

ARTICLES

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

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This study was supported in part by a National Conservation Fellowship from the National Wildlife Federation. The author expresses his appreciation to Dean Richard A. Merrill, William Pedersen, Charles Holtman and many unnamed reviewers for their critiques of earlier drafts of this study. Any errors are the author's.

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When President Reagan signed Executive Order 12,291,¹ a simmering controversy over whether, and under what conditions, the President has the authority to supervise executive agency rulemaking² took on new significance. The Order delegates to the Office of

¹ 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note (1982) [cited hereinafter as E.O. 12,291]. The Order was signed on February 17, 1981.

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 accomodation 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 Env'tl. 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*].

³ 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.⁴ 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-

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].

See also House Gov't Operations Comm., *Budget and Accounting: Appointments-Offices*, H.R. Rep. No. 697, 93d Cong., 1st Sess. (1973) (to accompany H.R. 11,137), reprinted in 1974 U.S. Code Cong. & Ad. News 2778, 2783 ("Next to the President, the [OMB] Director is the most powerful person in the Executive Branch.") [hereinafter cited as H.R. Rep. No. 697].

yond the scope of this article,⁵ 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."⁶

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.⁷

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.⁸

A third source of OMB influence is its administration of the Paperwork Reduction Act.⁹ 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."¹⁰ 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.¹¹

⁵ CRS Study of OMB, *supra* note 4, is an excellent although somewhat dated study of the broad powers of OMB.

⁶ Interview with Jim Tozzi, former OMB, Office of Information and Regulatory Affairs (OIRA) Deputy Adm'r, in Washington, D.C. (June 14, 1983).

⁷ The EPA noise pollution control program's demise illustrates the fate of a program unpopular with OMB. An April 1981 OMB critique of EPA argued: "There is serious question of whether noise is an appropriate area for EPA regulation." OMB Critique of EPA Programs (internal OMB memo), *summarized in* Inside EPA: Special Report (Inside Wash. Pubs.) 1 (April 24, 1981). (The OMB memo fails to note that Congress explicitly has directed the EPA Administrator to control noise pollution in the Noise Control Act of 1972. 42 U.S.C. §§ 4901-4918 (1982).) Shortly thereafter, EPA's FY 1983 budget passback from OMB showed a complete elimination of the noise program's operating budget. *See EPA Takes Major Hit in FY-83, Purchasing Power Halved, 2,000 in Staff Cuts*, Inside EPA (Inside Wash. Pubs.) 1 (Oct. 2, 1981).

⁸ *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).

⁹ 44 U.S.C. §§ 3501-3520 (1982).

¹⁰ 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).

¹¹ *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,¹² 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's Paperwork Act implementation is reviewed in detail in *Oversight of the Paperwork Reduction Act of 1980: Hearing Before the Subcomm. on Information Mgmt. and Regulatory Affairs of the Senate Comm. on Govtl. Affairs, 98th Cong., 1st Sess. (1983)* (*see especially* Responses of OIRA to written questions submitted by Senator Levin, *id.* at 65).

¹² OMB tools to influence agency rules include:

- a) OMB's role as a reviewer of agencies' Regulatory Flexibility Analyses, which analyze the impacts of new rules on small business. *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982); *see generally* Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 Duke L.J. 213 (1982).
- b) OMB's traditional role as informal moderator of interagency disputes. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).
- 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].
- f) OMB's former role as coordinator of reorganizations in executive agencies. *See* CRS Study of OMB, *supra* note 4, at 62-66. The Reorganization Act, 5 U.S.C. §§ 901-912 (1982), expired on April 7, 1981, meaning that no reorganization plan may go forward until the Act is extended. *Id.* § 905(b); *see* H.R. Rep. No. 128, 98th Cong., 1st Sess. (1983).
- 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,¹³ proposed bills,¹⁴ and proposed executive orders,¹⁵ to its power, pursuant to the Antideficiency Act,¹⁶ to reappropriation 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.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.¹⁸

¹³ See OMB Circular A-19, *supra* note 12.

¹⁴ See *id.*

¹⁵ See OMB Memo on Proposed Executive Orders, *supra* note 12.

¹⁶ 31 U.S.C. §§ 1341(a), 1342, 1349(a), 1350, 1351, 1511-1519 (1982). OMB's power to apportion and reappropriation 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. 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).

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. See Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11 (1974); H.R. Rep. No. 697, *supra* note 3.

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.).

An Attorney General report drafted late in the New Deal also urged the President to exert more control, and argued for the creation of a central office of Federal Administrative Procedure. See Att'y Gen. Comm. on Admin. Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

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.¹⁹ 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.²⁰ 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.²¹

Subsequent executive orders under the Ford²² and Carter²³ 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).

¹⁹ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

²⁰ *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.

²¹ 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.

²² Exec. Order No. 11,821, 3 C.F.R. 926 (1971-75 Comp.), *reprinted in* 12 U.S.C. § 1964 app. at 592 (1976), *modified by* Exec. Order No. 11,949, 3 C.F.R. 161 (1977). The Ford Order required "Inflation Impact Statements" for "major regulations" of all executive branch agencies. *Id.* Roughly at the same time, Congress created the Council on Wage and Price Stability (CWPS), which reviewed a handful of key federal regulations each year and submitted its detailed economic assessment of the rules to the public record. Council on Wage & Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (1974) (codified as amended at 12 U.S.C. § 1904 (1982)); *see also* Eads, *Harnessing Regulation: The Evolving Role of the White House Oversight*, Reg., May-June 1981, at 20-21; Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 *Am. U.L. Rev.* 1138 (1977).

²³ Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *reprinted in* 5 U.S.C. § 553 note (Supp. III

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.²⁴ The continuing inefficacy of centralized presidential oversight spurred increasing debate in the legal community, including the seminal Cutler and Johnson article of 1975,²⁵ and influential follow-up work by Professor Bruff²⁶ and the ABA Commission on Law and the Economy.²⁷ Nevertheless, Congress repeatedly has declined to enact legislation authorizing some form of centralized presidential oversight.²⁸

2. *The Reagan Executive Order 12,291*

Less than one month after taking office, President Reagan signed Executive Order 12,291 on Federal Regulation.²⁹ The new Order is, in the words of an OMB veteran, "a completely different animal" from its predecessors;³⁰ without question, it vests much more power in OMB.

The Reagan Executive Order requires all executive³¹ agencies to

1979). The Carter Executive Order established a "Regulatory Calendar"—a compilation of upcoming rules—and created the Regulatory Analysis and Review Group (RARG). *Id.* RARG, staffed by CWPS, *see supra* note 22, picked a few major rules each year to analyze in detail and to critique on the public record. *See Eads, supra* note 22, at 19-26; DeMuth, *Constraining Regulatory Costs: Part I: The White House Review Programs*, Reg., Jan.-Feb. 1980, at 13.

