THE QUIET SHIFT OF POWER: OFFICE OF MANAGEMENT & BUDGET SUPERVISION OF ENVIRONMENTAL PROTECTION AGENCY RULEMAKING UNDER EXECUTIVE ORDER 12,291

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When President Reagan signed Executive Order 12,291, a simmering controversy over whether, and under what conditions, the President has the authority to supervise executive agency rulemaking took on new significance. The Order delegates to the Office of


2 The constitutionality of, statutory limits upon, and need for presidential (or other executive branch) review of rulemaking have been debated heatedly by commentators. See, e.g., ABA Comm'n on Law and the Economy, Federal Regulation: Roads to Reform (1979) (arguing that procedurally limited presidential review of a handful of major rules each year would be desirable); Bernstein, The Presidential Role in Administrative Rulemaking: Improving Policy Directives: One Vote for Not Tying the President's Hands, 56 Tul. L. Rev. 818 (1982) (suggesting that while the potential for abuse certainly exists, the President and a few senior White House aides should be able to participate freely in those rulemakings where Congress has left flexibility for the accommodation of competing goals); Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451 (1979) (arguing for presidential involvement, identifying possible constitutional and other more vague boundaries of permissible presidential intervention, and suggesting that the Supreme Court adopt a more flexible approach to separation of powers analysis with regard to presidential initiatives); Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975) (contending that presidential control of regulatory agency activity is necessary under the practical and political realities of government); Davis, Presidential Control of Rulemaking, 56 Tul. L. Rev. 849 (1982) (arguing that the real issue is not whether the President may intervene in executive agency rulemaking ("of course he may"), but rather how such intervention should be procedurally limited to eliminate the harmful element of secrecy and undue displacement of agency statutory authority); Morrison, Presidential Intervention in Informal Rulemaking: Striking the Proper Balance, 56 Tul. L. Rev. 879 (1982) (asserting that there are few, if any, constitutional limits on Congress' power to circumscribe the President's role in informal rulemaking, and that Congress should declare that the President and White House staff be treated "just like anyone else"); Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 Mich. L. Rev. 193 (1981) (arguing, inter alia, that available evidence demonstrates Congress' intent to deny the President substantive control over administrative policymaking, and that the Order "exceeds the proper bounds of Presidential authority"); Shane, Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291, 23 Ariz. L. Rev. 1235 (1981) (rebutting Rosenberg's arguments, despite a decidedly agnostic view of the substantive requirements of E.O. 12,291); Sunstein, Cost-Benefit Analysis and the Separation of Powers, 23 Ariz. L. Rev. 1267 (1982) (concluding that to avoid serious separation of powers problems, the cost-benefit requirement of E.O. 12,291 should be applied only to rules adopted under statutes designed to remedy market failures in an economic setting or to those that have efficiency-promoting applications not in conflict with the legislative purpose); Zamir, Administrative Control of Administrative Action, 56 Calif. L. Rev. 866 (1969) (arguing that, in general, an administrative superior such as the President may control his subordinates' actions); Zamir, Administrative Control of Administrative Action: The Exceptions, 51 N.Y.U.L. Rev. 587 (1976) (noting several statutory and judicially created exceptions to the general rule that an administrative superior may control the actions of his subordinates, such as in quasi-judicial proceedings); Comment, Capitalizing on a Congressional Void: Executive Order 12,291, 31 Am. U.L. Rev. 613 (1981) (arguing that the legal basis for E.O. 12,291 is sufficient, that the Order may promote accountability in administrative decisionmaking, and that Congress should codify effective presidential review); Note, Delegation and Regulatory Reform: Letting the President
Management and Budget (OMB) the authority to ensure, "to the extent permitted by law," that all informal executive agency rules conform to certain broad economic principles: that they be based on adequate information, that their benefits outweigh their costs, and that aggregate net benefits to society be maximized.3

For more than four years, OMB quietly has been reviewing all proposed and final informal executive agency rules—and certain other agency actions—to verify their conformity with administration policies. This article is the result of a comprehensive study of how OMB has conducted its review of Environmental Protection Agency (EPA) rules under the Reagan Executive Order.

Section I describes the institutional origin of E.O. 12,291. It notes the broad array of OMB powers which, together with the new Executive Order, give the Office substantial leverage over EPA policy and rulemaking.

Section II addresses legal and policy questions raised by OMB review. First, to what extent may the President or OMB control EPA rulemaking consistent with the Constitution and applicable statutes? Second, may non-statutory considerations, particularly economic costs and benefits, properly be engrafted onto agency decisionmaking? Third, what are the legal strictures on ex parte contacts between OMB and outside parties, and between OMB and EPA?

Section III observes how OMB reviews EPA rules under E.O. 12,291. This section describes the resulting shift in the locus of administrative power, and highlights many of the practical concerns arising from a President's attempt to use OMB to impress his will upon the executive branch. The Executive Order has effectively infused OMB input into much of EPA decisionmaking, with OMB in some cases exercising a de facto veto over EPA rules. Secrecy pervades virtually all of OMB review, and undisclosed industry lobbying of OMB in some cases appears to influence OMB's positions on EPA rules under review.

Change the Rules, 89 Yale L.J. 561 (1980) (contending that the task of reconciling balance, accountability, and regulatory effectiveness should be congressionally delegated to someone other than the President); R. Rauch, Re: Legal restrictions on Presidential Interference in EPA Rulemaking (Sept. 5, 1978, memorandum), reprinted in Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works, 96th Cong., 1st Sess. 191-230 (1979) (arguing that presidential control of EPA rulemaking is an unconstitutional usurpation of Congress' legislative power) [hearings hereinafter cited as Hearings on Executive Review].

* E.O. 12,291, supra note 1, § 2.
The article concludes that if regulatory review is to increase bureaucratic accountability and provide more reasoned decisionmaking, the courts and Congress must act. First, any regulatory review process should be required to be on the public record, in accordance with the policies underlying the Administrative Procedure Act. Second, if a regulatory review process is desired, OMB, because of its institutional anti-regulatory bias, lack of staff and expertise, broad array of ancillary powers, and propensity for secrecy, should not be the reviewer. Instead, a separate review group should be established to comment, on the record, and to raise disagreements with the agency for presidential review and resolution, where such presidential review is permitted by the relevant statute. Third, rules to which cost considerations are irrelevant according to statute should be explicitly exempted from review. Finally, the review authority must not be permitted to displace the agency in reaching rulemaking decisions.

Because of executive branch sensitivity to the issue of OMB review under E.O. 12,291, several cited sources of information within OMB and EPA have requested anonymity.

I. STATUTORY AND EXECUTIVE GRANTS OF AUTHORITY TO OMB

The Office of Management and Budget is probably the most powerful agency in the federal government. Because of the Office's carefully maintained low profile, however, the public generally is unaware of OMB's influence on federal policy. A wide array of powers has made OMB an influential, near omnipresent force within the executive branch.

A. OMB's Synergistic Powers

While a comprehensive discussion of the powers of OMB is be-

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4 An in-depth study of OMB's power by the Congressional Research Service concluded: "Although it is often called the most powerful agency in the United States Government, the Office of Management and Budget remains somewhat mysterious to Congress and the public [because] OMB generally goes about its work quietly, outside the spotlight." J. Parris, Congressional Research Service, The Office of Management and Budget: Background, Responsibilities, Recent Issues i (1978) [hereinafter cited as CRS Study of OMB].

yond the scope of this article, it is important to note the breadth of OMB’s reach within the federal government. As one former OMB official noted, “The Government works using three things: money, people, and regulations; the agency must get all three through OMB.”

The power of OMB over agency budgets is perhaps its best-known tool for influencing agency policy. Administrators of programs that OMB dislikes must fight vigorously to survive OMB budget review. OMB also has significant influence on agency personnel ceilings that in part determine agency resources and manpower.

Contributing to OMB’s power is its location in the Executive Office of the President. This vantage point gives it close ties to the White House, and substantial political clout.

A third source of OMB influence is its administration of the Paperwork Reduction Act. Enacted during the Carter Administration, this Act’s seemingly innocuous mandate that any agency information-gathering effort must bear the OMB imprimatur “allows OMB to get at a lot of rules.” Even a cursory survey of the comments filed in OMB’s Paperwork public docket reveals that industries are keenly aware of OMB’s power to bottle up EPA programs by denying paperwork requests.

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* CRS Study of OMB, supra note 4, is an excellent although somewhat dated study of the broad powers of OMB.
* Interview with Jim Tozzi, former OMB, Office of Information and Regulatory Affairs (OIRA) Deputy Adm’r, in Washington, D.C. (June 14, 1983).
* See CRS Study of OMB, supra note 4; see also EPA “Issue Alerts” (1981-83) (series of memoranda from EPA Administrator to White House, citing OMB clearance of Agency actions as apparent litmus test of their political acceptability) (on file with author).
* Interview with Jim Tozzi, former OMB, OIRA Deputy Adm’r, in Washington, D.C. (June 14, 1983). Sub rosa attacks on rules through the Paperwork Act probably are impermissible. See 44 U.S.C. § 3518(e) (Act shall not increase OMB’s authority with respect to agency substantive policy); see infra note 83 (noting that the Act was not intended to be a substantive regulatory reform bill).
* See, e.g., OMB Paperwork Docket, 2,000 Series (located in New Executive Office Bldg.,
A host of other powers has been vested in OMB, ranging from the Office's authority to review executive agency testimony

Third Floor, Washington, D.C.) (see especially Hazardous Waste Reporting Requirements Forms).

OMB has been severely criticized by the General Accounting Office (GAO) for diverging from the intended goals of the Paperwork Reduction Act, and instead emphasizing regulatory relief. See GAO, Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain (1983).


OMB tools to influence agency rules include:


c) OMB's power to review, edit, and approve or disapprove of all executive agency testimony before Congress regarding any proposed spending or enrolled legislation. See OMB, Revision of Circular No. A-19, Revised, Dated July 31, 1972: Legislative Coordination and Clearance (Sept. 20, 1979) (memorandum to the Heads of Executive Departments and Establishments) (available in Executive Office of the President (EOP) Library, 1st Floor, New Executive Office Bldg., Washington, D.C.) [hereinafter cited as OMB Circular A-19].

d) OMB's review power over all legislative proposals from executive agencies. Id.

e) OMB's review power over all proposed Executive Orders and Proclamations. See OMB, Memorandum to Heads of Executive Departments and Establishments: Proposed Executive Orders and Proclamations (M-81-8) (March 9, 1981) (signed by David A. Stockman) (available in EOP Library) [hereinafter cited as OMB Memo on Proposed Executive Orders].


g) OMB's role as coordinator of administrative and management reforms in executive agencies. See CRS Study of OMB, supra note 4, at 50.

h) OMB's power to issue "circulars" and memoranda "to the Heads of Executive Departments and Agencies" on topics ranging from submission of procurement policies to establishment of employment ceilings. See OMB, Revised Table of Contents and Index for OMB Circulars and Federal Management Circulars under OMB Jurisdiction (M-82-8) (Sept. 21, 1982) (listing OMB Circulars in effect) (available in EOP Library).

i) OMB's emerging role as a promoter and broker of international deregulation efforts. See J. Tozzi, Linking Domestic Regulatory Relief with International Regulatory Relief: A Report to the Task Force (March 10, 1983, memorandum) (on file with author).
presented before Congress,\textsuperscript{18} proposed bills,\textsuperscript{14} and proposed executive orders,\textsuperscript{19} to its power, pursuant to the Antideficiency Act,\textsuperscript{16} to reapportion agency funds.

In sum, the Office has many arrows in its quiver other than E.O. 12,291. These powers enable OMB to exert broad and powerful influence upon agency decisionmaking.\textsuperscript{17}

B. Executive Order 12,291

1. The Roots of the Reagan Executive Order

For several decades, some students of the administrative process have argued for greater accountability and presidential review of the activities of federal regulatory agencies. Others have suggested that Congress more intensely oversee the rulemaking process. Perceptions of bureaucratic irresponsibility are noted in the report of the Brownlow Committee of the 1930's, which referred to the federal agencies as the "headless 'fourth branch' of the Government" evading the control of Congress and the President.\textsuperscript{18}

\textsuperscript{18} See OMB Circular A-19, \textit{supra} note 12.

\textsuperscript{14} See id.

\textsuperscript{19} See OMB Memo on Proposed Executive Orders, \textit{supra} note 12.

\textsuperscript{16} 31 U.S.C. §§ 1341(a), 1342, 1349(a), 1350, 1351, 1511-1519 (1982). OMB's power to apportion and reapportion pursuant to this Act was cited by the Office, for example, when it forced the Small Business Administration (SBA) to stop guaranteeing certain loans for the purchase or lease of pollution control equipment. \textit{See Testimony of the Honorable John D. Dingell Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives 2 (April 27, 1983)} (copy on file with author).

The American Law Division of the Congressional Research Service (CRS) concluded that this OMB action "raises substantial questions of legal propriety. . . . There appears to be no firm legal basis for OMB's authority to order the termination of the program." M. Rosenberg, American Law Div., CRS, Subject: Authority of OMB to Suspend SBA's Pollution Control Equipment Loan Guarantee Program for Tax-Exempt Issuances 57-58 (April 22, 1983) (memorandum to Hon. Carl Levin).

\textsuperscript{17} In recognition of OMB's broad powers, and in response to controversy over the Nixon administration OMB impoundment of certain funds, Congress codified a requirement that the OMB Director and Deputy Director be appointed with the advice and consent of the Senate. \textit{See Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11 (1974); H.R. Rep. No. 697, \textit{supra} note 3.}

\textsuperscript{18} The President's Comm. on Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government 40 (1937) (submitted to 74th Cong., 2d Sess.).


As early as 1952, it was proposed that the President be empowered to direct any agency to
Beginning with the Johnson Administration, OMB’s predecessor, the Bureau of the Budget, made independent attempts to oversee and influence the development of important agency regulations in the President’s name. Later, President Nixon initiated the “Quality of Life” review, an essentially standardless Executive Office of the President oversight procedure nominally applicable to all health and safety regulations, but in fact limited almost solely to review of EPA rules. Under the Quality of Life procedure, EPA circulated its rules to other agencies for comment and criticism; OMB was the “broker,” arbitrating interagency disputes, and often forging solutions to EPA-White House and EPA-Commerce Department disagreements.

Subsequent executive orders under the Ford and Carter ad-

follow the President’s direction, if permitted within the limits of applicable statutes. See E. Redford, Administration of National Economic Control 318-20 (1952). But see H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 153 (1962) (disagreeing with notion that President be allowed to direct certain agency actions).

* Interview with Jim Tozzi, former OMB, OIRA Deputy Adm’r, in Washington, D.C. (June 14, 1983).

* Id. The Quality of Life review had its roots in a memorandum from George Shultz, then OMB Director, establishing interagency review of “proposed agency regulations, standards, guidelines and similar materials pertaining to environmental quality, consumer protection, and occupational and public health and safety.” G. Shultz, OMB Director, Memorandum to Heads of Departments and Agencies (October 5, 1971), quoted in Federal Regulation and Regulatory Reform: Report by the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 121-22 (1976) [report hereinafter cited as Report on Regulatory Reform]. For accounts of how the Quality of Life review worked in practice, see J. Quarles, Cleaning Up America: An Insider’s View of the Environmental Protection Agency 117-42 (1976); Bruff, supra note 2, at 464-65; Hearings on Executive Review, supra note 2, at 60-76 (statement of J. Quarles); Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review, 7 Env’t Rep. (BNA) 693 (Sept. 3, 1976).

Quality of Life review ended on January 25, 1977, by order of the acting EPA Administrator; no court challenge to the system’s validity has been reported. See Rosenberg, supra note 2, at 216 n.100.

* Interview with Jim Tozzi, former OMB, OIRA Deputy Adm’r, in Washington, D.C. (June 14, 1983); see also J. Quarles, supra note 20, at 117-42.


ministrations attempted to broaden the scope of regulatory review to include more executive agency rules. These reviews were primarily advisory, however, and rulemaking agencies generally were free to ignore the comments of review authorities. The continuing inefficacy of centralized presidential oversight spurred increasing debate in the legal community, including the seminal Cutler and Johnson article of 1975, and influential follow-up work by Professor Bruff and the ABA Commission on Law and the Economy. Nevertheless, Congress repeatedly has declined to enact legislation authorizing some form of centralized presidential oversight.

2. The Reagan Executive Order 12,291

Less than one month after taking office, President Reagan signed Executive Order 12,291 on Federal Regulation. The new Order is, in the words of an OMB veteran, "a completely different animal" from its predecessors, without question, it vests much more power in OMB.

The Reagan Executive Order requires all executive agencies to

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5 Cutler & Johnson, supra note 2.

6 Bruff, supra note 2.

7 ABA Comm'n on Law and the Economy, supra note 2.

8 See Rosenberg, supra note 2, at 227-29; see also infra notes 100-02 and accompanying text.

9 E.O. 12,291, supra note 1.

10 Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

11 E.O. 12,291 is mandatory for executive agencies, see E.O. 12,291, supra note 1, at § 1(d); independent agencies may comply voluntarily with its provisions. Vice President Bush, in his capacity as head of the former Presidential Task Force on Regulatory Relief, formally requested seventeen independent agencies to comply voluntarily with the Order. See Letter from Vice President George Bush to independent agencies (March 25, 1981), reprinted in Role of OMB in Regulation: Hearings of the Oversight and Investigations Subcomm. of the House Comm. on Energy & Commerce, 97th Cong., 1st Sess. 177-78 (1981) [hearings hereinafter cited as Hearings on Role of OMB]. Although several independent agencies have promised to comply with the Order to the fullest extent possible, see Hearings on Role of OMB, supra at 179-94, only the Civil Aeronautics Board has committed itself to pre-publication review, id. at 179.
send all proposed and final regulations to OMB for pre-publication review. An agency may not issue the rule or proposal until it responds to OMB's comments. Any "major" rule—a rule with an impact of over $100 million, a rule which is expected to cause certain other adverse economic impacts, or any rule designated "major" at OMB's discretion—must be accompanied by a detailed "Regulatory Impact Analysis" (RIA) assessing its costs and benefits. OMB also reviews the adequacy of the RIA. Although the Office is given sixty days to review a proposed major rule, thirty days to review a final major rule, and ten days to review a non-major rule, it may extend its review without time limit simply by so notifying the agency.33

Under the Reagan Order OMB is directed to review each regulatory action to promote regulations that maximize "aggregate net benefits to society."34 The Office is instructed, however, to exercise its powers only "to the extent permitted by law."34

OMB's Office of Information and Regulatory Affairs (OIRA) is the focal point for review of all contemplated and many existing agency rules.35 The August 1983 disbanding of the Presidential

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33 See E.O. 12,291, supra note 1, § 1(d).
34 Id. § 2(e). The Order requires OMB to review agency rules to ensure that:
   a) They are based "on adequate information";
   b) Their "potential benefits to society...outweigh the potential costs";
   c) They involve "the least net cost to society";
   d) They "maximize net benefits to society"; and,
   e) They consider the condition of the economy and of regulated industries, and the future effects of the rules.

Id. § 2.

In addition to these oversight duties, OMB is directed (previously subject to review by the now-defunct Presidential Task Force on Regulatory Relief) to:
   a) Prescribe procedures for agency drafting and mailing of RIA's;
   b) Waive review or other requirements of the Order for any rules which it believes should be expeditiously promulgated;
   c) Designate existing rules for review and set up review schedules for them;
   d) Coordinate publication of an agenda of all contemplated executive agency rules;
   e) Recommend changes to agencies' legislation, in coordination with the agencies; and,
   f) Identify conflicting or overlapping rules of different agencies.

Id. §§ 3 to 9.
35 See, e.g., id. §§ 2, 3.
36 OIRA, created by the Paperwork Reduction Act to implement that statute's paperwork review requirements, exercises primary E.O. 12,291 review power. It formerly was headed by Dr. James Miller III (currently FTC Chairman), who was replaced by Christopher DeMuth. DeMuth left OIRA in mid-1984. With a staff of about 80, OIRA is divided into two key offices. The Information and Regulatory Management Division (formerly headed by Jim Tozzi, now by Robert Bedell), employs in its Regulatory Policy Branch the "Desk Officers." Desk Officers are the front-line staff-level analysts of agency rules. At this writing EPA is
Task Force on Regulatory Relief, which had oversight authority over OMB, now leaves an agency no formal recourse from an OMB review, except, perhaps, a request for presidential intervention. Such intervention is not explicitly provided for in E.O. 12,291.

