parker. I do.

Ms. Bernstein. I would say I agree also, Mr. Gore.

If I may add just a couple of remarks to your analysis which I know you did not mean to exclude—one is that you said the Congress delegates to the executive agency, and you know when you delegate to an executive agency that it is, indeed, part of the execu-
tive branch and that it has certain responsibilities to the Executive.

So there is a bit of a balancing that way because the responsibility between the head of an agency to the President is one that he or she must carry out.

Also important is the President's constitutional authority and responsibility to see to it that the laws be faithfully executed.

So it is not a one-sided debate, I do not think, and I do not think you meant to suggest that; it is a balance in the way the executive agencies carry out the mandate of the Congress, consistent with their authority to report and relate to the President of the United States who, after all, is elected.

Mr. Gore. Which is a replay of Justice Frankfurter's clarification?

Ms. Bernstein. Yes, I think it is.

Mr. Eads. I am the sole nonlawyer on the panel, and I would like to add my particular perspective.

What has happened over the last 10 or 15 years is that the scope of regulation in our society has grown far beyond any level that anyone contemplated particularly when the courts were considering the Youngstown case.

The dilemma that we face is that, practically speaking, regulation must involve balancing and tradeoff, both within an agency's programs and among the programs of agencies. We have limited resources, and it is important that they be wisely used.

How much discretion an agency or the executive branch itself has to make such a balancing is, of course, a matter of law. It does strike me that if the White House wishes to claim that it has a very broad authority to do so, then it should come to the Congress and request such a grant of authority as a practical matter.

I think what the Supreme Court was saying yesterday was that, if Congress, in its wisdom, says that certain things shall be considered, even if the results of that make little economic sense, the administration should carry out the law. If they do not like the law, they should get the law changed.

There is a major problem now. Regulation is important. It is affecting our society. There is need for balancing. But I think your interpretation of where the law currently sits is the correct one.

Mr. Gore. You bring an interesting perspective to this debate, Mr. Eads. You began in the Ford administration on this subject of regulatory reform.

Your concern is similar to our other witnesses' but from a different perspective. You see, and you have cited quite plainly, the greatly expanded role of the Federal Government that began with the New Deal and the enormous scope of regulatory power and authority.

While some would picture this debate and this concern in terms of less government or more government, you are saying it is really quite different than that. The fact that all of this regulatory apparatus exists makes it all the more important, in your judgment, for the decisions to be openly arrived at and to take into account the need to balance carefully the interests affected.

What you are saying is, even though there may be a temporarily seductive appeal to a move to take over this process and hot-wire it
by the White House and the OMB, you, coming out of the Ford administration, say, in the long run, the potential for abuse is very real and we may run into very serious problems if we allow this to go unchallenged. Is that an overstatement of your concern?

Mr. EADS. I think my position is a fairly conservative one in the traditional meaning of that term. Now that regulation has become, in a real sense, as important to the society as the taxing and spending of money, the public has a right to know how these decisions are being made.

It is an incredibly hard job of both deciding how far balancing can and should go, given the law, and also of making rational decisions in the Government about allocating these large sums of money.

Mr. GORE. Yes.

Mr. EADS. I testified last week before Senator Stafford's committee on the Clean Air Act. I stated that I believe that the country is going to have to face up to the issue of whether it will allow costs to be explicitly considered in setting ambient standards. It is something we cannot duck any more. Practically speaking, they get in now, but only through the backdoor. It strikes me that we should face the question directly.

Regulatory oversight is a problem that has faced the last four Presidents. Considering their differences in personality, all four of the Presidents have seen the problem in remarkably similar terms: To walk the fine line between continual oversight and arbitrary intervention and to try to figure out how to make the oversight process a reasonable and open one.

I happen to think that, given a few more months and a few more revisions, the current process may turn out to be not all that different from the ones we have seen before, and I see the process of regulatory oversight by the White House as an evolving one.

Mr. GORE. But while it may appear at times to be a matter of subtle shading and degree, the simple question is: Who makes the decision? And you are either on one side of that line or another.

It may be that by a process of evolution we will get back on the other side of the line, but it appears, from the evidence we have been reviewing and will review in this hearing, that a lot of these things like cost-benefit analyses are usually a sham and serve merely to bring the decision back on the OMB side of the line and let them actually make the decision.

A ping-pong game of just interminably delaying regulations that they do not like or that some industry that has contacted them does not like is also a sham and brings the decision back on the OMB side of the line.

But all of those are subsidiary questions to the main one: Who makes the decision, and how does the power lawfully flow from the Constitution to that person making the decision?

I recognize my colleague, Mr. Marks.

Mr. MARKS. Thank you very much, Mr. Gore.

Mr. PARKER, first of all, I am sorry I was not here for your testimony. We were called over for a vote, and it appeared as if we were going to have another one immediately, and so the chairman and I both stayed as a matter of fact, and that was the reason.
Ms. Bernstein, I read your formal statement before your testimony this morning, and I recollect that during the period of time that some of my colleagues were making their opening statement—both the chairman, perhaps, and Mr. Gore, in particular—there was a question raised as to the legality of the Executive order that we are here discussing—12291.

I did not note in your testimony that you read—although I may have just overlooked it—your own opinion which, as I read it now—and I am quoting:

My personal opinion is that there is more than adequate legal authority for both the imposition of the requirements of the Executive order and for the review which the President has established.

I assume that you have no reason to change that opinion at this point?

Ms. Bernstein. No, I do not, Mr. Marks.

Mr. Marks. Mr. Eads, in your testimony, as you were proceeding—and I think it may have been on page 5 or 6—you referred to the memorandum that Director Stockman of OMB put out on June 11, 1981, and you referred to the last two paragraphs—if I remember correctly—of that memorandum.

I was not quite sure what you were telling us about that memorandum in the sense of what your statement or what you were reading from—in the sense of how that would change your testimony or how that would lighten your concerns to some degree if, in fact, it does.

Mr. Eads. Let me clarify that. My prepared statement says that the Reagan plan totally dispenses with public filings. From discussions I have had with various people, including Jim Miller, Nino Scalia, and various other people, it was my strong impression that the only time any paper record was going to be kept of OMB/agency interactions—and that would include comments and analyses that OMB had of proposed regulations—was going to be in this postcomment period. I understood that they were not contemplating formal filings.

In the course of preparing my article for regulation, I had occasion to talk with Scalia who interviewed Miller on that point in the course of preparing a piece in the March–April issue.

One of the questions that had been asked in the March–April issue was whether or not filings were contemplated. It was possible to read the answer in any one of two ways, so I made the point of talking to various people to find it out, in preparing my article, whether I was right.

Mr. Dingell. Without objection, the article will be included in the record. [See p. 211.]

Mr. Eads. What the piece that came out Friday does is suggest that when the task force staff—I assume that refers to the Vice President’s task force, its that staff, which is identical to the OMB staff for all practical purposes—and OMB develop factual material pertinent to a rulemaking, they will do this in a formal way and submit it to the agency for the record.

Mr. Marks. And advise the agency?

Mr. Eads. And advise the agency.
That suggests to me that at least in some cases something akin to the filings that we made will be prepared. I do not know what they will interpret the term "factual material" to be.

Mr. Marks. Assuming it is a reasonable interpretation, you would therefore be somewhat relieved of your concern in that particular area?

Mr. Eads. Anything that puts agency/OMB contact on the record so that the public can know what it is, so that the courts can know what it is, so that analyses that are prepared in the Executive Office are made available, is something which helps to quiet my fears.

Mr. Marks. You made another comment. Was it in the same vein—about the following paragraph? Did you not mention the last paragraph?

Mr. Eads. Yes, sir. We discussed that a little bit while you were out of the room.

Mr. Marks. I am sorry if this is repetitive.

Mr. Eads. As I said, I have not been able to read the decision referred to, but it was my understanding that one of the points at issue in this case was the propriety of contacts between the White House—which means the whole Executive Office complex—and EPA. The courts had upheld specifically what we in the Carter administration did.

As I point out in the article, whenever any of the White House officers were going to have any discussions, with an agency, after the public comment period had closed, we informed the agency of that fact and informed them that they should keep a record of the conversation and put that record into the file. So, any time there was a substantial contact, it was included.

In preparing any article, I had raised this issue with a number of people. I had interpreted the reading of the Reagan Executive order that they intended to log all postcomment White House/agency contacts but I was told by others that it might be the administration's intention only to record things in the event that any White House/agency disagreement was not resolved.

Again, I do not know at this point exactly what this paragraph means, but to the extent that it will generate a more complete record of agency/White House contacts, it helps quiet my fears.

Mr. Marks. Thank you, Mr. Eads.

Mr. Parker, although I did not hear your testimony—for which I have already apologized—Mr. Stewart advises me that you responded to majority counsel's question as to whether Mr. Stockman's memo prevents outside contacts concerning any policy effects or other matters with an unqualified no, I think you gave.

To your knowledge, has the Director of OMB under any administration had a policy prohibiting such contacts?

Mr. Parker. I do not know. To my knowledge, there has not been such a policy.

On the other hand, I think the particular powers of this Director of OMB under this Executive order are rather different from those of prior OMB Directors, and I think it raises a lot more serious questions.

Mr. Marks. Thank you very much.

Thank you, Mr. Chairman.
Mr. EADS. Mr. Marks, could I comment on that for just a second?  Mr. GORE. Please go ahead.

Mr. EADS. I know, in our administration, that there was no bar up to the time that any filings had to be made to anybody from any party talking to us about anything. Our logging procedures only went into effect when the public comment period closed.

It was our position that if an industry association or anybody wanted to talk to us about anything, up to the time we filed something before the public comment period closed, that such contacts did not have to be logged. If such contacts got reflected in any actions we took or any filings we made they would be already included in the filings.

As was pointed out, the procedures in this administration and the degree of involvement routinely contemplated is very different.

Mr. GORE. That question begs another, and you have just partly answered it. That is, has OMB ever had this kind of power in the regulatory process before?

Mr. EADS. No.

Mr. GORE. So the question is, then, should such ex parte contacts by industries affected by proposed regulations be implied, and if that is impractical it merely begs the ultimate question of these hearings, and that is, should OMB be making these regulatory decisions? That is the crux of the matter.

If you are going to have OMB making the final decision on a regulation, and an industry affected by the regulation can call up on the telephone and bend the guy's ear, and the cotton mill workers have no opportunity to do so and cannot present evidence to the person really making the decision, then the Congress never intended to delegate its power, given to it by the Constitution, to the executive branch in such a manner. It is not right.

Let me go back to another question. I am interested in how the Supreme Court case yesterday affects this issue. Have any of you had an opportunity to read it yet?

Ms. Bernstein. Just what is in the newspapers.
Mr. EADS. The same thing.
Mr. GORE. Well, it is a hazardous exercise.
Ms. Bernstein. I did read two newspapers.
Mr. GORE. The Court did address the use of cost-benefit analysis and said—and I quote—"When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." It gives a number of examples of where the Congress has explicitly called for a cost-benefit analysis of regulations.

It says: "These and other statutes demonstrate that Congress uses specific language when intending that an agency engage in cost-benefit analysis." Then, skipping slightly, I pick up the quote: "We therefore reject the argument that Congress required cost-benefit analysis in section 6(b)(5)" of the OSHA Act.

The use of cost-benefit analysis, it seems to me, is again appealing if it can be done, but if it is not intended and if one of the reasons it is not intended by the Congress is that the Congress feels it is totally impractical and impossible, then the administration is on thin ice indeed in telling an agency, that has been delegated power by the Congress, that it has to perform a cost-benefit analysis and
it has to come out a particular way before the regulation can be
enacted.

We had before this subcommittee a lengthy exchange with Mr. Miller 2 years ago—and he will be appearing in our next panel very shortly—about the impossibility of assigning a dollar figure to the avoidance of a birth defect.

We had hearings before this subcommittee that showed that exposure to hazardous chemical waste was almost certainly causing birth defects. We have delegated the responsibility to the EPA to regulate the discharge and disposal of hazardous waste.

Now, if at the time that was done, the EPA had to perform a detailed cost-benefit analysis and show that it turned out a particular way before the regulation could be enacted, they would have to come up with some kind of value on the avoidance of that child’s birth defect. You cannot do that—you cannot do that—and to pretend that you can just sets up a roadblock, in my opinion.

I think our colleagues are anticipating that other vote. Maybe we should just go ahead.

I would like to thank our three witnesses on this panel. I am sorry that the business on the House floor is keeping some of our other colleagues from participating as fully as I know they had hoped to do and will as these hearings proceed. But, with that, you are excused, and we thank you very much.

I would like to call now Mr. James C. Miller III, Administrator of Information and Regulatory Affairs at the Office of Management and Budget; Mr. Miller is accompanied by Mr. Boyden Gray, General Counsel to the Vice President.

Gentlemen, welcome to you.

Actually, Mr. Gray is counsel to the task force. Is that correct?
Mr. Gray. That is correct, Mr. Chairman.

Mr. Gore. If you gentlemen would identify yourselves to the reporter——

Mr. Miller. Thank you, Mr. Chairman.

I am James Clifford Miller III. I am Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. I am also Executive Director of the Presidential Task Force on Regulatory Relief which is chaired by Vice President George Bush.

Accompanying me today is C. Boyden Gray, who is counsel to the Vice President and is also counsel to the Presidential Task Force on Regulatory Relief.

Mr. Dingell. Mr. Miller, the Chair advises you that it is the practice of this committee to swear all witnesses who appear before us and it will therefore be necessary to administer the oath to you. Do you have any objections thereto?

Mr. Miller. Oh, not at all.

Mr. Dingell. Very well. Now the Chair also inquires, will your associates appear with you as witnesses or will they appear with you as counsel?

Mr. Miller. I think the appropriate form would be as counsel.

Mr. Dingell. As counsel?

Mr. Miller. Yes, sir.

Mr. Dingell. Then it will not be appropriate for us to administer the oath to them but the Chair must advise that in the event they
do desire to give testimony it will be necessary at that point to administer the oath.

Mr. MILLER. Sure.

Mr. DINGELL. The Chair observes copies of the rules of the committee, the rules of the subcommittee and the House relevant to appearances are before you at the table, and if you will rise and raise your right hand, the Chair will administer the oath.

Do you solemnly swear that the testimony you are about to give today is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MILLER. Absolutely.

Mr. DINGELL. You may consider yourself under oath.

The Chair is happy to recognize you and to welcome you for such statement as you choose to give.

TESTIMONY OF JAMES C. MILLER III, ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, AND EXECUTIVE DIRECTOR, PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, ACCOMPANIED BY C. BOYDEN GRAY, COUNSEL, PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF

Mr. MILLER. Thank you, Mr. Chairman.

I have a statement here which I crafted and I would like to read it in full if you would not mind.

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: First, a stringent budgetary policy to reduce the rate of growth in Federal spending; second, an incentive tax policy to increase after-tax returns and thus promote savings, work, and investment; third, a regulatory relief policy to eliminate unnecessary regulations and improve the performance of the regulatory agencies; and, finally, 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. On January 22 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 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, to my left, counsel to the Vice President, also serves as counsel to the task force.
The task force's basic charter is to, first, 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 the agencies; second, assess executive branch regulations already on the books, especially those that are particularly burdensome to the national economy or to key industrial sectors; and, third, 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 establishes regulatory oversight at the highest levels.

To help carry out his program of regulatory relief, on February 17, President Reagan signed Executive Order 12291, "Federal Regulation." That order accomplishes three major tasks. First, it establishes the preeminence of the task force in matters involving regulatory relief. Second, it sets forth the President's regulatory principles.

These are, first, administrative decisions shall be based on adequate information concerning the need for and consequences of proposed Government action. Second, regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society. Third, regulatory objectives shall be chosen to maximize the net benefits to society. Fourth, among the alternative approaches to any given regulatory objective, the alternative involving the least cost to society shall be chosen. Fifth, 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 submit all proposed 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 as to whether they comport with the President's regulatory principles. To aid in the review and consultation process and to make sure that agencies have a proper factual basis on which to make their most important regulatory decisions, agencies are required to prepare regulatory impact analyses 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, by the President. The agencies, however, retain authority over the final decision pursuant to their governing statutes.

Let me describe now, briefly, our implementation of the Executive order. As you know, under the Paperwork Reduction Act of 1980, Public Law 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—that is, the paperwork—requirements and for the degree to which they comport with the President’s regulatory principles. 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 17—in other words, the date the order was signed—and June 10, my office reviewed 881 proposed or final regulations submitted by the agencies. As shown in attachment A, 764 of these submissions or 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 frame set forth in the Executive order; that is 96 percent. In only 35 cases or 4 percent was the review period extended.

Moreover, as shown in attachment B, our average turnaround time for agency submissions is 9 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.”

Mr. Chairman and members of the subcommittee, let me now turn to what I gather are some of your principle 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 were often 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 3 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 "nothing 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 imposes requirements on the 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 insures 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 cannot delay that action. In other words, if Congress or the courts have spoken on the 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, first, the spelling out of regulatory principles which the agencies must follow to the extent permitted by law; second, the creation of the Presidential Task Force on Regulatory Relief and the role it formally plays in the regulatory oversight process; and, third, 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 this 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, and I quote:

* * *
The authority of the President to control and supervise executive policy-making 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 jealous 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 advisors, 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 factual support in the rulemaking record, and under this particular statute the Administrator may not base the rule in whole or in part on any data or information which is not in the record, no matter what the source. The courts will monitor all of 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 been attained 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 that 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.

As you can see, the basic principle is that any factual information given to OMB and the task force should also be transferred 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 the 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.

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 proposals now moving before the Congress. I have in mind here 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.

[Attachments to Mr. Miller's prepared statement follow:]
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Mr. Gore [presiding]. Thank you very much, Mr. Miller.

I recognize first Mr. Synar.

Mr. SYNAR. Thank you, Mr. Chairman.

Mr. Miller and Mr. Gray, welcome.

Let me ask you, Mr. Miller, a question right off the top here. Your counsel today, Mr. Gray, in a recent speech on April 10, 1980 before the U.S. Chamber of Commerce made the following statement that I think we need some clarification on, and let me quote from Mr. Gray’s speech:

If you go to the agency first, don’t be too pessimistic if they can’t solve the problem there. If they don’t, that’s what the task force is for.

We had an example of that not too long ago but the people were not being completely candid with their own top people or the task force. We told the lawyers representing the individual companies and the trade associations involved to come back to us if they had a problem.

Two weeks later they showed up and I asked if they had a problem. They said they did, and we made a couple of phone calls and straightened it out, alerted the top people at the agency that there was a little hanky-panky going on at the bottom of the agency, and it was cleared up very rapidly, so the system does work if you use it as sort of an appeal. You can act as a doublecheck on the agency that you might encounter problems with.

Now I think this statement raises several questions. First, Mr. Miller, what is the legal and public policy basis for the use of the task force as an appeal for the business community from decisions of the regulatory agencies? Second, what are the instances in which the task force has been used as an appellate body? Third, to what extent are such ex parte communications going to be placed on the public record?

Mr. MILLER. Congressman Synar, that is a whole mouthful. Let me say my initial reaction to your first question is that it borders on a “When did you quit beating your wife?” type of question. I am not sure I can come up with an answer that would satisfy it, given the—

Mr. SYNAR. Well, Mr. Miller, are there any legal or public policy bases for that kind an appeal structure for the business community?

Mr. MILLER. I can describe for you, sir, the legal and public policy bases for the program, of but—

Mr. SYNAR. Not the program, the appeal structure to the task force.

Mr. MILLER. Pardon?

Mr. SYNAR. In this statement by Mr. Gray, it appears that the task force serves as a direct appeal body for any business community group or public sector group that wants to appeal. I am trying to find out what your legal or public basis is for being this type of an appeal structure.

Mr. MILLER. Could I answer it, first, by suggesting that we take the pejorative connotation out of the question. The task force does constitute, in a sense, an appeals board, but it is appeals not from business or industry, or consumer groups, or labor groups, or whatever. It is really an appeals process that involves the agencies and the Office of Management and Budget, the Office of Management and Budget being under the overall direction of the task force.

I would like to interrupt just a second, Congressman, if I could, and ask if Mr. Gray was correctly quoted.
Mr. Synar. Well, just a second, Mr. Miller. Let's come back to that. Let me ask you something. You said "agencies" and I would say that would probably be within the context of the legal and policy basis, but let me requote:

We told the lawyers representing the individual companies and trade associations involved to come back to us if they had a problem.

Two weeks later they showed up and I asked if they had a problem. They said they did. We made a couple of phone calls and straightened it out, alerted the people at the top of the agency that there was a little hanky-panky going on at the bottom of the agency, and they cleared it up very rapidly.

Now that does not appear to me to be an appeal from an agency. It appears to be circumventing the whole process of administrative law for any group that feels they have been impinged upon to go straight to the task force.

Mr. Gray. Congressman Synar, let me see if I can——

Mr. Synar. Mr. Chairman, before he testifies I would like him to be sworn in.

Mr. Gray. That is fine.

Mr. Gore. The Chair will advise that Mr. Gray is appearing as counsel for the witness. If you wish to testify—and it might be a good idea, since you were the author of the statement in question—if you wish to testify we will have to swear you, however.

Mr. Gray. That is fine.

Mr. Gore. Will you stand and be sworn?

Do you swear the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you God?

Mr. Gray. I do.

Mr. Gore. The gentleman from Oklahoma is recognized.

Mr. Synar. Fine.

Mr. Gray. I will see if I can answer it this way, Congressman, and that is, I think, an example of how we have approached the whole question of ex parte contacts: When they first came in to see us with materials I said, "Have you gone to the agency?"

They said, "No." I said, "Well, go to the agency. I do not want to see anything you are giving me until you first give it to the agency because I am not going to act as a conduit for your views," and so they did.

I said, "If you have a problem, if you think that they are not recognizing and paying attention to the material that you give them, bring the material to me and/or to us and we will see then what the problem is."

They came back, and what they had was an internal agency document which I thought should be brought to the attention of the top officials of the agency. The phone call was to alert them to the existence of a document in their own files.

If you want to call it an appeal, that is—I do not know if I was correctly quoted or not but——

Mr. Synar. This is a quote from your recent speech of April 10, from a transcript made off a tape of your speech, I think.

Mr. Gray. We have heard views from all groups.

Mr. Synar. Mr. Gray, what I am trying to get to—and I am not trying to be in an adversary position—I want to know what the legal or public policy basis is for groups, trade associations to come directly to you when they feel they have not necessarily gotten the
best treatment from the agencies. Where do you get this legal or public policy basis? I mean, that is what I am trying to get to. I am not saying that you are right or wrong. I want to know the basis by which I or a trade—

Mr. GRAY. Congressman, I know of no prohibition on the ability of the public to exercise first amendment rights to—

Mr. GORE. Will the gentleman yield?

Mr. SYNAR. Yes, I will.

Mr. GORE. The question is not what is the prohibition on the right of the public to appeal to you. The question is, what source of legal authority can you cite for serving as an appeal for business groups to come directly to you if they are dissatisfied with the progress or results of regulatory proceedings in the executive agencies?

Now it has to come either from the Constitution or from an explicit delegation of authority by the Congress. Does it come from the Constitution?

Mr. GRAY. Yes, sir.

Mr. GORE. Can you cite which portion of the Constitution is the source of that legal authority?

Mr. GRAY. I guess the principal source is that provision of the Constitution which vests in the President and his designees the authority to see that the laws are faithfully executed.

Mr. GORE. Precisely the source of authority cited by the lawyer who argued the case for President Truman in the Youngstown Steel and Tube case, and that was rejected by the Supreme Court.

Can you cite another source of authority in the Constitution?

Mr. GRAY. Mr. Chairman, I do not know that the Youngstown decision disqualified the public from communicating with the executive branch.

Mr. GORE. Well, again, the question is not addressed to the ability of the public to communicate to you. The question is, what source of legal authority do you have to "hot-wire" the regulatory proceedings at the agencies?

Mr. GRAY. I am not sure I know what you mean by "hot-wire."

Mr. GORE. To direct a result.

Mr. GRAY. Well, I believe, as Dr. Miller has testified, everything we are doing we think is very solidly based on opinion from—

Mr. SYNAR. Mr. Gray, that is what the Chairman is asking you. Can you give us some legal authority or public policy basis that gives you this authority? I mean, the whole root of this problem is that, if you listened to the opening statements, some of us think that maybe you all are stepping on some very serious constitutional questions. We want to know if you have based your whole statement that you are within the legal authority on the legal opinions of all these guys that are your hired guns in your administration—what is the basis that you are taking this type of authority, circumventing the whole process of administrative law, appeals, public hearings, public testimony—

Mr. GORE. Prohibition of ex parte communications.

Mr. SYNAR [continuing]. Ex parte communications, we want to know, what is your authority to do this?

Mr. MILLER. Could I respond to that, Congressman?

Mr. SYNAR. Sure.
Mr. Miller. That is your characterization of what is going on. We think that the appropriate characterization of what is going on is that the President is seeing to it that the laws are faithfully executed. Now there is a Constitution. The President does have the authority and responsibility to see that the laws are faithfully executed.

Moreover, the basis for it was an Executive order which was signed by President Reagan on February 17. It puts in place a task force comprised of the chairman, being the Vice President of the United States, and our members—

Mr. Synar. Mr. Miller, we are all familiar with what the Executive order—

Mr. Gore. Let the witness respond.

Mr. Miller. There is also an opinion by the Office of Legal Counsel with respect to the Executive order itself and the authorities granted to the Director of OMB, under direction of the task force, and whether these are permissible under law. We would be glad to make a copy of this available to you if you like.

With respect to the operation of the task force in touching base with people in the agencies, we also have an opinion from the Office of Legal Counsel, in the Department of Justice, as to what is required. I thought what I indicated in my testimony is that what Director Stockman issued in terms of guidelines went beyond what was required by the law.

Mr. Synar. Well, let me ask this question of Mr. Gray: Mr. Gray, do all people have the right to call you, all people, or just a select group of people?

Mr. Gray. Anybody can call me.

Mr. Miller. Anybody.

Mr. Gray. In fact, we have met with—

Mr. Synar. Anybody?

Mr. Miller. Yes.

Mr. Synar. My dad and mom who are upset about something?

Mr. Gray. Absolutely.

Mr. Synar. They can call directly to you?

Mr. Miller. Absolutely.

Mr. Synar. You will take their call?

Mr. Miller. Congressman, we receive a lot of inquiries from—

Mr. Synar. Will they get to Boyden Gray, though, like these people in his statement of April 10? Will they get to you, or will my mom and dad have to go through agencies and everything else?

Mr. Gray. We would hope that they would go to the agencies first and then come to us.

Mr. Synar. Okay, I know that we are not going to get anywhere on that. Let me ask one question: Are these ex parte communications ever going to be placed in the public record for all of us who are concerned about why and how decisions are made and the parameters of those decisions? Are they going to be made part of the record, such as the conversations you had with this example you used in the speech?

Mr. Miller. If it is appropriate from a policy standpoint that they be put in the record, if it is required by the law, they will be put in the record.
Mr. Synar. How do you determine appropriateness of what should be included in the record or not? See, that is why we have the Administrative Procedures Act, to determine the appropriateness of the statements——

Mr. Gray. That is right.

Mr. Synar [continuing]. But now you are telling me you all will determine whether it is appropriate.

Mr. Miller. No, sir, I just said if it is consistent with the law. The Administrative Procedure Act is part of the law and we are going to act consistent with the requirements of the Administrative Procedure Act.

If the communication is advice, or a privileged kind of information that the President, the Vice President, or other members of the task force would not want to be shared with the public, then we will not share it. If everything is to be shared, then advice is not candid and to the point and straightforward. We want to make sure that the advice given is candid, straightforward and to the point.

However, if on the other hand it has a factual basis—it is something that is relevant for the record itself—that will be transmitted just as I described.

Mr. Gore. Will the gentleman yield?

Mr. Synar. Yes, sir.

Mr. Gore. I would like to ask unanimous consent to put in the record at this time a document from your group that was supplied in response to a request from the chairman. Without objection, that will be included in the record.

[The document referred to follows:]

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 28, 1981

Honorable John D. Dingell
Chairman
Subcommittee on Oversight & Investigations
Committee on Energy and Commerce
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in further response to your request of March 13, 1981, for "a list of those contacts made ... with representatives of any business, association or group which may be affected by the regulations in question ...." The regulations in question are those released during the Vice President's press conference of March 23. Again, I apologize for the delay of this response, for reasons discussed in my prior communications.

Enclosed is the relevant list of contacts with me or my staff. It includes date (where known), the name of the group represented, and a very short description of the purpose of the meeting. Because your request was made after most of these contacts had occurred, the list was prepared by reviewing schedules and notes, and from interviews with those who were present at the meetings. Unfortunately, the list does not include all such contacts, but it does include all that, following substantial effort, we have been able to reconstruct. Also the list does not include telephone contacts and other encounters which were not meetings held in our offices—such as numerous telephone contacts with members of Congress and their staffs. (We do not keep records of such matters.) Further, the list does not include my speeches or attendance and discussions at public sessions.

Finally, let me note three other matters. First, nearly all of the meetings summarized on the list were initiated by the businesses, associations, or groups identified. Second, we have tried to make sure that information conveyed to us has also been conveyed to the relevant agencies. For example, on March 23, the Vice President urged that comments from the public be sent to the agency concerned as well as to the Presidential Task Force on Regulatory Relief.

Third, the terseness of our descriptions of the contacts on the list is largely the result of the fact that we did not keep detailed records of these meetings or their content. As you can see, many of these sessions were of a general nature, in which attendees merely wished to express support for the President's program. (We have indicated whether a meeting dealt with particular regulations when we have been able to ascertain that it did.)

We appreciate your interest and the interest of other members of Congress in the President's program of regulatory relief.

Sincerely yours,

/s/ James C. Miller III

James C. Miller III
Administrator for Information and Regulatory Affairs

Enclosure
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<tr>
<th>DATE</th>
<th>NON-GOVERNMENT GROUPS REPRESENTED</th>
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<td>California State Assemblyman Leo T. McCarthy</td>
<td>Discussion of procedural approaches to regulatory relief at state level</td>
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<td>Digital Corporation</td>
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<td>1/29/01</td>
<td>Greyhound Corporation</td>
<td>Reform of interstate bus regulations</td>
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<td>1/29/01</td>
<td>Air Transport Association</td>
<td>Progress and problems under airline deregulation</td>
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<td>1/29/01</td>
<td>U.S. Chamber of Commerce, General Motors, Atlantic-Richfield</td>
<td>Support for regulatory relief</td>
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<td>1/29/01</td>
<td>Procter &amp; Gamble, General Motors</td>
<td>Support for &quot;freeze&quot; on new final regulations</td>
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<td>Synthetic Organic Chemical Manufacturers Association</td>
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<td>Briefing at White House with Hispanic representatives</td>
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<td>American Mining Congress</td>
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3/19/01
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NON-GOVERNMENT GROUPS REPRESENTED
National Institute of Building Sciences
Chemical Manufacturers Association
Ford Motor Company
Ford Motor Company
American Business Conference
American Bar Association
CONSAD
Can Manufacturers Institute
CONSAD
Eli Lilly Co.
National Association of Manufacturers
General Motors
Sun Oil Company
Group of Congressman Brayhill's constituents
Delta Airlines
Georgia Power Co.
SUBJECT
Discussion of their task force's research on costs of regulations affecting new construction
Support for regulatory relief
Auto regulations
Import quotas
Invitation to speak
Procedural aspects of regulatory reform
General aspects of regulatory reform
Support for regulatory relief
Acceptance of Chamber-sponsored report, "Quality of Regulators"
General regulatory relief approaches
FDA regulation of new drugs
Support for regulatory relief
Auto regulations
Support for regulatory relief
Support for regulatory relief
Effects and problems of airline deregulation
FERC regulations
Additional staff member contacts over relevant period for which precise date could not be ascertained.

