a new decisionmaker or has access to and influences the decisionmaker as an agent for private parties, circumstances which appear to exist.[139]

b. Principles Undermined by Ex Parte Contacts

In a complex rulemaking, involving agency personnel in many different capacities, contacts with "decisionmakers" are difficult to avoid and inconvenient to docket. Yet, if undocketed, these contacts impede public participation, reasoned and accountable decisionmaking, and meaningful judicial review. This applies with force to ex parte contacts between OMB and industry.

i. Ex parte OMB-industry contacts undermine the APA public participation requirements for informal rulemaking.

When significant arguments or factual information is communicated to decisionmakers during rulemaking and not docketed for public comment, the extensive APA informal rulemaking procedures designed to ensure meaningful public participation in rulemaking[140] may become mere window dressing.[141] The *Home Box Office* court, noting that "[c]ompromises, fall-back positions, and so-called 'real facts' are often reserved" for off-the-record communications,[142] observed that where an agency "relied on these apparently more candid private discussions . . . the elaborate public discussion in these dockets has been reduced to a sham."[143]

The APA's goals of ensuring meaningful public participation in

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[139] *See infra* text accompanying notes 201-53 (discussing OMB's role as a new decisionmaker) and notes 305-11 (discussing OMB as a conduit from industry to EPA).

[140] *See* 5 U.S.C. § 553.

[141] *See Home Box Office*, 567 F.2d at 53-58; United States Lines v. FMC, 584 F.2d 519, 540 (D.C. Cir. 1978); Environmental Defense Fund v. Blum, 458 F. Supp. 650, 659-61 (D.D.C. 1978); *see also* [J. Skelly] Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 379-82 (1974) (concluding that all relevant information given to the agency should be made available for public comment); Note, *Demise of Effective Public Comment in Informal Rulemaking: Sierra v. Costle*, 18 New Eng. L. Rev. 183 (1982) (arguing informal rulemaking's public comment procedures will be undermined if courts allow unrevealed ex parte contacts). *But see* Carberry, *supra* note 136, at 83-85 (arguing that APA public comment procedures were not intended to compel docketing of ex parte contacts).

[142] 567 F.2d at 56 n.123 (quoting FCC Chairman Wiley).

[143] *Id.* at 54; *see also* United States Lines v. FMC, 584 F.2d 519, 540 (D.C. Cir. 1978) ("[T]he right to comment or the opportunity to be heard on questions relating to the public interest is of little or no significance when one is not apprised of the issues and positions to which argument is relevant . . . . [W]ithout such dialogue any notion of real public participation is necessarily an illusion.").

the rulemaking and encouraging full adversarial comment on agency rules argue strongly for disclosure of any significant OMB-industry contact, when OMB is the decisionmaker or a significant influence thereon. Public participation concerns support *a fortiori* a prohibition on post-comment-period ex parte contacts, absent docketing and an opportunity for rebuttal.[144] If a last opportunity to influence the rulemaking is to be available for certain parties, it must be available to all.

ii. Ex parte OMB-industry contacts hamper judicial review.

Effective judicial review, as provided for in the APA,[145] requires an accurate record of the arguments and facts before the agency decisionmaker. Without such a record, the court is left to make uninformed guesses about the rationality of agency decisionmaking. For this reason, some courts have required agencies to record, and permit adversarial discussion of, significant ex parte communications between the agency and outsiders.[146]

Judicial review is less meaningful when OMB-industry contacts are not divulged to the court. OMB may be influenced by these contacts, and in turn, the Office may influence EPA decisionmakers or may make its own decisions to veto or otherwise alter an EPA rule.[147] The administrative record delivered to the court by EPA would be a fictitious account of the actual decisionmaking process.

Agencies are required to develop rules on the basis of established statutory criteria; consideration of irrelevant factors may be held to be arbitrary and thus a ground to strike down the rule.[148] Ex

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[144] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (data used by EPA but not disclosed in time to permit rebuttal required that the final rule be remanded for rebuttal; rule remanded a second time when EPA failed to explain adequately its rejection of comments); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631-32 (D.C. Cir. 1973) (criticizing EPA's failure to provide opportunity for comment on certain agency methodology).

[145] 5 U.S.C. §§ 704-706.