II. LEGAL & POLICY ISSUES RAISED BY OMB REVIEW OF EPA RULES

OMB review of EPA rules raises constitutional, statutory and policy concerns. Despite the clear language of E.O. 12,291 authorizing review only to the extent permitted by law, OMB may encroach upon the discretion and judgment statutorily delegated to EPA, and may effectively introduce non-statutory criteria into agency decisionmaking. OMB review also encourages industry-OMB and OMB-EPA ex parte contacts which at best undermine decisionmaking integrity and at worst contravene the Administrative Procedure Act.

A. OMB Review: The Proper Scope

1. Presidential Review of Rulemaking

a. Arguments for Presidential Review

During the past decade, a chorus of academicians, private lawyers, and government policymakers has sung the praises of centralized presidential review of agency rulemaking. In Sierra Club v. Castle, Judge Wald of the D.C. Circuit advanced a common-sense justification for presidential review:

assigned three Desk Officers. Interviews with OMB, OIRA Officials "B" and "C" in Washington, D.C. (May 3, 1983). The Regulatory and Statistical Analysis Division is the reincarnated Council on Wage and Price Stability and is staffed by "Regulatory Analysts," who generally have economics or public administration backgrounds. Id.

Finally, OMB's budget branch, separate from OIRA, employs "Budget Examiners," who are assigned to individual agencies. The Budget Examiners also review EPA rules, and in many cases may have decisive input. Id.

Although the Budget Examiners and Desk Officers "are just G.S. twelves or fourteens, if both of them get on your [agency's] case, you're in a lot of trouble." Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983). In many cases "Assistant Secretaries have come crying" to these staff-level OMB people, "pleading" for mercy. Id.


** See E.O. 12,291, supra note 1.

** See, e.g., ABA Comm'n on Law and the Economy, supra note 2; Bruff, supra note 2; Cutler & Johnson, supra note 2.

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. 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 zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.40

Presumably, the President's reviewers are not locked into the "old way of thinking," nor are they captured by the "iron triangle" comprising agency policymakers, congressional overseers, and the agency's constituency.41 Perhaps implicit in Judge Wald's concern for a broad decisionmaking perspective is the assumption that the President's designated reviewers of rules have at their disposal tools for objective policy analysis.42

In addition, advocates of presidential review argue that inappropriate past regulation has revealed a need to make regulators more accountable to the public.43 It is asserted that presidential supervision of rulemaking returns decisionmaking to the control of the electorate, and reins a politically insulated bureaucracy gone astray.44

b. Response to Arguments for Presidential Review

While arguments for presidential review may seem persuasive, troublesome questions arise on closer analysis. The two principal purposes of review, justifying rules via objective economic analysis and ensuring their political acceptability, are in fundamental conflict. OMB oversight in practice lays bare this schizophrenia. Cost-benefit analysis falls victim to political intervention; regulations

40 Id. at 406.
43 See, e.g., Cutler & Johnson, supra note 2.
44 See, e.g., id.; ABA Comm'n on Law and the Economy, supra note 2.
considered politically unfavorable are relaxed without regard to costs and benefits.46 OMB review politicizes technical issues,46 if only because of the Office’s admitted anti-regulatory bias.47 Increased friction between the agencies can result, without improving the quality of agency decisions.48

Further, while OMB oversight is intended to increase the objectivity and rationality of decisionmaking, the opposite effect may result due to the Office’s lack of staff and inadequate technical expertise. A few relatively low-level OMB “Desk Officers,” some with no background in scientific or environmental matters, are charged with reviewing hundreds of highly complex technical rulemakings developed by the large, highly trained EPA staff. Not surprisingly, EPA officials frequently complain of the lack of expertise of OMB staff, and of the large amount of time they must spend to “educate” OMB staff about a rulemaking.49

Finally, the Office’s propensity for secrecy, as attested to by its alarm at the notion of being required to divulge fully its review process,50 tends to undercut the value of OMB review. OMB is not increasing the accountability of government; rather, it jealously keeps its influence a secret from the electorate. If OMB review is indeed aimed at rationalizing rulemaking, OMB should not object to complete disclosure.

It would be untenable to suggest that the EPA Administrator or any other executive official should be wholly isolated from OMB, the White House or Congress. Direct and secret supervision of EPA decisions by OMB, however, is not necessary to ensure that the Administrator gains the perspective to which Judge Wald referred in Sierra Club.

46 See infra notes 275-80 and accompanying text; see also particulate matter NAAQS case study, infra notes 371-80 and accompanying text.


48 See infra notes 201-06 and accompanying text.

49 See Section III.D. Case Studies, infra text accompanying notes 326-80.

49 Interview with EPA, Office of Standards & Regulations (OSR) Official “E” (June 6, 1983) and EPA, OSR Official “F” (June 8, 1983) in Washington, D.C.; Daniel Testimony, supra note 46, at 82 (in EPA’s experience, OMB employed economists, not environmental or health experts).

50 See infra notes 298-300 and accompanying text.
2. The President's "Inherent" Power to Oversee Executive Agency Rulemaking

Some argue that the President enjoys an "inherent" authority to supervise agency rulemaking: See, e.g., L. Simms, Dept. of Justice, Office of Legal Counsel, Re: Proposed Executive Order on Regulation 2 (Feb. 12, 1981) (memorandum to David Stockman, Director, OMB), reprinted in Hearings on Role of OMB, supra note 31, at 152, 153; Cutler, The Case for Presidential Intervention in Regulatory Rulemaking By the Executive Branch, 56 Tul. L. Rev. 830 (1982) (Supreme Court cases and Constitution allow presidential supervision); Shane, supra note 2 (former OMB official arguing that the Executive Order is constitutional).

61 See, e.g., L. Simms, Dept. of Justice, Office of Legal Counsel, Re: Proposed Executive Order on Regulation 2 (Feb. 12, 1981) (memorandum to David Stockman, Director, OMB), reprinted in Hearings on Role of OMB, supra note 31, at 152, 153; Cutler, The Case for Presidential Intervention in Regulatory Rulemaking By the Executive Branch, 56 Tul. L. Rev. 830 (1982) (Supreme Court cases and Constitution allow presidential supervision); Shane, supra note 2 (former OMB official arguing that the Executive Order is constitutional).

62 U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President . . . ").

63 Id. § 3 (The President "shall take Care that the Laws be faithfully executed.").

64 Although the President's removal power is not found in the text of the Constitution, implicit authority has been found. See Removal Cases, infra note 92.

65 U.S. Const. art II, § 2 ("The 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. . . . "). For a discussion of this "trifling" power and other sources of presidential authority, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-42 & n.9 (1952) (Jackson, J., concurring).


67 272 U.S. 52, 135 (1926).

whether the Constitution should expressly give the President the right to require opinions in writing from executive officers, if they had "already vested the illimitable executive power" in the President. See even as strong a proponent of centralized executive authority as Alexander Hamilton took pains to point out the President's limited authority over government. Hamilton warned that the new Constitution should prevent subordinate executive officers from "possessing the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure." Furthermore, nineteenth century Supreme Court authority, early opinions of the Attorneys General, and other authority speak against an inherent presidential authority to control all executive agency activity.

Nonetheless, during the twentieth century claims to inherent presidential authority have proliferated. Some commentators have welcomed such claims as the necessary offspring of the increasing complexities of modern-day government. Others, however, are not so sanguine. Professor Tribe, for example, has urged that "claims to inherent executive power should henceforth be regarded with the great suspicion they deserve in an era that has already witnessed too much presidential aggrandizement."

The debate will continue. One can accept the notion that the

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60 Myers, 272 U.S. at 207 (McReynolds, J., dissenting).
61 See The Federalist Nos. 67, at 436-40, 69, at 444-50 (A. Hamilton) (B. Wright ed. 1961) (citing narrow limits within which President may exercise his authority, as opposed to broad powers enjoyed by Congress or a monarch).
62 Id. No. 76, at 483 (A. Hamilton).
63 See, e.g., Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (denying the President the power to direct the Postmaster General's performance of his ministerial duty).
64 Attorney General William Wirt, for example, advised President Monroe:
   If the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only not be taking care that the laws were faithfully executed, but he would be violating them himself.
   1 Op. Att'y Gen. 624, 625 (1823); see also 18 Op. Att'y Gen. 33 (1884); 4 Op. Att'y Gen. 516 (1846). For a detailed review of these and other early opinions, see Rosenberg, supra note 2, at 204 & n.52-55.
65 Early commentators, for example, noted the original intent that the President be primarily a political chief, not the administrative head of government. See, e.g., 2 W. Wloughboy, The Constitutional Law of the United States 1156 (1910).
66 These claims have been inconsistently received by the Supreme Court. For discussion of the Court's treatment of the "inherent" executive powers, see Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 S. Cal. L. Rev. 863 (1983).
67 E.g., Cutler, supra note 51; Shane, supra note 2.
68 L. Tribe, American Constitutional Law § 4-7 (1978).
President, in carrying out his duty to see that the laws are faithfully executed, may suggest that a subordinate executive official take certain regulatory action, if the action is fully supported by the administrative record and accords with a broad delegation of authority in the applicable statute (unless, of course, Congress has placed that decision beyond the President's control). However, it is more difficult to accept the notion that an executive order which expressly precludes OMB from displacing discretion vested in other agencies may be the source of OMB’s authority to be a “superagency” supervising rulemaking by EPA and other agencies. When a statutory provision clearly vests a decision in the expert judgment of the EPA Administrator, ultimately only the Administrator can “faithfully execute” the law.

3. Separation of Powers: Limits on OMB Review of Decisions Clearly Delegated by Congress to the EPA Administrator

Executive Order 12,291 expressly prohibits OMB from displacing decisionmaking authority delegated to agencies by law, and provides that substantive review by OMB may take place only “to the extent permitted by law.” Furthermore, “independent” agencies are exempted from mandatory OMB review. However, the Order’s provisions, which in theory preclude conflicts between statutes and OMB review, are sometimes ignored or creatively interpreted in practice.

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68 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (if the President “takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb”) (Jackson, J., concurring).
69 E.O. 12,291, supra note 1, § 3(f)(3).
70 See, e.g., id. §§ 2, 6(a), 7(e), 7(g).
71 Id. § 1(d) expressly exempts from the Order’s mandatory provisions those independent agencies specified in the Paperwork Reduction Act, 44 U.S.C. § 3502(10) (1982) (definition of “independent regulatory agency” under the Act), and expressly applies those provisions to agencies listed in id. § 3502(1) (definition of “agency”).

Commentators disagree over the extent to which the President properly may oversee the activities of independent agencies. Compare Strauss, supra note 58, at 592-96 (President may require independent agencies to engage in economic analyses as required by E.O. 12,291, and may oversee independent agency execution of the law) with Bruff, supra note 2, at 483 (“If the dicta of the removal cases are taken at face value, the net result of the Court’s rigid approach is unrestricted Presidential domination over executive officers, and complete protection from his influence for independent officers.”).

72 See infra text accompanying notes 254-80.
a. The EPA Administrator: Repository of Congressionally Delegated Authority

In the late 1960s Congress began to enact an extensive body of legislation to address complex environmental, health and social problems. Some grants of rulemaking authority to agencies are broad and general.\textsuperscript{78} Other legislation is detailed, setting forth specific decisionmaking criteria to guide the administrator's discretion.\textsuperscript{74} In the case of EPA, Congress frequently has expressed its intent that the Administrator apply his or her own expertise, and that of the agency, in regulating technically sophisticated endeavors.\textsuperscript{75}

Since EPA's inception in 1970,\textsuperscript{76} Congress has delegated to it a cornucopia of regulatory authority,\textsuperscript{77} while referring to the agency as a quasi-"independent" body, responsible to Congress as well as

\textsuperscript{78} See, e.g., Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982) (granting Secretary of Labor broad regulatory and investigatory authority over the workplace); Federal Water Pollution Control Act § 501(a), 33 U.S.C. § 1361(a) (1982) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this [Act].").

\textsuperscript{74} See, e.g., Clean Air Act §§ 108(a), 109, 42 U.S.C. §§ 7408(a), 7409 (1982) (only certain health factors may be considered in setting ambient standards); Resource Conservation and Recovery Act § 3001, 42 U.S.C. § 6921 (1982) (citing criteria for identifying and listing a hazardous waste, which include its "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics").

\textsuperscript{75} See, e.g., H.R. Rep. No. 1185, 93d Cong., 2d Sess. 9-10 (1974), reprinted in Congressional Research Serv., Env't and Natural Resources Policy Div., A Legislative History of the Safe Drinking Water Act 542-43 (Comm. Print 1982) (prepared for Senate Comm. on Env't and Pub. Works, 97th Cong., 2d Sess.) (emphasizing that primary drinking water standards are to be based on "the judgment of the Administrator" that a contaminant may have an adverse health effect "based upon epidemiological, toxicological, physiological, biochemical, or statistical research or studies or extrapolations therefrom." For a provocative treatment of the implications for government of the trend toward increasingly technical and abstruse administrative rulemaking, see Yellin, \textit{Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking}, 92 Yale L.J. 1300 (1983).

Such clear delegations of authority to the EPA Administrator's judgment contrast starkly with legislative delegations to the President, which may be redelegated to EPA or other agencies. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9004-9606 (1982) (authorizing the President to take certain actions to respond to hazardous substance releases).


to the executive and the public. The Quiet Shift of Power
to the executive and the public. Congress views EPA as a repository of congressionally delegated power. Legislation vests decisionmaking authority in EPA with a view to the Agency's mission orientation, its technical expertise, and, some have argued, its


Throughout hearings on the creation of EPA, legislators and administration officials alike stressed the need for the agency's independence. See, e.g., House Hearings on the Creation of EPA, supra at 24, 27 (statements of Russell Train, Council on Environmental Quality Chairman); id. at 33 (statement of Rep. Erlenborn); Senate Committee on Government Operations, Subject: Reorganization Plan No. 3 of 1970—Environmental Protection Agency (July 23, 1970) (staff memorandum no. 91-2-23), reprinted in Reorganization Plans Nos. 3 and 4 of 1970: Hearings Before the Subcomm. on Executive Reorg. and Gov't Research of the Senate Comm. on Gov't Operations, 91st Cong., 2d Sess. 24 (1970) [hearings hereinafter cited as Senate Hearings on the Creation of EPA]; Senate Hearings on the Creation of EPA, supra at 34 (Hon. Gaylord Nelson quoting Rocco Siciliano, Under Secretary of Commerce); id. at 39-43 (statement of Sen. Muskie); id. at 49 (statement of Russell Train); id. at 89 (statement of Dwight Ink, Asst. Director, OMB); id. at 93 (statement of Andrew Rouse, Executive Director, Presidents' Advisory Council on Executive Organization [the "Ash Council"]).

EPA is not, however, an independent agency wholly outside of the executive branch; the President does appoint, with Senate advice and consent, the EPA Administrator, a Deputy Administrator, and up to five Assistant Administrators. Reorg. Plan No. 3 of 1970, supra note 76, § 1 (b)-(d). Also, the President has dismissed at least one of his EPA appointees without congressional protest. See Wash. Post, Mar. 26, 1983 at A2, cols. 1-6 (noting that the President had fired Rita Lavelle, EPA Assistant Adm'r for Solid Waste & Emergency Response, and that, in all, 13 EPA political appointees had been fired, had voluntarily resigned, or had resigned under pressure in the EPA controversy over alleged mismanagement and illegal activities by top-level EPA officials).

79 See supra note 78; Staff of Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess., Report on the President's Claim of Executive Privilege Over EPA Documents, Abuses in the Superfund Program, and Other Matters 12, 282-94 (Comm. Print 1984) (criticizing OMB interference with EPA rulemaking) [hereinafter cited as Oversight Subcomm. Report on Executive Privilege]; see also Report on Regulatory Reform, supra note 20, at 117 ("As evidenced by the statements of President Nixon and Mr. Train[, EPA] was to be a strong, independent regulatory agency") (original emphasis); id. at 125 (arguing that OMB's prolonged review of certain rules "constituted an attempt extra-legislatively to preempt that authority" which the Clean Air Act "clearly vests. . .in the Administrator"); accord Hearings on Superfund, supra note 46, at 2 (Rep. Dingell, Comm. Chm'n, expressing view that E.O. 12,291 has resulted in OMB "powers to displace the discretionary authority Congress has given to agency decisionmakers").

80 For clear evidence that EPA was created by the President, with the approval of Congress, to carry out a well-defined mission to improve environmental quality, see supra note 78.
supposed insulation from the vagaries of partisan politics.\textsuperscript{81}

b. Limits on OMB Review Authority

If OMB review of regulatory decisions clearly delegated by Congress to the EPA Administrator has become a supervisory or decision-controlling procedure, rather than a mere interagency commenting procedure,\textsuperscript{82} from what source does OMB’s control authority derive? No statute may be said even implicitly to vest such authority in the Office.\textsuperscript{83} The Executive Order itself expressly

\textsuperscript{81} Former EPA Administrator Ruckelshaus recently noted, for example, “[T]he major lesson of the unpleasant events of last year [the 1983 EPA scandal] was that the American people will not tolerate the involvement of partisan politics in the operation of environmental programs.” Envtl. Forum, Aug. 1984, at 5 (quoting William Ruckelshaus, EPA Adm’n).

\textsuperscript{82} The power of OMB effectively to supervise EPA rulemaking is discussed infra notes 201-53 and accompanying text.

\textsuperscript{83} Judge Harold Greene has held, it seems correctly, that neither OMB’s organic legislation nor its Reorganization Plan authorizes OMB usurpation of discretion granted by statute to another agency. American Fed’n of Gov’t Employees v. Freeman, 498 F. Supp. 651, 658 (D.D.C. 1980). \textit{AFGE}, decided before E.O. 12,291 was signed, held that OMB has been given no authority to direct General Services Administration (GSA) discretion. It noted, however, that because no executive order “issued pursuant to legitimate Presidential authority” purported to give OMB such power, the Court need not decide whether the President, as head of the Executive Branch, would be empowered to direct GSA with respect to a matter entrusted to its discretion by statute.” \textit{Id.} at 658 & n.16.


Neither of the Acts cited by OMB even impliedly authorizes the Office to review rules. The Budget and Accounting Act includes no provision even remotely suggesting that OMB (or its predecessor, the Bureau of the Budget) should review regulations. The Paperwork Reduction Act states clearly that it is not to be construed “as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, . . . with respect to the substantive policies and programs” of agencies. 44 U.S.C. § 3518(e). Indeed, OMB admits, “[L]egislative history is clear that Congress did not intend the Paperwork Reduction Act to be a ‘regulatory reform’ bill.” OMB, Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13,666, 13,668 (1983) [hereinafter cited as OMB Paperwork Rules]. The Senate Committee Report notes that it did “not intend that ‘regulatory reform’ issues which go beyond the scope of information management and burden be assigned to the Office.” S. Rep. No. 930, 96th Cong., 2d Sess. 8-9 (1980) (emphasis added).

Finally, when EPA and OMB were created by their respective Reorganization Plans in 1970, there were indications that OMB was not to have supervisory authority over EPA. See Reorganization Plan No. 2 of 1970, Message from the President of the United States (Mar. 12, 1970), H.R. Doc. No. 275, 91st Cong., 2d Sess., reprinted in Reorganization Plan No. 2
denies OMB the authority to displace decisions vested by law in another agency.\textsuperscript{64} Even assuming the Executive Order to be an implicit presidential grant of supervisory authority to OMB, may a unilateral presidential action in the domestic arena, unsupported by any legislation, properly vest in OMB the authority to assume decisionmaking discretion Congress clearly has vested in the EPA Administrator?

The Supreme Court has said little regarding the limits of presidential authority to take domestic\textsuperscript{65} action without Congress' blessing. The primary source of guidance in this field is Youngstown Sheet & Tube Co. v. Sawyer,\textsuperscript{66} the Steel Seizure Case. Justice Jackson's oft-cited concurrence\textsuperscript{67} proposes that where the President acts pursuant to an express or implied grant of power, his constitutional authority is at its maximum.\textsuperscript{68} On the other hand, as Jackson explained, if the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[, and] Courts can sustain exclusive Presidential control \ldots only by disabling Congress from acting on the subject."\textsuperscript{69} Where there exists no relevant statute tending to affirm or deny the President's asserted authority, there is a "zone of twilight," suggested Jackson, in which the President and Congress may share authority.\textsuperscript{70}

More recently, the Court's somewhat inflexible approach to the separation of powers principle, as shown in Immigration and Naturalization Serv. v. Chadha,\textsuperscript{71} seems to emphasize that any action

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\textit{of 1970: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 91st Cong., 2d Sess. 2, 3-5 (1970)} (OMB to be concerned with how government operates, whereas Domestic Council was to have more substantive role); \textit{Senate Hearings on the Creation of EPA, supra note 78, at 87} (statement of OMB Ass't Director Ink that EPA would be setting standards and OMB would merely be concerned "with the effective operation of governmental machinery").