International Paper—Discussion of BCT guidelines for pulp and paper effluents.
Garbage Compactor Manufacturers—Noise standards for garbage compacters.
Ralph Nader’s organization—New drug policy.
Business Roundtable—Clean Air Act regulations.
Sheet Metal Association—Voluntary standard-setting procedures.
St. Joseph Lead Company—OSHA an EPA lead regulations.

Mr. Gore. It lists the groups represented in contacts before—in other words, the people who have contacted you. The gentleman from Oklahoma asked can anybody contact you. The list is the U.S. Chamber of Commerce, General Motors, Atlantic Richfield, Procter & Gamble, U.S. Chamber of Commerce again, American Productivity Center, Synthetic-Organic Chemical Manufacturers, Greyhound Corp., a group of Congressman Broyhill’s businessmen constituents, Sun Oil Co., General Motors, the National Association of Manufacturers, the U.S. Chamber of Commerce again, Ford Motor Co. a couple of times, the Chemical Manufacturers Association, and so forth.

Mr. Synar. It does not look like my mom and dad are getting in there.

Mr. Miller. Congressman, may I speak to that?

Mr. Synar. Sure.

Mr. Miller. My office is open to anyone, within reason. I have a reasonable amount of time to give. I have given time to your staff. I have given time to a group of environmentalists that have come to me. I have given time to other congressional staff. The list that you read reflects the people that asked to see me. Now, I have no control over that.

Mr. Gore. Well, let me, if the gentleman will continue to yield—Mr. Gray, you have invited ex parte communications from—what was the name of the business group? This was the speech that you made before the chamber of commerce saying, “Hey, if you are not satisfied with the treatment you are getting over at the agencies, come see me. We might be able to take care of it for you.”

Have you made any speeches to public interest groups or the like with a similar invitation?

Mr. Gray. Yes, sir. In fact, we were nervous that we were not being asked to meet with environmental and consumer groups so we initiated meetings with the key environmental groups. There have been at least three major meetings with environmental groups and I have had other informal discussions with leaders in the environmental community.

The Vice President has had numerous discussions with people in the labor movement, and on one occasion we had a 2½-hour lunch with Lane Kirkland and several of his colleagues. We constantly seek these kinds of communications. We have met with handicapped groups. We are initiating further such meetings.

This is something that the Vice President takes very seriously. We will continue to do it, and my door is always open. I have listened, and taken virtually every phone call that I could possibly handle. I think the same is true of Jim, and also of Rich William-

Mr. Gore. If the gentleman will continue to yield, and then I will recognize my colleague, Mr. Marks—really, the question is the pro-
cedure, and the opportunity that organized interest groups have to bias the outcome and to get you to direct the result of regulatory proceedings under way.

Let me just cite you a couple of examples: When you met with the Chemical Manufacturers Association on February 23 of this year and discussed their support for regulatory relief, isn't there just a chance that they mentioned the hazardous waste disposal regulations which were ordered to be reviewed by your task force just 30 days later? I mean, isn't that what you discussed with them?

Mr. MILLER. No.
Mr. Gore. What did you discuss? You did not discuss the hazardous waste disposal regulations?
Mr. MILLER. No.
Mr. Gore. All right. What did you discuss?
Mr. MILLER. We discussed what I put on the piece of paper, Congressman.
Mr. Gore. Support for regulatory relief?
Mr. MILLER. Yes.
Mr. Gore. How long was the meeting?
Mr. MILLER. The meeting was 20 minutes, 30 minutes.
Mr. Gore. Did you mention hazardous waste?
Mr. MILLER. The answer is "No." I certainly do not recall that.
Mr. Gore. Wait a minute. You are under oath, now.
Mr. MILLER. I am under oath, yes.
Mr. Gore. The answer is 'No'"? You had a 20-minute meeting with the Chemical Manufacturers Association talking about regulatory relief a month before you asked to pull back the regulations on hazardous waste disposal, and you are telling me under oath that you did not even mention hazardous waste with the Chemical Manufacturers Association?

Mr. MILLER. I am telling you, to the best of my recollection that topic did not come up, and I am under oath when I am saying that. I do not recollect that.

Mr. SYNAR. Would the chairman yield?
Mr. Gore. Let me get the response to the question. Did they mention it?
Mr. MILLER. I do not recollect their mentioning it.
Mr. Gore. On January 29, 1981, you met with the Air Transport Association to discuss progress and problems under airline regulations. Didn't you really discuss the air carrier certification operating and maintenance rule, which is now undergoing review, or the general operating and flight rules, also being reviewed by your task force?

Mr. MILLER. No.
Mr. Gore. What about February 18, 1981? You met with the American Mining Congress and discussed "support for regulatory relief." Isn't it more likely that you discussed their support for the postponement of the Interior Department's rule on extraction of coal, which has now been postponed indefinitely?

Mr. MILLER. I cannot recall that particular meeting.
Mr. SYNAR. Would the chairman yield?
Mr. Gore. Yes.
Mr. MILLER. Could I, as a witness, finish answering the question?
When I indicated and wrote out the reasons for the meetings in response to Chairman Dingell's request, those characterizations were accurate to the best of my knowledge. More time has passed since I submitted that information to you; my memory is likely to be less accurate today than it was then.

Mr. Gore. Well, one of the problems is nobody knows what you did talk about.

Mr. Synar. Would the gentleman yield on that point? Will that—

Mr. Miller. Is there any law, is there anything you can cite, that says that I have to provide such information? We have provided information to the best of our ability, Congressman.

Mr. Gore. Yes, there is a law. The Congress has specified procedures that are to be followed when its delegation of authority to regulate is exercised by the executive branch, and that provides for a record upon which these decisions are made. Are your discussions with these industry groups going to be part of the record that is used to support these regulations? The answer is "No," isn't it?

Mr. Miller. Congressman, someone asks to come and visit and they give a general reason for their visit. Now you are saying that there is a requirement in the current law that when someone comes to visit and express a view, that I have to make a record of that and that information has to be made publicly available?

Mr. Gore. If you are in fact exercising the authority that the Congress has delegated to one of the executive agencies, they are required to follow those procedures. If you have arrogated that power to yourself, then you ought to be required to follow those procedures, or else you ought to give up the authority that you have arrogated.

Mr. Miller. Sir, could we have the appropriate citation? I am just at a loss.

Mr. Gore. I recommend this 150-page legal opinion from the American Law Division of the Library of Congress.¹

Mr. Miller. We have heard of such opinion; we have not been given an opportunity to review it.

Mr. Gore. I will give you one.

Mr. Miller. The Office of Legal Counsel in the Department of Justice, and the appropriate section of the American Bar Association, with which we discussed the issue, brought no such question to our attention.

Mr. Gore. The Supreme Court addressed it yesterday, too.

Mr. Dingell. The time of the gentleman has expired.

The Chair advises that we will continue to proceed under the 5-minute rule and try to see that all members are recognized in appropriate fashion and time.

The Chair recognizes now the gentleman from Pennsylvania, Mr. Marks.

Mr. Marks. Thank you, Mr. Chairman.

Did you say the 15-minute rule?

Dr. Miller, given the legal questions that have been raised concerning the contacts between OMB and the public and between

¹The opinion referred to was published as a committee print by the House Energy and Commerce Committee, "Presidential Control of Agency Rulemaking," serial No. 97-0.
OMB and the executive branch agencies, my understanding from your previous testimony was that you had asked an opinion of the Attorney General regarding such contacts. Is that correct?

**Mr. Miller.** Yes, sir.

**Mr. Marks.** Would you tell us, please, to the best of your recollection what advice you did receive as a result of that inquiry?

**Mr. Miller.** Congressman Marks, I am not an attorney so perhaps the details would best be articulated by my colleague. However, basically it said that we were not under substantial admonitions except to the degree that we might be serving as a conduit for information. That is the reason these ex parte guidelines were issued by Director Stockman.

We knew that this was an issue that needed to be addressed from the very beginning. When the Executive order was being put together, a question arose whether to put these specific guidelines in the Executive order. However, we needed to put the Executive order out fast. The President wanted to sign it. Even so, we began working in earnest on these guidelines but I must admit it took much longer to get these out than I anticipated.

**Mr. Marks.** Mr. Gray, would you like to add anything to that, or can you? May I add, is it possible for us to get a copy of that opinion?

**Mr. Gray.** We will look into it. Yes, sir.

**Mr. Marks.** Would you?

**Mr. Gray.** I think I would add to what Jim has said, that we are not to acting as conduits for outside groups, whether they are business or environmental or labor or whatever. What this ex parte guideline does—which is different than anything done in the past—is that we are making it clear in writing what we have said many, many times informally to all groups who come in to see us, that we do not want to get any information from them that they have not given or are not giving to the agencies.

I think that is an important point to bear in mind. I am not aware that that has ever been done before. When Congressman Gore made reference to the fact that we should put on the record if we arrogate to ourselves the decisionmaking power involved with these agencies, I want to make two points about that.

We are making sure that information goes into the record. That is why we issued these guidelines; they have never been issued before in a form like this. However, the second point I think is that we have not arrogated the power to make decisions. The Executive order makes that clear; I think Jim's testimony makes that clear. The agencies retain the ultimate decisionmaking authority pursuant to their governing statutes.

**Mr. Marks.** May I go back for just a moment? The opinion from the Attorney General that you mentioned previously in your testimony, is there a written opinion to that effect?

**Mr. Gray.** Yes, sir, there is.

**Mr. Marks.** Will you make that available to us?

**Mr. Gray.** Yes, sir.

**Mr. Marks.** Thank you.

**Mr. Dingell.** Without objection, the document referred to will be inserted in the record at the appropriate place. [See p. 152.]
Mr. Marks. Dr. Miller, I understand that the General Accounting Office is preparing a report on conflicting and overlapping regulations, as such. In this report, the GAO is supposed to examine the impact of the Executive order that we are now discussing in regulatory cases. I am wondering, could you briefly discuss the findings of this report with us at this point?

Mr. Miller. Well, the findings of the report—and I have only seen a copy of a draft, and perhaps I should not be giving too much detail about it—but basically they feel that the problem of overlapping and duplicative regulation is not as widespread as generally thought, but that it is an important issue.

In that regard, they recommended that my office, through the use of the responsibilities and authorities under the Executive order, be more diligent in ferreting out problems of duplicative and overlapping regulations, and ask agencies to verify, when they propose regulations that they have made sure that their proposed regulations do not overlap or duplicate the efforts of other regulatory agencies.

Mr. Marks. When do we expect that report to be out? Some time soon?

Mr. Miller. It seemed to be in fairly final form—the version that I saw—so I should imagine in the next few weeks.

Mr. Marks. Dr. Miller, again, would it in fact not simply paralyze the process of what we call providing coordination and policy advice if you would have in fact to account for every conversation with outside groups as well as with the agencies?

Mr. Miller. Well, I would draw a distinction between conversations with outside groups and conversations with the agencies. I think it much more important to prevent public disclosure of conversations with the agencies than with outside groups. I welcome Congressman Synar or Congressman Gore to any meeting that I have with outside groups, so long as the other people—the outside group—have no problems with it.

Mr. Dingell. Excuse me just a minute. I assume you would include the chairman, myself?

Mr. Miller. Yes, sir. I welcome any Member of Congress or any member of your staff to sit in such meetings.

Mr. Gore. Would the gentleman yield?

What if they have a problem? What if the American Mining Congress says I cannot come and listen, or what if the Chemical Manufacturers Association says they do not want me there on the hazardous waste regulations? Have I been excluded?

Mr. Marks. I suspect the President would take care of that.

Mr. Gray. Congressman Gore, if I may, Jim and I both would be relieved, I think, if somebody would come and attend these meetings.

Mr. Gore. Pardon me?

Mr. Gray. I said I think Jim and I would both be relieved if some people came and attended these meetings so we would not have to.

Mr. Gore. What if they said I could not come?

Mr. Miller. I think that anyone who comes to a meeting, who asks to see me, should have as their prerogative—

Mr. Gore. To meet secretly?
Mr. Miller [continuing]. Veto power over who attends the meeting and who does not. I am open, if you——
Mr. Gore. Oh, I see. To discuss these regulations that are going to affect the public?
Mr. Miller. Congressman, could I finish my statement?
If your mother or father or Congressman Synar's mother or father wished to come, and they did not want my associates sitting in, I would observe that request.
Mr. Marks. Excuse me. May I reclaim my time?
Mr. Gore. I am sorry.
Mr. Marks. You have really had about 20 minutes. Thank you.
Dr. Miller, we are interested in knowing as to whether or not the Executive order has in fact been successful in reducing the unjustified regulatory burdens about which so many people complain. Can you amplify on that for us?
Mr. Miller. Well, yes, sir. I think it has had a sizeable impact on the problem of excessive and inefficient regulation. I think the American people have considered regulatory excess and poor performance to be a substantial problem. The President believes that; I know he believes that, and he has instructed us very specifically to carry out his program of regulatory relief.
Now I tell you, it is difficult to get a very fine-tuned handle on some of these regulatory excesses because, quite frankly, one of the problems is that agencies have not done their regulatory impact analyses very well.
However, the materials that the Vice President released on June 13 contained some statistics that I think are important. One is that the regulatory initiatives announced to date involve regulations having a cost attributed to them of between $15 billion and $18 billion on a one-time basis, or annual savings of between $5.5 billion and $6 billion.
Now, as I stressed in the release and as I stressed at the press conference, these are very crude figures. They are arguably biased in the upward direction because some of the regulations will not be eliminated but only modified. They are arguably biased in the downward direction because, first, they are agency figures and these tend to be at the low end of the ranges, and second, because over 70 percent of the regulations we listed did not have any cost figures attached to them.
Therefore, this is a ballpark estimate—as I indicated at the press conference—but I think it is quite substantial. As Senator Dirksen used to say, a billion here and a billion there and pretty soon it adds up to real money.
Also, we find that the number of new rules published in the Federal Register has been cut approximately in half and the number of pages is down a third.
Now it is not the President's intent to stop all regulations but to make sure that those regulations, that do go forward do make sense and comport with his principles that he set out in the Executive order. I think we are making sizeable progress and I think that we have much more progress to make, and intend to make it.
Mr. Marks. There is one other question that I would like to ask, if I may, and that has to do with the question that has been put this morning to others about the Executive Office review delaying
the regulatory process. I wonder if you might give us your view on that, what your experience has been, in fact, with that question?

Mr. MILLER. Well, part of this is, I guess, human nature for agencies to procrastinate in drafting up regulations. Typically, a regulation of the type we review takes months and months, if not years, to draw up. Under the Executive order, we review the regulation and consult with the agency about the degree to which it comports with the President’s principles.

As I think I indicated in an attachment to my testimony, our record thus far in reviewing these regulations has been quite extraordinary, and I think it reflects extraordinarily hard work of my staff. The President and the Vice President admonished us, and the Director did too, that we should not delay our review of these regulations.

The last thing we want to do is have our review process be characterized as trying to block the regulations, so we give very expeditious treatment to these proposals when they come over. Nine days I think is a very short time period compared with the months and sometimes years it takes to draft the original regulation.

Besides that, I think that the process that the President has instituted here of providing some discipline on the agencies probably will speed up—the net effect will be to speed up—the regulatory decisionmaking process rather than slow it down.

Mr. MARKS. You know, I am not sure whether you heard it before but some of our witnesses before had some concerns about the staff and the adequacy of your staff in being able to handle the responsibilities that have been shifted to you. I wonder if you might comment on that for us?

Mr. MILLER. Well, sir, we have plans; we have a request in the fiscal year 1982 budget for additional slots for additional desk officers in my office who will be reviewing these regulations. We think with those additional resources that we will be able to meet the test—to meet the challenge—and to do a very fine job of reviewing these regulations.

We are somewhat shorthanded now, reflecting the fact that we are not quite into the fiscal year 1982 budget, and only through the extraordinary efforts of my staff are we able to accomplish the record that is before you. Let me mention something in that regard.

Quite frankly, Congressman, if OMB and the task force and the President were dealing with the same set of regulators as existed in President Carter’s term—people who were not committed to reform—and if President Reagan had at his disposal only Executive Order 12044, it would be a hopelessly impossible task. I would need hundreds and hundreds of analysts to keep up.

Therefore, the important thing here, the key to our success is really, I believe, the fact that the regulatory appointees at the agencies—the Reagan political regulatory appointees—are people who are dedicated to reform. Ours is more a review process, like a journal referee, rather than a person that is writing a report or a rebuttal statement that is put in a journal.

Mr. MARKS. Thank you very much, Mr. Miller.

Thank you, Mr. Chairman, for your courtesy.
Mr. Dingell. The Chair advises that the Chair recognizes because of the absence of time limits we have slipped past the 5-minute figure. The gentleman has been recognized for longer than 5 minutes.

The Chair will recognize next the gentleman from Indiana, Mr. Coates. Mr. Coates was here first. No? Well, the Chair will recognize the gentleman from Pennsylvania, then.

Mr. Ritter. Thank you, Mr. Chairman.

Just an opening observation: For 10 years the Federal Government has—along with many concerned interest groups—regulated in rather an emotional fashion with a lack of valid scientific base, a lack of reproducible science base. We have gone through 10 years of severe, burdensome overregulation. It seems to me that for once somebody is trying to do something about it.

We had the former employees of the Carter administration testifying earlier on a wonderful set of procedures that took pages and pages of documentation to analyze, to bring forth to us, and yet one of those people, Mrs. Bernstein, stated that they had not revised one major regulation. Therefore, they had this entire working bureaucracy set up with no results.

I think what we have to begin looking at is the fact that there are some people around today who are getting some results. I know there are questions that have been raised on procedures, and I think in a new set of processes, a new approach, those procedures will be ironed out. However, I think we have had enough emotionalism, and I think we have had enough emotionalism at these hearings today.

Mr. Synar and Mr. Gore were questioning the witnesses with a document which none of us in the minority had seen until just now. We feel as a minority that that kind of important documentation should be provided to us as a courtesy.

Both of my good friends made much of a quote alluding to Mr. Gray about working on a problem for some individuals, on page 22 of that report. I would like to read into the record, Mr. Chairman, Mr. Gray’s opening remarks in that very speech. Keep in mind the fact that he sought out three environmental groups when none had previously contacted him.

I would just like to ask Mr. Miller a simple question, and I think it bears very importantly on what we are talking about because we are talking about results: Has Executive Office review of proposed and final regulations hindered agency efforts at promulgating regulations or regulatory improvement?

Mr. Miller. If we mean promulgation of excessive and inefficient regulation, hopefully it has; if the question goes to whether our review has hindered the promulgation of regulations that make sense—and I consider the acid test as being whether they comport with the President’s principles—it has not slowed down or hindered the rulemaking process.

Mr. Ritter. If I might, Mr. Chairman, before I give up the balance of my time I might like to read into the record the statement made by Boyden Gray:

I certainly think that we will not be demanding information. I think the point has been made over and over again as simply one of getting the best data from outside Government to assist the agencies in this work. The better data you provide, con-
sumer groups provide, environmental groups provide, labor provides, et cetera, the better agencies will be able to go on preparing their regulatory impact statements, and the better we will be able to do in grading those analyses at OMB, and the better the result will be. It is something that is going to require effort all along the line but we do not want to generate paperwork that is useless.

I think it is clear that these individuals are trying to put a variety of perspectives into their actions, and I think I would like that placed in the record, Mr. Chairman.

Thank you.

Mr. Dingell. If the gentleman would permit, the Chair is not quite sure what document the gentleman wishes to have inserted in the record.

Mr. Ritter. Well, that makes two of us, then. This was given to us moments before it was used, moments after it was introduced by our colleagues.

Mr. Dingell. Could you identify it, if you will?

Mr. Ritter. This is the document, Mr. Chairman, that we received from majority staff. I assume if there is a—

Mr. Dingell. I appreciate that but if the gentleman can identify it for the Chair, we will try and cooperate with him.

Mr. Ritter. I would suggest that the chairman ask—

Mr. Dingell. If the gentleman wants a document in the record, Washington abounds in documents. The Chair seeks to have the gentleman identify what he wants in the record. If he will identify it for the Chair, the Chair will do its best to comply.

Mr. Ritter. Well, in Mr. Synar’s testimony he characterized this document in one way or another. I would think that the staff of the majority understands precisely what this document is and where it came from. If they would please put a title on the document, then I would be able to identify it more fully.

Mr. Dingell. Well, the Chair has to ask the gentleman from Pennsylvania to identify the document he wants in the record. The Chair is happy to oblige and cooperate with the gentleman but—

Mr. Ritter. I would like that portion which I read entered into the record, if the gentleman would yield.

Mr. Dingell. The Chair is doing its best to rule on the gentleman’s request. If the gentleman will identify the document, the Chair will be quite delighted to see to it that the gentleman has the cooperation of the Chair. Now the Chair was not in the room, and the gentleman is referring to a document.

Mr. Ritter. I would like the recorder to please read back Mr. Synar’s characterization of this document, the document which originated from the majority staff.

Mr. Dingell. I think that is probably beyond the capacity of the recorder. If the gentleman will search around and see what he can do about identifying the document, the Chair will be happy to rule on the gentleman’s request, and the Chair will defer ruling until
such time as the gentleman is prepared to make the appropriate request to the Chair.

Mr. RITTER. That is perfectly all right with me but I think that—

Mr. DINGELL. The gentleman now is recognized either to inquire of the document or to proceed with the questioning under the rules.

Mr. RITTER. I would like to inquire from the majority staff precisely what the name of this document is because it was given to us without a title, Mr. Chairman.

Mr. DINGELL. Well, the gentleman is recognized for purposes of inquiring of the witness in the well and he is using his time, the Chair trusts, for that purpose. The Chair does advise that the timer is running on the gentleman and the Chair hopes he will use his time well. The Chair does not have the staff of the committee in the well.

Mr. RITTER. I would request that the document be returned to me, Mr. Chairman, and I will read the top line of the document if that is so desired, and identify it and characterize it in that fashion.

Mr. DINGELL. The Chair will be happy to return the document; if that is the document, the Chair will be delighted to return it to the gentleman so that he may read the top line and help the Chair to know what he wants in the record.

Mr. RITTER. The paragraph that I asked to be read into the record derives from the "Transcription of Hall of Flags Regulatory Reform Meeting, April 10, 1980."

Mr. DINGELL. Does the gentleman want the whole document or some portion of it?

Mr. RITTER. That portion which I asked to read into the record, Mr. Chairman.

Mr. DINGELL. Well, in order to help the gentleman from Pennsylvania, who is having some difficulty, the Chair will be delighted to say that without objection, the appropriate portion of that document will be inserted in the record.

[Testimony resumes on p. 100.]

[The document referred to follows:]
TRANSCRIPTION OF HALL OF FLAGS REG REFORM BRIEFING, APRIL 10, 1980, U. S. CHAMBER OF COMMERCE, 10:00 A.M.

Honorable Joseph R. Wright, Jr., Deputy Secretary, U. S. Department of Commerce:

You're going to be hearing a lot of details this morning in terms of a little bit more specifics of how you are going to be interfacing, hopefully with the Federal Government in terms of this important enterprise. This morning, I'm going to start off with one of the shortest speeches you've ever given, in part because of the fact that I think it's so important what we're doing right now that it doesn't require a lot of adjectives, it is just a lot of nouns and verbs and that's it. In terms of the President's economic program, I was asked the other day if I could describe it in one sentence, because that is about all the time we have. Believe it or not we can, but we have to go back to somebody who came from the same state I did, and that is Will Rogers. At that time he sat there and said: "Don't tell me about the return on my money, tell me about the return of my money." That is the President's program, very simple.

I had a speech that was written for me and naturally I never use them, much to the chagrin of our entire public affairs office, but they came up with some points in terms of regulation and they're pretty darn good, it really is. It sat there, right in front of me and it says first of all, that the whole regulatory environment that has been built up for the past 30 or 40 years has had these impacts upon the American business community: First, it has been a major contributor to inflation. I don't think there's any question about that. I don't think we should get mired down in figuring out exactly how much it has cost because when you have a
drowning man and he's in 12 feet of water going down, one more gallon doesn't make any difference, so let's not spend our time figuring out exactly how many gallon are in that water, because he's drowning.

Second, it has drained hundreds of billions dollars in capital from the key thing that we are interested in at the Department of Commerce (DoC), from modernization of plant and equipment, productivity, innovation, etc. Third, it has helped produce a negative rate of productivity growth and right now among the major nations that we are competing with in the world for international trade our productivity growth is 8th out of 8. We cannot afford that any longer. Fourth, it has cost the American worker thousands and perhaps millions of jobs. That is becoming more and more important as our unemployment rate goes up. Fifth, it has diverted the attention of business managers from their main job of making their firms more productive, particularly with your small and medium sized businesses, who are coming in the DoC and telling us, "we're not filling out those forms properly, we're just guessing, we don't have the time for it."

Finally, it reduces the competitive ability overseas of American business. American business, right now, is competing pretty darn well overseas despite us. They don't have the Federal government working with them, they don't have the financial structure working with them, they have legal and business barriers, and they've done pretty well.

I was asked a couple of weeks ago of how to make American business competitive again. You don't have to make America competitive again. We've got the best competitive machine, starting all the way when most of us were little boys and girls, when we were taught to win. Our entire free enterprise system, our entire American business community, is taught to win. The DoC of this administration does not have to sit down and redesign the machine, for we are not intending to even attempt

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that. We're just getting the sand out that's been thrown in the cogs for thirty years, and once you do that, the machine will start going again.

So I had to change the title of the speech, and the key that we are interested in from the DoC is to enable foreign producers that are not burdened by all these regulations to make major inroads in our domestic marketplace. I would guess a last issue, although it's not the most important, is one of the most frustrating. It has created a great deal of turmoil and lack of cooperation between American business and Washington to the point where a businessman can come into Washington right now, come to the DoC, can find out that he has no problem with delivering goods and services, for example, then go over to the Justice Department and be stopped, or the Department of Defense will stop him, or State will stop him. Finally, he'll come back over to us, throw his hands in the air and say, "just tell us the rules of the game for a change." So the exercise that we're going through is more than just exercise in terms of identifying some programs, we're trying to make a major change here. I believe that the commitment that President Reagan has on this program is probably about as strong as he has on any issue that the Federal government is dealing with right now. The Executive Order (EO) was signed, came out a couple of days after the inauguration, but had been in the preparation stages for weeks prior to the inauguration. As a matter of fact, the Transition Team had been working on it back in the November/December time frame. Right before it was published, I heard this story and I believe it: the staff within OMB and all the other agencies that had a chance to look at it prior to it going out were looking at it on the desk. The were a little shocked by the EO and started going through and crossing out paragraphs, and they said, "Oh, we really can't do this one, this one is a little strong,"
let's go and study this one," until they got to the fourth or fifth page and they looked down at the bottom and there was a signature on it and it said Ronald Reagan. All of the sudden, they went back and erased all the marks they had put on it.

The President was very dedicated to this EO and the cabinet is strictly behind him one hundred percent. It is important that you know this. This means getting rid of the obsolete regulations. That includes all regs, as I'm sure most of you know that as the previous Administration came out with the Midnight Regs, the Federal Register increased by 40 percent the last month before the inauguration. That freeze was important, but it goes beyond that freeze, it goes back to looking at those regs not just in those last stages, but the ones that were in there before. Eliminating the duplicative, the overlapping, and the conflicting regulations, since there is a ton of them, and we've just got to attack them with a vengeance.

If it is necessary to regulate, for God's sake, make sure that the benefits exceed the cost. I think that's been one of our greatest faults, and then reducing the reporting requirements. That last part is a very important part of what we're talking about. Both Secretary Baldrige and myself at the DoC came from business and you're going to find that if you take a look at many, not only the cabinet, but sub-cabinet members within the Administration, you'll see that they did come from business and/or are the most business oriented group you've seen in Washington in a long time. The business that I came from, banking, is probably one of the most regulated of all businesses to do business in, in which the American companies were not only held down from a regulatory standpoint, but the regulations went into a social structure
of the Constitution. In particular, a company that I was with just went on ahead, if they were told (and they probably have been right now), to come in and help us get rid of these regulations, I guarantee you that they would have put together the most sophisticated staff papers that you've ever seen explaining both sides, they would have used this opportunity as one of the greatest opportunities for advancement within the banking industry that they've ever seen and would have absolutely been charged by it. They're probable doing this. All they needed was somebody to come and say, "let's go, let's do it."

The DoC and again you'll find more information on this, is working very closely with the Vice-President's Task Force. We're in the early stages right now and our key role is to make sure that we provide the interface between American business and the White House in terms of channelling in ideas, in terms of making sure as best we can that the staff work is properly done, in making sure that the other cabinet departments who have responsibility, exercise it. An example is the Department of Interior on the Clean Air Act, their covering most of the issues, staying out of the way where we shouldn't be, but being a true spokesman for American business. I believe the DoC has fallen down on that role over the years, and this is one of the big areas where we intend to pick it up.

This is not an NGO program, not cocktails and chitter-chat. A lot of people have said that trying to do anything in the Federal establishment is like trying to put racing stripes on a hippo. That's probably true in a lot of cases. But let me tell you something, we're not doing a paint job here, we're changing the animal, and we don't have a lot of time. Most of you are politically astute, and you know that the acceptability
of a new administration lasts for a certain period of time. I think this one is going to last much longer, because what we're going to put in from the economic program all the way through to this deregulation is going to work. Now, all I ask you do is help us. Help us do the staff work properly, because you can do it much better than we can. Drive as hard as we're driving, because you've wanted to for years and now you've got your shot. The rest of the speakers will give you a little bit more detail of exactly how we're going to be working but I really wanted to set the tone. I wanted to set the seriousness, and I wanted to say that we will represent you promptly. Thank you.

Q: Are you planning to do anything about the financial regulations, the IRS regulations, and so forth, aside from those already postponed or set aside for review?

A: Absolutely. You're talking about the financial, reporting and accounting regs. There is so much to be done here that we're not eliminating anything. The thing that we are doing, though, is hitting the biggest ones, the ones that get the most exposure to show that we can win. Once you put a brick in the dike, it goes. That's the reason we're doing that. At the current time, there is so much to be covered here and this is the reason I'm asking for help from the business community, from those who are most interested with the regulations that have high priority for them, those are the people who can help us most. We're concentrating on the big ones now so that we can have fast wins on major issues and go off and show the public that we can do it.
Q: Inaudible question on tax codes...

A: Let me say that getting the President's tax cut proposals through is a prerequisite. From the resulting positiveness in the economy, we can then go on and address the tax codes.

Q: Mr. Secretary, I think almost everyone in the room is very supportive of the administration's effort. I have a question in regards to the CoD in put into the administration's position on anti-trust policy, and of course that is specifically the AT&T case and the IBM case.

A: I was told this morning not to comment on the case since it is in the courts, so I won't comment on the case specifically. That ought to make everyone happy at our General Counsel's office to follow their advice. However, let me put it this way: I believe that that entire area of communications is an extremely important one, that through the NTIA, it is the DoC's responsibility to set overall policy in terms of communication, the entire information flow, not only domestically but internationally. This is going to be something that we are going to be working with the Congress on. This case is right in the middle of that and there's major policy issues to be decided by the Federal Government in exactly that area. In terms of our role on that case, I just can't even talk about it right now.