²⁴ General Accounting Office, *Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulations* 45 (1982) [hereinafter cited as GAO Report on 12,291].

²⁵ Cutler & Johnson, *supra* note 2.

²⁶ Bruff, *supra* note 2.

²⁷ ABA Comm'n on Law and the Economy, *supra* note 2.

²⁸ *See Rosenberg, supra* note 2, at 227-29; *see also infra* notes 100-02 and accompanying text.

²⁹ E.O. 12,291, *supra* note 1.

³⁰ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

³¹ 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."³³ 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

³³ See E.O. 12,291, *supra* note 1, § 1(d).

³³ *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.

³⁴ See, e.g., *id.* §§ 2, 3.

³⁵ 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,³⁶ 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,³⁷ 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.³⁸ In *Sierra Club v. Costle*,³⁹ 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.*

³⁶ See Wash. Post, Aug. 12, 1983, at A-15, cols. 4-5 (noting demise of Task Force).

³⁷ See E.O. 12,291, *supra* note 1.

³⁸ See, e.g., ABA Comm'n on Law and the Economy, *supra* note 2; Bruff, *supra* note 2; Cutler & Johnson, *supra* note 2.

³⁹ 657 F.2d 298 (D.C. Cir. 1981).

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.

⁴¹ See Pedersen, *How Well Can OMB Regulate the Regulators?*, *Env'tl. Forum*, Aug. 1984, at 7, 10.

⁴² *Cf.*, DeMuth, *The Reagan Record: A Strategy for Regulatory Reform*, *Reg.*, Mar.-Apr. 1984, at 25, 26-29.

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.⁴⁵ 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*.

⁴⁵ See *infra* notes 275-80 and accompanying text; see also particulate matter NAAQS case study, *infra* notes 371-80 and accompanying text.

⁴⁶ See, e.g., high-level radioactive waste rule case study, *infra* notes 326-49 and accompanying text; EPA: *Investigation of Superfund and Agency Abuses (Part 3): Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 5-8, 79-83 (1983)* (testimony of John Daniel) [hereinafter cited as *Daniel Testimony*; hearings hereinafter cited as *Hearings on Superfund*].

⁴⁷ See *infra* notes 201-06 and accompanying text.

⁴⁸ 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:⁵¹ inherent in the President's constitutional authority as Chief Executive,⁵² and implicit in the "take care" clause,⁵³ his judicially created removal power,⁵⁴ and his authority to demand written opinions from his cabinet officials.⁵⁵ The advocates of presidential review, like Judge Wald in *Sierra Club*,⁵⁶ rely heavily on Chief Justice Taft's dictum in *Myers v. United States*⁵⁷ asserting that the President generally may "supervise and guide" subordinate executive officers' construction of statutes "to secure th[e] unitary and uniform execution of the laws." Professor Strauss has gone so far as to suggest that even presidential supervision of independent commissions' rulemaking generally is proper.⁵⁸

There is some merit in the proposition that, at least as to executive agencies, the President should have the authority to guide his subordinates' execution of the laws. As Chief Executive, he must "take care" that the laws are faithfully executed. There is little evidence, however, that the framers, having just escaped from the oppressive authority of King George, intended to vest implicitly in the President the absolute authority to control activities of the executive branch. As the *Myers* dissent noted, it seems implausible that the framers, politically astute, would have debated for hours

⁵¹ 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).

⁵² U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President. . . .").

⁵³ *Id.* § 3 (The President "shall take Care that the Laws be faithfully executed.").

⁵⁴ 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.

⁵⁵ 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).

⁵⁶ 657 F.2d 298, 406 & n.524 (D.C. Cir. 1981).

⁵⁷ 272 U.S. 52, 135 (1926).

⁵⁸ See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 662-66 (1984).

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.⁵⁹ Even as strong a proponent of centralized executive authority as Alexander Hamilton took pains to point out the President's limited authority over government.⁶⁰ 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."⁶¹ Furthermore, nineteenth century Supreme Court authority,⁶² early opinions of the Attorneys General,⁶³ and other authority⁶⁴ speak against an inherent presidential authority to control all executive agency activity.

Nonetheless, during the twentieth century claims to inherent presidential authority have proliferated.⁶⁵ Some commentators have welcomed such claims as the necessary offspring of the increasing complexities of modern-day government.⁶⁶ 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."⁶⁷

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

⁵⁹ *Myers*, 272 U.S. at 207 (McReynolds, J., dissenting).

⁶⁰ 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).

⁶¹ *Id.* No. 76, at 483 (A. Hamilton).

⁶² 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).

⁶³ 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.

⁶⁴ 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. Willoughby, *The Constitutional Law of the United States* 1156 (1910).

⁶⁵ 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).

⁶⁶ E.g., Cutler, *supra* note 51; Shane, *supra* note 2.

⁶⁷ 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).⁶⁸ 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,⁶⁹ and provides that substantive review by OMB may take place only "to the extent permitted by law."⁷⁰ Furthermore, "independent" agencies are exempted from mandatory OMB review.⁷¹ However, the Order's provisions, which in theory preclude conflicts between statutes and OMB review, are sometimes ignored or creatively interpreted in practice.⁷²

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.⁷³ Other legislation is detailed, setting forth specific decisionmaking criteria to guide the administrator's discretion.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.⁷⁵

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

⁷³ 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].").

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").

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, *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. §§ 9604-9606 (1982) (authorizing the President to take certain actions to respond to hazardous substance releases).

⁷⁶ Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 Comp.), reprinted in 5 U.S.C.A. app. at 70 (Supp. 1984) (creating the Environmental Protection Agency).

⁷⁷ E.g., Clean Air Act, 42 U.S.C. § 7401-7642 (1982); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); Noise Control Act, 42 U.S.C. §§ 4901-4918 (1982); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10 (1982).

to the executive and the public.⁷⁸ Congress views EPA as a repository of congressionally delegated power.⁷⁹ Legislation vests decisionmaking authority in EPA with a view to the Agency's mission orientation,⁸⁰ its technical expertise, and, some have argued, its

⁷⁸ Proposing the creation of EPA, President Nixon stated to Congress: "[N]ew independent agencies normally should not be created. In this case, however, a *strong, independent* agency is needed." Reorganization Plans Nos. 3 and 4 of 1970, Message from the President of the United States (July 9, 1970), H.R. Doc. No. 366, 91st Cong., 2d Sess. (1970) (emphasis added), reprinted in *Reorganization Plan No. 3 of 1970 (Environmental Protection Agency): Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess. 2, 5 (1970) [hearings hereinafter cited as *House Hearings on the Creation of EPA*].

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, Ass't 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.⁶¹

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,⁶² from what source does OMB's control authority derive? No statute may be said even implicitly to vest such authority in the Office.⁶³ The Executive Order itself expressly

⁶¹ 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." *Env'tl. Forum*, Aug. 1984, at 5 (quoting William Ruckelshaus, EPA Adm'r).