\textsuperscript{64} E.O. 12,291, \textit{supra} note 1, § 3(f)(3).

\textsuperscript{65} The President's powers respecting foreign relations may be more expansive than they are in the domestic context. \textit{See Dames & Moore v. Regan, 453 U.S. 654} (1981).

\textsuperscript{66} 343 U.S. 579 (1952). In this decision, President Truman's seizure of several steel mills, justified on the basis of a national defense emergency need for steel to fight the Korean War, was held an unconstitutional usurpation of Congress' legislative powers.

\textsuperscript{67} \textit{Id. at} 634 (Jackson, J., concurring) Justice Black's plurality opinion has been eclipsed in judicial and academic writings by Justice Jackson's concurrence. \textit{See Dames & Moore v. Regan, 453 U.S. 654} (1981); \textit{Bruff, supra note 2, at 471-72}.

\textsuperscript{68} 343 U.S. at 635-37.

\textsuperscript{69} \textit{Id. at} 637-38.

\textsuperscript{70} \textit{Id. at} 637. The Court's continued reliance on the Jackson analysis was confirmed in \textit{Dames & Moore v. Regan, 453 U.S. 654} (1981).

\textsuperscript{71} 103 S.Ct. 2764. The \textit{Chadha} Court held a one-house legislative veto provision in §
with the purpose and effect of legislation must either be enacted in conformity with constitutional procedures, or be the direct product of an express delegation of legislative authority to an agency. No single branch is empowered to take action of a legislative nature.

These principles cast doubt on the permissibility of an executive order that implicitly grants to OMB the authority to control decisions expressly delegated to the discretion or judgment of another agency. Such OMB control would constitute a substantive change in the statutory delegation. Absent an express or implied legislative statement that OMB control of the decision was contemplated, the Office’s encroachment would contravene Congress’ directive.

Reinforcing the view that clear delegation of authority to a lesser executive official must be honored is Chief Justice (and former President) Taft’s dictum in the celebrated case of Myers v. United States.\(^{92}\) A vocal supporter of presidential power, Taft believed

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\(^{92}\) 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), to be unconstitutional. The Court reasoned that the action there at issue was “essentially legislative in purpose and effect,” 103 S.Ct. at 2784, and therefore “could have been achieved, if at all, only by legislation” passed by both Houses of Congress and either signed by the President, or the President’s veto overridden, id. at 2785. Justice White reminded the Court in dissent that the entire administrative state is dependent on rules essentially legislative, though not adopted pursuant to the formalities of the Constitution. Id. at 2801-04 (White, J., dissenting). The Court responded: “The bicameral process is not necessary as a check on the Executive’s administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7.” Id. at 2785 n.16. The Court also reiterated: “Clearly, . . . [i]n the framework of our Constitution the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” Id. (quoting the Steel Seizure Case, 343 U.S. 579, 587 (1952)). Thus, it seems likely that OMB could ignore a clear and specific legislative directive, such as a delegation of authority to the expert judgment of a named administrator, only at the risk of being held in contravention of statutory authority.

\(^{92}\) 272 U.S. 52 (1926). The first major twentieth century case to address the power of the President vis-a-vis Congress to dismiss federal employees, Myers held that Congress could not constitutionally restrict the President’s power to fire a postmaster, an executive officer appointed by the President with the advice and consent of the Senate. Chief Justice Taft, writing for the majority, found a broad executive power to remove executive officers, although, except in cases of an impeachable offense, the Constitution is silent on the subject. See U.S. Const. art. II. Taft found this broad power implicit in, for one, the “take care” clause. 272 U.S. at 129-34. Taft readily conceded: “To Congress, under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction. . . .” Id. at 129.

In Humphrey’s Executor v. United States, 295 U.S. 602 (1935), the second of the so-called Removal Cases, the President was held to lack the power to remove an FTC commissioner before his term expired, except for one of the congressionally established causes. The Court reasoned that the FTC clearly was intended by Congress to be an “independent” agency, and “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will”; furthermore, the FTC
that the President may generally "supervise and guide" his subordinates' construction of statutes in order "to secure th[e] unitary and uniform execution of the laws." The Chief Justice opined, however, in a frequently overlooked portion of the Myers opinion, that those decisions "peculiarly and specifically committed to the discretion" of a lesser executive officer by statute, or decisions "quasi-judicial" in character, may be beyond even the President's proper influence.

Taft's dictum that a superior must honor a clear delegation of authority to his subordinate finds support in *United States ex rel. Accardi v. Shaughnessy*. In *Accardi* the Supreme Court held that the Attorney General could not direct a decision which he had delegated by regulation to the discretion of a subordinate panel. The Court noted that "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." Similarly, the 1838 Supreme Court decision in *Kendall v. United States* and early opinions of United States

"duties are neither political nor executive, but predominately quasi-judicial and quasi-legislative." *Id.* at 624. The "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence" of the others precluded the President from firing the commissioner against the congressional mandate. *Id.* at 629.

The Humphrey's opinion could be read, in conjunction with Myers, to mean that the functional character of an officer's job might determine the power of the President to dismiss him.

In Weiner v. United States, 357 U.S. 349 (1958), the Court reiterated the bright-line functional test of "purely executive" versus quasi-judicial or quasi-legislative. The Court found the President lacked the power to remove an official, this time a member of the War Claims Commission fired for political reasons by President Eisenhower. Questions before the Commission were to be adjudicated "according to law" (that is, on the merits of each claim, supported by evidence and governing legal considerations) by a body "entirely free from the control or coercive influence, direct or indirect," of the President or Congress. *Id.* at 355-56. To protect the Commission from such coercive influence, the Court held that the commissioner could not be removed. *Id.* at 356.

272 U.S. at 135.

For example, the court in Sierra Club v. Costle, 657 F.2d 298, 406 n.524 (D.C. Cir. 1981), fails to cite or discuss this important passage of the Myers opinion, although it quotes from the sentence preceding it, and rests much of its analysis of presidential authority over rulemaking on the Myers dictum.

272 U.S. at 135.

347 U.S. 260 (1954). While the Accardi Court held that the Attorney General could not properly control the subordinate panel's decision, the Court did not find that he was foreclosed from continuing to enjoy his undelegated authority formally to overrule the panel pursuant to statutory and regulatory procedures.

*Id.* at 267.

37 U.S. (12 Pet.) 524 (1838). The Court denied the President the power to direct the
Attorneys General\textsuperscript{99} tend to affirm that a decision specifically vested by statute in the discretion or judgment of a lesser executive official is beyond the proper control of his superiors, including the President.

Determining the permissibility of OMB influence on agency rulemaking pursuant to E.O. 12,291, therefore, requires a search for any implied or explicit expression of congressional will which grants or denies the President the authority to oversee or control the agency rulemaking under examination. Despite the repeated efforts of past and present Presidents, Congress has refused to codify any "Regulatory Reform" statute that would ratify broad OMB or presidential oversight of rulemaking.\textsuperscript{100} Some commentators have inferred from Congress' repeated rejection of these bills, and from the lack of any other statutory support for OMB or presidential review of rulemaking,\textsuperscript{101} a congressional will to reject such review.\textsuperscript{102} At the same time, clear congressional delegation of regulatory decisionmaking to the EPA Administrator's expert judgment, accompanied by Congress' expectation that the EPA Administrator will remain "independent" and responsible to Congress and the public as well as to the President,\textsuperscript{103} may reasonably be viewed as

\textsuperscript{99} See, e.g., 1 Op. Att'y Gen. 625 (1823) ("[T]he Constitution assigns to Congress the power of particular subordinate officers. . . . [The President] has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates.") (emphasis added); 18 Op. Att'y Gen. 33 (1884) (advising the President, "It has been repeatedly held that the observance of your constitutional duty of taking care that laws be faithfully executed does not of itself warrant your taking part in the discharge of duties devolved by law upon an executive officer"). But see 7 Op. Att'y Gen. 453 (1855).

\textsuperscript{100} The most recent victims were H.R. 2327, 98th Cong., 1st Sess. (1983) and S. 1080, 98th Cong., 1st Sess. (1983), both of which died in the 98th Congress. Extensive hearings were held on the House Bill, in which agency staff and outside observers strongly criticized current OMB review practices. See Hearings, supra note 83.

Congress' repeated rejections of attempts to codify OMB review are reviewed in Rosenberg, supra note 2, at 219-20, 227-34. See also Probably Doomed for Year: Rules Committee Fails to Act; Regulatory Reform Stalled, 1982 Cong. Q. 3029 (Dec. 11, 1982).

\textsuperscript{101} See supra note 83.

\textsuperscript{102} See, e.g., Rosenberg, supra note 2, at 227-34.

\textsuperscript{103} See supra note 78.

The Department of Justice memorandum clearing E.O. 12,291 argues 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." Simms, supra note 51, at 4.
an implied expression of congressional will that those decisions not be overseen by OMB. Thus, to avoid a constitutional question, a court should read E.O. 12,291 as withholding OMB authority over decisions delegated by statute to the judgment of the Administrator.

c. Introduction of Non-Statutory Criteria into Agency Rulemaking

Executive Order 12,291 directs OMB to ensure "to the extent permitted by law"\(^{104}\) that the costs of a regulation do not exceed its benefits, and to attempt to assure that net societal benefits are maximized in agency rulemaking.\(^{105}\) As noted above, many statutory provisions delegating rulemaking authority to EPA list specific factors (e.g., protection of public health) on which the regulation is to be based. Cost and cost-effectiveness are at times noticeably absent from the list.\(^{106}\) May OMB properly require EPA to consider economics in its rulemaking when this is not made relevant by the statute authorizing the rule?

Substantial case authority holds that where a statute sets out certain factors to be considered by an agency in a rulemaking, only those factors may be considered.\(^{107}\) In *Lead Industries Ass’n v. EPA*,\(^{108}\) for example, the D.C. Circuit rejected an argument that EPA consider the economic or technical feasibility of achieving certain air pollution standards, noting:

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This memorandum, however, seems to misperceive the case authorities’ thrust. The correct focus is not on whether the displacement of authority is wholesale or only partial; rather, it is on whether the relevant statute specifically and clearly places that decision in the judgment or discretion of the subordinate official. If it does, then arguably no OMB or presidential supervision—wholesale or limited—would be proper.

\(^{104}\) E.O. 12,291, supra note 1, § 2.

\(^{105}\) Id.


\(^{107}\) There is, however, case authority leaning the other way. See, e.g., American Fed’n of Gov’t Employees, AFL-CIO v. Carmen, 669 F.2d 815, 821 (D.C. Cir. 1981) (“We cannot agree that an exercise of [statutory] authority becomes illegitimate if, in design and operation, the President’s prescription, in addition to promoting economy and efficiency [as required by the applicable statute], serves other not impermissible ends as well.”). This case involved an open-ended delegation of authority to the agency, rather than a set of specific factors to be considered in rulemaking.

When Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of statutory authority by taking other factors into account. . . . A policy choice such as this is one which only Congress, not the courts and not EPA, can make.\textsuperscript{100}

Presumably, if neither the courts nor EPA may alter Congress' policy choice, neither may OMB.

The same court reached a similar conclusion in \textit{National Fed'n of Fed. Employees v. Brown},\textsuperscript{110} rejecting the President's introduction of certain non-statutorily enumerated factors:

Under the structure of government—the separation of powers—established by the Constitution, the President has no authority to alter policy and principles declared by Congress even if, at the time the President acts, signals from Congress suggest it would approve the President's action. . . . We must therefore reject the sole position advanced by the Government. . . . that the President remains free to define 'the public interest' in any reasonable manner and without reliance upon the explicit standards Congress set to constrain executive discretion.\textsuperscript{111}

Other decisions confirm that it is for Congress to establish the factors to be considered in administrative decisionmaking.\textsuperscript{112} If certain factors clearly are set out as the basis of decision under a statute, other considerations not made relevant by statute should not enter into the calculus.\textsuperscript{113}

The D.C. District Court recently applied this principle to a Treasury Department rulemaking in which the agency relied on E.O. 12,291 as the basis for rescinding certain rules. Invalidating

\textsuperscript{100} Id. at 1150 (emphasis added).
\textsuperscript{110} 645 F.2d 1017 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 103 (1982).
\textsuperscript{111} Id. at 1025 (emphasis added).
\textsuperscript{112} See, e.g., American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (rejecting industry argument that Occupational Safety and Health Administration must engage in cost-benefit analysis when setting occupational standards for cotton dust exposure); EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) (where industry petitioners argued that certain Clean Air Act standards should consider compliance costs, Court held that Congress had clearly intended technology-based, not cost-based, standards); Union Electric Co. v. EPA, 427 U.S. 246, 257 (1976) ("The [statutory] provision sets out eight criteria that . . . must [be] satisfied[, and] provides that if these criteria are met . . . the Administrator 'shall approve' the proposed state plan. The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified.").
\textsuperscript{113} This, of course, is one implication of the Steel Seizure Case: if a statute clearly sets out the criteria to be considered in a rulemaking, the President is on thin constitutional ice when he proposes to graft new considerations onto the statute. \textit{See supra} notes 86-91 and accompanying text.
the rule rescission, the court in *Center for Science in the Public Interest v. Department of the Treasury*\textsuperscript{114} stated: "[T]he broad thrust of Executive Order No. 12,291 provides an insufficient basis for the defendants to disregard their statutory duties...reflecting Congressional policy which was reaffirmed as recently as 1979."\textsuperscript{115} Because the applicable statute included no "proviso that the regulations could be withdrawn if the costs to industry turned out to be too high,"\textsuperscript{116} the court reasoned that the Executive Order could not add a new basis for agency action.\textsuperscript{117}

These cases illustrate that if EPA is directed by statute to consider certain specified factors in drafting a rule, it is improper for EPA, OMB, or even the President to introduce new criteria—such as the cost-benefit calculation mandated by E.O. 12,291—into the rulemaking. Of course, statutes include provisions of varying specificity as to what factors may be considered in setting a standard or other rule. Logically, the more general and broad a delegation of authority, the more likely that Congress intended to allow the decisionmaker to consider factors he deems relevant, though not specifically cited in the statute. Conversely, the more specific a delegation of authority, the less likely that Congress would countenance the introduction of non-enumerated criteria into the decision.\textsuperscript{118}

d. \textit{OMB Review is Proper Only if Limited}

Influence on a rulemaking ranges from mere commentary, to strong persuasion, to outright control. In light of OMB's pervasive control of executive agency budgets, personnel ceilings, and formal contacts with Congress, as well as its other powers,\textsuperscript{119} a scrutinizing eye must be kept on the Office's "suggestions" regarding rulemaking delegated to other agencies. Comments by OMB on executive agency rules are proper, and sometimes desirable for the reasons stated in *Sierra Club*. But, while E.O. 12,291 may be entirely proper as written, it should not be used by OMB as a means to supervise decisions vested by law in the judgment of the EPA Administrator or other official.

\textsuperscript{115} Id. at 1175.
\textsuperscript{116} Id. at 1174.
\textsuperscript{117} Id. at 1174-75.
\textsuperscript{118} See generally Bernstein, supra note 2, at 827.
\textsuperscript{119} See supra text accompanying notes 5-17.
B. OMB Review: The Necessity of Disclosure

1. OMB Contacts with Outside Parties During Rule Review

a. The Ex Parte Contacts Doctrine

While the Supreme Court’s decision in Vermont Yankee Nuclear Power Corp. v. NRDC120 may temporarily have fettered judicial creativity under the Administrative Procedure Act (APA),121 the courts continue to sculpt the APA in an effort to accommodate the needs of modern administrative government.122 The notion that “informal” rulemaking under the APA123 should be accompanied by the building of a centralized administrative record has gradually gained acceptance, and continues to retain vitality despite the APA’s silence on the point.124 Courts and commentators have urged agencies to compile such a record to ensure that a complete account of the agencies’ rulemaking process is available to the public, to encourage fair and intelligent debate during rulemaking, and to aid courts in reviewing the rationality of agency rulemaking under the APA. An informal rulemaking record serves to document the facts and arguments presented to the agency, and thus helps to ensure that improper, non-statutory factors are not considered in reaching the decision.125

Ex parte contacts—unannounced, private, and off-the-record contacts with decisionmakers by those outside the decisionmaking agency—have long been prohibited in formal rulemaking.126 In the


123 “Informal” rulemaking is a term of art describing rule promulgation by federal agencies pursuant to § 553 of the APA. See generally K. Davis, supra note 122, §§ 6:1-6:10 (distinguishing between informal, or “notice-and-comment,” rulemaking, and formal rulemaking).


125 See infra text accompanying notes 140-59.

126 Prohibition for agency adjudications is at 5 U.S.C. § 554(d); prohibition for formal rulemakings is at id. § 557(d). See also Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (in adjudicatory proceeding, ex parte contacts violate due process); Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 66-67 (D.C. Cir. 1958) (in agency licensing proceeding, ex parte contacts prohibited).
informal rulemaking context, however, there is no express prohibition on ex parte contacts, and the case law is confused.\textsuperscript{127}

In informal rulemakings, where trial-type, quasi-adjudicatory\textsuperscript{128} proceedings are not required, and no "conflicting private claims to a valuable privilege"\textsuperscript{129} are involved, the courts have been circum-
spect about requiring agencies to avoid, or even to docket,\textsuperscript{130} ex parte contacts. A notable exception is *Home Box Office, Inc. v. FCC*,\textsuperscript{131} in which the D.C. Circuit\textsuperscript{132} held that extensive ex parte contacts during a purely informal rulemaking vitiated an FCC rule, necessitating a remand to the Commission.\textsuperscript{133}

\textsuperscript{127} *Compare*, e.g., *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (holding that ex parte contacts during informal rulemaking are generally prohibited), *with* *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) (holding that ex parte contacts during informal rulemaking not involving competing private claims to a valuable privilege generally are not prohibited).

\textsuperscript{128} *See* *United States Lines v. FMC*, 584 F.2d 519 (D.C. Cir. 1978) (quasi-adjudicatory rulemaking, though not "formal" or fully adjudicatory, vitiated by ex parte contacts); *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345, 350 (D.C. Cir. 1978) (adjudicative form of informal rulemaking "lies near the core described by the [ex parte contacts] doctrine's rationales").

\textsuperscript{129} *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959); *see also* *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (noting that where rulemaking "involves. . .quasi-adjudication among 'conflicting private claims to a valuable privilege' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process") (quoting *Sangamon Valley*); *Action for Children's Television v. FCC*, 564 F.2d 458, 475 (D.C. Cir. 1977) (dictum) (refusing to vacate FCC informal rulemaking decision, despite extensive ex parte contacts, because rulemaking did not involve "conflicting private claims to a valuable privilege"); *accord* *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188-89 (2d Cir. 1984).

One might consider exactly what this oft-quoted but rarely analyzed *Sangamon Valley* phrase "conflicting private claims to a valuable privilege" actually means. For example, when an agency proceeding decides whether a high level of worker protection from lead poisoning should be compromised to allow an industry to save millions of dollars, are these not competing private claims to valuable privileges (workers' health versus stockholders' dollars)? For a negative answer, see *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1218 n.33 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). Such competing claims to valuable privileges—whose claimants often are readily discernable prior to the rulemaking—may occur in many EPA, OSHA, FDA, and other federal agency informal rulemakings. For example, an EPA standard for ambient levels of particulate matter may determine the future health of tens of thousands of especially pollution-sensitive Americans who are in competition with industrial polluters for the use of a valuable commodity—clean air.

\textsuperscript{130} "Docketing" is the practice of placing written materials and summaries of oral communications in a publicly available file.


\textsuperscript{132} The lengthy per curiam decision, although of course unattributed, was "obviously authored" by Judge Wright. J. Mashaw & R. Merril, *Introduction to the American Public Law System* 41 (1980 Supp.).

\textsuperscript{133} 567 F.2d at 57.
In light of the Supreme Court decision in *Vermont Yankee*, and subsequent D.C. Circuit decisions, the continued vitality of the broad dicta in *Home Box Office* is suspect. Still, in the face of *Vermont Yankee*, at least one court has held that an agency’s purely informal rule was vitiated by extensive post-comment-period ex parte communications.

The current law apparently does not prohibit ex parte contacts during informal rulemaking. One common thread in the decisions is that docketing generally is sufficient to avoid reversal of the rule, as long as the docketing occurs in time for full adversarial comment on the new information or argument. Whether docketing is *required* for substantial argumentative or factual contacts in informal rulemaking is controversial.

