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Proper and Desirable Intervention by the President in Agency Rulemaking

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By Jim Tozzi, Center for Regulatory Effectiveness, who served as a career regulatory official for five consecutive administrations and was instrumental in establishing OMB's regulatory review office, OIRA.

WASHINGTON, Nov. 6, 2013 /NEWS.GNOM.ES/ — Bloomberg News, in an article titled *New Draft Report Finds Political Interference in Federal Rulemaking*, makes two points. First, the article asserts that OMB violates the transparency provisions of the regulatory review executive order by placing an undue emphasis on informal discussions with agencies on regulations prior to their being submitted to OMB. Two, the article argues that the administration has “politicized” the regulatory review process.

With respect to the first point, OMB discussion of regulations with agencies prior to the agency formally submitting the regulation for review, this is a process that has been going on for more than 40 years.

In fact, more than 35 years ago Bloomberg News's predecessor, BNA, addressed this same question about the propriety of agencies providing their regulatory documents to OMB for pre-submission review during the Carter Administration. In the 1976 article *Office of Management and Budget Plans Critical Part in Environmental Policymaking, Faces Little External Review*. 7 Env't. Rep. (BNA) 693 (1976), BNA stated:

Between the prerulmaking functions of the Regulatory Council and the analysis and commentary function of the RARG, the Carter Administration created coordinating bodies that achieve results similar to those obtained by the OMB “quality of life” review used in the Nixon and Ford Administrations but without the same political costs.

With respect to the article's second point, White House politicization of the regulatory process, decades ago, the US Circuit Court of Appeals addressed this very issue head-on. The question of both the constitutionality and the desirability of Presidential intervention, through OMB regulatory oversight, was definitely settled in a well-known court case, *Sierra Club v. Costle*. In that case, a very distinguished jurist, Judge Patricia Wald wrote that:

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

Judge Wald also explained that it is intervention in the regulatory process by the public and their elected leaders is an appropriate intervention.

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Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part on the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their command must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in a judicial context.

The practical necessity of OMB oversight of the federal regulatory process was explained by Judge Wald when she wrote “Single mission agencies do not always have the answer to complex regulatory problems. An overworked administrator exposed on a 24-basis to a zealous staff needs to know arguments and ideas of policymakers in other agencies as well as in the White House.”

Irrespective of the President’s authority to intervene in an agency’s regulatory processes, the assertion has been made that OMB pre-submission reviews routinely politicize what should be an objective, technical rulemaking process. To the contrary, it is because OMB represents the one person who was elected by the entire country that OMB is the right organization to ensure that the competing interests of various stakeholders are appropriately balanced.

The transparency of the Obama Administration is beyond challenge. In one of the White House’s most controversial exercises of regulatory power, President Obama personally directed EPA to withdraw new ozone standard regulations, thus demonstrating that the regulatory buck does ultimately stop, as it should in a democratic society, with our nationally elected leader. We see, therefore, that OMB pre-submission discussion of agency regulations: 1) has been going on for decades; and 2) is a proper and desirable exercise of the Presidential authority.

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