⁶² The power of OMB effectively to supervise EPA rulemaking is discussed *infra* notes 201-53 and accompanying text.

⁶³ 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). *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." *Id.* at 658 & n.16.

OMB asserts that E.O. 12,291, the Budget and Accounting Act, 31 U.S.C. § 1111 (1982), and the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1982), give it legal authority to request changes in EPA regulations. See Questions from the Subcommittee on Administrative Law and Governmental Relations for the Office of Management and Budget, August 2, 1983 (attachment to letter from Christopher DeMuth, OMB, OIRA Adm'r to Hon. Sam B. Hall, Subcomm. Chm'n, Sept. 2, 1983) (Question 14) [hereinafter cited as OMB Response to House Questionnaire], reprinted in *Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Govtl. Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 971, 980 (1983) [hearings hereinafter cited as *Hearings*].

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.⁸⁴ 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 domestic⁸⁵ action without Congress' blessing. The primary source of guidance in this field is *Youngstown Sheet & Tube Co. v. Sawyer*,⁸⁶ the *Steel Seizure Case*. Justice Jackson's oft-cited concurrence⁸⁷ proposes that where the President acts pursuant to an express or implied grant of power, his constitutional authority is at its maximum.⁸⁸ 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 . . . only by disabling Congress from acting on the subject."⁸⁹ 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.⁹⁰

More recently, the Court's somewhat inflexible approach to the separation of powers principle, as shown in *Immigration and Naturalization Serv. v. Chadha*,⁹¹ seems to emphasize that any action

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); *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").

⁸⁴ E.O. 12,291, *supra* note 1, § 3(f)(3).

⁸⁵ The President's powers respecting foreign relations may be more expansive than they are in the domestic context. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁸⁶ 343 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.

⁸⁷ *Id.* at 634 (Jackson, J., concurring) Justice Black's plurality opinion has been eclipsed in judicial and academic writings by Justice Jackson's concurrence. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); Bruff, *supra* note 2, at 471-72.

⁸⁸ 343 U.S. at 635-37.

⁸⁹ *Id.* at 637-38.

⁹⁰ *Id.* at 637. The Court's continued reliance on the Jackson analysis was confirmed in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁹¹ 103 S.Ct. 2764. The *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

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.”⁹³ The Chief Justice opined, however, in a frequently overlooked⁹⁴ 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.⁹⁵

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*.⁹⁶ 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.”⁹⁷ Similarly, the 1838 Supreme Court decision in *Kendall v. United States*⁹⁸ 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.

⁹³ 272 U.S. at 135.

⁹⁴ 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.

⁹⁵ 272 U.S. at 135.

⁹⁶ 347 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 *undelimited* authority formally to overrule the panel pursuant to statutory and regulatory procedures.

⁹⁷ *Id.* at 267.

⁹⁸ 37 U.S. (12 Pet.) 524 (1838). The Court denied the President the power to direct the

Attorneys General⁹⁹ 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.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,¹⁰¹ a congressional will to reject such review.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,¹⁰³ may reasonably be viewed as

Postmaster General's performance of his ministerial duty. Rosenberg, *supra* note 2, at 205, argues that *Kendall* "reflect[s] the nineteenth-century notion that the President may not direct the manner in which executive officers carry out their discretionary functions."

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).

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).

¹⁰¹ See *supra* note 83.

¹⁰² See, e.g., Rosenberg, *supra* note 2, at 227-34.

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:

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.*

¹⁰⁶ *See, e.g.*, 42 U.S.C. § 7409(b)(1) (1982) (EPA Administrator shall promulgate primary National Ambient Air Quality Standards “based on such [published health-based] criteria and allowing an adequate margin of safety, [as] are requisite to protect the public health”); *cf.* *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 510-11 (1981) (“When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.”).

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.

¹⁰⁸ 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

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.*¹⁰⁹

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

The same court reached a similar conclusion in *National Fed'n of Fed. Employees v. Brown*,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.¹¹¹

Other decisions confirm that it is for *Congress* to establish the factors to be considered in administrative decisionmaking.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.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

¹⁰⁹ *Id.* at 1150 (emphasis added).

¹¹⁰ 645 F.2d 1017 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 103 (1982).

¹¹¹ *Id.* at 1025 (emphasis added).

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] satisf[ied], 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.").

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. *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*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.”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,”¹¹⁶ the court reasoned that the Executive Order could not add a new basis for agency action.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.¹¹⁸

d. 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,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.

¹¹⁴ 573 F. Supp. 1168 (D.D.C. 1983), *appeal dismissed*, ___ F.2d ___ (D.C. Cir. 1984).

¹¹⁵ *Id.* at 1175.

¹¹⁶ *Id.* at 1174.

¹¹⁷ *Id.* at 1174-75.

¹¹⁸ See generally Bernstein, *supra* note 2, at 827.

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. NRDC*¹²⁰ 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

¹²⁰ 435 U.S. 519 (1978). *Vermont Yankee* strongly cautioned lower courts against imposing procedural requirements not found in the APA on informal rulemaking. For discussions of the *Vermont Yankee* decision, see Stewart, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1805 (1978); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345.

¹²¹ 5 U.S.C. § 551-559, 701-706 (1982).

¹²² See generally K. Davis, *Administrative Law Treatise* §§ 6:36-6:38 (1982 Supp.) (criticizing *Vermont Yankee* and noting continued judicial creativity).

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).

¹²⁴ See Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38 (1975).

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.¹²⁷

In informal rulemakings, where trial-type, quasi-adjudicatory¹²⁸ proceedings are not required, and no “conflicting private claims to a valuable privilege”¹²⁹ are involved, the courts have been circumspect about requiring agencies to avoid, or even to docket,¹³⁰ ex parte contacts. A notable exception is *Home Box Office, Inc. v. FCC*,¹³¹ in which the D.C. Circuit¹³² held that extensive ex parte contacts during a purely informal rulemaking vitiated an FCC rule, necessitating a remand to the Commission.¹³³

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).

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”).

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.

¹³⁰ “Docketing” is the practice of placing written materials and summaries of oral communications in a publicly available file.

¹³¹ 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

¹³² The lengthy per curiam decision, although of course unattributed, was “obviously authored” by Judge Wright. J. Mashaw & R. Merrill, *Introduction to the American Public Law System* 41 (1980 Supp.).

¹³³ 567 F.2d at 57.

In light of the Supreme Court decision in *Vermont Yankee*,¹³⁴ and subsequent D.C. Circuit decisions,¹³⁵ the continued vitality of the broad dicta in *Home Box Office* is suspect.¹³⁶ 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.¹³⁷

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.¹³⁸ 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

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

¹³⁵ See, e.g., *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

¹³⁶ For judicial treatment of ex parte contacts after *Vermont Yankee*, see, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 391-92 (D.C. Cir. 1981); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1216 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Hercules, Inc. v. EPA*, 598 F.2d 91, 126 (D.C. Cir. 1978); *United States Lines v. FMC*, 584 F.2d 519, 542 n.63 (D.C. Cir. 1978).