[146] *See, e.g.*, United States Lines v. FMC, 584 F.2d 519, 541-43 (D.C. Cir. 1978); National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978); *Home Box Office*, 567 F.2d at 54-55; Environmental Defense Fund v. Blum, 458 F.Supp. 650, 659-60 (D.D.C. 1978).

[147] *See, e.g., infra* text accompanying notes 359-65 (discussing review of beverage can surface coating NSPS).

[148] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1970) ("Section 706(2)(A) [of the APA] requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' To make this finding the court must consider whether the decision was based on a consideration of the

parte communications may encourage a decisionmaker to consider statutorily irrelevant factors.[149] In the case of OMB, where the decisionmaker gives preferential access to industry, keeps its contacts secret, and operates under a mandate to cut regulatory costs,[150] infiltration of irrelevant factors is likely. The fear that non-statutory factors will be considered is aggravated by OMB's insistence on reviewing rules, such as National Ambient Air Quality Standards,[151] where the cost considerations mandated by the Executive Order are wholly irrelevant under the applicable statute. The increased likelihood that improper factors will be considered makes a proper record for judicial review that much more important.

iii. Ex parte OMB-industry contacts detract from reasoned decisionmaking.

To assure that agencies engage in reasoned decisionmaking and accurate fact-finding, substantial contacts with outside parties should be divulged.[152] Docketing allows for full disputation of arguments or data proferred during such contacts, and encourages agencies to explain fully their reliance on, or rejection of, those arguments or data.

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relevant factors. . . .") (citation omitted).

[149] *See, e.g., Home Box Office*, 567 F.2d at 54-55 (where there are extensive, undocketed ex parte contacts, "a reviewing court cannot presume that the agency has acted properly. . .but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary"); United States Lines v. FMC, 584 F.2d 519, 541 (1978) ("The agency's secrecy as to *ex parte* communications is particularly troublesome [and] necessarily calls into question whether the justifications put forth by the agency in its decision were in fact its motivating force."); *see also* Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 Yale L. J. 194, 198 (1979) ("Permitting ex parte contacts [allows] secret political intervention [which] may interfere with the agency's ability to make a reasoned decision based on the statutory criteria.").

[150] *See infra* text accompanying notes 275-324.

[151] NAAQS primary standards, promulgated pursuant to the Clean Air Act, 42 U.S.C. § 7409(b)(1) (1982), may be based *only* on health considerations. *See* American Petroleum Inst. v. Costle, 665 F. 2d. 1176 (D.C. Cir. 1981); Lead Industries Ass'n v. EPA, 647 F.2d. 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

Despite this clear statutory command, OMB insists on reviewing NAAQS standards. *See* OMB Response to House Questionnaire, *supra* note 83 (Question 16), *reprinted in Hearings, supra* note 83, at 981-82; *see also infra* text accompanying notes 371-80 (OMB review of particulate matter NAAQS).

[152] *See Home Box Office*, 567 F.2d at 56 (secrecy interferes "with the ideal of reasoned decisionmaking which undergirds all of our administrative law"); Environmental Defense Fund v. Blum, 458 F.Supp 650, 659-61 (D.D.C. 1978) (citing need for adversarial discussion of complex reports submitted ex parte to EPA).

The "reasoned decisionmaking" rationale for requiring docketing applies particularly to OMB-industry communications. A mission-oriented agency such as EPA reads and analyzes the whole administrative record, and thus is more likely than OMB to consider views and data tending to rebut those which are presented in ex parte contacts. On the other hand, OMB's disproportionate interaction with industry[153] creates a distorted picture in the Office's mind of the rulemaking docket that is before EPA, the reviewing courts, and the public. Further, OMB staff lack substantive expertise in many technical areas of EPA rulemaking,[154] and so may be swayed by sophistic technical arguments not subject to adversarial comment.

iv. Ex parte OMB-industry contacts undermine public policy favoring accountable and open government.

Signing the Government in the Sunshine Act[155] into law, President Ford remarked:

> [T]he decisionmaking process and the decisionmaking business of regulatory agencies must be open to the public . . . . In a democracy, the public has a right to know not only what the government decides, but why and by what process . . . . [It is] America's proud heritage that the Government serves and the people rule.[156]

This rationale undergirds the "Sunshine" Act, the Freedom of Information Act[157] and the APA's notice-and-comment rulemaking procedures.[158]

In keeping with Congress' declaration that it is "the Policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government,"[159] secrecy of government decisionmaking is not

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[153] *See infra* text accompanying notes 282-93.

