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REGULATORY REFORM: OMB MAKING ENEMIES
WITH RULES GOVERNING OUTSIDE COMMUNICATIONS

Office of Management and Budget policy on monitoring contacts between its staff and persons outside OMB during the review of regulations has not been winning friends for the agency. In addition to public interest groups' criticizing OMB's role in regulatory review, at least one industry group is charging OMB with interfering improperly with a rulemaking at another agency.

Administration officials at OMB and the Presidential Task Force on Regulatory Relief say they are disturbed by charges that they are pulling shades of secrecy around key regulatory decisions. In an effort to defuse the criticism, Budget Director David A. Stockman enunciated a policy for contacts between OMB and persons outside the government in a June 13 memo. He also said that for contacts between OMB and other executive agencies, OMB would follow the ruling of the U.S. Court of Appeals for the District of Columbia in a decision, *Sierra Club v. Costle*.

Criticisms of the OMB policy are that it is unconstitutional, secretive, denies parties interested in a rulemaking their rights, undermines the role of agencies, and results in poorer regulations. The proper handling of ex parte communications and other types of contacts is important in the regulatory setting because a court could overturn a rule if irregularities can be shown in the record.

The criticism is coming from public interest groups and former officials of the Carter Administration. But it has also been voiced by a national trucking industry organization that is crying "foul" over OMB's handling of a major regulation in connection with trucking deregulation. In addition, officials of business associations like the Chamber of Commerce and the National Association of Manufacturers say they would not object to OMB's keeping records of the meetings they have with OMB staff.

C. Boyden Gray, counsel to Vice President George Bush, says the majority of contacts between the staff of the task force, which is headed by Bush, and regulatory agencies is "ordinary stuff ... friendly calls." Keeping a record of all contacts "makes no sense," Gray maintains.

Stockman decided that contacts between OMB officials and other agencies' staff do not need to be logged for the record. Deputy General Counsel Robert P. Bedell says the agency is sensitive to the criticisms. He says the agency is at pains to ensure that only those at the top at OMB, or persons they have expressly authorized, can have contact with persons outside OMB or at regulatory agencies.

"We are sensitive to the appearances," Bedell responds when asked about meetings and telephone conversations that go unrecorded. "We are policing ourselves by making sure only a limited number of individuals are authorized to talk" to outsiders. He explains this means James C. Miller III, director of OMB's information and regulatory affairs office, and Miller's two deputies, Jim J. Tozzi and Thomas D. Hopkins.

Court Ruling

Sierra Club v. Costle, a court case receiving attention lately, is cited by Gray and Stockman as providing a legal basis for the Administration policy.

In a decision exonerating the federal government's position, the court concluded that involvement by White House officials in decisions about regulations is desirable and necessary because a single agency in the executive branch, with a single regulatory mission, may fail to take into account all the factors necessary for national policy. The court denied a challenge to the contacts between White House officials and the head of the Environmental Protection Agency in the promulgation of clean air standards.

Conduit Communications

Critics of the current Administration say that it is ironic Sierra Club should be cited by Stockman because in that case procedures had been established during the Carter Administration for recording contacts between the White House and agencies during the rulemaking period. In addition, the ruling does not address the question of "conduit communications" -- contacts between White House officials and persons from the outside for the purpose of conveying the outsiders' views to the agency considering the rule.

To safeguard against conduit communications, Miller says OMB will ask that any information it receives -- economic studies, scientific data, and the like -- also be given to the regulatory agency involved. The mechanics of putting this material on the record at the agency are unclear if the outside party fails to pass along the information. But it is clear from an April Justice Department memo to Stockman that the Administration believes the responsibility for putting the information on the record lies with the particular agency, not OMB.

The Justice Department memo also argues that a requirement for putting factual information on the public record does not extend to policy recommendations from OMB. Such material is "deliberative," explains Bedell, and therefore is not subject to disclosure.

The memo to Stockman, a copy of which was obtained by BNA, states: "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."

The confidentiality of the government's deliberations is protected under the presidential powers provision of the Constitution and is analogous to the Freedom of Information Act exemption that covers documents relating to deliberations, the memo argues.

DOT Regulations

One group maintaining that OMB has interfered and not disclosed its role is the National Tank Truck Carriers, Inc.

A member of the powerful American Trucking Associations, Inc., NTTC has invoked the Freedom of Information Act to try to obtain documents from OMB on its role in the adoption of regulations by the Department of Transportation. Clifford J. Harvison, NTTC's managing director, says NTTC may sue both the Transportation Department and OMB, using President Reagan's Executive Order 12291 on regulatory relief as part of its case, over regulations on minimum insurance requirements for trucking companies.