Some commentators suggest that *Vermont Yankee* may have overruled the broad *Home Box Office* language. See, e.g., Carberry, *Ex Parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 Duke L.J. 65; Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking: Home Box Office and Action for Children's Television*, 1978 Ariz. St. L.J. 69; Bruff, *supra* note 2, at 503.

¹³⁷ *Environmental Defense Fund v. Blum*, 458 F.Supp. 650, 659-61 (D.D.C. 1978).

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.¹³⁹

b. Principles Undermined by Ex Parte Contacts

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

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

When significant arguments or factual information is communicated to decisionmakers during rulemaking and not docketed for public comment, the extensive APA informal rulemaking procedures designed to ensure meaningful public participation in rulemaking¹⁴⁰ may become mere window dressing.¹⁴¹ The *Home Box Office* court, noting that "[c]ompromises, fall-back positions, and so-called 'real facts' are often reserved" for off-the-record communications,¹⁴² observed that where an agency "relied on these apparently more candid private discussions . . . the elaborate public discussion in these dockets has been reduced to a sham."¹⁴³

The APA's goals of ensuring meaningful public participation in

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

¹⁴⁰ See 5 U.S.C. § 553.

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

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

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

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

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

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

Judicial review is less meaningful when OMB-industry contacts are not divulged to the court. OMB may be influenced by these contacts, and in turn, the Office may influence EPA decisionmakers or may make its own decisions to veto or otherwise alter an EPA rule.¹⁴⁷ The administrative record delivered to the court by EPA would be a fictitious account of the actual 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.¹⁴⁸ Ex

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

¹⁴⁵ 5 U.S.C. §§ 704-706.

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

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

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

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

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

To assure that agencies engage in reasoned decisionmaking and accurate fact-finding, substantial contacts with outside parties should be divulged.¹⁵² Docketing allows for full disputation of arguments or data proffered 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 properly. . . but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary"); *United States Lines v. FMC*, 584 F.2d 519, 541 (1978) ("The agency's secrecy as to ex parte communications is particularly troublesome [and] necessarily calls into question whether the justifications put forth by the agency in its decision were in fact its motivating force."); see also Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 Yale L. J. 194, 198 (1979) ("Permitting ex parte contacts [allows] secret political intervention [which] may interfere with the agency's ability to make a reasoned decision based on the statutory criteria.").

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

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

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

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

The “reasoned decisionmaking” rationale for requiring docketing applies particularly to OMB-industry communications. A mission-oriented agency such as EPA reads and analyzes the whole administrative record, and thus is more likely than OMB to consider views and data tending to rebut those which are presented in ex parte contacts. On the other hand, OMB’s disproportionate interaction with industry¹⁵³ creates a distorted picture in the Office’s mind of the rulemaking docket that is before EPA, the reviewing courts, and the public. Further, OMB staff lack substantive expertise in many technical areas of EPA rulemaking,¹⁵⁴ and so may be swayed by sophistic technical arguments not subject to adversarial comment.

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

Signing the Government in the Sunshine Act¹⁵⁵ into law, President Ford remarked:

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

This rationale undergirds the “Sunshine” Act, the Freedom of Information Act¹⁵⁷ and the APA’s notice-and-comment rulemaking procedures.¹⁵⁸

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

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

¹⁵⁴ See *supra* text accompanying note 49.

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

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

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

¹⁵⁸ 5 U.S.C. § 553.

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

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

2. Interagency Contacts

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

a. OMB "Conduit" Contacts with EPA

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

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

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

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

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

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

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

Language in decisions of the D.C. District Court¹⁶⁴ and the D.C. Circuit¹⁶⁵ indicate that it may be improper for an agency not to summarize and docket conduit contacts received from another executive agency during informal rulemaking. Furthermore, authorities as diverse as the Department of Justice Office of Legal Counsel,¹⁶⁶ the Alliance for Justice (a public interest consortium),¹⁶⁷ and

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 Counsel (DOJ/OLC), which advised that post-comment-period intraexecutive comments would be proper, provided a "catalogue" of all oral and written communications between CEA and outside parties was docketed at the Department of Interior. This would prevent CEA from being a conduit for private parties. *Id.* at 1738;
- b) The DOJ/OLC memorandum advised OSM that any of the CEA-OSM contacts (described by the court as "extremely limited") that were part of the basis for a change in the rule should be revealed by OSM for the public record. There was no reason to believe OSM would not comply. *Id.* at 1739-40;
- c) OSM did indeed fully disclose all communications between CEA and the public, "most of which were duplicative of material in OSM files." *Id.* at 1740 n.9.

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

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

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

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

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

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

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

b. *Non-conduit Interagency Contacts*

i. *Sierra Club v. Costle*.

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

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

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

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

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

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

¹⁷⁰ *See infra* text accompanying note 299.

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

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

¹⁷³ 657 F.2d 298 (D.C. Cir. 1981).

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

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

ii. OMB executive privilege?

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

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

¹⁷⁴ *Id.* at 404-05.

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

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

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

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

¹⁷⁸ 657 F.2d at 400.

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

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

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

The rebuttable¹⁸⁴ presumption of executive privilege accorded to *presidential* communications logically must attenuate, eventually to in consequence, as executive authority is delegated farther from the Oval Office (for instance, to OMB staff). This attenuation is analogous to the attenuation of civil immunity for official acts.¹⁸⁵

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

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

¹⁸¹ 418 U.S. at 706 (emphasis added).

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

¹⁸³ 657 F.2d at 407.

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

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

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

III. OMB REVIEW OF EPA RULES: SOME EMPIRICAL OBSERVATIONS

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

A. Overview

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

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

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

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

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

¹⁸⁸ *Id.* at 5.

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.¹⁸⁹ 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.¹⁹⁰ About twenty percent of all rules reviewed by OMB were EPA rules;¹⁹¹ eight of these 1074 EPA rules were designated "major" under the Executive Order.¹⁹²

While, as of 1982, eighty-six percent of all draft rules sent by agencies to OMB had been "cleared without change,"¹⁹³ 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.¹⁹⁴ Roughly eight percent of all rules reviewed by OMB in 1981 and 1982 were found "consistent with minor change,"¹⁹⁵ sometimes undergoing "substantive modification."¹⁹⁶

As of the end of 1982, 101 regulations—or two percent of those

¹⁸⁹ *Hearings on Role of OMB*, *supra* note 31, at 114-15.

¹⁹⁰ 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, *supra* note 187, at 11, 27.

¹⁹¹ OMB 1982 Report on 12,291, *supra* note 187, at 11, 27.