[154] *See supra* text accompanying note 49.

[155] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §§ 551, 552, 552b, 556, 557 (1982)).

[156] Government in the Sunshine Act: The President's Remarks Upon Signing S. 5 Into Law, Sept. 13, 1976, 12 Presidential Docs. No. 38, at 1333-34 (1976), *reprinted in* Staff of Senate and House Comms. on Gov't Operations, Government in the Sunshine Act—S.5: Source Book: Legislative History, Texts, and Other Documents 831 (Joint Comm. Print 1976) [hereinafter cited as Sunshine Act Legislative History].

[157] Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (1982)). *But see* 5 U.S.C. § 552(b)(5) (exempting from mandatory disclosure certain intra- and interagency memoranda).

[158] 5 U.S.C. § 553.

[159] Government in the Sunshine Act § 2, 5 U.S.C. § 552b note.

lightly to be tolerated. Significant contacts between OMB and outside parties are exactly the kind of "decisionmaking business" that should be carried on in the light of day.

2. *Interagency Contacts*

The President certainly has the power to *participate in* agency rulemaking,[160] and it is assumed *arguendo* that he may delegate that authority to OMB. The focus of this section is not on the propriety of OMB jawboning,[161] but on the potential docketing requirements for OMB-EPA contacts. Few courts have considered thoroughly the propriety of, or the need to docket, contacts between executive agencies during and after the informal rulemaking comment period. No court has discussed whether, under the APA, an agency must disclose in a rulemaking docket OMB communications with that agency.[162]

a. OMB "Conduit" Contacts with EPA

Where OMB serves as a mere conduit of information or arguments from private parties to EPA,[163] the question is raised: May a private party simply "launder" its views or data through OMB, and thus avoid public disclosure, critique and possibly judicial re-

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[160] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 404-08 (D.C. Cir. 1981).

[161] See Verkuil, *Jawboning the Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 944 (1980), for discussion of intraexecutive contacts. The *Sierra Club* court offered its view that "unless expressly forbidden by Congress. . .intra-executive contacts may take place, both during and after the public comment period; the only real issue is whether they must be noted and summarized in the docket." Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981). The court carefully noted that it was *not* deciding the propriety of "so-called 'conduit' communications, in which administration or interagency contacts serve as mere conduits for private parties." *Id.* at 405 n.520.

See also In Re Permanent Surface Mining Regulation Litigation, 13 Env't Rep. Cas. (BNA) 1586, 1597 (D.D.C. 1979) ("[E]nvironmental[ist] plaintiffs agree that consultation between the President's advisors and other entities in the executive branch is not illegal. Their argument concerns the procedures employed" by agencies engaging in such contacts.).

[162] In Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), the court considered the propriety of a post-comment-period briefing by EPA for OMB and certain other agency staff under the special Clean Air Act rulemaking procedures. *See* 42 U.S.C. § 7607(d) (1982). A description of this meeting and all materials distributed were placed in the public docket; however, the meeting was only an informational briefing by EPA, and not an arm-twisting session by OMB. 657 F.2d at 388, 404. The court held that the briefing was not improper, but did not speculate as to the propriety of a jawboning session, nor as to the propriety of *not* docketing the materials distributed in the meeting or a summary of the meeting itself. *Id.* at 404-08.

[163] *See infra* text accompanying notes 305-11; *see also infra* notes 359-65 and accompanying text (discussing beverage can surface coating NSPS).

view of its position? The courts seem to frown upon conduit contacts, as do several commentators, yet no court has ruled squarely on the propriety of interagency conduit contacts.