Q: Just how far is the Administration willing to go in dealing in a concerted effort to bring about the regulatory reform/relief that we are
addressing here today?

A: Let me give you a general guideline. We went too far one way in terms of many of the regulations, and it seems like that everything we do has a social context in this country. I'll also give you a personal viewpoint, since that is too general a question for me to sit down and give you specifics on. I believe the both myself and the DoC are willing to go a little bit too far in the other direction to bring some rationalization back to your area of business, sir, but in all of them. In addition, a total repeal may be the practical approach in some cases in your staff papers, if that's what you come up with. But I think most of the businesses will come to us knowing that at least some parts of any questionable regulations have some good purpose and practicality in them.

Dr. Thomas D. Hopkins, Acting Director, Council on Wage and Price Stability:

As you are well aware, under the new Executive Order (EO), a Regulatory Impact Analysis (RIA) must be prepared by the rule making agency for every new major regulatory proposal. Your critiques of these RIA's will be given very careful attention, being a valuable part of the rule making reform and relief process. What I want to spend a few minutes talking about is what we in the Executive Office are going to be looking to the rule make agencies to be providing in the way of RIA's and Bob Miki will be talking a little more specifically about the kinds of
information that will be most useful for you to be providing to the Administration, on regulatory problems generally and specific rule making proceedings.

I think essentially that the kind of regulatory analysis, the type of document that we want will be one, most simply, that would not let get through the hoops next time around, kinds of regulations such as the Energy Department's Appliance Efficiency Standard of last year, and the Education Department's Bi-lingual regulatory proposals (which we think that a full regulatory analysis would clearly show to be poorly conceived), are both excessively burdensome regulations, the type of regulations that this Administration will try to make sure don't get promulgated and ferreted out if they have previously been promulgated. Now there are a couple different ways as to how to get a handle on what should be in the RIA from the agency and what should be in your submission to us or the agencies about the rulemakings.

1) Take a look at the kinds of critiques that the regulatory analysis group did of regs such as those two I just mentioned, of the Appliance Efficiency Standard and the Bi-lingual education proposals critiques that were done last year, which are, incidently, available through my office at COWPS. They identify the basic flaws and shortcomings in the analyses done by the agencies supporting those rulemakings, and flagged the kinds of things that need to be attended to in any critiques of other regulations or forthcoming regulations.

2) Another is to take a careful look at the Executive Order itself. Section 3 of the EO does spell out in some detail what a RIA must contain.
and that it must be provided for major regulations (and there is a
definition in Section 1 as to what is a major regulation). We are in the
process, in the Executive Office and through the mechanism of the Task
Force of trying to prepare some additional guidance for the benefit of
rule making agencies and for the benefit of the public that goes beyond
what is stated in the EO itself. This is still in the process of
drafting and I don’t have anything firm or final to indicate in that
regard, but let me try to sketch out what kinds of information, what kinds
of analyses we think best comport with the spirit of this new EO.

I’ll be coming at it in the perspective of what is the kind of test,
evaluative test, that we at the Task Force and the Executive Office will
be using when we look at supporting documents from agencies trying to
justify a new rule, looking at and critiquing the RIA.

First and foremost, we will want to have a document that clearly
explains the need for and the consequences of the proposed regulation.
That statement will have to address items such as the following questions:

What precisely is the objective of the regulation?

What are the market imperfections that the regulation is addressing?

Would the proposed regulation improve the function of the market or
might it too fail? And if so, if we have an imperfect regulation that is
promulgated, and it might fail, is that likely to leave society worse off
than living with the current problem that we have before we tried the

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regulatory cure? The objective, after all, is to make sure we are comparing imperfect regulations with imperfect markets— not perfect regulations (which we are never able to produce) with perfect markets.

What precisely is the problem that needs to be corrected by a regulatory action?

What is the cause of the market failure that gave rise to the development of the regulation in the first place?

Is this a new problem, have conditions changed in some way to make a regulatory change desirable now, or is the regulatory solution being drummed up now solve the problem that existed ten years ago, but does not exist now?

How will this regulatory change achieve its stated objective?

The document should address alternative approaches to the problem at hand, including, most importantly, the alternative of taking no regulatory action at all. Agencies really should establish a baseline as to what the world will look like in the absence of a new regulation and are there things such as the adequacy of tort laws that itself could be relied upon to accomplish the object of the regulation.

We want a discussion of the alternatives that lie beyond the scope of the specific legislative provision under which the proposed regulation is being promulgated. The agency is not to limit its attention to those items that are just within its current statute, but discuss also the
costs and benefits of the alternatives which might require some statutory change. Alternatives to regulations would also include things such as food inspection rather than a regulatory mandate and so on. If we are talking about the existing statute and alternatives that are open to us within the scope of the existing statute, the examination would want to ask about the cost and benefits of alternative stringency levels; what would happen if we made the standard more or less stringent than the proposal being contemplated, what would happen if we add alternative effective dates, earlier, later, staggered, phased; alternative methods of insuring compliance, as well.

An examination of market oriented ways of regulating, and alternatives to the traditional command and control type regulation, for these alternatives, which have been getting short-tripped in the past, should include informational or labelling strategies that mandate a change buy rather mandate that information, should be available. Standards that are performance oriented rather than design specific. Standards or approaches that embody economic incentives, such as fees, mission offsets, marketable permits to the command and control. These are the kinds of broad issues that have to be addressed every time we get one of these RIA's through for a major proposal and for each of these proposals we'll want estimates of costs, and of benefits.

On the cost side, the bottom line that we're interested in getting from the agency and in turn from you, is the present value of all of the potential costs to society that would result from the promulgation of the new regulation, costs that represent real resource expenditures and costs, and to support these estimates of the present value of the costs
of compliance. We'd like to have a schedule of the costs that would identify the type of costs that we are talking about (are these capital costs, recurring costs, or operating and maintenance costs). When would these costs be incurred (next year or two, not for 5 years, or time pattern for the imposition of the costs)? These costs should be expressed in constant dollar terms with assumptions clearly identified so we know whether we are talking about 1981 dollars or 1970 dollars. The cost should be properly discounted so that we do have in our present value estimates, consistent, sound, economic principals observed in coming up with these estimates. Both direct costs ought to be included, costs borne directly by industry, consumers and by governments. Indirect costs, such as not so much a direct compliance cost, but a cost that may show an adverse effects on competition or productivity or innovation. Any major increase in cost for particular sectors, particular geographic areas would want to be indentified as well.

Turning to the benefit side, the bottom line here is the present value of all benefits that are likely to be generated for society by promulgation of this regulation. Quantify those that can be quantified into monetary terms and describe in non-monetary terms other social benefits that you can't put a price tag on, but describe them in sufficient clarity and detail so that we know that we are looking at some real benefits and not some hoped-for, vaguely understood improvement. There should be an explanation of just how these benefits are likely to be generated by this regulation and over what time frame with proper discounting of the benefits, just as we have proper discounting of the costs when coming up with these estimates. It needs to be a schedule that would show the type of benefit being generated, to whom or what

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types of beneficiaries we're talking about, and again the time pattern, just exactly when this would occur. Having gone as far as you can in estimating the present value of the costs and the present value of the benefits (recognizing the sum of the cost elements and the benefits elements can't be quantified and can't be put into dollar terms, but can at least be indentified), then how far can you go in coming up with a net benefit estimate resulting from this proposal compared to alternative proposals. Our effort will be to go as far as we can in an effort to get that kind of estimation and analysis done.

These are the kinds of things we're talking about with agencies as ways of insuring compliance with the spirit of the Executive Order. As I say, they're still in flux, these precise guidelines and concepts are not yet nailed down, but I wanted to give you a feel for what we are looking to the agencies to do in trying to comply with the EO, and that in turn should give you a feel for the kinds of information that will be most useful to us. I think the hallmark is going to be in stuff that we'll get from you that is factual, is succinct, and corresponds to these kinds of concerns. Thank you.

Q: To what extent will the independent agencies be affected by these guidelines and to what extent does figuring in opportunity costs figure in the make-up of these analyses?

A: I think we are very interested in opportunity cost concepts and their inclusion in the analyses, turning to your second question first, and on you first question, which is really more of a legal question, I would like to defer that to Boyden, if you could ask that question again.
on what extent the independent agencies will be affected.

Q: Will OMB be preparing a document critiquing any particular rule as in the past other did?

A: It's unclear whether it will be necessary for us to provide the major critiques written of rules as the RARD did in the past because we have a quite different type of leadership at the regulatory agencies and much closer cooperation with agency rule writers than has been the case in the past. If we have a clear understanding right from the start with rule writers as to what type of analysis is expected of them, it may not be necessary for much in the way of formal critiques from OMB to the agencies, but certainly where OMB or the Task Force is concerned about the adequacy of the analysis, there are ways in which it is envisioned that these concerns would be communicated to the agency, the agency would identify its concerns and would put these concerns in the public record before issuing any final rule. So if there are any problems of this sort, it would appear in the public record with sufficient detail.

Q: Inaudible question....

A: We have to sort of start walking and then hopefully move into a trot and gallop. I think that in the first instance we're going to be asking the agencies to have just very sound analysis of the costs and benefits of each individual major rule action. There isn't a very considerable interest on trying to get a better handle on it than we've had before on cumulative cost burdens and cumulative benefit burdens, but
that can't be done overnight, and we may have situations arise where we have to make decisions on particular regulations before it is at all possible to have tored up cumulative effects of previous regulations on that sector or that industry. But certainly decisions on individual regulations to the extent that the data exists to the extent that the analysis can be done will take into account cumulative effects of other regulations on that industry, it is just a question of how much is feasible.

Q: Does the administration view it as possible that some agencies will use the cost/benefit requirement to enable them to subpoena or otherwise require businesses to submit cost figures to those agencies to perform these analyses, and secondly, will Jim Miller, who is now also head of government paperworks, so to speak, a clearing of government paperwork at OMB, see that role as a possible check on agencies that would generate additional paperwork for companies to have to answer?

A: Certainly I'm not aware of any talk of agencies using subpoena powers as a result of this Executive Order. Jim Miller in his role with the Paperwork Reduction Act and his staff will be taking a very careful look at agency requests for permission to send out additional forms, data gathering efforts, and has quite a lot of power under that new Paperwork Reduction Act to see to it that forms aren't sent out that really aren't absolutely essential and every effort is going to be made to reduce the reporting requirements, not to increase them.
Better clap now because you probably won't later. There is, in response to one of the last questions an obvious tension between reducing paperwork and asking for a lot of cost/benefit data. We don't want to turn this into one of the biggest paperwork exercises of all time. I certainly think that we will not be demanding information, I think the point that has been made over and over again is simply one of getting the best data from outside government to assist the agencies in this work. The better data you provide, consumer groups provide, environmental groups provide, labor provide, etc., the better the agencies will be able to do in preparing their Regulatory Impact Analysis (RIA) and the better Tom will be able to do in grading those analyses at OMB and the better the result will be. It is something that's going to require effort all along the line, but we certainly don't want to generate paperwork that is useless.

Before I discuss some of the legal questions, I thought I might just do a little overview of the Task Force generally, to put this into context. There's been an awful lot of material written about the role of the Task Force. What I want to do here is emphasize that whatever we do and whatever OMB does is ultimately dependent on what the agencies do. They are the prime focus of this and we should not be viewed as the initiators of a lot of action. The focus will be at the agencies and that's where you should train your first efforts.

That is why the letter that went out says that while the Secretary of Commerce and the Task Force staff want copies, summaries of what you
submit to the agencies, the initial papers, the underlying data, goes to the agencies first. There are a lot of reasons for that but I'll just give you two: they're the ones who make the decisions. Their new appointments there have been very receptive, and as Tom said, very cooperative and there are also legal reasons for it, because of exploited contracts we can not operate as a conduit for factual data that goes from you to us to the agencies, unless it is put in the record and it's a terrible burden for us to try to track to make sure agencies have everything if you submit it only to us. But if you submit to the agencies, there shouldn't be any problems with that as long as you've told an agency what you tell us, there's no problem with you telling us anything.

The Task Force, I think, then will operate as a [coordinator, as a catalyst, as a prod]. We can help set deadlines to get action which are very important. There is nothing more productive than a reasonable deadline. We can eliminate conflicts and duplication. Bob Hiki will talk about that in a few minutes. We can help set priorities based on where we think the greatest savings can be achieved at the least cost to other values. That's what we plan to do. We cannot make, to repeat, the decisions. The better job you do in getting the agencies the information, the less we have to do which is really the way it should be done.

Tom has gone over some of the points generally about what you should submit. It isn't very complicated. It's all common sense. If you can indentify a problem, the question is how to achieve the best solution at the cheapest cost and it may very well be to eliminate a particular regulation entirely. That is one option, it isn't always going to be the
solution but the quest is to find the best solution for a problem. That solution may require legislation, but it may also be achievable administratively and that will at times take some creative lawyering. When cost/benefit is done, the lawyering has to be done in conjunction with the work on the economics.

When you suggest an alternative, you're going to have to know what that alternative costs, how much money it will save, how will we achieve our statutory goal in a perhaps better way. But it isn't very complicated, but to sit down and see what can be done administratively, and if that can be, suggest that. If it can't be, suggest legislation. I think to take the Clean Air Act for an example, there are some things that cannot be done administratively and in the PSD area there are certain problems, red tape problems, permitting process, certain problems where you have complicated overlap and court decision and regulation and statute, there is probably no way to solve those problems administratively. All of those problems are under review by the Administration in preparing the Clean Air Act Revision that is coming this year.

But there are a lot of things under the Clean Air Act that can be solved administratively. There is a lot of discussion, for example, about peer-group review, scientific data. If you look at the Executive Order, you will see that there is authority at OMB and the Task Force to require an agency to seek and evaluate scientific data from additional second opinion, if you will (peer-group review, scientific data). That is just an example. There are a lot of other examples to give. We could go into Section 504, which is the access by the handicapped to transit systems, for example. There is a lot that can be done administratively. We may
determine in the end that we also want legislation, we're going to have both tracks, but it is my view that if a clean solution exists administratively, we should go for that as fast as possible. You can probably get some of these changes administratively, faster than we can get legislation.

It is a simple common sense look at a particular problem, what can be done, what can't be done. Now, some of the changes should be couched as petitions for reconsideration. That is one way of focusing the agencies on the changes that you want. A summary of this should go to the various points identified in the letter to the various groups that we sent it. I think Bob Niki will say the DoC would like to have a copy of the underlying data as well. What we will do is have the various recipients of the summaries and the underlying data which will also be going to the agencies. We will assemble all of this to try to figure out what the priorities should be to help the agencies determine whether there are certain conflicts that they should address, but that don't know about because they only see part of the problem, or because there are costs that they don't know about because of relationship to other laws, to other agencies. However, I want to emphasize that the agency itself is still, and will be, the prime focus of what we hope to do.

If you take a look at the Automobile Package, the story by Clyde Farnsworth in the New York Times, on April 8, it is a pretty good overview of how we hope to proceed. You can see in that Automobile Package, together with the final rule on the one year postponement for the passive restraint, how the economic and micro-economic aspects are integrated. Cost/benefit analysis are integrated with legal requirements. It is quite straightforward, but it is a useful guide.
What was done in that package, both in terms of the proposals and in terms of the final action announced, will give you an idea of how to proceed. It is a very good model to use, and I would urge you to get a copy of the Automobile Package and take a look at it.

In terms of the letter that was sent out, it is directed to trade associations. We hope that trade associations will act as a funnel, a filter, to simplify our work and the work of the agencies. But I want to emphasize that we by no means intend by directing that letter to trade associations to preclude individual companies from seeking their own changes outside of their trade association. As you know, there are trade associations who have politics just as the White House has politics, and we don't want what often happens in trade associations, which is a search for a common ground to preclude a particular issue that may be of great importance to one company in an industry, and of great importance therefore to its suppliers and its customers. We don't want that kind of situation to be ignored so we hope that the companies represented here will work with their trade associations to do the best job possible.

Then, we will know where common issues are that affect companies in an industry, or consumer groups in an umbrella group, or labor unions within an umbrella union. We want to know where the common issues are, and not stop an individual group from reporting something to an agency that effects them uniquely in a very important way.

I hope that I have sufficiently confused you so that you have no questions, but I think maybe the thing for me to do is try and answer questions rather than continue talking. Thank you.

Q: Insoluble question...
A: Well, if you go to the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that is what the Task Force is for. We had an example of that not too long ago, but the people were not being completely candid with their own top people or with the Task Force. We told the lawyers representing the individual companies and trade associations involved to come back to us if they had a problem. Two weeks later they showed up and I asked if they had a problem. They said they did and we made a couple of phone calls and straightened it out, alerted the top people at the agency that there was a little banky panky going on in the bottom of the agency, and it was cleared up very rapidly. So the system does work if you use us as sort of an appeal. We can act as a double-check on the agency that you might encounter problems with.

Q: Question on the role the Task Force will play...

A: That's correct. If you may not have received a copy of the letter, it says to send your suggestions for change. As I said here, you might want to be couched in terms of a petition for reconsideration. Send the basic data to the agency first, and a copy of the summary to the Task Force. In the case of a business group, send a duplicate of the entire package to the DoC. This is for existing regulations that you think ought to be changed. Under the Executive Order, proposed regulations will come through this review process that Tom has outlined. Existing rules have the new authority for the Task Force to designate any of them for review, but we want you to take the initiative from the
outset, to get the agencies to reconsider. If they don't reconsider, and you think they should, then we might become involved.

Q: Do you expect much opposition to new and pending rules, as well as the Executive Order, in the form of court challenges and/or judicial review?

A: The Executive Order (EO) is not judicially reviewable, we hope. There is precedent to indicate that his kind of order is not reviewable. But, what an agency does in preparing its Regulatory Impact Analysis (RIA) will go into the record, obviously, into the record of the rule if it is challenged on appeal. We expect challenges to rules and we expect those challenges to be based on whatever they can be based upon. The EO will not make the challenges any easier or any harder. We think it will make the challenges harder because the discipline of better data will provide stronger support in the end for whatever result is chosen and in fact better protect results from judicial review. There is going to be court action, there is no question about that.

Q: Do you expect an extension of the Executive Order and invitation from the Vice President to the independent agencies and businesses?

A: The Vice President has sent a letter to the independent agencies asking for them to continue their voluntary cooperation with the analysis portions of the Executive Order. It is my understanding that Carter had done the same with his EO, and that virtually all independent agencies complied, and I'm not aware of any refusal to comply with his letter.
is, however, voluntary. The EO, by its terms, does not cover the independent agencies. This is not so much that we thought we lacked certain legal authority to do certain things, since I think we could have extended the EO and might still in the future. We chose not to do it really because of policy reasons that we had our plate more than full with the Executive Branch Agencies which do impose by far the greatest percentage of capital costs burdens that we think were issued during the campaign. We just didn't want to spread ourselves too thin. If we can get the main regulatory problems under control, we'll actually focus at that point more on the independents, but we'll wait and see how much progress we make with the Executive Branch.

Q: How much influence will the Administration bring to bear on balancing the competing interests of energy on the one hand and environment on the other?

A: This is, like in many cases, the essence of governing, I suppose. How do you make these balancing judgements? The agencies will in the initial instance have to make these judgements. We are hoping that the analyses that come in from the private sector, what the agencies do with that data, and what Tom's group does, will lead us to rational judgements on it. But of course there are going to be balancing choices that will have to be made. My guess is that on tough issues, the Task Force will probably get involved, by discussing with the agency alternatives ways of trying to achieve what we all would view as a common goal.

Q: Will, once the responses come in from the Vice President's letter,
the Task Force set the priorities for the agencies or will they set them themselves?

A: I think the answer will be a combination. Bob Miki will go into more detail. One of the things that the Task Force can do is see conflicts between agencies themselves can't see. In those areas, conflict, or in the case of duplication, the Task Force will undoubtedly play a definite role. It will be the job of the DoC in connection with business interests to review those conflicts and those duplications. To tell the agencies things that perhaps they don't know. As to what needs to be done, it will be primarily be the agencies setting their own priorities and if we disagree with them, then of course we would tell them. It is a combination, a joint venture, if you will.

Q: What about if changes are sought with respect to Executive Orders, and where, or to whom, should they be directed?

A: If changes are sought with respect to Executive Orders, it would depend on the extent of the coverage of the EO. Most EO's form the basis of regulatory programs such as the Goals and Timetable, the EO dealing with Affirmative Action and Federally Assisted Construction. Those comments, if they deal with only a couple agencies, should go to those agencies directly. If there is an EO, and there is one dealing with flood control, which I think affects a lot of different agencies, then those comments should probably come to the Task Force.

\[\text{DRAFT}\]
Robert T. Miki, Director of Regulatory Policy, U. S. Department of Commerce:

The gentlemen who preceded me conveyed the Administration's commitment to regulatory relief. I think it is clearly understood that you have a major role in this effort. What I'd like to do is to follow up on some of the analysis issues that Tom Hopkins mentioned and some across-the-board issues that merit your attention and participation.

First, with regard to individual regulations. Tom Hopkins told you what is being expected of agencies which propose to issue regulations. You've been invited to make submissions regarding your priority concerns. You have a powerful tool at your command. The Task Force and the OMB activities have seasoned them with respect to what the regulatory agencies will be doing, the analyses they conduct, the timetables they will have to meet, and so on. I think that you really do need to expend your resources in conducting an analysis along the line of the agencies' regulatory impact analysis. That is basically being asked for in the one page sheet that was attached to the letters that were sent out. So what I'm suggesting is a counterpart analysis, that is an analysis on your part that can be set side by side with the agency's analysis. The reason I say this is that in many instances in the past, you have provided considerable materials. Often time I've noticed that the material is rather voluminous and the agency or whoever else is involved has to wade through a substantial amount of material to get to particular points that are comparable to the ones being made by the regulatory agency. What I'm suggesting is nothing new, merely that the materials that you present be
structured for maximum usefulness. The time that you spend doing in organized structured manner now, will save you a lot of time and effort in the future. My suggestion for the counterpart analysis is not in addition to the information requested by the Vice President's letter to the business community, rather it is an application of the request, that a summary and documentation be provided. I think that as Boyden pointed out, we're still asking for something that is not really voluminous.

We all remember the Environmental Impact Statement process and the tons of material that it generated. I know that I were back at various universities, the students would invariably ask, "Gee, how long should my answers be?" And I always said, "Well, they should be like a bikini, long enough to cover the subject, but short enough to make it interesting, or in your case, pertinent." Certainly, you won't be getting into all of the kind of things that are being requested of the regulatory agencies.

However, I think it is important that you provide:

- an estimate of the costs of compliance. Here you should include the technical and administrative costs, percluding people work. Then provide some documentation as to how you arrived at these figures.

- include adverse effects on the production process, on your cash flow, and capital structure of your particular industry.

- list the principal industries which are purchasers of your output, not a percentage of sales, just a listing (this would help determine what the ripple effect of a particular regulations, due to a subsequent effect on supply conditions, etc. of like industries).

With respect to benefits:

- specify the additional costs that you would incur and the
additional benefits that would accrue. For example, all costs would be $5 Million to achieve an additional 3% benefit, whereas the previous 90% benefit was achieved at a cost of $3 Million.

The groups have come up some alternatives, which would substantially achieve the goals being sought, but do so in a more cost effective manner than they have been considered by the agency proposing the regulation. I think these all fit into a kind of summary, a kind of documentation that is being requested that would provide us with sufficient background information to participate within the rubrick of the Task Force.

Let me for a few minutes turn to broader issues. I think they're gut issues. I would like to see things from your perspective. Do you fill out multiple forms which are duplicative or overlapping? Do you have to follow differing testing protocols for differing regulations? Do you have to go through a number of certification procedures because of different regulations? Do you have to meet varying labelling requirements that are imposed by federal and state government? Does meeting technology prescriptions by one agency put you afoul of another agency's regulations? Are regulations so detailed in their specifications that the legitimate objectives are lost in the forest of detail? If your answer is yes, I expect it would be, we'd like to hear about them. On forms that are duplicative and overlap, give us the form numbers where this takes place. Give us the citations of the sections involved in other overlaps, conflicts, and duplications. That kind of information would be quite helpful in looking at some of these problems that cut across or are generic problems. These are areas which costs and benefits do not touch directly, but I think they are important and we
would be pleased to consider your concerns in these various areas. It is of concern because if you've got one socket, and then you put in some multiple plugs, and multiple plugs on top of that, and then you plug in your appliances, you're going to have a short circuit somewhere in the system. The question is, do we have so many regulatory wires plugged into the circuit of business that we're causing a short circuit in your systems.

Unless we hear from you about these occurrences, and your reasoned recommendations, we'll probably be poorly attuned to your problems. If you let us know and pass along your interest in these matters, we can get a better picture, and begin to attempt to reduce the duplications, the overlaps and conflicts. So this goes beyond the concept of individual regulations, but I think it is an important area that we would want to pay attention to. This is not to say that the individual regulations and the activities in regard to these individual regulations are not important. Tom's right, we've got to walk before we run, but the Department is quite willing to take on this additional task of looking at these kinds of issues. So let me just say that we invite your active participation. You are the ones that are burdened by regulations, you are the ones who should take the present opportunity to make yourselves heard, and to have your recommendations considered. Thank you.
Mr. Dingell. The gentleman from Pennsylvania continues to be recognized.
Mr. Ritter. Mr. Chairman, I yield back the balance of my time.
Mr. Dingell. The Chair thanks the gentleman.
The Chair recognizes counsel for purposes of asking questions.
Mr. McLain. Thank you, Mr. Chairman.
Mr. Miller, I would like to begin, if I might, with one matter that I know is of particular interest to this subcommittee, and that is the question of the effect of the Executive order on independent agencies. In an interview in the April 1981 issue of Regulation magazine, you stated that the administration chose not to apply the order to independents for policy—not legal—reasons.
Could you tell us, if you would, what is the legal basis upon which you would rely should you have chosen to apply it to independent agencies?
Mr. Miller. An opinion by the Office of Legal Counsel of the Department of Justice.
Mr. McLain. Is that a written opinion?
Mr. Miller. Yes.
Mr. McLain. Will you please supply that to the subcommittee?
Mr. Miller. I will be glad to. [See p. 152.]
Mr. McLain. Would you please tell us now what the substance of that opinion said?
Mr. Gray. Mr. McLain—
Mr. Miller. I am not an attorney. The question was whether the requirements of the Executive order could apply to the so-called independent agencies. The answer was "Yes," and the opinion went to the reasons why. Now maybe Mr. Gray is better—
Mr. Gray. I do not think it would be appropriate to release that opinion until such time as we extend the Executive order to the independent agencies, since the Executive order does not apply to the independent agencies.
Mr. Dingell. If the gentleman would permit, is this a public document?
Mr. Gray. No, sir.
Mr. Dingell. Do you plead executive privilege on this matter?
Mr. Gray. No, sir, I do not.
Mr. Dingell. Do you wish to withhold it from the committee, and if so, on what grounds?
Mr. Gray. Well, we will consider this, Mr. Chairman.
Mr. Dingell. Sir?
Mr. Gray. I say we will consider it, Mr. Chairman. I just do not know that it is relevant. We have not—
Mr. Dingell. Do you desire to withhold this document from the committee, and if so, on what grounds?
Mr. Gray. Is it possible to take that under advisement?
Mr. Dingell. No. This is a committee, not a court. Besides, I take the matter under advisement, not you.
Mr. Gray. I appreciate that.
Mr. Dingell. Perhaps you could begin by advising us first, whether you desire to withhold it from the committee and second, if so, on what grounds?
Mr. Gray. We would prefer to withhold it from the—
Mr. Dingell. Sir?
Mr. Gray. I said, Mr. Chairman, we would prefer to withhold it because of its lack of relevance. We have not asserted jurisdiction over the independent agencies.

Mr. Dingell. The Chair finds that not to be a persuasive reason for withholding any public document from a committee of Congress. You are therefore instructed, unless you choose to withhold it and to set forth some appropriate statutory or constitutional grounds therefor, to make the document available to the Congress at your earliest convenience.

Mr. Miller. Could I——

Mr. Dingell. Certainly.

Mr. Miller. Could I mention something, Mr. Chairman? My previous answer was predicated on a citation of the wrong opinion. The opinion I had in mind was the one that went with the Executive order. There was an earlier opinion that I think——

Mr. Dingell. All right. In order to be helpful to you, we will take both documents.

The Chair recognizes counsel.

Mr. McLain. Thank you, Mr. Chairman.

Let me pursue this matter a little bit further. In your press package released over the weekend you indicated that seven of the independent agencies responded to the Vice President's request that they comply voluntarily with the Executive order, those seven being: the Civil Aeronautics Board, Federal Energy Management Agency, Federal Energy Regulatory Commission, Federal Home Loan Bank Board, Federal Mine Safety and Health Review Commission, Interstate Commerce Commission, and Securities and Exchange Commission. Further you stated that they "indicated their willingness to abide by the spirit and the principles of the Executive order."

Could you tell us precisely what each of these agencies is doing to evidence such an abidance?

Mr. Miller. Well, I think perhaps the best thing to do would be just to make available copies of the letters the Vice President received from the heads of these agencies.

Mr. McLain. As well as any other information that they might have supplied to you pursuant to their abidance?

Mr. Miller. Sure. Yes.

Mr. McLain. Mr. Chairman, would the committee desire to have the record held for that material?

Mr. Gore [presiding]. Without objection. [See p. 179.]

Mr. McLain. If I could also pursue the matter of your communications with outside parties, I note the memorandum from Director Stockman to the executive department heads, and that memorandum states that the task force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record.

Will you convey to the agency any nonfactual information that you have received?

Mr. Miller. At our discretion.