¹⁹² *Id.* at 59.

¹⁹³ *Id.* at 11.

¹⁹⁴ 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, *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.

¹⁹⁵ OMB 1982 Report on 12,291, *supra* note 187, at 11.

¹⁹⁶ Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1.a.3.), reprinted in *Hearings*, *supra* note 83, at 2642.

reviewed by OMB—were returned to the agencies;¹⁹⁷ “returned” in some cases is a euphemism for “vetoed.”¹⁹⁸ Agencies had withdrawn eighty-one rules, in some cases upon receiving signals from OMB of an impending dispute.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.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].”²⁰¹ Some EPA employees long have contended that the agency has been “singled out” by OMB for especially close scrutiny;²⁰² OMB admits that it gives EPA special attention.²⁰³

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

¹⁹⁷ OMB 1982 Report on 12,291, *supra* note 187, at 11.

¹⁹⁸ See *infra* text accompanying notes 209-14.

¹⁹⁹ OMB 1982 Report on 12,291, *supra* note 187, at 11.

²⁰⁰ See *infra* text accompanying notes 246-53 (discussing internal EPA changes in response to OMB review).

²⁰¹ *Hearings on Superfund*, *supra* note 46, at 234 (testimony of Anne Burford).

²⁰² See *Special Report: Office of Management & Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 1976 Env’t Rep. (B.N.A.) 693.

²⁰³ Interview with OMB, OIRA Official “B” in Washington, D.C. (May 3, 1983).

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].

²⁰⁵ See, e.g., *OMB Midterm Analysis Gives EPA Poor Marks on Reg Reform, Other Programs*, *Inside EPA* (Inside Wash. Pubs.) 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 Relief²¹⁰—the now-disbanded "appeals board" from OMB decisions under the Executive Order.²¹¹ None of the forty-five rules "returned" to the agencies by OMB in 1981 was appealed to the Task Force.²¹²

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.²¹³ 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."²¹⁴

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."²¹⁵ 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.²¹⁶

²¹⁰ 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.

²¹¹ See E.O. 12,291, *supra* note 1, § 6 (setting forth role of Task Force). The Task Force was disbanded in August 1983. Wash. Post, August 12, 1983, at A-15, col. 4-5.

²¹² GAO Report on 12,291, *supra* note 24, at 53.

²¹³ OMB Response to House Questionnaire, *supra* note 83 (Question 7), reprinted in *Hearings*, *supra* note 83, at 976.

²¹⁴ *Deregulation H.Q.: An Interview on the New Executive Order With Murray L. Weidenbaum and James C. Miller III*, Reg., Mar.-Apr. 1981, at 22 [hereinafter cited as *Deregulation H.Q.*].

²¹⁵ Telephone interview with William Drayton, Jr., former EPA Ass't Adm'r for Planning & Mgmt. (April 28, 1983).

²¹⁶ 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.²¹⁷ When OMB does bring its power to bear, however, it often is very influential.²¹⁸

OMB’s power to “return” rules²¹⁹ 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.²²⁰ An additional sanction, presidential dismissal of the EPA Administrator, is an extraordinary measure.²²¹ Perhaps a fur-

²¹⁷ Interview with OMB, OIRA Official “A” in Washington, D.C. (May 17, 1983).

²¹⁸ See *infra* Section III.D., Case Studies.

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.

²¹⁹ 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).

²²⁰ 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).

²²¹ 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. *Id.*

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.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."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 bluntest 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.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.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.²²⁶

²²² *Daniel Testimony, supra* note 46, at 7.

²²³ *Id.* at 7-8.

²²⁴ Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (May 14, 1983).

²²⁵ *OMB Gearing to Control Agency Decisions at the Earliest Stage*, Inside OMB (Inside Wash. Pubs.) 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.*

²²⁶ See NAAQS case study, *infra* text accompanying notes 371-80. The rule was finally proposed on March 20, 1984. See 49 Fed. Reg. 10,408 (1984).

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.”²²⁷

Under EPA’s formal procedures OMB clears a proposed or final regulation, and the EPA Administrator signs it.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.²²⁹

Early OMB involvement compromises EPA’s role as the front-line 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.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.²³¹

b. Day-to-Day OMB Review of EPA Rules

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

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

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

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.

²³⁰ Telephone interview with William Drayton, Jr., former EPA Ass’t Adm’r for Planning & Mgmt. (April 28, 1983).

²³¹ For an excellent treatment of how the ideal federal agency’s risk assessment and risk management decisionmaking might proceed, see National Academy of Sciences, National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983). See especially *id.* at 33-49, discussing the interplay between science and policy in risk assessment and regulation.

most cases cleared within ten days.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.²³³

OMB review of most non-major rules must be cursory because of the volume of rules to be reviewed.²³⁴ "Major" rules receive substantially more scrutiny; the average time for review is over thirty days.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,"²³⁶ OMB almost never looks at the EPA rulemaking docket or at any public comments other than those sent directly to OMB.²³⁷ OMB does accept, and sometimes actively solicits, industry comments both written and oral;²³⁸ on rare occasions OMB receives comments from non-industry parties, but in general the "record" before OMB is distinctly one sided.²³⁹ EPA officials have charged that OMB has given draft EPA rules to industry for comment before the rules are available to the public,²⁴⁰ presenting industry a secret "first shot" at the rules.

c. *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-

²³² Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); see *OMB Worksheet*, *supra* note 216.

²³³ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

²³⁴ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²³⁵ *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 302 (testimony of OMB, OIRA Adm'r DeMuth).

²³⁶ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²³⁷ Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983); see also J. Lash, *supra* note 204, at 24:

The long rulemaking record, the legal basis of the rule, the opportunity for public comment were just too cumbersome for OMB. "We should read the record," says [former OIRA Deputy Administrator] Tozzi, "but we didn't." When OMB reviews a rule, [former OIRA Administrator] Miller testified, "we are not evaluating a record."

²³⁸ See *infra* text accompanying notes 282-95.

²³⁹ In response to the author's FOIA request, for example, OMB produced scores of letters, fact sheets, and other documents which oil refiners, lead producers and other industrial interests sent to OMB advocating relaxation or rescission of a single EPA rule, the gasoline "lead phasedown" regulations. Materials provided pursuant to author's FOIA request (June 13, 1983) (on file with author).

²⁴⁰ See, e.g., *Daniel Testimony*, *supra* note 46, at 5, 80.

For a discussion of OMB solicitation and acceptance of industry comments on EPA rules, see *infra* text accompanying notes 282-95.

view is neither smooth nor predictable. Regulatory packages sent to OMB may become enmeshed in disagreement for over a year.²⁴¹ 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.²⁴²

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,²⁴³ despite the Order's clear mandate that such deadlines be honored.²⁴⁴

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.²⁴⁵

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.²⁴⁶ 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.²⁴⁷ 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-

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.