Language in decisions of the D.C. District Court[164] and the D.C. Circuit[165] indicate that it may be improper for an agency not to summarize and docket conduit contacts received from another executive agency during informal rulemaking. Furthermore, authorities as diverse as the Department of Justice Office of Legal Counsel,[166] the Alliance for Justice (a public interest consortium),[167] and

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[164] In NRDC v. Schultze, 12 Env't Rep. Cas. (BNA) 1737 (D.D.C. 1979), plaintiff environmental groups contended that ongoing ex parte contacts by the President's Council of Economic Advisors (CEA) with Interior Department, Office of Surface Mining (OSM) staff during the rulemaking would taint it. Plaintiffs' request for an injunction on future CEA contacts was denied. The court noted three facts substantially tempering any claim of "irremediable harm" or "patent violation of agency authority":

a) The Dep't of Interior had consulted with the Dep't of Justice, Office of Legal Council (DOJ/OLC), which advised that post-comment-period intraexecutive comments would be proper, provided a "catalogue" of all oral and written communications between CEA and outside parties was docketed at the Department of Interior. This would prevent CEA from being a conduit for private parties. *Id.* at 1738;

b) The DOJ/OLC memorandum advised OSM that any of the CEA-OSM contacts (described by the court as "extremely limited") that were part of the basis for a change in the rule should be revealed by OSM for the public record. There was no reason to believe OSM would not comply. *Id.* at 1739-40;

c) OSM did indeed fully disclose all communications between CEA and the public, "most of which were duplicative of material in OSM files." *Id.* at 1740 n.9.

In a related case, *In Re* Permanent Surface Mining Regulation Litigation, 13 Env't Rep. Cas. (BNA) 1586, 1597 (D.D.C. 1979), environmentalists charged that interexecutive post-comment-period ex parte contacts between CEA and the Interior Department compromised statutorily required citizen participation in the development of state surface mine regulations. The court granted a limited motion for discovery, enabling the environmental plaintiffs to discover whether any documents had been presented off-the-record by private parties to CEA without the opportunity for adversarial comment.

The reliance of both the *NRDC* and *Permanent Surface Mining* opinions on the DOJ/OLC advice that all conduit contacts be fully docketed with opportunity for public comment is clear. What is not readily apparent is how the courts would have dealt with the interexecutive contacts absent the docketing measures implemented at the suggestion of the DOJ/OLC. It seems likely that docketing is advisable to avert reversal in the case of a significant conduit contact.

[165] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981) ("We note that the Department of Justice, Office of Legal Counsel has taken the position that it may be improper for White House advisers to act as conduits for outsiders, [but plaintiff] has given us no reason to believe that a [docketing] policy. . .was not followed here, or that unrecorded conduit communications exist in this case.").

[166] *See* Larry Hammond, Dep't of Justice, Office of Legal Counsel (DOJ/OLC), Re: Consultation With Council of Economic Advisers Concerning Rulemaking Under Surface Mining Control and Reclamation Act (memorandum to Hon. Cecil D. Andrus, Interior Secretary), *reprinted in* Legal Times of Washington, Jan. 29, 1979, at 32-33 [hereinafter cited as Carter admin. DOJ/OLC memo]:

The rulings of the D.C. Circuit, however, do suggest that it might be inappropriate

the Administrative Conference of the United States (ACUS)[168] seem to recognize that significant interagency conduit contacts should be docketed, if not prohibited.[169] OMB seems prepared to accept a legal requirement to docket written factual conduit contacts.[170]

The reasons for docketing substantial conduit contacts are the same as those for docketing any ex parte contacts from private parties: full public participation, meaningful judicial review, and political accountability.[171] In addition, it is important that OMB inform EPA of the source of its comments; comments assumed to be from OMB are likely to be accorded greater significance by EPA than those known to be from a private party.

b. Non-conduit Interagency Contacts

i. Sierra Club v. Costle.

Few decisions discuss disclosure of interagency contacts during rulemaking, and none of them is directly on point.[172] The most important is *Sierra Club v. Costle*.[173] The *Sierra Club* court refused

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for interested persons outside the executive Branch to have so-called *ex parte* communications with you and your staff. If that is so, we think it logical to conclude that the D.C. Circuit would disapprove of CEA or other advisers to the President serving as a conduit for those same *ex parte* communications.

The DOJ/OLC under the Reagan administration apparently has a different view of the case law. In an April 24, 1981, memorandum from Assistant Attorney General Theodore Olson of DOJ/OLC to David Stockman, OMB Director (copy on file with author) [hereinafter cited as Reagan admin. DOJ/OLC memo], the OLC does not suggest that the D.C. Circuit would disapprove of OMB as a conduit. The memorandum does conclude, however, that all *factual* contacts between OMB and an agency, and all OMB contacts which "are 'conduit' transmissions of views or information from persons outside of Executive or independent agencies" should be docketed.