The principles developed by the courts applicable to ex parte contacts between the decisionmaking agency and outside parties should apply to contacts between OMB staff and outside parties during rulemaking review. This analogy is proper if OMB is either

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134 435 U.S. 519 (1978); see *supra* note 120.


138 *Id.* at 660 ("Where . . . information received *ex parte* is not generated internally by the agency, bears directly on highly complex technical issues, and will probably have some effect on the final outcome [of the rule], it should be revealed for public comment before the agency reaches its decision."); *Home Box Office*, 567 F.2d at 57 (suggesting, in dictum, docketing of ex parte contacts in time for interested parties to comment, should ex parte contacts occur despite prohibition thereon); see also Admin. Conference of the United States (ACUS), Recommendation 77-3, 1 C.F.R. § 305.77-3 (1984) (recommending docketing of written communications addressed to the merits of an informal rulemaking, and suggesting that agencies experiment with procedures to disclose oral communications of significant arguments or information from ex parte contacts).

The cases encouraging timely docketing of ex parte contacts accord with the principle of administrative law that information critical to the substance of a proposed rule should be docketed to provide adequate opportunity for comment. See, e.g., United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) (noting that where FDA apparently relied on certain data not available for public rebuttal, its action was not based on consideration of all relevant factors and was arbitrary).
a new decisionmaker or has access to and influences the decisionmaker as an agent for private parties, circumstances which appear to exist.\textsuperscript{139}

\textit{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.

\textit{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\textsuperscript{140} may become mere window dressing.\textsuperscript{141} The \textit{Home Box Office} court, noting that "[c]ompromises, fall-back positions, and so-called 'real facts' are often reserved" for off-the-record communications,\textsuperscript{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."\textsuperscript{143}

The APA's goals of ensuring meaningful public participation in

\footnotesize{\textsuperscript{139} See \textit{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).

\textsuperscript{140} See 5 U.S.C. § 553.


\textsuperscript{142} 567 F.2d at 56 n.123 (quoting FCC Chairman Wiley).

\textsuperscript{143} \textit{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. 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, 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.

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. The administrative record delivered to the court by EPA would be a fictitious account of the actual decision-making 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. 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).


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. In the case of OMB, where the
decisionmaker gives preferential access to industry, keeps its con-
tacts secret, and operates under a mandate to cut regulatory
costs, 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 Qual-
ity Standards, 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. Docketing allows for full disputation of argu-
ments or data proferred during such contacts, and encourages
agencies to explain fully their reliance on, or rejection of, those
arguments or data.

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 prop-
erly. . but must treat the agency's justifications as a fictional account of the actual deci-
sionmaking 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.

Despite this clear statutory command, OMB insists on reviewing NAAQS standards. See
OMB Response to House Questionnaire, supra note 83 (Question 16), reprinted in Hear-
ings, 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
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 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, 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 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.

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

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," secrecy of government decisionmaking is not

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158 See infra text accompanying notes 282-93.
154 See supra text accompanying note 49.
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, 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, 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.

a. OMB "Conduit" Contacts with EPA

Where OMB serves as a mere conduit of information or arguments from private parties to EPA, 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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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...intraexecutive 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]nvironmentalists 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\textsuperscript{164} and the D.C. Circuit\textsuperscript{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,\textsuperscript{166} the Alliance for Justice (a public interest consortium),\textsuperscript{167} and

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\textsuperscript{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.

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\textsuperscript{166} 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.").

\textsuperscript{167} 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 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.


\(^{168}\) 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).

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

Judge Wald pointed out that EPA had voluntarily docketed summaries of each of these intraexecutive agency meetings. 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. 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.

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, available to OMB as an arm of the Executive Office?

The Nixon Court repeatedly noted that it was considering a

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.

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," and that its decision was informed by "[t]he President's need for complete candor and objectivity from advisers." 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.

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. 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 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.

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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).

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. . . .").

183 857 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. 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.” 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.”

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

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

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”).


Id at 5.
achieved through E.O. 12,291. Such criticism has elicited reluctant admissions from OIRA's former Administrator that estimates "were mainly from industry sources," that estimates did not consider benefits of the regulations in place, and that, on the whole, "[i]t is conceivable" that OMB's regulatory reform efforts may have saved nothing and may have cost the American public.\footnote{\textit{Hearings on Role of OMB, supra note 31, at 114-15.}}

Whatever the truth about savings resulting from OMB's efforts—which probably rests between critics' claims of negative benefits and OMB's bloated estimates—it is clear that OMB has substantially influenced the pace and substance of executive agency rulemaking.

In 1981 and 1982, OMB reviewed over 5,400 proposed and final regulations; roughly 140 of these were "major" rules.\footnote{Presidential Task Force on Regulatory Relief, Reagan Administration Regulatory Achievements 59-61 (Aug. 11, 1983) [hereinafter cited as 1983 Task Force Report]. OMB may "exempt" classes of rules from review if it determines that "as a class" they are consistent with the goals and requirements of the Order. Furthermore, a rule may be returned to an agency because it was improperly sent, or it may be passed through OMB due to an emergency or a statutory or judicial deadline. During 1981 and 1982, three percent of all rules fell into these categories. OMB 1982 Report on 12,291, \textit{supra} note 187, at 11, 27.} About twenty percent of all rules reviewed by OMB were EPA rules;\footnote{OMB 1982 Report on 12,291, \textit{supra} note 187, at 11, 27.} eight of these 1074 EPA rules were designated "major" under the Executive Order.\footnote{\textit{Id.} at 59.}

While, as of 1982, eighty-six percent of all draft rules sent by agencies to OMB had been "cleared without change,"\footnote{\textit{Id.} at 11.} it is likely that OMB had some impact on their substance. Often the Office is in close contact with the agency staff drafting the rules, and sometimes helps to fashion the proposal before it is "logged" for review.\footnote{Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); accord Telephone interview with Allan Jennings, EPA Office of Standards & Regulations (May 27, 1983); see also GAO Report on 12,291, \textit{supra} note 24, at 53. EPA's High Level Radioactive Waste Disposal rule, see infra text accompanying notes 326-49, is one example of a rule substantively modified before proposal, after OMB review.} Roughly eight percent of all rules reviewed by OMB in 1981 and 1982 were found "consistent with minor change,"\footnote{OMB 1982 Report on 12,291, \textit{supra} note 187, at 11.} sometimes undergoing "substantive modification."\footnote{Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1.a.3.), \textit{reprinted in Hearings, supra note 83, at 2642.}}

As of the end of 1982, 101 regulations—or two percent of those
reviewed by OMB—were returned to the agencies;\textsuperscript{197} "returned" in some cases is a euphemism for "vetoed."\textsuperscript{198} Agencies had withdrawn eighty-one rules, in some cases upon receiving signals from OMB of an impending dispute.\textsuperscript{199}

The primary macroscopic impacts of the Executive Order appear to be delay of the regulatory process—especially where OMB and the agency disagree on the substance of a rule—and the day-to-day infusion of OMB input into agency decisionmaking.\textsuperscript{200} This OMB input generally is difficult if not impossible for the public to discern.

B. OMB Encroachment on EPA Discretion: A New Locus of Power

The struggle between EPA and OMB has at times become embittered. Former EPA Administrator Burford recently testified, for example, that "it is appropriate for the President of the United States to have an office which can overview [sic] regulations. . .but I think that there were some serious abuses [by OMB]."\textsuperscript{201} Some EPA employees long have contended that the agency has been "singled out" by OMB for especially close scrutiny,\textsuperscript{202} OMB admits that it gives EPA special attention.\textsuperscript{203}

The friction between OMB and EPA is not surprising. OMB has openly criticized the entire health and environmental regulatory regime.\textsuperscript{204} It has charged that EPA’s management has tried to evade OMB oversight.\textsuperscript{205} EPA’s orientation toward “command and

\textsuperscript{197} OMB 1982 Report on 12,291, supra note 187, at 11.
\textsuperscript{198} See infra text accompanying notes 209-14.
\textsuperscript{200} See infra text accompanying notes 246-53 (discussing internal EPA changes in response to OMB review).
\textsuperscript{201} Hearings on Superfund, supra note 46, at 234 (testimony of Anne Burford).
\textsuperscript{203} Interview with OMB, OIRA Official “B” in Washington, D.C. (May 3, 1983).
\textsuperscript{204} For example, OIRA Administrator DeMuth asserted: "[T]here are scores, hundreds of regulations on the books that are imposing costs without much positive results in terms of environmental or health improvements. . . ." Office of Management and Budget Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov’t Operations, 97th Cong., 2d Sess. 347 (1982) (testimony of OMB, OIRA Adm’r DeMuth) [hereinafter cited as Hearings on OMB Control of OSHA Rulemaking]. See also J. Lash, K. Gillman & D. Sheridan, A Season of Spoils 19-21 (1984) (citing criticism of environmental regulation by top-level OMB officials, including Director Stockman) [hereinafter cited as J. Lash].
\textsuperscript{205} See, e.g., OMB Midterm Analysis Gives EPA Poor Marks on Reg Reform, Other Programs, Inside EPA (Inside Wash. Pub.) 1, 5 (Nov. 12, 1982) (quoting internal OMB
control” regulation often runs directly against the grain of OMB’s market-oriented approach. A key former OMB official admits that OMB has “a loving bias against regulation . . . a rebuttable presumption against regulation,” but insists that this bias results from OMB’s “neutral competence” rather than from any pro-industry bent.206

As the following sections illustrate, OMB’s philosophical bias against command and control regulation has led the Office to frequent, at times vehement, arguments with EPA. These disagreements have often resulted in substantive changes in EPA’s rules.

1. OMB’s De Facto Veto Power: The Displacement of EPA Discretion

The terms of Executive Order 12,291 give OMB no authority to “veto” an agency rule; the Order merely provides that the agency “shall . . . refrain from publishing” its rule “until the agency has responded to the [OMB] Director’s views, and incorporated those views and the agency’s response in the rulemaking file.”207 The Order explicitly states that it shall not “be construed as displacing the agencies’ responsibilities delegated by law.”208

In practice, however, OMB has acquired a de facto veto power over certain agency regulations. OMB officials have essentially admitted to such power in testimony before Congress.209 Although a

memorandum):

EPA has resisted White House efforts to promote reform of environmental regulations. The agency’s attempts to circumvent White House oversight of its regulatory activities has resulted on one or two occasions in considerable political embarrassment to the Administration. All of this could have been counteracted by sufficiently forceful action on the part of EPA’s political appointees, but they appear unable to debunk the assertions of their staff, or to focus on the most important opportunities for regulatory reform.

206 Interview with Jim Tozzi, former OMB, OIRA Deputy Adm’r, in Washington, D.C. (June 14, 1983).
207 E.O. 12,291, supra note 1, § 3(f)(2).
208 Id. § 3(f)(3).
209 See, e.g., Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 350 (testimony of OMB, OIRA Adm’r DeMuth):

Mrs. Collins. . . .When OMB disagrees with an agency and feels that a standard does not comply with the cost-benefit analysis, based on Executive orders, could that agency actually proceed to implement it, or target [sic] a standard anyway?

Mr. DeMuth. Sure.

Mrs. Collins. It could. Do you know of any that have done that?

Mr. DeMuth. No. Wait a minute, let me think. No, I think the answer is “No.”

But see Hearings, supra note 83, at 966 (OIRA Adm’r DeMuth, testifying that “OMB does not have ‘veto power’ over rules”).
determined agency may be able to reject OMB's "recommendations" and promulgate the rule intact, OMB has publicly cited only a single instance in which an agency brought a dispute with the Office to the Presidential Task Force on Regulatory Relief—a now-disbanded "appeals board" from OMB decisions under the Executive Order. None of the forty-five rules "returned" to the agencies by OMB in 1981 was appealed to the Task Force.

When asked in August 1983 how many rules returned to agencies were later promulgated, OMB could not cite a single rule, ostensibly because they "do not maintain records" of such cases. In the view of former OIRA Administrator Miller, agencies generally are unlikely to test OMB's bureaucratic mettle, because "if you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly.

Although OMB is indeed a "tough kid," its experience with the Executive Order demonstrates that the Office is neither omnipotent nor prodigal in the use of its powers. For example, when OMB attempted in a drawn-out battle to pressure EPA into significantly relaxing the standards for lead in gasoline—the "lead phasedown" debate—OMB, in the words of former EPA Assistant Administrator Bill Drayton, "was rolled." That OMB is not prodigal in exercise of its powers is illustrated by the fact that in 1981 and 1982 it returned only thirty-one of the 1074 EPA rules reviewed.

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310 In the spring of 1982, OMB opposed OSHA's "Hazard Communication" rule, and OSHA appealed to the Task Force. The Task Force upheld the rule, although the standard ultimately differed from the original OSHA proposal. Perhaps it is no coincidence that the Task Force's approval occurred during a congressional inquiry into OMB's delay of the rule. See Hearings on OMB Control of OSHA Rulemaking, supra note 204, 4-5, 20-26, 55, 316-19; see also GAO Report on 12,291, supra note 24, at 53.


312 GAO Report on 12,291, supra note 24, at 53.

313 OMB Response to House Questionnaire, supra note 83 (Question 7), reprinted in Hearings, supra note 83, at 976.


315 Telephone interview with William Drayton, Jr., former EPA Asst' Adm'r for Planning & Mgmt. (April 28, 1983).

316 OMB 1982 Report on 12,291, supra note 187, at 10-12. This figure is misleading because most of the thousand-odd rules sent by EPA to OMB are of minor significance; only perhaps a fourth or less are of substantial influence, and only a handful were designated "major." See Hearings, supra note 83, at 3146-3215 (worksheet of proposed and final EPA rules received by OMB through April 30, 1983, for E.O. 12,291 review) [hereinafter cited as OMB Worksheet].
A key OMB official explains that it requires "too many bureaucratic chips" for OMB to insert itself into and possibly polarize many rulemakings and to "bring in the heavies" too often.\textsuperscript{217} When OMB does bring its power to bear, however, it often is very influential.\textsuperscript{218}

OMB's power to "return" rules\textsuperscript{219} is analogous to the President's power to veto legislation. If the agency writing the rule can muster enough will and political support to override OMB, it will prevail, much as Congress may override a presidential veto. But, the threat of an OMB veto probably has its greater effect in a day-to-day sense, as a threat looming on the horizon. Its mere existence gives OMB the power to influence EPA policymaking.

Of course, OMB has many powers other than the power to return a rule with which it can encourage EPA to alter its course. OMB sanctions include budget and personnel cuts, and delay of future rules.\textsuperscript{220} An additional sanction, presidential dismissal of the EPA Administrator, is an extraordinary measure.\textsuperscript{221} Perhaps a fur-


\textsuperscript{218} See infra Section III.D., Case Studies.

\textsuperscript{219} EPA's Administrator Ruckelshaus, recently resigned, may have been more independent of OMB and the White House than was his predecessor or will be his successor. When quizzed by Senator Stafford about his views on OMB's power, he asserted: "I will have the final authority to promulgate regulations, not OMB." Written responses of William Ruckelshaus, EPA Adm'r-designate (Question 7) (written questions of Sen. Stafford following confirmation hearings) (undated) (copy on file with author).

However, a recent review by the Oversight and Investigations Subcommittee of the Senate Energy and Commerce Committee concludes: "[I]t seems quite clear that the problem of OMB interference in EPA rulemaking has not ceased with the shakeup of the top leadership of the Environmental Protection Agency in early 1983." Oversight Subcomm. Report on Executive Privilege, supra note 79, at 293. The ability of Administrator-designate Lee Thomas to resist OMB influence remains to be seen.

\textsuperscript{220} When OMB decides to return a rule to EPA, the Desk Officer usually drafts a memorandum recommending return of the rule as inconsistent with the Executive Order. That memorandum climbs the OMB chain of command and ultimately may lead to a letter to EPA, usually from the OIRA Administrator, notifying the Agency of OMB's determination that the rule is inconsistent with the Executive Order. Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

\textsuperscript{221} As discussed supra text accompanying notes 5-17, OMB may combine its vast array of powers with the veto threat to effectively persuade EPA. No overt threats of such sanctions have been cited by EPA officials in interviews, but the mere existence of such powers may have a chilling effect on EPA's willingness to contravene OMB orders. "[T]housands of transactions a year with OMB" take place; therefore "if you've publicly humiliated [OMB], they'll get even—this can come in many different ways." Interview with Douglas Costle, former EPA Adm'r, in Washington, D.C. (Aug. 17, 1983).

Former EPA Administrator Costle notes that the actual firing of the EPA Administrator is not a real threat—absent a major political crisis—because of the extraordinary nature of this remedy. \textit{Id}. 

\textsuperscript{221}
ther power is illustrated by former EPA Chief of Staff John Daniel's recent testimony that he received "veiled threats" when EPA took actions objectionable to OMB.\textsuperscript{222} After EPA Administrator Burford issued a rule under court order without first receiving OMB approval, Daniel explained: "Late that evening I received a call from an OMB official . . . [who said] words to this effect[:]: that there was a price to pay for doing what we had done, and that we hadn't begun to pay."\textsuperscript{223}

2. OMB's More Subtle & Pervasive Influence on EPA

As noted, OMB only rarely resorts to vetoing EPA rules; the veto appears to be its bluest weapon, to be used only when EPA resists OMB arm-twisting and refuses "voluntarily" to alter a rule's substance. This section reveals the day-to-day influence OMB exerts on EPA rulemaking short of a management-level veto.

a. Early OMB Involvement in EPA Rulemaking

There is "an old OMB saying: get in below the bow line"; in other words, get involved in agency rulemaking as early as possible to maximize influence on rules that are still in their formative stages.\textsuperscript{224} To this end, there are reports that OMB is planning to use the "unified agenda of federal regulations" mandated by § 5 of E.O. 12,291 to involve itself in "ground-floor" decisions on whether proposed rules should even be drafted by agencies.\textsuperscript{225}

In many cases OMB already is involved in the EPA rulemaking process prior to formal submittal of a proposed rule to the Office. An excellent example of this is the early OMB involvement in the National Ambient Air Quality Standard (NAAQS) for particulate matter; OMB was involved for over a year before any proposal was floated by EPA.\textsuperscript{226}

\textsuperscript{222} Daniel Testimony, supra note 46, at 7.
\textsuperscript{223} Id. at 7-8.
\textsuperscript{224} Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (May 14, 1983).
\textsuperscript{225} OMB Gearing to Control Agency Decisions at the Earliest Stage, Inside OMB (Inside Wash. Publ.) 5 (Oct. 8, 1982). OMB would accomplish this through review of all agency rules planned and placed on the regulatory agenda; if OMB were to find that "policy issues" were raised by the agency's planned rulemaking, the regulatory plan would be brought to the attention of OMB for an overall decision on whether to begin the regulatory process. This would be the first step toward establishing "regulatory budgets" for agencies. Id.
This pre-proposal input is critical because, once the inertia builds after proposal of a rule, it takes many more "bureaucratic chips" for OMB to halt or significantly alter the EPA rule. One observer of the OMB-agency debates explains, "[B]y the time that [a] standard is issued as a proposal in many agencies’ views, it is nailed down . . . [the] proposal is close to, if not identical to, the agency’s final action."\textsuperscript{227}

Under EPA’s formal procedures OMB clears a proposed or final regulation, and the EPA Administrator signs it.\textsuperscript{228} This may avoid the appearance of OMB overriding the EPA Administrator, but it also precludes a "pure" EPA rule—the rule is always the joint product of OMB and EPA before it actually reaches the Administrator's desk for signature. OMB review is completed prior to the EPA Administrator's signature. While this is procedurally courteous, the Administrator often is fully aware of—and indeed completely supports—a rule that has gone through internal low level review before it is sent to OMB.\textsuperscript{229}

Early OMB involvement compromises EPA’s role as the frontline expert decisionmaker in matters entrusted to EPA by Congress. EPA’s former Assistant Administrator Drayton feels that early OMB input over-politicizes the EPA background scientific work before it has had a chance to see the light of day.\textsuperscript{230} This directly undercuts the ideal mode of regulation: first, expert determination of risks, and then, a policy decision as to what level of risk is acceptable.\textsuperscript{231}

\textbf{b. Day-to-Day OMB Review of EPA Rules}

Once formally submitted to OMB, non-major EPA rules are in

\textsuperscript{227} Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 12 (testimony of Peg Seminario, AFL-CIO).

\textsuperscript{228} See EPA, Office of Standards and Regulations, Managing the Process 51-52 (August 1982) (Regulation Management Series).