²⁴² Letter from Joseph A. Cannon, EPA Assoc. Adm'r, Policy and Resource Mgmt., to Hon. Sam B. Hall, Chm'n, House Subcomm. on Admin. Law and Govtl. Relations (May 26, 1983) (enclosure) (Questions 5a.(6), 5b.(6)), *reprinted in Hearings, supra* note 83, at 1561-62 [hereinafter cited as EPA Response to House Questionnaire].

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).

²⁴⁵ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²⁴⁶ Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

²⁴⁷ EPA Response to House Questionnaire, *supra* note 242 (Attachment K), *reprinted in Hearings, supra* note 83, at 1615-18.

sionmakers and is essentially a waste of EPA's scarce resources.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.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.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.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.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.²⁵³ This goal seems to have been at least in part achieved.

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 Ass't 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].

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).

²⁵⁰ GAO Report on 12,291, *supra* note 24, at 51.

²⁵¹ GAO Report on Cost-Benefit Analysis, *supra* note 248.

²⁵² Interview with EPA, Radiation Programs Official "K" in Arlington, Va. (May 24, 1983).

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

²⁵⁴ *E.g.*, E.O. 12,291, *supra* note 1, §§ 2, 3.

²⁵⁵ *See, e.g.*, Gray, *Presidential Involvement in Informal Rulemaking*, 56 Tul. L. Rev. 863 (1982); *cf.* Rep. Frank Horton, Executive Order 12291 and the Conflict Between the Legislative and Executive Branches of Government, *reprinted in Hearings on OMB Control of OSHA Rulemaking, supra* note 204, at 103, 116-17.

²⁵⁶ *Compare* E.O. 12,291, *supra* note 1, § 1(a), with Administrative Procedure Act, 5 U.S.C. § 551(4) (1982).

²⁵⁷ Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

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.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.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."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.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."²⁶⁵ The applicable court order had clearly stated that "OMB review is not only unnecessary, but in contravention to applicable law."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.²⁶⁷ While the Executive

and accompanying text.

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.").

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.

²⁶³ E.O. 12,291, *supra* note 1, § 8(a)(2).

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 1982 deadline).

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).

²⁶⁶ *Natural Resources Defense Council, Inc. v. Ruckelshaus*, No. 84-758, at 8-9 (D.D.C. filed Sept. 14, 1984).

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.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.²⁶⁹

OMB staff report that "common sense is an important constituent" of the Office's review,²⁷⁰ and that the Office dislikes "command and control" regulations, favoring instead "market incentive" approaches.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.²⁷² OMB's "political antennae" often pick up strong signals from industry transmitters.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.²⁷⁴

late. . . what the benefits are that were lost or never gained due to the Executive Order.' Such calculations would be very difficult, speculative, and of little value to either our process or agency regulatory decision-making.") (quoting from Questionnaire). When an agency formally prepares an estimate of a rule's benefits, OMB review of the rule would include consideration of that estimate. See generally GAO Report on Cost-Benefit Analysis, *supra* note 248.

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).

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).

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'").

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.

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

²⁷³ See *infra* text accompanying notes 282-95.

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."²⁷⁵ 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."²⁷⁶

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),²⁷⁷ it cleared EPA's revocation of the hydrocarbon NAAQS in two days with no formal RIA.²⁷⁸ When a series of noise pollution rule relaxations and suspensions reached OMB, they

nying notes 326-49; see also *Daniel Testimony*, *supra* note 46, at 5 (citing OMB's adoption *in toto* of DOE position on EPA rule affecting DOE energy facilities).

²⁷⁵ 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).

²⁷⁶ *Deregulation H.Q.*, *supra* note 214, at 17 (emphasis added).

²⁷⁷ See NAAQS case study, *infra* text accompanying notes 371-80.

²⁷⁸ The rule was logged at OMB on March 9, 1982, and found consistent on March 11. *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." *Id.* at 628 (original emphasis). The Agency, it seems, here adopts the OMB view that *relaxations* are not subject to the RIA and cost-benefit provisions of E.O. 12,291.

were, again, cleared in two days.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.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.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

²⁷⁹ *Id.* at 3153.

²⁸⁰ OMB now vigorously denies that it fails to review deregulatory measures. See OMB Response to House Questionnaire, *supra* note 83 (Question 2), 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 nub 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).

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.²⁸²

OMB encourages such input.²⁸³ 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.²⁸⁴ OMB admits that on occasion the Office does go to industry to ask for comments on EPA rules.²⁸⁵

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

²⁸² *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.

²⁸³ 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.

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.

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.

²⁸⁶ Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

²⁸⁷ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

power” of the parties involved in rulemaking.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.”²⁸⁹

The Office insists that it meets with interested persons on all sides of regulatory issues.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.²⁹¹

OMB refuses, in general, to record or summarize these meetings with outside parties.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.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.²⁹⁴ The evidence seems to amply document this charge.²⁹⁵

²⁸⁸ *Id.*

²⁸⁹ See OMB Response to House Questionnaire, *supra* note 83 (Question 5), reprinted in *Hearings*, *supra* note 83, at 985-86.

²⁹⁰ *Id.*

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 adverted 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).

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.

²⁹² OMB Response to House Questionnaire, *supra* note 83 (Questions 2, 6), reprinted in *Hearings*, *supra* note 83, at 985, 986.

²⁹³ *Hearings on Role of OMB*, *supra* note 31, at 58-61.

²⁹⁴ 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

Testimony, supra note 46, at 82:

Mr. Gore. . . . [S]o the inescapable conclusion is that [OMB] just sat over there and acted as a back-door channel to let the corporations affected hotwire the regulatory process and get the result that they wanted. . . .

Mr. Daniel. I think you have correctly characterized it, yes.

See also id. at 5.

²⁹⁶ *See infra* text accompanying notes 305-11.

²⁹⁶ *Daniel Testimony, supra* note 46, at 82; *accord* Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

²⁹⁷ 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 1.a.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.

²⁹⁸ *Wash. Post*, July 10, 1981, at A21, col. 2 (quoting Jim Tozzi, OMB, OIRA Deputy Adm'r).

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;²⁹⁹ 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.³⁰⁰

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.³⁰¹ 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.³⁰²

EPA generally does not place in the docket copies of the draft or proposed rule which is sent to OMB for review.³⁰³ 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.

²⁹⁹ 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.

³⁰⁰ 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.

³⁰¹ See, e.g., Letter from Christopher DeMuth, OMB, OIRA Adm'r, to Joseph Cannon, EPA Assoc. Adm'r 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'r, to Kathleen Bennett, EPA Ass't Adm'r 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.)

³⁰² 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.