[167] *See* C. Ludlam, Undermining Public Protections: The Reagan Administration Regulatory Programs: A Report by the Alliance for Justice 40-42 (1981).

[168] ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) (*All* communications from the President, advisors to the President, the Executive Office of the President, or other administrative bodies "containing or reflecting comments by persons outside the government" should be identified and docketed.).

[169] Both the Carter administration DOJ/OLC, *see supra* note 166, and the Alliance for Justice, *see* C. Ludlam, *supra* note 167, suggest that conduit contacts may be prohibited.

[170] *See infra* text accompanying note 299.

[171] *See supra* notes 140-59 and accompanying text.

[172] The D.C. Circuit twice has skirted the issue of whether Executive Office communications with a regulating agency must be summarized and made available to the public. Both decisions rely on procedural defects in petitioners' efforts to compel disclosure of and public comment on the contacts. *See* American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); Nader v. Volpe, 466 F.2d 261 (D.C. Cir. 1972).

[173] 657 F.2d 298 (D.C. Cir. 1981).

to prohibit interagency, intraexecutive post-comment-period meetings,[174] but noted that docketing of such lower-level intraexecutive meetings *may* be necessary in some circumstances.[175]

Judge Wald pointed out that EPA had voluntarily docketed summaries of each of these intraexecutive agency meetings.[176] Nevertheless, to ensure the adequacy of the record, the court required EPA to file affidavits further discussing the substance of several post-comment-period meetings.[177] The court was not presented with, and therefore did not rule on, the propriety of *undocketed* interagency communications; all of the interagency contacts considered by the court had been summarized for the public docket, albeit in some cases after the close of the comment period.[178]

ii. OMB executive privilege?

A question may arise where non-conduit, policy-oriented communications involving executive branch officials are involved: Is the constitutionally based presumptive "executive privilege" for presidential communications, announced by the Supreme Court in *United States v. Nixon*,[179] available to OMB as an arm of the Executive Office?

The *Nixon* Court repeatedly noted that it was considering a

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[174] *Id.* at 404-05.

[175] *Id.* at 406-07. It should be remembered that the Clean Air Act's procedural provisions, 42 U.S.C. § 7607(d) (1982), *not* the APA's informal rulemaking provisions, 5 U.S.C. § 553 (1982), were under consideration in *Sierra Club*. 657 F.2d at 391-96. The Clean Air Act, for instance, instructs reversal of EPA action only if procedural "errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8). Furthermore, the Act appears to exclude from the record for judicial review many EPA-OMB communications. *See id.* § 7607(d)(4)(B)(ii) (requiring docketing of such contacts); *id.* § 7607(d)(7)(A) (excluding such contacts from the record).

[176] Summaries of all post-comment-period intraexecutive meetings, save the single meeting with the President and one with staff members of the Senate Environment and Public Works Committee, were docketed by EPA. 657 F.2d at 387-89, 404.

[177] *Id.* at 389-91 & n.450. The court denied plaintiffs' motion for further discovery related to these meetings, absent "the requisite showing of bad faith or improper conduct which would create serious doubts about the fundamental integrity of [the] rulemaking proceeding." *Id.* at 348-50.

On the use of affidavits to discover the effects of ex parte contacts, see McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 Duke L.J. 333, 348-49.

[178] 657 F.2d at 400.

[179] 418 U.S. 683, 708 (1974) (presumptive privilege of President's communications outweighed by need of judiciary to do justice in criminal prosecution).

"presumptive privilege of *Presidential* communications,"[180] and that its decision was informed by "[t]he *President's* need for complete candor and objectivity from advisers."[181] In general, the courts have held that a claim of executive privilege may be asserted only by the President, or by the head of an executive department who has personally participated in the decision to assert the privilege.[182]

Discussing the privilege for executive communications, the *Sierra Club* court noted that it was considering "a face to face policy session involving the President," and that "the President himself [was] directly involved" in the sole undocketed meeting of substance.[183] The court's emphasis on personal presidential participation in the undocketed meeting perhaps implies a privilege distinction between presidential communications and communications involving only lower-rank executive officials.