\textsuperscript{229} The EPA High Level Radioactive Waste Disposal rule, for example, was fully supported by EPA Administrator Burford, who personally debated its provisions with OMB officials during OMB’s extended one-year review. See infra text accompanying notes 329-46.

\textsuperscript{230} Telephone interview with William Drayton, Jr., former EPA Asst Adm'r for Planning & Mgmt. (April 28, 1983).

most cases cleared within ten days.\textsuperscript{232} If the rule is controversial, however, copies of the rule may be sent to key White House and other executive staff, and review may take several months or more than a year.\textsuperscript{233} OMB review of most non-major rules must be cursory because of the volume of rules to be reviewed.\textsuperscript{234} “Major” rules receive substantially more scrutiny; the average time for review is over thirty days.\textsuperscript{235}

Because of time constraints, and because OMB sees itself as an overseer of the process rather than a “bunch of technicians redo[ing] the work of EPA,”\textsuperscript{236} OMB almost never looks at the EPA rulemaking docket or at any public comments other than those sent directly to OMB.\textsuperscript{237} OMB does accept, and sometimes actively solicits, industry comments both written and oral;\textsuperscript{238} on rare occasions OMB receives comments from non-industry parties, but in general the “record” before OMB is distinctly one sided.\textsuperscript{239} EPA officials have charged that OMB has given draft EPA rules to industry for comment before the rules are available to the public,\textsuperscript{240} presenting industry a secret “first shot” at the rules.

c. \textit{Delay in the Regulatory Process}

OMB’s quick turnaround for most EPA regulations is only a part of the story. For those regulations with which OMB disagrees, re-
view is neither smooth nor predictable. Regulatory packages sent to OMB may become enmeshed in disagreement for over a year. EPA reported in May 1983 that OMB had extended its review of 158 proposed and final rules beyond the time limits prescribed in the Executive Order, sometimes for several months, and in four cases for over a year.

Once OMB announces an extension, there is no time limit on OMB review. In some cases, OMB has extended its review well beyond the statutory deadline for a rule’s promulgation, despite the Order’s clear mandate that such deadlines be honored.

Interagency dispute produces delay and incremental, sometimes substantial, change in the rule or proposal. Although relatively few rules are delayed for more than ten weeks, many of those rules are from EPA.

d. Internal Changes at EPA as a Consequence of OMB Review

As this section attempts to demonstrate, direct OMB intervention results in EPA policy changes. In addition, the very knowledge that rules will be reviewed by OMB has brought about internal changes at EPA.

First, a more rigorous internal review has developed. EPA has beefed up its economic analyses; in fact, by May 1983 EPA had spent $2.45 million on the still-uncompleted Regulatory Impact Analysis (RIA) for RCRA owner/operator land disposal standards. The Reagan Order requires that considerable analysis be undertaken; however, in general, EPA staff interviewed believed that a full-blown cost-benefit RIA is of little value to EPA deci-

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241 See, e.g., discussion of OMB’s year-long reviews of EPA’s High Level Radioactive Waste Disposal rule and NSPS’s, infra text accompanying notes 326-70.


243 See, e.g., NSPS case study, infra text accompanying notes 350-70 (noting that several of these rules were delayed by the OMB review process for months, even more than a year, after the statutory deadline had passed).

244 E.O. 12,291, supra note 1, § 8(a)(2).


sionmakers and is essentially a waste of EPA's scarce resources.\^\textsuperscript{248}

EPA's more rigorous internal review has increased significantly the time it takes to issue some rules. The drafting of the RIA's for two major rules, for example, have taken in excess of two years.\^\textsuperscript{249} In 1982, General Accounting Office (GAO) investigators found in general that "the knowledge that all regulations must be reviewed by OMB may indirectly cause delay" due to intensified internal review within the agency.\^\textsuperscript{250} A more recent GAO study concluded that while cost-benefit analyses may be time consuming, costly and flawed by significant data gaps, in some cases these analyses have aided EPA decisionmakers.\^\textsuperscript{251}

A more subtle and consequential internal EPA development induced by OMB review is a "guessing game," in which EPA attempts to draft rules it believes will clear OMB. As one EPA official put it, "we are practicing the art of the possible": the agency staff starts with reduced expectations, and drafts initially a proposal that will clear both the EPA hierarchy and OMB.\^\textsuperscript{252}

The Executive Order has effectively institutionalized OMB input, especially where OMB has a strong policy interest. Of course, most rules receive little OMB attention. It is, however, OMB's goal to induce in EPA staff the understanding that rules in certain form will never clear OMB, and therefore should not even be sent there for review.\^\textsuperscript{253} This goal seems to have been at least in part achieved.

\^\textsuperscript{248} E.g., Interview with EPA, Office of Standards & Regulations Official "D" in Washington, D.C. (March 30, 1983). Publicly, EPA states that the cost-benefit analyses have been useful to the agency. See, e.g., Letter from John M. Campbell, Jr., EPA Acting Asst Adm'r for Policy, Planning & Evaluation, to J. Dexter Peach, GAO (Oct. 20, 1983), reprinted in GAO, Cost-Benefit Analysis Can Be Useful in Assessing Environmental Regulations, Despite Limitations 40-41 (1984) ("In general, EPA agrees with GAO in its finding that cost-benefit analysis is a useful tool in considering options for setting standards despite some inherent limitations.") [report hereinafter cited as GAO Report on Cost-Benefit Analysis].

\^\textsuperscript{249} EPA Response to House Questionnaire, supra note 242 (Attachment G), reprinted in Hearings, supra note 83, at 1595-97; accord Telephone interview with EPA, Office of Policy & Resource Management Official "I" (May 31, 1983).

\^\textsuperscript{250} GAO Report on 12,291, supra note 24, at 51.

\^\textsuperscript{251} GAO Report on Cost-Benefit Analysis, supra note 248.

\^\textsuperscript{252} Interview with EPA, Radiation Programs Official "K" in Arlington, Va. (May 24, 1983).

\^\textsuperscript{253} Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983). OMB officials will on occasion tell EPA that it is "O.K. to propose" x and/or y, "but be forewarned that we're looking for x" in the final rule. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983). The official noting this practice did not suggest how often or in what cases it is invoked. If used effectively, it would directly undercut the APA public comment process.
3. **OMB Review: Not Limited by Statutory Criteria or the Terms of the Executive Order**

   a. **OMB Review Effectively Ignores Relevant Statutes and the Terms of the Executive Order**

Executive Order 12,291 grants OMB review powers only "to the extent permitted by law."\(^{254}\) The Order has been vigorously defended by Reagan administration officials, who note that, because it explicitly applies only to the extent permitted by law, it cannot be legally defective.\(^{255}\) The evidence indicates, however, that OMB sometimes goes beyond the terms of both the Executive Order and the enabling statute in reviewing a rule.

For example, the Order applies only to "regulations" or "rules" defined essentially as in the APA definition of "rule."\(^{256}\) Nonetheless, OMB often reviews documents which appear to fall outside of this definition—including guidance documents, interpretive statements, policy statements,\(^{257}\) agency progress reports,\(^{258}\) and even the settlement agreement in *NRDC v. EPA*\(^{259}\)—for conformity with presidential policies. The legal basis for such review, given the definition of "rule" provided in the Executive Order, is tenuous.

Perhaps more unsettling is OMB's refusal to waive its review of rules which are to be strictly health based according to applicable statutes. For example, former EPA Chief of Staff Daniel recently testified before Congress that in the case of certain EPA rules required to be based solely upon health considerations, OMB was "trying to shape the standard and kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute."\(^{260}\) While admitting that

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\(^{254}\) E.g., E.O. 12,291, *supra* note 1, §§ 2, 3.


\(^{258}\) See, e.g., N.Y. Times, Oct. 2, 1984, at A28, cols. 4-6 (EPA report titled "Environmental Progress and Challenges: An EPA Perspective," according to EPA sources cited in the *Times*, "might just as easily be called 'an OMB Perspective'" due to heavy editorial revisions of the report by OMB prior to its publication and distribution to Congress and the public).

\(^{259}\) OMB reviewed this common issues settlement for nearly a month. See *OMB Worksheet*, *supra* note 216, at 3162.

\(^{260}\) Daniel Testimony, *supra* note 46, at 81; see NAAQS case study, *infra* notes 371-80
some rules such as EPA's NAAQS and the FDA-administered Delaney Amendment ban on carcinogenic food additives do not permit economic considerations, OMB has publicly stated that it reviews such rules.\textsuperscript{261} The legal basis for OMB review, where economic considerations and technical feasibility of compliance with the rules are irrelevant, is here again not clear.\textsuperscript{262}

Furthermore, OMB apparently does not feel constrained by the Executive Order explicitly exempting from review any regulation whose consideration by OMB "would conflict with deadlines imposed by statute."\textsuperscript{263} For example, it has held several EPA New Source Performance Standards (NSPS's) for more than a year, well beyond the statutory deadline for promulgation.\textsuperscript{264} It recently was reported that OMB, even more boldly, "is putting pressure on EPA to significantly weaken a draft rule proposing new truck standards for particulate and nitrogen oxide emissions just days before a district court deadline for action on the rulemaking."\textsuperscript{265} The applicable court order had clearly stated that "OMB review is not only unnecessary, but in contravention to applicable law."\textsuperscript{266}

Although a cost-benefit analysis consists of weighing costs against benefits, critics have charged that OMB fails to consider rules' benefits. OMB's response to a congressional committee questionnaire does little to rebut this allegation.\textsuperscript{267} While the Executive

\textsuperscript{261} See OMB Response to House Questionnaire, supra note 83 (Question 16), reprinted in Hearings, supra note 83, at 981-82 ("Even where economic considerations are entirely precluded as a basis for a rule, an assessment of the economic impacts can be extremely valuable. . . . In situations where an agency is precluded by statute from basing a decision on benefit-cost analysis, OMB reviews the regulation with that constraint in mind.").

\textsuperscript{262} See id. OMB simply asserts: "[T]he results may be useful later when changes in the authorizing statute are being considered."

This shows a failure to understand the reason for prohibiting economic considerations, namely, that the regulation secures benefits not easily quantified, and therefore prone to de-emphasis in a cost-benefit calculation.

\textsuperscript{263} E.O. 12,291, supra note 1, § 8(a)(2).

\textsuperscript{264} See NSPS case study, infra text accompanying notes 350-70; accord Daniel Testimony, supra note 46, at 82-83 (noting that several NSPS's were delayed "interminably" beyond the August 1282 deadline).

\textsuperscript{265} OMB Raises Big Concerns With Heavy-Duty Truck Rule as Court Deadline Nears, Inside EPA (Inside Wash. Pubs.) 9 (Oct. 12, 1984). The rule ultimately was released by OMB before the deadline. See EPA Last Week Proposed Particulate and Nitrogen Oxides Standards for Trucks, Inside EPA (Inside Wash. Pubs.) 9 (Oct. 19, 1984); the rule was published at 49 Fed. Reg. 40,258 (1984).


\textsuperscript{267} See OMB Response to House Questionnaire, supra note 83 (Question 3), reprinted in Hearings, supra note 83, at 974 ("We do not, however, require agencies to calcu-
Order establishes cost-benefit analysis and net benefit maximization as the criteria by which OMB should judge rules, OMB officials admit that their regulatory review can be simply a means of assuring that the rules comply with the "cosmic presidential policies," as OMB staff see them.\textsuperscript{268} As one key OMB official notes, "debate of the merits of the economic analysis [of EPA] doesn't help" resolve the real issues; where OMB has budgetary, philosophical, or political problems with a rule, the regulatory analysis is used as "a key" in holding up or changing the EPA action.\textsuperscript{269}

OMB staff report that "common sense is an important constituent" of the Office's review,\textsuperscript{270} and that the Office dislikes "command and control" regulations, favoring instead "market incentive" approaches.\textsuperscript{271} And, as might be expected, a pivotal review criterion is the political impact of the rule; OMB management always has its "political antennae" out.\textsuperscript{272} OMB's "political antennae" often pick up strong signals from industry transmitters.\textsuperscript{273} Similarly, interagency political disputes are often waged at OMB; for example, if an EPA standard is projected to put the Department of Energy (DOE) to expense, OMB's budget examiners may weigh in for DOE, attempting to minimize the cost of the EPA rule.\textsuperscript{274}

\textsuperscript{268} Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); accord Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

\textsuperscript{269} Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); accord Daniel Testimony, supra note 46, at 6 ("[T]here was immense pressure brought by OMB on the agency to change [a rule] and it was purely philosophical, because there was no cost analyses [sic], cost-effectiveness studies or anything else that I think would have borne out any basis for changing that part of the reg.") (emphasis added).

\textsuperscript{270} Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983); accord J. Lash, supra note 204, at 24 (former OIRA Deputy Adm'r Tozzi "says he could 'tell in about four minutes if a rule made sense'").

\textsuperscript{271} Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983). Despite OMB's claimed push for market-based or alternative regulatory approaches, GAO investigators found that "OMB appears to make only a modest effort to encourage the use of other regulatory techniques as an alternative to simply establishing less restrictive standards." GAO Report on 12,291, supra note 24, at 4.

\textsuperscript{272} Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

\textsuperscript{273} See infra text accompanying notes 282-95.

\textsuperscript{274} See, e.g., High Level Radioactive Waste Disposal rule case study, infra text accompa-
b. Waivers & Exemptions from E.O. 12,291: OMB Oversight is Not Always a Cost-Benefit Review

A close look at OMB's use of exemptions and waivers demonstrates that if an EPA action relaxes a standard, there is likely to be no effort on OMB's part to assess the costs and benefits of the action. In an OMB annual report on progress under E.O. 12,291, OMB openly admitted that it exempts from review rules "which relax or defer regulatory requirements, or which delegate regulatory authority to the states; such exemptions were granted only for nonmajor and noncontroversial regulations."\footnote{OMB, Executive Order 12291 on Federal Regulation: Progress during 1981, at 36 (Apr. 1982) [hereinafter cited as OMB 1981 Report on 12,291]. The 1982 OMB annual report on E.O. 12,291, supra note 187, at 30-31, dropped this statement, but lists several categories of deregulation among those EPA actions which are automatically exempt from review: (1) "pesticide tolerances [and] tolerance exemptions. . .except those which make an existing tolerance more stringent"; (2) "carbon monoxide and nitrogen oxide waivers. . .and deletions from the [NSPS] source categories list"; (3) "hazardous waste delisting petitions"; (4) "deletions from the 307(a) list of toxic pollutants; and suspensions of Toxic Testing Requirements"; and, (5) "TSCA Section 5 test marketing exemptions." (emphasis added).} When asked if a rule that is being relaxed to reduce compliance costs would have to go through "the time consuming RIA procedure," OIRA's former Administrator James Miller responded: "[I]f OMB . . . were convinced on the basis of evidence, however sparse, that such a reduction [in compliance costs] would occur, a waiver would be granted immediately."\footnote{\textit{Deregulation H. Q.}, supra note 214, at 17 (emphasis added).}

A look at OMB oversight of major rule relaxations bears this out. For example, while OMB engaged in a protracted argument with EPA over whether an RIA is required for the possible tightening of the particulate matter National Ambient Air Quality Standard (NAAQS),\footnote{See NAAQS case study, infra text accompanying notes 371-80.} it cleared EPA's revocation of the hydrocarbon NAAQS in two days with no formal RIA.\footnote{The rule was logged at OMB on March 9, 1982, and found consistent on March 11. \textit{OMB Worksheet, supra} note 216, at 3193. Final revocation of the hydrocarbon NAAQS was published at 48 Fed. Reg. 628 (1983). EPA explained that the revocation "is not major [rulemaking subject to the RIA requirement] because it involves revocation of a standard or guide, which in itself has required only limited regulatory costs. Revocation will result in no increased regulatory costs." \textit{Id.} at 628 (original emphasis). The Agency, it seems, here adopts the OMB view that \textit{relaxations} are not subject to the RIA and cost-benefit provisions of E.O. 12,291.} When a series of noise pollution rule relaxations and suspensions reached OMB, they
were, again, cleared in two days.\textsuperscript{279}

This perfunctory review of rule relaxations seems to indicate that if a rule is to be relaxed, OMB often is not concerned with whether the net societal benefits are greater with the rule intact or with the relaxation.\textsuperscript{280} Research has not uncovered a single instance of OMB's insistence that EPA maximize net benefits by increasing health or environmental protection.

C. Secrecy & Ex Parte Contacts at OMB

OMB long has been criticized for the secrecy with which it operates. The Office does not record or summarize for the public its meetings with outside parties or agency personnel. Secret OMB-agency arm-twisting sessions may be especially troublesome if OMB is passing on information or arguments as a conduit for outside parties, a concern which OMB steadfastly asserts is apocryphal.\textsuperscript{281}

1. OMB-Industry Contacts: Extensive, Secret, Unrecorded

OMB is a new focus of power in the federal bureaucracy to which many sophisticated attorneys turn if the rulemaking agency is likely to be unreceptive. Joan Bernstein, former EPA General Counsel, has gone so far as to suggest that an attorney representing a client on regulatory matters borders on incompetence if he or

\textsuperscript{279} Id. at 3153.

\textsuperscript{280} OMB now vigorously denies that it fails to review deregulatory measures. See OMB Response to House Questionnaire, supra note 83 (Question 2), \textit{reprinted in} Hearings, supra note 83, at 971-72 ("Virtually all of the Reagan Administration's 'relaxations' of pre-existing rules have been reviewed in detail by OMB before issuance."). Even taken as true, however, this response passes over the rub of the problem: does OMB fully consider the costs of regulations being relaxed, or benefits of possible increases in a rule's stringency? The Supreme Court's recent decision in the motor vehicles passive restraints case, Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co., 103 S. Ct. 2856 (1983), reversed a National Highway Traffic Safety Administration rule rescission targeted by the Task Force and OMB. The Court demanded that the Administration consider deregulatory measures potentially more cost-beneficial than a total rescission. See also supra note 267 (OMB states that agencies are not asked to calculate benefits foregone due to relaxation of regulations).

\textsuperscript{281} See, e.g., Wash. Post, Sept. 28, 1983, at A8, col. 4 (quoting Edwin L. Dale, OMB: "As for us being a conduit for industry views I think that's a distortion. It's entirely proper that we receive industry's views, but there are strict procedures [for that]. . . .Only the very top people [at OMB] can have any conversations with industry."); see also N.Y. Times, Sept. 28, 1983, at A1, col. 1 ("Mr. DeMuth said the office 'never did anything improper' and never acted as a 'back channel' as some have charged, for industry to get its way.").
she does not use OMB.\textsuperscript{283} OMB encourages such input.\textsuperscript{288} The Office sometimes actively solicits industry comments on specific rules. For example, former EPA Chief of Staff Daniel testified that he received industry comments on EPA rules after OMB had sent the rules to industry representatives, while the rules were under review at OMB, but well before their release to the public.\textsuperscript{284} OMB admits that on occasion the Office does go to industry to ask for comments on EPA rules.\textsuperscript{285}

As a result of this encouragement, OMB management spends much of its time meeting with industry representatives.\textsuperscript{286} Written comments from industry come “pouring into” OMB offices;\textsuperscript{287} as one staffer said, “what OMB sees is reflective of the lobbying

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\textsuperscript{283} Hearings on Role of OMB, supra note 31, at 28 (testimony of Joan Bernstein). Similarly, an article in the National Law Journal suggested that since OMB has gained so much power under the Executive Order,

the practitioner should make every effort, where appropriate, to communicate with the director [of OMB] to attempt to influence his views on a proposed rule in the direction of the client’s preference. In the absence of any ground rules, the possible approaches are limited only to the extent of the practitioner’s ingenuity. . . .

Quoted in, Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 12.

\textsuperscript{288} For example, Task Force Counsel C. Boyden Gray advised his industry listeners:

[I]f 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. . . .[L]awyers representing the individual companies and trade associations. . . .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 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.

C. Boyden Gray, Remarks at Transcription of Hall of Flags Reg Reform Briefing (April 10, 1980), reprinted in Hearings on Role of OMB, supra note 31, at 92.

OIRA’s former Administrator Miller suggested that there are several ways to solicit OMB action on behalf of a business: “Those who are interested will try many ways of making contact. The best way, of course, is to submit written material. Another is to arrange a personal visit. A third is to sit in front of the office door—which I’ve had some people do.” Deregulation H.Q., supra note 214, at 19.

\textsuperscript{284} Daniel explained that he later determined that the industry representative who had contacted him actually had intended to comment to OMB on the draft EPA rule, but had inadvertently contacted Daniel at EPA with his comments. Daniel Testimony, supra note 46, at 80.