Mr. McLain. Upon what standard——

Mr. Miller. Oh, excuse me. Will we convey information——

Mr. McLain. Of a nonfactual nature.
Mr. MILLER. Surely.
Mr. McLAIN. All of that information—
Mr. MILLER. All of what information?
Mr. McLAIN. [continuing] That you receive from outside parties?
Mr. MILLER. No. Let's back up. I think the predicate of my answer and your question were not the same.
Mr. McLAIN. Let me rephrase it. The memorandum from Director Stockman says that you will convey all factual information that you receive to the department heads. Will you convey to them other information of a nonfactual nature which you receive from outside parties?
Mr. MILLER. If we think it pertinent.
Mr. McLAIN. On what basis are you going to decide whether it is pertinent or not?
Mr. MILLER. Whether it is pursuant to the agency's performance under the Executive order.
Mr. McLAIN. In order to do that, I trust that you would have to in some manner log those communications and describe what the nature of the communications are.
Mr. MILLER. That is incorrect.
Mr. McLAIN. Do you intend to log your contacts with outside parties, personal contacts?
Mr. MILLER. We do not.
Mr. McLAIN. Do you intend to log telephone contacts with outside parties?
Mr. MILLER. We do not.
Mr. McLAIN. Are there any restrictions placed upon OMB staff in terms of who they can and cannot communicate with outside the agency?
Mr. MILLER. I have, as a matter of policy, instructed the desk officers not to communicate with outside parties——
Mr. McLAIN. Is that instruction evidenced in writing?
Mr. MILLER. [continuing] with the following exception: If a need arises for them to acquire information from sources outside the Federal Government, they are authorized to make inquiries on their own, but they are forbidden from having contacts from the private sector directly pertaining to any regulatory matter before them.
Mr. McLAIN. Is that instruction evidenced in writing?
Mr. MILLER. I have had three meetings where I have repeated this. I am not sure I have it in one of my standard operating procedure memos.
I am told by my deputy that he has so indicated in writing.
Mr. McLAIN. Mr. Chairman, would the committee desire that that document be included in the record?
Mr. GORE. Without objection. [See p. 195.]
Mr. McLAIN. Let me turn to your principal basis to which you devote about two pages of your prepared statement, and that is the basis upon which you rely in the memorandum from Director Stockman, the Sierra Club v. Costle case. Have you read that case?
Mr. MILLER. I have perused it. I do not want to hold myself out to be an expert on all facets of procedural law. But it seemed to me that the court's statement in that vein was quite explicit.
Mr. McLAIN. As you read the case—it was quite explicit?
Mr. Miller. Yes.
Mr. McLain. I think it was quite explicit, also. Let's try to find out what it was explicit on.
Isn't it true that in the Costle case, the court specifically said that there were no allegations of the conduit-type communications with private parties and that they reserved judgment on that point?
Mr. Miller. Would you direct me to the appropriate language? I would like to look at that.
Mr. McLain. I do not know that I have that clipped the case right now.
Mr. Miller. Well, I am reluctant to respond because, as I indicated, I have not covered this document in thorough detail. Not being a lawyer, I hesitate to characterize a judge's opinion without a complete study.
Mr. McLain. Maybe Mr. Gray could help on that matter.
Mr. Gray, I am sure you are familiar with this case.
Mr. Gray. I will try.
Mr. McLain. The question is, is it not true that in Costle, the court specifically said that there were no allegations of conduit-type communications with private parties in the case, and that they reserved judgment on that point? They did not address that question.
Were there conduit-type communications? Aren't we talking about communications from the President to the agency, between the two?
Mr. Gray. Well, I wish you could refer me to—your question again?
Mr. McLain. My question is, did the Costle case involve conduit-type communications, or did that case address the question of Presidential communications between himself, his staff, and an agency head?
Mr. Gray. That is correct.
Mr. McLain. Thank you.
Isn't it also true that Costle involved a one-time briefing between the President, with his staff and an agency head?
Mr. Gray. That is correct.
Mr. McLain. Isn't it also true that the Costle contacts were during the post-comment period and not during the rule development stage?
Mr. Gray. Well, the post-comment period is part of the rule development stage.
Mr. McLain. However, it did involve communications during the post-comment period between the close of the comment period and the rule becoming final. Is that correct?
Mr. Gray. That is correct.
Mr. McLain. Can you tell us what relevance this case has to a question of your ex parte communications with private parties that might have an interest in a given rulemaking proceeding? Does it have any relevance?
Mr. Gray. It does not have that much relevance to discussions we have with environmental groups, business groups, labor groups—
Mr. McLain. However, it is the basis upon which you have relied in your guidelines of what you call ex parte communications, contacts with private people.

Mr. Gray. We have said in our ex parte guidelines that we will not receive information from them if they have not given it to the agencies. We will not act as a conduit. That is, to the extent that this case says that you should not act as a conduit, we have issued guidelines—

Mr. McLain. To what extent did this case say that?

Mr. Gray. Then I am not sure I understand your question. This case stands for the proposition that the President or his agents not only have a right—

Mr. McLain. His aides?

Mr. Gray [continuing]. And his aides or people in the Executive Office of the President have not only a right but an obligation to discuss policy issues about what is in the record with agency officials. It is on that basis that we say that our Executive order is quite valid.

Now the ex parte guidelines are a slightly separate issue. It is a slightly separate question, not addressed directly in the case. We are not going to act as a conduit for outside parties; I therefore do not understand your question.

Mr. Miller. Maybe it stems from this, Mr. McLain. Maybe you misread that last paragraph in Director Stockman's memorandum. He said: "Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in Sierra Club v. Costle." He did not mean to indicate that that was the only legal foundation on which these ex parte rules were promulgated, nor the authority of the President and his designees to have such communications.

Mr. McLain. Dr. Miller, I am referring more to your prepared statement and specifically statements such as: "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 the agencies."

Mr. Miller. Yes?

Mr. McLain. Costle does not apply to your contacts with the interested public.

Mr. Gray. What we have not done, Mr. McLain, is issue guidelines that require us to log our contacts, our communications with the agencies. That is what we have not done, and we have not done it because Sierra Club v. Costle says we do not have to do it.

Mr. McLain. Let me, if I might, move on to another matter.

Dr. Miller, you commented in the Regulation magazine of August 1977—and I would like to quote you, if I might—"Agencies were not required under the program to place exclusive or even primary reliance in their decisionmaking on cost-benefit calculations where such a requirement could have been imposed only through legislation."

Would you please tell us what legislation was passed by Congress in the interim period that allowed President Reagan to impose such requirements?
Mr. MILLER. Could I have a copy of the interview? I am sorry I do not have one with me. I think the context, as I recollect, would be important. I would be glad to respond to your question, though.

Mr. DINGELL. Doctor perhaps you can help the Chair by advising us. There are a series of Federal statutes that fall within the purview of this matter.

Mr. MILLER. Right.

Mr. DINGELL. There also are a series of Federal regulatory agencies, both within the old-line departments and within the category of the independent agencies which are an arm of Congress.

Can you first of all submit to us for the record, please, a statement indicating which of the statutes that you will apply cost-benefit to where there is a provision in the statute which would authorize cost-benefit to be applied to cases and regulatory processes arising within the Federal regulatory system, please?

Mr. MILLER. Let me respond to that by saying, first of all, the Executive order indicates very clearly that the requirements thereof apply only to the extent permitted by law.

Mr. DINGELL. We are in full agreement, and I am delighted to hear that. I just want to be sure that that condition remains. In order that we might best monitor it, I would appreciate it if you would submit to us then the following: One, a statement of each of the statutes that will be subject to this which has cost-benefit included in the congressional language and a statement of those which do not. I would like also to have you submit to us a list of each of the independent regulatory bodies to whom cost-benefit will be applied, and a list of the old-line departments to which cost-benefit will be applied, and we will insert that in the record in the appropriate place.

[The information requested was not available to the subcommittee at the time of printing.]

Mr. DINGELL. Now, Doctor if you please, you had a comment.

Mr. MILLER. Sir, you have asked me to provide something that I cannot at this point agree can be——

Mr. DINGELL. No; submit it for the record, if you please.

Mr. MILLER. Yes; I understand but I do not know whether that can be accomplished within a time frame that makes any sense. The resources involved——

Mr. DINGELL. The committee is very comfortable. We will wait.

Mr. MILLER. Well, this may take years to do. The reason is that the laws, the enabling statutes for agencies across the Federal Government, are extraordinarily long. We would have to go through the Code of Federal Regulations to identify each case.

In some cases, as you know, Mr. Chairman, the law specifically requires some benefit-cost analysis; in a few other cases it authorizes it, but my understanding, Mr. Chairman, is that in most cases where it is not specifically prohibited then it is implicitly authorized.

Mr. GORE. Would the Chairman yield?

Mr. DINGELL. Well, can you tell me whether you—are you aware of any, any of these regulatory agencies or any of the statutes where cost benefit is permitted?

Mr. MILLER. In every case where it is not explicitly forbidden. Mr. DINGELL. It is permitted in those instances? All right.
Mr. Miller. There are only a few cases where it is specifically prohibited or it has no relevance to the decision. The Dulaney amendment to the Food, Drug and Cosmetic Act is a notable example. Also the usefulness or relevance of benefit-cost analysis has been circumscribed by the interpretation of the Supreme Court in yesterday’s “Cotton Dust” decision, an interpretation of an extraordinarily vague statute passed by Congress.

Mr. Dingell. Well, can you tell us then whether you did any research to find out which of these were subject to this cost-benefit analysis and which were not, before the orders were issued?

Mr. Miller. Did we compile a formal study, numbered in the hundreds of pages, to list each case? The answer is “No.”

Mr. Dingell. Did you do any research at all?

Mr. Miller. That is the reason the Executive order very specifically set out “to the extent permitted by law.”

Mr. Dingell. Well, I guess if folks inside the administrative branch of Government or in the independent regulatory agencies are supposed to comply to the degree that they are required by law, they would have to know whether or not they then could or should, or should or should not apply cost-benefit analysis to their regulatory process.

Mr. Miller. That is right.

Mr. Dingell. Now how are they supposed to know, and how are you supposed to know whether in fact they are supposed to do so or not do so if you have performed no study of this?

Mr. Miller. I will be glad to answer that. In each agency there is a general counsel’s office with attorneys whose job, among other things, is to know what the enabling statutes require and what they forbid and what they allow. Therefore, agencies have often pointed out that with respect to particular kinds of regulation, benefit-cost analysis or the principles cannot apply in full, or only in part or whatever. Quite frankly, we are reasonably short handed and have not in every case been able to verify their admonition that the President’s principles do not apply.

Mr. Dingell. Well, you seem to be in the rather anomalous position of having an order which you defend vigorously but not being able to tell us who you think it applies to or to tell us who might think on the basis of their own research that it applies to them. This leaves us, I think, in a rather curious position as regards the order.

Can you define to us how we get ourselves out of this situation where we do not know who the order applies to and where the people involved probably do not know that it applies to them? How do we deal with this?

Mr. Miller. Well, Mr. Chairman, I think that is an inaccurate characterization.

Mr. Dingell. Sir?

Mr. Miller. My reading of the statutes and research on the statutes, reflected in books I have written, papers I have written, and speeches I have given have imparted to me the understanding that with only a few exceptions, agency benefit-cost analysis has some legitimate role to play at the option of the agency head in terms of making decisions.
Now I will be happy to try to provide you—and I do not want to try to seem evasive but to go through every single statute, Mr. Chairman, as you know, the Code of Federal Regulations is so massive and our staff resources are limited—we will be glad to provide you what we can.

Mr. Dingell. I am not asking you to perform massive inquiries of this sort but I am trying to find out who you had in mind applying this to and which statutes you intended it would apply to, and you seem to be incapable of telling us today.

Now it is, I think, relatively important that we understand who this would apply to; who would know it applied to them; who would know it did not; who you knew it applied to; and who you had doubts about. I gather that we are sort of in the air as to who is subject to this.

Mr. Miller. Could I say—

Mr. Dingell. Sir?

Mr. Miller. It applies to each of the departments of the Federal Government, the Environmental Protection Agency, and if you will wait just a moment I will read you some others.

Mr. Dingell. Well, the Chair is going to recognize counsel again but I will yield briefly to the gentleman from Tennessee.

Mr. Gore. Thank you, Mr. Chairman.

Is a cost-benefit analysis appropriate under the OSHA law?

Mr. Miller. It is arguable that it is in rulemakings under provisions except for 6(b)5. The Supreme Court ruled on that yesterday. Even in cases involving 6(b)5, benefit evaluation must be met according to the Supreme Court’s decision in the Benzene case handed down 1 year ago.

Mr. Gore. Are cost-benefit analyses appropriate for new regulations promulgated pursuant to section 6(b)5 of OSHA?

Mr. Miller. I have not read the decision in sufficient detail to give you a definitive answer, Mr. Gore. On the basis of my reading of the summary—I was very busy yesterday studying all the materials, so I was very, very busy and I have not had a chance to review that in great detail—but from my understanding, the Supreme Court ruled that the interpretation of the OSHA Act was that except for the feasibility aspect, benefit-cost analysis could not be the overriding criterion for promulgation of new rules.

Mr. Gore. Are you going to insist that OSHA apply a cost-benefit test to new regulations issued pursuant to section 6(b)5 of OSHA?

Mr. Miller. Yes, in the following sense: first, to the degree that the decision is relevant, the Supreme Court’s decision in the cotton dust standard allows for such; and, second, the Executive order requires certain analyses to be done with respect to the lowest-cost way of meeting any given objective. To the extent that the cotton dust standard prevents that, then the agencies are required to perform the analysis and to show what the effects of the legislative restraint would be, but of course their decision would be governed by the Supreme Court’s interpretation.

Mr. Gore. Which said you could not.

Mr. Dingell. The Chair thanks the gentleman.
The Chair recognizes counsel again.

Mr. McLain. Dr. Miller, you were about to tell us what legislation Congress had enacted since 1977 where you stated that to re-
quire cost-benefit analysis as a decisionmaking tool, that that was a requirement which could only be imposed by legislation.

Mr. Miller. Could I just identify that what you are referring to is a page from an article I published in the first issue of Regulation magazine entitled, "Lessons of the Economic Impact Statement Program." It was published in the July-August 1977 issue. Without even reading it, let me of course mention that this went to a discussion of President Ford's program and President Carter's program to that date.

Let me just read in the whole paragraph from which you quoted.

Mr. Dingell. Without objection, the Chair will put the whole of it, the relevant portions, in the record and will recognize you for summary. [See p. 221.]

Mr. Miller. May I either read it aloud or at least read it to myself so I can see what the contents are?

Mr. Dingell. Either way.

Mr. Miller. Let me just read it aloud: "In briefings on the program, agencies were told that a proposal need not be considered inflationary simply because it might generate cost. Rather, if the proposal would increase real output, that is, generate tangible and intangible benefits in excess of cost, then in a real sense it was anti-inflationary; but, if the action would decrease real output, that is, generate costs in excess of benefits, it was inflationary."

Here is the part that you quoted, Mr. McLain: " Agencies were not required under the program to place exclusive or even primary reliance in their decisionmaking on cost-benefit calculations where such a requirement could have been imposed only through legislation. Nevertheless, it was believed that requiring agency officials to address costs and benefits systematically would make them more sensitive to these issues."

Now what was your question about that?

Mr. McLain. My question was, what legislation has Congress passed since you wrote that statement which allowed President Reagan to mandate that the decisionmaking be based upon cost-benefit calculations?

Mr. Miller. What the paragraph says and what the sentence that you quoted says is that agencies were not told that they had to place exclusive or even primary reliance on cost-benefit calculations because there were certain laws that restrained it or restrained the—

Mr. McLain. What it says is, to impose such a requirement would take legislation.

Mr. Miller. That is right.

Mr. McLain. Is that right?

Mr. Miller. That is right, and the analogy would be if President Reagan's Executive order had been written and did not include the phrase "to the extent permitted by law." What I am saying there—and perhaps I inartfully said, Mr. McLain—was that there are situations as cited by Chairman Dingell where legislation does not permit the primary reason for a decision to be the results of a benefit-cost analysis.

Mr. McLain. You were talking in terms though, were you not, of the Executive orders of President Ford and President Carter?
Mr. Miller. That is right. I am saying that when we briefed people on President Ford's program we did not tell them, "Ignore your statutes; if you promulgate regulations, you have to base them on the outcome of this," because to do so would have been to violate the law because there are certain statutes that restrain that.

Mr. Dingell. The harsh fact, then, is that you really do not know who this order covers and who it does not cover. Isn't that true?

Mr. Miller. It applies to the Department of Commerce, the Department of Agriculture, the Department of Defense, the Department of Education, the Department of Energy, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, the Department of State, the Department of Transportation, the Department of Treasury, and a number of other agencies in the executive branch of Government.

Mr. Dingell. OK. However, you do not know which statutes under the purview of those agencies it applies to.

Mr. Miller. I will not cite every statute for you. I just simply cannot remember them but I will provide something for the record.

Mr. Dingell. However, you do not know which statutes under the purview of these agencies it applies to so you really do not know who is going to be covered by it or who is not going to be covered by it. Isn't that right?

Mr. Miller. Congressman, I think I have answered the question to the best of my ability.

Mr. Dingell. Well, I asked you to tell us which statutes were covered. You told us you had not made a study on that and what I am trying to figure out is, who is covered, what statutes are covered? You are telling me which departments are covered but you are not telling me which statutes are covered.

I am trying to figure out, if you do not know which statute is covered, aren't you falling afoul of the adjuration of the court that legislative bodies not cast large nets of small mesh to catch all the fish, and then decide which fish they should keep and which fish they should throw back? That is an ancient prohibition of the courts in terms of equity, in terms of bad lawmaking or bad regulations.

What I am trying to figure out is, who is covered, who is not covered? Which statute is covered, which statute is not covered? Now I have asked you to tell me which statute is covered or whether you studied them to find out which statutes were covered and which were not, and you told me you had not done it.

The next question I am trying to get to here is to figure out, if you do not know which statutes are covered, how are you supposed to know what the savings of this proposal are going to be? You have come up with a figure of $18 billion but you do not know what statutes are going to be covered and what statutes are not going to be covered. Now how do you get the figure of $18 billion if you do not know what statutes are covered?

Mr. Miller. Well, each of the regulations identified in that attachment are regulations that the agency as well as OMB Counsel believe that the agency has sufficient discretion that—following the
President's principles which go beyond just the question of benefit-cost analysis—the agency can do something about them. Each of those is an instance.

Now I cannot provide you off the top of my head with a specific reference, legal reference, statutory reference to each one of those things. I do not——

Mr. Dingell. Was cotton dust covered under this?
Mr. Miller. The cotton dust question was one of those listed, and we believed that we had such discretion.
Mr. Dingell. The court said yesterday that cotton dust was not covered.

Mr. Miller. Well, to the degree that the court said specifically that, then that is the ruling and the Executive order requirements will not apply. Any requirements of the Executive order that conflict with that ruling will not apply.

Mr. Dingell. Well, can you tell me any of the other statutes that were covered in the release of $15 billion to $18 billion, which you in your opinion can tell us firmly involved the power to consider cost benefit in the regulatory process?

Your figures on cotton dust were annual recurring costs of $246 million a year, one-time investment cost of $783 million.

I am trying to figure out which of the other statutes that you talked about would, in fact, involve the power of the agency to exercise judgments in regard to cost-benefit.

Mr. Miller. Well, section 504 of the Rehabilitation Act of 1973 is one.

Mr. Dingell. Sir?
Mr. Miller. Pardon?
Mr. Dingell. Which one was that?
Mr. Dingell. A judgment may be made under that statute as to cost-benefit?

Mr. Miller. I am saying that is a possibility. I have not read the statute myself researching those grounds.

Mr. Dingell. Are you telling us that you know or you do not know, on this point?
Mr. Marks. Mr. Chairman?
Mr. Dingell. Yes?

Mr. Marks. If I may, I think the chairman's original request of Dr. Miller is one that, as I understand it, they will try to provide when they have the opportunity.

Mr. Dingell. The Doctor said he did not have the time. I am content to have them submit it to us but——

Mr. Marks. My thought is at this particular moment that to take the time of the committee now to try to go through all of those various statutes, which could run into thousands, might lead us into the recess.

Mr. Gray. Mr. Chairman, may I clarify something? In terms of your question as to which agencies does the Executive order apply, there is more to the Executive order than just cost-benefit. Indeed, the sections setting forth the President's principles involve more than just cost-benefit.

For example, in the President's principles is the reference to cost effectiveness. This is an issue which appears to be preserved even
under the court's decision in the OSHA case. The figures that are in this statement do not necessarily relate to cost-benefit analysis; they relate to costs that may be eliminated even if——

Mr. Dingell. Well, before the regulation goes into play cost benefit has to be found to be there. The power to assert cost-benefit based regulations has to be found to be present.

Mr. Miller. [Shakes head negatively.]

Mr. Gray. Mr. Chairman, I——

Mr. Dingell. Maybe I misunderstood you but that is the way I understood it.

Mr. Gray. The availability of cost-benefit analysis does not trigger the application of the Executive order.

Mr. Dingell. That is involved in the savings, is it not?

Mr. Gray. No, sir. These are——

Mr. Dingell. Oh, you are not going to make any savings, then, by having cost-benefit analysis?

Mr. Gray. Oh, yes. No, that is not——

Mr. Dingell. Well, you either are or you are not. I am prepared to take your word on it. Which is the case?

Mr. Miller. Could I indicate that the 1977 amendments to the Clean Water Act require EPA to consider the reasonableness of the cost, for the control of conventional pollutants. That is an instance where the agency is not only permitted but indeed required to assess the benefits and the costs.

Mr. Dingell. Well, are you telling us that that particular Clean Water Act has a provision whereby the regulatory agency may consider cost-benefit?

Mr. Miller. Yes, not only may, but it is required.

Mr. Dingell. Is it there in the statute?

Mr. Gray. Yes, sir.

Mr. Miller. It is required.

Mr. Dingell. Where?

Mr. Gray. 33 U.S.C. 1314(b)(1).

Mr. Dingell. We will get it; we will get it and take a look at it but——


Mr. Dingell. The Chair finds this all very interesting.

The Chair is going to recognize counsel again.

Mr. McLain. Thank you, Mr. Chairman.

If I could address the question of regulations that have been returned for review, you indicated in your press package released over the weekend, and you have included in the materials that you have supplied the subcommittee that there were 55 nonmajor rules that have been returned to the agencies for reconsideration.

You are aware of the request from Chairman Dingell to Mr. Stockman of June 8, 1981, where he asks for, among other things, a list of those proposed rulemakings which have been submitted to OMB under section 3(c)3 which have not yet been published in the Federal Register as Notice of Proposed Rulemaking as a result of suggested modification of OMB. I think we are talking basically about those 55 regulations.
Mr. Miller. I may have made a mistake in responding. I think you asked for copies, did you not, rather than a list, and I said that we do not have copies.

Mr. McLain. At another point we did ask for copies, for regulations that were published in a different form.

Mr. Miller. Wait a minute. I have a copy of Chairman Dingell’s letter in front of me. Which one of these——

Mr. Dingell. In order to ease our mutual concern here, I will not ask for the originals; I will just ask for copies and I am quite content to receive those.

Mr. Miller. You are asking, sir, for what?

Mr. Dingell. I will not ask for the originals. I will just ask for copies, and the Chair will advise I will be quite content to receive those.

Mr. Miller. We do not have copies.

Mr. Dingell. You do not have copies?

Mr. Miller. Yes, sir. We do not have copies.

Mr. Dingell. Well, you can make a copy and give us the copy, and you keep the original and we will take the copy.

Mr. Miller. We do not have an original.

Mr. Dingell. Well, who has the original?

Mr. Miller. Sir, the flow of paper into our office is awesome. Under the Paperwork Reduction Act, the irony is that the paper flow in our office increased from something like 3,000 transactions to 12,000 transactions, and so we do not even——

Mr. Dingell. I am impressed but all I am asking for is copies of papers that are supposed to be in your files.

Mr. Miller. I do not know how you allege that, sir, not knowing what our filing system is. I have just said we do not keep copies of the regulations.

Mr. Dingell. I am beginning to believe it might be a little on the chaotic side but we shall pursue it, and maybe we will have some folks down there to look at the files.

The Chair recognizes counsel.

Mr. McLain. Dr. Miller, I might simplify this: Will you submit to the subcommittee those 55 regulations that you have returned to the agencies for review?

Mr. Miller. I do not have copies of them; I will give you a list of them.

Mr. McLain. I said a list, would you submit——

Mr. Miller. Sure.

Mr. McLain. That is responsive to Chairman Dingell’s original request, is it not?

Mr. Miller. No, sir. I read his question as——

Mr. Dingell. The Chair will simplify this whole business. I am distressed you do not have the documents but in lieu thereof, will you please submit the letters whereby you returned them to the agencies?

Mr. Miller. In most cases those——

Mr. Dingell. You must have copies of those?

Mr. Miller. I will submit to you, sir, a list of the regulations. I do not have copies.
Mr. DINGELL. The list will be acceptable. We will receive the list, then, in the prayerful hope that your filing system will improve. [See p. 196.]

The Chair recognizes——

Mr. MILLER. Sir, I think that our filing system is very efficient in not keeping copies of these thousands of communications that come to us. We would occupy three floors in the New Executive Office Building rather than one.

Mr. DINGELL. We would just like to get the list.

The Chair recognizes counsel again.

Mr. McLAIN. Tell me briefly, Dr. Miller, what the standards are that you apply to a rule to determine whether it should be reconsidered by the agency.

Mr. MILLER. The President’s principles as set forth in the Executive order.

Mr. McLAIN. You have also indicated in prior statements that of the some 172 regulations that were originally postponed by the President on January 29 for a period of 60 days, that some 37 of those postponed were further postponed at the end of the 60-day period. Is that correct?

Mr. MILLER. Yes.

Mr. McLAIN. Are there still about 37 that are further postponed?

Mr. MILLER. Yes.

Mr. DINGELL. On that, Doctor, would you please submit to us a list of each. I will not ask you to get anything out of your files because I am afraid of what the answer would be, but if you will just get us a list we will be much appreciative.

Mr. MILLER. I will be happy to. [See p. 200.]

Mr. McLAIN. Dr. Miller, what is your legal authority to postpone further than the 60-day period?

Mr. MILLER. I think there was a legal memorandum on the so-called 60-day postponement. Each agency has authority to postpone so the question, I guess, should be addressed to the agencies themselves.

Mr. DINGELL. No, you tell them to postpone, do you not?

Mr. MILLER. No, sir.

Mr. DINGELL. Who tells them to postpone?

Mr. MILLER. Let me answer that. The President of the United States, in a memorandum to the head of the departments and the EPA, asked the agency heads to postpone on their own initiative the effective dates of the regulations. Subsequently the agencies further postponed 37 of those same regulations that had been postponed during the 60-day period.

Mr. DINGELL. Now on what basis did they do that?

Mr. MILLER. Under the authority of their enabling statutes.

Mr. DINGELL. Under the authority of their enabling statutes?

Mr. MILLER. Right. If there was any question of that, I am sure that someone would have raised it in court. It is my understanding the Administrative Procedure Act clearly gives the agencies the authority to do that.

Mr. DINGELL. It does, if that does not prejudice the rights of one of the parties to the proceedings. Isn’t that true?

Mr. MILLER. Well, if that is the case, I am sure that one of the prejudiced parties would have raised this issue.
Mr. Dingell. Would you submit to us a copy of the opinion that you have referred to affording authority to direct the postponement for the period of time that—

Mr. Miller. I am not absolutely sure there is a written document but we were given—

Mr. McLain. Mr. Chairman, if I can be of assistance, there is a written document and the subcommittee has the written document.

Mr. Dingell. Then in order to save Dr. Miller difficulty, the Chair will instruct that that be inserted in the record. [See p. 152.]

Mr. McLain. That written document, I might add, limits its advice to a 60-day period and discusses in some detail the problems attendant to extending it further than that 60-day period.

Could you tell me what is the likelihood of these regulations that are being postponed further being voided because of the extended postponement and having to renew the notice and comment requirements again?

Mr. Miller. I cannot give you a summary statistic on that. I will look into it.

Mr. McLain. Dr. Miller, let me just raise a couple of points, if I could. The chairman has made reference to the press release over the weekend whereby the administration claimed credit for saving the public some $15 to $18 billion through your regulatory reform efforts. Let me just make a couple of statements about those numbers generically, and tell me if these statements are wrong.

Is it not true that many of those numbers simply take industry estimates for costly retrofitting of existing equipment, extrapolated into the future, or out-of-date agency estimates?

Mr. Miller. We put together the very best estimates we could, but these were mainly from industry sources, almost all of them.

Mr. Dingell. Did you receive anything from any nonindustry source? Is there anything from a nonindustry source in there?

Mr. Miller. From nonindustry? Mr. Chairman, almost all of the information came from the agencies themselves.

Mr. Dingell. From the agencies?

Mr. Miller. From the agencies.

Mr. Dingell. It came from agencies or it came from industry? Which?

Mr. Miller. It came from the agencies.

Mr. Gray. In the automobile package, for example, Mr. Chairman—

Mr. Dingell. Pardon?

Mr. Gray. In the automobile relief package released on April 5, those estimates in that package of 34 regulations of EPA and NHTSA were agency estimates which were in almost all respects lower than what the industry was claiming. We chose to use the agency estimates and the truth may very well lie somewhere in between. We do not know.

Mr. Dingell. Counsel?

Mr. McLain. Is it not true that those estimates which you published to justify the statement that you have saved the American public between $15 and $18 billion, is it not true that they do not take into account at all any of the benefits that might be derived from those regulations?
Mr. Miller. Could I correct you, Mr. McLain? I do not think we said "have saved." "Hold the potential for saving," I think is the phrase——

Mr. Dingell. Therefore, you are not saying that it would save or will save; you are just saying it could save.

Mr. Miller. That is right.

Mr. Dingell. I see.

Mr. McLain. Then again, could it save nothing?

Mr. Miller. It conceivably can save nothing. It conceivably can save many times the estimate.

Mr. McLain. Isn't it true in some of these cases that the available analysis indicates that the benefits exceed the costs of these particular regulations?

Mr. Miller. Yes.

Mr. McLain. Therefore, in effect your regulatory reform effort could have cost the American people, could it not?

Mr. Miller. You asked me whether the analyses that are available—we want to make sure that the analyses, that the decisions made, reflect the best evidence.

Mr. Gore. Will counsel yield?

Mr. McLain. Is it not true——

Mr. Gore. Go ahead.

Mr. McLain. Is it not true that based upon the analysis of those regulations which you have cited, that your regulatory reform efforts in holding them up could have cost the American people money?

Mr. Miller. It is conceivable. The question arises, however, do we want to move forward with the regulation on the basis of inadequate information? If all that you require is some evidence that there are benefits, without knowing what those benefits are and without knowing anything about the costs, we have willy-nilly regulation.

Mr. McLain, in my judgment and in the judgment of this administration we have had far too much willy-nilly regulation in the past decade. This regimen that is implicit in the Executive order is going to require better regulation. It is going to require agencies to do a better job. It is going to require that agencies, when they promulgate a regulation or try to meet some objective, they meet it at lowest cost. That saves the consumer; that saves the taxpayer. It is going to require that when agencies issue a regulation for a given cost, they secure the objective, the highest objective, and that helps those who are the subject or who are the beneficiaries of the regulation. That is what this is all about.

Mr. Dingell. The time of counsel has expired.

The Chair is going to recognize the gentleman from Tennessee.

Mr. Gore. Thank you, Mr. Chairman.

What were the potential benefits foregone compared to the potential costs avoided?

Mr. Miller. I think in these instances, if you count the fact that alternative ways of achieving the same regulatory objective were to be considered by the agencies, on the whole I am absolutely convinced that of the regulations listed, the initiatives taken thus far, the costs far exceed the benefits.

Mr. Gore. What were the potential benefits?
Mr. MILLER. The benefits were sizeable but the costs were even—

Mr. GORE. What were they?

Mr. MILLER. I do not have an explicit estimate and that is one—

Mr. GORE. Well, you performed a cost-benefit analysis.

Mr. MILLER. If I could answer, Congressman Gore, one of the very difficult problems with regulation as we have known it in the past decade is the propensity of agencies not to estimate the economic ramifications of their proposed regulations. In this case we want the agencies to do that.

Mr. GORE. Now your justification for avoiding the regulations was the cost-benefit analysis. You cited in your statement a figure of $18 billion of costs avoided. What I want from you is, what was your estimate of the benefits foregone? Since you went through a cost-benefit analysis, I am sure you have it, unless you did not make an estimate of the benefits, unless you only estimated the costs.

Mr. MILLER. Congressman Gore, I am afraid that I have been so inarticulate in expressing to you the basis for this document. The basis for this document was not that each of the items listed was chosen after an extensive benefit-cost analysis. Each of the items was chosen after there was considerable concern about the overall impact of the regulation, good or bad, and that it should have the kind of analysis that the President set forward in the Executive order. Now not all of these, I should emphasize, are initiatives that are "major" under the terms of the Executive order but they are all initiatives that will be going through the Executive order process.