³⁰³ 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.³⁰⁴ 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.³⁰⁵ 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;³⁰⁶ nonetheless, the case studies below,³⁰⁷ Daniel's testimony,

³⁰⁴ 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 1648 [hereinafter cited as Ruckelshaus memorandum]. The memorandum can be read as a change in existing policy, stating in part:

[A]ll 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.*

³⁰⁵ *Daniel Testimony, supra* note 46, at 5, 82.

³⁰⁶ See *supra* note 281.

³⁰⁷ 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. Boyden 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 rulemaking³⁰⁸ 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. Pubs.*) between December 1981 and October 1982.

³⁰⁸ 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 305.

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 advertizing 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. *Id.* Nonetheless, the cost to industry under the final effluent guidelines was substantially less than that of the proposed rules. *Id.*

For a review of the settlement agreement negotiations that ultimately ended the steel effluent guidelines dispute, see Miller, *Steel Industry Effluent Limitations: Success At the Negotiating Table*, 13 *Env'tl. L. Rep.* (Env'tl. 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-

³⁰⁹ Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

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 905, 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,

³¹⁶ Wash. Post, Sept. 28, 1983, at A8, col. 4 (quoting Edwin L. Dale).

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 317 (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,³²¹ including those who sign off on all OMB rule reviews.³²²

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."³²³ The author could locate no such comprehensive docket.³²⁴

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"³²⁵ 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).

³²¹ 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").

³²² *Id.* (noting that the OIRA administrator, deputy administrators and branch chiefs are authorized to meet with outsiders regarding rules).

³²³ 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.

³²⁴ 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).

³²⁵ 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

public debate.³²⁶ 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.³²⁷ Some of these wastes will remain lethally radioactive for ten thousand years.³²⁸

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, 1981.³²⁹ 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 disputes³³⁰ 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.³³¹

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.³³²

³²⁶ See, e.g., F. Shapiro, *Radwaste: A Reporter's Investigation of a Growing Nuclear Menace* (1981).

³²⁷ See Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10,101-10,226 (1982); Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes: Proposed Rule, 47 Fed. Reg. 58,196, 58,197 (1982) [hereinafter cited as High-Level Radwaste Rule].

³²⁸ See EPA, Draft Environmental Impact Statement for 40 CFR 191: Environmental Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes (Dec. 1982) [hereinafter cited as EPA Radwaste DEIS]; see also High-Level Radwaste Rule, *supra* note 327, at 58, 199.

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.

³³¹ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

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.³³³ However, after nine months of delay OMB continued to have “philosophical” disagreements with the rule.

OMB staunchly opposed the proposed rule’s so-called “assurance requirements” establishing qualitative criteria for choosing a site.³³⁴ 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.³³⁵ 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.³³⁶

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,³³⁷ the EPA Administrator reportedly engaged in a “shouting match”³³⁸ with OMB, ultimately threatening to send the rule out “whether or not OMB liked it.”³³⁹

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.³⁴⁰ 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.

³³³ Interview with Official “K”, EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³³⁴ *Id.*

³³⁵ *Id.* EPA had been planning to issue “Federal Radiation Protection Guidance,” which must be approved by the President; OMB opposed this. *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Interview with EPA, Office of Standards & Regulations Official “E” in Washington, D.C. (June 6, 1983).

³³⁹ Interview with Official “K”, EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³⁴⁰ *Id.*

EPA submitted the proposed rule for review, the revised proposed rule was issued.³⁴¹

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.³⁴² 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.³⁴³ 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.³⁴⁴ Indeed, OMB hardly mentioned the EPA Regulatory Impact Analysis (RIA).³⁴⁵ The RIA showed that, to the extent they were quantifiable, the costs of disposal were largely insensitive to variations in the standards' stringency.³⁴⁶ 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.³⁴⁷ 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.³⁴⁸ According to EPA officials, none of the meetings were publicly announced or open.³⁴⁹

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

³⁴¹ High-Level Radwaste Rule, *supra* note 327.

³⁴² Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³⁴³ *Daniel Testimony*, *supra* note 46, at 80.

³⁴⁴ Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

³⁴⁵ *Id.*

³⁴⁶ 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).

³⁴⁷ See EPA Docket R-82-3 (located in EPA Docket Room, Washington, D.C.).

³⁴⁸ *Id.*, Document II-E-1 (March 21, 1983).

³⁴⁹ Interviews with Official "K", EPA Radiation Programs (May 24, 1983) and Official "L", EPA Radiation Programs (April 27, 1983) in Arlington, Va.

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-1981.³⁵⁰ 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."³⁵¹

EPA delivered all eleven of these NSPS's well before the statutory promulgation deadline of August 7, 1982.³⁵² OMB held all of them well beyond that deadline; indeed, two NSPS's were held at least ten months past the date.³⁵³ One rule, the stationary internal combustion NSPS, was vetoed twice during more than two years of OMB review.³⁵⁴ Though the statutory deadline has passed, OMB has made clear its intention to continue to review NSPS's cur-

³⁵⁰ 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, *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, *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.)

³⁵¹ Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

³⁵² 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 *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).

EPA submitted the final internal combustion engine rule on June 29, 1981, the volatile organic liquid storage vessels rule on June 25, 1981, Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981), the glass manufacturing rule in August 1981, and all of the other NSPS's listed in *supra* note 350 (except the phosphate rock NSPS) in May 1982. OMB 1982 Report on 12,291, *supra* note 187, at 16; Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

³⁵³ 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 and beverage can surface coating rules were held for a year past the deadline. Memorandum from Harvey Nozack, 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).

³⁵⁴ *See 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.

rently being developed well behind EPA's required schedule.³⁵⁵ This OMB review is in direct conflict with the Executive Order.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.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.³⁵⁸

The beverage can surface coating NSPS review³⁵⁹ 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.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

³⁵⁵ See OMB Response to House Questionnaire, *supra* note 83 (Question 15), reprinted in *Hearings*, *supra* note 83, at 980-81.

³⁵⁶ E.O. 12,291, *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. . . .").

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. *Id.*

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, *see supra* note 350. 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, 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 unreasonably 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.

³⁵⁹ The proposed NSPS for beverage can surface coating appeared at 45 Fed. Reg. 78,980 (1980). The final rule was published—after receiving congressional attention—on August 25, 1983. 48 Fed. Reg. 38,728 (1983).

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.³⁶¹ EPA officials began to suspect industry influence.³⁶² 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.”³⁶³ 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,³⁶⁴ and some several months after the close of the comment period.³⁶⁵

To summarize OMB review of EPA’s NSPS program: (1) OMB has extended review well beyond the statutory deadline;³⁶⁶ (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-

³⁶¹ Interview with EPA, Office of Standards & Regulations Official “E” in Washington, D.C. (June 6, 1983).

³⁶² *Id.*

³⁶³ *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.

³⁶⁴ 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).

³⁶⁵ See, e.g., Letter from Can Mfrs. Inst. to Jim Tozzi, OMB, OIRA Deputy Adm’r (Dec. 19, 1982); Handbook: Reasonably Available Control Technology for Beverage Can Surface Coating (Jan. 1983).