\textsuperscript{285} According to OIRA Administrator DeMuth, OMB’s reputation is that they “are as tight as a drum.” DeMuth admitted, “I can’t say we have never gotten any input from industry. . . . There were a few cases in the hundreds of EPA rules coming over here from EPA where we couldn’t get an answer from EPA or anybody here. So we got them from industry. There is no secret about it.” N.Y. Times, Sept. 28, 1983, at A22, col. 3.


\textsuperscript{287} Interview with OMB, OIRA Official “A” in Washington, D.C. (May 17, 1983).
\end{footnotesize}
power" of the parties involved in rulemaking.\textsuperscript{288} OMB openly states that its officials "have met with countless numbers of groups," but will not say with whom these officials have met or what rules have been discussed, assertedly because OMB does "not compile records of meetings or of the subjects discussed."\textsuperscript{289}

The Office insists that it meets with interested persons on all sides of regulatory issues.\textsuperscript{290} Evidence indicates, however, that industry interests spend a disproportionate amount of time meeting with and passing documents on to OMB, as compared with public interest groups or consumers.\textsuperscript{291}

OMB refuses, in general, to record or summarize these meetings with outside parties.\textsuperscript{292} As a result, the only available public record of these meetings is that elicited during congressional hearings into OMB's role in rulemaking. In one hearing, OMB provided an admittedly incomplete list of OMB-outside party contacts during a two month period early in the Reagan administration. The list revealed that at least thirty-six such meetings were held, all but three with industry representatives.\textsuperscript{293}

This extensive OMB-industry communication has led several critics, including top-level EPA officials, to charge that the Office acts as a "conduit" of information and arguments from industry to EPA.\textsuperscript{294} The evidence seems to amply document this charge.\textsuperscript{295}

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\textsuperscript{288} Id.
\textsuperscript{289} See OMB Response to House Questionnaire, supra note 83 (Question 5), reprinted in Hearings, supra note 83, at 985-86.
\textsuperscript{290} Id.
\textsuperscript{291} For example, the author submitted to OMB an FOIA request for all documents sent by outside parties to OMB discussing roughly a dozen EPA rules under OMB review. Of the scores of documents produced, the author counted three from environmental, public health and consumer groups. The overwhelming majority of the documents were from industry representatives; many of these advertised to telephone calls and meetings between OMB and industry, some occurring after the public comment period. OMB Response to Author's FOIA Request (June 13, 1983) (on file with author).
\textsuperscript{292} The lack of public interest group input into OMB decisionmaking may be due in part to OMB's unwillingness to actively solicit these groups' views on EPA rules, and, probably in greater part, to the reluctance of public interest groups to allocate their scarce resources to what they view as a futile exercise.
\textsuperscript{293} OMB Response to House Questionnaire, supra note 83 (Questions 2, 6), reprinted in Hearings, supra note 83, at 985, 986.
\textsuperscript{294} Hearings on Role of OMB, supra note 31, at 58-61.
\textsuperscript{295} Former EPA Administrator Costle, who served under President Carter, warns that under the Executive Order, industry representatives are given an "extra inning" in which to attack EPA rules. Interview with former EPA Administrator Douglas Costle in Washington, D.C. (August 17, 1983).

Former EPA Chief of Staff Daniel, a veteran of the Gorsuch-Burford EPA, concurs, stating that OMB frequently intervenes in EPA rulemaking on behalf of industry. See Daniel
2. OMB-EPA Contacts

OMB’s criticisms of EPA rules are rarely written, but instead rendered in unannounced meetings between OMB and agency staff, or by telephone.296 These oral communications, almost without exception, are neither summarized in writing nor publicly logged for the EPA docket by either agency.297

One OMB official explains that the Office doesn’t like to “leave fingerprints.”298 The Office is willing to accept a requirement that

See also id. at 5.

296 See infra text accompanying notes 305-11.


298 Interview with OMB, OIRA Officials “B” and “C” in Washington, D.C. (May 3, 1983); Interview with Dan Egan, EPA, Radiation Programs Office, in Arlington, Va. (May 24, 1983); Interview with Allan Jennings, EPA, Office of Standards and Regulations, in Washington, D.C. (March 30, 1983); see also Section III.D., Case Studies, for a discussion of docketing practices by EPA in specific rulemakings. Both OMB and EPA report that although many rules have been modified as a result of OMB input, there is no comprehensive or accessible information on these changes. See Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1a.3.), reprinted in Hearings, supra note 83, at 2642; EPA Response to House Questionnaire, supra note 242 (Question 5(a)(3)), reprinted in Hearings, supra note 83, at 1560.


OMB officials offer several reasons for this secrecy. First, they argue that because of their extremely heavy workload and because there is only a handful of OMB staff keeping tabs on all of EPA, it is essential that they not waste their time writing down criticisms of EPA rules, or logging and summarizing EPA-OMB meetings. Interviews with OMB, OIRA Officials “B” and “C” in Washington, D.C. (May 3, 1983).

This is unconvincing. If OMB’s workload is onerous, this is largely self-inflicted, for it has not requested a significant increase in staff. Agency staff are also very busy, yet they typically are required to log and summarize meetings. Furthermore, the workload problem at OMB certainly cannot be the reason why EPA officials do not record and summarize OMB-EPA meetings.

A second reason given by OMB for not recording its criticisms is that by conducting its business orally, it can change its mind at a later date. Interview with OMB, OIRA Official “C” in Washington, D.C. (May 3, 1983). This permits late input by Budget Examiners, White House staff, or OMB management without providing EPA a piece of paper with which to protect itself.

The last reason OMB offers is, “If everything is to be shared [with the public], then advice is not candid and to the point and straightforward.” Hearings on Role of OMB, supra note 31, at 57 (testimony of James Miller, III, former OIRA Adm’r). This assertion is the refuge of those desiring governmental secrecy. One wonders why OMB would fear to be candid with communications intended solely to increase decisionmaking rationality. Regard-
its written comments on agency rules be publicly docketed, provided that its regulatory review powers are statutorily codified; it has, however, vehemently opposed any effort to require it (or an agency) to log, summarize or docket the Office’s oral contacts with the agency or outside parties.

On occasion, OMB does record its comments on EPA rules. In many of these cases, however, the comments are not placed in EPA’s public rulemaking docket. Further, OMB’s oral comments influencing an EPA rule often are not discussed in the rule’s preamble; neither are they consistently summarized for the docket—despite the fact that often the rule’s substance appears to have been influenced by OMB input.

OMB generally does not place in the docket copies of the draft or proposed rule which is sent to OMB for review. Little of OMB review is reduced to writing. Overall, even less of OMB’s input into

less, the public’s right to meaningful participation in EPA rulemaking must be balanced against OMB’s need for candor. If a rule’s substance is affected by OMB pressure, that influence should be reflected on the public record.

See Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 312, 339; OMB Response to House Questionnaire, supra note 83 (Question 9), reprinted in Hearings, supra note 83, at 977.

See, e.g., OMB Response to House Questionnaire, supra note 83 (Question 10), reprinted in Hearings, supra note 83, at 977-78 (logging or docketing requirement “is totally unworkable” and “would certainly lead to a bonanza of new work for administrative lawyers”).

OMB disfavors any agency initiative to divulge the full extent of OMB influence on rulemaking. When asked if it would object to an agency publicly docketing summaries of OMB-agency meetings, for example, OMB obliquely responded that the Office “would not favor a policy or practice by an agency which sought to, or acted to inhibit communications concerning informal rulemaking between an agency and the President or, in this instance, his agent, OMB.” Id. (Question 11), reprinted in Hearings, supra note 83, at 979.

See, e.g., Letter from Christopher DeMuth, OMB, OIRA Adm’t, to Joseph Cannon, EPA Assoc. Adm’t for Policy & Resource Mgmt. (July 9, 1982) (returning seven draft NSPS’s to EPA; absent from four of seven dockets: A-79-47 (metal furniture surface coating), A-80-05 (metal coils), A-80-06 (large appliances), A-79-50 (rotogravure printing of publications) (dockets located in EPA Docket Room, Washington, D.C.)); Letter from Jim J. Tozzi, OMB, OIRA Deputy Adm’t, to Kathleen Bennett, EPA Asst Adm’t for Air, Noise & Radiation (Nov. 18, 1982) (arguing against beverage can surface coating NSPS; not docketed for nine months, until after final rule promulgated). (Letters on file with author.)

Of the extensive OMB-EPA debate over the High Level Radioactive Waste Disposal rule, and over several NSPS’s, none is summarized for the docket or fully discussed in the rules’ preambles. See High Level Radioactive Waste Disposal rule case study, infra text accompanying notes 326-49; NSPS case study, infra text accompanying notes 350-70.

For example, drafts of NSPS’s for beverage can surface coating, large appliance surface coating and rotogravure printing of publications sent to OMB for 12,291 review were not placed in the docket. See EPA Dockets A-80-04, A-80-06, A-79-50, respectively (located in EPA Docket Room, Washington, D.C.).
EPA rulemaking is ever publicly docketed. This makes it almost impossible for the public or reviewing court to know the extent of OMB involvement in any given rulemaking, or in EPA rulemaking as a whole.

3. **OMB as a Conduit from Industry to EPA**

Former EPA Chief of Staff Daniel has charged that OMB frequently represents industry arguments to EPA as its own. This would not be surprising in light of OMB's active encouragement of industry contacts and its proclivity for undocumented communications with EPA.

OMB vigorously denies that it acts as a "conduit" for industry, nonetheless, the case studies below, Daniel's testimony,

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504 A memorandum from former EPA Administrator Ruckelshaus to EPA employees raised the prospect that EPA might begin to more fully document OMB comments. W. Ruckelshaus, EPA Adm'r, Contacts with Persons Outside the Agency (May 19, 1983) (memorandum to all EPA employees), reprinted in Hearings, supra note 83, at 1646 [hereinafter cited as Ruckelshaus memorandum]. The memorandum can be read as a change in existing policy, stating in part:

[All written comments received from persons outside the Agency (whether during or after the comment period) are [to be] entered in the rulemaking docket, and ... a memorandum summarizing any significant new factual information or argument likely to affect the final decision received during a meeting or other conversations is [to be] placed in the rulemaking docket.

Id. at 2 (emphasis added).

The broad phrase "persons outside the Agency" could include OMB staff; however, EPA's Office of General Counsel has stated that no change in EPA's policy regarding docketing of OMB comments is intended. Interviews with EPA, Office of General Counsel (OGC) Officials "G" and "H" in Washington, D.C. (June 8, 1983). One key attorney stated that "the policy will be determined in the first case to be adjudicated, rather than by EPA staff counsel. Interview with EPA, OGC Official "G" in Washington, D.C. (July 1, 1983). In other words, admitted the attorney, EPA staff are given little direction as to docketing of OMB contacts. Id.

505 Daniel Testimony, supra note 46, at 5, 82.

506 See supra note 281.

507 See infra text accompanying notes 325-80. As another example, OMB's position in the gasoline "lead phasedown" debate was reached after OMB secretly met with affected industries at least fourteen times and after OMB had received scores of documents from these industries, some of which are not in the EPA docket. Eight of these meetings were revealed when Congressman Moffett demanded a list of all meetings between Task Force or OMB personnel and interested parties to the lead phasedown. Letter from Christopher DeMuth, OMB, OIRA Adm'r, to Hon. Toby Moffett (Sept. 8, 1982). The Vice President's Office revealed that Task Force staff had met twice with oil industry interests, in June and July 1982, in response to industry demand. Letter from C. Boyd Gray, Counsel to the Vice President, to Hon. Toby Moffett (Aug. 20, 1982); Memorandum from Jane Kelly, Office of the Vice President, to Christopher DeMuth (Aug. 27, 1982) (attached to DeMuth letter to Moffett). Finally, a meeting of the Lead Industries Association with DeMuth took place on September 17, 1982, and a meeting of attorneys representing petroleum blenders with OMB,
and the EPA iron and steel industry effluent guideline rulemaking\textsuperscript{808} indicate that OMB does indeed act as a conduit for the views and data of both industry and other federal agencies. A key OMB

OIRA Regulatory Analyst Brian Mannix took place on October 7, 1982, according to letters revealed to the author in response to his FOIA request (June 13, 1983). (All materials on file with author.)

The Task Force openly stated that review of the gasoline lead regulations resulted from industry pressure. See Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing, Washington, D.C., Attachment: Existing Regulations to be Reviewed 3 (August 12, 1981) (copy on file with author). The shifts in OMB’s position throughout this rulemaking, in response to industry pressure, are well detailed in trade press such as Inside EPA (Inside Wash. Publs.) between December 1981 and October 1982.

\textsuperscript{808} Late in the Carter administration EPA proposed effluent guidelines, under the Clean Water Act, for iron and steel plants. See Proposed Rules, 46 Fed. Reg. 1858 (1981). These stringent proposed rules created an outcry in the iron and steel industry, which heavily lobbied both EPA and OMB for changes in the rules. See EPA docket for Iron & Steel Effluent Guidelines (two hundred and four volumes, including massive industry critiques) (located in EPA Library, Washington, D.C.). OMB showed the author a sample of the documents it received on the EPA proposal. Every document came from industry; the file was two inches thick and filled with data, some of which do not appear to be in the EPA docket.

OMB became involved in the final rulemaking prior to EPA’s internal review. Interview with EPA, Effluent Guidelines Division (EGD) Official “M” in Washington, D.C. (June 9, 1983). For example, OMB urged EPA to relax the “central treatment” portion of the rules. Interview with EPA, EGD Official “N” in Washington, D.C. (May 24, 1983). During its review, OMB received a thick stack of industry comments and documents, including extensive economic analyses, criticizing EPA’s “over-optimistic” economic data. See, e.g., Central Treatment: Addendum (March 11, 1982) (unsigned memo in OMB files for outside comments, recommending that OMB force EPA to complete an RIA prior to promulgation); Effluent Limitation Guidelines (ELG’s): Iron and Steel Industry Subcategory (undated, unsigned memo, four pages in length, in OMB files for outside comments, encouraging OMB to “exercise oversight of EPA’s finalizing of these regulations to ensure that they will be ‘least cost’ consistent with” E.O. 12,291); EPA’s Proposed Effluent Limitations Guidelines for “Best Available Technology” for the Iron and Steel Industry (Federal Register, 1/7/81) (unsigned, undated memo in OMB files for outside comments). This strongly suggests that OMB was acting as a conduit and amplifier of industry comments, as John Daniel has maintained. See testimony cited supra note 306.

As a court-ordered deadline approached, several meetings took place, at which industry representatives told OMB that certain “new” data they had gathered showed that EPA’s cost estimates should have been in the $1.7 billion per year neighborhood, rather than $350-400 million. Interview with EPA, EGD Official “M” in Washington, D.C. (June 9, 1983). The OMB public files include letters from iron and steel industry representatives advertising to industry-OMB telephone conversations and meetings at which the rules were discussed. Though they were submitted well after the close of the comment period, OMB told EPA to consider the data before promulgating the rules. Interview with EPA, EGD Official “N” in Washington, D.C. (June 9, 1983).

Ultimately, EPA Administrator Gorsuch told OMB that EPA would meet the court deadline with or without OMB approval. \textit{Id}. Nonetheless, the cost to industry under the final effluent guidelines was substantially less than that of the proposed rules. \textit{Id}.

For a review of the settlement agreement negotiations that ultimately ended the steel effluent guidelines dispute, see Miller, \textit{Steel Industry Effluent Limitations: Success At the Negotiating Table}, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,094 (1983).
official privately admitted that “on occasion, OMB has played the heavy for industry,” but also asserted that OMB’s intervention on industry’s part generally is required only when EPA staff keep high-level policymakers unaware of certain information.\(^{309}\)

The evidence indicates that OMB passes industry arguments and data to EPA without indicating the source of the comments, amplifying industry’s voice at EPA.\(^{310}\) OMB engages in these contacts after the close of the comment period as well.\(^{311}\)

4. OMB Actions to Quell Criticism of Secret Industry Lobbying

OMB management is fully aware of the criticism of its meetings with outside parties. The Office asserts in response: “[T]he very purpose of . . . Executive Order 12291 is to make regulatory decisions more transparent and accessible,”\(^{312}\) and they “emphatically disagree that [OMB’s] is a ‘secret’ role” in the rulemaking process.\(^{313}\)

The Office has taken several actions aimed at blunting the charges of behind-closed-doors decisionmaking. First, OMB Director David Stockman issued guidelines stating: “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.”\(^{314}\) OMB has no system to monitor whether its recommendations are heeded.\(^{315}\) The Stockman guidelines do not call for any docketing or recording of oral contacts, or of written legal or policy arguments. Only “factual materials” are covered, leaving a wide excep-

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\(^{310}\) See, e.g., discussion of OMB influence on EPA’s effluent guidelines for the iron and steel industry, supra note 308, and John Daniel’s testimony thereon, Daniel Testimony, supra note 46, at 5; see also NSPS case study, infra text accompanying notes 350-70.

\(^{311}\) For example, much of the OMB-industry contact during both the iron and steel effluent guideline review, see supra note 308, and the beverage can surface coating NSPS review, see infra text accompanying notes 359-65, took place after the close of the comment period.

\(^{312}\) Statement of Christopher DeMuth, Administrator for Information and Regulatory Affairs, OMB, Before the Subcommittee on Administrative Law & Governmental Relations of the House Judiciary Committee, on H.R. 2327, the Regulatory Reform Act of 1983 (July 28, 1983), reprinted in Hearings, supra note 83, at 906, 922.

\(^{313}\) OMB Response to House Questionnaire, supra note 83 (Question 11), reprinted in Hearings, supra note 83, at 988-89.

\(^{314}\) David A. Stockman, Director, OMB, Certain Communications Pursuant to Executive Order 12291, ‘Federal Regulation’ (memorandum M-81-9) (June 11, 1981), reprinted in Hearings, supra note 83, at 2811 [hereinafter cited as Stockman Guidelines].

\(^{315}\) GAO Report on 12,291, supra note 24, at 53-54. Davis, supra note 2, criticizes the Guidelines as inadequate to protect the integrity of informal rulemaking.
tion which allows—perhaps encourages—OMB staff to transmit the arguments they hear from outsiders to agencies.

The Office also cites a second action it has taken to moderate industry influence: OMB spokesmen assert that "only the very top people [at OMB] can have any conversations with industry."\(^{316}\) OMB cites memoranda to the effect that lower-level staff cannot meet with industry representatives to discuss rules.\(^{317}\) This prohibition, however, has gone unobserved with the full knowledge of OMB management,\(^{318}\) and does not inhibit OMB staff from discussing "paperwork" requirements of rules—requirements which often are so integrally linked with the rules' substance as to be inseparable.\(^{319}\) In addition, OMB staff are "encouraged... to review any written material" submitted by outside parties.\(^{320}\) Finally,

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\(^{317}\) See, e.g., Jim J. Tozzi, OMB, OIRA Deputy Adm'r, Memorandum to Desk Officers: Contacts with Non-Federal Employees (undated), reprinted in Hearings on Role of OMB, supra note 31, at 195 [hereinafter cited as Tozzi memo to Desk Officers].
\(^{318}\) For example, the Desk Officer reviewing the NSPS for the synthetic fiber industry met in February 1983 to discuss the rule with representatives of the Chemical Manufacturers' Association and the Man-Made Fibers Products Association. Follow-up letter from H. Adams, Jr., Man-Made Fiber Producers Ass'n, to Jim Tozzi and Don Arbuckle, OMB, OIRA (Feb. 18, 1983) (copy on file with author).

When asked by a congressional subcommittee why a Desk Officer at OMB had been allowed to meet with industry to discuss a rule, OMB responded that the meeting "concerned only the reporting and record-keeping requirements proposed in EPA's rule which OMB was required to review under the Paperwork Reduction Act." OMB Response to House Questionnaire, supra note 83 (Question 7), reprinted in Hearings, supra note 83, at 986-87. According to EPA's Federal Register notice, however, the NSPS for Synthetic Fiber Production Facilities involved no reporting and recordkeeping requirements for OMB to review under the Paperwork Reduction Act. See Standards of Performance for New Stationary Sources; Synthetic Fiber Production Facilities: Proposed Rule and Notice of Public Hearing, 47 Fed. Reg. 52,932, 52,943 (1982) ("This rulemaking does not involve a 'collection of information' as defined in the 1980 [Paperwork Reduction] Act. Therefore, the Provisions of the Paperwork Reduction Act... do not apply to this rulemaking.").