Mr. GORE. Now you have listed the costs on all of these but you have not listed any of the benefits. I have the document right here. You see, the question goes to the viability of cost-benefit analysis. You and I had a very lengthy discussion about this a couple of years ago and I still have not really gotten an answer from you.

This Executive order says that a regulation cannot be issued, it says, "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." Now let's take the regulation on the dumping of hazardous waste into that woman's well in Tennessee who gave birth to a deformed child. I want you to tell me, exactly what is the value of avoiding that child's birth defect?

Mr. MILLER. Well, Mr. Gore, I do not think that we probably will be able to close any further than we did when we had the same colloquy 2 years ago about the same person.

Mr. GORE. Well, what is the answer? You see, the difference is that somebody has to answer that question before they can protect that child. If you cannot answer it, how in blazes can they answer it? If they cannot answer it, how under this Executive order can they protect that child?

Mr. MILLER. Let me indicate to you some parameters on this, the first point being that, as you probably would agree, Congressman, the vast majority of regulations do not require that kind of life-or-death or cost—could I finish?—or birth defect issue. In those cases I do not think you, sir, would disagree substantially with the need
for trying to evaluate costs and benefits so as to make sure that the public is well-served by its regulatory apparatus.

Now in those cases where there are very subjective costs or very subjective benefits, you have first the question of cost effectiveness. That is, of the resources that the Federal sector and the private sector are devoting to the reduction of risk from hazardous wastes and other things, are we doing it in an appropriate manner? Are we—

Mr. GORE. No, no. That is not it. You are saying that they have to do it in a way that has a positive cost-benefit analysis or they cannot do it, and you still have not answered the question. Can you quantify the value of the avoidance of that child's birth defect, and thousands like that child, can you quantify it?

Mr. MILLER. Congressman Gore, I am trying to be responsive to your question.

Mr. GORE. Well, it is a very simple question, yes or no. Can you? Go ahead.

Mr. MILLER. The opportunity cost of not undertaking a regulation for protecting this child—and of course there is a difference between ex-post and ex-ante, the difference between the child that you know is deformed and the child that is at risk—in that event, the opportunity cost is using the resources somewhere else.

Now frankly, Congressman, we do not make those decisions. Congress makes those decisions in terms of the amount of regulation that it—

Mr. GORE. That is right. Go ahead. I was just agreeing with you; Congress does make the decision.

Mr. MILLER. Congress makes the decisions on the global amount of resources that is applied to it, in terms of the budgetary cost and the general guidelines for agencies to follow in regulating. Now I have often used a characterization of benefit-cost analysis where there are subjective benefits and costs, what I characterize as the pile of sand analogy.

If we had two large piles of sand on this table of comparable size, we would not be able to tell very easily which one was the larger. However, if we organized a brigade where we took a cup from each pile in sequence, as their absolute sizes diminished their relative sizes would become much more obvious.

In those cases involving benefit-cost analysis where some costs can be easily quantified and others not, where some benefits can be easily quantified and others not, it behooves the regulatory agency to do the quantification to the extent permissible, the extent feasible, and net out those costs that can be expressed in dollar terms and those benefits that can be expressed in dollar terms so as to focus on those not easily quantified benefits or not easily quantified costs.

Now this is made fairly apparent and clear in the guidelines that we have issued for developing a regulatory impact analysis. We have indicated in testimony before the Congress on many occasions, in speeches, and repeatedly in discussions with agencies that at times the determination that the benefits exceed costs will not be made on a simple arithmetic comparison of $2 amounts. On occasion there has to be some exercise of judgment.
There is nothing in the Executive order and I dare say, Congressman Gore, there is nothing in anything that I have said in print or in speaking, unless I misspoke, that contradicts that point.

Mr. Gore. Well, except the Executive order itself: It says, "Regulatory action shall not be undertaken unless the potential benefits to society outweigh the potential costs to society," and the burden of performing that analysis and quantifying the benefits and quantifying the costs is on the regulatory agency. If they cannot do it, then they cannot issue the regulation, and you have just been unable to do it. You cannot quantify the benefits in the hypothetical I cited, and I dare say hundreds if not thousands like it.

You have not exempted health and safety regulations from this net. You are requiring them to do it as well, and you are putting the burden on the people that the Congress is trying to protect. You are right in saying that the decision is that of the Congress. The Congress decides to protect that child and protect others in this society who need protection and who we, as elected representatives of the people, decide to protect with laws and with the delegation of authority to the agencies to implement those laws.

You are saying, "All right, now, in addition to that we are going to require in the implementation of those laws that they not implement them unless they can come up with this hocus-pocus cost-benefit analysis even where it is absolutely impossible to do so."

Mr. Miller. Congressman Gore, you are welcome to that view of that, but I think you did misstate what is contained in the Executive order. Could I direct your attention to the Executive order, section 3, subsection D(1)—that each regulatory impact analysis is supposed to contain "a description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits."

Paragraph (2) says, "a description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs."

I think that what you are saying does not reflect what is in the Executive order.

Mr. Dingell. The time of the gentleman has expired.

Dr. Miller, the Chair would like to ask you some questions, a couple of things. I would like to go through the way this thing is working, the regulatory process. We will go back to a case which is before a regulatory body.

The first thing they would do is, on completion of the case they would have to submit it to your agency. Is that correct?

Mr. Miller. Well, please bear in mind, Mr. Chairman, that the Executive order applies only to informal rulemaking. Typically, what happens with a case of informal rulemaking is that an agency puts a proposed rule in the Federal Register for comment and then publishes the final rule in the Federal Register after the comment period has closed and the agency has reached its decision.

Mr. Dingell. Now when do they submit it to you for review?

Mr. Miller. That is a good question. Under the Executive order, the agency submits the proposed rule to us prior to its appearance in the Federal Register as a proposed rule.
Mr. Dingell. Prior to—
Mr. Miller. Prior to, that is right.
Mr. Dingell. All right. We have that case clear in mind. What about a case where the proceeding had already gone through the entirety of the process? When was it submitted to you then?
Mr. Miller. It will be submitted to us prior to the agency’s publishing the final rule in the Federal Register.
Mr. Dingell. Have you, under your regulations, dealt with any of the rules which had already been in place and which had for all intents and purposes achieved the force and effect of law?
Mr. Miller. Well, one case was the Department of Transportation decision to postpone the effective date of the implementation of the passive restraint rule for the automobile industry. That was one that Secretary Brock Adams had—
Mr. Dingell. I think he thoroughly screwed it up but my views on that are personal views. I am concerned here with the process and I am trying to find out when these things came to you and under what circumstances because I want to find out whether or not you have the appropriate and necessary procedural and due process rights protected to all persons.
Now if a rule was submitted to you after it had achieved the force and effect of law, when was it submitted to you, or were any in fact submitted to you under those conditions?
Mr. Miller. Well, in that case, Chairman Dingell, the agency submitted it to us. In the case where Secretary Lewis postponed the effective date of the passive restraint rule, the agency submitted to us the proposal to postpone the rule before it appeared in the Federal Register.
He then also submitted to us for our review the regulatory impact analysis of the rule as well as the proposed final rule itself. In that particular case we had no consultations other than to say, “It comports with the President’s principles.”
Mr. Dingell. Now what happens when this is submitted to you? What happens when the rule is submitted to you? What review do you make? What do you do? You say you want these rules submitted to you before they are put into the Federal Register but you have also told us that you do not want any of them submitted; that where any affected person would want to have you look at it, they would have to submit the papers to you at the same time they would submit them to the regulatory agency. Is that correct?
Mr. Miller. Yes.
Mr. Dingell. All right, now, how does anybody submit a paper to you at the same time they submit it to a regulatory agency if the proceeding has not yet been published in the Federal Register?
Mr. Miller. They simply transmit it to the agency. Any time that someone wants to discuss with us an issue pertinent to a regulation that is either proposed formally in the Federal Register or is under development at the agency, we ask them to submit the same information to the agency.
Mr. Gray. Mr. Chairman, I might add here that I do not believe there is anything in the Home Box Office decision that applies these ex parte principles in advance of a notice of proposed rule-making but our ex parte guidelines do not make those distinctions.
We are not going to see material from outside groups under any circumstances that they——

Mr. Dingell. You are not?

Mr. Gray [continuing]. That they have not also submitted——

Mr. Dingell. You do not receive papers from the outside groups at all?

Mr. Gray. No.

Mr. Dingell. You do not?

Mr. Gray. Unless they have—we have instructed them not to give us anything that they have not also given to the agencies.

Mr. Dingell. Say that again, please.

Mr. Gray. We have instructed outside groups of whatever sort not to give us any material that they have not also given to the agencies, regardless of——

Mr. Dingell. Is that a rule of yours which is in writing?

Mr. Gray. Yes, sir.

Mr. Dingell. Where?

Mr. Miller. It is in the ex parte guidelines, sir, that Director Stockman issued on June 13. Sir, it even gets to the point of the ridiculous. When people come in my office to visit, no matter what the group, they say, 'Hello,' and I say, 'Did you tell the agency that?'

Mr. Dingell. Well, I am not sure I am for or against that. I am very concerned about ex parte communications, as you very well know.

Mr. Miller. Right, as are we, and that is the reason that we developed those guidelines.

Mr. Dingell. One thing that I am curious about is, how are you going to avoid becoming a court of appeals? If the agency issues a rule you will have authority to hold up that rule, will you not?

Mr. Miller. In the general sense of the term.

Mr. Dingell. Sir?

Mr. Miller. Not authority in the sense of—in the general sense as you would understand it, we would be able to hold up the rule.

Mr. Dingell. You would be able to hold up the rule?

Mr. Miller. Right.

Mr. Dingell. Therefore, under what authority would you hold up the rule? Under the Executive order?

Mr. Miller. Yes, sir.

Mr. Dingell. OK. Now how would you do that, just tell the agency that the rule is suspended?

Mr. Miller. No, sir. There are a couple of things that could happen. The first is, we advise the agency that the rule as submitted comports with the President's program.

Mr. Dingell. It does, or does not?

Mr. Miller. The first is, we could advise the agency that it does comport with the President's program. The average length of time is 9 days and the shortest time——

Mr. Dingell. I am not talking about the length of time. I am trying to find out how you hold it up, why you hold it up, under what authority you hold it up, and what happens when you hold it up.

Mr. Miller. The second thing that could happen is that we tell an agency, 'We are reviewing your regulation, your proposal. We
have not been able to determine whether it comports or fails to
comport with the President's program. We need more time to make
such an evaluation."

Mr. Dingell. I am just trying to find out what authority you
hold it up under.

Mr. Miller. Under the Executive order.

Mr. Dingell. Under the Executive order? All right. Therefore,
the rule just does not go into effect during the time that you are
engaged in your review, if you notify them. Is that right?

Mr. Miller. If we ask the agency to hold it up for further re-
views under the Executive order, they do that.

Mr. Dingell. All right. Now in the event that you do this, what
actions do you take to ascertain whether it comports with the
President's Executive order or not? Do you hold hearings?

Mr. Miller. No.

Mr. Dingell. Do you receive testimony? Do you receive any docu-
ments? How do you inform yourself as to whether it conforms with
the President's ruling or not?

Mr. Miller. Mr. Chairman, there are two kinds of regulations
under the Executive order. Major regulations are accompanied by a
regulatory impact analysis, and of course in those situations we
rely most heavily on the regulatory impact analysis for a determi-
nation of whether it comports with the rule.

Mr. Dingell. All right.

Mr. Miller. In the case of nonmajor regulations, we simply in-
spect the rule itself. If we need additional information, we go back
to the agencies and ask the agencies to provide us with additional
information in order to make a determination to——

Mr. Dingell. To reopen the record and take additional testimo-
ny?

Mr. Miller. No, sir.

Mr. Dingell. Well, how do they get you the information if they
do not do that? Let's suppose this is an on-the-record proceeding.
How do they get that information, if you say it is not in the
record, without opening the record to receive additional testimony?

Mr. Miller. Sir, they do not transmit the entire record to us.

Mr. Dingell. They what?

Mr. Miller. The information we request may well be in the
record and the agency simply supplies it.

Mr. Dingell. Let's suppose it is not.

Mr. Miller. Well, then, we look at two stages in the informal
rulemaking process: If it is a proposal that has not yet appeared in
the Federal Register and information is not in the record, they
simply can acquire—they will go and acquire additional informa-
tion.

Mr. Dingell. How? How are they supposed to acquire——

Mr. Miller. As they acquire information that they supply to the
record on their own volition. They do research; they contract; they
find it from published sources and other means. How does an
agency find any additional information that it supplies from its
own staff?

Mr. Dingell. You just say that they then go out and get the in-
formation any way they are minded?

Mr. Miller. Pardon?
Mr. Dingell. They go out and get the information any way they are minded?

Mr. Miller. Just as they do for ordinary research that agencies perform in putting materials in the record. It is very frequent, Mr. Chairman, that agencies have informal rulemaking records in which the staff documents are placed and analyses are provided. Let me indicate, as you well know, in the preamble to most regulations there is a statement of what the impact would be. Not only that, but the Executive order contains a version of a provision that is often associated with Senator Bumpers' name—requiring agencies to verify that what they propose is within their statutory authority.

Mr. Dingell. Do you review the record of these agencies?
Mr. Miller. We do not review the whole record.
Mr. Dingell. You do not?
Mr. Miller. Need not, need not.
Mr. Dingell. Do you review any portions of it?
Mr. Miller. Occasionally. It is usually at our request, though, to the agency—our request to the agency to provide materials.

Mr. Dingell. How do you know whether the agency's record and the agency's behavior comports with the President's guidelines under the Executive order?

Mr. Miller. We are not evaluating the record and not evaluating the behavior of the agency; we are evaluating the rule itself.

Mr. Dingell. Well, if the rule does not have anything in on the cost-benefit ratio or the economic impact, how do you know whether it comports with the President's Executive order or not?

Mr. Miller. We make a judgment on many occasions—on most occasions, as a matter of fact.

Mr. Dingell. On what basis do you make this judgment?

Mr. Miller. On the basis of long-term experience with regulatory phenomena and good judgment based on careful analysis in the past.

Mr. Dingell. Where do you get the information, though, on which you make this judgment? Do you hold hearings or do you receive information from any outside source?

Mr. Miller. I have just indicated to you, sir, we do not hold hearings. We rely upon the information provided to us by the agencies. On some occasions we also receive information from outside parties.

Mr. Dingell. What outside parties?

Mr. Miller. Anyone who wishes to submit information to us.

Mr. Dingell. Who would that be?

Mr. Miller. That would be environmental groups, it would be business groups, it would be trade associations, it would be labor groups and others. However, such information——

Mr. Dingell. Then on the basis of your review and this information submitted, you then return it to the agency for action. Now suppose you find it does not comport with the President's Executive order. Do you return it then to the agency for——

Mr. Miller. Yes, we do, but——

Mr. Dingell [continuing]. For what action? What action do you instruct the agency to take at that point?
Mr. MILLER. The record should show that when such information is provided from outside parties, to the degree this is factual information it is also transmitted to the agency for their record.

Mr. DINGELL. Well, but the record of the agency is at this point already closed, is it not?

Mr. MILLER. It depends on what point in the regulatory——

Mr. DINGELL. The agency cannot submit the matter to you until they have a decision, can they?

Mr. MILLER. No, sir.

Mr. DINGELL. They cannot and they do not.

Mr. MILLER. That is incorrect. I thought I described earlier, sir, that there are two stages in the process. The first stage is before the proposed regulation appears in the Federal Register. The second——

Mr. DINGELL. All right. Now we are not talking about that. We are talking about the second one.

Mr. MILLER. Yes.

Mr. DINGELL. In the second one, when you are getting ready to send it back to the agency because it does not comport with the President’s instructions, as I gather it you are returning a final agency action to the agency for further action; are you not?

Mr. MILLER. Yes.

Mr. DINGELL. Therefore, at that point the record of the agency is already closed; is it not?

Mr. MILLER. The record of the agency is closed. The agency may on its own volition—if it thinks that it is proper or if it thinks, also, that it is required by law—may reopen the record. The important thing——

Mr. DINGELL. The agency can but there is no requirement here——

Mr. MILLER. The important thing, Mr. Chairman, is what I indicated in my testimony and the thing that was articulated by Judge Wald, the judge that came out of the consumer movement. Remember, the most liberal court of appeals in the land said that ultimately a regulation must rest on the merits as in the record.

Mr. DINGELL. Well, I do not think that is at issue between us at this point, Mr. Miller. The point that I am trying to get is, what happens? You receive a matter from the agency on which the record has been closed, on which they have come to a final decision. They are sending it down to you for review.

You then review it. I have been trying to find out on what basis you review it. You tell me you review it on the basis of longtime expertise and your own knowledge, and such other information as you can gather either from the record if you are minded to look at it, or from outside sources which you have sort of identified. Then if you disapprove it you send it back down to the agency. Is that right?

Mr. MILLER. If it is not consistent with the President’s principles, yes, sir.

Mr. DINGELL. Now what instructions do you give the agency when you send it down, on the basis of your review?

Mr. MILLER. We tell them it does not comport with the President’s program principles and we describe briefly in what way it does not.
Mr. Dingell. All right, now, in what fashion would the order or the regulation not comply with the President's guidelines?

Mr. Miller. Pardon?

Mr. Dingell. At this point, in what fashion would the matter not comply with the President's guidelines?

Mr. Miller. Well, sir, the principles articulated, the President's requirements are contained in section 2 of the Executive order. It may be a question of inaccurate information: We are simply unable to determine from a reasonable review whether the benefits exceed the cost. We may seek more information on alternative approaches.

I think it would be helpful, Congressman, if I just indicate here that section 3(f)(2) says, "Upon receiving notice that the Director intends to submit views with respect to any final regulatory impact analysis or final rule, the agency shall, subject to section 8(a)(2) of the order, refrain from publishing its final regulatory impact analysis or final rule until the agency has responded to the Director's views and incorporated those views and the agency's response in the rulemaking file."

Mr. Dingell. Well, what I am trying to get now here is—what you are essentially saying then is that the matter can be returned to the agency under the following conditions, as I gather: Under section 2, if it is not based on adequate information. Is that right?

Mr. Miller. Yes, sir.

Mr. Dingell. If you find that the regulatory action will not confer benefits which outweigh the costs; is that right?

Mr. Miller. Again, only to the degree that the agency has the discretion—

Mr. Dingell. Sir?

Mr. Miller. Only to the degree that the agency has discretion to consider those things. Of course, the agency may say—

Mr. Dingell. Now wait, wait. You are making the decision. You do not know what the statute provides. The question then is whether the agency has to comply with that, and the agency's compliance is decided when the matter gets back to the agency; is it not? Isn't that when the issue is decided?

Mr. Miller. That is right.

Mr. Dingell. Sir?

Mr. Miller. That is right, sir.

Mr. Dingell. OK. Therefore, you return it and the agency then has to make a determination whether or not they are going to comply.

Now the next one would be: "The regulatory action shall be chosen to maximize the net benefits to society." That is the next ground on which you would return it. Then the next one would be alternative approaches to any regulatory objective: "The alternative involving the least net cost to society shall be chosen." Is that right?

Mr. Miller. Yes, sir.

Mr. Dingell. OK. Now is (e) under that involved: "Agencies shall set regulatory priorities maximizing the net aggregate benefits to society"? Is that included in the grounds on which you would return it to the agency?

Mr. Miller. One might imagine a case where a regulation of not much substance required a lot of additional information but usual-
ly by the time that we are talking about, Mr. Chairman, in the scena-

rio you described the conditions are already set, and so the——

Mr. Dingell. All I am trying to find out is on what grounds you
are going to return it.

Mr. Miller. The grounds that are listed in section 2 of the Ex-

ecutive order.

Mr. Dingell. Section 2? How about section 3?

Mr. Miller. Section 3 of the order?

Mr. Dingell. That is regulatory impact analysis and review. Will

you return it on that basis?

Mr. Miller. If an agency did not perform an adequate regulatory

impact analysis——

Mr. Dingell. You would then require that it also be returned?

Mr. Miller. If the analysis and other information provided by

the agencies was not sufficient for us to make a determination of

whether the regulation comported with the President’s principles,

we would so return it.

Mr. Dingell. OK. I am not quite sure whether the answer to my

question was yes or no.

Mr. Miller. You see, Mr. Chairman, the regulatory impact anal-

ysis is a tool for determining, an instrument for helping the agency

and us to determine, whether the proposed rule comports with the

President’s——

Mr. Dingell. Sir?

Mr. Miller. The regulatory impact analysis is a tool for helping

us determine and helping the agencies determine whether the pro-

posed rule comports with the President’s principles. As you can

see, Mr. Chairman, section 3——

Mr. Dingell. However, you just told us that you were not going
to read the record on these matters.

Mr. Miller [continuing]. Section 3(a) says, “in order to imple-

ment Section 2,” so that refers back to the President’s principles.

Mr. Dingell. However, my question is: Is section 3 going to be
the basis of returning these regulatory actions to the regulatory
bodies?

Mr. Gray, are you saying “Yes” or “No”?

Mr. Gray. Mr. Chairman, section 3 sets forth the procedures to
be followed by the agencies.

Mr. Dingell. Well, if they have not complied with the proce-
dures, then are you going to require them to be returned or not?

Mr. Gray. Well, part of the requirement of section 3 is to submit
the rule.

Mr. Dingell. Sir? If they do not comply with 3, are you going to
have it returned or not? That is what I am trying to figure out,

Mr. Gray. Yes, sir, parts of 3.

Mr. Dingell. You will?

Mr. Gray. Parts of 3, yes, sir.

Mr. Dingell. Therefore, 3 is essentially a procedural require-
ment they have to comply with or it is going to get returned to
them?

Mr. Gray. Yes, sir, although part of the requirement is that they
be sent, and if they have not been sent then we cannot——
Mr. Dingell. I am just trying to find out here. I do not want you to feel that there is anything you ought to be apprehensive about in the questions I am asking.

Now will you review this matter before it goes to court or not? Will you review the matter before it goes to court or not?

Mr. Miller, do you need a brief recess?  
Mr. Miller. Yes, could I?  
Mr. Dingell. The committee will be in recess for 5 minutes.  
[Brief recess.]

Mr. Dingell. The subcommittee will come to order.  
The Chair apologizes to you for any inconvenience at that particular time.

Mr. Miller. Thank you, sir.  
Mr. Dingell. The Chair wants to know, as his next question, at the time the matter has been referred to you the rule has been published in the Federal Register, has it not?

Mr. Miller. Yes, sir.  
Mr. Dingell. It comes up to you for review to see if it comports with the guidelines. Now does your action change the appellate rights of any person who might be affected by the rule?

Mr. Miller. Not to my knowledge.  
Mr. Dingell. Does it impair their right to go into court?  
Mr. Miller. No, sir.  
Mr. Dingell. Let's assume somebody is in court. You then send the matter back down to the regulatory body for action in conformity with the President's views. What happens with regard to the rights of the person who has gone into court? Are they in any way affected?

Mr. Miller. I do not think so. Mr. Gray might want to comment on that.

Mr. Gray. I am not sure I clearly understand your question. Once a rule has been——

Mr. Dingell. You have a final order. You folks are reviewing it. The court has the matter before it because somebody feels himself aggrieved by the rule and he is in court on the matter.

Mr. Gray. Well, normally he would not be in court until the rule had become final and he had a final order from which to appeal.

Mr. Dingell. Do you get the rule before it becomes final?

Mr. Gray. Yes, sir.

Mr. Dingell. Do you change procedural law, through the Executive order of the President, under the Administrative Procedures Act that deals with the time at which the order becomes final?

Mr. Miller. No.

Mr. Gray. No, sir.

Mr. Dingell. You do not? Well, when does the order become final, then, so that an individual can go into court? While you folks are reviewing it, or after you have completed your review?

Mr. Miller. After.

Mr. Dingell. After? I am not sure that that agrees with the Administrative Procedures Act because the Administrative Procedures Act states that the individual involved has a certain period of time during which he can file after the order is published in the Federal Register.

Mr. Gray. He can certainly do that.
Mr. Dingell. Sir?
Mr. Gray. He can certainly do that under this Executive order. There is no—
Mr. Dingell. He can?
Mr. Miller. Sure.
Mr. Dingell. All right, now, can you in any fashion review on any substantive question? In other words, do you in any fashion review the regulatory order on the basis of any substantive question or on the basis of any procedural defects which take place in the agency that are not mentioned in the Executive order?
Mr. Miller. If some egregious procedural defect came to our attention we would mention it to the agencies but probably would not use that as a reason to return a regulation. There have been a couple of things that we have sent back in part because they reflected procedural abnormalities.
Mr. Gray. I think I can also add, Mr. Chairman, my recollection is that during the 60-day freeze some of the agencies wanted to postpone or eliminate some rules without going through notice and comment. There may have been a close question of law involved. Our recommendation was that they not bypass the APA, and do it in a more slow way in order to insure against any adverse judicial review.
Mr. Dingell. Well, I do not quarrel with that and I find that somewhat comforting but the question that bothers me most at this particular minute is: Do you have authority to send back a rule to a regulatory agency in any fashion, on the basis of any reason that is not set forth in the Executive order?
Mr. Miller. That is a good question, Congressman. Let me see if I can explain. While we might do it, the agency would be under no compunction to follow our advice because it is only things that are pursuant to the Executive order that we should be speaking to. For example, if—
Mr. Dingell. You can hold it up but they do not have to do it if it is outside the scope of this?
Mr. Miller. That is exactly right.
Mr. Dingell. Well, what I am trying to figure out is, what are your powers? Am I to detect here that you would hold it up for any reason that is not included in the President’s Executive order?
Mr. Miller. Yes.
Mr. Gray. [Nods affirmatively.]
Mr. Miller. But we would not hold it up.
Mr. Dingell. You could hold it up for reasons not—
Mr. Miller. Well, we could ask the agency to hold it up but the agency would simply disregard such a request.
Mr. Dingell. Would it?
Mr. Miller. Yes.
Mr. Dingell. You are an officer of the Office of Management and Budget, are you not?
Mr. Miller. Yes, sir.
Mr. Dingell. They will be back before you within the year for review of their budget.
Mr. Miller. Yes, sir. Now I have before my agency—
Mr. Dingell. I am disposed to think you are treated with a great deal of respect, am I not?
Mr. Miller. I think most agencies are sufficiently sophisticated to realize that I have very little impact on the agency's budget. You see, the way we are organized in the Office of Management and Budget, Chairman Dingell, is that—just roughly speaking—there is a budget side and there is a management side. Our activities are on the management side. I do not become involved as a routine measure on any kind of budget matters.

Mr. Dingell. I have observed that there is some confusion between the two sides as to what their respective responsibilities are.

Mr. Miller. Well, I am not confused on what I am supposed to do.

Mr. Dingell. The Chair will yield briefly to the gentleman from Tennessee.

Mr. Gore. Thank you, Mr. Chairman.

I just wanted to cite for the record an interview in the American Enterprise Institute Journal on Government and Society, in which Mr. Miller is asked this same question: What happens if the agency disagrees with the task force, if the head of an agency disagrees with the task force?

Mr. Miller responds:

"He or she still has the legal authority to issue the regulation but that action could be risky, meaning that the President of the United States might decide to remove such person from office." He goes on and says later in the interview, 'You know, if you are the toughest kid on the block most kids will not pick a fight with you.'

I think the message is clear.

Mr. Dingell. Mr. Miller, is that your statement?

Mr. Miller. That is, but—-

Mr. Dingell. Well, which is the committee then to believe, what you have told us here or what you said there?

Mr. Miller. Sir, there is nothing inconsistent with my previous statement and what Congressman Gore read. What Congressman Gore read, the predicate was the task force itself; it is not Jim Miller, it is the task force. Our task force is headed by the Vice President of the United States.

Mr. Dingell. You are indicating, then, that it might be perilous for anybody not to do what you sent back. Is that right?

Mr. Miller. Pardon?

Mr. Dingell. You are indicating, then, that it would be dangerous for any person in the Federal regulatory structure not to do what you sent back.

Mr. Miller. Yes, I think that would be perilous if they took it on their own initiative to publish something that we sent back without first requesting the views or a ruling or consultation with the task force on regulatory relief. In other words, you understand, Mr. Chairman that ours is the first step in a process of consultation.

If the consultation is satisfactory, meaning that the conclusion is drawn that the regulatory proposal comports with the President's principles, then it need go no further. However, if the agency does not agree with our consultation to the effect that it does not comport with the President's principles, then the agency head can ask for this to be considered by the Presidential Task Force on Regulatory Relief.
Therefore, I think the quote from my article is accurate and it is an accurate representation of what my thinking is on the matter, as was my answer to your question, sir.

Mr. Dingell. You were interviewed as executive director of the task force?

Mr. Miller. Yes, sir, but you realize I am not a member of the task force. I am the chief staff person on the task force.

Mr. Dingell. I understand, but you regard your statement there as factual.

Now the Chair is going to recognize one of our colleagues who has appeared, Mr. Rogers.

Mr. Rogers. I thank the chairman.

Dr. Miller, I would like to commend you and your staff at the task force for taking on a chore that has been waiting for someone with courage for some time. The growth of regulations in this country has been alarming in the last few years. It costs billions of dollars to comply with senseless, silly, costly, burdensome regulations which superseded the congressional intent for the laws of this land.

I commend you and the White House and the administration for grappling with that problem and dealing with it within the law, and giving some relief to the taxpayers of this Nation and the consumers of this Nation who are paying the bill for this senseless action that has been going on. Therefore, I wish to commend you, and I wish you godspeed, and I wish you the best of everything as you take on that chore further.

Mr. Miller. Thank you, sir.

Mr. Rogers. I wish you would tell us about the growth of regulations over the past few years. Let's say, take the last 10 years. Can you give us some documentation of the growth?

Mr. Miller. Yes, sir. It is difficult at times to get a perfect handle on the extent of regulation, whether you measure it by aggregate costs—where we have better figures than in the case of aggregate benefits, as I was relating to Congressman Gore—or there are other crude indices.

However, as the President pointed out in I believe his first state of the Union message, the budgetary expenditures of the Federal regulatory agencies quadrupled in the last 10 years. The number of pages published annually in the Federal Register almost tripled and the number of pages in the Code of Federal Regulations almost doubled, so we have had really a veritable explosion in the extent of Government regulation.

Now it does not mean it is all bad, but it certainly means that we should look very closely at the performance of the regulatory agencies and, as you indicated, we should be vigilant in making sure that excessive, inefficient regulations do not appear on the books.

Mr. Rogers. It is estimated, Dr. Miller, if I am correct, that Americans spend 1.8 billion man-hours per year filling out Federal regulations. Is that an accurate figure?

Mr. Miller. I understand it is slightly less but it is a very large number, sir. It is over 1 billion hours for sure. We are committed to making some changes in that regulatory burden, that paperwork burden.

Mr. Rogers. Does that have any direct relation to inflation and the rising prices to consumers across the board?
Mr. MILLER. Whenever paperwork requirements that do not generate any appreciable benefits are imposed upon the private sector, on individuals, then that adds to inflation. It constitutes a waste of resources.

Mr. ROGERS. Now you have already answered this repeatedly today, and I must say consistently, many, many times but I would like you to answer it one more time: Have you taken care of the ex parte problem, if it is a problem?