³⁶⁶ 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.³⁶⁷ OMB comments are required to be docketed as well.³⁶⁸ 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,"³⁶⁹ 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 dockets fail to include any reference to OMB's veto of the rule or to the accompanying written materials from OMB, and most of the dockets include absolutely no indication of OMB's extensive input into the rules.³⁷⁰

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

³⁶⁷ 42 U.S.C. § 7607(d)(4)(B)(ii) (1982) provides:

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 dockets 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.”³⁷¹ 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.³⁷²

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.³⁷³ In December 1983 EPA filed a formal draft RIA for the standards, and docketed a cost-benefit analysis of alternative standards.³⁷⁴

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.³⁷⁵ Industry attacked the contractor study when this result was revealed.³⁷⁶

OMB also has criticized the study, objecting in detail to several of the studies upon which it relies.³⁷⁷ EPA’s former Chief of Staff

³⁷¹ 42 U.S.C. § 7409(b)(1) (1982).

³⁷² See *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *Lead Industries Ass’n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

³⁷³ Telephone interview with EPA, Office of Policy & Resource Management Official “I” (May 31, 1983).

³⁷⁴ 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).

³⁷⁵ Interview with EPA, Office of Policy & Resource Management Official “J” in Washington, D.C. (May 27, 1983).

³⁷⁶ 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).

³⁷⁷ Interview with EPA, Office of Policy & Resource Management Official “J” in Washing-

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."³⁷⁸ 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.³⁷⁹

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.³⁸⁰

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.

ton, D.C. (May 27, 1983).

³⁷⁸ *Daniel Testimony*, *supra* note 46, at 81.

³⁷⁹ 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.)

³⁸⁰ EPA Docket A-79-29 (located in EPA Docket Room, Washington, D.C.); *id.*, docs. II-B-23.

A. *Judicial Remedies*1. *Preserving Congressionally Delegated Agency Authority*

As this study³⁸¹ and congressional investigators³⁸² 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. 12,291³⁸³ nor any congressional authorization³⁸⁴ 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*,³⁸⁵ can be accommodated. However, when OMB's influence becomes supervisory rather than advisory, the court must step in to protect the agency's statutory delegation of authority.³⁸⁶

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,³⁸⁷ and by Congress' long-standing view of EPA as a quasi-independent expert agency.³⁸⁸

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.³⁸⁹ 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-

³⁸¹ See *supra* text accompanying notes 201-53; 326-80.

³⁸² See, e.g., Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 12, 282-94.

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.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*."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. 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.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."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.³⁹⁴ This, of course, does not rebut a requirement to disclose communication of *factual* materials.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

³⁹⁰ See, e.g., E.O. 12,291, *supra* note 1, §§ 2, 6(a), 7(e), 7(g).

³⁹¹ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954) (emphasis added).

³⁹² Ruckelshaus memorandum, *supra* note 304.

³⁹³ OMB Response to House Questionnaire, *supra* note 83 (Question 8), *reprinted in Hearings*, *supra* note 83, at 976 (emphasis added).

³⁹⁴ See, e.g., *id.* (Questions 10, 11), *reprinted in Hearings*, *supra* note 83, at 977-79.

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.³⁹⁶ Withholding the privilege for staff-level contacts does not conflict with *Sierra Club v. Costle*,³⁹⁷ with executive privilege case law,³⁹⁸ or with the *Vermont Yankee* proscription of judicially created, non-statutory procedural requirements.³⁹⁹

The reviewing court should apply principles of ex parte contacts doctrine⁴⁰⁰ 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,⁴⁰¹ be summarized and

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

³⁹⁷ 657 F.2d 298, 404-08 (D.C. Cir. 1981). As discussed *supra* notes 173-78 and accompanying text, *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 *Sierra Club* opinion cannot be used to justify cloaking in secrecy OMB-EPA staff level contacts. 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 *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 *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, *id.* at 408 & n.529.

³⁹⁸ See *supra* text accompanying notes 179-86 (arguing that executive privilege case law should be read to protect only interexecutive policy-oriented meetings at the very highest levels of government, e.g., President-EPA Administrator meetings).

³⁹⁹ *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. 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); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁴⁰⁰ See *supra* text accompanying notes 140-59.

⁴⁰¹ See *supra* text accompanying notes 305-11.

docketed.⁴⁰²

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.⁴⁰³

Docketing of *ex parte* communications is needed to preserve the agency's decisionmaking integrity.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.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.

⁴⁰² Cf. ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) (recommending 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).

⁴⁰³ See *Environmental Defense Fund v. Blum*, 458 F.Supp. 650, 659 (D.D.C. 1978):

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.

⁴⁰⁴ 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.

⁴⁰⁵ See Administrative Procedure Act, 5 U.S.C. § 553 (1982).

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.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.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.⁴¹⁰

⁴⁰⁸ See generally Sunstein, *supra* note 2; *supra* notes 260-66 and accompanying text.

⁴⁰⁹ See *supra* notes 160, 172 and accompanying text.

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. § 101(c) (1983) (proposed new 5 U.S.C. § 624(c)) (all *written* comments on rules by Director of OMB must be docketed); H.R. 3939, 98th Cong., 1st Sess. § 102 (1983) (proposed new 5 U.S.C. § 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. § 3 (proposed new 5 U.S.C. § 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).

⁴¹² 46 Fed. Reg. 1036 (1985) [hereinafter cited as E.O. 12,498].

and of the Administration.”⁴¹³ 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,⁴¹⁴ and likely will attempt to structure agencies’ regulatory priorities, much as it structures their budgetary priorities,⁴¹⁵ only here without congressional or public review.⁴¹⁶

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.”⁴¹⁷ OMB determines whether the Program is consistent with the “Administration’s policies and priorities,”⁴¹⁸ and may include further regulatory or deregulatory actions.⁴¹⁹ 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.⁴²⁰ OMB may, “to the extent permitted by law, return for reconsideration” any such rule.⁴²¹

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,”⁴²² but this is a vague limitation given OMB’s authority to review and revise agency Regulatory Programs⁴²³ and delay agency action on rules absent from the Regulatory Program or materially different from an action described therein.⁴²⁴ The requirement of agency heads that all regulatory actions be consistent with administration policies is not expressly delimited by existing law.⁴²⁵

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

⁴¹³ *Id.* § 1(b) (emphasis added).

⁴¹⁴ *Id.* § 4.

⁴¹⁵ 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).

⁴²⁵ See *id.* § 1(b).

even formal OMB “vetoes” of potential regulatory activities be divulged to the public.⁴²⁶ 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.

⁴²⁶ Compare *id.* § 3(d) with E.O. 12,291, *supra* note 1, § 3(f)(2).

⁴²⁷ *Supra* note 1, § 3(f)(3).