\(^{319}\) OMB recently has initiated a policy whereby Desk Officers must notify their superiors of any meetings they will have with outsiders regarding paperwork reviews, since a discussion of paperwork "could blend easily into a discussion of the substance of the regulation which contains the information collection." Gail Coad, OIRA Regulatory Policy Branch Chief, Contacts With the Public Involving Proposed Collection of Information (April 19, 1983 memorandum to Reg. Policy Desk Officers), reprinted in Hearings, supra note 83, at 2814. No prohibition of staff-level contacts with industry regarding paperwork is established, however, nor is the policy changed that Desk Officers may freely telephone outsiders regarding paperwork reviews. Id.

\(^{320}\) Tozzi memo to Desk Officers, supra note 817 (emphasis added). The policy's inefficacy in limiting the influence of outside parties on OMB is manifest; the OIRA Administrator candidly admitted, in fact, that the policy's raison d'être is primarily "a matter of protecting the staff from the deluge of phone calls that come in when you are trying to make a serious judgment on a controversial matter," rather than an attempt to actually limit
the loose strictures on industry contacts are wholly inapplicable to well over a dozen OMB managers, including those who sign off on all OMB rule reviews. The Office asserts, in response to critics of its secrecy, that it has established a public docket which includes “all material sent to OMB from outside parties about regulations.” The author could locate no such comprehensive docket.

D. Case Studies

In this section, three case studies illustrate OMB review of EPA rules under E.O. 12,291. In each case, the limited degree to which OMB’s input into the rulemaking is reflected on the public record will give the reader an idea of how difficult it is to comprehend OMB’s influence simply by relying on the rulemaking docket. Although the Home Box Office v. FCC court spoke in a slightly different context, its fear that secrecy might create “the possibility that there is here one administrative record for the public and this court and another for the [agency] and those in the know” appears to be well founded.

1. High-Level Radioactive Waste Disposal Rule

The disposal of highly radioactive waste from nuclear power plants and nuclear weapons programs has become a key point of outside influence on OMB. Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 351 (testimony of Christopher DeMuth).

See OMB Response to House Questionnaire, supra note 83 (Question 1), reprinted in Hearings, supra note 83, at 985 (enumerating those at OMB authorized to talk with outside parties interested in rulemaking, including staff as low as deputy associate directors, branch chiefs, a chief statistician, “and other senior staff as may be authorized on [a] case-by-case basis”).

Id. (noting that the OIRA administrator, deputy administrators and branch chiefs are authorized to meet with outsiders regarding rules).

See Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 309-10; see also OMB Response to House Questionnaire, supra note 83 (Question 8), reprinted in Hearings, supra note 83, at 987.

When the author requested access to the docket, he first was told that no such docket existed; when the testimony was pointed out, he was shown a thin set of seven folders containing comments on as many EPA rules. Conversations with OIRA Adm'r DeMuth's Office, OIRA Deputy Adm'r Bedell's Office (June 9 & 10, 1983). Pursuant to the author's FOIA request for any materials OMB had received from outside parties regarding a number of EPA rules under review, the Office produced scores of documents, almost exclusively from industry representatives, none of which had been in the OMB "docket." OMB Response to Author's FOIA Request (June 13, 1983) (on file with author).

public debate. The Nuclear Regulatory Commission (NRC) and the DOE ultimately will implement the high-level nuclear waste disposal program in the United States, while EPA is charged with promulgating environmental protection requirements for this program. Some of these wastes will remain lethally radioactive for ten thousand years.

After years of internal debate and redrafting, EPA sent its nineteenth draft of the proposed high-level radioactive waste disposal rule to OMB for review on December 24, 1981. OMB sent the regulatory package to NRC and DOE, each of which objected to the proposal on several grounds. A major squabble ensued between the agencies over the precise jurisdiction of each in adopting and implementing the rules. OMB, as traditional arbiter of interagency jurisdictional disputes and as E.O. 12,291 review authority, extended its review beyond the sixty-day period prescribed in the Executive Order and told EPA that it was required to get both DOE and NRC to sign off on the rule before OMB would even consider releasing it.

Interagency negotiations ensued, leading to important changes in the rule. For example, EPA finally agreed to a significant relaxation of the definition of “accessible environment”; the EPA draft definition included earth and groundwater one mile from the disposal site or more, while the definition after interagency negotiations included only earth and groundwater “more than ten kilometers” from the site.

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329 Interview with Official “K”, EPA Radiation Programs, in Arlington, Va. (May 24, 1983); accord Daniel Testimony, supra note 46, at 82.
330 The Office’s wide acceptance as the forum at which interagency disputes are waged stems from a long history of OMB mediation of jurisdictional and policy debates within the executive branch.
332 Id. This change came largely at NRC’s insistence. Id. A copy of the EPA draft rule sent to OMB (in author’s files), when compared to the proposed rule as published in the Federal Register, confirms that this change, among others, occurred during OMB review.
After several months of negotiations, and several more changes in the proposal, DOE and NRC finally agreed, in late summer or early fall, to sign on to the rules. OMB also opposed EPA’s plan to have the President announce the rules; some EPA staff assume that OMB feared it would be politically unwise to have the President make such a pro-regulatory announcement. Further, OMB and DOE sought to relax a provision limiting reliance on “institutional controls” (such as guards) to one hundred years when calculating the site’s theoretical safety. OMB argued for a period of reliance on such controls of several hundred years.

At this point, the proposal had been held up for ten months; finally, in an October 1982 meeting of EPA Administrator Gorsuch, OIRA Administrator DeMuth, and others, the EPA Administrator reportedly engaged in a “shouting match” with OMB, ultimately threatening to send the rule out “whether or not OMB liked it.”

Interagency arguments at the staff and policy levels continued, including discussions among EPA’s Administrator and Deputy Administrator, and OMB. Ultimately, resolution was reached; EPA agreed not to have the President announce the rules, to relax the institutional controls standards from one hundred years to “several hundred years,” and to ask for public comment on the “assurance requirement” issue. On December 29, 1982, over a year after

See High-Level Radwaste Rule, supra note 327, at 58, 196. “Accessible environment” is that area beyond the containment site into which radioactive waste release is to be measured when determining containment requirements. See EPA Radwaste DEIS, supra note 328, at 112-14.


34 Id.

35 Id. EPA had been planning to issue “Federal Radiation Protection Guidance,” which must be approved by the President; OMB opposed this. Id.

36 Id.

37 Id.


40 Id.
EPA submitted the proposed rule for review, the revised proposed rule was issued.\footnote{High-Level Radwaste Rule, supra note 327.}

Throughout the debate, asserts one EPA official, OMB’s Budget Examiners for DOE and NRC acted as “surrogates” for the agencies, for fear that the standards would impose excessive costs on their respective agencies.\footnote{Interview with Official “K”, EPA Radiation Programs, in Arlington, Va. (May 24, 1983).} EPA also received inquiries from industry representatives during the OMB review which revealed that OMB had provided industry with copies of the draft rule (which still had not been made public), and had asked for their comments.\footnote{Daniel Testimony, supra note 46, at 80.} According to EPA staff, OMB used the Executive Order as a “ruse” to disguise its political (the presidential announcement) and philosophical (the assurance requirements, the period of institutional controls) objections.\footnote{Interview with Official “K”, EPA Radiation Programs, in Arlington, Va. (May 24, 1983).} Indeed, OMB hardly mentioned the EPA Regulatory Impact Analysis (RIA).\footnote{Id.} The RIA showed that, to the extent they were quantifiable, the costs of disposal were largely insensitive to variations in the standards’ stringency.\footnote{See EPA, Draft Regulatory Impact Analysis for 40 CFR 191: Environmental Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes 42-59 (Dec. 1982).} It required the personal intervention and continued vocal support of the EPA Administrator to keep OMB’s review moving; even then EPA made important concessions.

OMB’s input into this proposed rule is not mentioned in the public record, although many of NRC’s and DOE’s comments are docketed.\footnote{See EPA Docket R-82-3 (located in EPA Docket Room, Washington, D.C.).} A note in the EPA docket titled “Briefings Held to Date for other Government Officials” fails to mention any of EPA’s meetings with OMB.\footnote{Id., Document II-E-1 (March 21, 1983).} According to EPA officials, none of the meetings were publicly announced or open.\footnote{Interviews with Official “K”, EPA Radiation Programs (May 24, 1983) and Official “L”, EPA Radiation Programs (April 27, 1983) in Arlington, Va.}

2. New Source Performance Standards

OMB has taken great interest in EPA New Source Performance Standards (NSPS’s) for new and modified stationary air pollution
sources, vetoing or bottling up many NSPS's sent to it for review. In fact, OMB has "returned" at least eleven NSPS's to EPA since mid-1981.\textsuperscript{560} An EPA official summarized OMB review of NSPS's this way: "[A]lthough the [Clean Air] Act requires us to issue these rules, OMB doesn't like technology-based standards—they sometimes seem upset when we bring up the statute."\textsuperscript{561}

EPA delivered all eleven of these NSPS's well before the statutory promulgation deadline of August 7, 1982.\textsuperscript{562} OMB held all of then well beyond that deadline; indeed, two NSPS's were held at least ten months past the date.\textsuperscript{563} One rule, the stationary internal combustion NSPS, was vetoed twice during more than two years of OMB review.\textsuperscript{564} Though the statutory deadline has passed, OMB has made clear its intention to continue to review NSPS's cur-

\textsuperscript{560} NSPS's vetoed include: (1) the NSPS for stationary internal combustion engines (vetoed twice), Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981) (first veto); Letter from Christopher DeMuth, OIRA Adm'r, to Joseph A. Cannon, EPA Assoc. Adm'r for Policy & Resource Mgmt. (Apr. 28, 1983) (second veto); (2) the volatile organic liquid storage vessel NSPS, see OMB 1981 Report on 12,291, \textit{supra} note 275, at 16; (3) the glass manufacturing plant NSPS; (4) the flexible vinyl coating and printing operations NSPS; (5) the surface coating of metal furniture NSPS; (6) the metal coil surface coating NSPS; (7) the graphic arts industry rotogravure printing NSPS; (8) the surface coating for large appliances NSPS; (9) the beverage can surface coating NSPS; (10) the rubber tire manufacturing NSPS (vetoes of NSPS's (3)-(10) noted in OMB 1982 Report on 12,291, \textit{supra} note 187, at 16); (11) the phosphate rock plant NSPS, Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981). (All letters on file with author.)

\textsuperscript{561} Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

\textsuperscript{562} The Clean Air Act deadline is found at 42 U.S.C. § 7411(f)(1) (1982) (requiring that all of the NSPS's listed in 40 C.F.R. § 60.16 (1983) be promulgated by Aug. 7, 1982). This fact was noted on each copy viewed by the author of \textit{Standard Form 83: Request for OMB Review (Under the Paperwork Reduction Act and Executive Order 12291)}, the form submitted by the agency to OMB with each of the NSPS packages (copies on file with author).


\textsuperscript{563} Interviews with EPA, Office of Standards & Regulations (OSR) Official "F" (June 8, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. The internal combustion engine and beverage can surface coating rules were held for a year past the deadline. Memorandum from Harvey Noack, EPA Office of Air Quality Planning & Standards (OAQPS), to Sheldon Meyers, Director, OAQPS (June 3, 1983) (listing these two and several other NSPS's OMB was holding at that point). The beverage can rule was published on August 25, 1983. 48 Fed. Reg. 38,728 (1983).

\textsuperscript{564} See \textit{supra} note 350; EPA first delivered the rule to OMB on June 29, 1981. The rule was vetoed on August 19, 1981; a revised rule was vetoed on April 28, 1983.
recently being developed well behind EPA's required schedule.\textsuperscript{355} This OMB review is in direct conflict with the Executive Order.\textsuperscript{356}

OMB has asserted that the NSPS's are not cost effective at the levels EPA sets, and that the standards are too prescriptive and should be more flexible.\textsuperscript{357} As a different matter, OMB held the stationary internal combustion engine NSPS for two years, essentially because of disagreement with EPA over what constitutes a "significant" source under the Clean Air Act.\textsuperscript{358}

The beverage can surface coating NSPS review\textsuperscript{359} illustrates how OMB may act as a conduit from industry to EPA. OMB logged in the final rule from EPA in May 1982; it took well in excess of a year to be reviewed.\textsuperscript{360} OMB's vigorous resistance was puzzling since the rule involved "basically no net control costs" to the overall industry, although certain operators would be subject to higher

\textsuperscript{355} See OMB Response to House Questionnaire, \textit{supra} note 83 (Question 15), \textit{reprinted in Hearings, supra} note 83, at 980-81.
\textsuperscript{356} E.O. 12,291, \textit{supra} note 1, § 8(a)(2) ("The procedures prescribed by this order shall not apply to...[a]ny regulation for which consideration...under the terms of this Order would conflict with deadlines imposed by statute...").
\textsuperscript{357} Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. OMB also expressed its concern that "two-tiered" standards, setting two different allowable emission levels for sources within the same category according to the control technology used, are anticompetitive and undesirable. \textit{Id.}
\textsuperscript{358} Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. The internal combustion engine NSPS was proposed July 23, 1979, 44 Fed. Reg. 43,152 (1979); the final rule was rejected twice by OMB, \textit{see supra} note 360. EPA officials complain that OMB has no authority even under the Executive Order's broad mandate to make expert technical judgments such as whether a source is "significant"; they argue that costs and benefits have little to do with OMB's intervention, for the rule is highly cost effective. Interviews with EPA, OSR Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

As another example of OMB attempts to encroach on decisions clearly appropriate for EPA's expert judgment, see A. Fraas, OIRA Regulatory Analyst, \textit{Reasonable Control Costs for Hydrocarbon Emissions} (December 1, 1982) (memorandum to OIRA Adm'r DeMuth) (copy on file with author). This memorandum, transmitted to EPA, suggests that "EPA's suggested incremental cost cut-off of $1,900 per ton" of NSPS hydrocarbon emission reduction is unreasonable high, and strongly hints that OMB should adopt a cut-off of $1,000 or less per ton. EPA officials suggest that such a cut-off mandate by OMB would be a clear usurpation of the Agency's authority to set standards at the level it determines is reasonable. Interviews with EPA, OSR Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

\textsuperscript{360} Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.
control costs.\textsuperscript{861} EPA officials began to suspect industry influence.\textsuperscript{862} Their suspicions were confirmed when OMB sent to EPA a detailed six-page memorandum, complete with charts and figures, absent from the docket, criticizing the rule and "mouth[ing] verbatim the industry position."\textsuperscript{863} Industry lobbying of OMB on the can coating rule did indeed take place; OMB received a thick package of documents, some not in the EPA docket,\textsuperscript{864} and some several months after the close of the comment period.\textsuperscript{865}

To summarize OMB review of EPA's NSPS program: (1) OMB has extended review well beyond the statutory deadline;\textsuperscript{866} (2) OMB has not confined its comments solely to criteria mandated by E.O. 12,291; (3) OMB has exercised de facto veto power over some rules by holding them in "rule review limbo"; and (4) amid indus-

\textsuperscript{861} Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

\textsuperscript{862} Id.

\textsuperscript{863} Id. See Memorandum from Jim Tozzi, OMB, OIRA Deputy Adm'r, to Kathleen Bennett, former EPA Ass't Adm'r for Air, Noise & Radiation (Nov. 18, 1982) (on file with author). This memo was docketed on August 26, 1983, after the final rule already had been published in the Federal Register.

\textsuperscript{864} OMB Response to Author's FOIA Request (June 13, 1983) (requesting all documents received by OMB from outside parties discussing, inter alia, the beverage can surface coating NSPS).

One letter from the Can Manufacturers' Institute to OMB's Tozzi, for example, notes: "As requested, we are enclosing the industry's recorded position." It goes on to update the industry data, suggest a proposed rule, and update arguments presented to EPA. Letter from Can Mfrs. Inst. to Jim Tozzi, OMB, OIRA Deputy Adm'r (Dec. 19, 1982) (on file with author).


\textsuperscript{866} On July 7, 1982, OMB finally rejected formally seven of the NSPS's. The flexible vinyl coating, metal furniture coating, coil surface coating, rotogravure printing, large appliance coating, beverage can coating, and tire manufacturing NSPS's were vetoed that day, according to OMB 1982 Report on 12,291, supra note 187, at 16. After extensive staff-level debate, EPA management met with OMB in October 1982 to hammer out an agreement. Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. Finally, following much "wordsmithing" by OMB and several relatively minor changes, OMB began to slowly release the rules for promulgation. Most of the originally rejected rules now have been published. Interview with EPA, OSR Official "F" in Washington, D.C. (June 8, 1983). The following final NSPS's have been published: Large Appliance Surface Coating, 47 Fed. Reg. 47,778 (1982); Metal Furniture Surface Coating, 47 Fed. Reg. 49,276 (1982); Metal Coil Surface Coating, 47 Fed. Reg. 49,606 (1982); Rotogravure Printing 47 Fed. Reg. 50,644 (1982); Beverage Can Surface Coating, 48 Fed. Reg. 38,728 (1983). The NSPS proposals for petroleum dry cleaners and rubber tire manufacture were published at 47 Fed. Reg. 56,118 (1982) and at 48 Fed. Reg. 2676 (1983), respectively. As of this writing, the internal combustion engine NSPS has yet to be promulgated. [Federal Regulations] 1 Env't Rep. (BNA) 121:0391 (Nov. 2, 1984).
try lobbying at OMB, the Office has made arguments that in some cases track industry positions verbatim.

NSPS's are issued pursuant to the Clean Air Act, which explicitly provides that all draft rules sent to OMB must be docketed prior to a rule's promulgation. OMB comments are required to be docketed as well. At the least, the Act directs that no rule may be based "in part or whole" on "any information or data which has not been placed in the docket," a command which would seem to require docketing of significant OMB comments. EPA's docketing practices appear to fall far short of the Act's mandates. At least five of the eleven NSPS docket dates fail to include any reference to OMB's veto of the rule or to the accompanying written materials from OMB, and most of the docket indicate absolutely no indication of OMB's extensive input into the rules.

3. National Ambient Air Quality Standard for Particulate Matter

The Clean Air Act charges EPA to develop health-based standards for ambient air concentrations of certain pollutants, which

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The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

368 Id. ("all written comments thereon by other agencies" as meaning all agencies other than EPA).

369 Id. § 7607(d)(6)(C).

370 See EPA Docket A-80-06 (large appliance surface coating NSPS) (no reference to OMB input, despite OMB's extensive input into the rules and its written veto of the rule in July 1, 1982); EPA Docket A-80-02 (petroleum dry cleaners NSPS) (no reference to OMB input, although OMB extensively criticized the EPA rules); EPA Docket OAQPS-79-05 (internal combustion engine NSPS) (the docket includes four internal EPA memos which make brief reference to OMB's problems with the rule; see docs. IV-H-1, IV-H-2, IV-H-3, and IV-H-4. Neither of the two letters from OMB vetoing the rule is docketed. See supra note 350.); EPA Docket A-79-47 (metal furniture surface coating NSPS) (no reference to OMB's return of the rule or input into the rulemaking); EPA Docket A-80-05 (metal coil surface coating NSPS) (no reference to OMB's return of the rule or input into the rulemaking).

Only the internal combustion engine docket, OAQPS-79-05, even refers to OMB's review. See supra notes 364-65 and accompanying text regarding the beverage can docket. (All docket located in EPA Docket Room, Washington, D.C.)
"in the judgment of the Administrator . . . allow . . . an adequate margin of safety . . . to protect the public health." The D.C. Circuit has emphasized the statutory command that these National Ambient Air Quality Standards (NAAQS's) are to be solely health based, and that health protection may not be compromised to reduce compliance costs.

However, soon after EPA began reconsidering its NAAQS for particulate matter, discussion between OMB and EPA ensued as to whether EPA should prepare an RIA. Ultimately, EPA agreed to hire a contractor to assess the costs and benefits of regulatory alternatives. In December 1983 EPA filed a formal draft RIA for the standards, and docketed a cost-benefit analysis of alternative standards.

Some industry representatives, particularly the American Iron and Steel Institute (AISI), favor a relaxation of the particulate matter NAAQS. The original draft of the contractor study, however, indicated that tightening the standard, rather than loosening it, would create the greatest net societal benefit. Industry attacked the contractor study when this result was revealed.