Mr. MILLER. I think, sir, we have taken care of the problem in a way that is not only consistent with the law but goes further than what is required by law, and at the same time preserved the very important advisory relationship the President of the United States must have with his subordinate officials. The President is held responsible by the public, by the electorate, and he is also responsible under the Constitution of the United States.

Mr. ROGERS. By its very terms, doesn't the Executive order by its own terms preclude any transgression of laws?

Mr. MILLER. Absolutely.

Mr. ROGERS. The reason I asked you if you have taken care of the ex parte problem is because I am going to be presenting to you shortly the work product of some 400 members of the communities that I represent in my district who belong to a task force that I appointed, following up on the President's appointment of your task force, in which all 28 counties that I represent are represented on my task force—

Mr. MILLER. Right.

Mr. ROGERS [continuing]. With 28 people in each county representing 28 different occupations, businesses, professions, all facets and walks of life, devoted to finding out those Federal regulations that are so costly and useless in the Federal Register, that I am going to compile together and present to you on behalf of the citizens of my district.

Now if these people are precluded, these taxpaying citizens of this Nation, if they are precluded from giving to their Government chapter and verse of where the king is walking on our rights, then I think it is time we began to rethink just exactly how this Federal Government is put together. Are you telling me that they can or cannot present to you a chapter and verse recitation of these regulations they think excessive?

Mr. MILLER. Congressman Rogers, not only can they, we look forward to receiving such material. We are aware of the work you are doing, the fine work you are doing in your regulatory task force, and we look anxiously forward to receiving such information.

Mr. GRAY. It is, Congressman, a basic right guaranteed by the first amendment.

Mr. ROGERS. Well, I should hope so, and if there is anything in the statutes passed by this Congress which precludes that right of free speech and address of grievance to the Government, I think then we had better look at the constitutionality of any acts that so do.

I must tell you that Saturday 2 weeks ago some 400 members, grassroots citizens, met together in my hometown and spent an entire day doing nothing but this and they are not yet through. If there is anyone who doubts but that there is a very strong feeling
in the countryside to stop the cancerous growth of the Federal bureaucracy, then they are badly mistaken, because it is out there and it is strong, and they will not rest until action is taken and successfully taken. That is why I so strongly commend you and the President for tackling this cancer growing on the American society.

I yield back the balance of my time.

Mr. Dingell. The time of the gentleman has expired.

Gentlemen, you have indicated to us that the reasons set forth in the President’s Executive order would not be the only basis on which a regulation should be sent back to the regulatory agency. Is that right?

Mr. Miller. Well, sir, that is the only reason that an agency would have to pay attention to what we say.

Mr. Dingell. However, could you send it back for other reasons?

Mr. Miller. Yes, we could send something back.

Mr. Dingell. Under what authority, then, would you send it back for other reasons?

Mr. Miller. There really would not be any.

Mr. Dingell. Sir?

Mr. Miller. It really would not be—I guess in a sense if it were for a reason that is not tied in with the principles set forth in section 2 of the Executive order, we would have no authority to send it back.

Mr. Dingell. You would have no authority but you have indicated that you would do so.

Mr. Miller. I would do it by mistake.

Mr. Dingell. Sir?

Mr. Miller. I would do it only by mistake.

Mr. Dingell. You would do it only by mistake?

Mr. Miller. Right.

Mr. Gray. Mr. Chairman—

Mr. Dingell. In other words—all right. I am sorry. Mr. Gray?

Mr. Gray. I just want to clarify one thing, that in addition to section 2 of the order, section 6(a)5 authorizes the task force and OMB to identify duplicative, overlapping and conflicting rules, existing or proposed, that are inconsistent with the policies of the underlying statutes governing the agencies other than the issuing agency or with the purposes of the order, and in each case requires appropriate interagency consultation to minimize or eliminate duplication, overlap, or conflict. I just want to emphasize that one of the reasons that a rule might be sent back or held up—

Mr. Dingell. That is another reason.

Mr. Miller. Well, I find that consistent with the—

Mr. Dingell. How will you establish any of those facts, though?

Mr. Gray. Whether there is conflict between two agencies?

Mr. Dingell. Yes. How will you establish that?

Mr. Gray. Usually it comes from the other agency with which a proposed rule is in conflict.

Mr. Dingell. Well, what I am trying to learn is, are you going to have any regular procedures for doing this?

Mr. Miller. What we do, Mr. Chairman, is ask the agencies when they send over proposals to us to check first to make sure that it is not duplicative. You know, the General Accounting Office report actually admonishes us to be more vigilant in this regard.
Now we also have something called the regulatory calendar. This was an initiative by the Carter administration which is a very fine one, and the Vice President announced on March 25 that this would be carried over and would continue to be published, so this is a source of information on duplication that we address.

Mr. Dingell. You are not going to have any kind of a record before your agency at all; are you?

Mr. Miller. No, we will not maintain a file and a record.

Mr. Dingell. No record. Will you return it with a letter stating your reasons or will you just return it?

Mr. Miller. It depends, sir, on whether it is a substantial regulation. I mean, if it is a fairly insignificant regulation the reasons for returning it will be communicated over the telephone.

Mr. Dingell. You will communicate over the telephone?

Mr. Miller. Yes, sir.

Mr. Dingell. Therefore, essentially the agency then is going to have to respond by opening up its proceedings after it has closed its proceedings, on the basis of a telephone call from you folks. Is that right?

Mr. Miller. Well, there are again two stages, sir. One is at the proposal stage, in which case there is no formal record.

Mr. Dingell. I am talking about the final stage. I am not talking about the proposal stage.

Mr. Miller. In the final stage—well, it depends on whether there were regulatory impact analyses. If there were, it is pursuant to the material that I read from the Executive order—

Mr. Dingell. However, you will not return it with a letter.

Mr. Miller. In that case, it would be. There would be formal comments that would be filed in the record. Now in the case of a nonmajor regulation there would not necessarily be formal written comments. There probably would be. The process is not that old, sir. It is a good question but—

Mr. Dingell. Well, it is not my process. I am trying to find out what is in it, and I hope you know what is in it because I think that if you do not you are liable to have a great deal of litigation over this question.

Mr. Miller. To my knowledge, we have not returned a final regulation without indicating in writing the reasons for returning it.

Mr. Dingell. Now let's talk about rulemakings that are required by statute. Will you treat these exactly the same way that you have described the nonstatutory rulemakings that would be issued by the regulatory bodies?

Mr. Miller. You are talking, sir, about formal rulemakings?

Mr. Dingell. I am talking about formal rulemakings. Will you treat formal rulemakings required by statute in the same way?

Mr. Miller. The Executive order does not cover formal rulemakings.

Mr. Dingell. It does not cover formal rulemakings?

Mr. Miller. It does not.

Mr. Dingell. Will you have any power at all to require the return and the review of rules that are done under a formal rulemaking?

Mr. Miller. No, sir.
Mr. Dingell. You will not? All right. Now what about agencies that are independent agencies that voluntarily agree to comply? After they complete their record they will submit their rulemakings and the rules that they have issued to you for review?

Mr. Miller. None have done so thus far.

Mr. Dingell. I am advised that Mr. Shad at SEC has. I am advised that FTC has also done so.

Mr. Miller. Perhaps I should explain, but, Mr. Chairman, under the Paperwork Reduction Act all agencies including independent agencies must send to the Office of Management and Budget for their—

Mr. Dingell. That is only with regard to paperwork; is it not?

Mr. Miller. As far as paperwork—

Mr. Dingell. That is not with regard to formal rulemaking.

Mr. Miller. That is right. We have reviewed a number of paperwork requirements but many times, the paperwork requirement is—

Mr. Dingell. Let's not talk about paperwork requirements. That is not before us.

Mr. Miller. A rule that is the result of a formal rulemaking often contains paperwork requirements, so the formal rule may have been submitted to us for review of the paperwork requirements, and in a number of cases they have been.

Mr. Dingell. What I am trying to figure out, though, is where a Federal regulatory agency, the ICC, FTC, SEC, one of the independent agencies, completes a rulemaking acting under their authorities given them by Congress—

Mr. Miller. Right.

Mr. Dingell [continuing]. Do they as soon as they publish their rulemaking in the Federal Register, if they have agreed to function voluntarily, they submit that rule to you for review? Is that right?

Mr. Miller. Yes, sir.

Mr. Dingell. They do? Then what do you do?

Mr. Miller. Well, we would identify as to whether it comported with the President's regulatory policies.

Could I wait just a second, sir, to—

Mr. Dingell. My time is limited and your time is limited, and I just want to—I am trying to figure out what you are doing with these independent agencies which are a matter of special concern to this committee.

Now, you then would return it to the agency if it did not comport with the President's guidelines?

Mr. Miller. Sir, could I indicate that it says who voluntarily re-
quired—

Mr. Dingell. Sir?

Mr. Miller. Sir, could I indicate that it says "who voluntarily re-
went to the heads of the independent agencies, that is on pages 94 and 95 of this, sir.

It requests them to adhere voluntarily to sections 2 and 3 of the President's Executive order; section 2 is the principles and section 3 is the regulatory impact analysis. It does not, unless I am mistaken, require the agency—the Vice President was not even asking the heads of the independent agencies to send their regulations over for review by the Office of Management and Budget.
Mr. Dingell. They are not required but if they voluntarily comply, they submit it to you, you find out whether it comports with the President’s guidelines. If it does not comport with the President’s guidelines, you then return it to the agency. Is that right or is that wrong?

Mr. Miller. Just a moment, sir. Actually, I stand corrected on that. Section 3 does contain the provisions about the review of the regulatory impact analysis itself but not of the actual rule itself.

Mr. Dingell. However, if they submit a rule to you voluntarily—

Mr. Miller. Right.

Mr. Dingell [continuing]. And you do not like it, then you return it to them if it does not comply with—

Mr. Miller. We say we do not like it.

Mr. Dingell. Sir?

Mr. Miller. We would say we do not like it or that it does not—

Mr. Dingell. Do you give them a written letter or some kind of a statement?

Mr. Miller [continuing]. It does not comport with the President’s regulatory principles. We—yes.

Mr. Dingell. What I am trying to figure out is what you do if they submit a rule that you do not find is in accord with the President’s—

Mr. Miller. We would so advise them that it does not comport with the President’s principles.

Mr. Dingell. Will you do this by letter or formal opinion or will you do it otherwise?

Mr. Miller. I would expect to do it by formal letter.

Mr. Dingell. Formal letter? Will you set forth the reasons?

Mr. Miller. Yes.

Mr. Dingell. Will you have any other basis on which you would return it, for example, you did not agree with the substance of it or anything of that sort?

Mr. Miller. Well, the only reasons would be the degree to which it comported with the President’s principles.

Mr. Dingell. Now on what basis would you decide that you were returning it to the agency? Would you hold hearings? Would you call in people to discuss it with you, or would you receive written statements? Would you review the record of the agency? On what basis would you do so?

Mr. Miller. The same as applied to the executive branch agencies as described before.

Mr. Dingell. Exactly the same basis you have already described?

Mr. Miller. Right. However, let me just emphasize there is another reason for sending it back and that is the paperwork requirements. I just wanted to separate that—

Mr. Dingell. I will not even talk about them. They are not under the jurisdiction of this committee. I am trying to find out on what basis you are going to be returning these things to the regulatory bodies because they are under the jurisdiction of the committee; the Paperwork Act is not. What I am trying to figure out is on what basis you would return them.
Well, all right, having established that, then would your action be reviewable in court?

Mr. MILLER. Sir, I think our action would hold the same standing as any ordinary intervenor before an independent regulatory agency.

Mr. DINGELL. In other words, you would have the same—in your action in returning the matter to the agency, you would stand just as any ordinary intervenor? You would not stand as some kind of an appellate agency which would essentially be returning their action to them for further consideration and action?

Mr. MILLER. If an independent agency were to say, "voluntarily we are going to do only things that comport with the President's principles as communicated to us by the Office of Management and Budget," then I suppose that the Office of Management and Budget would have a great deal of influence over the agencies, not by statute but by the agencies volunteering to respond to any kind of consultations we make with them.

Mr. DINGELL. What impact would your submission—returning this to the agency—have on the agency? Would it be that of an ordinary intervenor?

Mr. MILLER. Sir, I think you should address that question to the agency itself.

Mr. DINGELL. Sir?

Mr. MILLER. Sir, I think you should address that question to the agency. I do not know.

Mr. DINGELL. Well, dear friend, you are going to be sending these things down. I want to know what it is going to mean. I am going to ask the agencies that, too, but I want you to tell me.

Mr. MILLER. Sir, since it is a voluntary submission, since the President has chosen not to exercise authority over them with regard to the Executive order, how they comply is a matter for them to determine. I think it would be best to address the question to them how they will respond.

Mr. DINGELL. We intend to do so but I want to get your judgment on this matter.

Mr. MILLER. I would think that they would consider our analysis, and in the event that they agreed to comply with the system and they sent an analysis over for us to review, I think that is the first step of indicating that they would take seriously anything we said. If we identified substantial inadequacies in the work that they had done up to that stage, I would think it likely that they would take that information into account in making their final decision.

Mr. DINGELL. Well, what would they do with the papers that you sent them? Would they include them in the record, and would they treat them as an intervenor's submission or would they treat them as instructions from a court? Would they regard them as mandatory, permissive? What would be the penalty if they chose not to comply, either at law or otherwise? Would they lose their appropriations or authorizations, or would they get cut in the submissions of their budget to the Congress? What would happen to them?

Mr. GRAY. Mr. Chairman, let me see if I can shed some light on this. Many of your questions are somewhat anticipatory because it is my understanding that very, very few if any rules have come over.
Mr. Dingell. Well, I am untroubled about how many or few there might be. I am troubled about what this all means to us.

Mr. Gray. Any comments we would provide would be put on the record by that agency. We would probably be very much in the same shoes as the Antitrust Division of the Department of Justice, which often intervenes or files comments in independent agency proceedings. However, the problem that we have—and I know this is not directly responsive to your question—the problem that we have which is a much greater one is trying to respond primarily to the Congress, from Members of the House and Senators who are in constant contact with us wondering why we have not taken care of some rules——

Mr. Dingell. I am not even asking you about that. I am just trying to find out what all this means and what you are going to do. I must confess I am very much troubled by what you tell me.

Mr. Miller. Why is that, Mr. Chairman, because the process of communicating the information would not be sufficient——

Mr. Dingell. You are dealing with highly specific statutes setting forth the powers and responsibilities of these bodies. You propose to review their actions. I am trying to find out whether on record or not. You have indicated you might do it on the record and you might do it on the basis of somebody who will come in and talk to you about it.

Let me ask you this: If you return one of these matters to an independent regulatory agency which has voluntarily agreed to comply, will you then call them up and say, "Well, we will let you have it if you will do this, or do that?" Will you deal with them on the record or off the record? How will you deal with them?

Mr. Miller. Let them have what, sir?

Mr. Dingell. Sir?

Mr. Miller. Let them have what, sir?

Mr. Dingell. You will let them put their rule into place.

Mr. Miller. We have no authority under the Executive order to postpone a regulatory agency's decision or to forbid an independent regulatory agency from promulgating a rule.

Mr. Gray. Indeed, we have no authority under the Executive order to ask that the agency send us a copy of the rule.

Mr. Dingell. I am beginning to wonder—well, what communications will you have with the independent agency after you return their rule to them? Will you have a formal communication with them or not?

Mr. Miller. Sir, may I tell you——

Mr. Dingell. Will you just return it to them and refuse to talk to them, and they will say, "Well, why did you return it to us?"

Mr. Miller. It has not happened yet but my plan is as follows: First of all, I do not anticipate independent regulatory agencies that have volunteered to cooperate and responded affirmatively to the Vice President's letter to send us analyses of proposed regs. They would send us analyses of rulemakings that they have already undertaken.

Under the provisions of the Executive order—or consistent with the provisions or the system set up under the Executive order with respect to executive branch agencies—we would submit to them our views on the analyses, and those would go into the record.
Mr. Dingell. Well, the law requires that on rulemakings persons should communicate with them only on the official record. Will you communicate with them only on the official record, or off the record?

Mr. Miller. Sir, with respect to formal rulemakings the communications would be on the record. It would follow the requirements of the Administrative Procedure Act and the requirements that the independent agencies had laid down themselves.

Mr. Dingell. What guidelines do you have with regard to that in your Executive order or in your structural instructions to yourself, your instructions from the President? Do you have any?

Mr. Miller. There are no instructions laid out in the Executive order. Since all communications with agencies with respect to major rules have to be signed by me, then there is no need for me to articulate rules with the rest of my staff. I am just telling you what my rule is.

Mr. Dingell. You are telling me, then, that you are going to be the only person at the agency that will be communicating with the independent agencies or to the governmental agencies like Commerce or Department of Transportation, where they are functioning in a rulemaking process?

Mr. Miller. No, sir, what I am saying is that I have promulgated a statement in writing that all determinations adverse to an agency—and the presumption there is that we are talking about executive branch agencies—have to be authorized by me personally, so I would know what communications—

Mr. Dingell. I see. You would be authorizing telephone communications or written communications, or communications for the record or communications off the record. You will be authorizing communications with regard to rulemaking proceedings which are going on before these independent agencies and before the old-line agencies like DOT.

Mr. Miller. Sir, first we have to distinguish between formal and informal rulemakings. The Executive order goes only to the question of informal rulemakings. Formal rulemakings are quasi-judicial proceedings that have their own rules, specific rules of ex parte communication, and we expect to follow those.

With respect to informal rulemakings, again, covered by the Executive order, any decision communicated to an agency—following up on my directive of a few months ago—any decision that is adverse to an agency in the sense of postponing or further extending the time period for review, or returning a rule to an agency, or a determination that a rule is major, I am the only person authorized to make such a determination and communicate that—

Mr. Dingell. Do you do that by telephone or by letter, or by some written communication?

Mr. Miller. It is by letter. In the cases thus far it has been by letter, with just a couple of exceptions.

Mr. Dingell. Very well. The Chair will be, I think, following this hearing up with a written communication asking further questions about the relationship of your agency with regard to different kinds of rulemaking processes before the agencies.

Is there further business to come before the committee at this time?
[No response.]
Mr. Dingell. Doctor, we thank you. The committee stands adjourned.
[The following letter and attachments were received:]
June 26, 1981

Honorable John D. Dingell
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Dingell:

This letter follows up on my June 18 appearance before the Subcommittee on Oversight and Investigations.

At that hearing, you asked that I provide several documents to you for inclusion in the formal record. (These are in addition to the materials provided in my letters of April 2, April 28, and June 17.) Enclosed are the following:

Attachment 1: Opinion by the Office of Legal Counsel concerning contacts between the Office of Management and Budget and Executive-branch agencies pursuant to Executive Order 12291;

Attachment 2: Opinion by the Office of Legal Counsel addressing the applicability of Executive Order 12291 to "independent" regulatory agencies;

Attachment 3: Vice President Bush's letter of March 25 to several agencies asking that they comply voluntarily with certain sections of Executive Order 12291;

Attachment 4: Compilation of responses received from agencies in response to the Vice President's letter of March 25;

Attachment 5: Memorandum from my deputy, James Tozzi, to Desk Officers concerning their contacts with outside parties;
Attachment 6: A list of the 55 regulations found by my office to be inconsistent with Executive Order 12291 and returned to the agencies; and,

Attachment 7: A list of the 37 regulations designated for further postponement at the end of the 60-day regulatory postponement period initiated by the President.

In addition, I am enclosing several other documents which I request be included in the printed record. All of these materials were referred to during the course of the hearing, and I believe many interested parties would consider the record incomplete without them:

Attachment 8: The formal recommendations of the Administrative Conference of the United States with respect to ex parte communications;

Attachment 9: Relevant excerpts from Sierra Club v. Costle;* 

Attachment 10: The Supreme Court's decision in American Textile Manufacturers v. Donovan;* 

Attachment 11: "Deregulation HQ," the transcript of an interview with Council of Economic Advisers Chairman Weidenbaum and me which appeared in the March/April 1981 issue of Regulation;

Attachment 12: "Lessons of the Economic Impact Statement Program," an article I published in the July/August 1977 issue of Regulation;


Attachment 14: "The First 100 Days of Executive Order 12291," a report to the Presidential Task Force on Regulatory Relief by the Office of Management and Budget staff dated June 13, 1981;

*Attachments 9 and 10 may be found in subcommittee files.
Attachment 15: "The President's 60-Day Regulatory Postponement," a report to the Presidential Task Force on Regulatory Relief by the Office of Management and Budget staff dated June 13, 1981;"

Attachment 16: "Materials on President Reagan's Program of Regulatory Relief;"

Attachment 17: "Regulatory Relief for the Automobile Industry," dated April 5, 1981; and

Attachment 18: The Office of Legal Counsel's February 13 opinion on Executive Order 12291.

Thank you very much.

Sincerely yours,

James C. Miller III
Administrator for Information and Regulatory Affairs

cc: Congressman Marc Marks

#The report cited in attachment 15 is included in attachment 16.
Memorandum for Honorable David Stockman
Director, Office of Management and Budget

Re: Contacts Between OMB and Executive Branch Agencies—Pursuant to Executive Order 12291

Your Office has requested the views of this Office regarding the legality of contacts which may occur between you and your staff and officials of Executive agencies in the implementation of Executive Order 12291 (Order). The Order generally requires these agencies to maximize the benefits and minimize the costs of regulations promulgated following informal rulemaking proceedings. Your Office is charged with ensuring compliance with these requirements by engaging in prepublication review of proposed and final rules and preliminary and final Regulatory Impact Analyses (RIA). In performing this oversight role, you and your staff will presumably communicate on a regular basis with agency officials regarding the substance of proposed regulations. You might also wish to transmit to these agencies information or arguments received from other federal agencies or from non-federal parties. Some or all of these contacts might be challenged under the so-called "ex parte contacts" doctrine developed in the D.C. Circuit.


While other circuits have not taken a clear position on ex parte contacts, the D.C. Circuit cases are particularly significant because so many federal regulatory actions are reviewed there and because, as a practical matter, the D.C. Circuit is often the court of last resort in light of the Supreme Court's limited docket.
We conclude that neither the ex parte contacts doctrine, nor other generally applicable provisions of law impose any duties on you or your staff to refrain from communicating with rulemaking agencies. The law is uncertain as to whether rulemaking agencies must disclose communications from your Office which occur after publication of a notice of proposed rulemaking. In order to reduce the danger of reversal, we believe that rulemaking agencies should include in the administrative file and the record for judicial review: (1) oral or written information from your Office of a purely factual nature; and (2) oral or written material received from an interested party outside the Federal Government which influences the views your Office expresses to the agency. Your Office could assist rulemaking agencies in complying with these recommendations by following procedures similar to those described herein.

I. Ex Parte Contacts Doctrine

The D.C. Circuit has thrice addressed the question of ex parte contacts in informal rulemaking. In Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977), interested private parties engaged in wide-spread off-the-record communications with FCC Commissioners and staff regarding a proposed cable television rule. The court condemned the comments on several grounds, including the Due Process Clause, the judicial review requirements of the Administrative Procedure Act (APA), and what the court perceived to be a general need to ensure rationality and fairness in agency decision processes. In a broadly worded dictum, the court stated that such communications would be improper even if the FCC disclosed them in the administrative file in time to allow public comment and judicial review. The court also said that such comments would be permissible prior to publication of a notice of proposed rulemaking. 2/

In Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), a different panel of the D.C. Circuit refused to apply Home Box Office retroactively. In dictum, the panel severely criticized the Home Box Office rationale and expressed its view that the doctrine should be limited to a narrow class of cases involving competing private claims to a valuable privilege. Id. at 477.

In United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir.), stayed in part, 101 S.Ct. 603 (1988), the D.C. Circuit limited the ex parte contacts doctrine in the context of intra-agency communications. While formulating a final

rule regulating workplace exposure to airborne lead, the Assistant Secretary of Labor consulted closely with a staff attorney who argued for the agency staff's proposed standard. The Assistant Secretary also commissioned private consultants to review and analyze the record, and partly relied on these studies in formulating a final rule. The court, per Chief Judge Wright, held that these off-the-record intra-agency communications were permissible, even if slanted towards a particular viewpoint, if they were part of the "deliberative process," a concept closely analogous to the deliberative process exemption under the Freedom of Information Act (FOIA).

The doctrine developed in Home Box Office involves three distinct requirements: (1) a flat prohibition on agency receipt of views and information outside the usual channels for public comment; (2) a requirement that such views and information, if received, be memorialized and placed in the administrative file for public comment; and (3) a duty to place such views and information in the record for judicial review. In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), the Supreme Court severely undermined the Home Box Office doctrine. It held that, absent exceptional circumstances, a reviewing court may not impose special rulemaking procedures beyond those set forth in the APA.

We believe that Vermont Yankee is inconsistent with D.C. Circuit's flat ban on agency receipt of views or information outside the usual channels for public comment. This purely procedural prohibition finds no support whatever in the text or the legislative history of the APA. The APA contains no prohibition on such contacts in informal rulemaking, although it has always prohibited them in adjudication, and a recent amendment provides penalties and remedies when they occur in adjudication or formal rulemaking.

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5/ Id. § 554(d).
leaving informal rulemaking unaffected. 8/ We believe this history to be strong evidence that there is no basis for imposition by a court of a flat prohibition on agency receipt of views or information outside the ordinary channels. You and your staff may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public.

It is unclear whether the two other requirements of Home Box Office — that the substance of contacts be placed in the administrative file and the record for judicial review — can survive Vermont Yankee. These requirements might possibly be supportable, not as part of an "ex parte contacts" doctrine, but as implications of the APA's provisions for judicial review and for public participation in informal rulemaking, a question we discuss in the following section. What is clear, however, is that the disclosure obligations, if any, lie with the rulemaking agency and not with your Office. Your Office is therefore under no legal disability with respect to contacts with rulemaking agencies. At most, your Office could adopt procedures as a matter of policy to assist the agencies in complying with our recommendations or with rules fashioned by the agencies themselves to address this issue. 9/


9/ Specific "hybrid rulemaking" statutes may sometimes impose special rules regarding contacts between your Office and rulemaking agencies. The Clean Air Act Amendments of 1977, for example, require that written documents compiled during your Office's review procedures be placed in the rulemaking docket prior to the promulgation of a final rule. 42 U.S.C. § 7607(d)(4)(B)(ii) (Supp. III 1979). These documents are excluded from the record on judicial review. Id. § 7607(d)(4)(B)(ii). Two challenges to inter-agency participation in Clean Air Act rulemaking are now pending in the D.C. Circuit. Sierra Club v. Costle, Nos. 79-1565 et al; American Petroleum Institute v. Costle, Nos. 79-1104 et al. In those cases EPA officials met with other Executive Branch officials to discuss a rule after the close of the public comment period; the substance of these meetings was not fully disclosed in the record for judicial review. The government takes the position that EPA fully complied with the Clean Air Act's requirements. The cases have been argued and await decision.

Internal agency regulations, which have the force of law until repealed, may also limit contacts with your Office during rulemaking. Cf. 47 C.F.R. § 1 (1979) (FCC); 16 CFR § 1012 (1979) (CPSC); 14 CFR § 300.2 (CAB).
II. Disclosure Obligations of Rulemaking Agencies

We believe that, at least as a matter of protection against reversal in the D.C. Circuit, rulemaking agencies should disclose in the administrative file and the record for judicial review substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of Executive or independent agencies. This conclusion is based on a combination of possible disclosure requirements in the APA and a deliberative process exception.

A. APA Provisions

The APA provides that judicial review of informal rulemaking shall be based on the "whole record." 5 U.S.C. § 706. The Supreme Court has never clearly stated what types of material must be included in the record for judicial review. Traditionally, informal rulemaking procedures were thought to leave the agency almost complete discretion as to what was included in the record; judicial review was correspondingly narrow and deferential. More recently, the Supreme Court has stated that judicial review of informal agency action should be "searching and careful," 10/ and that a reviewing court should demand a case to the agency if its determination is not "sustainable on the administrative record made." 11/ The relatively intensive judicial scrutiny implied by these statements seems incompatible with the traditional idea that the agency retains complete control over what goes in the record. Lower federal courts have expanded on the Supreme Court's tentative statements by inferring a requirement that the record for judicial review contain all material, whether factual, analytical, or argumentative, which is substantive in the sense that it might have influenced the agency's decision. 12/ Finally, the Supreme Court in Vermont Yankee gave somewhat conflicting signals on the question. 13/


The Court's emphasis on the agency's discretion to structure its own procedures free of judicial interference suggests that this discretion should include the power to determine the content of the record for judicial review. On the other hand, the Court's remand of the case to the D.C. Circuit for a determination of whether the rule was sustainable on the administrative record points to a more stringent record requirement. 14/

The state of the law on this point is, in short, confused. We do not believe it to be particularly useful to attempt to predict whether the Supreme Court would require that substantive oral or written communications received by the agency be included in the record for judicial review. We would, however, recommend that agencies generally adopt this course to avoid a substantial danger of reversal in the D.C. Circuit without any assurance of vindication in the Supreme Court. 15/

We would also recommend that agencies generally include substantive oral or written communications in the administrative file for public comment and criticism, at least when these communications occur before the close of public comment. 16/ A "public comment" requirement could be inferred from the APA's provision for review on the whole record and its guarantee of an "opportunity to participate in the rule making," 5 U.S.C. § 553(c). On the other hand, such a requirement comes perilously close to the type of extra-statutory procedure Vermont Yankee forbids courts to require of agencies. In addition, the opportunity to comment on evidence in the record seems inconsistent with the realities of informal rulemaking, clearly sanctioned by the APA, that interested parties can file comments on the last day of the comment period and thereby deprive others outside the government of a chance to comment unless the agency, in its discretion, chooses to reopen the file. The argument for public comment is considerably weaker than the case for placing substantive material in the judicial record; our judgment

14/ One commenter has argued that in light of the administrative record the Court should simply have affirmed the agency rather than remanding. Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833 (1978).

15/ The agency need not engage in unnecessary duplication of material already contained in the record, however.

16/ A case-by-case analysis may be required to determine whether the administrative file must be reopened to allow public comment on communications received after the close of the comment period. See Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).
is that the Supreme Court would not impose such a requirement. Nevertheless, the D.C. Circuit probably would require public comment, 17/ and the prospects of obtaining Supreme Court review of such a determination cannot be predicted.

B. Deliberative Process Exception

Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process. A variety of legal doctrines recognize a privilege against compelled disclosure of the federal government's deliberations. The need for non-disclosure is inherent in the President's constitutional power to "take Care that the Laws be faithfully executed," 18/ by "supervis[ing] the guid[ing]" Executive Branch agencies in their "construction of the statutes under which they act in order to secure the unitary and uniform execution of the laws which Art. II of the Constitution evidently contemplated in vesting executive power in the President alone." 19/ Similar concerns undergird the constitutionally based privilege for certain deliberative communications within the Executive Branch, 20/ as well as the rule against probing an administrator's mind in court absent a showing of bad faith or other exceptional circumstances. 21/ Congress has safeguarded the deliberative process by exempting deliberative documents from disclosure under the FOIA. 22/ Finally, the D.C. Circuit held the ex parte contacts doctrine inapplicable.


18/ U.S. Const., Art. II, § 3. See also U.S. Const., Art. II, § 2 (presidential power to require written opinions from heads of Executive Departments).

19/ Myers v. United States, 272 U.S. 52, 135 (1926).


to deliberative process communications in United Steelworkers, supra. For similar reasons, we believe that oral or written communications which are part of the deliberative process need not be disclosed under any provisions of the APA.