The rebuttable[184] presumption of executive privilege accorded to *presidential* communications logically must attenuate, eventually to inconsequence, as executive authority is delegated farther from the Oval Office (for instance, to OMB staff). This attenuation is analogous to the attenuation of civil immunity for official acts.[185]

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[180] *Id.* (emphasis added). In another passage of the opinion, the Court accepted President Nixon's argument that there exists a "valid need for protection of communications between high Government officials and those who advise and assist them," *id.* at 705, but went on to explain that any "privilege of confidentiality of *Presidential* communications in the exercise of Art. II powers" must be inferred from the Constitution, on the basis of the privileges flowing from the President's enumerated powers, *id.* (emphasis added).

On the constitutional basis for a presidential privilege, see Berger, *Executive Privilege: A Presidential Pillar Without Constitutional Support*, 26 Vill. L. Rev. 405 (1980-81) (cautioning against over-extension of executive privilege doctrine).

[181] 418 U.S. at 706 (emphasis added).

[182] *See* United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (there "must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"); Black v. Sheraton Corp. of America, 564 F.2d 531, 543 (D.C. Cir. 1977) ("It is. . .essential that the affidavit [claiming executive privilege] be based on actual personal consideration by the affiant official. . .and that it explain why the specified documents properly fall within the scope of the privilege. . . .What the situation required was the sworn statement of the appropriate Cabinet officer. . . .").

[183] 657 F.2d at 407.

[184] *See, e.g., Nixon*, 418 U.S. at 708; Sun Oil Co. v. United States, 514 F.2d 1020, 1024 (Ct. Cl. 1975).

[185] *Compare* Nixon v. Fitzgerald, 102 S.Ct. 2690, 2701-02 (1982) ("[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. . . . The President's unique status under the Constitution distinguishes him from all other executive officials.") *with* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2734 (1982) ("Having decided. . .that members of the Cabinet ordinarily enjoy only qualified immunity from suit we conclude today that it would be equally

Many have argued for at least partial disclosure of White House staff communications during rulemaking.[186] Empirical observation of OMB E.O. 12,291 review suggests that such proposals deserve to be implemented.

III. OMB Review of EPA Rules: Some Empirical Observations

This section looks at OMB review under the auspices of E.O. 12,291. First, a brief overview of OMB review of all executive agency rules is provided. The section then discusses OMB's de facto veto power over EPA rules, and OMB's more subtle—and more pervasive—use of its powers to influence EPA rulemaking. OMB often bases its review on non-statutory criteria, in violation of the Executive Order, and sometimes serves merely to launder industry arguments on their way to EPA. OMB conducts its review behind a veil, thus making its influence difficult for courts, Congress, the public and even EPA to judge. Case studies of several EPA rulemakings bear out these observations.

A. Overview

According to OMB, Executive Order 12,291 has "reduce[d] the burden of Federal regulation on the American public" and has "sharply curtailed" what it calls "the proliferation of new Federal regulations."[187] OMB asserts that its reform efforts "have achieved estimated savings in unnecessary costs totaling $9 to $11 billion for one-time capital expenditures and $6 billion in recurring annual costs."[188]

While these cost savings may appear impressive, congressional critics have excoriated OMB for its method of calculating savings

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untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House.").

[186] *See* Verkuil, *supra* note 161 at 987-89 (recommending that presidential oral contacts be fully privileged from disclosure, but that White House staff *written* contacts be docketed, and staff *oral* contacts be noted on the record but not summarized); Bruff, *supra* note 2, at 504 ("[I]nstead of seeking to prevent ex parte communications from the White House during the rulemaking period, they should be encouraged but channeled into the public record."); ACUS Recommendation on Intragovernmental Communications in Informal Rulemaking, Rec. No. 80-6, 1 C.F.R. § 305.80-6 (1984) (favoring docketing of Executive Office communications containing "material factual information" or "reflecting comments by persons outside the government").

[187] OMB, Executive Order 12291 on Federal Regulation: Progress during 1982, at 4 (April 1983) [hereinafter cited as OMB 1982 Report on 12,291].

[188] *Id* at 5.