OMB also has criticized the study, objecting in detail to several of the studies upon which it relies. EPA's former Chief of Staff

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774 See EPA, Regulatory Impact Analysis on the National Ambient Air Quality Standards for Particulate Matter (Dec. 1983); Argonne National Laboratory, Costs and Air Quality Impacts of Alternative National Ambient Air Quality Standards for Particulate Matter (Jan. 1983) (Technical Support Document prepared for EPA). EPA states in the preamble to its proposal: "Neither the draft RIA nor the contractor reports have been considered in issuing this [NAAQS] proposal. The Administrator has not seen these documents nor has he been briefed on their contents." 49 Fed. Reg. 10,408, 10,421 (1984).
776 AISI went so far as to argue: "[W]e seriously question whether an RIA is required . . . EPA has uniformly interpreted Executive Order 12291 as requiring an RIA only when there is an adverse impact on industry, which would not be true in this instance. Since a proper revised standard would be somewhat less stringent than the present standard, there would be no adverse impact on industry." Letter from E.F. Young, AISI, Vice President, Energy and Environment, to Richard Morgenstern, EPA, Office of Policy Analysis (Oct. 29, 1982), EPA Docket A-79-29, Document II-D-87, attachment (original emphasis) (located in EPA Docket Room, Washington, D.C.). Cf. supra note 278 (EPA drafted no RIA for hydrocarbon NAAQS revocation because the revocation would not increase regulatory compliance costs).
complained that during the NAAQS review, OMB "kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute." Vice President Bush himself, apparently prompted by communications from Bethlehem Steel, joined OMB's effort to impress upon EPA the steel industry's concern that the standards not produce undesirable economic impacts.

The EPA docket for this rule revision contains the correspondence to and from the Vice President. There is, however, no record of communications between OMB and the steel industry, or of OMB's input into the rule.

IV. Judicial and Legislative Remedies to Preserve the Integrity of Informal Rulemaking

The measures proposed below are intended to further the rationality of, public accessibility to, and accountability for informal rulemaking. Under existing law, much can be accomplished by holding OMB to the terms of the Executive Order, protecting agency authority and enforcing comment docketing requirements. Given the unsettled state of ex parte contacts law, though, legislative codification of a docketing requirement may be desirable. In addition, Congress should create a separate rule review authority, with codified procedures. Divesting OMB of this authority would protect agency decisionmaking from the considerable political influence which OMB exerts during E.O. 12,291 review.

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775 Daniel Testimony, supra note 46, at 81.
779 A letter dated December 13, 1983, from Walter F. Williams, President and Chief Operating Officer of Bethlehem Steel, to Vice President Bush notes that if EPA were to adopt a stringent NAAQS for particulate matter "we would have no option but to oppose the proposal." A December 16, 1983, cover letter to the Vice President from Rep. Lyle Williams of Ohio, enclosing the Bethlehem Steel letter, notes that the Congressman was "most fearful that the proposal of the wrong standard would jeopardize the modernization of the U.S. Steel Industry and, if that be the case, then we in government would be prolonging unemployment in the industry." Rep. Williams notes that while "EPA is not to consider economics, [certain standards] could be handled financially by the industry and thus not jeopardize modernization."

A December 20, 1983, letter from the Vice President to Walter Williams at Bethlehem Steel states, "I appreciate your thoughts on this [NAAQS] issue and have shared your letter with Bill Ruckelshaus." The Vice President also noted that a meeting with Bethlehem officials on the issue was to be arranged. (All letters on file with author; also available in EPA Docket A-79-29, docs. II-B-23, located in EPA Docket Room, Washington, D.C.)
A. Judicial Remedies

1. Preserving Congressionally Delegated Agency Authority

As this study and congressional investigators have asserted, OMB is able to substantially influence regulatory decisions delegated by Congress to the expert judgment of the EPA Administrator. This can constitute an impermissible shift of authority from the Administrator to the new “superagency,” OMB. Neither E.O. 12,291 nor any congressional authorization supports such a shift; the courts should prevent it.

To assure the integrity of regulatory decisionmaking, the courts need not insist on a hermetic seal between the agency and OMB. Interagency discussion to secure coordinated execution of the law, as advocated in Sierra Club, can be accomodated. However, when OMB’s influence becomes supervisory rather than advisory, the court must step in to protect the agency’s statutory delegation of authority.

In construing specific statutory delegations of authority to the EPA Administrator, the reviewing court should determine congressional intent regarding the role of technical expertise in the decisionmaking. The court’s analysis should also be informed by a careful review of EPA’s 1970 mandate, and by Congress’ longstanding view of EPA as a quasi-independent expert agency.

Where Congress states the specific factors to be considered in rulemaking, an agency decision influenced by other factors is improper and likely judicial grounds to strike down the rule. The reviewing court must ensure that OMB review under E.O. 12,291 does not effectively insert non-statutory factors into EPA’s decisionmaking calculus. In particular, it should forbid review where a rule is required by statute to be based on specified, non-economic criteria. The Executive Order contemplates this limitation, provid-

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381 See supra text accompanying notes 201-53; 326-80.
383 See supra note 1, § 3(f)(3).
384 See supra notes 100-03 and accompanying text.
385 Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981); see supra text accompanying note 40.
386 See supra text accompanying notes 73-81.
387 EPA was created pursuant to Reorg. Plan No. 3 of 1970, supra note 76.
388 See supra notes 78-80.
389 See supra notes 104-18 and accompanying text; see also note 148.
ing for OMB review only to the extent permitted by law.\textsuperscript{390} In the end, the reviewing court should keep in mind the Supreme Court’s admonition, “[I]f the word discretion means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience.”\textsuperscript{391} Thus, where a statute expressly commits a decision to the expert judgment of the agency administrator, the presumption should be that Congress intended to have the administrator make that decision free from OMB pressure.

2. \textit{Restricting Ex Parte Contacts}

Responding to judicial and public concern, EPA Administrator William Ruckelshaus instituted a policy requiring all rule-related written communications received by EPA from outside parties and summaries of all substantial rule-related oral contacts to be docketed.\textsuperscript{392}

OMB’s comments to EPA are at least as appropriate for docketing as are those of outside parties. The Office asserts: “We believe that all of our comments [on rules] are significant.”\textsuperscript{393} In fact, OMB comments often are remarkably influential on the shape of EPA rules; this argues strongly for their disclosure on the record for public and judicial scrutiny.

OMB argues that in order to have frank, candid and open policy discussion with agencies, its communications generally should be off the record.\textsuperscript{394} This, of course, does not rebut a requirement to disclose communication of factual materials.\textsuperscript{395}

Even policy-oriented discussions, conducted at the lower staff levels, would not seem to merit exemption from the APA’s requirement that the public and the courts be informed of the basis of agency actions. Former EPA Administrator Douglas Costle has suggested that where OMB staff are acting in their day-to-day role as overseers, they must yield any presumed mantle of executive

\textsuperscript{390} See, e.g., E.O. 12.291, supra note 1, §§ 2, 6(a), 7(e), 7(g).


\textsuperscript{392} Ruckelshaus memorandum, supra note 304.

\textsuperscript{393} OMB Response to House Questionnaire, supra note 83 (Question 8), reprinted in \textit{Hearings}, supra note 83, at 976 (emphasis added).

\textsuperscript{394} See, e.g., id. (Questions 10, 11), reprinted in \textit{Hearings}, supra note 83, at 977-79.

\textsuperscript{395} ACUS Recommendation 80-6, 1 C.F.R § 305.80-6 (1984) recommends docketing of factual contacts between executive office staff and agencies.
privilege.\textsuperscript{396} Withholding the privilege for staff-level contacts does not conflict with \textit{Sierra Club v. Costle},\textsuperscript{397} with executive privilege case law,\textsuperscript{398} or with the \textit{Vermont Yankee} proscription of judicially created, non-statutory procedural requirements.\textsuperscript{399}

The reviewing court should apply principles of ex parte contacts doctrine\textsuperscript{400} to OMB contacts during E.O. 12,291 rule review. Specifically, the court should require that:

1. All written material received by OMB from outside parties regarding a rulemaking be placed in the agency's rulemaking docket.

2. All substantial oral communications between OMB and outside parties going to the merits of a rule be summarized and placed in the agency's rulemaking docket.

3. OMB be prohibited, after the comment period closes, from discussing the rulemaking with parties outside the federal government.

4. OMB-agency communications, if written, be docketed by the agency; oral communications, if going to the merits of a rule or if merely "conduit" communications,\textsuperscript{401} be summarized and

\textsuperscript{396} Interview with Douglas Costle, former EPA Adm'r, in Washington, D.C. (Aug. 17, 1983).

\textsuperscript{397} 657 F.2d 298, 404-08 (D.C. Cir. 1981). As discussed supra notes 173-78 and accompanying text, \textit{Sierra Club} held that a strictly policy-oriented meeting involving the President himself and the EPA Administrator need not be docketed. However, as has been pointed out by Professor George Eads and others, the \textit{Sierra Club} opinion cannot be used to justify cloaking in secrecy OMB-EPA staff level contacts. \textit{See Hearings, supra} note 83, at 1138 (testimony of George Eads) ("I was amused to . . . see the Reagan Administration attempt to cloak their oversight process with [Sierra Club] . . . .[W]ere the Reagan administration to have adopted the procedures that Judge Wald found acceptable in \textit{Sierra Club} and adhered to them in both spirit and letter, much of the controversy that its oversight program has generated would have been avoided."). The \textit{Sierra Club} court was reviewing an EPA record which included docketed summaries of all of the interexecutive meetings, save the presidential meeting, 657 F.2d at 404, and specifically noted that all contacts upon which the agency relied had been docketed, \textit{id.} at 408 & n.529.

\textsuperscript{398} \textit{Vermont Yankee} certainly does not speak against judicial insistence that agencies comply with the APA's fundamental requirement to make available to the public the comments it receives, to fully explain the basis of its regulatory decisions, and to supply the reviewing court with an adequate record of the agency decision. \textit{See, e.g., Motor Vehicles Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co.}, 103 S.Ct. 2857 (1983) (agency must explain fully the bases for regulatory decisions); \textit{Citizens to Preserve Overton Park v. Volpe}, 401 U.S. 402 (1971).

\textsuperscript{400} \textit{See supra} text accompanying notes 140-59.

\textsuperscript{401} \textit{See supra} text accompanying notes 305-11.
docketed.\textsuperscript{403}

Because of OMB's lack of technical sophistication and industry's influence on OMB decisionmakers, a reviewing court aware of extensive OMB-industry contacts during an agency rulemaking may wish to temper the traditional judicial deference to agency expertise.\textsuperscript{403}

Docketing of ex parte communications is needed to preserve the agency's decisionmaking integrity.\textsuperscript{404} Docketing enables non-parties to the communication to rebut its substance, resulting in more reasoned decisionmaking. This rationale is fundamental to the APA's informal rulemaking procedures.\textsuperscript{405} Furthermore, docketing is necessary to convey to the reviewing court an accurate portrait of the facts and arguments before the agency during the rulemaking. Only in this way can the court take the "hard look" required to determine agency rationality. Finally, advocates of centralized review who argue that OMB rulemaking input is necessary to ensure bureaucratic accountability must recognize the need for disclosure of OMB's review process and contacts with outside parties. Only with such disclosure may OMB be held accountable for its decisions and for the forces influencing these decisions.

\textsuperscript{403} Cf. ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) (recommendating docketing of all conduit contacts, and of material factual information transmitted by Executive Office of the President staff to agencies; the recommendation also urges agencies to "consider the importance" of allowing rebuttal of important new issues or data presented in intraexecutive communications).


The agency's technical expertise is normally given prevailing weight, because the procedures prescribed by the APA create a sense of confidence in the result by reason of the fact that they insure interested parties a full opportunity to make submissions and respond to comments already made. Such confidence, however, cannot result if this full opportunity is denied, as where pertinent communications are received in secret by the agency.

\textsuperscript{405} In Oversight Subcomm. Report on Executive Privilege, supra note 79, at 17, a key House subcommittee with jurisdiction over EPA recommends that OMB and all federal agencies insure that all regulatory review communications under E.O. 12,291 be in writing and be docketed. The report further recommends that OMB maintain a public file identifying all contacts with outside parties about regulations subject to review under E.O. 12,291, and include in the file a written summary of each such contact. Finally, the report recommends that OMB maintain a public file containing all written material provided to OMB on regulations reviewed under E.O. 12,291.

B. Statutory Remedies

1. Congressional Authorization of Executive Review

Remedial legislation would be the most effective solution to OMB encroachment on agency discretion. For example, Representative Sam Hall's regulatory reform bill in the 98th Congress would have codified OMB review of agency regulations, while making it clear that the OMB Director would not have been permitted to "participate in any way in deciding what regulatory action, if any, the agency will take."\(^{406}\)

This legislation would be helpful. The careful student of E.O. 12,291 review would doubt, however, whether such a limitation on OMB's authority would be effective in light of the Office's broad powers over agencies, and the opportunity for sub rosa influence. Practically speaking, OMB "suggestions" often may become directives due to the Office's extensive powers.

A more effective approach to limiting unwarranted OMB influence would be to establish a more objective and open review authority wholly separate from the Office. Such an independent review board could be statutorily required to conduct its reviews on the record, to accept comments on the record from all persons, to avoid consideration of non-statutory criteria, to not displace agency authority, and to review only "major" rules of national importance.\(^{407}\) Any disagreement between this board and an agency could be followed by notification of Congress and resolution on the public record by the President, in accord with the regulatory reform statute's procedures. Only with objective overseers of the regulatory process, full disclosure, and congressional notification of "appeal" to the President can the goals of regulatory reform—full accountability of the bureaucracy and improved, unbiased regulatory decisionmaking—be achieved.

Any generic regulatory reform package codifying some form of executive review of rules should make the terms of such review as clear as possible. Such legislation should make it clear that authority statutorily delegated to an agency may not be displaced by the review board, that only informal regulations and not settlement agreements or more formal proceedings may be reviewed, and that only statutorily enumerated factors may be considered during re-

\(^{406}\) H.R. 2327, 98th Cong., 1st Sess. § 101(b) (1983) (proposed new 5 U.S.C. § 624(a)).

\(^{407}\) Cf. ABA Comm'n on Law and the Economy, supra note 2 (recommending procedurally limited presidential oversight of rulemaking).
view. Rules issued pursuant to statutory provisions precluding economic considerations or enumerating only non-economic bases for decision should not be reviewed.\textsuperscript{408}

2. Codification of Ex Parte Contacts Doctrine

Although current judicial interpretation of the APA and the due process clause can be invoked by the court to require docketing of significant OMB-industry communications and most OMB-agency contacts of substance, this result is not assured. No court has ruled squarely on the requirements for docketing of significant OMB-industry or OMB-agency contacts.\textsuperscript{409}

Therefore, to be certain that the public participation requirements and the judicial review provisions of the APA retain vitality, Congress should clarify the docketing requirements for OMB-industry and OMB-agency ex parte contacts. If Congress wishes to allow OMB rulemaking review to continue, it should at a minimum codify requirements that: (1) all written comments and all formal or informal drafts of rules passed between OMB and the agency be placed in the docket; (2) significant oral OMB-agency contacts addressing the merits of the rules be summarized and docketed; (3) all significant oral contacts between OMB and private parties be summarized and docketed, and all written OMB-private party contacts be docketed, at the rulemaking agency; and (4) post-comment-period contacts between OMB and outside parties on a rule's merits be forbidden, absent reasonable notice and opportunity for opposing interests to rebut. No recent regulatory reform bill would require such extensive "sunshine"; without it, however, we can only expect less accountable government and further erosion of the foundations of the APA.\textsuperscript{410}

\textsuperscript{408} See generally Sunstein, supra note 2; supra notes 260-66 and accompanying text.

\textsuperscript{409} See supra notes 160, 172 and accompanying text.

\textsuperscript{410} Bills requiring docketing only of written interagency communications fail to recognize that the vast majority of substantial interagency contacts are oral, and fail to account for the conduit contact. See, e.g., H.R. 2327, 98th Cong., 1st Sess. \textsection 101(c) (1983) (proposed new 5 U.S.C. \textsection 624(c)) (all written comments on rules by Director of OMB must be docketed); H.R. 3939, 98th Cong., 1st Sess. \textsection 102 (1983) (proposed new 5 U.S.C. \textsection 553(c)(2), (f)(1)(D) & (f)(1)(E)) (all written material from agency to OMB, and any "document" [presumably including OMB comments] containing "significant factual material of central relevance to the rulemaking," must be docketed; all changes in draft rules "which respond to" OMB comments must be explained on docket); S. 1080, 98th Cong., 1st Sess. \textsection 3 (proposed new 5 U.S.C. \textsection 553(d)(2), (f)(1)(B), (f)(1)(F), & (f)(1)(G)) (essentially the same as H.R. 3939's docketing provisions, but requiring docketing of "copies of all written comments") (emphasis added).
V. Conclusion

The twin goals of an executive regulatory oversight process should be to increase the accountability to the public of a sometimes unresponsive bureaucracy, and to ensure better, more impartial reasoning in rulemaking. Measured by these yardsticks, OMB review under E.O. 12,291 has been a failure. While OMB review has sometimes succeeded in encouraging agencies to bring their policies into line with the thinking of the Office's staff, OMB has not, for the most part, increased the accountability or rigor of analysis of the rulemaking process.411

The Office's propensity for secrecy and insistence on keeping its critiques of rules oral undermine the accountability of the regulatory decisionmakers. OMB's anti-regulatory bias, and the preferential access to Office staff enjoyed by industry, further erode the values of accountability to the public and reasoned government decisionmaking on the merits. The APA's public participation and judicial review provisions are hampered by off-the-record OMB review, and the rationale for the judicial doctrine granting expert agencies substantial deference is severely undercut by secret OMB pressure. Furthermore, congressional delegations of power to specific repositories of expertise—such as EPA—are violated by OMB influence on or control of rulemaking.

If some form of executive oversight of the rulemaking process is desired, oversight authority should be delegated to a body other than OMB. Congress and the courts should ensure that the review is above board, unbiased, on the merits, and observant of the letter and spirit of all relevant statutory requirements; OMB to date has not demonstrated that it can fulfill these goals.

Editor's Note:

On January 4, 1985, President Reagan signed Executive Order 12,498412 which, by its terms, will increase significantly OMB authority over agency regulatory activity. Under E.O. 12,498, all heads of executive agencies subject to the Order "shall ensure that all regulatory actions are consistent with the goals of the agency

411 But see GAO Report on Cost-Benefit Analysis, supra note 248 (concluding that despite the limitations of cost-benefit analysis, some major rules which were accompanied by an RIA were improved by the E.O. 12,291 requirements; noticeably absent from the GAO report, however, is any praise for OMB review of EPA rules). Cf. GAO Report on 12,291, supra note 24 (criticizing OMB E.O. 12,291 review).

and of the Administration.” The Order is aimed, inter alia, at thwarting regulatory actions contrary to administration policies before they even are initiated by the agencies. OMB is authorized to implement the Order, and likely will attempt to structure agencies’ regulatory priorities, much as it structures their budgetary priorities, only here without congressional or public review.

Under E.O. 12,498, each agency subject to E.O. 12,291 must develop a “Regulatory Program” laying out “all significant regulatory actions . . . planned or underway, including . . . the development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings.” OMB determines whether the Program is consistent with the “Administration’s policies and priorities,” and may include further regulatory or deregulatory actions. A regulatory action absent from the Regulatory Program, or materially different from an action described therein, shall not go forward without OMB approval, unless an emergency exists or a statutory or judicial deadline applies. OMB may, “to the extent permitted by law, return for reconsideration” any such rule.

E.O. 12,498 is less restrained in its grant of power to OMB than is E.O. 12,291. OMB is authorized to implement the Order only “to the extent permitted by law,” but this is a vague limitation given OMB’s authority to review and revise agency Regulatory Programs and delay agency action on rules absent from the Regulatory Program or materially different from an action described therein. The requirement of agency heads that all regulatory actions be consistent with administration policies is not expressly delimited by existing law.

Furthermore, unlike E.O. 12,291, E.O. 12,498 fails to require that

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418 Id. § 1(b) (emphasis added).
414 Id. § 4.
410 See supra note 7 and accompanying text.
416 See supra note 225 (noting that OMB was likely to seek such power).
417 E.O. 12,498, supra note 412, § 2(a).
418 Id. § 3(a)(i).
419 Id. § 3(a)(ii).
420 Id. § 3(c).
421 Id. § 3(d).
422 Id. § 4.
423 Id. § 3(a), (b).
424 Id. § 3(c).
426 See id. § 1(b).
even formal OMB "vetoes" of potential regulatory activities be divulged to the public.⁴⁸⁸ Again unlike E.O. 12,291,⁴²⁷ the Order fails to stipulate that its provisions shall not be construed as displacing discretion vested by law in an agency other than OMB. The broad provisions of E.O. 12,498, and the noticeable lack of limits placed on OMB authority, likely will expand OMB's power to supervise, off the public record, virtually all agency activity, however tenuously related to future regulation.

⁴⁸⁸ Compare id. § 3(d) with E.O. 12,291, supra note 1, § 3(f)(2).
⁴²⁷ Supra note 1, § 3(f)(3).