Deliberative process communications are those designed to aid the agency in determining its course based on the facts of record. They include analyses of these facts, 23/ legal and policy arguments, 24/ and factual data that cannot be reasonably segregated from deliberative material. 25/ They do not include oral or written factual data which can be reasonably segregated from deliberative material. 26/ Thus the rulemaking agency need not disclose your Office's legal and policy arguments and analyses of the facts, but should generally disclose readily segregable factual material.

Communications from Executive or independent agencies are entitled to deliberative process protection. Your Office surely participates in the deliberative process when it exercises the power of the President delegated to you to "supervise and guide" the agency by communicating factual analyses or legal and policy arguments. We believe the deliberative process is also implicated when your Office acts as a "conduit" for views of other Executive agencies, since these agencies are part of an integrated Executive Branch headed by the President. We reach the same conclusion with respect to independent agencies. 27/ Although largely freed of presidential oversight and supervision, these agencies are part of a unitary government


26/ See cases cited in note 25, supra. Also not within the deliberative process are communications which the agency adopts as the explanation for its action. See Renegotiation Board v. Grumman Aircraft Engineering Corp. 421 U.S. 168 (1975); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

27/ Deliberative process documents transmitted from an independent agency to an Executive Branch agency would be exempt from disclosure under FOIA. 5 U.S.C. §§ 552(b)(5), 552(e).
which seeks as far as possible to coordinate its programs and policies. 29/

Our view is that the deliberative process does not extend to the legal or policy views of persons outside of Executive or independent agencies. These persons are not within the overall decision process of the rulemaking agency. Their views not being protected by a deliberative process exception, the rulemaking agency would be well advised to place these views in the administrative file and the record for judicial review if the views might affect the agency’s decision. Agencies should follow this procedure even if the views are transmitted by an Executive or independent agency acting as a “conduit” for the third party.

III. OMB Procedures

As discussed above, your Office is under no legal obligation to limit its communications with rulemaking agencies. We also conclude that, as a matter of policy, the agencies should include in the administrative file and the record for judicial review substantive oral or written communications from your Office which (1) are purely factual in nature, or (2) are "conduit" transmissions of views or information from persons outside of Executive or independent agencies. Your Office could assist the rulemaking agencies in the task of distinguishing what should be disclosed from what may be kept out of the public record, as follows:

(1) Your Office could separate, as far as possible, purely factual material from arguments and analysis in oral or written comments it makes to the rulemaking agency under the Order. A format could be developed for comments which clearly draws this distinction. The agency should generally be entitled to rely on your Office’s judgment that the transmitted material is deliberative rather than factual in nature.

(2) With respect to "conduit" communications, the official responsible for commenting to the rulemaking agency could determine whether his views have been influenced by oral or written communications received from someone outside of Executive or independent agencies. If so, your Office could require that the third party transmit this material to the rulemaking agency for inclusion in the administrative

29/ Our conclusions in this regard are consistent with Recommendation 80-6 of the Administrative Conference of the United States regarding Executive Branch Communications in Informal Rulemaking Proceedings.

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file and the record for judicial review. The official may transmit to the rulemaking agency a statement of your Office's views, which need not be disclosed except to the extent it includes purely factual material.

Alternatively, or in conjunction with these procedures, your Office could seek to ensure that rulemaking agencies follow the advice contained in this memorandum. Agencies could institute a policy of disclosing in the administrative file and the record for judicial review all material which your Office identifies as purely factual in nature, as well as the identified conduit material transmitted under (2) above. The agencies would have to develop procedures for memorializing the non-deliberative parts of oral communications from your Office. Your Office could assist the agencies in following these recommendations by rendering informal advice or by more formal instructions.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel
MEMORANDUM FOR HONORABLE DAVID STOCKMAN
Director
Office of Management and Budget

Re: Proposed Executive Order on Federal Regulation

The President is considering a proposed Executive Order designed to reduce regulatory burdens, to provide for presidential oversight of the administrative process, and to ensure well-reasoned regulations. The Order sets forth a number of requirements that Executive Branch agencies must adhere to in exercising their statutory rulemaking authority. Certain of the Order's procedural requirements would apply to the independent regulatory commissions as well. This memorandum discusses the legal basis for the proposed Order and examines issues that are raised by certain of its provisions. We conclude that the Order is within the President's authority.

First, for Executive Branch agencies the Order has the following major provisions. Agencies must take action only if the potential benefits outweigh the social costs; attempt to maximize social benefits; choose the least costly alternative in selecting among regulatory objectives; and set priorities with the aim of maximizing net benefits. All of these requirements must be followed "to the extent permitted by law." The Order would require agencies to prepare for each "major rule" a Regulatory Impact Analysis (RIA) setting forth a description of the potential costs and benefits of the proposed rule, a determination of its potential net benefits, and a description of alternative approaches that might substantially achieve regulatory goals at a lower cost. Agencies would be required to determine that any proposed regulation is within statutory authority and that the factual conclusions upon which the rule is based are substantially supported by the record viewed as a whole. The Director of the Office of Management and Budget and the Presidential Task Force on Regulatory Relief would be given authority, inter alia, to designate proposed or existing rules as major rules, to prepare uniform standards for measuring costs and benefits, to consult with the agencies concerning preparation of RIA's, to state approval or disapproval of RIA's and rules on the administrative record, to require agencies to respond to statements of disapproval (and to defer rulemaking while so consulting), and to establish schedules for review and possible revision.
of existing major rules. The Order would require agencies to defer rules that are pending on the date of its issuance, including rules that have been issued as final rules but are not yet legally effective, and to reconsider them under the Order. By its terms, the Order would create no substantive or procedural rights enforceable by a party against the United States or its representatives, although the RIA would become part of the administrative record for judicial review of final rules. For the independent regulatory agencies, the Order would impose some procedural requirements, principally the preparation of RIA's, and would authorize the Director or the Task Force to exercise limited supervisory powers.

I. Legal Authority: Executive Branch agencies

The President's authority to issue the proposed Executive Order derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to "supervise and guide" Executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. 52, 135 (1926).1/

The supervisory authority recognized in Myers is based on the distinctive constitutional role of the President. The "take Care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created ... the President is a constitutional officer charged with taking care that a 'mass of legislation’ be executed," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

1/ In Buckley v. Valeo, 424 U.S. 1; 140-41 (1976), the Supreme Court held that any "significant governmental duty exercised pursuant to a public law" must be performed by an "Officer of the United States," appointed by the President or the Head of a Department pursuant to Art. II, § 2, cl. 2. We believe that this holding recognizes the importance of preserving the President's supervisory powers over those exercising statutory duties, subject of course to the power of Congress to confine presidential supervision by appropriate legislation. See also n.7, infra.
Moreover, because the President is the only elected official who has a national constituency, he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole. 2/ In fulfillment of the President's constitutional responsibility, the proposed Order promotes a coordinated system of regulation, ensuring a measure of uniformity in the interpretation and execution of a number of diverse statutes. If no such guidance were permitted, confusion and inconsistency could result as agencies interpreted open-ended statutes in differing ways.

Nevertheless, it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. 3/ In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). It is with these basic precepts in mind that the proposed Order must be approached.

We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by Executive Branch agencies. When Congress delegates legislative power to Executive Branch agencies, it is aware that those agencies perform their functions subject to presidential supervision on matters of both substance and procedure. This is not to say that Congress never intends in a specific case to restrict presidential supervision of an Executive agency; but it should not be presumed to have done so whenever it delegates rulemaking power directly to a subordinate Executive Branch official rather than the President. Indeed, after Myers it is unclear to what extent Congress may insulate Executive Branch agencies from presidential supervision.


3/ In certain circumstances, statutes could invade or intrude impermissibly upon the President's "inherent" powers, but that issue does not arise here.
Congress is also aware of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has sought to minimize presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President, who may remove them from office for any reason. It would be anomalous to attribute to Congress an intention to immunize from presidential supervision those who are, by force of Art. II, subject to removal when their performance in exercising their statutory duties displeases the President.

Of course, the fact that the President has both constitutional and implied statutory authority to supervise decisionmaking by Executive Branch agencies does not delimit the extent of permissible supervision. It does suggest, however, that supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official. See Myers v. United States, supra, at 135: "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." This suggestion is based on the view that Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision, because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess.4/ Under this analysis, of course, lesser incursions on administrative discretion are easier to support than greater ones. This Office has often taken the position that the President may consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant

4/ Cf. H. Friendly, The Federal Administrative Agencies (1962) (discussing concept of "agency expertise" as reason for delegation of power to particular agencies). The Myers Court reaffirmed, however, that even such officers may be dismissed at the pleasure of the President. 272 U.S. at 135.
matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority. Of course, the President has the authority to inform an appointee that he will be discharged if he fails to base his decisions on policies the President seeks to implement.

A. The Order would impose requirements that are both procedural and substantive in nature. Procedurally, it would direct agencies to prepare an RIA assessing the costs and benefits of major rules. We discern no plausible legal objection to this requirement, which like most procedural requisites is at most an indirect constraint on the exercise of statutory discretion. At least as a general rule, the President's authority of "supervision" in his administrative control," Myers v. United States, supra, at 135, permits him to require the agencies to follow procedures that are designed both to promote "unitary and uniform execution of the laws" and to aid the President in carrying out his constitutional duty to propose legislation. See U.S. Const., Art. II, § 3. We believe that a requirement that the agencies perform cost-benefit analysis meets these criteria. Further, the President's constitutional right to consult with officials in the Executive Branch permits him to require them to inform him of the costs and benefits of proposed action. In our view, a requirement that rulemaking authorities prepare an RIA is the least that Myers must mean with respect to the President's authority to "supervise and guide" Executive officials.

B. Substantively, the Order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis. More


6/ See note 4 supra.

7/ See U.S. Const., Art. II, § 2 (President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").
complex legal questions are raised by this requirement. Some statutes may prohibit agencies from basing a regulatory decision on an assessment of the costs and benefits of the proposed action. See, e.g., EPA v. National Crushed Stone Ass'n, 101 S. Ct. 295 (1980). The Order, however, expressly recognizes this possibility by requiring agency adherence to principles of cost-benefit analysis only "to the extent permitted by law." The issue is thus whether, when cost-benefit analysis is a statutorily authorized basis for decision, the President may require Executive agencies to be guided by principles of cost-benefit analysis even when an agency, acting without presidential guidance, might choose not to do so. We believe that such a requirement is permissible. First, there can be little doubt that, when a statute does not expressly or implicitly preclude it, an agency may take into account the costs and benefits of proposed action. Such a calculus would simply represent a logical method of assessing whether regulatory action authorized by statute would be desirable and, if so, what form that action should take. In our view, federal courts reviewing such actions would be unlikely to conclude that an assessment of costs and benefits was an impermissible basis for regulatory decisions.

Second, the requirement would not exceed the President's powers of "supervision." It leaves a considerable amount of decisionmaking discretion to the agency. Under the proposed Order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take. The limited requirements of the proposed Order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency. Any other conclusion would create a possible collision with constitutional principles, recognized in Myers, with respect to the President's authority as head of the Executive Branch.

C. We believe that the President would not exceed any limitations on his authority by authorizing the Task Force and the Director to supervise agency rulemaking as the Order would provide. The Order does not empower the Director
or the Task Force to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions. The function of the Task Force and the Director would be supervisory in nature. It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the President's Order. Procedurally, the Director and the Task Force would be authorized to require an agency to defer rulemaking while it responded to their statements of disapproval of proposed agency action. This power of consultation would not, however, include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative. The limited power of supervision embodied in the proposed Order is, therefore, consistent with the President's recognized powers to supervise the Executive Branch without displacing functions placed by law in particular agencies.

II. Independent Regulatory Commissions

We now consider whether the proposed Order may legally be applied to the independent regulatory commissions in certain respects. Principally, the Order would require independent agencies to prepare RIA's and would authorize the Director or the Task Force to exercise limited supervision over the RIA's. For reasons stated below, we believe that, under the best view of the law, these and some other requirements of the Order can be imposed on the independent agencies. We would emphasize, however, that an attempt to exercise supervision of these agencies through techniques such as those in the proposed Order would be lawful only if the Supreme Court is prepared to repudiate certain expansive dicta in the leading case on the subject, and that an attempt to infringe the autonomy of the independent agencies is very likely to produce
a confrontation with Congress, which has historically been jealous of its prerogatives with regard to them. 8/

The distinguishing characteristic of an independent regulatory commission is the presence of a provision in its enabling act that the President may remove its members from office only for cause. 9/ Many of these provisions are modeled on the FTC Act, which allows removal only for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. The leading case on the constitutional status of the independent agencies arose when President Roosevelt removed an FTC Commissioner without asserting cause to do so. Humphrey's Executor v. United States, 295 U.S. 602 (1935). The President was relying on Myers v. United States, supra, which had held that Congress could not constitutionally require the Senate's advice and consent to the removal of a postmaster. In Humphrey's Executor, a unanimous Court held that the FTC Act was constitutional, and limited the scope of Myers to "purely executive" officers. See also Wiener v. United States, 357 U.S. 349 (1958) (removal of Member Of War Claims Commission without asserted cause held illegal).

The holding of Humphrey's Executor is that Congress may constitutionally require cause for the removal of an FTC Commissioner; the Court's opinion, however, contains broad dicta endorsing a perceived congressional purpose to insulate the FTC almost entirely from Presidential supervision:

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the

8/ See the attached letter to the President from the Chairmen and Ranking Minority Members of six congressional committees, responding to a proposal that the requirements of E.O. 12044, which are similar to but weaker than those of the proposed Order, be applied to the independent agencies.

9/ Sometimes a cause provision is implied from a silent statute based on the functions an agency performs, usually adjudication. Wiener v. United States, 357 U.S. 349 (1958). Accordingly, it is not always an easy task to identify an agency as being independent.

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law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

295 U.S. at 624 (quoting Illinois Cent. Ry. v. ICC, 206 U.S. 441 (1906)). The Court continued:

Thus, . . . the Congressional intent to create a body of experts who shall gain experience by length of service — a body which shall be independent of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. . . . And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

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

If the dicta of Humphrey's Executor are taken at face value, the President's constitutional power to supervise the independent agencies is limited to his power of appointment, and none of the proposed Order's requirements may legally be applied to the independent agencies. 10/ We believe, however, that there are several reasons to conclude that the Supreme Court would today retreat from these dicta. First, the Court in Humphrey's Executor and Wiener focused primarily on the inappropriateness of Presidential interference in agency adjudication, a concern not pertinent to supervision of rulemaking. Second, insofar as the Court was concerned about rulemaking, it did not take account of the fact that Executive Branch and independent agencies engage in rulemaking

10/ The President would, however, be free to urge these agencies voluntarily to follow the Order. See, e.g., the President's Letter to the Heads of Independent Regulatory Agencies, urging them to follow E.O. 12044, 14 Weekly Comp. Pres. Docs. 563 (1978).
in a functionally indistinguishable fashion. 11/ Third, the Court espoused what is now an outmoded view about the "apolitical" nature of regulation. 12/ It is now recognized that rulemaking may legitimately reflect political influences of certain kinds from a number of sources, including Congress and the affected public. Fourth, the President has today a number of statutory powers over the independent agencies, which recognize the legitimacy of his influence in their activities. 13/

Although the removal cases do not precisely define the meaning of "inefficiency, neglect of duty, or malfeasance in office," both Humphrey's Executor and Wiener emphatically rejected general philosophical or policy differences between President and commissioners as fit grounds for dismissal. The cases thus strongly suggest, although they do not require, the conclusion that more specific policy differences do not justify removal. By implication, then, if substantive policy may not be a ground for removal, it may not be a ground for supervision that carries an express or implied threat of removal for noncompliance. See, e.g., Wiener, supra, 357 U.S. at 355-56.

It seems clear that Congress intends the independent agencies to be free of Presidential supervision on matters of substantive policy. See generally, e.g., Sen. Comm. on Governmental Affairs, Study on Federal Regulation, Vol. V, Regulatory Organization 25-32, 95th Cong., 1st Sess. (1977). We believe that the holding of Humphrey's Executor, born of the Court's broad dicta that these agencies are independent "except in [their] selection," fully supports the view that Congress may remove some rulemaking from Presidential supervision of the

11/ When Humphrey's Executor was decided, the rulemaking activity that the Court described as "quasi-legislative" was performed largely by independent agencies. Since that time, Congress has come to lodge broad rulemaking power in Executive Branch agencies as well.

12/ See generally, e.g., Freedman, Crisis and Legitimacy in the Administrative Process, 27 Stan. L. Rev. 1041, 1056-61 (1975). To say, however, that regulation is no longer regarded as completely "apolitical" is not to say that agency expertise is irrelevant. See note 4 supra.

13/ These are discussed infra.
sort that would be appropriate in the absence of such a provision. It remains necessary, then, to reconcile the holding of Humphrey's Executor with the President's duty under Article II, § 3, to "take Care that the Laws be faithfully executed." Certainly provisions requiring cause for removal must be read as expressing congressional intent to minimize Presidential supervision of these agencies. Accordingly, a frequent formulation of the President's power over the independent agencies has been that he may supervise them as necessary to ensure that they are faithfully executing the laws, although he may not displace their substantive discretion to decide particular adjudicative or rulemaking matters. 14/ Such a formulation would allow for many types of procedural supervision.

In addition to his constitutional powers, the President has been given some statutory powers that extend to independent as well as Executive Branch agencies. These powers include reorganization authority, OMB's budgetary and legislative request processes, the deferral or rescission of appropriations, and the selection of agency chairmen. 15/ We do not interpret these statutes to imply broad authority for presidential supervision of the independent agencies, because of the clear congressional intent to minimize presidential supervision that is expressed in removal restrictions. Nevertheless, we do believe that these statutes recognize the legitimacy of

14/ See, e.g., Landis, Report on Regulatory Agencies to the President-Elect 33 (1960):

The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all a part of the President's constitutional concern to see that the laws are faithfully executed. The outcome of any particular adjudicatory matter is, however, as much beyond his concern, except where he has a statutory responsibility to intervene, as the outcome of any cause pending in the courts and his approach to such matters before the agencies should be exactly the same as his approach to matters pending before the courts.

15/ See generally Bruff, supra, 88 Yale L.J. at 491-95 (1979).
some presidential influence in the activities of independent agencies, especially when it consists of a coordinating role with only an indirect effect on substantive policymaking.16/

We believe that the foregoing constitutional and statutory analysis supports the application to the independent agencies of those portions of the Order that would be extended to them. The principal requirement is that independent agencies prepare RIA's. These analyses would have only an indirect effect on substantive discretion, since the identification of costs and benefits and the particular balance struck would be for the agency to make. It should also be possible for OMB to prescribe criteria for independent agencies to follow in preparing their RIA's, to consult with them in the process, and to disagree with an independent agency's analysis on the administrative record. None of these actions would directly displace the agencies' ultimate discretion to decide what rule best fulfills their statutory responsibilities. Nor would the requirements of § 4 of the Order that agencies confirm the legal and factual basis of their rules significantly intrude on statutory discretion. The RIA's and statements of legality could prove useful to both President and Congress

16/ In particular, two new statutes impose procedural requirements on independent agencies that are pertinent to assessing the legality of applying the proposed Order to them. First, the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, requires the preparation of agendas and analyses somewhat similar to those of the proposed Order. Insofar as the Order would make these procedural steps part of a broader analysis, it would minimize its new procedural burdens for these agencies. Second, the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2012, will give OMB a direct role in coordinating agency regulations that impose paperwork burdens on the public. The independent agencies, however, have explicit authority to override the Director's disapproval of their information collection requests (§ 3505(b)), although the Director may file public comments presenting his views of the wisdom of the requests (§ 3504(h)). We would also note that, with respect to non-independents, the Paperwork Reduction Act gives the Director broad authority to disapprove "unreasonable" agency collection of information requests, though not to disapprove the rule itself insofar as the two are separable. § 3504(h)(5)(C).
in considering legislation concerning these agencies. 17/
Also, the requirements of § 5 of the Order for agendas of
proposed rules would have minimal impact on the statutory
discretion of independent agencies, and may, we believe,
legally be applied to them.

III. Suspension of proposed and final regulations.

The Order requires Executive Branch agencies (1) to
suspend the effective date of rules that have been issued as
final rules, but have not become legally effective; and (2)
to reconsider rules that are proposed but have not yet been
made final. After suspension of final rules, agencies must
reconsider all such rules in accordance with the Order.
These requirements are imposed only "to the extent permitted
by law" and are thus inapplicable when a judicial or statutory
deadline requires prompt action. Moreover, agencies must,
in complying with these directives, adhere to the requirements
of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et
seq., and all other laws.

For rules that have not yet been made final, the APA
imposes no special procedural requirements. Agencies need
not follow the notice and comment procedures of 5 U.S.C.
§ 553, for nothing in that provision requires an agency to
allow a period for comment on a decision to delay final
adoption of a proposed rule. The agency's decision may,
however, be subject to judicial review, and the agency may have
to furnish a reasoned explanation for that decision. See
ASG Indust. v. CPSC, 593 F.2d 1323, 1335 (D.C. Cir. 1979);
Action for Children's Television v. FCC, 564 F.2d 458,
478-79 (D.C. Cir. 1977). The explanation here -- that the
agency needs time to prepare an RIA required by Executive
Order -- is, we believe, sufficient.

The second category of regulations covered by the Executive
Order raises somewhat different legal issues. Under 5 U.S.C.
§ 553(b), notice and comment procedures must be followed for
"rulemaking" unless "the agency for good cause finds (and

17/ We note that the Order would not attempt to displace the
substantive discretion of these agencies by directing them
either to postpone issuing rules that they deem necessary (§
7) or to select the most cost-effective rule when they would
not otherwise be willing to do so (§ 2).
incorporates the finding and a brief statement of reasons therefor in the rules issued] that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. § 551(5), the term "rulemaking" is defined as "agency process for formulating, amending, or repealing a rule." The initial question, then, is whether an agency's decision to "suspend" a final but not effective rule is "rulemaking" which triggers the procedural safeguards of § 553.

In a recent memorandum, this Office concluded that a 60-day suspension of the effective date of a final rule should not, in general, be regarded as rulemaking within the meaning of the APA. We based our conclusion on "the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days" and the absence of statutory language or history suggesting "that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b)."

Nevertheless, we believe that a short-term suspension of the effectiveness of a final rule is not the equivalent of an indefinite suspension coupled with a process designed to review the basis for the rule, with a view to establishing a new rule. Although the former seems fairly characterized as a mere extension of an effective date under § 553(d), the latter should probably be characterized as "agency process for formulating, amending, or repealing a rule" for purposes of § 553(b).

The difference between these two measures for purposes of § 553 becomes clear upon examination of the sequence of events that is expected to take place under each of them. Under the President's Memorandum of January 29, 1981, agencies are to defer the effective dates of final rules for sixty days in order to review them. The completion of that review will point to either of two dispositions. The rule might be allowed to take effect as published in final form, or it might be withdrawn for some proposed change. The first disposition would require no new procedures. The second disposition would

18/ Memorandum of January 28, 1981, for Honorable David Stockman, Director, Office of Management and Budget, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel.
surely contemplate an amendment or repeal of the earlier rule subject to § 553's public procedures, but the earlier deferral of the rule's effective date would remain just that.19/

Under the proposed Order, the situation is analogous to the second possible disposition under the President's Memorandum. The Order, by requiring careful cost-benefit analysis of rules through the RIA process, would contemplate notices of proposed rulemaking on the preliminary RIA and a reexamination of the rule at the appropriate time. The issue to be decided at the time the rule is suspended indefinitely for the Order's process to take place is whether the rule, which has already been promulgated in final form, should be allowed to have interim effect while it is under review by the agency. We believe that this decision is one of "formulating, amending, or repealing a rule" that requires either notice and comment procedures or good cause for dispensing with them under § 553(b). Admittedly, the difference between a short deferral of the effectiveness of a rule and an indefinite suspension for reexamination is in part one of degree. But there is also a difference in kind: once a decision to begin the process of amending a rule is made, there is no longer a plausible argument that a rule that was to take effect is merely to be delayed for a brief period.

Notice and comment procedures on the issue of the interim effectiveness of a rule that is due to undergo reexamination under the Order should take the following form. The agency should defer the rule's effective date for a period sufficient to allow a short time for notice and comment, an opportunity for the agency to consider the comments and decide the issue of interim effectiveness, and an interval before the rule

19/ Admittedly, one of the purposes of the 30-day effective date provision is to allow agencies to correct errors or oversights in final regulations. See Final Report, Attorney General's Committee on Administrative Procedure 114-15 (1941); Sannon v. United States, 460 F. Supp. 458, 467 (S.D. Fla. 1978). This purpose, however, does not suggest that agencies may make corrections, let alone withdraw rules, during the period between a rule's publication and its effective date without offering public procedures or showing good cause for dispensing with them. Proposed corrections -- or even repeals -- would of course be amendments for purposes of § 553(b).
takes effect sufficient to meet the purposes of § 553(d).

In deciding on the interim effectiveness of final rules subject to the Order's procedures, the final question is whether and under what circumstances agencies will have good cause to dispense with notice and comment procedures. Public procedures on interim effectiveness might be "unnecessary, impracticable, or contrary to the public interest," where the question whether there should be any rule at all was fully ventilated in the rule's comment process, or where it is clear that interim effect could impose substantial but short-term compliance costs. On the other hand, notice and comment might be needed where the rule's proponents had advanced substantial arguments for its early effectiveness, and where compliance costs are not likely to be wasted.

Such arguments must, of course, be assessed on a case-by-case basis. If the available record indicates that the costs of the rule at issue are not substantial and that the failure to allow the rule to become effective may itself be controversial, the likelihood that a court will require notice and public comment increases. The procedural requirements of the APA will, therefore, vary with the size and immediacy of the burdens imposed by the rule and the need for public comment on a decision to withdraw a final but not effective rule.

IV. Regulatory Review by Agency Heads.

Section 4 of the proposed Order would require agency heads to make express determinations that regulations they issue are authorized by law and are supported by the materials in the rulemaking record. These requirements are meant to assure agency compliance with existing legal principles that rules must be authorized by law, and that they should be adequately supported by a factual basis. Accordingly, we find no legal difficulty with them. In particular, they do not purport to change generally applicable statutory standards for judicial review of agency action, see 5 U.S.C. § 706, and could not have such an effect. They also do not purport to alter any specially applicable standards, such as those concerning the evidentiary standard that must be met to uphold a given rule, appearing in statutes governing a particular agency.
On the other hand, the section would add the significantly new procedural requirements that agency heads expressly determine that the legal and factual requisites for a rule have been met. The first requirement reflects the principle, central to administrative law, that agency action must be guided by the "supremacy of law." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J.). This principle protects against excess of power and abusive exercise of power by administrators. See Report of the U.S. Attorney General's Comm. on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 76 (1941). The requirement that agency heads determine that a rule has "substantial support" in the materials before the agency means that a rule's necessary factual basis must be found to exist. This second requirement should not be confused with a "substantial evidence" standard of judicial review, which could be imposed only by statute. It embodies Recommendation 74-4 (subpart 3) of the Administrative Conference of the United States, 1 CFR § 305.74.4, which urges that for a rule to be considered rational, it should be adequately grounded in a factual basis. This requirement is consistent with the approach of courts that have carefully reviewed agency action under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A). See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc); cert. denied, 426 U.S. 911 (1976).

V. Judicial Review.

The Order states that it is not intended to create any rights or benefits enforceable by a party to litigation against the United States, its agencies, or any other person. At the same time, it provides that determinations of costs and benefits, and the RIA itself, are meant to form part of the agency record for purposes of judicial review. The effect of this provision is to preclude direct judicial review of an agency's compliance with the Order. The provision makes clear the President's intention not to create private rights, an intention that should be controlling here. See Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976) (no judicial enforcement of Executive Order requiring consideration of inflationary impact of regulations, in part because such
Order had not been issued pursuant to delegation from Congress); Legal Aid Soc. of Alameda County v. Brennan, 608 F.2d 1319 [9th Cir. 1979] (judicial review available of compliance with an Executive Order that had been ratified by Congress). Even without the provision, compliance with the Order would probably be immunized from review because the Order has not been promulgated pursuant to a specific grant of authority from Congress to the President and thus lacks the "force and effect of law" concerning private parties. See Independent Meat Packers Ass'n v. Butz, supra; National Renderers Ass'n v. EPA, 541 F.2d 1281, 1291-1292 (8th Cir. 1976); Hiatt Grain Feed, Inc. v. Bergland, 446 F. Supp. 457, 501- 502 (D. Kan. 1978). The bar on judicial review of agency compliance with the Order does not, of course, prohibit a court from hearing a constitutional or statutory attack on the legality of the Order itself or of agency action taken pursuant to its requirements.

Because the regulatory impact analysis that will be required by the Order will become part of the agency record for judicial review, courts may consider the RIA in determining whether an agency's action under review is consistent with the governing statutes. This, of course, is true of all matters appearing in the rulemaking record.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel
December 16, 1977

The President
The White House
Washington, D. C.

Dear Mr. President:

We welcome the opportunity to comment on your draft Executive Order designed to improve government regulations. We applaud your decision to make this Order available in draft form to give the public a full opportunity to review and comment on it.

In asking for comments on the Order, you have specifically requested that comments respond to the question: "Should the procedures outlined in the Executive Order apply to the independent regulatory agencies"? Other issues are raised as well, but our comments will be restricted to this particular question:

It is our unqualified view that the answer is No. The Executive Order cannot lawfully be applied to the independent regulatory commissions. To do so would violate the intent of Congress that the Executive Branch not control the rules these agencies issue.

Essentially, the draft Executive Order is designed to do three things. First, it requires agencies to prepare a "regulatory analysis" for any regulation having a significant economic effect, analyzing all of the economic consequences of the proposed regulation and assessing all potential alternative approaches. Second, it requires agencies to undertake a periodic review of their existing regulations, to determine whether these regulations are meeting certain basic goals. Third, it requires agencies to prepare work plans and regulatory agendas for their significant regulatory activities and to provide additional notice to the public.

Under the Order, the OMB is assigned responsibility for reviewing agency compliance with these requirements. Agencies will be required to submit their new procedures
to OMB by February 15, 1978, for OMB's approval. Regulations which have been prepared in violation of the Order's procedures could not be issued.

Mr. President, we agree completely with the basic objectives of the proposed Executive Order. Regulatory reform is a major goal of this Congress, and we would very much like to see these objectives achieved.

However, we have serious difficulty with the means used to accomplish these ends. In our opinion, the proposed Order cannot lawfully be applied to the independent regulatory commissions without an express statutory basis. At present no such basis exists.

Our opinion is based on a review of the judicial precedents and statutory law governing the independent regulatory agencies. We have also reviewed the opinion of the Justice Department dated July 22, 1977, which purports to support the Executive Order. A brief summary of our review may be helpful.

For the President to promulgate an Executive Order without a new Congressional statute, he must do so either (1) pursuant to an implied power derived from the Constitution, or (2) pursuant to a previous grant of statutory authority. In this case, we can find neither.

1. The only implied power upon which the President could conceivably rely—and in fact, the Attorney General's opinion does rely on it—is the responsibility of the President set forth in Article II, Section 3, of the Constitution: "to take care that the laws be faithfully executed." But there are a long line of Supreme Court cases, beginning with the 1835 decision in Kendall v. United States, and culminating in the famous steel seizure case (Youngstown Steel), which hold that the President cannot use this clause to impose new requirements where an express or implied Congressional authorization is lacking. The Youngstown Steel case in particular found that in situations where Congress has insulated an area from Presidential domination, the President has no such implied authority.