According to Harvison, the Transportation Department's proposal was for requiring the highest insurance coverage allowed by the Motor Carrier Act of 1980 -- \$5 million for hauling hazardous materials. When the DOT proposal was reviewed by OMB, it was "guttled" and the financial responsibility levels reduced to \$500,000, Harvison says. Supporters of the change say it will be easier for new persons to enter the trucking industry as a result.

"I don't think OMB should have been involved," Harvison said. "The decision should have been left up to DOT. They have the statistics and the carrier-by-carrier safety records." Referring to OMB's involvement, Harvison says, "They took DOT's expertise and threw it out the window."

The DOT proposal was "significantly changed," according to Robert I. Ross, senior attorney in the DOT general counsel's office. He refused to discuss the changes but acknowledges that Miller and Stockman participated in the regulatory review.

Massaging Conflicts

Like some other officials from the previous administration, George Eads, a member of President Carter's Council of Economic Advisers, speaks in favor of a full public record for a rulemaking. He compares OMB's approach of overseeing regulatory agencies to its handling of those agencies' budget requests. "OMB works by massaging out the conflicts before going public." Eads, a Rand Corp. economist, says he does not think Miller believes in "the efficacy of public filings" and calls the Stockman memo on OMB contacts with agencies and outsiders "calculatedly ambiguous."

The public has a right to know about all the data used in making regulatory decisions, says Peter J. Petkas, director of the U.S. Regulatory Council, which Reagan abolished. Petkas, who is on the University of Virginia faculty, doubts that Miller or OMB staff "are trying to subvert the process. I believe they are trying to get all the data and taking pains to tell people to go to the agencies" with their data.

But Petkas sees problems. "The way it is set up now they run the risk of creating suspicions about closed meetings and secret documents," he says. He would like Congress to adopt regulatory reform legislation codifying a formal system of central review that maintains appearances of propriety and ensures the integrity of the rulemaking process.

The Alliance for Justice, a consortium of 20 public interest and environmental groups, is preparing a comprehensive analysis of OMB's regulatory review role. Chuck Ludlam, a consultant to the Alliance and legal adviser to the Carter White House task force on regulatory reform, assesses the OMB review procedure: "The main problem is that key regulatory decisions are now being made in secret bargaining sessions between OMB and private parties, and OMB and agency officials. The public can't attend these meetings. We'll never know what happened at these meetings and we'll never know precisely why a given regulatory decision was made."

Ludlam distrusts the notion that outside parties will forward to agencies what they give to OMB. "They have no incentive to make sure the rulemaking agency has the information because the real decisionmaker is OMB, not the agency."

A report by the Congressional Research Service released June 18 criticized OMB's review, in part, on the claim that due process goals of fairness to the parties in a rulemaking were being denied. The report also argued that the executive order was unconstitutional and that judicial review of a regulation could be hindered because the rulemaking record could be incomplete (Report No. 117, A-14).

The OMB's centralization has "created a critical access point to the agency decision-making process without providing safeguards against secret, undisclosed and unreviewable contacts. . ." the CRS study says.

OMB officials like Bedell reply that safeguards against conduit communications, such as those who can meet with outsiders, are adequate and that divulging OMB-agency contacts which are deliberative is not required under the law. An assistant secretary of an agency, Bedell says, can advise his boss, the secretary, on a regulation and that communication does not have to be revealed. "Why should the chief executive be treated any differently?" he asks.

When OMB officials meet with agencies "we undertake that on behalf of the President and are entitled to confidentiality," Bedell says. He adds that the Sierra Club decision supports that position.

Recording Visits

Robert Ragland, director of regulatory reform and government organization at the National Association of Manufacturers, says he thinks meetings between NAM representatives and OMB staff to talk about regulations should be on the record. "We advocate a complete, open record," Ragland says, adding, "There is no reason to have clandestine meetings."

Ragland said NAM has opposed "presidential veto" power over regulations in the past, but he defends the OMB review. "Someone has to have the authority and responsibility to see to it the rules have rationality." Ragland says the system is working.

A requirement that OMB keep a record of every contact with another agency "would tie them up with so much red tape, they couldn't function," says Stephen Bokas, a lawyer for the National Chamber Litigation Center at the Chamber of Commerce. He also says *ex parte* contracts occur frequently, did not begin with the Reagan Administration, and serve as a useful tool. "You make a tentative approach to settle a problem. You don't want to take a formal position. But these aren't under-the-table deals," according to Bokas. In instances where a formal regulation is being promulgated, however, Bokas feels meetings with OMB should be placed on the record.

Looking ahead, Eads says he thinks the degree of OMB involvement in the regulatory process governmentwide will change. The decisionmaking "will take place less in OMB than OMB thinks it will," he says. Because of the magnitude of the task of reviewing all regulations, OMB "can't follow up," he explains.

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