The history of the regulatory commissions is replete with efforts by Congress to insulate the commissions from Presidential domination. From the creation of the ICC in 1887, continuing through the creation of the FTC and
the independent agencies of the New Deal, down to the new independent regulatory commissions created during the past few years, Congress has made it abundantly clear that these commissions are not subject to Presidential direction or control. Congress, and not the Executive, controls the guidelines for the independent regulatory agencies. Congress created these agencies. Congress provided for their organization. Congress adopted their statutory mandates. Congress controls their budgets and oversees their performance. Congress specifies agency procedures.

Congress has also determined that, in exercising the quasi-judicial and quasi-legislative authority which Congress had delegated to the agencies, agency actions shall not be subject to review or modification by either Congress or the Executive; only the courts may review final agency actions. And to ensure that the agencies will be able to act in a fully independent fashion, without fear of control or domination from the Executive, Congress has given agency members a set term, and provided that commissioners may be removed from office only for "inefficiency, malfeasance, or neglect of duty."

The Humphrey's Executor case, decided by the Supreme Court in 1935, established beyond question the constitutional ability of Congress to create agencies independent of Executive control. The Humphrey's Executor case dealt with a Presidential attempt to remove an FTC commissioner. The Court pointed out that aside from the commissioners, which Congress had given to the President, Congress had provided that the FTC was to be completely free of any Presidentially-imposed obligations. The Court said that the FTC is --

"a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."

Then the Court went on to say:

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies. . . . Such a body
cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control."

Thus, both law and tradition clearly demonstrate that the President is not free to act on his own initiative in setting procedures and requirements for the independent regulatory agencies. On the contrary, Congress by its actions has treated the independent agencies as "arms of Congress." Accordingly, this is an area which falls completely outside any implied Presidential authority under the Constitution (Youngstown Steel).

2. If there is no implied Constitutional authority, can Presidential power to act in this instance be derived from some express statutory authority? Again, we can find none.

As the foregoing has demonstrated, the statutory powers which Congress has granted the Executive in connection with the independent regulatory agencies are extremely limited. We know of only three Executive prerogatives which apply across-the-board to the independent regulatory commissions—(i) the power to make appointments to the commissions and to designate agency chairmen; (ii) the power to appraise agency budgets prior to submission to Congress (31 U.S.C. 2); and (iii) the power to subject commission staff to Federal civil service rules on hiring, ethics, and related personnel matters (5 U.S.C. 2102, 3101; 18 U.S.C. 208).

There is no way the proposed Executive Order, which governs agency procedures for developing and issuing regulations, can be said to fall within any of the three categories above. The Order does not concern budget preparation; nor does it concern the appointment authority; nor does it concern personnel standards and procedures.

We have reviewed previous Executive Orders to determine their applicability to the independent regulatory commissions. That review discloses only a single order with such coverage—the May 8, 1965, Order of President Johnson which sets ethical standards of conduct for all
government employees, including employees of the regulatory agencies. That Order, however, was based on explicit statutory authority—namely, the statutes in the third category above, as well as the President's general power to delegate to Executive Branch officials (3 U.S.C. 301).

All of the other Executive Orders which we reviewed exempt independent regulatory commissions from their coverage. Executive Orders 11821 and 11949, issued by former President Ford two years ago, illustrate that pattern. Those Orders were designed to do the same thing which this proposed Order is designed to do—namely, require agencies to consider the costs and benefits of proposed regulatory agencies. The Executive Branch, however, never sought to require compliance by the independent agencies. And the independent agencies did not implement the Orders. Executive Orders 11821 and 11949 thus constitute an important acknowledgement that the President's power does not extend to these agencies.

Absent either statutory authority or implied constitutional authority, we conclude that the President would be acting without basis in law if the proposed Executive Order were applied to the independent regulatory commissions.

One final point merits emphasis. The opinion of the Attorney General suggests that the independent agencies are off limits as far as substantive requirements are concerned, but that the President can impose strictly procedural obligations on the agencies. We reject this view for two reasons.

First, there is nothing in either the statutes or the judicial precedents which makes such a distinction. Aside from the areas in which specific statutory authority is granted, the courts have refused to allow Presidential control of the independent regulatory commissions. The courts make no distinction between substantive control and procedural control.

Second, such a distinction is almost impossible to draw. Procedures inevitably affect the substance of agency action; they cannot be divorced from substantive policies.

A reading of the proposed Executive Order makes this evident. The proposed Order on its face establishes
The President 

December 16, 1977 
Page Six 

... 

substantive standards the independent regulatory agencies must meet when they issue any rule. For example: 

The Order states that no independent regulatory agency may adopt regulations unless "the least burdensome of the acceptable alternatives has been chosen" (Sec. 3(d)); 

The Order requires that agencies consider the economic impact and costs and benefits of proposed regulations before they are issued, and that OMB review the criteria used by the agencies (Secs. 4 and 6); 

The Order requires that agencies review existing regulations so that those that no longer meet statutory goals may be eliminated (Sec. 5). 

This desire to influence the substantive content of the regulations clearly violates the intent of Congress. When Congress created the independent regulatory agencies, it prohibited Executive Branch influence. The proposed Order undermines this. OMB would inevitably become involved in substantive questions. OMB could influence which regulations the independent regulatory agencies review and which they repeal or amend. OMB could influence the nature of the economic regulatory analysis and thus the content of the rules issued by the independent regulatory agencies. OMB could prohibit an independent regulatory agency from adopting the most effective regulation if there are other "acceptable alternatives" which would impose less burdens. OMB could assure action on some proposed regulations and reject all others by influencing the semi-annual agendas each agency must adopt. 

In short, we can find no basis for making the distinction between an Executive Order which affects commission procedures and an Executive Order which affects substantive mandates. To do either, the Executive must come to Congress for a statute. 

Mr. President, we hope these views will be helpful to you. 

Sincerely,
The President

Abe Ribicoff
Chairman, Committee on
Governmental Affairs

Charles Percy
Ranking Minority Member
Committee on Governmental Affairs

James O. Eastland
Chairman, Committee on the
Judiciary

Strom Thurmond
Ranking Minority Member
Committee on the Judiciary

Warren Magnuson
Chairman, Committee on Commerce

James B. Pearson
Ranking Minority Member
Committee on Commerce

William Proxmire
Chairman, Committee on Banking,
Housing and Urban Affairs

Edward W. Brooke
Ranking Minority Member
Committee on Banking, Housing
and Urban Affairs

James Abourezk
Chairman, Subcommittee on Admin-
istrative Practices and Procedures

Paul Laxalt
Ranking Minority Member
Subcommittee on Administrative
Practices and Procedures

James Allen
Chairman, Subcommittee on
Separation of Powers

Orrin G. Hatch
Ranking Minority Member
Subcommittee on Separation of
Powers

Jacob K. Javits
Ranking Minority Member
Committee on Human Resources

cc: Mr. Wayne Granquist
Honorable Paul A. Volcker  
Chairman, Board of Governors  
of Federal Reserve System  
20th & Constitution Avenue, N.W.  
Washington, D.C. 20551  

Dear Chairman Volcker:  

President Reagan is deeply concerned about the burden of Federal regulations and paperwork, and strongly believes we need to reduce the intrusion of the Federal government into our daily lives. He has established a Task Force on Regulatory Relief, which I chair, and he has issued Executive Order 12291 to establish procedures for careful review of new and existing regulations to assure their compliance with his goals of reducing regulatory burdens.  

In this Executive Order, President Reagan ordered cabinet departments and agencies to choose, among feasible alternative approaches to any given regulatory objective, the alternative involving the least net cost to society. To help focus these efforts, he ordered that these agencies prepare a regulatory impact analysis of major regulatory actions.  

We appreciate that your organization’s internal procedures may make it difficult for you to comply with every provision of Executive Order 12291. For upcoming major regulations, however, I am requesting that you voluntarily adhere to Sections 2 and 3 of the Order. To the extent you can comply with the spirit of the Order, this will help demonstrate to the American people the willingness of all components of the Federal government to respond to their concerns about unnecessary intrusion of government into their daily lives.  

By the enclosed communication, I have today carried out the President’s wish to disband the U.S. Regulatory Council. You should note, however, that the staff will continue to prepare for publication the extraordinarily useful Regulatory Calendar. We solicit and urge your continued, and valued, participation in the Regulatory Calendar project.  

President Reagan joins me in asking for your cooperation. Working together, we will be able to coordinate and reduce the cumulative burden of needless and overly rigid government regulation.  

Sincerely,  

George Bush  

Enclosure
The addressees are:

Honorable Paul A. Volcker
Chairman, Board of Governors of
Federal Reserve System

Honorable Marvin S. Cohen
Chairman, Civil Aeronautics Board

Honorable James M. Stone
Chairman, Commodity Futures
Trading Commission

Honorable Stewart Statler
Acting Chairman, Consumer Product
Safety Commission

Honorable Charles D. Ferris
Chairman, Federal Communications
Commission

Honorable Irvine H. Sprague
Chairman, Federal Deposit
Insurance Corporation

Honorable Georgianna Sheldon
Acting Chairwoman, Federal Energy
Regulatory Commission

Honorable John H. Dalton
Chairman, Federal Home Loan
Bank Board

Honorable Leslie Canuk
Acting Chairwoman, Federal
Maritime Commission

Honorable David A. Clanton
Acting Chairman, Federal Trade
Commission

Honorable Marcus Alexis
Acting Chairman, Interstate
Commerce Commission

Honorable Richard V. Backley
Chairman, Mine Enforcement Safety
and Health Review Commission

Honorable John Fanning
Chairman, National Labor
Relations Board

Honorable Joseph Hendrie
Chairman, Nuclear Regulatory
Commission

Honorable Frank R. Barnako
Acting Chairman, Occupational Safety
and Health Review Commission

Honorable Janet D. Steiger
Acting Chairwoman, Postal Rate
Commission

Honorable John Shad
Chairman, Securities and
Exchange Commission
AGENCY RESPONSES TO THE VICE PRESIDENT'S LETTER
OF MARCH 25 REQUESTING VOLUNTARY COMPLIANCE WITH
EXECUTIVE ORDER 12291 RECEIVED AS OF JUNE 26, 1981:

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20523

April 30, 1981

Mr. William Nichols
General Counsel
Office of Management and Budget
Old Executive Office Building
Room 406
Washington, D.C. 20503

Dear Mr. Nichols:

We have been pleased to arrange with your office, through
Mr. Jeff Eisenach, procedures by which the CAB will voluntarily submit
its rulemaking actions for OMB comment in accordance with Executive
Order 12291 and the letter of March 25, 1981, from Vice President Bush.
Under the normal OMB procedure, proposed regulations would be processed
by the Office of Information and Regulatory Affairs, which is directed
by Mr. James Miller.

As you may be aware, Dr. Miller is testifying in his individual
capacity in our Competitive Marketing Investigation, a formal multiphased
hearing case to review the structure of air transportation retailing,
which is currently governed by private industry agreements. Objections
to his appearance on conflict of interest grounds, originally upheld by
the law judge, were overruled by the Board, and Dr. Miller has stated
that he will disqualify himself from future consideration of any Board
actions arising from the matter that may cause the appearance of a
conflict of interest.

The Board has not finally decided to admit Dr. Miller's testimony.
Nor is it clear whether any rulemaking actions will flow from the
investigation. Should both events occur, I think it desirable that any
OMB review not be conducted in the Office of Information and Regulatory
Affairs, to avoid the appearance of undue influence. If it is not
possible to insulate OMB's review from that office, then my current
inclination is not to submit actions in that area for comment.

If you agree in principle, we can wait until any rulemaking action
is developed to work out the details.

Sincerely,

[Signature]

David H. Kirstein
General Counsel

[Date]
The Honorable George Bush  
Vice President of the United States  
Washington, D.C.

Dear Mr. Vice President:

Thank you for your letter of March 25, 1981 concerning Executive Order 12291. The Commodity Futures Trading Commission shares the President's concern that government regulations not needlessly burden the regulated sectors of the economy. Accordingly, we concur with the spirit of this Executive Order. We do have some concern, however, regarding several provisions of the Order.

We are currently preparing a more detailed response that specifies our concerns. However, because of the importance of this matter, we wish to allow the newly-designated Chairman of the Commission, Mr. Philip Johnson, an opportunity to participate in the formulation of our response. Therefore, a more detailed response from the Commission will be forthcoming in a short period of time.

Sincerely,

Jane K. Stuckey  
Secretary to the Commission
Honorable George Bush
The Vice President of the United States
Washington, DC 20501

Dear Mr. Vice President:

Thank you for your memorandum of March 25, 1981, to the Heads of Executive Departments and Agencies concerning the consolidation of regulatory oversight. You may be assured that we, in the Federal Emergency Management Agency, are most supportive of the steps taken thus far by your Task Force and the Office of Management and Budget to bring Federal regulations procedures under control and to improve the rulemaking process.

We are now in the process of developing our semi-annual agenda which could be included in the "Regulatory Calendar," and we have made submissions to the Calendar. We will provide our reports to the Office of Management and Budget in the next few weeks. Also, I would advise you that we are preparing new rulemaking policies and practices for use by this agency which will reflect the new guidelines issued by the Task Force and incorporated in Executive Order 12291. Our regulations outlining these rulemaking requirements are being provided to OMB for its review and comment under the Executive Order.

If the Task Force or its staff have questions on FEMA regulations management, please contact Mr. George Jett our General Counsel at 634-4100.

Sincerely yours,

Bernard T. Gallagher
Acting Director
MAY 6 1981

Honorable George Bush
The Vice President of the
United States
Washington, D.C. 20501

Dear Mr. Vice President:

Thank you for your letter of March 25, 1981, outlining the President's program for reducing regulatory burdens.

With the formation of the Federal Energy Regulatory Commission (FERC) in October 1977, the need for a serious and indepth review of our regulations and the associated burdens on industry became obvious to all those associated with the regulatory process. I would like to take this opportunity to briefly summarize the FERC's energy data validation program which has been instrumental in reducing industry reporting burden.

On March 23, 1978, Executive Order 12044, "Improving Government Regulations," required executive agencies to adopt procedures to improve existing and future regulations. This Order exempted FERC by virtue of its independent regulatory status. However, former Chairman Curtis, in keeping with the spirit and intent of the Order, voluntarily chose to comply with the Order and established guidelines to be used in the preparation of all rules and regulations proposed for Commission consideration.

In August 1978, a Validation Team was established within FERC to review all public use forms required by the Commission. Systematically, each data element on these forms has been, or is in the process of being, reviewed by this Validation Team to determine which elements of data are, in fact, now used for regulatory purposes. The elements not used for regulatory purposes are recommended for elimination in Commission rulemakings.

The validation process of public use forms is tracked in the "Information Systems Report" (copy enclosed), an internal staff publication which summarizes information on each form and tracks the status of the individual validation reviews. Initially, 72 public use forms were included in this document representing approximately 1.5 million hours of annual reporting requirements on industry.
The FERC's validation program exceeded the expectations of all involved with this program. This validation effort has identified reductions and eliminations of approximately 45 percent of the burden related to those public use forms in place on October 1, 1979. Final Rules have been issued eliminating approximately 30 percent of the October 1979 burden, while the remaining 15 percent are at various stages of the validation and formal rulemaking processes.

On November 30, 1979, the FERC voluntarily chose to comply with Executive Order 12174, which exempted the independent regulatory agencies, and submitted an Information Collection Budget (ICB) to OMB for approval in June 1980.

While the validation process may appear to be a relatively simple task, our experience with this program over the past two years provides evidence to the contrary. The validation of these forms and applications often involves the rewriting of complete sections of the Commission's regulations, and requires rulemakings by the Commission. Due to public interest in these rulemakings, extensions of the comment period are not unusual. For example, the comment period on FPC Form No. 1 was twice extended for a total comment period in excess of four months; several public meetings were also held on this rulemaking in accordance with the provisions of the Administrative Procedures Act.

With a growing public awareness of what appears to be excessive Government regulation, more stringent requirements for rulemakings are in effect or in the drafting stages in Congress. While the intent of these new rulemaking requirements is well understood, these new procedural requirements have also delayed the processing of our validation rulemakings which recommend the reduction or elimination of existing reporting requirements.

In closing, I would like to reaffirm the FERC's commitment to eliminate the collection of data not required to carry out our legislative mandates. In fact, the General Accounting Office recently completed an initial review of the data reduction programs at five independent regulatory agencies with the conclusion that the FERC had developed procedures which could easily be emulated by other agencies. I believe that our commitment to this effort is best exemplified by our voluntary initiatives to review our data requirements long before this effort became mandatory.

Sincerely,

[Signature]

Georgiada Sheldon
Acting Chairman

Enclosure
The Vice President  
The White House  
Washington, D. C.  20500

Dear Mr. Vice President:

As Chairman of the Federal Home Loan Bank Board, I am pleased to respond to your letter dated March 25, 1981, and express the Board's strong support for the goals of the Task Force on Regulatory Relief and Executive Order 12291. Your letter specifically requests that the Board voluntarily comply with the spirit of Executive Order 12291, and sections 2 and 3 in particular, although the Order does not apply to the Board.

As you may know, the Board's resolution on regulatory simplification (Board Resolution No. 80-584) incorporates the policies of requiring new regulations to achieve goals in the most efficient and least burdensome manner possible and preparing impact analyses for major new regulations. Accordingly, the Board believes that it already adheres to the spirit of the Order and the substance of sections 2 and 3.

You can be assured of the Board's continued cooperation in the efforts of the Task Force.

Sincerely,

[Signature]

John H. Dalton
June 10, 1981

The Honorable George Bush
Vice President
The White House
Washington, D.C. 20500

Dear Mr. Vice President:

This responds to your letter of March 25, 1981, in which you request that the Federal Maritime Commission voluntarily adhere to the spirit of Executive Order 12291, which is designed to reduce the regulatory burden imposed by Federal agencies on the public.

As you point out, the Order is not binding on independent regulatory agencies such as this Commission. We, however, very much share the concern of the President and yourself that regulatory requirements be reduced to the maximum extent possible consistent with the Commission's statutory obligations. To this end, we currently consider factors such as those described in section 2 of the Executive Order when publishing a proposed or final rule.

It should be emphasized, however, that our statutory responsibilities do not afford us the flexibility to follow the exact requirements of the Order in all cases. As an example, the recent enactment of Public Law 95-475 governing the conduct of domestic rate cases incorporated time limits for the promulgation of rules which could not have been accomplished within the framework of the Order. There have been numerous instances of similar legislation affecting this agency over the past decade.

In closing, let me again assure you of our intention to comply with the spirit of Executive Order 12291 to the fullest extent possible.

Sincerely,

Leslie L. Kanuk
Acting Chairman
Honorable George Bush
Vice President of the United States
Washington, D.C. 20500

Dear Mr. Vice President:

I have received your letter of March 25, 1981 regarding the President's efforts toward reducing regulatory burdens. In that letter you requested the cooperation of this agency with regard to Sections 2 and 3 of Executive Order 12291 and with the Regulation Calendar project.

In the past the Commission has made contributions to the Regulation Calendar Appendix on Public Participation and I am pleased to report that we will continue to make at least that contribution in the future.

I have examined Executive Order 12291 and, as you indicated in your letter, its application to this Commission may be limited.

As you know, the Federal Mine Safety and Health Review Commission was established by Congress as an independent agency for resolving disputes between the Mine Safety and Health Administration of the Department of Labor (MSHA) and mine operators under the Federal Mine Safety and Health Act of 1977. MSHA is the enforcing agency and it is MSHA which promulgates all substantive rules and regulations. By statute the Commission may establish only procedural rules of adjudication.

Rules of adjudication procedure do not fit precisely the provisions of Sections 2 and 3 of Executive Order 12291. They are not "major" rules as that term is defined in the Order. Nevertheless, it is quite possible that certain other provisions of Sections 2 and 3 may apply to them. Therefore, we will examine those sections very closely in the event that we publish any additional Rules of Procedure and we will adhere to the applicable provisions whenever possible.

Please call upon me if I may be of any further assistance to you in your endeavor.

Sincerely,

RICHARD V. BUCKLEY
Chairman
Honorable George Bush  
Vice President of the United States  
The White House  
Washington, D.C.  20501  

Dear Mr. Vice President:

The Federal Trade Commission is pleased to respond to your letter and memorandum of March 25, 1981. The Commission pledges its continued participation in the Regulatory Calendar and its full support for the policies and goals reflected in President Reagan's Executive Order 12291 on federal regulation. The Commission shares the President's determination that regulatory objectives be met at the minimum net cost to society.

The primary source of the Commission's rulemaking authority is Section 18 of the Federal Trade Commission Act, which authorizes the Commission to promulgate rules defining unfair or deceptive acts or practices. Such rules may also impose affirmative requirements upon industry designed for the purpose of preventing such acts or practices. The Commission is also empowered by Section 6(g) of the FTC Act to promulgate rules relating to unfair methods of competition; however, no such rules have been adopted. Several other statutes, such as the Magnuson-Moss Warranty Act, authorize implementing regulations in their narrow subject areas.

The Commission's own rulemaking policies are fully consistent with those reflected in Section 2 of Executive Order 12291. In order to assure that the Commission's decisions are based on adequate information concerning the need for and consequences of proposed rulemaking, the Commission in June 1978 established the Impact Evaluation Unit in the Bureau of Consumer Protection. One of the responsibilities of this unit is to conduct prospective studies to ensure that new regulatory proposals are designed to provide benefits that substantially exceed their costs. Persons outside the agency are also encouraged to provide the Commission with information on the need for, and the potential costs and benefits of, possible regulations even before a notice of proposed rulemaking is published. In an advance notice of proposed rulemaking, the Commission describes its regulatory objectives and identifies regulatory alternatives under consideration, as required by Section 18(b)(2) of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 376. The Commission also invites interested persons to comment on the rulemaking under consideration and to propose additional alternatives for achieving the Commission's objectives.
The preliminary regulatory analysis that the Commission must issue in connection with the publication of a notice of proposed rulemaking further assures that the Commission will have an adequate factual basis for a decision whether to promulgate a rule. Under Section 22 of the FTC Act, as amended, 94 Stat. 374, 388, that analysis must contain:

1. A concise statement of the need for, and the objectives of, the proposed rule;

2. A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law; and

3. For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic or other effects and a preliminary analysis of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.

The Commission is also required under Section 22 of the FTC Act to issue a final regulatory analysis of each rule at the time of promulgation containing:

1. A concise statement of the need for, and the objectives of, the final rule;

2. A description of any alternatives to the final rule which were considered by the Commission;

3. An analysis of the projected benefits and any adverse economic or other effects of the final rule;

4. An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and

5. A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.
The Commission closely reviews each regulatory proposal brought before it for final approval to ensure that federal regulatory action is necessary and that the proposed rule minimizes any burden imposed on industry, especially small businesses. If these conditions are not met, the Commission will terminate the proceeding without promulgating any rule.

The Commission uses the tools of zero-based budgeting, quarterly budget reviews, and bimonthly policy review sessions to help it pinpoint those areas of activity which promise the greatest benefits in terms of increased competition and reduced consumer deception in the marketplace. In this manner the Commission, consistent with Section 2(e) of the President's Order, is already "setting" 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.

The Commission's current practices are also consistent with the concept of regulatory impact analysis reflected in Section 3 of Executive Order 12291. The preliminary and final regulatory analyses required by the Federal Trade Commission Act are substantially similar to the analyses required of the executive agencies for major rules under subsection 3(d). In addition to complying fully with its own statute, the Commission will make every effort to include the information listed in subsection 3(d) within its final regulatory analyses of all rules that would be considered "major" under the Order. Moreover, the Commission will be guided by that subsection in drafting its preliminary regulatory analyses of all rules, as well as its final analyses of rules that may not be considered major.

In order to assist OMB further in the execution of its responsibilities under subsection 6(a)(5) of the Order, the Commission will send the Director copies of its advance notices of proposed rulemaking and its semiannual regulatory agendas, as well as its published notices of proposed and final rulemaking.

The four members of this Commission are evenly divided on the question of complying voluntarily with Section 3 of Executive Order 12291, which provides for OMB review of notices of proposed rulemakings and preliminary regulatory analyses, as requested by your letter. The absence of a majority renders the Commission legally unable to comply with your request. The Commission believes, however, that it would be useful to state the divergent views of individual members of the Commission.
Commissioner Bailey and I believe that even though the Commission is not required, by virtue of its independent status, to comply with Executive Order 12291, the Commission should provisionally determine to send to the Director of the Office of Management and Budget notices of proposed rulemaking and preliminary regulatory analyses in future major proceedings. Under such a procedure, these would be provided to OMB at the same time they are sent to Congress under Section 18(b)(2)(B) of the Federal Trade Commission Act, as amended, i.e., at least thirty days before publication. OMB comments would be fully considered by the Commission in issuing preliminary and final regulatory analyses. As to major rulemakings that are already in progress, Commissioner Bailey and I would send final regulatory analyses to OMB for review at least thirty days prior to publication. We would also send for review final regulatory analyses that differ substantially from preliminary analyses reviewed by OMB. All comments would be included in the rulemaking records and would be considered to the fullest extent practicable.

However, Commissioner Bailey and I believe that if OMB was unable to comment on a final regulatory analysis before the Commission felt it must move forward to promulgate a rule, there would still be an opportunity for OMB comment. No rule promulgated by the Commission before September 30, 1982, will take effect for at least ninety days of continuous Congressional session after promulgation, because of the legislative veto provisions in Section 21 of the FTC Act, as amended, 94 Stat. 374, 393.

For rules that are not major, Commissioner Bailey and I would, consistent with Section 3(c)(3) of the Executive Order, send OMB notices of proposed rulemaking and final rules ten days before publication. Such notice would also be given for final major rules where OMB had already reviewed a preliminary regulatory analysis that was substantially the same as the final analysis.

While Commissioner Dixon recognizes the value in apprising the Office of Management and Budget of regulatory proposals throughout the government so that it may identify duplicative, overlapping, and conflicting proposals, as well as those that "are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of [the President's] Order," he believes that Congress' determination to establish the Commission as a regulatory agency independent of the Executive Branch makes it inappropriate for the Commission to submit regulatory analyses and notices of proposed and final rulemaking to that Office for review prior to publication.
Commissioner Dixon believes that the rulemaking process is presently structured in a way that will provide OMB with ample opportunity to comment without infringing upon the independence of the agency.

Commissioner Pertschuk opposes prepublication review by OMB of the Commission's notices of rulemaking and regulatory analyses. He believes the FTC Improvements Act of 1980, through its creation of an elaborate system for legislative oversight of Commission rulemaking, reaffirmed the Congress' determination that the Commission is an agency independent of the Executive Branch. The new Act requires Commission procedures which afford ample opportunities for OMB and other interested parties to provide timely comment on the impact of any proposed rule. In Commissioner Pertschuk's view, however, the Act does not contemplate or permit special opportunities for review by OMB. For these reasons, Commissioner Pertschuk would consider any initiative by the Commission, without authorization from Congress, to provide preferential status to OMB in our rulemakings to be a violation of the principle of independence reaffirmed by Congress in the FTC Improvements Act. For a fuller statement of Commissioner Pertschuk's views on this issue, see his separate statement attached to this letter.

By direction of the Commission.

[Signature]

David A. Clanton
Acting Chairman
Separate Statement
of
Commissioner Pertschuk

I oppose the Administration's request that the Commission submit its notices of rulemaking and regulatory analyses to the Office of Management and Budget for final review prior to their publication.

The last Congress addressed itself specifically to the Commission's rulemaking processes. In so doing it made very clear its intention that all interested parties, including other government agencies, be afforded full opportunity for informal comment to the Commission in response to a mandatory advance notice of proposed rulemaking. It also affirmed, in no uncertain terms, the Commission's special status as an agency independent of the Executive Branch and responsive to the Congress. It did so in two particulars: (1) by requiring a 30 day period for pre-publication review of notices of proposed rulemaking and preliminary regulatory analyses by the oversight committees of Congress; and (2) by establishing an elaborate system of Congressional veto to which all Commission rules henceforth are to be subjected.

Under these procedures, OMB as well as other government agencies will have ample opportunity, along with all other interested parties, to comment both informally, in response to advance notices of proposed rulemaking, and formally, on the record, in our rulemaking proceedings.

As the text of this letter abundantly demonstrates, the Commission's procedures are now structured to afford exhaustive opportunity for OMB to provide the Commission timely counsel on the impact of any proposed rule.

Presidential oversight of FTC rulemaking is neither contemplated by nor consistent with the system for Congressional review of Commission rules. Indeed, if OMB were given special access to the Commission's final notices of rulemaking and final regulatory analyses prior to their publication, it would have an opportunity for advance review that Congress did not even confer upon itself. For these reasons, I would consider any initiative by the Commission, without authorization from Congress, to provide preferential status to the executive branch in our rulemakings to be a violation of the principle of independence reaffirmed by Congress in the FTC Improvements Act. I therefore oppose and would dissent from any action by the Commission to give OMB an opportunity for pre-publication review of the Commission's notices of rulemaking and regulatory analyses.
April 1, 1981

The Honorable George Bush
Vice-President
The White House
Washington, D.C.

Dear Mr. Vice President:

In a letter dated March 25, you requested that the Interstate Commerce Commission comply voluntarily with Sections 2 and 3 of Executive Order 12291. Although the Commission is an independent regulatory agency created as an arm of Congress, the Commission intends to comply fully with the spirit of your request to coordinate and reduce the cumulative burden of needless and overly rigid government regulation.

We share the President's objectives. As I am sure you know, the Commission has, in fact, over the past several years, eliminated unnecessary regulation and substantially modified its regulation of the trucking, rail, bus, and water carrier industries in response to changing economic conditions. Substantial deregulation has taken place both administratively and in response to congressional directives.

Current Commission procedures already provide that regulatory action not be undertaken unless the potential benefit to society from the regulation outweigh the potential costs, and the alternative involving the least cost to society is certainly the preferred option.

Furthermore, in connection with every major rule, the Commission considers potential costs and benefits in reaching a decision.

We will continue to publish a semi-annual regulatory agenda.

The path of reducing regulatory burdens, reducing paperwork requirements, and streamlining administrative decision-making is one the Commission has already chosen to follow.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Marcus Alexis
Acting Chairman
April 9, 1981

The Honorable George Bush
Vice President
The White House
Washington, D.C.

Dear Vice President Bush:

Thanks very much for your letter of March 25th concerning
deregulation and Executive Order 12291; which was forwarded
to me here as the Chairman-designate of the SEC. As indicated
in my April 6th Senate confirmation hearing, I wholeheartedly
concur with these objectives and will do my level best to
implement them.

Sincerely yours,

John S. R. Shad

JSRS/kd
MEMORANDUM TO DESK OFFICERS

SUBJECT: Contacts with Non-Federal Employees

I would like to restate the policy I have enunciated on the aforementioned topic.

In the discharge of your duties, numerous outside groups will want to meet with you. While there are no legal constraints on such discussions, there are constraints on your time, consequently, I prefer that you not have any verbal communications with such groups. You are encouraged, however, to review any written material they submit to you and the affected agency.

The above guidance is not applicable to your review of paperwork clearances.

Jim J. Tozzi
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